

SUPREME COURT COPY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re MARK CHRISTOPHER CREW, )  
 )  
 Petitioner, )  
 )  
 On Habeas Corpus. )  
 \_\_\_\_\_ )

CAPITAL CASE

No. S107856

SUPREME COURT  
FILED

MAY - 1 2008

Frederick K. Chirlich Clerk

Deputy

PETITIONER'S RESPONSE TO  
REFEREE'S FINDINGS OF FACT

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**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

In re MARK CHRISTOPHER CREW, ) **CAPITAL CASE**  
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REFEREE'S FINDINGS OF FACT**

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

Petitioner Mark Christopher Crew agrees with the Referee's Findings of Fact except for two relatively minor points specified below. Indeed, Mr. Crew submits that additional findings, fully consistent with the Referee's report, are supported by the record developed at the evidentiary hearing. Those findings, with reference to the evidence supporting them, are contained in petitioner's Proposed Findings of Fact, a copy of which is attached hereto as Exhibit 1.

Petitioner's exceptions to the Referee's Findings of Fact are as follows:

**Exceptions to Finding 6(b)**

The Referee described evidence that would be "damaging to petitioner, but not presented by the prosecution at the guilt or penalty phase of trial, [that] would likely have been presented in rebuttal" if petitioner had

introduced the available mitigating evidence. (Findings, p. 18.) The Referee noted counsel Morehead's concern that the presentation of mental health evidence on petitioner's behalf would have led to "reiteration of the facts of the crime" on cross-examination. (*Id.*, citing RT 216-217.) The Referee also cited as potentially damaging rebuttal evidence, the testimony of respondent's expert, Dr. Martell, who opined that "petitioner's symptoms were just as consistent with antisocial personality disorder as they were with sexual abuse." (*Id.*, citing RT 412-413.)

Petitioner excepts to these findings. The "facts of the crime" that counsel Morehead purportedly was concerned would be used in cross-examining mental health experts at the penalty phase had already been introduced at the guilt phase. They were also stressed by the prosecutor during his penalty phase closing argument. (See Trial RT 5059-5061, 5064-5065, 5067-5068.) Therefore, this evidence is not responsive to the Reference Question regarding evidence that was "not presented by the prosecution at the guilt or penalty phase of the trial."

Dr. Martell's testimony that petitioner's symptoms, namely depression, substance abuse and sexual promiscuity, were as consistent with antisocial personality disorder (ASPD) as with victimization by childhood sexual abuse (RT 412-413), would not have constituted damaging rebuttal. The Referee found the evidence that petitioner suffered from sexual abuse to be credible. (Findings of Fact, pp. 16, 19.) Petitioner's expert, Dr. Morris, acknowledged that male victims of childhood sexual abuse often engage in antisocial behavior and that Mr. Crew's mental health symptoms were consistent with someone with ASPD. (RT 138, 152-153.) It was undisputed, however, that Mr. Crew would not have been diagnosed with ASPD because he does not meet the diagnostic criteria, specifically the

presence of a conduct disorder before the age of 15. (RT 152.) The fact that the symptoms Mr. Crew exhibited may have been consistent with a personality disorder as well as sexual abuse is, therefore, neither proper rebuttal nor particularly damaging.

Finally, there is a typographical error on page 4, line 7, of the Findings of Fact. The reference to "Dr. Morris" should be to "Dr. Phillips."

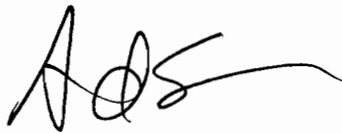
### **CONCLUSION**

Mr. Crew respectfully requests that this Court adopt the Referee's Findings of Fact with the exceptions submitted above, and adopt petitioner's additional findings as well.

Dated: May 1, 2008

Respectfully submitted,

MICHAEL J. HERSEK  
State Public Defender

A handwritten signature in black ink, appearing to read "A.S. Love", with a long horizontal flourish extending to the right.

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**EXHIBIT 1**

(ENDORSED)  
**FILED**  
DEC 5 2007

KIRI TORRE  
Chief Executive Officer/Clerk  
Superior Court of CA County of Santa Clara  
BY S. Chua DEPUTY

**IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SANTA CLARA**

In re MARK CHRISTOPHER CREW,  
Petitioner,  
On Habeas Corpus.

Case No. 101400  
[Cal. Supreme Court No. S107856]  
**PETITIONER'S PROPOSED  
FINDINGS OF FACT**

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(vi) Crew functioned well in the Army despite abusing drugs and alcohol and suffering from depression . . . . . 38

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9 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
10 **IN AND FOR THE COUNTY OF SANTA CLARA**

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12 In re MARK CHRISTOPHER CREW, ) Case No. 101400  
13 Petitioner, ) [Cal. Supreme Court No. S107856]  
14 On Habeas Corpus. ) **PETITIONER'S PROPOSED**  
15 **FINDINGS OF FACT**

16 **I.**  
17 **INTRODUCTION**

18 Petitioner established, without contradiction, that his trial lawyers did not begin their  
19 investigation of mitigating evidence until shortly before the penalty phase began, that no  
20 social history investigation was undertaken at all, and that the minimal investigation that  
21 belatedly was done was far too narrow in scope to produce a meaningful case in mitigation.  
22 It was undisputed that this was not a matter of strategy, but instead, was due to the  
23 debilitating drinking problem of lead counsel, Joseph O'Sullivan, which interfered with his  
24 ability to prepare for trial. By the time O'Sullivan ultimately sought and obtained the  
25 assistance of Joseph Morehead, an attorney with no prior experience in death penalty cases,  
26 it was too late to launch an adequate penalty phase investigation. As both trial counsel  
27 conceded at the evidentiary hearing, they did not expect there to be a penalty phase, and  
28 with very little time to prepare for either phase of the trial, they devoted their time to

1 preparing a guilt phase defense, while the penalty phase investigation was an afterthought.  
2 Indeed, the first substantive interview of a mitigation witness took place mere days before  
3 the start of the penalty phase.

4 A timely social history investigation would have revealed the true story of Mark  
5 Crew's life, characterized by a deeply disturbed family background, a traumatizing  
6 childhood marked by sexual abuse by his mother and sexual exploitation by his  
7 grandfather, and his resulting depression, lifelong dependence on drugs and alcohol, and  
8 other mental health problems. This is a far cry from the superficial, misleading and utterly  
9 unconvincing presentation by trial counsel that portrayed Crew as a "good guy" with a  
10 relatively normal background.

11 Respondent's challenge to the available mitigation presented at the reference hearing  
12 focused on whether counsel would have discovered one aspect of the potential mitigation –  
13 the allegation of mother-son incest – in the absence of disclosure by Crew, but did not  
14 seriously dispute the remainder of the compelling case that was presented through lay and  
15 expert witnesses. Respondent's apparent contention that counsel's performance was  
16 reasonable because competent counsel would not have even considered the possibility that  
17 Crew may have been the victim of sexual abuse – or any childhood trauma for that matter –  
18 is simply untenable in view of the wealth of readily available, uncontroverted evidence of  
19 Crew's family history and the mental health problems Crew suffered.

## 20 II.

### 21 SUMMARY OF HABEAS PROCEEDINGS

22 Mark Crew filed a habeas corpus petition in the California Supreme Court on June  
23 26, 2002, challenging his confinement on San Quentin's Death Row. On February 2, 2005,  
24 the Supreme Court issued an order to show cause why relief should not be granted "as a  
25 result of trial counsel's failure to adequately investigate and present mitigating evidence at  
26 the penalty phase of petitioner's trial as alleged in Claim VI(B)."

27 On October 12, 2005, the Supreme Court issued an order for a reference hearing at  
28 which a judge of the Santa Clara Superior Court would take evidence and make findings of

1 fact on seven questions relating to petitioner's ineffective assistance of counsel claim. On  
2 September 13, 2006, this Court was appointed to preside over the reference hearing.

3 The hearing began on September 10, 2007, and concluded on September 14th.  
4 Petitioner presented the testimony of his two trial attorneys (Joseph O'Sullivan and Joseph  
5 Morehead), the trial investigator (John Murphy), and the two psychiatrists who were  
6 retained by trial counsel (Frederic Phillips, M.D., and David Smith, M.D.). Dr. Larry  
7 Morris, Ph.D., a psychologist specializing in the evaluation of perpetrators and survivors of  
8 childhood trauma and sexual abuse, presented mitigating evidence of Crew's family history  
9 and upbringing. In particular, Dr. Morris testified about the history of sexual abuse on both  
10 sides of Crew's family and the sexual abuse Crew suffered. Dr. Smith, a psychiatrist with  
11 an expertise in addiction and substance abuse, testified about Crew's dependence on drugs  
12 and alcohol beginning at an early age, the factors which led to his addiction, and its impact  
13 on his development. Petitioner also presented several lay witnesses who testified about  
14 petitioner's and his family's background. Three witnesses testified via deposition (Eddie  
15 Richardson, Cheryl Norrid and Debbie Murphy). The parties stipulated to the sworn  
16 declarations of lay witnesses John Turner, Maurice Lambert, Margie Crow and Darla  
17 McFarland. This Court previously admitted into evidence the sworn declaration of  
18 Kenneth Lovitt, who is deceased. Petitioner presented the following witnesses at the  
19 hearing: Gail Frost, Cynthia Pullman, Patricia Silva, Emily (Bates) Vander Pauwert, and  
20 Doug Thompkins. In rebuttal, respondent presented Dr. Daniel Martell, Ph.D., and Doug  
21 Thompkins.

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

25 //

26 //

27

28

1 regarding Penal Code section 987.9. (EH 97.)<sup>1</sup>

2 III.

3 TRIAL PROCEEDINGS AND TRIAL COUNSEL'S PERFORMANCE

4 Joseph O'Sullivan was retained to represent Mark Crew on July 7, 1987. (JSUF #1;  
5 CT 2018.) The trial was set to begin on September 19, 1988. (JSUF #2; CT 2060.)  
6 Because of his alcoholism and other mental health problems, however, O'Sullivan was  
7 unprepared for trial. O'Sullivan had been diagnosed with Alcohol Dependence,  
8 accompanied by depressive symptoms and generalized anxiety. (JSUF #4; C T 2065.) He  
9 was emotionally disorganized, his capacity to concentrate was impaired, and he suffered  
10 from bouts of depression and "unbound anxiety." (9/16/88 RT 26-27.) On September 8,  
11 1988, O'Sullivan sought a six month continuance to allow for a period of recovery. (JSUF  
12 #3; CT 2062.)

13 In support of the request for continuance, O'Sullivan's doctor testified that  
14 O'Sullivan had been alcohol dependent for several years, but that in the previous two years  
15 – a period encompassing his representation of Crew – his condition had "gotten way out of  
16 hand." O'Sullivan was drinking daily, and cutting back on his work so he could indulge in  
17 alcohol consumption. He had reportedly stopped drinking by early September 1988, and as  
18 part of his treatment plan required a period of time without the stress of working on a death  
19 penalty case in order to fully recover. (JSUF #5; 9/16/88 RT 20-22.) In his own sworn  
20 declaration in support of the request for a continuance, O'Sullivan admitted that there was  
21 no way he could "handle the mental and emotional commitments" of a capital case and  
22 could not try the case "in my present posture." (CT 2066; 9/13/88 RT 13, 9/16/88 RT 28-  
23 29, 33.) His psychologist agreed. (JSUF #6-#7; 9/16/88 RT 25.)

24 On November 29, 1988, a continuance of less than five months was granted, to April  
25 17, 1989, to give O'Sullivan the opportunity to recover from his alcohol abuse and other

26  
27 <sup>1</sup> "EH" refers to the evidentiary hearing transcript, and "Exh." refers to evidentiary  
28 hearing exhibits. With regard to the trial record, "RT" refers to the reporter's transcript on  
appeal, "CT" refers to the clerk's transcript on appeal, and "Aug CT" refers to the  
augmented clerk's transcript re: 987.9. "Supp CT" refers to the portions of the clerk's  
transcript that were added to the record during the appellate record correction process.

1 mental health problems, and Joseph Morehead was appointed as second counsel. (JSUF  
2 #8; CT 2087.)

3 It is undisputed that O'Sullivan conducted no penalty phase investigation in this  
4 case, and that no such investigation had been done, at the time Morehead was appointed.  
5 (EH 196-197, 239, 265.) As the trial record establishes, O'Sullivan had not prepared for  
6 the guilt phase of trial, either. He had not sought investigative or expert funds pursuant to  
7 Penal Code section 987.9, had not hired an investigator, and had failed to prepare or file  
8 any pre-trial motions. Thus, while O'Sullivan delegated the penalty phase investigation  
9 and presentation to Morehead (EH 194, 195, 263), Morehead's responsibility for several  
10 other aspects of the case precluded him from working on the penalty phase until well after  
11 the trial began. Morehead's tasks included assisting counsel with jury selection, preparing  
12 pre-trial motions, exploring the possibility of a mental state defense for the guilt phase, and  
13 second chairing the guilt phase, which required him to be in court throughout the trial. (EH  
14 194-195, 264.) Morehead was responsible for hiring an investigator and directing the  
15 investigation for both phases of the trial, as well as hiring and consulting any and all mental  
16 health experts. (EH 164, 166, 195, 236, 264.) Morehead had no prior death penalty  
17 experience. (EH 193.)

18 No funds pursuant to Penal Code section 987.9 were requested until December 12,  
19 1988, approximately two weeks after Morehead's appointment. (EH 197; Exh. 138<sup>2</sup> [Aug  
20 CT 10-13].) This first application sought funds for an "initial psychiatric interview" of  
21 Crew (Aug CT 12), which was limited to exploring a potential guilt phase defense. (EH  
22 199, 222.)

23 Dr. Frederic Phillips, M.D., was the mental health expert hired by Morehead. (EH  
24 164, 198.) Dr. Phillips, whose sub-speciality was geriatric psychiatry (EH 164, Exh. 100),  
25 had worked with Morehead on homicide cases, but had never worked on a death penalty  
26 case. (EH 164-165.) Dr. Phillips understood that his role in this case was the same as any  
27

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28 <sup>2</sup> Judicial notice was taken of Exhibits 138, 140 and 142, the Penal Code section  
987.9 requests filed in this case. (EH 97.)

1 other homicide case in which Morehead had retained him – to interview the client and  
2 evaluate whether he exhibited mental health symptoms relevant to his competency to stand  
3 trial and to a potential mental state defense to the murder charges. (EH 165-167, 199.)

4 Both Morehead and Dr. Phillips confirm that Phillips was not asked to consider the  
5 existence of mitigating circumstances for the penalty phase, and was not asked to do  
6 anything different in this case because it was a death penalty case. (EH 169, 199.)  
7 Morehead never explained to Dr. Phillips the difference between a mental health  
8 assessment for a potential guilt phase defense, and an evaluation for purposes of developing  
9 mitigating circumstances for a penalty phase.<sup>3</sup> (EH 166, 200.) Indeed, Dr. Phillips did not  
10 even know this was a death penalty case. (EH 164.)

11 Dr. Phillips interviewed Crew on January 5, 1989. (EH 199.) Prior to the visit, Dr.  
12 Phillips was provided facts about the crime, either verbally or through a police report,  
13 which Dr. Phillips characterized as “brief and not very informative.” (EH 167, 202.) The  
14 interview conditions were far from ideal in assessing Crew, as both petitioner’s current  
15 expert and respondent’s expert agree. (EH 160, 449-450.) Due to delays at the jail, Dr.  
16 Phillips’ interview with Crew lasted only 20 minutes. (EH 168.) During the interview,  
17 Crew was shackled, a guard was within earshot, and Crew was sleepy. It appeared to Dr.  
18 Phillips that Crew had been woken up just before he was brought into the interview room.  
19 (EH 168-169, 178.) Not only was Crew “not fully awake,” but Dr. Phillips was in a “foul  
20 mood” and was “upset by the long wait” by the time Crew finally arrived. (EH 174-175.)  
21 Not surprisingly given these circumstances, Crew was not particularly responsive to Dr.  
22 Phillips’ questions, which included “general questions about his growing up. . . .” (EH

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23  
24 <sup>3</sup> This distinction between counsel’s burden at the guilt and penalty phases has been  
25 explained as follows: “Mental state is relevant at the guilt phase for issues such as  
26 competence to stand trial and legal insanity – technical questions where a defendant must  
27 show a specific and very substantial level of mental impairment. Most defendants don’t  
28 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.”  
(*Frierson v. Woodford* (9th Cir. 2006) 463 F.3d 982, 993, quoting *Wallace v. Stewart* (9th  
Cir. 1999) 184 F.3d 1112, 1117 n. 5.)



1 176-177.) In any event, Dr. Phillips did not ask Crew whether he had been physically or  
2 sexually abused. (EH 169.) Dr. Phillips considered his interview with Crew a “preliminary  
3 interview.” He hoped to see Crew again, but never did. (EH 171, 175-176.)

4 Dr. Phillips spoke with Crew’s father, William Crew, in an effort to obtain  
5 information regarding Crew’s psychiatric history, if any. (EH 166, 169-170.) Crew’s  
6 father did not provide any helpful information, but shared some childhood photographs  
7 which Dr. Phillips promptly misplaced. (EH 170-171.) Dr. Phillips did not prepare a  
8 report and did not testify at trial. (EH 171.) He billed counsel for four hours of work,  
9 which included his round trip travel between San Francisco and San Jose, the time he spent  
10 waiting for Crew to be brought out for the visit, and the 20 minute interview. (EH 168.)

11 The first funds request filed by trial counsel in December 1988 also sought funds for  
12 an “initial work up” of defendant’s background, to locate witnesses who could present  
13 “favorable” evidence regarding his “lifestyle.” (Aug CT 12.) As Morehead explained at  
14 the hearing, he “wanted to find witnesses and evidence to establish that, other than this  
15 crime, [Crew] had a very positive background.” (EH 213.)

16 No penalty phase investigation of any kind, however, was conducted in the months  
17 after Morehead was appointed. John Murphy, the investigator, was not hired until February  
18 21, 1989. (EH 202-203, 238; Ex. 102.) Murphy, like Morehead, had no prior experience in  
19 death penalty cases. (EH 236-237.) He was responsible for investigating both phases of  
20 the trial, and immediately focused on the guilt phase rather than the penalty phase, given  
21 that the trial was scheduled to begin within two months. (EH 203, 240-241.) In fact,  
22 Murphy confirmed what his detailed billing records reveal: Nothing was done to obtain  
23 mitigating evidence until weeks before the penalty phase began on August 1, 1989. (EH  
24 237-240, Exhs. 102-108.)

25 Neither counsel believed there would be a penalty phase. (EH 207, 265.) Morehead  
26 explained, and his billing records establish, that in March 1989, he spent more than three  
27 weeks researching and drafting a motion to strike the financial gain special circumstance.  
28 (EH 203; Aug CT 49.) The motion was filed on April 4, 1989 (Supp CT 48), with an

1 amended motion filed on April 10th. (CT 2107.) The motion was argued on April 17,  
2 1989, the day jury selection began. (EH 205; CT 2126.) Judge Schatz took the motion  
3 under submission, stating, "I'm not thoroughly convinced at this point that it is an  
4 appropriate special circumstance in this case. It may be, but I want to hear the testimony  
5 before coming to some conclusion on the matter." (EH 206; RT 544.) In addition to these  
6 comments, Judge Schatz provided the defense and prosecution with a legal memorandum  
7 prepared by his law clerk that recommended striking the special circumstance. (EH 207;  
8 CT 2523-2526.) Morehead testified at the hearing that in light of Judge Schatz's remarks  
9 and the memorandum the judge shared with counsel, he believed the special circumstance  
10 would be struck and there would be no penalty phase. (EH 207.)

11 A second application for funds pursuant to Penal Code section 987.9 was filed on  
12 March 30, 1989. (EH 208-209; Exh. 140 [Aug CT 23-27].) The application included a  
13 request for funds to retain David Smith, M.D., to testify "to defendant's condition relative  
14 to alcohol and narcotic ingestion which will militate against a finding of premeditation."  
15 (EH 209; Aug CT 25.)<sup>4</sup> Morehead's consultation with Dr. Smith was, as with Dr. Phillips,  
16 limited to Crew's mental state at the time of the crime, and specifically whether Crew's use  
17 of drugs may have impaired his conduct on the day in question. Dr. Smith was not asked to  
18 consider Crew's substance abuse as a potential mitigating factor other than as it related to  
19 the crime itself. (EH 209, 221-222.) Dr. Smith did not interview Crew, and he did not  
20 testify at either phase of the trial. (EH 199, 209.)

21 This second 987.9 request did not seek funds for investigation of Crew's  
22 background for purposes of the penalty phase. Indeed, a request for travel expenses  
23 pertained only to out-of-state witnesses with information on to the question of guilt. (Aug  
24 CT 26.) As Morehead testified, when this request was filed, the focus of the case remained  
25 the guilt phase. (EH 212.)

26  
27 <sup>4</sup> The 987.9 request also sought funds for Dr. Paul [sic] Phillips to testify at the  
28 penalty phase. As noted above, both Morehead and Dr. Phillips testified that the sole focus  
of Dr. Phillips' evaluation was Crew's mental state at the time of the crime. He was not  
consulted further and did not testify at either phase of the trial.

1 The prosecution rested its guilt phase case-in-chief on July 17, 1989. That same day,  
2 Judge Schatz denied the motion to strike the special circumstance. (CT 2270.) It was only  
3 then that it became apparent to Morehead that there likely would be a penalty phase. (EH  
4 208, 231-232.)

5 John Murphy did not begin any investigation with regard to the penalty phase until  
6 July 1989. (EH 239-240; Exhs. 102-108.) Murphy's first conversations with Morehead  
7 regarding the penalty phase took place in early July. (EH 240; Exh. 106.) Given the time  
8 constraints, Morehead decided to focus on the positive aspects of Crew's life (EH 213, 228-  
9 229), and told Murphy that he wanted to show that Crew was a "good man." (EH 239.)  
10 Thus, Murphy never conducted a social history investigation. He did not seek to obtain any  
11 life history documents pertaining to either Crew or his family, other than Crew's military  
12 records (which he failed to get) and Crew's jail records. (EH 242-243, 253.) Murphy did  
13 not conduct interviews with Crew, his relatives or anyone else for the purpose of obtaining  
14 mitigating evidence of Crew's upbringing and family background. (EH 241-253, 257.)

15 Murphy's initial efforts in July 1989 consisted of trying to locate witnesses who  
16 would supply evidence in line with Morehead's view of the scope of the penalty phase. He  
17 did not conduct his first substantive interview of a potential penalty phase witness until July  
18 27, 1989 (EH 247-251; Exhs. 106-107), the day after the jury found Crew guilty of murder  
19 and found the special circumstance true, and five days before the penalty phase was to  
20 begin. (CT 2279.)

21 A third request for funds pursuant to Penal Code section 987.9 was filed on August  
22 3, 1989, two days *after* the penalty phase began. (Exh. 142 [Aug CT 60-61]; CT 2290.)  
23 This request sought investigative expenses of \$7500 "to locate, screen, and interview  
24 Penalty Phase witnesses . . . ." (Aug CT 61.) This untimely request was never ruled on.

25 The prosecution introduced no evidence in aggravation at the penalty phase. The  
26 case in mitigation presented by the defense, as described below, focused on the positive  
27 aspects of Crew's character: he was a kind and generous person, did well in the military,  
28 and, based on his exemplary conduct in jail, would be a model prisoner if sentenced to life

1 without possibility of parole.

2 The jury rendered its death verdict on August 10, 1989. (CT 2298-2300.) On  
3 February 23, 1990, Judge Schatz found the jury's determination that the aggravating  
4 circumstances outweighed the mitigating circumstances contrary to the evidence presented,  
5 and granted the defense motion for modification of sentence pursuant to Penal Code section  
6 190.4(e). Judge Schatz set aside the death penalty and sentenced Crew to life without  
7 possibility of parole. (RT 5173-5182.) The 190.4(e) ruling was reversed by the Court of  
8 Appeal, on the grounds that the judge improperly engaged in intercase proportionality  
9 review, and the case was remanded for a new hearing. (*People v. Crew* (1991) 1  
10 Cal.App.4th 1591.) Upon remand, after Judge Schatz was determined to be unavailable,  
11 Judge Robert Ahern was assigned to the case. On July 22, 1993 Judge Ahern denied the  
12 190.4(e) motion and imposed the death sentence. (CT 3004, 3016.)

13 The judgment was affirmed on appeal by the California Supreme Court on August  
14 25, 2003. (*People v. Crew* (2003) 31 Cal.4th 822.)

#### 15 IV.

#### 16 ANSWERS TO REFERENCE QUESTIONS

- 17 1. What information did petitioner's trial counsel have when deciding on the scope of  
18 his investigation into potential mitigating evidence?

19 The scope of trial counsel's investigation was determined as a matter of expediency  
20 rather than informed strategy. Morehead testified that he felt compelled because of time  
21 constraints to limit his penalty phase investigation to developing the positive aspects of  
22 Crew's life. (EH 213, 2228-229.) Morehead was aware that Crew had no prior criminal  
23 history. (EH 213, 228-229.) He was also told by Crew's father that Crew had a good,  
24 fairly normal childhood, at least until Crew's parents divorced. (EH 225.) There was,  
25 however, other information in trial counsel's possession that should have alerted counsel  
26 that Crew's background was troubled and warranted investigation.

27 In police reports provided in discovery, former girlfriends described Crew as  
28 exhibiting symptoms of depression, sleep disorders, and long-standing and serious  
problems with drugs and alcohol. (JSUF #11.) For example, Cindy Koelsch-Erdelyi (aka

1 Cynthia Pullman) told the police that Crew was an alcoholic who went on periodic drinking  
2 binges and smoked marijuana. (Exhs. 91-92). Debra Lund, petitioner's second wife,  
3 informed the police that Crew was "into-drugs, speed, coke and marijuana." (Exh. 85.)  
4 Jeanne Meskell informed the police that Crew drank, appeared depressed and often stayed  
5 out all night. (Exh. 88.) Beverly Ortiz Ward informed the police and testified at the  
6 preliminary hearing, when Crew was represented by the Public Defender, that Crew drank a  
7 lot and suffered from insomnia. (Exh. 90; CT 1446, 1455-1456.) Viola Purvis told the  
8 police that Crew smoked marijuana all the time. (Exh. 93.)

9 Morehead recalled that the discovery suggested that Crew had a "pattern of drug  
10 abuse and alcohol use" that "preceded a few years from the crime." (EH 221.) Morehead  
11 also testified that Crew informed him that he abused alcohol, cocaine and other drugs. (EH  
12 202.) In addition, Crew told Morehead that he had relationships with many women and had  
13 difficulty maintaining long-term relationships. (EH 230.) O'Sullivan was aware that Crew  
14 used drugs and alcohol. (EH 269-270.) Crew also told Murphy about his drug and alcohol  
15 use, that he drank to excess, and used methamphetamine and cocaine. (EH 241.)

16 Morehead interviewed Crew's father, William Crew, several times. William told  
17 Morehead that Crew had a good childhood until he and Crew's mother divorced and  
18 William remarried, at which time Crew had difficulties with his stepmother. (EH 225.)  
19 William described Crew's mother as "cold and withdrawn," while describing himself as a  
20 caring and devoted father. (EH 226.) William Crew's reliability as a family history was  
21 clearly questionable. In addition to the police reports noted above, counsel also had other  
22 information that described a family history of substance abuse and provided clues about the  
23 inappropriate sexual boundaries of both of Mark Crew's parents. For example, a report by  
24 an investigator hired by the victim's family, provided in discovery, referred to an incident  
25 in which Crew's father became intoxicated and made sexual advances towards Crew's  
26 girlfriend, Lisa Moody. (Exh. 65; JSUF #12.) Counsel also had a report of Crew's  
27 brother's arrest for public drunkenness. (Exh. 78; JSUF #13.) In addition, Morehead  
28 observed a visit between Crew and his mother when Crew's mother's came to court to

1 testify, during which Crew's mother sat on Crew's lap while he was shackled in a jury  
2 room.<sup>5</sup> (EH 215-216.)

3 2. What actions did petitioner's trial counsel take to investigate potential evidence that  
4 could have been presented in mitigation at the penalty phase of petitioner's trial?  
5 What were the results of that investigation?

6 Trial counsel's attempt to develop mitigating evidence was untimely and inadequate.  
7 Their exclusive focus on the guilt phase of the case meant that no investigation of potential  
8 mitigating evidence was done until just before the penalty phase was scheduled to begin.  
9 Forgoing any semblance of an adequate social history investigation, counsel relied instead  
10 on Crew's father for information about Crew's background. William Crew, who portrayed  
11 his son's life as relatively normal and emphasized his own role as a loving father, was  
12 hardly a credible source given his own problems with alcohol, his inappropriate  
13 encouragement of Crew's drinking, and his aberrant sexual behavior. Counsel's and their  
14 investigator's interviews with Mark Crew for the penalty phase focused only on developing  
15 information about the "positive aspects" of his life, and not on the causes of his reported  
16 depression, substance abuse, and other mental health problems, or on whether he suffered  
17 any childhood trauma. The portrayal at the penalty phase of Crew as the product of a  
18 relatively normal upbringing, and as a kind and generous person who did well in the Army,  
19 and was and would continue to be a model prisoner, was grossly incomplete and wholly  
20 misleading.

21 Joseph O'Sullivan did no investigation of potential mitigating evidence before  
22 Morehead was appointed, and then delegated preparation of the penalty phase to him. (EH  
23 263-265.) O'Sullivan testified that he asked Crew about his background. (EH 265.) He  
24 stated that he interacted with Crew on a "daily basis" throughout the trial, constantly asking  
25 if there was anything they were missing. (EH 268.) Of course, as noted above, for most of  
26 this period of time, the focus was solely on the guilt phase of the case. O'Sullivan did not  
27 specifically ask Crew about whether he had been mistreated during his childhood, and

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28 <sup>5</sup> Crew's mother testified for the prosecution during the guilt phase on July 13,  
1989. (CT 2268.)

1 explained the scope of mitigating evidence to Crew merely by reading him the applicable  
2 code sections. (EH 268.) Not surprisingly, Crew did not tell O'Sullivan anything that  
3 O'Sullivan considered abnormal.<sup>6</sup> (EH 269.)

4 Morehead devoted his time to the guilt phase of the case until after the close of the  
5 prosecution's case-in-chief, in mid-July, 1989. When Morehead interviewed Crew in  
6 preparation for the penalty phase, he focused on positive aspects of his life. (EH 228.) As  
7 Morehead put it, "under the constraints of time that I had . . . what I wanted to get from  
8 Mark Crew was the names and locations of various witnesses who could give positive  
9 reinforcement to his claim that he should not be executed," by which Morehead meant,  
10 showing "that some of his relationships were good. He was caring and loving. That his  
11 military record was outstanding. That he was good to friends and associates. That he was  
12 an ideal prisoner." (EH 229.) Morehead acknowledged that he focused on these aspects of  
13 Crew's character "to the exclusion of other things." (*Id.*) He did not ask Crew "what was  
14 bad" about his childhood, but focused on the period of time from when he left home to join  
15 the Army until the time of trial. (*Id.*)

16 Morehead met with Crew's father on several occasions. Crew's father told  
17 Morehead that Crew's childhood was relatively normal, although Crew's mother was "cold  
18 and withdrawn," and that Crew began having difficulties after his parents divorced. (EH  
19 225-226, 224-226.) The information Crew's father provided was consistent with his  
20 testimony at the penalty phase. (EH 214; RT 4723-4760.) Morehead also spoke with  
21 Crew's paternal grandmother by telephone. (EH 214-215.) The information she provided  
22 Morehead was consistent with her testimony at trial. (EH 215; RT 4782-4799.) Morehead  
23 did not interview Crew's mother when she came out from South Carolina to testify for the  
24 prosecution at the guilt phase because he did not believe it was appropriate to interfere with  
25 a prosecution witness. (EH 215.) Morehead also met with Emily (Bates) Vander Pauwert,

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26  
27 <sup>6</sup> O'Sullivan did not necessarily consider Crew's drug and alcohol abuse to be  
28 severe. (EH 269-270.) Given O'Sullivan's own problems with alcohol abuse, however,  
and his testimony in support of the continuance that it was not unusual for him to drink 18  
beers a day on weekends (9/16/88 RT 30), his assessment of the severity of Crew's  
substance abuse problem is virtually meaningless.

1 Crew's former girlfriend, but they talked mostly about Crew's relationship with Dick  
2 Elander, the key prosecution guilt phase witness. (EH 321.)

3 John Murphy's testimony at the evidentiary hearing, together with his detailed  
4 billing records, establish that he performed no investigation of mitigating evidence until  
5 July 1989. (EH 237, 239-240, Exh. 102-108.) Murphy did not talk to Crew about penalty  
6 phase-related issues until that time, and when he did, he did not ask Crew about his family  
7 and background. (EH 241-242, 257.) Murphy spoke with Crew's mother and brother, but  
8 only about information related to the guilt phase of the case. (EH 243-247; Exh. 116.)

9 Beginning on July 7, 1989, when he first began conducting tasks related to the  
10 penalty phase, through July 26, 1989, Murphy's work was limited to attempting to locate –  
11 as opposed to interview – potential penalty phase witnesses. (EH 248, 250-251; Exhs. 106-  
12 107.) Murphy also tried to retrieve Crew's military records, beginning in early July, but  
13 was unsuccessful. (EH 242, 248-249; Exhs. 106-107.) Murphy ultimately obtained Crew's  
14 jail records on July 31, 1989. (EH 242-243, 253; Exhs. 106-107.) No other life history  
15 records of Crew or his family were sought.

16 Murphy did not conduct a substantive interview for purposes of developing  
17 mitigating evidence until July 27, 1989, less than a week before the penalty phase was  
18 scheduled to begin. On that day, Murphy interviewed James Gilbert, a high school friend  
19 and Army buddy of Crew's, and Tex Varnado, a jail deputy. (EH 251-252; Exh. 107.) On  
20 July 28th, Murphy interviewed Ron Yount, another jail deputy and Col. Donald Pearce,  
21 Crew's commanding officer in the Army. (EH 252-253; Exh. 107.) On July 29th, Murphy  
22 interviewed a third deputy, Toby Council. (EH 252-253; Exh. 107.)

23 Murphy was also instructed by Morehead, on August 2, 1989, to locate an expert to  
24 testify regarding Crew's adjustment to prison. Murphy obtained the services of Jeri  
25 Enomoto, a former warden. (EH 253-254.)

26 The results of counsel's investigation is reflected in the testimony presented at the  
27 penalty phase. Crew's father, William Crew, was the primary witness with regard to  
28 Crew's background. He testified that Crew had a normal childhood. (RT 4727-4729.)



1 According to William, he and his wife, Jean, had no problems at all in the early years of  
2 their marriage, but later had difficulties because Jean wanted to marry a more mature man  
3 with more money. (RT 4726-4728, 4730.) William referred to occasions when Crew's  
4 mother was uncommunicative. (RT 4731.) According to William, he and Crew had a great  
5 relationship. They were buddies, and went fishing and hunting together. (RT 4729.)  
6 William testified that he and Jean divorced when Crew was about 13 years old. Crew lived  
7 with his father after his parents separated, and William played the role of mother and father.  
8 (RT 4732-4733.) When Crew was 14 or 15, and William married his second wife, Barbara,  
9 who had three children of her own, Crew found himself increasingly isolated. (RT 4734-  
10 4736.) Crew decided to join the Army at the age of 17, and served for four years. (RT  
11 4736-4739.) In 1978-1979, after returning from the service and a failed marriage to Debra  
12 Lund, Crew went to school and worked as a truck driver. (RT 4739-4741.) According to  
13 William, in 1981-1982, Crew became guarded, less communicative, and not as happy as he  
14 had been. (RT 4744.)

15 Crew's paternal grandmother, Irene Watson, testified briefly regarding Crew's  
16 background as well as his helpful and caring nature. Ms. Watson lived in Texas. She saw  
17 the family often until they moved away, when Crew was two years old. (RT 4785.)  
18 According to Ms. Watson, Crew had a normal, happy childhood during the first two years  
19 of his life. (RT 4786.) Ms. Watson subsequently visited with Crew and his family in Texas  
20 and California. (RT 4787-4788.) She confirmed that after William married Barbara, Crew  
21 felt left out. (RT 4789.) Ms. Watson testified that Crew stayed with her in Texas for two  
22 to three months after the breakup of his marriage to Debra Lund, and he was very helpful to  
23 her. (RT 4791-4792.)

24 Emily Bates, a former girlfriend, testified that she dated Crew for a couple of  
25 months in 1977, before he suddenly married someone else. (RT 4762-4763.) In 1980, after  
26 Crew's marriage ended, Crew and Bates resumed dating, and moved in together. (RT  
27 4766-4767.) They had a good relationship for a period of time. Crew was "nice" and never  
28 treated her cruelly or violently. (RT 4770, 4772.) The relationship ended because Crew

1 was seeing other women. (RT 4767, 4769-4770.)

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

7 Colonel Donald Pearce, Crew's superior officer at Fort Gordon, Georgia, testified  
8 about Crew's military service. (RT 4826, 4834-4840.) Crew was Pearce's driver in 1976-  
9 1977, and Pearce described him as among the very top soldiers with whom he served. (RT  
10 4841-4843.) He described Crew as intelligent, dependable, and having common sense,  
11 charisma, and mechanical ability. (RT 4846-4847.)

12 The defense also presented the testimony of law enforcement personnel who had  
13 contact with Crew while he was in Santa Clara County Jail awaiting trial. These officers,  
14 Ron Yount, Toby Council and Donald Varnado, all testified that Crew was an ideal  
15 prisoner. (RT 4852-4894.) Jeri Enomoto, the former head of the California Department of  
16 Corrections, testified that if sentenced to life without possibility of parole, Crew would be  
17 classified at the maximum level, would never appear before a parole board, and would live  
18 in a very restrictive environment under constant supervision. (RT 4932-4936.) Enomoto  
19 opined that Crew would be a stable, calming influence on other prisoners. (RT 4940-4945.)

20 A jury instruction proposed by the defense and read to the jury, summarized the  
21 defense case in mitigation: (a) Crew's mother and stepmother were "emotionally  
22 neglectful;" (b) Crew was helpful to his grandmother; (c) Crew was kind and generous  
23 towards several girlfriends and an Army buddy; (d) Crew was an outstanding soldier; (e)  
24 Crew had been a model prisoner in county jail and would adjust well to state prison; (f)  
25 Crew's family and friends did not believe he should receive a death sentence; and (g) Crew  
26 had a high degree of mechanical aptitude. (CT 2553-2554.)

27 The prosecutor predictably capitalized on counsel's inadequate presentation by  
28 arguing that petitioner deserved no mercy because he had squandered a good and decent

1 upbringing and lacked the tragic life experiences that could shed light on his conduct:

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

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

16 3. What tactical justifications, if any, does petitioner's trial counsel offer for (a)  
17 limiting the scope of his investigation and conducting the investigation in the  
18 manner that he did, and (b) in limiting the presentation of the penalty phase evidence  
19 in the manner that he did?

20 Counsel provided no informed tactical reasons for the limited investigation and  
21 presentation of mitigating evidence. The failure to investigate petitioner's family,  
22 background and upbringing was due, first and foremost, to O'Sullivan's inability to  
23 conduct any investigation because of his drinking problem. O'Sullivan, who was  
24 incapacitated by alcohol abuse from the moment he was retained in July 1987, did no  
25 penalty phase investigation, and delegated preparation for the penalty phase to Morehead  
26 (EH 196-197, 239, 265; JSUF #3-#7), who had no prior death penalty experience (EH 193),  
27 and was appointed less than five months before trial. (CT 2087; JSUF #8.)

28 Although Morehead was given responsibility to develop evidence for the penalty  
phase from scratch, he first had to prepare for the guilt phase because O'Sullivan had also  
done little to prepare for that phase. (EH 194-195, 264.) Morehead hired John Murphy to  
investigate both phases in February 1989, two months prior to trial. (EH 202-203, 238.)  
Both Morehead and Murphy concentrated on the guilt phase before belatedly turning to the  
penalty phase. (EH 239-240.)

Morehead explained at the evidentiary hearing that the mitigating themes he hoped

1 to establish at the penalty phase were that petitioner: (a) had a good background and did  
2 good things in his life; (b) had good relationships with women; and (c) would be a good  
3 prisoner if sentenced to life without possibility of parole. (EH 212-213.) Counsel settled  
4 on this approach, however, without the benefit of any investigation. The overarching  
5 consideration for limiting the investigation and presentation of mitigating evidence was the  
6 lack of time to do more. As Morehead acknowledged, he did not work on developing  
7 evidence for the penalty phase until the trial judge denied his motion to strike the special  
8 circumstance (EH 231-232), and once that happened, with little time left before the start of  
9 the penalty phase, he focused on these positive aspects of Crew's life. (EH 228-229.)  
10 Murphy did not begin interviewing penalty phase witnesses until less than a week before  
11 the penalty phase began on August 1, 1989. (EH 251-253.)

12 The narrow scope of counsel's investigation of mitigating evidence is clear from the  
13 applications for funds filed in this case. Instead of seeking resources for a comprehensive  
14 social history investigation, the first 987.9 request, filed on December 13, 1988 sought only  
15 an "initial work up" of Crew's background which would entail "locating favorable lifestyle  
16 and witness [sic] that would militate against imposition of death." (Exh. 138 [Aug CT 12].)  
17 A second request sought no investigative funds specifically for penalty phase purposes.  
18 (Exh. 140 [Aug CT 26].) As Morehead testified, at the time this request was filed, the  
19 focus of the case remained the guilt phase. (EH 212.) Morehead testified that it was only  
20 later that his investigator, John Murphy, urged him to launch an investigation into Crew's  
21 background. Morehead admitted, "I don't know what the purpose of that was, but I do  
22 know we submitted a budget to get that travel expense, and it wasn't authorized." (EH  
23 230.) Thus, a third request for funds was filed. (EH 233.) This request sought  
24 investigative expenses of \$7500 "to locate, screen, and interview Penalty Phase witnesses .  
25 . . ." (Aug CT 61.) As Morehead noted, these funds were never authorized. (EH 230,  
26 233.) This was because the request was filed too late, on August 3, 1989, *after* the penalty  
27 phase was already underway.

28 Morehead's consultation with mental health experts was also unreasonably limited.

1 He utilized them as he would in any other homicide case. (EH 199-200, 209.) He directed  
2 his experts to consider only Crew's mental state as it related to a guilt phase defense, rather  
3 than have them assess Crew's mental health symptoms as potential mitigation, regardless of  
4 whether they supported a defense to the homicide. (EH 216, 221-223, 233-234.) This was  
5 due not to any tactical reason, but only because of the need to quickly develop a guilt phase  
6 defense, Morehead's lack of death penalty experience, and his (and O'Sullivan's) belief  
7 that there would not be a penalty phase. (EH 207, 232, 265.)

8 A mental health evaluation relevant to developing a case in mitigation would have  
9 included, for example, analyzing aspects of Crew's history that may have led to his  
10 substance abuse problems, the long-term nature of his substance abuse, and the  
11 psychological impact of chronic dependence on drugs and alcohol. (See, e.g., Direct  
12 Testimony Declaration of David E. Smith, M.D., hereafter "Smith Declaration," pp. 12-13.)  
13 But Morehead never considered using mental health experts in this manner. As he testified  
14 at the hearing, the experts were asked to evaluate only whether there was a "viable defense  
15 based on the mental state at the time of the crime itself. I really hadn't been contemplating  
16 a penalty phase." (EH 221.)

17 Morehead unreasonably restricted his mental health experts to assessing Crew's  
18 mental state at the time of the crime (EH 199-200, 209, 221-222) and then decided not to  
19 present any mental health testimony at the penalty phase because, as he explained, he  
20 wanted to avoid cross-examination of the experts on the facts of the homicide. (EH 216-  
21 217, 223.) While it is true that testimony of Crew's mental impairments at the time of the  
22 crime likely would have resulted in cross-examination on the crime facts, mental health  
23 testimony regarding Crew's family history, traumatic upbringing and its impact on his  
24 mental health, unrelated to the crime, would not have opened the door to any damaging  
25 rebuttal, as the testimony of Dr. Morris and Dr. Smith at the evidentiary hearing made clear.  
26 (EH 103-149, 382-383.) Crew's trial lawyers, however, never attempted to develop such  
27 evidence.

28 The penalty phase presentation was, thus, not limited by any tactical considerations,

1 but by counsel's failure to investigate and obtain meaningful mitigating evidence. Nothing  
2 presented at the evidentiary hearing suggested that counsel limited their investigation or  
3 presentation because of any legitimate concerns regarding the potential for damaging  
4 rebuttal evidence by the prosecution.

5 4. What additional mitigating evidence could petitioner have presented at the penalty  
6 phase? How credible was this evidence?

7 The evidence presented at the evidentiary hearing about petitioner's family history,  
8 background and life experiences, and their psychological impact, was reliable and available  
9 to counsel at the time of trial. Indeed, with the exception of the aspects of Dr. Morris's  
10 testimony regarding maternal incest, discussed below, virtually none of petitioner's  
11 mitigating evidence was subject to dispute at the hearing, either in terms of its availability  
12 or credibility.

13 There was uncontroverted evidence presented at the hearing, through lay and expert  
14 witnesses, that Mark Crew was raised in a family with an extensive history of sexual abuse,  
15 substance abuse, neglect and mental illness. It was undisputed that Crew's maternal  
16 grandfather and uncle molested young girls, that Crew's mother was molested by her father,  
17 and that Crew's father molested his (the father's) stepdaughter. It was also undisputed that  
18 Crew was sexually exploited by his grandfather, and exposed to sexually inappropriate  
19 behavior by his grandfather, brother and other male role models at a young age, conduct  
20 characterized by Dr. Morris as abuse of Crew's sexuality.

21 Crew presented testimony that he was sexually abused by his mother – the only  
22 potential mitigation that was even remotely challenged by respondent. As petitioner will  
23 demonstrate, however, the efforts to cast doubt on this evidence were grossly ineffectual.  
24 Moreover, respondent did not call into question evidence which established that Crew's  
25 symptoms of depression, low self-esteem, substance abuse, sleep disorders, sexually  
26 compulsive behavior and inability to form meaningful relationships with women, were  
27 consistent with the sexual abuse and childhood trauma he suffered.

28 Credible evidence from multiple sources showed that Crew began using and abusing  
alcohol and drugs by junior high school, that this behavior had a devastating impact on his

1 psychological development, and that his substance abuse continued with greater frequency  
2 throughout his life. Evidence of Crew's exposure to several risk factors for addiction,  
3 including a genetic predisposition to substance abuse, a family history of mood disorders,  
4 childhood trauma, and an enabling environment provided through parental neglect,  
5 exposure to drugs and alcohol at a young age by an older brother and a family friend, and  
6 the encouragement of his father was presented at the hearing without challenge.

7 Thus, as set forth in detail below, abundant compelling and credible mitigating  
8 evidence of Crew's traumatic upbringing and its psychological impact could have been  
9 presented at Crew's trial.

#### 10 **A. Family History**

11 Crew's social history was presented through the testimony of Dr. Larry Morris, a  
12 psychologist with a specialty in childhood sexual abuse. Dr. Morris relied on multiple  
13 sources of information, including his interviews with Crew and others, sworn declarations  
14 of relatives, neighbors and friends, and life history records, all of which counsel could have  
15 obtained at the time of trial. In addition, several lay witnesses testified about Crew's  
16 background and upbringing at the hearing, by deposition or by sworn declaration.

- 17 (i) Crew's mother was raised in an incestuous family with a history of mental  
18 illness, domestic violence, physical and sexual abuse, and substance abuse.  
19 She was beaten and sexually abused by her father, who was mentally  
20 disturbed, violent and had few sexual boundaries.

21 Crew's mother, Jean Richardson, was born on July 25, 1931, in Forth Worth, Texas,  
22 to Jack and Irene Richardson. (Morris Declaration, pp. 12-13, citing Exhs. 2, 8.) Jean's  
23 father was an extremely disturbed man who sexually molested Jean, molested other young  
24 girls throughout his life, severely beat his wife and children, and exposed his grandsons,  
25 Mark Crew and his brother, Mike, to highly inappropriate sexual conduct when they were  
26 young. (Morris Declaration, p. 12.)

27 Crew presented evidence documenting Jack Richardson's mental health problems.  
28 (Morris Declaration, pp. 12, 16-17, 27.) His military records, which refer to

1 psychoneurosis, anxiety, and emotional instability, “help explain and provide corroboration  
2 for Jack Richardson’s overall dysfunctional mental state and his inappropriate responses to  
3 family members and others.” (Morris Declaration, pp. 16-17, citing Exhs. 22-24, 58.)<sup>7</sup>

4 Jack Richardson’s behavior toward his wife and children was abusive and violent.  
5 (Morris Declaration, p. 13-15.) Their son, Eddie Richardson (Jean’s brother), described  
6 how Jack beat Irene in the face with his fists. (Deposition of Eddie Richardson, at pp. 9-  
7 14.) According to Eddie, he and his mother were often knocked unconscious. Jean was  
8 beaten as well. (*Id.* at pp. 10-13, 18.) Eddie also testified that his father beat his  
9 grandmother, recalling how both her jaws were broken and had to be wired. (Deposition of  
10 Eddie Richardson, at pp. 15, 18.) Eddie testified that Jack stopped beating Jean when she  
11 was in high school and began dating Crew’s father, who was a big football player. (*Id.* at p.  
12 16.)

13 A review of court records related to Jack and Irene Richardson’s marriage  
14 reveal that they separated and then reconciled several times, and show a deeply troubled  
15 marriage, marked by violence. (Morris Declaration, p. 15, citing Exh. 19 [1940 divorce  
16 petition alleging that Jack “commenced a course of unkind, harsh and tyrannical conduct”];  
17 Exh. 20 [1944 divorce petition alleging that Jack “constantly fussed, nagged, and  
18 quarreled” and otherwise engaged in “cruel conduct”]; Exh. 21 [1956 divorce petition and  
19 temporary restraining order, alleging that Jack “frequently beat, stomped, kicked and [did]  
20 great physical violence” to Irene, causing her “great bodily violence and physical injury”].)

21 Dr. Morris explained the impact of domestic violence on Crew’s mother Jean:  
22 “Experiencing and witnessing the level of violence in the home as did Mr. Crew’s mother,  
23 particularly if untreated, would typically have a significant impact on one’s emotional and  
24 social development. Depression and emotional isolation and withdrawal, as Jean Crew has  
25 been described as suffering, are common responses to such experiences.” (Morris  
26 Declaration, p. 16.)

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28 <sup>7</sup>Records also show that Jack Richardson’s older brother, Dewey Richardson, was  
psychotic and institutionalized in the 1950s. (Morris Declaration, p. 12, citing Exh. 4; see  
also Deposition of Eddie Richardson, at p. 7.)



1 Ample evidence was presented at the hearing, without contradiction, establishing  
2 that Jack Richardson sexually molested his daughter, Jean, his granddaughter, Cheryl, and  
3 other young girls. (Morris Declaration, pp. 17-19, 30.) Eddie Richardson detailed the  
4 sexualized atmosphere that pervaded the environment in which he and his sister Jean were  
5 raised. (Morris Declaration, p. 17.) He described his father taking him to see a  
6 pornographic film as a young boy, and witnessing his father molesting his classmate, a  
7 seven or eight-year-old girl who lived across the street. (Richardson Deposition, pp. 19-22,  
8 24.)

9 Eddie Richardson knew that his father molested his sister Jean. Jean told him that  
10 their father "messed with her." He recalled that whenever Jean wanted to bathe and their  
11 father was in the house, she would have Eddie get into the bathtub with her to shield her.  
12 In later years, when they were adults, Jean confirmed that she had been molested by her  
13 father. (*Id.* at pp. 22-24.) Jean also told Cheryl Norrid, Eddie's daughter, that her father  
14 had molested her. This was in response to Cheryl telling her Aunt Jean that Eddie had  
15 molested her. (Deposition of Cheryl Norrid, pp. 18-21.) Cheryl described Jean as being  
16 upset when she learned that Eddie had molested her. (*Id.* at p. 26.) As Dr. Morris  
17 explained, Jean's anger was not inconsistent with having abused Crew given that she "may  
18 not have even seen her activities with her own son as being abusive." (EH 160.)

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

21 While not all children who are sexually abused go on to  
22 perpetrate child sexual abuse, it is a risk factor that cannot be  
23 ignored. At the very least, Jean was vulnerable to all the  
24 negative impact of child sexual abuse as documented in the  
25 research literature and described in detail elsewhere in this  
26 declaration. These mental health issues, if not resolved, remain  
27 in place while the abused individual parents their own children,  
28 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.)

1 Jack Richardson also molested his granddaughter Cheryl Norrid. (Morris  
2 Declaration, p. 19.) Cheryl testified by deposition that whenever Jack, who was living in  
3 California during her childhood, returned to Texas for a visit, he sexually molested her.  
4 (Norrid Deposition, p. 16.) Cheryl described sexually disturbing conduct exhibited by Jack,  
5 which included fondling his poodle in front of his grandchildren. (Norrid Deposition, p.  
6 17.)

7 John Turner, the son of Ola Forrester, who married Jack Richardson in 1976,  
8 provided stipulated testimony by sworn declaration. Turner described Richardson as a  
9 mean man with a quick temper who always carried a gun. Richardson was afraid of people  
10 and threatened to shoot his neighbors. Turner stated that Jack Richardson molested his  
11 granddaughter and his brother's granddaughter. (Turner Declaration, Exh. 73.)

12 According to Dr. Morris, evidence of Crew's grandfather's "penchant for  
13 inappropriate sexual responses to children, including family children" further confirms "the  
14 likelihood that he did, in fact, molest his own daughter, Jean," shows that he had "few  
15 sexual boundaries," and "helps trace the genesis of Mr. Crew's mental health issues."  
16 (Morris Declaration, p. 19.)

17 Eddie Richardson repeated the pattern of sexual abuse that was exhibited by his  
18 father. (Morris Declaration, p. 19.) Cheryl Norrid, Eddie's daughter, testified that her  
19 parents divorced when she was young, and that she spent weekends at her father's house  
20 beginning at the age of 5 or 6. (Norrid Deposition, p. 7.) Cheryl testified that she was  
21 sexually molested by her father from her earliest memories until she was about 12 years  
22 old, when she told her mother about the abuse and the visits ceased. (*Id.* at pp. 9-11.)  
23 Cheryl reported that because of this abuse, she suffered depression, low self-esteem, and  
24 has endured bad marriages. (*Id.* at p. 20.)

25 Debbie Murphy is the daughter of Eddie Richardson's second wife, Mary. Debbie  
26 was raised by Mary's parents, and believed Mary was her sister, not her mother, until she  
27 was older. (Deposition of Debbie Murphy, pp. 6-7.) Like Cheryl Norrid, Debbie spent  
28 weekends at Eddie's house, and was molested by him repeatedly over the course of many

1 years. (Murphy Deposition, pp. 8-14.) Cheryl testified that she witnessed Eddie molesting  
2 Debbie. (Norrid Deposition, pp. 14-15.) Debbie also suffered from the effects of  
3 childhood sexual abuse, including drinking, using drugs and being sexually promiscuous at  
4 a very young age. She had low self-esteem and was involved in several abusive,  
5 dysfunctional relationships. (Murphy Deposition, p. 22.)

6 Kimberly Richardson is Eddie's daughter from his marriage to Mary. Cheryl Norrid  
7 testified that when she stayed at Eddie's house, she and Kimberly slept in the same bed, and  
8 Kimberly would beg Cheryl to sleep on the outside to protect her from Eddie. (Norrid  
9 Deposition, at pp. 12-14.) Debbie Murphy testified that Eddie raped Kimberly when she  
10 was about 14 years old, and that Kimberly ran away and lived with Murphy for a period of  
11 time. (Murphy Deposition, p. 20.) Kimberly has had many problems in her life stemming  
12 from sexual abuse, including difficulty holding a job, marital difficulties, and drug and  
13 alcohol abuse. (*Id.* at p. 22-23; Norrid Deposition, pp. 29-30.)

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

19 Dr. Morris noted a history of substance abuse among members of the maternal side  
20 of Crew's family. (Morris Declaration, pp. 11-14.) These include Irene Richardson's  
21 brother, Robert Estes, who was described as an alcoholic by both Eddie Richardson and  
22 Cheryl Norrid. (Richardson Deposition, p. 8; Norrid Deposition, p. 20.) Eddie also  
23 described his father, Jack Richardson as a binge drinker, who did not drink all the time but  
24 when he did "he was serious." (Richardson Deposition, pp. 9-10.)

25 (ii) The paternal side of Crew's family is characterized by a history of  
26 abandonment, marital strife and extra-marital affairs, and substance abuse.

27 Crew's father, William Crew, was born on November 23, 1929, in Fort Worth,  
28 Texas, to Warnell Crew and Irene Crow. His parents separated in May 1933, when

1 William was three years old. William was subsequently raised by his paternal  
2 grandparents. (Morris Declaration, p. 21, citing Exhs. 17, 28, 29, 33, 34; Declaration of  
3 Maurice Lambert, Exh. 33; Declaration of Darla McFarland, Exh. 34.)<sup>8</sup> The divorce  
4 complaint, filed on June 3, 1933, alleged that Warnell often remained away from home and  
5 associated with other women. (Exh. 32.) According to Maurice Lambert, the son of Irene  
6 Crow's sister, Irene and Warnell split up for good when Warnell got another woman  
7 pregnant. (Lambert Declaration, Exh. 33.) As Dr. Morris noted, "William's mother Irene's  
8 marriage to Warnell at a very young age, the breakup of the marriage and the abandonment  
9 of their child, mirrored Irene's own upbringing and foreshadowed William's marriage to  
10 Jean Richardson." (Morris Declaration, p. 21, citing Exhs. 31, 33, 35, 36; Lambert  
11 Declaration, Exh. 33; Crow Declaration, Exh. 36.)

12 After her marriage to Warnell Crew, Irene married and divorced several more  
13 times. (Morris Declaration, pp. 21-22.) The divorce petitions describe Irene's abusive  
14 behavior and fits of anger (Exh. 38), her marriage to a man whose alcohol abuse and verbal  
15 abuse caused her "much mental anguish and humiliation" (Exh. 40), and her "harsh, cruel  
16 and tyrannical" behavior. (Exh. 42.)

17 Crew's grandmother, Irene, was reportedly an alcoholic. (Morris Declaration, p.  
18 22.) According to Maurice Lambert, she was very wild and independent. She was a "party  
19 girl who drank and danced." (Lambert Declaration, Exh. 33.) She was also described by  
20 Margie Crow as being a nervous person. (Crow Declaration, Exh. 36.) Crew's father  
21 recalled that she drank a lot and often appeared to be intoxicated. (Morris Declaration, p.  
22 22, citing Exh. 17.)

23 Dr. Morris testified that "the descriptions of the paternal side of Mr. Crew's family  
24 show dysfunctional rather than functional interpersonal relationships, as well as alcohol  
25 abuse. These traits are often transmitted to each succeeding generation, including Mr.  
26 Crew's father and Mr. Crew himself. Of particular note are reports of womanizing and  
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28 <sup>8</sup> The declarations of Maurice Lambert (Exh. 33), Darla McFarland (Exh. 34) and  
Margie Crow (Exh. 36) have been admitted into evidence by stipulation.

1 alcohol abuse.” (Morris Declaration, p. 22.)

2 (iii) Crew’s parents had marital difficulties early in their marriage due, in part, to  
3 his father’s womanizing.

4 Petitioner’s parents, Jean Richardson and William Crew met in high school in Fort  
5 Worth, Texas, and were married on August 22, 1947, when William was 17 and Jean was  
6 16. (Morris Declaration, p. 22, citing Exhs. 17, 18.)

7 Their first child, Crew’s brother Michael, was born on August 28, 1950. At the  
8 time, William was working as an apprentice newspaper pressman and Jean was a  
9 housewife. (Morris Declaration, pp. 22-23, citing Exh. 45.) William reported to Dr. Morris  
10 that there were difficulties in the early years of their marriage. William admitted he liked to  
11 party and drink, and “had an eye for other women.” (*Id.* at p. 23, citing Exh. 17.) William  
12 recalled that they decided to have a second child, thinking that it would help the marriage.  
13 (*Id.*) Mark Christopher Crew was born on December 25, 1954. (*Id.* at p. 23, citing Exh.  
14 46.)

15 Records show that on March 2, 1955, Jean filed for divorce, stating that  
16 she and William had “separated on several occasions, until about the 28th day of February,  
17 1955, at which time they permanently separated, and have since lived wholly separate and  
18 apart.” The complaint was dismissed two weeks later for failure to prosecute, and at some  
19 point the couple reconciled. (Morris Declaration, p. 23, citing Exh. 47.)

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1 (iv) Consistent with her abusive upbringing, Crew's mother was depressed and  
2 emotionless, and often remained in her nightgown, robe and slippers all day.  
3 Crew's father was rarely home and engaged in numerous extramarital affairs.  
4 Crew was thus deprived of appropriate role models, and suffered from  
5 emotional neglect and lack of supervision. These circumstances hampered  
6 Crew's ability to form appropriate emotional responses to others and to  
7 develop a positive self-image, and exposed him to the risk of traumatic  
8 experiences and early experimentation with drugs and alcohol.

9 In the late 1950s, after several moves, the family settled in California. William  
10 worked long hours as a pressman in San Francisco, and was rarely home. (Morris  
11 Declaration, p. 23, citing Exh. 17.) Jean worked occasionally but mostly stayed home. As  
12 Dr. Morris noted, "consistent with her upbringing that was marred by sexual and physical  
13 abuse, Jean Crew suffered symptoms of depression. She was often described as sad,  
14 withdrawn, and emotionless, staying home and not getting dressed for days at a time." (*Id.*)

15 William Crew described to Dr. Morris how he often came home from work to find  
16 Jean in her robe and slippers, having never gotten dressed for the day. (Morris Declaration,  
17 p. 23.) As William described: "Jean did not socialize much after our marriage. She often  
18 stayed home and did nothing at all. She sometimes stayed in bed all day long, and there  
19 were many days when she did not even get dressed. I recall coming home from work often  
20 and being able to tell she had not been up for very long." (*Id.* at pp. 23-24, quoting Exh.  
21 17.)

22 Jean's isolation, withdrawal, complacency and other symptoms of depression were  
23 confirmed by family friends and neighbors. (Morris Declaration, pp. 24.) Gail Frost  
24 testified at the evidentiary hearing. She and her husband were neighbors of William and  
25 Jean Crew in the late 1950s/early 1960s. (EH 358-359.) She remembered the Crew home  
26 as "messy" and "cluttered." (EH 360, 363.) Jean was usually dressed in a nightgown and  
27 robe or pajamas no matter what time of day it was. (EH 361.) Frost described Jean as a  
28 very sad person, who did not laugh and never seemed to be happy. (*Id.*) Jean did not

1 interact with others, and did not participate in any school activities. (EH 362.) When  
2 Jean's children ran up to her excited about something, Jean simply did not react, as if there  
3 was no recognition of them. (EH 362-363.)

4 Friends of Mark and Mike Crew uniformly described Jean as different from the  
5 other mothers in the neighborhood. (Morris Declaration, pp. 24-25, citing Exhs. 49-52.)  
6 They remembered Jean as quiet, sad, and withdrawn, staying at home in her bathrobe. For  
7 example, Crew's junior high school friend, Kenneth Lovitt, agreed that Jean "wasn't like  
8 any of the other mothers. She always seemed to be at home. She appeared shell shocked  
9 and did not show emotion. She did not laugh or even smile. She was polite but  
10 expressionless. When she spoke, she spoke briefly and in a monotone, and she was  
11 generally withdrawn." (Declaration of Kenneth Lovitt, Exh. 49.)<sup>9</sup>

12 Dr. Morris testified that:

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

23 (Morris Declaration, p. 25.)

24 There are also descriptions of Jean's sexual promiscuity. (Morris Declaration, p.  
25 25.) William claimed that he caught Jean having affairs. (*Id.*, citing Exh. 17.) Frost  
26 testified that Jean once propositioned her husband while William was propositioning her.  
27 (EH 364-365.) Dr. Morris testified that "such episodes are not inconsistent with Jean's  
28 depressive symptoms and may also indicate the presence of inappropriate sexual responses  
as a result of being a victim of child sexual abuse." (Morris Declaration, at p. 25.)

William Crew's absence from the home was due not only to working long hours. He  
was also engaged in numerous extramarital affairs. (Morris Declaration, p. 26.) He

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<sup>9</sup> This Court granted Crew's motion to admit Lovitt's declaration into evidence.

1 admitted to Dr. Morris that he was involved with other women throughout the marriage.  
2 (*Id.*) Joyce Cox, a childhood friend of Jean's, confirmed to Dr. Morris that William was the  
3 most aggressive womanizer she had ever come across. She described two occasions when  
4 William propositioned her, including once when he was still married to her friend Jean.  
5 (Morris Declaration, p. 26, citing Exh. 25.) Eddie Richardson recalled visiting the Crew  
6 family in California, and going out at night with William Crew to drink and chase women.  
7 (Deposition of Eddie Richardson, at pp. 25-26.)

8 Jean's emotional withdrawal and William's absence resulted in a lack of guidance  
9 and attention, and a seeming lack of interest in their children. Mark and Mike Crew's  
10 friends remarked on the lack of supervision and extraordinary permissiveness of Mr. and  
11 Mrs. Crew. (Morris Declaration, p. 26 citing Exhs. 55-57.) As Mark Crew put it to Dr.  
12 Morris, his parents really did not care how he and his brother did in school and did not care  
13 what they did as long as they did not get caught. (*Id.*)

14 Dr. Morris explained:

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

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

25 (v) Crew's parents divorced when Crew was a teenager. He then lived with his  
26 father, who, with his heavy drinking and womanizing, was a poor role model.

27 William and Jean separated in the summer of 1969, when Crew was fourteen, and  
28 divorced the following year. (Morris Declaration, p. 28, citing Exh. 17, 60.) Crew lived  
with his father after the breakup of his parents' marriage. (*Id.*)

William remarried in 1970. (Morris Declaration, p. 28, citing Exh. 62.) His new  
wife, Barbara Miller, had three children of her own, Doug, Dean and Debbie. According to  
Barbara, William was a heavy drinker. (Morris Declaration, p. 28, citing Exh. 63.)



1 William and Barbara had adult parties that Crew was allowed to attend when he was  
2 in high school. (Morris Declaration, p. 28.) Patricia Silva, Crew's high school girlfriend  
3 and first wife, described these parties at the evidentiary hearing:

4 First of all, just excessive drinking. But they would . . . play  
5 music, and they would have . . . some sort of game where  
6 everybody would be in a big circle, and as the music played, the  
7 circle would get smaller and smaller, until somebody was in the  
8 middle of the circle and then they would start touching and  
9 groping whoever was in the middle of the circle.

10 (EH 336.) Crew drank a lot at these parties. (EH 337.)

11 William continued his pursuit of other women. (Morris Declaration, p. 29, citing  
12 Exh. 63.) This even extended to his son's girlfriends. Emily Vander Pauwert, Crew's  
13 girlfriend in the late 1970s/early 1980s, described an incident when William tried to kiss  
14 her. (EH 308.) Another of Crew's girlfriends told a private investigator that Crew's father  
15 once became intoxicated and made a sexual advance towards her. (Morris Declaration, p.  
16 29, citing Exh. 65; JSUF #12.)

17 According to Dr. Morris, "William Crew's womanizing and drinking provided a  
18 negative role model for Mr. Crew. Indeed, few adults in Mr. Crew's life, including his  
19 father, were role models for stable relationships, appropriate responses to women and  
20 sobriety." (Morris Declaration, p. 29.)

21 (vi) Crew's father sexually abused young girls, including his own stepdaughter.

22 In addition to the evidence of sexual abuse on the maternal side of Crew's family,  
23 Dr. Morris also found evidence of such abuse on the paternal side. Barbara Miller, Crew's  
24 second wife, described an incident where William groped and propositioned the young  
25 daughter of friends on a camping trip. (Morris Declaration, 29, citing Exh. 63.)

26 Doug Thompkins, Crew's stepbrother, testified at the evidentiary hearing that  
27 William molested his sister Debbie. (EH 460-461.) Shortly after Barbara and William  
28 separated in 1986, Debbie told Barbara that William had been molesting her for about six  
years, both before and during her teenage years. (Morris Declaration, p. 29, citing Exhs.  
63, 66, 67, 68.)

As Dr. Morris explained, "even assuming Mr. Crew was unaware of these incidents,

1 they document the pervasive sexual dysfunction of Mr. Crew's family." (Morris  
2 Declaration, p. 29.)

3 (vii) Crew's mother remarried, and subsequently exhibited signs of depression and  
4 alcoholism.

5 In December 1970, Jean married Bergin Mosteller. Jean was 39 years old and  
6 Bergin was 23. They moved to Arizona and later to South Carolina. Although there were  
7 no reports about her drinking prior to moving to South Carolina, at least beginning at that  
8 time, Jean was drinking a great deal and was often depressed and withdrawn. (Morris  
9 Declaration, pp. 29-30, citing Exhs. 69, 70, 71.)

10 **B. Sexual Abuse and the Effects of Crew's Traumatic History**

11 Petitioner presented evidence that Crew was a victim of sexual abuse when he was  
12 young, and that this had a devastating impact on his development and mental health. As  
13 Dr. Morris explained, Crew suffered from a range of traumatic experiences which  
14 encompassed "many kinds of destructive behaviors and is best seen on a continuum from  
15 non-abusive behaviors to abuse of sexuality to sexual victimization." (Morris Declaration,  
16 p. 6.)

17 As summarized by Dr. Morris:

18 Mr. Crew was sexually abused by his mother beginning at a  
19 very young age and this abuse continued throughout his  
20 childhood. In addition, Mr. Crew's maternal grandfather  
21 exposed Mr. Crew to an extraordinarily oversexualized  
22 environment and encouraged Mr. Crew to participate in highly  
23 inappropriate sexual activities for the grandfather's pleasure.  
24 Other adult males in Mr. Crew's life, including his father and  
25 older brother, exacerbated the psychological impact of this  
26 abuse through neglect, exposure to additional inappropriate  
27 sexual experiences, drug and alcohol abuse, and by being  
28 unsuitable role models. These factors had a profound negative  
29 impact on Mr. Crew's emotional well-being, the development  
30 of functional interpersonal relationships, attitudes and skills,  
31 and his developing sexuality.

32 (Morris Declaration, p. 7.)

Respondent attempted – unsuccessfully – to rebut one aspect of Dr. Morris's  
opinion, regarding mother-son incest, but did not seek to challenge the remainder of the  
evidence presented by petitioner, including Crew's exposure to these other damaging and

1 abusive experiences, and the mental health problems Crew subsequently experienced.

2 (i) Dr. Morris provided credible testimony that Crew was sexually molested by  
3 his mother.

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

11 When Crew was a child, approximately 6 or 7 years old, his mother often  
12 got into the bathtub with him when he was taking a bath, holding him sideways so his hip  
13 bone was between her legs and holding him close. Crew also recalled that when he took a  
14 bath, his mother often sat on the toilet and after urinating had Crew take the toilet paper and  
15 wipe her with it. (Morris Declaration, p. 30.)

16 Dr. Morris testified:

17 These episodes of inappropriate sexual contact appeared to be  
18 the only time Mr. Crew was able to get the love and affection  
19 which he (or any child) needed, and with which his mother  
20 seemed unable to provide him during her days of depression  
21 and withdrawal. Mr. Crew described just wanting his mother to  
22 hug him and hold him, which she did after she was sexually  
23 gratified. However, the closeness Mr. Crew achieved with his  
24 mother during these episodes carried a tremendous  
25 psychological cost.

26 (Morris Declaration, pp. 30-31.)

27 As Dr. Morris continued:

28 The love and comfort that Mr. Crew received from his mother  
only through erotic expressions of affection was extremely  
damaging to his social, emotional and sexual development. In  
many ways, Mr. Crew learned to confuse emotional intimacy  
with sex, and for the rest of his life he engaged in compulsive  
womanizing in a desperate and futile attempt to feel the same  
level of emotional intensity that he felt during these confusing,  
yet deeply emotional experiences, with his mother.

(*Id.* at p. 31.)

1 Dr. Morris credibly explained why the sexual abuse Crew described was believable.  
2 (Morris Declaration, pp. 7-11.) According to Dr. Morris, the details Crew gave of his  
3 experiences, as well as his demeanor and affect, were consistent with others who have  
4 suffered the type of abuse he described. In addition, while the details Crew provided of the  
5 abuse, and his feelings and reactions to it, were consistent with those of other male victims  
6 of sexual abuse, they contained many unique characteristics which were unlikely to be  
7 fabricated. (*Id.* at p. 8.) The fact that Crew had not disclosed his sexual abuse history  
8 previously in no way casts doubt on the credibility of the evidence. Both Dr. Morris and  
9 respondent's expert agreed that men are typically very reluctant to disclose that they have  
10 been sexually abused. (EH 148, 151-152, 414, 416.)

11 Also lending credence to Crew's reports of abuse were the consistency between  
12 Crew's sexual, emotional and behavioral patterns and problems, and those experienced by  
13 male victims of sexual abuse: "These included interpersonal relationship problems,  
14 compulsive sexual behavior and confusion about sexual matters, self-destructive thoughts  
15 and behavior, substance abuse, poor self-esteem, shame, depression, and sleep  
16 disturbances." (Morris Declaration, p. 9.) While, contrary to respondent's characterization,  
17 Dr. Morris did not testify that these symptoms necessarily meant that Crew was sexually  
18 abused – by his mother or anyone else – he explained that such symptoms *often* appear in  
19 men who have been sexually abused. (*Id.* at pp. 6, 9, 40.)

20 Dr. Morris testified that:

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

(Morris Declaration, p. 9.)

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1 (ii) Lay witnesses provided additional evidence of the unusually intense  
2 relationship between Crew and his mother, which supports the conclusion  
3 that mother-son incest occurred.

4 As noted above, Crew's attorney, Joseph Morehead, described a noteworthy  
5 incident in which he observed Crew's mother sitting on Crew's lap while they visited  
6 together in a jury room during trial. (EH 215-216.) In addition, Crew's former girlfriend  
7 and his first wife both described the unusual relationship between Crew and his mother.  
8 Emily Vander Pauwert testified that Crew often cried when he talked about his mother.  
9 (EH 313.) When Vander Pauwert tried to get Crew to tell her what had happened between  
10 them, Crew replied that he "felt rejected" by her and admitted that they had an "abusive  
11 relationship," although he never specified whether it was physical, sexual or emotional  
12 abuse. (EH 326.) Vander Pauwert met Crew's mother one time, and observed that she was  
13 very "distant and cold" toward her son, which Vander Pauwert thought was unusual  
14 because they had not seen each other for quite awhile. (EH 314.)

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

21 (iii) Crew's grandfather subjected Crew to "abuse of sexuality," whereby Crew  
22 was exposed to and exploited by his grandfather's highly disturbed sexuality.

23 By 1960, Jean's father, Jack Richardson, was having increasing difficulty holding  
24 down a job due, among other things, to his psychological condition. (Morris Declaration,  
25 p. 27, citing Exh. 58.) In the early 1960s, Jack and Irene Richardson moved from Texas to  
26 California. They lived for a period of time with the Crew family, and eventually rented a  
27 place of their own in the area. In about 1967, the Crew family moved to a farm on the  
28 outskirts of Petaluma, where they lived for a year or two. William then took a new job in

1 San Jose in 1968 or 1969. When the family moved to San Jose, Jack and Irene moved onto  
2 the farm, where Mark Crew spent a great deal of time. (Morris Declaration, p. 27, citing  
3 Exhs. 17, 49, 56.) As Dr. Morris described, “Jack Richardson’s aberrant behavior  
4 continued when he and Irene moved to California, and as a result, Mark Crew was exposed  
5 to a disturbing sexual environment and was sexually exploited by his grandfather.” (Morris  
6 Declaration, p. 27.)

7 Crew reported to Dr. Morris that his grandfather was always trying to touch girls or  
8 to get him and his brother, Mike, to do so. As confirmed by several of Crew’s and his  
9 brother’s friends, Jack Richardson was constantly doing or saying something sexual.  
10 (Morris Declaration, pp. 31-32, citing Exhs. 50, 52, 56 ). Eddie Richardson testified that  
11 his father, Jack, offered money to Mark Crew in return for letting Jack watch Crew and his  
12 girlfriend have sex. Eddie learned about this from Crew’s mother, who was furious with  
13 Jack over the incident. (Deposition of Eddie Richardson, at pp. 26-27.)

14 Crew’s friend, Kenneth Lovitt, recalled that:

15 [Crew] and I spent some time at his grandparents’ farm in  
16 Petaluma . . . Jack was a strange man. As soon as we were  
17 alone with him, he talked dirty in a way I had never really  
18 heard. Although many men made sexual references in private,  
19 this was different and unsettling. He talked about ‘young  
20 pussy.’ He always talked about young girls in a sexual way and  
21 talked about the things he liked doing to girls. [Crew] got very  
22 quiet when this happened and tried to get us to leave soon after  
23 Jack started talking dirty.

24 (Lovitt Declaration, Exh. 49.)

25 Crew recalled that several times when he was 11 or 12 years old, his grandfather had  
26 Crew kiss a neighborhood girl and put his finger in her vagina while the grandfather  
27 watched. By the time Crew was 12 or 13, he was engaging in sexual activity with girls  
28 with greater frequency. According to Dr. Morris, “[t]his is not surprising since early  
exposure to inappropriate sexual experiences often produces more sexualized behavior in  
children, including sexual preoccupations and compulsive sexual activities, than in children  
absent age-inappropriate or child sexual abuse experiences. Such children often develop  
ineffective boundaries and also engage in inappropriate sexual behavior modeled by

1 influential people in the child's life." (Morris Declaration, p. 33.) In Crew's case, his  
2 "childhood abuse of sexuality experiences provided the foundation for sexually compulsive  
3 behavior that was seldom under his control." (*Id.*)

4 (iv) Crew's brother showed signs of a traumatic upbringing, including depression  
5 and anxiety, aggressive sexual behavior, and substance abuse. He and the son  
6 of a family friend exposed Crew to drugs and sexual activity at an  
7 inappropriately young age.

8 In the absence of a stable father figure, Crew looked up to two older boys, his  
9 brother Mike, and Doug Cox, the son of a family friend who lived with the Crews for a  
10 period of time. As Dr. Morris testified, they were not appropriate role models, and it  
11 appears that their primary influence was to expose Crew at a very young age to drinking,  
12 drugs and inappropriate sexual activity. (Morris Declaration, p. 34.)

13 Mike Crew has been described as anxious and depressed, having low self esteem,  
14 resorting to alcohol and drugs, unable to maintain stable relationships, oversexualized and  
15 inappropriately aggressive. (Morris Declaration, p. 34, citing Exhs. 49, 51, 54, 56, 59, 75.)

16 According to Mike's first wife, Cathy, he was very wild in high school, drank  
17 and used drugs, and was involved in a "biker lifestyle." Mike did not settle down after  
18 marrying Cathy in 1968, as she had hoped. (Morris Declaration, p. 34, citing Exhs. 59, 76.)  
19 He was depressed and drank a great deal. Cathy believed he was also using drugs and  
20 seeing other women. They divorced in 1971, because of Mike's behavior, which included  
21 "drinking, partying, sleeping around and missing work." (*Id.*, citing Exhs. 59, 77.) Over  
22 ten years later, in 1982, Mike was arrested for public drunkenness in South Carolina. (Exh.  
23 78; JSUF #13.)

24 As Dr. Morris noted, Mike's "difficulties point to pervasive dysfunction in Mr.  
25 Crew's family and how it impacted not only Mr. Crew but other members of the family. It  
26 also adds credibility to the reports of a seriously dysfunctional upbringing and its far  
27 reaching negative impact." (Morris Declaration, pp. 34-35.) Dr. Morris further explained  
28 that Mike came from the same environment as Mark Crew, and "the history that we have of

1 | this family is a really incestuous family with lots of inappropriate activities by most of the  
2 | adults. And so he was subjected to those kinds of things as well.” (EH 156.)

3 |         In the late 1960s, Doug Cox, the son of Jean’s childhood friend, Joyce Cox,  
4 | got into some trouble at home in Texas and came out to California to live with the Crew  
5 | family for 1½ to 2 years, beginning when Crew was about 13 years old. He was  
6 | approximately four years older than Crew, but they spent a great deal of time together,  
7 | moving into a barn behind the farm in Petaluma, where they had built a loft. Not  
8 | surprisingly, Crew was exposed to drugs during this period of time. (Morris Declaration,  
9 | pp. 27, 35.) Kenneth Lovitt remembered that Cox bought them alcohol and smoked  
10 | marijuana with them. (Lovitt Declaration, Exh. 49.) Also, spending time with Doug Cox,  
11 | who was sexually active, furthered Crew’s exposure to sex with girls in the neighborhood  
12 | despite his young age. (Morris Declaration, p. 35.)

13 |         (v) Crew’s daily use of alcohol and drugs began in junior high and increased in  
14 | high school, where he drank, smoked marijuana and used other drugs.

15 |         As early as junior high school, Mr. Crew was drinking and using illicit drugs,  
16 | to which he was first exposed by his brother and Doug Cox. According to Kenneth Lovitt,  
17 | this included smoking marijuana daily, drinking on weekends and occasionally using LSD.  
18 | (Morris Declaration, p. 35; Lovitt Declaration, Exh. 49)

19 |         Mr. Crew’s substance abuse problems became more pronounced in high school.  
20 | Various sources described Crew as smoking marijuana, drinking, using speed and  
21 | barbiturates, and taking LSD. (Morris Declaration, p. 35, citing Exhs. 49, 55, 57.)

22 |         Patricia Silva testified that during high school Crew drank beer, smoked marijuana  
23 | and did other drugs, including barbiturates, on a daily basis. Silva described this as a “daily  
24 | routine.” According to Silva, Crew was always high; he was consistently high through the  
25 | day. (EH 351, 352.) He also occasionally used LSD. (EH 333-334.)

26 |         (vi) Crew functioned well in the Army despite abusing drugs and alcohol and  
27 | suffering from depression.

28 |         Crew enlisted in the Army in December 1972, at the age of 17. (Morris Declaration,



1 p. 35, citing Exh. 79.) He and Patricia Silva were married in April 1973, after Silva  
2 became pregnant. (EH 340; Exh. 80.) Their daughter was born on October 9, 1973.  
3 (Morris Declaration, p. 35, citing Exhs. 57, 81.) Crew and his wife moved to Georgia,  
4 where he was stationed. (EH 340; Morris Declaration, pp. 35-36.) While in the Army,  
5 Crew continued to use drugs and alcohol excessively, and also suffered from depression.  
6 (Morris Declaration, p. 36, citing Exh. 57.)

7 Patricia Silva testified that while Crew was somehow able to perform his duties in  
8 the Army, he was using drugs, such as marijuana and barbiturates, and drinking daily. (EH  
9 341-342, 354.) Silva noted that there were times when Crew tried to stop using drugs, and  
10 he would remain clean for a few days, but would then start using again. (EH 342.)  
11 According to Silva, Crew became depressed two or three times a month and slept  
12 excessively. During these times, he skipped dinner, remained very quiet, did not talk to  
13 anyone, and went to sleep. (EH 344-345, 347.)<sup>10</sup>

14 (vii) Crew's attempts at marriage and family life failed and his use of drugs,  
15 drinking and compulsion to see other women escalated.

16 Crew was initially excited about the birth of his daughter and being a father. He  
17 soon began staying away from home, however, and was unable to curb his drinking and  
18 drug use. (EH 344; Morris Declaration, p. 36, citing Exh. 57.) Two months after their  
19 daughter was born, Crew and Silva separated, and Silva returned to California. Silva later  
20 moved back to Georgia, and she, Crew and their daughter moved into a new apartment.  
21 (EH 345.) Silva testified that Crew "wanted things to be different" and "wanted us to stay  
22 as a family." (EH 345-346.) At first, Crew tried to not drink or use drugs, did not go out,  
23 and spent more time with the family. (EH 346.) It was clear, however, that Crew was "not  
24 able to settle down and handle the responsibilities of a family," (Morris Declaration, p. 36,  
25 quoting Exh. 57 and citing Exh. 82), and in July 1974, they separated for good. Their  
26

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27 <sup>10</sup> Morehead wrongly believed that because Crew did well in the Army he must  
28 have "put aside whatever problems he had" during that period in his life. (EH 229.) The  
failure to undertake a competent investigation led counsel to make such false assumptions  
and resulted in the failure to develop significant mitigating evidence.

1 | divorce became final in 1976. (EH 347.)

2 | Crew successfully completed his active duty tour in December 1975, and  
3 | received an honorable discharge in 1978, after completing his remaining reserve duty  
4 | obligations. (Exh. 79.)

5 | In 1976, Crew moved to Minnesota with Debra Lund, with whom he had  
6 | established a relationship. He continued to drink, use drugs and date other women.  
7 | (Morris Declaration, p. 36.) In early 1977, Crew left Debra and returned to California. He  
8 | met and began dating Emily Vander Pauwert. (*Id.*, citing Exh. 64.) Several months later,  
9 | Debra came to California, and she and Crew reconciled. They were married on August 26,  
10 | 1977, and moved back to Minnesota. (*Id.*, citing Exh. 83.) On August 6, 1979, their son,  
11 | Christopher, was born. (*Id.*, citing Exh. 84.)

12 | Dr. Morris explained that, once again, Crew's inability to maintain a healthy,  
13 | intimate relationship led him to see other women, and he continued to drink and do drugs.  
14 | Debra Lund later told the police prior to Mr. Crew's trial that he had been "into drugs,  
15 | speed, coke and marijuana." (Exh. 85.) As Dr. Morris testified, when Crew's "life  
16 | appeared to be going well, he became even more self-destructive, believing that he did not  
17 | deserve the things he had. Although he badly wanted what he viewed as a normal life,  
18 | when it appeared he had obtained everything he wanted – a wife, baby, house and job – he  
19 | became anxious and overwhelmed." (Morris Declaration, p. 37.)

20 | Crew left Debra and after spending some time with his grandmother in Texas,  
21 | returned to California in the summer of 1980, and resumed his relationship with Emily  
22 | Vander Pauwert. However, his drinking, drugs and womanizing escalated. Dr. Morris  
23 | testified that, "[a]fter the failure of [Crew's] marriage to Debra, he realized that he was  
24 | incapable of having a normal life, and the ensuing self-hatred and despair resulted in a life  
25 | that spiraled out of control." (Morris Declaration, p. 37.)

26 | (viii) Crew's father encouraged Crew to drink to excess.

27 | When Crew returned to California, he spent time with his father, which often meant  
28 | heavy drinking. (Morris Declaration, p. 37.) Emily Vander Pauwert testified that Crew and

1 his father “almost always got drunk together.” (EH 304, 305.) They drank Jack Daniels.  
2 (EH 305.)

3 Vander Pauwert described one incident when they went on Crew’s father’s boat:

4 [Crew]’s dad encouraged him to get drunk, and kind of kept  
5 giving him a bad time, saying ‘Boy, you can drink more than  
6 that.’ And [Crew] became so drunk, that he passed out on the  
7 dock, and his dad hosed him down with the hose that you hose  
8 off the boats with. And then I had a car that lifted up in the  
9 back, and his dad dumped him in the back.

10 (EH 306.)

11 On another occasion, as soon as Crew and Vander Pauwert got on the boat, Crew’s  
12 father took out a large bottle of Jack Daniels, took off the top, and told Crew that they  
13 needed to finish it. According to Vander Pauwert, they got very drunk, especially Crew.

14 (EH 307.)

15 Vander Pauwert also testified about a hunting trip that Crew took with his father and  
16 a group of other men: “Next to the hunting cabin was a tree, and they called it the puking  
17 tree. And so I guess [Crew] got drunk, and they put him out under the puking tree. And  
18 they had pictures of him passed out with puke all over him.” (EH 309.) Vander Pauwert  
19 saw photographs taken of Crew passed out under the tree, and recalled that Crew’s father  
20 thought this was funny. (*Id.*)

21 (ix) Crew exhibited symptoms consistent with being sexual abused and  
22 traumatized as a child, including excessive drinking and drug use, depression,  
23 low self-esteem, sleep disorders, and the inability to maintain healthy,  
24 monogamous relationships.

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

28 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,  
citing Exhs. 64, 87, 88.) Vander Pauwert described Crew’s depression and low self esteem:

“[i]t was along the lines of he just couldn’t shake feelings that he had. And he didn’t think

1 he was good enough . . . in life. And that he was upset about his relationship with his  
2 mother. And he had been upset about his relationship with his father . . .” (EH 315.) She  
3 also testified that Crew’s sleeping habits were unusual. He slept for long periods of time  
4 during the day and had nightmares. (EH 311-312.) Crew would sleep for just a few hours,  
5 after being out all night drinking, and at other times he would sleep for 16-18 hours for  
6 “days on end.” (EH 312.)

7 Cynthia Pullman, one of Crew’s girlfriends in the early 1980s (EH 280), also  
8 described Crew’s depression and sleeping problems. Pullman testified that Crew was “very  
9 depressed.” (EH 287.) She also stated that Crew “would be up all night and would sleep  
10 during the day. He had insomnia, restlessness type of thing . . . Yeah, he would just not  
11 sleep at night.” (EH 284.)

12 During this time period, Crew was drinking daily. Vander Pauwert, whose father  
13 and other relatives were alcoholics, testified that Crew drank “a lot,” and she believed that  
14 Crew was an alcoholic. (EH 304, 310.) Vander Pauwert explained that Crew did not drink  
15 much in front of her – except when he was with his father – because he knew she did not  
16 like it because of her experience with alcoholism in her family. (EH 304-305.) When she  
17 and Crew went out together, often to a country-western bar called the Saddle Rack, Crew  
18 had one or two drinks, but then she would leave and Crew would later come home drunk.  
19 (EH 304-305, 310.)

20 While Crew was living with his stepbrother, Doug Thompkins, and Dick Elander, it  
21 was “like party central” at their house, where there was always drinking and partying going  
22 on, according to Pullman. (EH 281-282, 462-463.) Thompkins testified that it was  
23 common for them to drink daily. (EH 463.) Pullman testified that Crew had a drinking  
24 problem, that he drank “all the time,” and that she did not know if she ever saw him when  
25 he was not drinking. (EH 282-283.) Pullman could not say precisely how much he drank  
26 when they went to the Saddle Rack together, but “he was just drinking all the time.” (EH  
27 283.)

28 Crew was also smoking marijuana frequently, and was using harder drugs, including

1 | methamphetamine and cocaine. (Lovitt Declaration, Exh. 49, Morris Declaration, pp. 38-  
2 | 39, citing Exh. 49, 93, 94.) Pullman testified that Crew used cocaine. (EH 284.)

3 | Crew was compelled to see other women when he was in a relationship. (Morris  
4 | Declaration, p. 37.) Vander Pauwert testified that Crew saw other women constantly while  
5 | they were together. (EH 315-316.) This ultimately led to their breakup. (EH 316.)

6 | Thus, as Dr. Morris concluded, in the few years immediately prior to the events  
7 | leading to Crew's arrest and conviction, he was often extremely depressed, and his  
8 | womanizing, drinking and drug use increased significantly. "Mr. Crew had always drunk  
9 | and used drugs to self-medicate his emotional distress, but, as he put it, he went from  
10 | partying with alcohol and drugs to serious self-destructive drinking and drug abuse."  
11 | (Morris Declaration, p. 39.)

12 | (x) The sexual abuse and traumatic experiences Crew suffered as a child had a  
13 | damaging impact on his development and mental health.

14 | Dr. Morris testified that "Mark Crew's life cannot be understood without  
15 | considering the impact of his social history, and in particular, the sexual abuse he suffered  
16 | from his earliest memories and throughout his childhood. His early traumatic experiences  
17 | resulted in confusion, shame, insecurity, a poor self-image and extreme emotional distress."  
18 | (Morris Declaration, p. 39.) While, like other sexual abuse survivors, Crew developed  
19 | ways to cope with his traumatic childhood experiences, "these strategies were formed based  
20 | upon a breach of basic trust between a parent or other family members and child, unmet  
21 | childhood needs, a fractured self-image, confusion about sexuality and serious  
22 | misconceptions about interpersonal relationships." (*Id.*)

23 | Such strategies used by Crew included: "denial and substance abuse to insulate  
24 | himself from painful childhood memories and emotional distress. He also learned to  
25 | protect himself emotionally by not allowing people, especially desirable persons, to get too  
26 | close, even though he yearned for the affection found in close relationships." (Morris  
27 | Declaration, p. 39.) As Dr. Morris concluded, [w]hile these strategies may have provided  
28 | some utility as a child and adolescent, collectively they became a serious liability as an

1 adult, leaving Mr. Crew with few resources to help him understand and cope with his  
2 emotional distress and normal life events. As a result, he became increasingly depressed,  
3 desperate and self-destructive.” (*Id.*)

4 **C. Substance Abuse**

5 David Smith, M.D., the founder and former medical director of the Haight Ashbury  
6 Free Clinics in San Francisco, is an expert in substance abuse and addiction. (Smith  
7 Declaration, pp. 1-2; Exh. 98.) Dr. Smith was retained by Morehead, but did not see Crew  
8 at the time of trial, and was consulted only on the issue of whether Crew’s drug and alcohol  
9 use provided a potential guilt phase defense. (EH 209, 221-222.) Had Dr. Smith been  
10 asked about potential mitigation, and had he interviewed Crew and been provided the  
11 background information that was available, he could have testified at the penalty phase as  
12 he did at the evidentiary hearing (via declaration) that Crew suffered from “addictive  
13 disease, consisting of drug and alcohol dependence,” and that the risk factors in Crew’s  
14 history leading to addiction included a genetic predisposition to alcoholism and mood  
15 disorders, a traumatic and sexually abusive childhood, and an enabling environment  
16 consisting of parental neglect and exposure to alcohol and drugs by role models. (Smith  
17 Declaration, pp. 4-14.) Dr. Smith’s testimony at the evidentiary hearing was neither  
18 challenged nor rebutted.

19 (i) Crew had a genetic predisposition to substance abuse.

20 Crew’s family history shows that several family members, including his maternal  
21 grandfather, maternal grandmother’s brother, paternal grandmother, father, and brother, had  
22 substance abuse problems and thus, Crew was genetically predisposed toward addiction.  
23 (Smith Declaration, pp. 5-6, citing Exhs. 5, 10, 17, 33, 57, 59, 63, 64, 66, 71, 78.)

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1           (ii) Crew's family had a history of psychiatric conditions, particularly depression,  
2           and medical conditions known to affect mood, such as high blood pressure  
3           and diabetes, which are all commonly related to self-medication with alcohol  
4           and drugs.

5           There is evidence of mental illness, particularly mood disorders in Crew's family  
6 history. Crew's maternal grandfather, Jack Richardson, was psychologically disturbed, and  
7 Richardson's brother, Dewey, was institutionalized because of psychotic episodes. Crew's  
8 paternal grandmother was reportedly unstable. Crew's mother, Jean, appeared to suffer  
9 from major depression, and his father reported symptoms of depression and anxiety.

10 Crew's brother has been described as depressed. (Smith Declaration, p. 6, citing Exhs. 4, 5,  
11 10, 17, 23, 24, 25, 33, 36-44, 48-52, 54, 56, 58, 59, 73, 95.) There is also ample evidence  
12 that Crew suffered from symptoms of depression. (*Id.* at pp. 7-8, citing Exhs. 57, 64, 87.)

13           Crew's father and paternal grandfather suffered from diabetes, and his mother had  
14 high blood pressure and developed a duodenal ulcer. Crew was diagnosed with high blood  
15 pressure after his arrest. Diabetes and high blood pressure are known to affect mood.  
16 (Smith Declaration, pp. 6-7, citing Exhs. 17, 34, 96, 97.)

17           According to Dr. Smith, it is common for people with mood disorders to "self-  
18 medicate" with drugs and alcohol to alleviate the symptoms of their diseases such as  
19 overwhelming anxiety and depression. (Smith Declaration, p. 7.)

20           (iii) Crew's trauma history is also a risk factor for substance abuse.

21           Dr. Smith explained that, "in addition to being genetically predisposed to addiction,  
22 Crew turned to drugs and alcohol in an attempt to ward off the feelings of depression,  
23 anxiety, shame, and self-loathing that stemmed from his traumatic childhood experiences."  
24 (Smith Declaration, at p. 4.) He testified that "[s]tudies confirm that addiction is one of the  
25 most common consequences of sexual abuse. It has been well documented that children  
26 who are subjected to trauma and abuse are more likely to turn to drugs and alcohol to 'self-  
27 medicate' in an attempt to dull the pain they are experiencing." (*Id.* at p. 7.)  
28

1 (iv) Crew was raised in an “enabling environment” consisting of poor role models  
2 who encouraged his use of drugs and alcohol, and a lack of parental  
3 supervision.

4 In Crew’s case, “the environment in which he was raised fostered drug and alcohol  
5 use because of its availability, the lack of supervision and the encouragement or at least  
6 acquiescence by role models.” (Smith Declaration, at p. 8.) Dr. Smith explained that:

7 An important consideration for determining a predisposition to  
8 addiction is the role of the parents in encouraging or condoning  
9 drugs and alcohol use, and whether there is an enabling system  
10 present for the individual who is using drugs and alcohol. In  
11 Mr. Crew’s case, the environment in which he was raised  
12 fostered drug and alcohol use because of the availability of  
13 alcohol and drugs, the lack of supervision and the  
14 encouragement or at least acquiescence by role models.

15 (*Id.*)

16 As noted above, Crew’s father was usually absent from the home, and his mother  
17 was emotionally withdrawn. Friends and neighbors have remarked on the lack of  
18 supervision in the Crew household, creating an atmosphere conducive to drug and alcohol  
19 use. (Smith Declaration, p. 8, citing Exhs. 17, 48, 55-57.)

20 Dr. Smith testified that Crew was introduced to drugs by his older brother and by  
21 Doug Cox. Crew became aware of his father’s drinking around the time of the breakup of  
22 his parents’ marriage, when he was approximately 14 years old. At that time he noticed his  
23 father drinking all the time at home and having a bottle with him when he was out. When  
24 Crew was in high school, he attended his father’s and stepmother’s parties where heavy  
25 drinking and the use of marijuana was condoned. (Smith Declaration, p. 8, citing Exhs. 49,  
26 50, 55, 57.)

27 Crew began drinking with his father when he was in his late teens. (Smith  
28 Declaration, p. 8.) In later years, as also testified to by Emily Vander Pauwert, Crew’s  
father encouraged Crew to drink to the point of becoming sick. (*Id.*)

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1 (v) Credible, uncontroverted evidence was presented which established that Crew  
2 began using drugs and alcohol at an early age, and that such use continued  
3 with increasing intensity throughout his life. The early onset and long term  
4 nature of Crew's polysubstance dependence had a damaging impact on his  
5 psychological development.

6 Based on multiple sources which provide consistent, reliable information, Dr. Smith  
7 concluded that:

8 Mr. Crew's polysubstance dependence began in his early youth.  
9 By age 13 or 14, he smoked marijuana daily, drank, and used  
10 hallucinogens frequently. In high school he continued to drink,  
11 smoke marijuana and use hallucinogens, and also used  
12 amphetamines and barbiturates. He reportedly passed out from  
13 drinking and drugs at least once a week. Mr. Crew's excessive  
14 drinking and drug use continued in the military, which he  
15 entered at the age of 17, and throughout his adulthood. In the  
16 years prior to the events for which he was arrested he was  
17 drinking every day, smoking marijuana, and using whatever  
18 other drugs were available, including cocaine and  
19 methamphetamine.

20 (Smith Declaration, p 9.)

21 Dr. Smith explained the deleterious impact of Crew's substance abuse:

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

(Smith Declaration, p. 13.)

#### 21 **D. Credibility and Availability of Mitigation**

22 Petitioner established that the mitigating evidence he presented at the evidentiary  
23 hearing was credible and would have been available at the time of trial had his attorneys  
24 conducted an adequate investigation.

25 All of the lay witness were available and would have testified at trial consistent with  
26 their evidentiary hearing testimony. (EH 288-289 [Pullman]; EH 322 [Vander Pauwert];  
27 EH 348 [Silva]; EH 368 [Frost]; Richardson Deposition, p. 29; Norrid Deposition, p. 22;  
28 Murphy Deposition, p. 24; Exh. 33, p. 3 [Lambert]; Exh. 34, p. 2 [McFarland]; Exh. 36, p.

1 3 [Crow]; Exh. 49, p. 2 [Lovitt]; Exh. 73, p. 1 [Turner].) This was not disputed by  
2 respondent.

3 Except for the issue of maternal sexual abuse, Dr. Morris's testimony about Crew's  
4 family history and upbringing was not challenged by respondent. None of the underlying  
5 documentation or information upon which Dr. Morris relied was ever called into question,  
6 with regard to either its availability or authenticity. Nor was the validity of the  
7 observations and experiences of petitioner's lay witnesses seriously disputed. This  
8 included the three witnesses who testified by deposition (Eddie Richardson, Cheryl Norrid,  
9 and Debbie Murphy) and the witnesses who testified at the hearing (Gail Frost, Patricia  
10 Silva, Cynthia Pullman and Emily Vander Pauwert). The declarations of other witnesses  
11 were submitted by stipulation or court order. (Margie Crow, Maurice Lambert, John  
12 Turner, Darla McFarland and Kenneth Lovitt). There is simply no question that the  
13 evidence presented at the evidentiary hearing of a family history of mental illness,  
14 abandonment, neglect, marital strife, domestic violence and substance abuse was both  
15 credible and available to counsel at the time of trial.

16 With regard to the evidence of Crew's own mental health problems, including his  
17 struggle with depression, low self-esteem, sleep disorders, substance abuse, and inability to  
18 form healthy relationships, there was also no meaningful dispute. Neither Dr. Morris's  
19 presentation of Crew's symptom history nor Dr. Smith's testimony regarding Crew's long-  
20 standing polysubstance addiction and its impact was challenged at all. Four lay witnesses,  
21 Kenneth Lovitt (by declaration), Cynthia Pullman, Emily Vander Pauwert and Patricia  
22 Silva all testified as detailed above. Respondent's cross-examination of the three live  
23 witnesses did nothing to undermine, or even suggest, that their testimony was anything but  
24 trustworthy.

25 Respondent presented Doug Thompkins, Crew's stepbrother, as their only lay  
26 rebuttal witness to Crew's entire social history presentation. Thompkins merely testified  
27 that in the one year period in 1981-1982 that he lived with Crew, he did not see Crew  
28 falling down drunk. (EH 463-464.) Thompkins acknowledged that he, Crew and their

1 other roommate, Dick Elander, drank beer daily, and went to the Saddle Rack to drink  
2 further. (EH 463-464.) Thompkins conceded on cross-examination that after they got to  
3 the bar, the three men would separate and therefore, he did not observe how much Crew  
4 actually drank. (EH 465-466.) Thompkins' belief that Crew did not get intoxicated was  
5 based on Crew's ability to drive Thompkins and Elander, who were too drunk to drive,  
6 back to the house. (EH 464.)

7 Thompkins' testimony does not rebut the evidence of Crew's long term drinking and  
8 drug use, or in particular, the testimony of Cynthia Pullman and Emily Vander Pauwert,  
9 who knew Crew in the same period of time described by Thompkins, and stated that he was  
10 always drinking. (EH 283-284, 304-305, 310.) Thompkins' ultimate conclusion was that  
11 Crew did not get as drunk as Elander or himself, and that "he always managed to get us  
12 home." (EH 466.) But, as both Pullman and Crew's first wife, Patricia Silva, remarked,  
13 Crew could drink an enormous amount or use drugs and still function. (EH 284, 341.) In  
14 fact, Thompkins testified that Crew's father drank a great deal without appearing drunk.  
15 (EH 466.) Since Thompkins did not observe how much Crew actually drank, even  
16 assuming his veracity, all that can really be concluded from his testimony is that Crew was  
17 able to function well despite drinking heavily, and that Thompkins was too drunk himself  
18 to provide a reliable opinion on the level of Crew's intoxication.

19 Respondent did not challenge the evidence, cited above, establishing the pervasive  
20 history of sexual abuse on both sides of Crew's family. This included evidence from  
21 several witnesses (Eddie Richardson, Cheryl Norrid, John Turner) that Jack Richardson,  
22 Crew's maternal grandfather, sexually abused young girls, including his daughter (Crew's  
23 mother), his granddaughter, and his second wife's granddaughter. There was also  
24 testimony from Cheryl Norrid and Debbie Murphy that Crew's maternal uncle molested his  
25 daughters and other young girls. Doug Thompkins testified that Crew's father molested his  
26 sister.

27 Nor did respondent call into question the credibility of evidence that, as a boy, Crew  
28 was subjected to his grandfather's highly inappropriate sexual conduct, which included

1 constantly talking about sex in graphic detail, and encouraging Crew to engage in sexual  
2 activity which the grandfather watched and sometimes participated in. (EH 156.) Evidence  
3 that Crew was also exposed to sexual activity by his brother and the older son of a family  
4 friend at an inappropriately young age was also presented without dispute. These  
5 experiences were characterized by Dr. Morris as “abuse of sexuality,” and as  
6 psychologically damaging themselves. Such activities do not fit into the traditional  
7 category of sexual abuse because they do not involve direct sexual contact, but children  
8 with these experiences, according to Dr. Morris’s uncontroverted testimony, suffer from  
9 symptoms consistent with those who have been sexually abused. (EH 153-154.) Thus,  
10 even if Crew had not been sexually abused by his mother, there are a “cluster of activities,”  
11 including those described above, that could account for his various mental health  
12 symptoms, including substance abuse, depression, sleep disorders, compulsive sexual  
13 behavior, and his inability to form healthy relationships with women. (EH 154-155.)

14 The only aspect of petitioner’s entire mitigation case upon which respondent has  
15 attempted to cast doubt is the evidence that Crew was the victim of mother-son incest. As  
16 described in detail above, Dr. Morris’s opinion that Crew was sexually molested by his  
17 mother was based on several factors, including the family history of sexual abuse, the fact  
18 that Crew’s mental health symptoms are consistent with male victims of sexual abuse, and  
19 Crew’s presentation to Dr. Morris which, based on his experience as a clinician, Dr. Morris  
20 found to be credible.<sup>11</sup>

21 Respondent attempted to challenge Dr. Morris’s opinions because he did not  
22 perform any psychological testing on Crew. (EH 122-128.) Dr. Morris agreed that  
23 psychological tests were available at the time of Crew’s trial, but explained that they were  
24 only used in sexual abuse cases for clinical purposes. (EH 124-128.) As Dr. Morris  
25 pointed out, one problem with using such tests in criminal cases was that they were not  
26 standardized on a prison population. (EH 124.) Dr. Morris stated unequivocally that there  
27

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28 <sup>11</sup> By 1989, Dr. Morris had treated hundreds of men who were victims of sexual abuse, including “a dozen or so” who were victims of mother-son incest. (EH 153.)

1 | were no psychological tests used at the time of Crew's trial in a forensic setting to assess  
2 | whether or not a person had actually been sexually abused. (EH 151.) This point was not  
3 | rebutted by respondent.

4 |         Respondent also questioned why Dr. Morris did not provide a diagnosis of Crew  
5 | under the Diagnostic and Statistical Manual (DSM). (EH 128-131.) Dr. Morris testified  
6 | that he only renders a DSM diagnosis in clinical cases unless ordered otherwise, consistent  
7 | with the stated purpose of the DSM. (EH 130.) Furthermore, as Dr. Morris explained,  
8 | there is no diagnostic category in the DSM for child abuse victims, and abuse victims  
9 | generally do not fit into any one specific DSM diagnosis. (EH 151.)

10 |         Dr. Daniel Martell, a forensic psychologist, testified on respondent's behalf. Dr.  
11 | Martell, however, did not offer an opinion as to whether or not Crew was sexually abused.  
12 | (EH 411.) His testimony centered on whether or not a reasonably competent mental health  
13 | professional would have considered the possibility that Crew had been sexually abused in  
14 | the absence of disclosure by Crew. This is an issue discussed below in response to  
15 | Reference Question #5.

16 | 5.     What investigative steps would have led to this additional evidence?

17 |         A reasonably competent investigation consistent with prevailing professional norms  
18 | would have led to the above-described evidence. Indeed, it was undisputed that the lay  
19 | witnesses, including neighbors, friends and family, were available, willing and able to  
20 | testify at trial. It also was undisputed that the documentary evidence relied on by  
21 | petitioner's experts was available to trial counsel. One of petitioner's two expert witnesses,  
22 | Dr. Smith, was actually consulted by trial counsel but, as discussed above, did not evaluate  
23 | petitioner at the time and was given a narrow referral question limited to guilt phase issues.  
24 | The other expert, Dr. Morris, co-wrote an authoritative book on male victims of sexual  
25 | abuse that was published in 1989, the time of trial, and as respondent's expert conceded,  
26 | either Dr. Morris or an expert with comparable experience would have been able to provide  
27 | testimony regarding Crew's sexual abuse history at the time of trial. (EH 441-442.)

28 |         In 1989, the American Bar Association published "Guidelines for the Appointment

1 and Performance of Counsel in Death Penalty Cases” (hereafter “ABA Guidelines”) which  
2 have been relied on by both the United States Supreme Court and the California Supreme  
3 Court as articulating well-defined norms for determining the reasonableness of trial  
4 counsel’s performance in investigating and developing mitigating evidence.<sup>12</sup> (*Wiggins v.*  
5 *Smith* (2003) 539 U.S. 510, 524; *In re Lucas* (2004) 33 Cal.4th 682, 725.) These guidelines  
6 require that counsel’s investigation into the penalty phase “should begin immediately upon  
7 counsel’s entry into the case and should be pursued expeditiously.” (ABA Guideline  
8 11.4.1.A.) This investigation should “comprise efforts to discover all reasonably available  
9 mitigating evidence . . . .” (ABA Guideline 11.4.1.C.) The sources of this information  
10 include, but are “not limited to: family and social history (including physical, sexual or  
11 emotional abuse) . . . .” (ABA Guideline 11.4.1.D.2.C; see also ABA Guideline 11.8.6.B.5)  
12 “[N]eighborhood surroundings and peer influence” should also be considered. (ABA  
13 Guideline 11.8.6.B.5.) The Guidelines provide that counsel “should consider interviewing  
14 potential witnesses, including . . . witnesses familiar with the client’s life history . . . and/or  
15 other mitigating evidence to show why the client should not be sentenced to death.” (ABA  
16 Guideline 11.4.1.3.B.) Counsel should also “secure the existence of experts . . . for the  
17 presentation of mitigation.” (ABA Guideline 11.4.1.7.D.) Such experts should be  
18 consulted for the purpose of testifying with regard to the client’s history and its resulting  
19 impact on him. (ABA Guideline 11.8.6.B.8.) Among the topics counsel should consider  
20 presenting are “alcohol and drug use,” and “physical, sexual or emotional abuse.” (ABA  
21 Guideline 11.8.6.B.1 & ABA Guideline 11.8.6.B.5.)

22 In any death penalty case, but particularly in this case, in view of the clues derived  
23 from the discovery documents, a reasonably competent investigation of Crew’s background  
24 was warranted. As Dr. Smith testified without contradiction, had he been “provided with  
25

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26  
27 <sup>12</sup> Both the 1989 and 2003 ABA Guidelines can be accessed at [www.probono.net/](http://www.probono.net/deathpenalty)  
28 [deathpenalty](http://www.probono.net/deathpenalty). The 1989 Guidelines, cited above, “represent a codification of longstanding,  
common-sense principles of representation understood by diligent, competent counsel in  
death penalty cases.” (*Hamblin v. Mitchell* (6th Cir. 2003) 354 F.3d 482, 487.) The 2003  
ABA Guidelines “simply explain in greater detail than the 1989 Guidelines the obligations  
of counsel to investigate mitigating evidence.” (*Id.*)

1 the police reports documenting Mr. Crew's alcohol and drug use, depression and sleep  
2 disturbances, and asked by counsel to provide an expert opinion on the availability of  
3 mitigating evidence, [he] would have advised counsel of the likelihood of a compelling  
4 case in mitigation based, at least in part, on Mr. Crew's substance abuse, and would have  
5 advised counsel to develop a comprehensive medical, psychological and social history of  
6 Mr. Crew." (Smith Declaration, p. 13.)

7 Had counsel merely interviewed the witnesses who provided information about  
8 Crew to the police, they would have been able to mine a wealth of information regarding  
9 Crew's depression, sleep disorders and long-term substance abuse, which was itself  
10 mitigating. As Pullman testified, however, counsel never contacted her despite the  
11 information about Crew's drinking and drug use she provided to the police. (EH 287-288.)  
12 Patricia Silva, Crew's first wife, was also interviewed by the police, but not by counsel.  
13 (EH 348.) Had counsel contacted her, they would have learned a great deal about Crew's  
14 long-standing mental health problems, which she described at the evidentiary hearing.  
15 While Morehead interviewed Vander Pauwert, he was more concerned with Crew's  
16 relationship with Dick Elander than with Crew's mental health problems. (EH 321.)

17 Pullman was a prosecution witness at the guilt phase. She testified briefly on  
18 cross-examination that Crew had a drinking problem as well as sleep disturbances. (RT  
19 4393-4394.) Vander Pauwert testified for the defense at the penalty phase and she noted a  
20 couple of times when Crew drank to excess. (RT 4767-4769.) Counsel did not develop  
21 this evidence further or argue to the jury that this constituted mitigation. In the pinpoint  
22 instruction prepared by the defense, which directed the jury to consider specific mitigating  
23 circumstances, counsel did not cite these isolated instances of Crew's drinking and sleeping  
24 habits that the defense had elicited. (CT 2553-2554.)

25 The most basic social history documents – all of which were available to trial  
26 counsel in 1989 – were rich sources of critical information. Court records of Crew's  
27 parents and grandparents established a history of marital discord, abandonment and  
28 domestic violence. (Exhs. 19-21, 32, 37-42, 47.) Medical and mental health records show

1 a family history of mental illness, as well as diabetes and high blood pressure, which  
2 adversely affect mood. (Exhs. 4, 23, 24, 58, 95-97.)

3 A reasonably competent investigation of Crew's background – consistent with ABA  
4 Guidelines – would have included interviews of relatives beyond the immediate family,  
5 such as Eddie Richardson, the only surviving sibling of Crew's parents. Such an  
6 investigation would have yielded an enormous amount of information regarding domestic  
7 violence, substance abuse and sexual abuse – including the sexual abuse of Crew's mother  
8 by his grandfather, and the grandfather's and maternal uncle's abuse of other young girls.  
9 (See, e.g., Exh. 5, 10, 17, 25, 27, 33, 71, 73.) Interviews of Crew's father's second wife,  
10 Barbara, and her children, would have revealed that Crew's father was a womanizer and  
11 heavy drinker, and that he had molested his stepdaughter. (Exhs. 63, 66.) Interviews of  
12 neighbors and childhood friends of Crew and his brother in Northern California would have  
13 provided additional information about the sexually aberrant behavior of Crew's maternal  
14 grandfather to which Crew was exposed, the depressive symptoms of Crew's mother, the  
15 mental health symptoms of Crew's brother, and the early onset of Crew's use of drugs and  
16 alcohol. (Exhs. 48-57, 59, 75.)

17 These facts of Crew's family history, particularly when combined with information  
18 provided in discovery, that Crew had substance abuse problems, showed symptoms of  
19 depression and sleep disorders, and engaged in compulsive sexual behavior, inevitably  
20 would have led counsel to explore with Crew his upbringing and to retain appropriate  
21 experts, and to thereby learn that Crew had been sexually abused throughout his childhood.  
22 Both Dr. Morris and Dr. Phillips agree that a reasonably competent mental health  
23 professional would have inquired about the possibility that Crew had been sexually abused  
24 – or subject to some childhood trauma – had they been provided with this history. (Morris  
25 Declaration, p. 41; EH 179-181.)

26 Remarkably, Dr. Martell, respondent's expert, disagreed. He testified that a  
27 reasonably competent mental health professional would not have inquired as to whether or  
28 not Crew had been sexually abused – even if he or she were aware of the nature and extent



1 of Crew's mental health symptoms and the family history, including the history of sexual  
2 abuse, presented by petitioner. (EH 411.) Dr. Martell's opinion is untenable and  
3 completely unsupported. Given his relative lack of experience in the field of child sexual  
4 abuse, particularly when compared with Dr. Morris,<sup>13</sup> and his *complete* lack of experience  
5 in consulting with defense counsel in preparing mitigating evidence in a death penalty case  
6 (EH 451-453), Dr. Martell's opinion should be given no weight.

7 Dr. Martell provided three reasons to support his view that Crew's sexual abuse  
8 would not have been discovered in the absence of disclosure by Crew himself. First, he  
9 contended that Crew's symptoms of depression, womanizing and substance abuse would  
10 have led a forensic psychologist or psychiatrist first to consider that the defendant had anti-  
11 social personality disorder ("ASPD"). (EH 412.) According to Dr. Martell, having found  
12 symptoms consistent with ASPD, a competent expert would go no further. (EH 450-451.)  
13 It is ludicrous, however, to suggest that an expert consulted by the defense for purposes of  
14 developing mitigating evidence would simply cease exploring a defendant's mental health  
15 history after concluding that the symptoms are consistent with – although not exclusive to –  
16 ASPD. This would be particularly ill-advised given that, as Dr. Martell testified, a  
17 "substantial majority" of the prison population exhibit these symptoms. (EH 417-418.)<sup>14</sup>

18 It may be Dr. Martell's practice, as the State's expert rebutting defense evidence, to  
19 narrow the scope of his assessment in order to find ASPD. However, as Dr. Martell  
20 conceded, he has never been retained by the defense in a capital case where child sexual  
21

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22 <sup>13</sup> Dr. Martell's expertise is in the area of neuropsychology and forensics. (EH 386,  
23 388, 393.) Although he qualified as an expert on sexual abuse over petitioner's objection  
24 (EH 405-408), his forensic and clinical experience with regard to male victims of sexual  
25 abuse is minimal, particularly in contrast to that of Dr. Morris. (Compare EH 106-114,  
26 153, Exh. 1 with EH 385-408, Exh. 153.)

27 <sup>14</sup> Although he could not point to any specific portion of Dr. Morris's testimony, Dr.  
28 Martell criticized Dr. Morris for opining that these symptoms were "pathognomonic" for  
sexual abuse. (EH 413, 433-439.) Dr. Morris clearly testified, however, that Crew  
"suffered from sexual, emotional and behavioral patterns and problems that were *consistent*  
with those experienced by male victims of sexual abuse." (Morris Declaration, p. 9.) In  
fact, Dr. Morris agreed that Crew's mental health symptoms would be consistent with  
someone with ASPD. (EH 138.) Crew, however, would not have been diagnosed with  
ASPD because he does not meet the DSM criteria, specifically the presence of a conduct  
disorder before the age of 15. (EH 152.)

1 | abuse was a potential mitigating circumstance. (EH 430.) In fact, he has no experience  
2 | whatsoever, developing mitigating evidence for the defense in a death penalty case.  
3 | (EH 451-453.)

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

11 |         Dr. Morris agreed that the reason for publishing this book was the "relative dearth"  
12 | of information about male sexual abuse at the time, particularly with regard to abuse  
13 | perpetrated by females. (EH 121.) He pointed out, however, that although it was published  
14 | in 1989, the book was written over the preceding 18 months, and was based on existing  
15 | research of male victims of sexual abuse. (EH 151.)

16 |         Furthermore, Dr. Martell's review of the literature was both overly broad and unduly  
17 | narrow. He conceded that he relied on materials that post-dated 1989 (EH 423-430), but  
18 | also inexplicably limited his research to mother-son incest, as opposed to the broader area  
19 | of male victims of sexual abuse.<sup>15</sup> (EH 416, 420.) While Dr. Martell testified that there  
20 | was little in the way of literature regarding mother-son incest, he could not render an  
21 | opinion about the state of the literature of male victims of sexual abuse, generally, or even  
22 | of male victims of sexual abuse by female perpetrators. By contrast, Dr. Morris pointed to  
23 | several studies pre-dating 1989, which involved sexual abuse of males by females. (EH  
24 | 132-136.) By contrast, Dr. Morris pointed to several studies pre-dating 1989, which  
25 | involved sexual abuse of males by females. (EH 132-136.)

26 |         Thus, Dr. Martell was unable to dispute Dr. Morris's assertion that:

27 | \_\_\_\_\_  
28 | <sup>15</sup> In fact, when Dr. Martell referred throughout his testimony to "sexual abuse," he  
was only referring to mother-son incest" (EH 433), thereby ignoring the other traumatic  
sexual experiences suffered by Crew.

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

7 (Morris Declaration, p. 6.)

8 Dr. Martell's final contention was that in the absence of disclosure from Crew  
9 himself, the history of sexual abuse on both sides of Crew's family, including that Crew's  
10 mother was sexually abused by her father, together with Crew's mental health symptoms,  
11 "would not have raised a concern" that Crew, himself, was a victim of sexual abuse,  
12 because all the victims in the family were women and the perpetrators were men. (EH 416-  
13 417, 448.) Dr. Martell concluded that, "[i]t's just not a logical endpoint to get to based on  
14 that set of facts, even with the totality of the circumstances of depression, substance abuse,  
15 womanizing, and coming from a chaotic and sexually abused family, that would lead a  
16 reasonably competent doctor to reach that conclusion that, oh, he must be a victim of sexual  
17 abuse as well." (EH 417.) Dr. Martell claimed that it is "highly unlikely" that an attorney  
18 or an expert, who, unlike Dr. Morris, was not an expert in sexual abuse, "would have been  
19 reasonably led to consider Mr. Crew was the victim of sexual abuse." (EH 442; see EH  
20 441 [Dr. Martell concedes that Dr. Morris or someone with comparable experience would  
21 have considered such a possibility].)

22 While the evidence of the family history and Crew's mental health symptoms may  
23 not necessarily have directed an expert to suspect that Crew was molested by his mother, it  
24 is hard to fathom that a competent expert would not have suspected some degree of trauma  
25 in Crew's life,<sup>16</sup> and particularly in the area of sexual abuse. Indeed, this history included  
26 the abuse of sexuality experiences involving Crew's grandfather and older brother, which  
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<sup>16</sup> Dr. Martell would not even concede that Crew's history and symptoms suggested  
childhood trauma. (EH 444-445.)

1 as Dr. Morris testified, were themselves psychologically destructive. Even Dr. Phillips, the  
2 expert consulted by trial counsel, agreed that Crew's sexual abuse would be a conclusion he  
3 would have considered if presented with Crew's symptoms and family history. (EH 180-  
4 181.) And certainly, had counsel undertaken an appropriate investigation, and then  
5 observed, as counsel did, Crew's mother sitting on Crew's lap while visiting him the jury  
6 room (EH 215-216), a red flag would have been raised.

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

13 Dr. Martell's testimony sheds no light on the availability of mitigating evidence in  
14 this case. Respondent has presented no credible evidence to dispute that had trial counsel  
15 followed prevailing professional norms and conducted a timely and reasonably thorough  
16 investigation of Crew's social history and upbringing, they would have obtained the  
17 evidence presented at the evidentiary hearing by petitioner.

18 6. What circumstances weighed against the investigation or presentation of this  
19 additional evidence? What evidence damaging to petitioner, but not presented by  
20 the prosecution at the guilt or penalty phase of trial, would likely have been  
21 presented in rebuttal if petitioner had introduced this evidence?

22 As demonstrated by respondent's cross-examination of petitioner's witnesses and  
23 the rebuttal testimony presented at the evidentiary hearing, there would have been no  
24 downside to introducing the above-described mitigating evidence at trial. Evidence of  
25 Crew's traumatic history and upbringing would have provided the jury with a far fuller,  
26 more realistic portrait of Crew's life story than the one the jury heard. Such a presentation  
27 would not have negated the positive aspects of Crew's character that trial counsel  
28 introduced. On the contrary, it would have compellingly shown that despite suffering from  
parental neglect, sexual abuse, a genetic predisposition to substance abuse, and other  
adverse influences throughout his life which left him depressed, dependent on drugs and

1 alcohol and unable to form healthy long-term relationships, Mark Crew was a kind and  
2 generous person who served his country honorably in the military and would adjust well to  
3 prison if sentenced to life without possibility of parole. Significantly, such a presentation  
4 would have undermined the prosecutor's argument that Crew deserved the death penalty  
5 because he had squandered the advantages of a good upbringing and normal life. (RT  
6 5068-5069; see also RT 5065.)

7 Respondent was unable to show how any of the evidence presented by petitioner at  
8 the hearing would have opened the door to damaging cross-examination or rebuttal.  
9 Indeed, since trial counsel had presented evidence of Crew's good character at the penalty  
10 phase, any conceivable rebuttal with regard to potential negative attributes or bad conduct  
11 would already have been presented by the prosecution. In any event, no such evidence was  
12 introduced at the evidentiary hearing.

13 7. Did petitioner do or say anything to hinder or prevent the investigation or  
14 presentation of mitigating evidence at the penalty phase, or did he ask that any such  
evidence not be presented? If so, what did he do or say?

15 The investigation of mitigating evidence was not undertaken until weeks before the  
16 penalty phase was scheduled to begin. There was, therefore, no investigation for Crew to  
17 hinder or prevent. In any event, O'Sullivan, Morehead and Murphy all agreed that Crew  
18 was a cooperative client who did not impede counsel's investigation or presentation of  
19 evidence.

20 O'Sullivan testified that he had a "great" relationship with Crew, and described him  
21 as a "delightful client." (EH 265.) He denied that Crew impeded the investigation in any  
22 way. (*Id.*) Morehead also described Crew as cooperative, and testified that Crew never  
23 asked counsel to avoid investigating any particular areas. (EH 214.) Murphy "had a very  
24 open, cooperative relationship" with Crew. (EH 241.)

25 It is undisputed that Crew did not volunteer that he had suffered from a traumatic  
26 and abusive upbringing. However, as the California Supreme Court has made clear, a  
27 petitioner's "failure to inform defense counsel that he, petitioner, had been abused as a  
28 child" does not "constitute[] a lack of cooperation excusing defense counsel's perfunctory

1 investigation.” (*In re Lucas, supra*, 33 Cal.4th at p. 729.) Rather, “it was counsel’s  
2 obligation to initiate investigation into petitioner’s background.” (*Id.*) Moreover, “the  
3 accused would not necessarily understand the significance of the information that would be  
4 uncovered by such an investigation.” (*Id.*)

5 Crew was not asked about whether he was abused and was not informed that such  
6 information was even significant to his defense at the penalty phase. O’Sullivan explained  
7 the scope of mitigating evidence by reading him the “applicable code sections,” and did not  
8 specifically ask him whether he was mistreated as a child. (EH 268.) Morehead’s  
9 discussions with Crew related to the penalty phase focused on positive aspects of his life,  
10 particularly his adult life “to the exclusion” of potentially negative aspects of his childhood.  
11 (EH 228-229.) Murphy did not interview Crew regarding his family life and childhood.  
12 (EH 257.)

13 As discussed above, Dr. Phillips, the only mental health expert to evaluate Crew  
14 before trial, conducted a 20 minute “preliminary interview” while Crew was shackled, with  
15 a guard within earshot. (EH 168-169, 175-178.) Dr. Phillips asked “general questions”  
16 about Crew’s childhood, but did not ask him whether he had been physically or sexually  
17 abused. (EH 169, 176-177.) Such an interview was not likely to elicit any significant  
18 information about Crew’s childhood, as even respondent’s expert conceded. (EH 449-450.)

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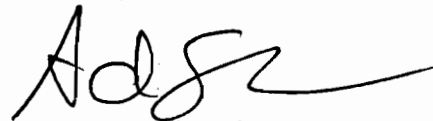
CONCLUSION

Petitioner has established that Crew's trial counsel did not investigate his background and upbringing, and that their penalty phase investigation and presentation was marred by untimeliness rather than any informed but failed strategy. Petitioner further demonstrated that had counsel undertaken an investigation consistent with prevailing norms they would have obtained a wealth of compelling and credible mitigating evidence. The evidence with regard to what counsel did, what they failed to do, and what they should have done, was not meaningfully challenged by respondent.

DATED: November 30, 2007

Respectfully submitted,

MICHAEL J. HERSEK  
State Public Defender



ANDREW S. LOVE  
Assistant State Public Defender

EVAN YOUNG  
Senior Deputy State Public Defender

Attorneys for Petitioner  
MARK CHRISTOPHER CREW

(ENDORSED)  
**FILED**  
DEC 5 2007

**DECLARATION OF SERVICE**

KIRI TORRE  
Chief Executive Officer/Clerk  
Superior Court of CA County of Santa Clara  
BY S. Chua DEPUTY

Re: *In re Mark Christopher Crew*

No. S107856

I, VICTORIA MORGAN, am a citizen of the United States. My business address is 221 Main Street, 10th Floor, 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 PROPOSED FINDINGS OF FACT**

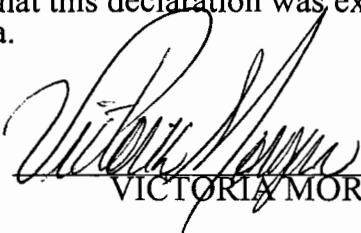
on the following named person(s) by placing a true copy thereof enclosed in an envelope addressed as follows:

Glenn R. Pruden  
Supervising Deputy Attorney General  
Office of the Attorney General  
455 Golden Gate Avenue, Suite 11000  
San Francisco, CA 94102-3664

Judith Sklar, D.D.A.  
Office of the District Attorney  
70 W. Hedding Street, 5<sup>th</sup> Floor  
San Jose, CA 95113

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 November 30, 2007 at San Francisco, California and that this declaration was executed on November 30, 2007, at San Francisco, California.

  
\_\_\_\_\_  
VICTORIA MORGAN





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 RESPONSE TO REFEREE'S  
FINDINGS OF FACT**

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

Glenn R. Pruden  
Supervising Deputy Attorney General  
Office of the Attorney General  
455 Golden Gate Avenue, Suite 11000  
San Francisco, CA 94102-3664

Hon. Andrea Y. Bryan  
Santa Clara Superior Court  
191 North First Street  
San Jose, CA 95113

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

Judith Sklar  
Deputy District Attorney  
70 W. Hedding Street, 5th Floor  
San Jose, CA 95113

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

