IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re

In re MARK CHRISTOPHER CREW,

On Habeas Corpus.

CAPITAL CASE
S107856

Trial: Santa Clara County Superior Court No. 101400
The Honorable John Schatz and Robert Ahern, Judges
Reference Hearing: Santa Clara County Superior Court No. 101400
The Honorable Andrea Y. Bryan, Judge

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

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re **In re MARK CHRISTOPHER CREW,** On Habeas Corpus.	**CAPITAL CASE** S107856

INTRODUCTION

A jury convicted petitioner and sentenced him to death for the murder of his wife, Nancy Jo Wilhelmi Andrade, who was last seen alive on August 23, 1982, when she left her parents' home in Santa Cruz, in the company of petitioner.[1/] Her body has never been found. Petitioner's conviction and sentence were affirmed by this Court on direct appeal. (*People v. Crew* (2003) 31 Cal.4th 822.) The United States Supreme Court denied certiorari. (*Crew v. California* (2004) 541 U.S. 991.)

Petitioner filed the instant petition for writ of habeas corpus in this Court on June 26, 2002. On October 12, 2005, this Court issued a reference order directing the referee to take evidence on and answer the following questions:

> 1. What information did petitioner's trial counsel have when deciding on the scope of his investigation into potential mitigating evidence?
>
> 2. What actions did petitioner's trial counsel take to investigate potential evidence that could have been presented in mitigation at the penalty phase of petitioner's trial? What were the results of that investigation?
>
> 3. What tactical justifications, if any, does petitioner's trial counsel offer for (a) limiting the scope of his investigation and conducting the

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1. The jury found true the special circumstance allegation that petitioner carried out the murder for financial gain. (Pen. Code, § 190.2, subd. (a)(1).)

investigation in the manner that he did, and (b) in limiting the presentation of penalty phase evidence in the manner that he did?

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

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

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

7. Did petitioner do or say anything to hinder or prevent the investigation or 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?

(<http://www.appellatecases.court.info.ca.gov/search/dockets/CrewS017856>.)

The referee held an evidentiary hearing on these questions on September 10-14, 2007. At the end of the hearing the referee ordered the parties to submit simultaneous pleadings offering their respective proposed findings of fact on the reference questions. (RT 473-474.)[2/] The parties filed those pleadings on December 3, 2007. The referee filed her Findings of Fact on February 28, 2008.

SUMMARY OF THE EVIDENCE

The following is a summary of the evidence adduced at the reference hearing through a combination of declarations, depositions, live testimonies and documents:

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2. "RT" refers to the five-volume, 476-page reporter's transcript of the evidentiary hearing. Any reference to the reporter's transcript of petitioner's 1989 trial will be to "Trial RT."

A. Larry Allen Morris, Ph.D.[3/]

1. Direct Examination

Dr. Morris is a clinical psychologist licensed to practice in Arizona. (Morris Decl. at p. 1, ¶ 1.) He specializes in the evaluation and treatment of perpetrators and survivors of childhood sexual abuse. (*Id.* at p. 1, ¶ 2.) He possesses an A.B. from Indiana University (1965), and an M.A. in psychology from the University of Arizona (1967) and a Ph.D. in clinical psychology from the University of Arizona (1970). (*Id.* at p. 1, ¶ 3.) He belongs to a variety of professional organizations and has published and given presentations in his field. (See Decl. Appen. A.) Except for his work in petitioner's case, Dr. Morris is retired from clinical and forensic work, having closed his private clinical practice in 2002. (*Id.* at p. 2, ¶ 7.) The vast majority of his patients were adult victims of child sexual abuse and rape, approximately half of whom were male victims, including some cases where males had been abused by their mothers. (*Id.* at pp. 2-3, ¶ 7.) Dr. Morris has been qualified as an expert witness in both state and federal courts, mostly in cases involving sexual offenses, although he also testified as an expert in murder cases. (*Id.* at p. 3, ¶ 8.)

Dr. Morris was retained by habeas counsel in 2001 to assess petitioner's social history and to specifically address whether he suffered sexual abuse as a child and, if so, what impact that had on his development. (*Id.* at p. 5, ¶ 14.) At counsel's request, he used only resources and research that were available in 1989. (*Id.* at p. 5, ¶ 15.)

As part of his preparation, Dr. Morris reviewed social historical

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3. Dr. Morris's direct testimony was submitted through his declaration that was introduced into evidence. (See RT 95.) His cross-examination and redirect examination were conducted live and citations are to the reporter's transcript of those portions of his testimony.

documents concerning petitioner and his family, which included vital records, medical, mental health, school, military and court records. He also reviewed sworn declarations obtained by habeas counsel and a series of documents pertaining to petitioner's criminal trial. (*Id.* at p. 5 ¶ 16.) He confirmed the reliability of certain facts regarding petitioner's family history through personal interviews of several witnesses. (*Id.* at p. 5, ¶ 17.) Dr. Morris also conducted a clinical interview of petitioner for approximately five hours, on February 26, 2002, at San Quentin. (*Id.* at p. 5, ¶ 18.)

Dr. Morris opined that "the initial effects on males who were sexually abused as children often include emotional and psychological distress (e.g., fear, anger, depression, guilt and shame, self-esteem problems, suicidality, sleep disturbances, dependence), behavior problems (including substance abuse) and sexualized behavior." (*Id.* at p. 6, ¶ 21; p. 41, ¶ 179 [these symptoms should have been "red flags" causing "any reasonably competent mental health professional to inquire whether [petitioner] had been a victim of sexual abuse"].) For many male 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." (*Id.* at p. 6, ¶ 21.) By 1989, there were studies showing that "mother-son incest was more profoundly detrimental" to development than incest by other family members and that sexual abuse, in general, "commonly recurred in families over generations." (*Id.* at pp. 6-7, ¶ 22.)

In Dr. Morris's "professional opinion," petitioner "was sexually abused by his mother beginning at a very young age and this abuse continued throughout his childhood." (*Id.* at p. 7, ¶ 25.) Additionally, it was his opinion that petitioner was exposed "to an extraordinarily oversexualized environment" by his maternal grandfather [Jack Richardson], and encouraged by his

grandfather "to participate in highly inappropriate sexual activities for the grandfather's pleasure." (*Id.* at p. 7, ¶ 25; see also *id.* at pp. 31-33, ¶¶ 137-144 [detailing the grandfather's inappropriate encouragements].) The psychological impact of his grandfather's involvement was "exacerbated" by petitioner's additional exposure to "inappropriate sexual experiences and, drug and alcohol abuse" through the other adult males in his life, including his father and brother. (*Id.* at p. 7, ¶ 25.) "These factors had a profound negative impact on [petitioner's] emotional well-being, the development of functional interpersonal relationships, attitudes and skills, and his developing sexuality." (*Id.* at p. 7, ¶ 25.)

Dr. Morris found the evidence of sexual abuse that [petitioner] described to him to be credible based on: (a) Dr. Morris's experience and training as a clinician; (b) the consistencies of the details provided by petitioner, as well as his demeanor and affect; (c) that there were unique characteristics "unlikely to be fabricated" about the abuse petitioner described along with many details and feelings that numerous other male abuse victims have reported;[4/] (d) the "consistency between [petitioner's] sexual, emotional and behavioral patterns and problems and those experienced by male victims of sexual abuse;" (e) the prevalence of sexual abuse and symptomology in the family history; and, (f) the "consistency between the mental health and behavioral symptoms" petitioner's mother suffered from and "those generally associated with female perpetrators of male sexual abuse." (*Id.* at pp. 7-8, ¶ 26.)

In Dr. Morris's opinion, petitioner "suffered from sexual, emotional and behavioral patterns and problems that were consistent with those experienced by male victims of sexual abuse." Those patterns and problems include "interpersonal relationship problems, compulsive sexual behavior and

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4. (See also (*Id.* at pp.30-31, ¶¶ 130-134 [recounting petitioner's descriptions of how his mother molested him].)

confusion about sexual matters, self-destructive thoughts and behavior, substance abuse, poor self-esteem, shame, depression, and sleep disturbances." (*Id.* at p. 9, ¶ 32.) Dr. Morris further opined that petitioner's family exhibit "at least three major factors" commonly found where mother-son incest has occurred: (a) marital difficulties where the father is physically and emotionally absent; (b) a mother who is depressed and socially withdrawn; and, (c) a family history of sexual abuse, including a mother who was sexually abused. (*Id.* at p. 9, ¶ 32.) Dr. Morris went on to state that petitioner's propensity for telling lies "about his life, background and experiences" was also consistent with someone who suffered childhood sexual abuse. (*Id.* at p. 10, ¶ 37.)

According to Dr. Morris, "[t]he sexual abuse [petitioner] suffered provides a critical context within which to see his behaviors that could otherwise be construed as selfish, manipulative and irresponsible." (*Id.* at p. 11, ¶ 38.)

Dr. Morris's declaration next chronicled, in elaborate detail, petitioner's family history and background. The People note that with respect to this evidence there is no corresponding evidence showing that petitioner ever experienced or was aware of it. In any event, Dr. Morris also included in his declaration a discussion of petitioner's marriages, alcohol and substance abuse, military service, his maternal grandfather's behavior and encouragements of petitioner to participate in inappropriate sexual activities, petitioner's mother's depression and social withdrawal from neighbors and aloofness towards her children, and the negative effect petitioner's parents' divorce had on him, including his strained relationship with his stepmother and stepsiblings. (*Id.* at pp. 11-30, ¶¶ 39-128.)

According to Dr. Morris, the documentation he was provided about petitioner's family history and background "contains a wealth of clues that would have led any reasonably competent mental health professional to inquire

whether [petitioner] had been the victim of sexual abuse. . . ." (*Id.* at p. 41, ¶ 180.)

2. Cross-Examination

Dr. Morris admitted that, during the course of his training, he never had any fellowships in forensic psychology, and further admitted that he has never been board certified in the area of forensic psychology, which he described as the area where the law and psychology interact in an attempt to provide helpful information in legal cases. (RT 105-106.) In fact, Dr. Morris admitted that he was not board certified in any of the specialty fields for which the American Psychiatric Association (A.P.A.) offers board certification. (RT 106.) Over the course of his career Dr. Morris has testified in only 10 to 15 murder cases, and only for the defense. (RT 107-108.) Dr. Morris also admitted that, out of the 500 cases (both civil and criminal) on which he has been consulted as expert, only a very small subset of those sexual abuse cases involved sexual abuse of a male by his mother. (RT 114.)

Dr. Morris testified that when petitioner's counsel contacted him about serving as an expert in this case, counsel told him that petitioner's background had not been investigated adequately and there "there is a possibility that there might have been some trauma in his background. (RT 117.) Dr. Morris stated that counsel gave him "an intimation" that petitioner may have been sexually abused. (RT 117.) Thus, Dr. Morris was not the first person to raise the possibility that petitioner had been sexually abused – that had been done by counsel. Although Dr. Morris did not recall counsel specifically telling him petitioner had been sexually abused, "that's where the intimations were. There was a possibility that based upon some interviews he had had." (RT 118.) Dr. Morris had no specific knowledge of petitioner telling anyone that he had been sexually abused prior to his clinical interview. (RT 118.)

In discussing the book he co-authored,[5] *Males at Risk: The Other Side of Child Sexual Abuse* (hereafter *Males at Risk*), which was first published in 1989,[6] Dr. Morris stated that he had been motivated by the need "to put together some information about males being traumatized as children sexually." (RT 119.) This was because, Dr. Morris explained, at the time, "it was more of a female issue that it was a male issue." (RT 120.) Dr. Morris agreed that he had felt a need to publish in the area of male sexual abuse because there was, in his opinion, "a relative dearth of information" about male sexual abuse. (RT 121.) In fact, he further agreed that in 1989 there existed even greater lack of information about sexual abuse of males by females than there was concerning male-on-male sexual abuse. (RT 121.)

Dr. Morris spent approximately five hours of face-to-face time with petitioner during his February 2002 clinical interview. (RT 116.) At no point during the clinical interview did Dr. Morris conduct any standardized psychological testing of petitioner, notwithstanding the fact that it is his custom and practice in criminal cases where he is retained as an expert to conduct such testing. (RT 122.) Dr. Morris explained that such standardized psychological testing was not his usual practice in a case like petitioner's. (RT 122.) Rather, his normal procedure in such a case is to review the documentation and do a clinical interview. Only if he cannot answer the referral question based on those actions might he select "an appropriate psychological instrument," or several of them. (RT 122-123.) Among those Dr. Morris listed as useful are the Minnesota Multiphasic Personality Inventory Test (M.M.P.I.),[7] the Millon

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5. Although technically a co-author, Dr. Morris "wrote the majority of the book." (RT 120.)

6. The same year as petitioner's criminal trial.

7. At the time of petitioner's trial, the version in use was the M.M.P.I. I. (RT 125.) The current version is the M.M.P.I. II. (See Butcher, MMPI-

Clinical Multiaxial Inventory II (M.C.M.I - II) and the Beck Depression Inventory. (RT 125-127.) Dr. Morris stated that standardized psychological tests are problematic in a forensic setting such as petitioner's because they are not standardized for that population. (RT 124.) However, Dr. Morris later admitted that the M.M.P.I., M.C.M.I. - II, and the Beck Depression Inventory are all used to varying degrees by members of his profession in a forensic setting. (RT 127-128.) Dr. Morris also admitted that in *Males at Risk*, he listed a number of testing protocols as being very useful to the clinician in addition to the clinical interview. (RT 124.) Dr. Morris explained such tests are useful in determining if there is reliability and validity in the clinician's clinical interview observations. (RT 125.)

Dr. Morris testified that the Diagnostic and Statistical Manual (D.S.M.), published by the American Psychiatric Association, is designed to help clinicians diagnose mental diseases and disorders and to treat patients. (RT 128.) Its use is so commonplace within a clinical setting that a clinician submitting a claim to an insurance company without a D.S.M. diagnosis probably would not get paid. (RT 128.) At the time of petitioner's trial, the current version of the D.S.M. was the D.S.M. - III Revised, more commonly referred to as the D.S.M. - III - R. (RT 129.) Notwithstanding the fact that his custom and practice in the 100 cases where he had testified as an expert was to render a D.S.M. diagnosis, Dr. Morris did not do so in this case. (RT 129.) He explained "I only render a D.S.M. diagnosis if it's primarily a clinical case, because that's what the D.S.M. is designed for". (RT129-130.)

When questioned again about what directions were given him in petitioner's case, Dr. Morris stated that counsel did not specifically ask him to determine whether or not petitioner had been sexually abused by his mother.

2/MMPI-A Research Project <http://www1.umn.edu/mmpi/> (as of April 2008).)

(RT 130.)

> A. . . . I was asked to do an evaluation to explore any kind of possibility of what was going on in his childhood. It was an open-ended referral question. It was not a specific question just to zero in on one thing.
>
> Q. And did you take your charter, if you will, in this case to mean that you were not to explore whether or not Mr. Crew suffered from a mental disease or disorder?
>
> A. No, I did not.
>
> Q. And that sort of exploration for a mental disease or disorder, the D.S.M. - III - R. Would have been a very useful tool, correct?
>
> A. Yes.

(RT 131.)

When asked how he satisfied himself that petitioner was not malingering, Dr. Morris said that he looked for consistency with history, consistency with research literature and consistency within the interview. (RT 136.) Among the factors he looked at to validate his belief that petitioner was not malingering were the history of substance abuse, petitioner's multiple sexual relationships and use of women (no regard for their feelings, lack of long-term relationships), petitioner's self-destructive behavior, and petitioner's lies about himself and his activities. (RT 138.) However, Dr. Morris was forced to concede that these symptoms were not exclusively consistent with a male who has been sexually abused, but that they are also consistent with someone having Antisocial Personality Disorder or who is a psychopath. (RT 138.) And, when asked to define Antisocial Personality Disorder and a psychopath for the referee, Dr. Morris stated:

> A. Antisocial Personality Disorder is listed in the D.S.M. as an individual who has admitted the types of things he [respondent's counsel] just described. It's an individual that engages, as the word or as the term states, into activities that are antisocial; steal, lie, commit crimes, could do a number of things. It's just antisocial behavior.

> Q. And among those other things, somebody with an Antisocial Personality Disorder is commit murder, right?
>
> A. Yes.
>
> Q. And a psychopath, would you define psychopath for the court?
>
> A. Well, psychopath, it depends on who you are talking about, who you are talking with about psychopathy. [¶] Hare describes psychopathy as somewhat different than the Antisocial Personality Disorder diagnosis. [¶] Psychopathy, based on most of the literature, based on the individual, really does not have any kind of empathy or connection with any other individuals, and operates strictly based upon whatever it is that they want to do at the time, and are very impulsive, can be very bright and cunning.

(RT 139.) Nevertheless, when asked if someone who premeditates a murder over the course of many months in order to make sure the victim is isolated from friends and family, who convinces the victim to cash out securities, and who sells off all the victim's tangible property after he murders her, would be someone he diagnosed as a psychopath, Dr. Morris answered, "No." (RT 140.)

Dr. Morris admitted that he knew of no evidence showing petitioner was aware of the history of other family members who perpetrated sexual abuse or were the victims of sexual abuse. (RT 144-145.) Likewise, Dr. Morris agreed that, like petitioner, himself, petitioner's older brother Mike suffered from the same behavioral symptoms upon which Dr. Morris relied in concluding petitioner had been sexually abused by his mother, but that there was no evidence that Mike was ever sexually abused by anyone, including his mother. (RT 145.) Dr. Morris further agreed that there was no extrinsic evidence from any family member, friend or acquaintance of petitioner, or contained in any of the records that he reviewed, that petitioner ever disclosed to anyone that his mother had sexually abused him. (RT 145-149.) Finally, Dr. Morris admitted that he did not think to ask petitioner during their clinical interview if petitioner had ever confided to someone else about his mother sexually abusing him. (RT

149.)

3. Redirect Examination

Dr. Morris stated that the D.S.M. contained no diagnostic category for sexual abuse victims. (RT 151.) Further, he claimed it is common for victims of sexual abuse not disclose their abuse, even to family members. (RT 152.)

Dr. Morris could find no evidence to support a finding of a conduct disorder for petitioner prior to age 15. He described conduct disorder as "sort of like a mini Antisocial Personality Disorder." (RT 152.) He reiterated that victims of sexual abuse may exhibit symptoms similar to symptoms of someone diagnosed as having Antisocial Personality Disorder. (RT 152-153.)

Of the hundreds of male sexual abuse victims Dr. Morris treated in his clinical practice, about only a dozen or so were the victims of mother-son incest. (RT 153.)

When asked to assume that petitioner did not disclose that he was molested by his mother to him during the clinical interview, Dr. Morris stated that many other traumatizing life experiences could explain the behavioral symptoms petitioner exhibited. (RT 154-156.)

Dr. Morris was permitted to review why he thought petitioner's report of sexual abuse by his mother was not fabricated. (RT 156-157.) Dr. Morris also felt that, while petitioner's mother was upset when she learned that her brother, Eddie Lee Richardson, had molested her niece, Cheryl Norrid, she might not view her molestation of her son as being equally abusive. (RT 160.)

B. Dr. Frederick James Phillips

1. Direct Examination

Dr. Phillips is a psychiatrist currently employed at the Family Service

Agency in San Francisco. (RT 163-164.) He has a specialty in geriatric psychiatry, which he possessed in 1989 when he was hired to work on petitioner's case. (RT 164.) He was contacted by Attorney Morehead, who did not inform him that this was a capital case. (RT 164.) He had no prior experience consulting on capital cases, but had worked on murder cases previously with Morehead. (RT 164.) At the time he was retained to work on petitioner's case, he had been practicing psychiatry for approximately 21 years. (RT 173.) During that 21-year period, he had consulted in about 18 or 19 criminal cases, approximately 10 of which were murder cases. (RT 173.)

Generally in murder cases, he was asked perform a mental status exam to look for psychosis or other mental symptoms which would explain motivation or mitigation of the homicide. (RT 165.) His standard practice in murder cases included meeting with the defendant and any spouse or relevant family members, performing a mental status exam, and obtaining biographical information from family members. (RT 165.) In particular, he was interested in any mental illness history, prior mental health treatments or hospitalizations, and prior criminal history. (RT 166.)

Dr. Phillips had no "understanding" of doing anything differently in a capital case, and Morehead never said anything to him about handling a capital case differently. (RT 166.) Dr. Phillips never talked to Attorney O'Sullivan. (RT 166.) He dealt only with Morehead, who asked him to assess petitioner while he was incarcerated at the jail. (RT 166.) Morehead specifically requested that Dr. Phillips assess petitioner's mental state (current and at the time of the crime) and previous psychiatric history, and to perform his usual evaluation. (RT 166-167.) Dr. Phillips was informed that petitioner had murdered his then girlfriend. (RT 167.) He also read a police report about the crime which he described as "brief and not very informative." (RT 167.)

Dr. Phillips spent about 20 minutes evaluating petitioner, after spending

almost 45 minutes waiting to see him. (RT 168.) Morehead and a security guard were also present during the interview. The guard was outside the room, likely within earshot, and petitioner was shackled during the evaluation. (RT 168-169.) And, although Dr. Phillips thought the guard might inhibit his evaluation, he was also of the mind that it might be good to have the guard so close for his own safety. (RT 174-175.) Nevertheless, he did not ask Morehead to speak to the guard's supervisor about having him move out of earshot. (RT 175.) Dr. Phillips did not ask petitioner if he had been physically or sexually abused. (RT 169.) Asking these questions during such an evaluation was not his customary practice back in 1989. Similarly, it was not his customary practice in 1989 to obtain a sexual history of a defendant unless there was a reason to ask such questions, i.e., sexual implications in the homicide. (RT 176.) Dr. Phillips asked petitioner "general questions" about his childhood, i.e., growing up, his parents' relationship, why they divorced, and the nature of his family life. (RT 176-177.) He received "little or no information," elaborating that petitioner's answers were "bland," i.e., "'I grew up . . . in a normal home.'" (RT 177.) Petitioner provided no negative information about his mother; petitioner did not say there was difficulty communicating with her, or that he felt distant from her, or suffered a lack of her affection. Nor did he claim his mother sexually abused him. Similarly, he provided no negative information about his relationship with his father. (RT 177-178.) Dr. Phillips described petitioner as being in a "sleepy mood," "not fully awake" and, therefore, "not fully compliant." Petitioner had no trouble comprehending his questions, and acted "irritated" over the evaluation process. (RT 178.) Dr. Phillips reached this conclusion because petitioner would not "enlarge[] on the answers. Very often he would answer in yes or no answers and not enlarge on any questions that I would put to him," even though Dr. Phillips tried to elicit more substantial responses. (RT 178-179.) In his opinion, petitioner did not seem interested in

establishing a meaningful interview relationship. (RT 179.)

Dr. Phillips admitted that he was in a foul mood while conducting his evaluation, because of the long wait to see petitioner. (RT 175.)

Dr. Phillips also spoke to petitioner's father by telephone in an attempt to get information about any mental illness history or treatment. However, all he got were childhood photographs of petitioner, which Dr. Phillips subsequently lost. The loss of these photos angered petitioner's father. (RT 169-171.) After losing the photos, Dr. Phillips had no further contact with the father. (RT 171.) Dr. Phillips attempted to contact petitioner's mother, but was unable to do so. (RT 171.) His memory about how he went about trying to contact her and whether or not she was willing to talk to him was uncertain. (RT 182-183.) He never asked counsel

Dr. Phillips told counsel he wanted to have another visit with petitioner, but that never happened. (RT 171.) It was his customary practice to have a second visit with a defendant, or a satisfactory interview with a relative. (RT 175-176.) However, on cross-examination, Dr. Phillips admitted that he never told Morehead that he had to see petitioner again in order to be of use to him in the case. (RT 183.)

Dr. Phillips did not prepare any report of his evaluation, because he was unable to provide any useful information regarding petitioner's case. (RT 174.)

When asked about paragraph eight of his declaration offered in support of the habeas petition wherein he declared that, had he been provided with materials showing a history of sexual abuse in petitioner's family, together with petitioner's symptoms of depression, chronic use of drugs, alcohol, and compulsive womanizing, that he would have advised counsel there was a "strong likelihood" that petitioner had been sexually abused, and he would have inquired into such a possibility, he testified that he was "not sure" if it would be the most likely conclusion he would reach. He also was not sure if a more

likely conclusion he would have reached was that petitioner suffered from Antisocial Personality Disorder. (RT 179-181.)

C. Joseph Morehead

Morehead has been a licensed attorney since 1970. He is a certified criminal law specialist in California and has been since 1980. (RT 193, 217.) At the time of petitioner's trial, approximately 90 percent of his practice involved criminal law and he had tried over 50 jury trials. (RT 218.) He was retained as *Keenan* counsel in petitioner's case. Prior to petitioner's case he had been involved in other capital cases; however, none had proceeded to the penalty phase. Most of his practice was in San Francisco, where a death sentence was and is rarely sought. He did have significant prior homicide case experience, including cases where he presented mental state defenses. (RT 193-194.)

Morehead understood his role in petitioner's case as twofold: (1) serve as second chair to O'Sullivan at the guilt phase, and (2) "more important[ly]" prepare and present the penalty phase if the case went to penalty phase. (RT 194.) Morehead considered it fair to say that O'Sullivan delegated the penalty phase to him. (RT 195.)

Both Morehead and O'Sullivan evaluated whether a mental state defense would be used. (RT 194-195.) Morehead was responsible for hiring and consulting with mental health experts. He was also responsible for hiring investigator John Murphy, who was to assist in both guilt and penalty phase investigation. (RT 195, 203.)

After his appointment to the case, Morehead initially spent much of his time reviewing case materials provided to him by O'Sullivan, which included numerous police reports, forensic reports and witness interviews. It was, he stated, a "tremendous amount of information." (RT 196.) And, in addition to

case file materials specific to petitioner, he also reviewed case file materials specific two "parallel cases" involving co-defendants Gant and Mosteller. (RT 196.) He also attended the California Criminal Justice Seminar in February 1989, which was a continuing legal education seminar on defending capital trials. (RT 218.)

It was Morehead's opinion that no penalty phase preparation had occurred prior to his appointment to the case. (RT 196-197.) However, he recognized that investigation into mitigating evidence was an essential part of penalty phase preparation, and this included investigation into petitioner's background and his family background. (RT 219.) He also recognized that unflattering information in a defendant's background could also be useful mitigation evidence. (RT 219.)

Morehead hired Dr. Phillips and arranged for him to evaluate petitioner. The purpose of the evaluation was to determine whether there was a potential mental status defense to the charges, and whether petitioner was competent to stand trial. (RT 199.) He did not ask Dr. Phillips to do anything differently because this was a capital case. (RT 199.) He did not mention anything to Dr. Phillips about possible mental state defenses at the penalty phase. (RT 200.)

Morehead also retained Dr. David Smith, consulting him about petitioner's substance abuse problem and how that might have "impaired his ability," or "affected his conduct" at the time of the murder. (RT 209.)

Neither doctor told Morehead that they needed more information to properly evaluate petitioner's case. He could not recall whether Dr. Phillips told him he wanted a second interview with petitioner. (RT 222.)

Morehead testified that he possessed information concerning petitioner's alcohol and substance abuse, which he derived from petitioner. He could not recall whether he also derived similar information from police reports. According to Morehead, petitioner "abused periodically alcohol, cocaine, and

polysubstances; a variety of other drugs." (RT 202.) He provided this information to Dr. Phillips. (RT 202.) His recollection was that this substance abuse went back a few years before the crime. (RT 221.) Upon further reflection, Morehead subsequently testified that petitioner told him his alcohol and drug abuse "probably started when he was a young boy." (RT 229.)

After familiarizing himself with petitioner's case, Morehead decided to focus his attention on whether the financial gain special circumstance was truly appropriate to the facts of this case. After extensive research, he concluded that there was a strong argument to be made that it was not and he proceeded to prepare a motion to that effect. (RT 203-204.) The court heard the motion on April 17, 1989, and took it under advisement, at which time it said, "'I'm not thoroughly convinced at this point that it is an appropriate special circumstance in the case. It may be, but I want to hear the testimony before coming to some conclusion on the matter.'" (RT 206.) In addition to the court's on-the-record comment, it also provided counsel for both sides with a two to three-page memorandum that had been drafted by its law clerks concluding that they did not believe the financial gain special circumstance was appropriate to the facts of this case. However, it was clear that this was not the court's final decision on the issue. (RT 206-207.) Based on these occurrences, Morehead did not think petitioner's case would proceed to penalty phase. (RT 207.) It was not until July 17, 1989, that the court denied Morehead's motion to strike the financial gain special circumstance; Morehead then realized there would most likely be a penalty phase. (RT 207-208; see also RT 231.)

Although Morehead had been primarily focused on guilt phase preparation until July 17, he had "considerable contact" during that time with both petitioner and his father, so he had a "general idea of the kind of things I would be thinking about should it proceed to a penalty phase." (RT 208.) He estimated that his preparation for the penalty phase began in earnest around the

end of March or late April 1989; however, he had been thinking about the penalty phase before then. (RT 220.)

With regard to exploring how he might handle the penalty phase, Morehead testified:

> A. Well, I think we could sort of break it down into four separate components. [¶] The first thing I was considering, of course, was the defendant's background. Mr. Crew's background. And it was somewhat unique, in the fact that he had no criminal history. And that I wanted to find witnesses and evidence to establish that, other than this crime, he had a very positive background. In other words, he did very good things in his life. [¶] The second thing I had to worry about was, since the crime involved the killing of a woman, and since there had been testimony during the guilt phase that Mr. Crew's relationships with women were manipulative, I wanted to find women with whom he had a good relationship to establish that his relations with women were not always manipulative and exploitive. [¶] The third thing I was concerned about, in the penalty phase, the ultimate concern the jury would have, is if he was given a life-without-the-possibility-of-parole sentence, as opposed to a death sentence, what kind of prisoner would he be. And for that reason, I also focused on his jail conduct for the three years that he'd been incarcerated in Santa Clara County. [¶] And I also had Mr. Murphy locate and provide Jeri Enomoto, who was formerly the head of the Department of Corrections, and who had personal experience with people on death row.

(RT 212-213; see also RT 223 [recapping why Morehead eschewed a mental defense at the penalty phase].)

Morehead described petitioner as a very cooperative client. (RT 214.) Petitioner never told him not to conduct any investigation into any particular areas. (RT 214.)

Morehead primarily relied on petitioner's father for family background information. (RT 214.) He interviewed him on numerous occasions and explained to him about the penalty phase, including the types of evidence, good and bad, that might be presented there. (RT 224-225.) In response to his queries about petitioner's life growing up, his father presented a "picture of perhaps a normal, and perhaps not idyllic, but a good childhood until the time

that William Crew and his wife Barbara [*sic*] divorced." (RT 225.) After the divorce, both petitioner and his father informed Morehead that petitioner's life "became very unpleasant" because of his relationship with the stepmother and stepbrother. (RT 225.) Petitioner's father also told him that petitioner's mother was cold and withdrawn. (RT 226.) He never gave Morehead any indication that petitioner's mother had sexually abused petitioner. (RT 227.) He also contacted petitioner's grandmother by telephone for family background information, because she lived out-of-state. (RT 214.) He described the penalty phase testimonies of petitioner's father and grandmother as consistent with the information they provided to him. (RT 214-215; see Trial RT 4724-4759, 4782-4799.)

Morehead also explained the penalty phase to petitioner, including the types of evidence that might be presented there. They discussed petitioner's life growing up, which petitioner presented as "a good life" until his parents divorced; from there it "spiraled downward." (RT 227.) Petitioner never volunteered that his mother had sexually abused him. (RT 229.) Nor did he ever tell Morehead that his grandfather, Jack Richardson, had ever treated him inappropriately. (RT 229.) They also discussed petitioner's military service, leaving Morehead with the impression that petitioner was an ideal soldier. (RT 229; see Trial RT 4826-4847 [favorable penalty phase testimony of LTC Donald Dean Pearce, U. S. Army (Ret.)].) Petitioner also discussed with Morehead his numerous romantic relationships with women, none of which lasted for any substantial time. (RT 230.)

Morehead stated that Murphy told him it would be wise for the defense to travel to Texas and South Carolina to interview family members. Accordingly, he submitted a budget to get that travel approved, but the court did not authorize it. (RT 230.)

Morehead also described meeting petitioner's mother at trial and the

circumstances of her contact visit with petitioner in the jury room. Petitioner was shackled, his hands not free, and sitting at a table. His mother came in, greeted him, hugged and kissed him and then sat in his lap. This latter act Morehead described as "rather unusual." (RT 215-216.)

Morehead considered using Dr. Phillips at the penalty phase, but rejected the idea. He felt that having Dr. Phillips testify would open the door for the prosecution to rehash the horrendous facts of the crime for the jury, something the prosecution indicated it was not planning on doing in its case in aggravation. (RT 216.)

> My concern was if I introduce psychiatric testimony as to mental state of Mark Crew, that would certainly allow the prosecution to again reopen the question of the homicide itself, the dismemberment of the body, Mr. Crew's refusal to tell anyone where the body was located. I don't know how I could have kept that out if I started opening up his mental status. So that's why I chose to reject that.

(RT 217.)

Morehead believed he had a pretty good read on how the jury was reacting to the evidence it heard during the guilt phase. It was his belief that "they were obviously inclined" to consider petitioner "quite guilty" of Nancy's murder. At the penalty phase, he thought the jury showed signs of sympathy towards petitioner, based on the case he was presenting. However, in hindsight, "I was incorrect in my analysis." (RT 224.)

D. John A. Murphy

Murphy is a licensed private investigator in California, Nevada and Arizona, who was hired to do investigative work during petitioner's trial. (RT 236.) It was his first death penalty case. (RT 236-237.) He was asked to conduct investigation for both phases of the trial. (RT 238.) He was initially focused on developing information for use at the guilt phase, later for the penalty phase. (RT 238.) His recollection was that his first discussions with

counsel about investigating for penalty phase evidence occurred in early July 1989. (RT 240.)

Murphy felt that he had a good relationship with petitioner, "very open, cooperative." (RT 241.) He had multiple conversations with petitioner while working on the case. (RT 241.) They talked about petitioner's drug and alcohol abuse, which included excessive drinking, methamphetamine use and cocaine abuse which, in synergistic combination, got him in trouble. (RT 241-242.) Petitioner's demeanor during these conversations "ran the full spectrum," i.e., from open and happy to crying on several occasions. (RT 242.) Never during those conversations did petitioner discuss his family life with Murphy. (RT 258.)

Murphy believed he tried to obtain petitioner's military records, but was unsuccessful in that attempt. (RT 242, 248-249.) He did obtain petitioner's jail records in Santa Clara County. (RT 242-243.) He never sought to obtain any documents pertaining to petitioner or his family. (RT 243.)

He interviewed petitioner's mother in South Carolina on July 3, 1989, talking to her about petitioner's visit to South Carolina with Elander, and the destruction of some of Nancy's property. (RT 244.) He also spoke to petitioner's brother Mike about guilt phase issues, but not penalty phase ones. (RT 246-247.) He did speak to petitioner's friend, James Gilbert, about penalty phase matters, as well as some deputies at the jail. (RT 251-252.)

Murphy also testified that he was instructed to locate an expert to testify regarding petitioner's potential for successful adjustment to incarceration in prison. (RT 253-254.)

E. Joseph O'Sullivan

At the time of petitioner's trial, O'Sullivan had been a practicing attorney for 10 to 15 years, and had already tried two or three death cases, and

about 10 to 12 homicide cases total. (RT 266.) He had recently completed a continuing education class on defending capital cases, approximately a year or year-and-a-half earlier. (RT 267.) O'Sullivan testified that he was lead counsel and that Morehead was responsible for the penalty phase; however, he did not abrogate his responsibility for penalty phase preparation. (RT 263, 266.) To O'Sullivan, it "just seemed like a natural division of labor." (RT 266.) Morehead also assisted him during voir dire and prepared a motion challenging the special circumstance alleged. (RT 264.)

O'Sullivan stated that they had petitioner examined for the possibility of presenting a mental state defense. That investigation was handled by Morehead, including the hiring of the experts. (RT 264-265.) Morehead also gave direction to Murphy about his investigations. (RT 264.)

O'Sullivan believed he interviewed petitioner about his family background and family status; however, he did not employ any experts or begin a penalty phase investigation. (RT 265.) He was aware of the importance of mitigating evidence and that it could include evidence that did not flatter petitioner. (RT 267.) Throughout his discussions with petitioner, he asked petitioner if there was anything they were missing or overlooking that might prove useful in mitigation. (RT 268.) O'Sullivan described petitioner as "very bright," and O'Sullivan felt petitioner understood the explanations offered him about mitigating evidence. (RT 268.) "I must have interviewed him close to a hundred times during the trial. And during those times that we would be speaking about the case, we would just go into social history and background; just tell me about yourself." (RT 268.) This was both before and during trial. (RT 272.) He characterized his relationship with petitioner as "great." "He was a delightful client . . . a very open individual." (RT 265.) Yet, petitioner never told O'Sullivan anything he considered abnormal in that regard. (RT 269.) With regard to petitioner's alcohol and substance abuse, and womanizing, trial

counsel were aware of it, and O'Sullivan evaluated it as something petitioner employed to "achieve sexual gains." (RT 269, 273.) O'Sullivan also believed they sought information from petitioner about other members of his family for possible use in mitigation, but did not recall learning anything "amiss or awry." (RT 270-271.) O'Sullivan did not think the case was going to a penalty phase. (RT 265.)

F. Cynthia Pullman[8/]

Ms. Pullman first met petitioner in 1981 and became romantically involved with him. (RT 280.) There never was a time petitioner was not drinking when she knew him back in 1981. (RT 282-283.) She also knew that petitioner used cocaine on occasion. (RT 284.) Pullman also stated that petitioner had insomnia; he would be up all night and sleep all day. (RT 284.) She also testified that petitioner experienced "sexual dysfunction," perhaps more than once. She ended her relationship with petitioner in December 1981, after he stood her up for a Christmas party. (RT 285.) She next saw him approximately six months later when he appeared at her door around 2:30 to 3:30 a.m. She did not speak to him at that time, but merely watched him walk away when she did not open the door. (RT 286.) However, later that day, she called petitioner and petitioner lied to her about buying a Corvette.[9/]

Pullman was interviewed by police prior to petitioner's trial and informed them that petitioner was depressed, drank a lot, did drugs and

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8. Ms. Pullman testified at petitioner's criminal trial as a witness for the prosecution and was known, at the time, as Cynthia Koelsch Carver. At trial she testified on cross-examination by petitioner's counsel about petitioner's drinking and sleeping problems. (See RT 286-287, 290, 293-294; Trial RT 4373-4383.)

9. The Corvette in question was the one owned by his wife, Nancy. (See Trial RT 3545, 3551, 3676, 3710, 4374.)

exhibited symptoms of insomnia. (RT 287.) She never spoke to petitioner's trial counsel about these observations, even though she was in the San Jose area. (RT 288.)

G. Emily Vander Pauwert[10/]

Vander Pauwert first met petitioner approximately 10 years before his criminal trial. (RT 302.) She testified that she had experienced "a lot of medical problems" and been "under a lot of medical care" the past few years, taking medications that have affected her memory. (RT 303.) She has a problem with exact dates, but can recall things that did happen. (RT 303.)

She observed petitioner drink a lot, but he did not drink a lot when he was with her, because she did not like drinking. (RT 303-304.) When petitioner was around his father, he drank a lot. (RT 304.) There were also times when she would leave him at a bar and petitioner would come home later, drunk. (RT 305.)

Vander Pauwert had met petitioner's father. (RT 305.) She recounted going out with petitioner on his father's boat, and his father encouraging him to get so drunk that petitioner passed out. His father had to hose down petitioner, because he had vomited on himself. (RT 306.) Another time, petitioner became so drunk that he began putting bait between slices of bread and eating it. (RT 307.) She also recounted petitioner becoming drunk after attending a cioppino feast. (RT 307.)

Vander Pauwert testified about an incident where, unknown to petitioner, petitioner's father gave her a ride home and tried to kiss her. He was

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10. Ms. Vander Pauwert also testified at petitioner's criminal trial for the defense at both the guilt and penalty phases. At the time of her trial testimony she was known as Emily Bates. (See Trial RT 4502-4511, 4761-4780; RT 302, 319 .)

drunk, but not "sloppy drunk." (RT 308.)

She also testified about "the puking tree" that stood outside a family cabin, and pictures she had seen of petitioner passed out under this tree with vomit all over him. (RT 309.) Petitioner's father showed her these pictures.

Vander Pauwert also testified that petitioner slept for long periods and would make noises and cry out in his sleep. (RT 311-312.) He sometimes slept 16 to 18 hours a day for days on end. (RT 312.) In addition to his lengthy bouts of sleep, petitioner also experienced "sexual dysfunction" throughout the time of their relationship. (RT 312.)

In addition to meeting petitioner's father, she also met his mother. She claimed petitioner told her about his parent's divorce and stated his mother did not want him. (RT 313.) When she met petitioner's mother Jean, during a weekend trip to Las Vegas, Jean had remarried. (RT 313.) Vander Pauwert described the interactions between petitioner and Jean as "very distant and cold." (RT 314.)

She also testified that petitioner claimed at times to be depressed, that he didn't feel "good enough," and that he was upset about his relationship with his parents. (RT 315.)

Vander Pauwert was aware that petitioner was cheating on her during their relationship, because she caught him. (RT 315-318.) She also caught him smoking marijuana a couple of times. (RT 318.)

Prior to her trial testimony she had several short, perhaps 15-minute, interviews with O'Sullivan; however, these conversations were not about her testimony, but involved O'Sullivan asking her to mortgage her house to pay his fee for representing petitioner. (RT 320-321.) She also spoke with Morehead and talked about petitioner's behavior, his relationship with Richard Elander, Elander's drug abuse, and the fact that petitioner and Elander used to go out all the time. (RT 321.) She also recalled speaking to two police officers for "a

couple of hours" before trial. (RT 322.)

On cross-examination, Vander Pauwert admitted that she always wanted her relationship with petitioner to develop into something more than it did. (RT 323.) At petitioner's trial, she wore a diamond ring he had bought her, and she visited him in jail eight to ten times. (RT 324.) One of the reasons she visited petitioner was her desire to know whether he indeed murdered his wife. She asked him if he did. (RT 324.)

Based on her conversations with petitioner about personal matters, she believed petitioner was comfortable confiding in her. However, he never told her that his mother had sexually abused him. Rather, the only thing he complained of was feeling rejected by her. (RT 325-326.)

While petitioner was living with Vander Pauwert he went to see a psychiatrist because he felt he needed to address certain issues regarding his mental health. She claimed to have difficulty remembering this incident due to the medications she had been taking. However, when shown her declaration made in support of the habeas petition wherein she recounted such an incident, it refreshed her recollection that she had asked petitioner to see a psychiatrist. (RT 326-328.) Next, when asked if petitioner had told her he stopped seeing the psychiatrist because he felt it would do him no good, since he could tell the psychiatrist anything and the psychiatrist could not distinguish truth from fiction, she said she could not remember. (RT 328-329.) However, again after having her recollection refreshed, she stated, "And I remember him telling me that he didn't see any need going to a psychiatrist, because he didn't feel they could help him because he could tell them anything he wanted." (RT 330.)

H. Patricia Silva

Silva first met petitioner when she was 17 and attending high school with him. (RT 332.) They later married in 1974 and had a child. (RT 333,

347.)

During the time she knew petitioner in high school, he smoked a lot of marijuana and took barbiturates. He did this "[a]lmost on a daily basis." (RT 333.) On occasion he also did L.S.D. (RT 333.) He also drank beer on a daily basis, consuming, on average, six beers. He would consume more than six on the weekends. (RT 334.)

Silva met petitioner's parents after their divorce. Both had remarried. (RT 335.) She would often go to petitioner's father's (Bill's) house, where she met his new wife, Barbara. (RT 335-336.) Bill and Barbara often would have adult parties, where there was excessive drinking. She also talked about a game that the adults would play where they would grope one another. (RT 336.) These parties occurred after she and petitioner were out of high school. (RT 336-337.) Petitioner would drink to excess at these parties, and she would have to drive home. (RT 337.)

Silva described petitioner's relationship with his stepmother as unfriendly. She favored her children from her former marriage, treating petitioner as an "outsider." (RT 338.) Likewise, petitioner did not like his stepmother. He was jealous of her and felt that she had a negative impact on the attention his father gave to him. (RT 338.)

Petitioner would also talk to Silva about his relationship with his mother. Silva described petitioner as being frustrated with his mother. However, these were never lengthy discussions. She met petitioner's mother one time in Petaluma. However, after she and petitioner moved to Georgia while he was in the Army, petitioner's mother and her new husband visited them a few times after their daughter was born. (RT 339, 353.) Petitioner complained that his mother would go from treating him like a baby to being very harsh towards him. (RT 339.)

Silva stated that petitioner continued to use drugs and drink while on

active duty in the Army; however, she described it as less than when he was in high school. (RT 341-342.) Eventually, his drinking progressed to where it exceeded what he did in high school. (RT 342.) On the weekends he would drink 12 beers a day. (RT 354.) Nevertheless, despite the heavy drug and alcohol abuse described by Silva, she testified that petitioner never had any difficulty functioning as a soldier. (RT 355.)

Shortly after their daughter's birth, "the excitement wore off" and the situation of being a father became stressful for petitioner. He began spending less time at home. When home, he slept and was not very communicative, and acted depressed. (RT 343-345.) He acted depressed two to three times a month. (RT 356.) As a result, Silva left petitioner and returned to California. Subsequently petitioner convinced her to return to Georgia, but the situation surrounding their relationship did not improve significantly. Eventually, Silva returned permanently to California. They divorced in 1976. After their divorce, she had contact with him only once. (RT 346-347.) No one representing petitioner at trial ever contacted her. (RT 348.)

I. Gail Myrene Frost

Frost and her then husband were neighbors of the Crews in the late 1950's, early 1960's. (RT 358-359, 363.) She recalled petitioner and his older brother Michael. (RT 359.) She also recalled petitioner's parents, Bill and Jean. (RT 359-360.) Her boys played with petitioner and Mike. (RT 360.) During this time, Frost worked outside the home at a grocery store. (RT 369.)

Frost occasionally visited the Crew home. However, there were many days when she never saw Jean. (RT 369.) She described the Crew home as messy. Often, Jean was dressed in a nightgown or robe during the day. Jean was often dressed that way when Frost observed Jean outside the home, as well. (RT 361.) Jean constantly complained about small things. She seemed like a

sad person. (RT 361.) Jean did not seem interested in her children's daily activities, including school, where Frost was very involved. (RT 362.)

Frost and her husband socialized on occasion with the Crews. (RT 363.) They mostly socialized at the Frost home. (RT 363.)

Frost told of one occasion where Bill asked her if she was interested in "swinging" with him. She declined the invitation. When she later told her husband about this, he told her Jean had made a similar proposition to him, which he declined. (RT 364-365.)

Frost recalled that Bill worked daily in San Francisco, but would be home most every afternoon. (RT 366-367.)

She was never contacted by petitioner's investigator or attorneys during petitioner's trial. (RT 367.)

Frost testified that she had a lot of interaction with petitioner. (RT 369.) At no time did petitioner ever speak to her about any unusual behavior his parents might have directed towards him. (RT 370.) She never observed petitioner acting other than like an ordinary boy of his age. (RT 370.) She also described Bill as a "reasonably good father." (RT 370.)

J. David E. Smith, M.D.[11/]

Dr. Smith is a medical doctor licensed to practice medicine in California. His specialty is in addiction medicine and clinical toxicology. He is certified in addiction medicine by the American Board of Addiction Medicine. He is the founder and former Medical Director of the Haight Ashbury Free Clinics in San Francisco. He served as their medical director until 2006. He is currently the

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11. The parties agreed that Dr. Smith's declaration, executed on July 9, 2007, would serve as his direct testimony. His curriculum vita was admitted as Exh. 98 and his declaration as Exh. 99. (RT 380-381.) Citations for his cross-examination are to the reporter's transcript.

Executive Medical Director of the Prometa Center. He has also served as Medical Director of Center Point, Inc., an alcohol and drug abuse treatment facility in San Rafael, and is the former Medical Director for the State of California Department of Alcohol and Drug Programs. (Exh. 99, Smith Decl., p. 1, ¶¶ 1-4.) He received a B.A. from the University of California at Berkeley (1960), an M.S. in Pharmacology and his M.D. from the University of California at San Francisco (1964). He was a post-doctoral fellow in pharmacology and toxicology at the University of California at San Francisco, 1965-1967. He is a fellow and past President of the American Society of Addiction Medicine, as well as a member of numerous medical associations, societies, and drug abuse advisory committees. He is the author or co-author of numerous publications on subjects related to the toxicology and pharmacology of drugs, addiction and abuse. He has testified approximately 250 times in state and federal court as an expert in addiction medicine and toxicology, and has rendered opinions on mental state at the time of crime and offered mitigation evidence in capital cases. He has also maintained a clinical practice. (*Id.* at p. 2, ¶¶ 5-8; see also Exh. 98.)

Dr. Smith has no current recollection of his involvement in petitioner's criminal trial. (*Id.* at p. 2, ¶ 10.) Habeas counsel asked him to evaluate petitioner and assess his drug and alcohol history, and its impact on his history of mental state and functioning. Counsel asked Dr. Smith to particularly assess what mitigating evidence could have been presented at petitioner's trial. (*Id.* at p.2, ¶ 11.)

In preparation for his testimony, Dr. Smith reviewed social history documents provided by habeas counsel pertaining to petitioner and his family, including vital records, medical, mental health, school, military, and court records; sworn declarations obtained by habeas counsel; documents pertaining to petitioner's trial, including a summary of facts from the appellate opinion, the

reporter's transcript of the penalty phase testimonies, and selected portions of the guilt phase transcript and police reports. He also reviewed Dr. Morris's declaration. (*Id.* at p. 3, ¶¶ 12-13; see also Exh. B. to Decl. [Exh. 99].) Dr. Smith personally interviewed petitioner at San Quentin on April 24, 2002. He also interviewed Larry Rider, Cynthia Pullman and Emily Vander Pauwert, primarily regarding their knowledge of petitioner's drug and alcohol use. (*Id.* at p. 3, ¶¶ 15-16.)

Dr. Smith opined that petitioner has "addictive disease, consisting of drug and alcohol dependence." He based this on petitioner's drug and alcohol history, which corroborates his self-reporting. Dr. Smith attributed petitioner's addiction to both "genetics and environment." (*Id.* at p. 4, ¶¶ 17-18.) He opined that petitioner "has a genetic predisposition to abuse substances." (*Id.* at p. 6, ¶ 29.) He also found that petitioner came from an enabling environment that encouraged substance abuse. (*Id.* at p. 8, ¶ 39.)

According to Dr. Smith, petitioner's substance abuse derailed his psychological development, undermining his ability to cope with stress. (*Id.* at p. 4, ¶ 21.) Dr. Smith further testified that studies show that persons who have been sexually abused are likely to turn to drugs and alcohol to self-medicate. (*Id.* at p. 7, ¶ 36.) He also found petitioner suffered from symptoms of depression. (*Id.* at p.7, ¶ 37.)

On cross-examination, Dr. Smith agreed that being sexually abused is not the exclusive reason someone with a genetic predisposition for alcohol and substance abuse becomes a substance abuser. (RT 383.)

K. Daniel A. Martell, Ph.D., A.B.P.P.

1. Direct Examination Redirect Examination And Voir Dire

Dr. Martell is forensic psychologist, licensed in both California and New York, who is affiliated with Park Dietz and Associates of Newport Beach,

California and who also practices independently. He possesses an undergraduate degree in psychology from Washington and Jefferson College, Pennsylvania, where he graduated with honors. He received both Master's and Ph.D. degrees in clinical psychology from the University of Virginia. While at the University of Virginia he also did a minor specialization in Behavioral Science in the Law, as well as some advance study at the Institute of Law, Psychiatry and Public Policy, at the University of Virginia Law School. (RT 385-386.) Dr. Martell performed his clinical internship at Bellevue Hospital and the New York University School of Medicine in Manhattan, where he was their first forensic intern, spending half of his time at Bellevue and the other half at a maximum security hospital for mentally disordered offenders located on an island in the East River. (RT 386.) Following his internship, he was awarded a year-long post-doctoral fellowship in forensic psychology where he specialized in forensic neuropsychology, studying brain damage and its effects on behavior. (RT 386.)

Dr. Martell is a member of the American Board of Forensic Psychology, the American Psychological Association, including their Division for Psychology and the Law, and the American Academy of Forensic Sciences where he is on the board of directors. (RT387.) He also is a Clinical Assistant Professor in Behavioral Sciences at the Semel Institute for Neuroscience and Behavior at U.C.L.A. (RT 388.)

With regard to sexual abuse issues, Dr. Martell has worked on numerous cases over the years, including criminal cases where there existed an issue of sexual abuse that was potentially mitigating or relevant to the crime. (RT 388.) He has worked on the clergy abuse cases arising out of the Los Angeles and San Diego Archdioceses, as well as one involving the Mormon Church in Seattle. (RT 388-389.) He has also worked on institutional sexual abuse cases where children in institutions have been abused by employees, as well as a case

in Riverside County arising over charges of sexual abuse against a police officer. (RT 389.) And, most recently in a capital context, he testified in *Heishman v. Ayers*, N.D. Cal No. CV-90-1815 VRW,[12/] where the issue was whether the defendant was sexually abused during childhood by his grandfather. (RT 389.) He has been qualified as an expert in forensic psychology many times in both state and federal courts nationwide, including approximately 20 times in California superior courts. (RT 389-390.)

Dr. Martell had the opportunity to learn extensively about issues involving child sexual abuse and crimes that are sexually motivated during his graduate training under Dr. Park Dietz, who is widely regarded as an expert in those areas. This has since been supplemented by his on-the-job involvement in such cases over the course of his 20-year career. (See RT 397-405.)

In preparation for his testimony, Dr. Martell reviewed the reporter's transcripts from both the guilt and penalty phases of petitioner's trial, the expert declarations of Drs. Morris and Smith, declarations submitted in support of the habeas petition, as well as family historical records, military records, and school records. He also had the opportunity to observe the testimonies of Drs. Smith, Phillips and Morris and considered those testimonies. (RT 409-410.)

Dr. Martell was unable to reach an opinion to a reasonable degree of psychological certainty, based on the information that was available to him, on the question of whether petitioner was sexually abused by his mother. (RT 411.)

Dr. Martell disagreed with Dr. Morris's assertion that the factors he discussed during his testimony would cause any reasonably competent mental health professional to look into whether petitioner was sexually abused. (RT 411.) The first reason is that the symptoms listed by Dr. Morris, i.e.,

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12. This case is currently pending appeal before the U. S. Court of Appeals for the Ninth Circuit. (*Heishman v. Ayers*, 9th Cir. No. 07-99016.)

depression, substance abuse and sexual promiscuity,[13] are not specific to sexual abuse. Rather, they occur in many other disorders. In a murder case that involves a non-sexual homicide, the first thought of the psychologist or psychiatrist who sees depression, womanizing, and substance abuse is not going to be that "this man was sexually abused by his mother." (RT 412.) Rather, "[t]he first thought is going to be this is quite consistent with Antisocial Personality.' (RT 412.) This is because the reasonable psychologist or psychiatrist is going to think of the more common explanations for these symptoms rather than immediately thinking of "an exotic explanation for the pattern you see." (RT 412.) "So, to suggest that these symptoms would be pathognomonic of sexual abuse by one's mother, I think is farfetched, at best. And to anticipate or to suggest that any reasonably competent mental health professional would know to go to this I think is unsupportable by the literature." (RT 413.)

With regard to the issue of Dr. Morris's position not being supported by the professional literature, Dr. Martell reviewed "all the literature" he could find "on this problem, knowing that one issue that the court has to address is what was known as of 1989." (RT 413.) Notwithstanding that limitation, Dr. Martell felt it was "also important to see what do we know as of today about the psychological or behavioral effects of being abused by one's mother." (RT 413.) The only reason he looked at post-1989 literature was to see "what we understand today, and to compare what we know now to what we knew then, which is not much different." (RT 454.) Furthermore, at the time of petitioner's trial, Dr. Martell was "freshly minted," having been "trained at some of the best places in the country," yet the issue of boys being abused by their mothers "was not part of the mainstream training." (RT 420.)

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13. Dr. Martell grouped the symptoms given by Dr. Morris into these three categories. (RT 412.)

> This is a very small group of individuals. Their problems can't be generalized to people; to men who are abused by other men, or men who are abused by other women. [¶] Abuse by the mother is a very specific thing about which very little is known. That may be because these individuals are very reticent to discuss it. Every culture in the world has a pejorative epithet for this kind of behavior, and no one wants to carry that moniker. Hence, very few people like to talk about it if it happened. [¶] Empirical literature actually suggests that it happens very, very rarely; hence, my analogy to the unicorn.[14] When you look at the professional literature before 1989 on the topic of boys who were sexually abused about by their mothers, you find a small number of studies of either individual cases, or very small groups of four or five or six or seven individuals. [¶] And the behavioral effects, the psychopathology and the sequelae, range from the kinds of things Doctor Morris did speak of, the question of substance abuse and issues with sexuality, to no effects at all, to other sets of symptoms.

(RT 413-414.) In short, "there is no one profile or syndrom or behavioral pattern that one expects to see in these cases." (RT 414.)

Dr. Martell noted that, as Dr. Morris pointed out, a major flaw in the ability to understand this small population of abused individuals results from their reticence to disclose or discuss this problem. (RT 416.) The result of this is that the literature that existed in 1989, in general, was much more broad in the spectrum of sexual abuse that it discussed. (RT 416.)

Dr. Martell also disagreed with Dr. Morris's position that petitioner's family history of male members abusing females would also make a reasonably competent mental health professional think petitioner might have been sexually abused by his mother. There was no evidence in this family history "to suggest that any of the men in the family were abused by anyone, or that the mother had abused anyone, including Mr. Crew, or anyone else." (RT 417.) Rather, the

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14. "And there is a saying in medicine and in psychology: If you hear hoof beats, think horses, not zebras. And what this means is, that you would think the more common thing before you would go to an exotic explanation for the pattern that you see . . [a]nd, frankly, being abused by you mother is a unicorn." (RT 412-413.)

evidence demonstrated that "the men in the family took advantage of women. And that appears to be true for Mr. Crew as well." (RT 417.) Dr. Martell found "no red flag there." (RT 417.)

> You know, just because there is a history that men in the family abused women, why would a reasonable doctor at that time expect that Mr. Crew was allegedly abused by his own mother? It's just not a logical endpoint to get to based on that set of facts, even with the totality of the circumstances of depression, substance abuse, womanizing, and coming from a chaotic and sexually abused family, that would lead a reasonably competent doctor to reach that conclusion that, oh, he must be a victim of sexual abuse as well.

(RT 417.)

Dr. Martell testified that the symptoms relied upon by Dr. Morris occur in the "substantial majority" of the criminals Dr. Martell has evaluated over the course of his 20-year career. (RT 418.)

2. Cross-Examination And Re-Cross-Examination

Here, Dr. Martell defined sexual abuse to encompass the behaviors that are described as having occurred between petitioner and his mother, "her frotteurism," her asking him to wipe her after she used the bathroom, and the allegation of their having intercourse when petitioner was in his early twenties. (RT 431-432.) He also took into account what Dr. Morris referred to as "abuse of sexuality" when rendering his opinions. Dr. Martell did not consider the grandfather's bad behavior with petitioner to be sexual abuse. (RT 432-433.)

Dr. Martell defined "pathognomonic symptoms" as symptoms where "if you see A., you know you've got B." (RT 433-434.) He also explained how he arrived at the triumvirate of symptoms he mentioned in discussing Dr. Morris's testimony, from Dr. Morris's declaration. (RT 435-439.) He then reaffirmed his opinion that "No one would suspect sexual abuse based on this [petitioner's social] history in 1989." (RT 439.) He further explained why

petitioner's history suggested, if anything, that he might be a perpetrator of sexual abuse, based on the concept of "modeling." (RT 440.) Dr. Martell reaffirmed that "your generic competent doctor off the street looking at this set of facts" would not consider the possibility that petitioner was sexually abused by his mother. (RT 441.) As a consequence of this, Dr. Martell opined that it was unlikely any layperson would conclude there was a possibility petitioner had been sexually abused and seek out a "specialist in this problem" to evaluate him. (RT 442.) His definition of layperson included attorneys; meaning anyone not trained as a mental health professional. (RT 443.) Dr. Martell did not see anything in petitioner's history that he would consider "trauma" except for possibly what had previously been described as "abuse of sexuality" by petitioner's grandfather, and that seemed to be a stretch. (RT 444.) He also saw no reason why a competent mental health professional would focus on the family history showing sexual abuse of women as a "cause of trauma" to petitioner, especially since there is no evidence petitioner was even aware of this sexual abuse of women. (RT 445.)

Dr. Martell opined that it was highly unlikely any attorney or a mental health professional examining petitioner at the time of trial would have considered the possibility of petitioner being sexually abuse absent disclosure by petitioner. (RT 448.)

Dr. Martell considered it unlikely that petitioner would have disclosed his sexual abuse at the hands of his mother to Dr. Phillips under the conditions surrounding Dr. Phillips's examination. (RT 450.)

Dr. Martell testified that often, when he is consulted by the defense and he tells defense counsel "I think your guy is antisocial, and he's got a drug problem," the defense attorney will say, "'Okay. Thanks. That's enough. Don't write a report. We'll call you if we need you.'" (RT 451.)

L. Doug Thompkins[15]

Mr. Thompkins, who is petitioner's step-brother, described an incident that occurred when he was about 12-years old. He observed petitioner's father, Bill Crew, put his hand down the pajama top of his 11-year-old sister, Debbie. This incident occurred in his parents' master bedroom. (RT 460-461.) He also thought it was unusual that Bill sometimes was inside Debbie's bedroom with the door closed. (RT 461.) He thought Debbie received preferential treatment from Bill. (RT 461.)

Thompkins lived with petitioner for about a year at house on Maria Way in San Jose in either 1980 or 1981. (RT 462.) He and petitioner would drink beer almost daily, but he rarely saw petitioner get drunk. When he did observe petitioner drunk, he was never slurring his words or having difficulty standing. (RT 463.) He felt petitioner was able to control or moderate the amount of alcohol he consumed based on the situation. (RT 464.) He also observed petitioner smoke marijuana "[a] handful of times." (RT 464.)

Thompkins testified that Bill Crew drank beer and whiskey regularly and could drink "a whole lot" without seeming drunk. (RT 466.)

M. Cheryl Norrid[16]

Norrid is the daughter of Eddie L. Richardson and Joann Reaves. (Exh. 157, Norrid Depo., p. 6: 21.) Her parents separated when she was two-years-old. (*Id.* at p. 6: 24-25.) Her mother remarried her stepfather shortly thereafter. (*Id.* at p. 7: 14.) She began weekend visitations with Eddie around age five or

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15. Mr. Thompkins was called as a witness by both parties. (See RT 457.)

16. Norrid's testimony was submitted by testimonial deposition taken on August 23, 2007, at Fort Worth, TX, and designated Exh. 157.

six. (*Id.* at p. 7:15-23.) These visitations stopped when she was almost age twelve, because her mother and stepfather forbade them due to Eddie having sexually molested her. She had reported this molestation to her mother approximately two weeks before the visitations ended. Eddie would frequently bother her during the night by kissing her and putting his hands down her pants.(*Id.* at pp. 9-10: 2-7.) At other times, Eddie would barge in on her while she was in the bathroom, try to touch her breasts and kiss her, and put his hands down her pants, telling her he loved her. (*Id.* at p. 10: 14-23.) He would tell her not to say anything and hold her mouth when she started screaming. (*Id.* at p.17: 17-19.)

Norrid also stated that Eddie kept "dirty magazines and stuff like that upstairs" in the attic. (*Id.* at p. 11: 24-25.)

Norrid testified that she knew petitioner's mother, Jean, who would visit when traveling through the area. She described Jean as very, very quiet and soft-spoken. When Norrid was 16-years-old, she confided to Jean about her molestations by Eddie and Jack Eddie. In turn, Jean confided to Norrid about her molestation by Jack Richardson. The next day, Jean called Norrid's mother and told her to keep Norrid away from both men. (*Id.* at pp. 18-20: 2-2.) Norrid stated that Jean reminded her of her grandmother, for whom she had the utmost respect and love. (*Id.* at p. 24: 21-24.)

Norrid testified that she knew Robert Estes, who was her Grandmother Wood's brother. Estes was always drunk and frail. (*Id.* at p. 20: 4-9.)

Norrid has never met petitioner, nor has she spoken to him or communicated with him in any manner. (*Id.* at p. 21: 11-12, p. 24: 9-12, p. 27: 5-6.) She was never contacted by petitioner's trial counsel. (*Id.* at pp. 21-22: 22-6.) She was aware that petitioner was facing a criminal trial at the time of the trial. (*Id.* at p. 24: 15-21.)

Norrid admitted that she was once very angry about her molestation, but

has never murdered anyone. (*Id.* at p. 27: 16-24.) She also stated that, although she had been molested, she would "never do that" to someone. (*Id.* at p. 28 18-20.)

Norrid described how her little sister, Kim, wanted her to sleep with her during Norrid's visits to "protect her" from Eddie's attempted molestations. (*Id.* at pp. 12-13: 7-22.) She also stated that Eddie would "do things" to another girl named Debbie in her presence. This consisted of Debbie sitting on his lap while watching TV and Eddie keeping a pillow over his hand. (*Id.* at p. 14: 17-24.) Eddie would be rubbing his hand on her leg under the pillow and Debbie would be smiling. (*Id.* at p. 15: 1-4.)

Norrid recalled that her grandfather, Jack Richardson, would occasionally visit her family. She described him as "very loving" but "weird." He also tried kissing her and putting his hands down her pants. This would happen at her great grandmother's house, at the zoo and in the backseat of the car and on train rides. (*Id.* at pp. 15-16: 11-18.) Norrid also described an incident where she observed Jack Richardson rubbing and kissing a dog "down there," which made her get out of the car real quick. (*Id.* at p. 17: 1-8.)

N. Debra Murphy[17]

Murphy's maiden name is Bumgardner. (Exh. 158, Murphy Depo., p. 6: 12-13.) She was raised by her grandparents. (*Id.* at p. 6: 19-20.) Her mother is Mary Richardson, whose maiden name is Bumgardner. (*Id.* at p. 6: 21-22, p. 7: 6-9.) Eddie Richardson was Mary's husband. (*Id.* at p. 7: 15-16.) When Murphy was younger, she believed that Mary was her sister. She maintained that belief until age 18. (*Id.* at p. 7: 2-14.)

While growing up, Murphy would often spend time at Eddie and Mary's

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17. Murphy's testimony was submitted by testimonial deposition taken on August 23, 2007, at Fort Worth, TX, and designated Exh. 158.

house in Fort Worth, maybe twice a month, and stay the weekend. (*Id.* at p. 8: 7-10, 20-24.) She also spent the summer with them at age 15. During that time she babysat Eddie and Mary's other children. (*Id.* at pp. 8-9: 25-3.)

Murphy described her relationship with Eddie as "[s]trange" and "difficult" because he was a molester who molested her every time he was around her. (*Id.* at p. 10: 1-10.) She used Eddie's molestation of her to her advantage by manipulating him to provide her things she wanted, like ice cream and candy. (*Id.* at p. 10: 11-21.) She thought this molestation began at age six. (*Id.* at p. 11: 3.) Eddie began by fondling her. The fondling progressed to oral sex. (*Id.* at p. 11: 18-25.)

Murphy testified that Eddie kept a mattress in the attic. (*Id.* at p. 12: 22.)

Murphy stopped spending the night at Eddie's at age 16. (*Id.* at p.13: 14-17.) She went on to recount that Eddie tried to rape her once when she was there babysitting. (*Id.* at p.13: 21-24.) This happened when she was 16 or 17. (*Id.* at p. 14: 5-6.) She prevented him from raping her by kicking him in the face. (*Id.* at p. 14: 9.) Murphy testified that there were additional rape attempts, but she was always able to thwart them by screaming and hitting. (*Id.* at p. 14: 22-25.) When she was almost 30, Eddie tried again to rape her. This time Murphy threatened to tell Mary. (*Id.* at p. 15: 19-23.)

While Murphy suspected Eddie of molesting others, she never saw him do so. (*Id.* at p. 19: 3.) Murphy testified that Eddie's daughter, Kim, claimed he raped her when she was 14 and she ran away from home. (*Id.* at pp. 19-20: 16-1.)

Murphy stated that Eddie had posted Playboy centerfolds on the attic wall. (*Id.* at p. 20: 19-20.) Murphy said Eddie also had a big screen TV which he always kept tuned to a "pornographic channel" with the sound turned off. (*Id.* at p. 21: 9-11.)

At the time of petitioner's trial, she was living in Fort Worth. (*Id.* at p.

23: 21-23.) Murphy does not remember if she's ever met petitioner. (*Id.* at pp. 23-24: 24- 2.) She has never corresponded or talked with petitioner, nor has petitioner ever attempted to contact her by phone. (*Id.* at p. 25: 10-22.)

Murphy said she had met petitioner's mother on a few occasions when Jean visited. She described her as scary, but could not recall why she thought Jean to be so, other than the fact she was related to Eddie. (*Id.* at pp. 27-28: 1- 14.) Jean never did anything to her that she found personally offensive. (*Id.* at p. 28-29: 20-10.) Likewise, Murphy never saw Jean do anything sexually untoward children. (*Id.* at p. 29: 11-13.)

Murphy stated that she felt everyone had to be responsible for their own actions. (*Id.* at p. 31: 13-15.) As such, she is very proud of the way she sought help to overcome the effects of her molestation. (*Id.* at pp. 31-32: 16- 12.) And, notwithstanding her molestation, she has never molested anyone. (*Id.* at p. 32: 13-16.)

O. Eddie L. Richardson[18/]

Eddie is the son of Jack Richardson and Irene Estes, and is the brother of petitioner's mother, Jean. (Richardson Depo., p. 5: 2-7.) He is petitioner's uncle. (*Id.* at p. 6: 1-2.) He is currently incarcerated in federal prison due to a statutory rape conviction. (*Id.* at pp. 37-38: 22-1.)

Eddie discussed wounds suffered by Jack during World War II. (*Id.* at pp. 6-7: 17-7.) Eddie stated that Jack's brother, Dewey had a mental breakdown and was hospitalized at Terrell Asylum. (*Id.* at p. 7: 8-18.) He also stated that his mother's brother, Robert Estes, was an alcoholic and a

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18. Eddie L. Richardson's testimony was submitted by testimonial deposition taken on May 8, 2007, at the Federal Correction Institution La Tuna, 8500 Doniphan Road, Anthony, TX. It was never assigned an exhibit number by the referee, but she ruled on respondent's objections to the deposition and considered it. (See RT 473; see also Findings of Fact at p. 9.)

homosexual. (*Id.* at p. 8: 2-10.)

Eddie stated that, while he was growing up, Jack owned an auto repair shop, located behind the house. (*Id.* at p. 8: 15-21.) He testified that Jack would often go out drinking and chasing women, and remain out all evening. He described Jack as an abusive drunk, who would make outrageous demands on Irene and find fault with her attempts to comply with those demands. This would result in Irene getting a "whooping." Jack would use his belt or fists. While Irene would normally receive the brunt of these beatings, Jack would also beat Jean and him on occasion. (*Id.* at pp. 9-12: 16-23.) Jean would also receive beatings if she stayed out too late. (*Id.* at pp. 12-13: 24- 3.) Sometimes, Jack would render Irene unconscious. (*Id.* at p. 13: 11-12.) Eddie also related observing Jack hit and break his grandmother's jaw. (*Id.* at p. 15: 2-18.) Eventually, Jack stopped beating Jean after she began dating Bill Crew. (*Id.* at p.16: 5-8.)

Eddie described Jack's attitude towards sex as, "He was a believer in it." (*Id.* at p. 19: 8-10.) Eddie stated that Jack molested a seven-year-old neighbor girl. (*Id.* at p. 20, 1-15.) When Irene confronted Jack about this she was beaten. (*Id.* at p. 21: 10-15.)

Eddie stated that, although he never saw Jack molest Jean, he knew that he was because she used to want Eddie to get in the bathtub with her. (*Id.* at p. 22: 6-21.) Later in life, Jean told Eddie that Jack had "messed with her" and "hurt her real bad." (*Id.* at p. 23: 17-22, p. 24: 4-10.)

Eddie described how Jack liked to watch pornography and allowed him to watch once when he was between age ten to twelve. (*Id.* at p. 24: 13-24.)

Eddie stated that when he stayed with Bill and Jean Crew in California, he and Bill spent some time nightclubbing and chasing women, but never having sex with them. He described Bill as being able to hold his liquor. (*Id.* at pp. 25-26: 10-16.)

Eddie related an incident Jean related to him where she became angry at jack for giving petitioner money to allow Jack watch petitioner and petitioner's girlfriend have sex. (*Id.* at pp. 26-27: 25- 4.)

Eddie was aware that the FBI was looking for petitioner prior to his arrest. Eddie was living in Fort Worth at the time. (*Id.* at pp. 27-28: 13-4.) He subsequently learned that petitioner had been arrested and was pending trial for capital murder. (*Id.* at p. 28: 8-20.) No one from the family ever contacted him about petitioner's trial. (*Id.* at p. 39: 8-24.) Nor did petitioner ever contact him about his trial. (*Id.* a pp. 39-41: 25-18.)

Eddie stated that he and Jean had a good relationship. In fact he lived with Bill and Jean for a time when they resided in Texas, while petitioner was young. He also visited them once in California. (*Id.* at pp. 33-34: 1-21.) To him, Jean seemed to be a good and caring mother. (*Id.* at pp. 30-31: 24-10, 35-36: 5-6.) He also described how Jean returned to Texas from South Carolina to care for his mother-in-law and father-in-law. (*Id.* at p. 31:11-13.) He has no knowledge of Jean sexually molesting petitioner. (*Id.* at p. 36: 13-15.) Based on his knowledge of Jean, sexually molesting her children would be out of character for her. (*Id.* at p. 36: 19-24.) Nor did petitioner ever tell him that he was being molested by Jean. (*Id.* at p. 41: 19-21.)

EXCEPTIONS TO THE REFEREE'S FINDINGS OF FACT

A referee's factual findings are not binding, but are entitled to great weight when supported by substantial evidence. (*In re Visciotti* (1996) 14 Cal.4th 325, 345; *In re Malone* (1996) 12 Cal. 4th 935, 946; *In re Williams* (1994) 7 Cal.4th 572, 594; *In re Hitchings* (1993) 6 Cal.4th 97, 109 [or "ample, credible evidence"].) Conclusions of law or mixed questions of law and fact are subject to independent review. "Mixed questions include whether counsel's performance was deficient and whether the deficiency prejudiced the defense."

(*In re Lucas* (2004) 33 Cal.4th 682, 694.) The deference accorded to the referee's factual findings results from the fact that the referee had the opportunity to observe the demeanor of the witnesses and their manner in testifying. (*In re Williams, supra*, 7 Cal.4th at p. 594; *In re Hitchings*, *supra*, 6 Cal.4th at p. 109; *People v. Mayfield* (1993) 5 Cal.4th 142, 199.) When the referee's factual findings are based on documentary evidence "this deference is arguably inappropriate." (*In re Lucas*, *supra*, 33 Cal.4th at p. 694.) Furthermore, "[b]ecause observing the demeanor of an expert is generally of little or no benefit in evaluating the persuasive value of the expert's opinion testimony, deference to the referee's factual findings may not be appropriate." (*In re Cudjo* (1999) 20 Cal.4th 673, 688.) Therefore, this Court "will independently review the evidence presented" and "determine whether it supports the referee's findings and conclusions." (*Ibid.*) "'The chief value of an expert's testimony . . . rests upon the *material* from which the opinion is fashioned and the *reasoning* by which he progresses from his material to his conclusions.' [Citation.]" (*People v. Samuel* (1981) 29 Cal.3d 489, 498, original emphasis.)

A. The Referee's Finding That Crew's Evidence That He Was Sexually Abused By His Mother Is "Valid" Should Be Given No Weight

In her Findings of Fact, the referee stated, "This Court has no reason to doubt the veracity of any of the [mitigating] evidence that was presented and accepts the evidence as valid." (Findings of Fact, p. 16.) Among the mitigating evidence presented by petitioner was opinion evidence from his psychological expert, Dr. Larry Morris, Ph.D., that petitioner had been sexually abused by his mother, Jean Crew. There exist several reasons this Court should give no weight to the referee's finding that petitioner's evidence that he was sexually abused by his mother is "valid". The first is that by improperly denying

respondent an opportunity to have its psychological expert conduct a psychodiagnostic evaluation of petitioner, the referee precluded respondent from effectively testing petitioner's expert's opinion that petitioner was abused by his mother.[19/]

1. Dr. Martell' Proposed Evaluation Was Relevant To Testing The Validity Of Dr. Morris's Conclusion That Petitioner Had Been Sexually Abused By His Mother

a. Background

On February 9, 2007, respondent filed a motion with the referee seeking permission to conduct a psychodiagnostic evaluation of petitioner. In support of that motion, respondent's psychological expert, Dr. Martell, declared, in part, as follows:

> 5. It is my considered professional opinion that, in order for me to render the necessary expert opinions concerning the mental health issues raised in the petitioner's petition for writ of habeas corpus, it is necessary for me to conduct a full psychodiagnostic evaluation of petitioner. Mr. Crew is alleging that he was the victim of child sexual abuse, and as a result suffers from impairing conditions that may be relevant to his case. It is the nature of forensic psychology to look at

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19. To the extent that the referee relied on Dr. Morris's opinion testimony to reach a conclusion about the veracity of petitioner's claim he was sexually abused by his mother, the limitations on the use of such opinion testimony should be borne in mind. Courts regularly rule that psychologists are prevented from opining whether someone else is telling the truth. (*People v. Ainsworth* (1988) 45 Cal.3d 984, 1012.) While expert testimony may be premised on material that is not admitted into evidence, such use is limited to explaining the basis for the expert's opinion. (*People v. Bell* (2007) 40 Cal.4th 582, 608.) Experts may rely on hearsay in forming their opinions, but this does not establish independent proof of facts. (*Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1524-1525.) A witness's on-the-record recital of sources relied on for an expert opinion does not transform inadmissible matter into "independent proof" of any fact. (*People v. Gardeley* (1996) 14 Cal.4th 605, 619; *People v. Elliot* (2005) 37 Cal.4th 453, 481.)

> both an individual's past and present condition, comparing them, to get the most accurate psychological picture. An examination of Mr. Crew is necessary in order that I can make a first hand assessment of his mental status, obtain a first-person account of his history, and conduct objective psychological testing to determine the exact nature and extent of any diagnosable psychiatric disorders that he may be suffering from.

(Exh. A to Respondent's Motion for Permission to Conduct Psychodiagnotic Evaluation of Petitioner and for Production of All Raw Testing Data and Clinical Interview Notes from other Mental Health Professionals Who Have Examined Petitioner, Dec'l of Dr. Martell, at p. 1.)

Petitioner opposed respondent's motion, arguing first that respondent had failed to explain how Dr. Martell's evaluation would reasonably relate to the specific aspects of petitioner's mental health that he had put at issue. (Petitioner's Opposition at pp. 2-8.) He also argued that because one of this Court's reference questions asked whether the mitigating evidence trial counsel failed to introduce "*was*" credible (and not "*is*" credible), "a reliable credibility determination of the mitigating evidence that would have been presented at trial had petitioner not been saddled with incompetent counsel requires looking at how the prosecution would have attempted to rebut that testimony at the time of trial." (*Id.* at p. 3.) As a corollary to this argument, petitioner noted (1) that the psychological tests Dr. Martell proposed "should not be permitted because they had not been developed and therefore were not available until after petitioner's trial"; and (2) during no capital trial in Santa Clara County up to and including the time of his trial had prosecutors ever made any effort to have their own experts evaluate defendants who had put their mental health in issue. (*Id.* at pp. 3, 8-10.) "This is significant because, as with the use of recently devised testing instruments, respondent should not be permitted to challenge the evidence that could have been presented at trial with evidence that would not have been obtained or was not obtainable at the time." (*Id.* at p. 3.)

The referee ultimately denied respondent's motion without prejudice,

"for all the reasons set forth in the petitioner's opposition." (RT 3/19/2007 at p. 64.) The referee was impressed by petitioner's showing that in no capital trial in Santa Clara County up to and including the time of petitioner's trial had prosecutors ever made any effort to have their own experts evaluate defendants who put their mental health in issue, and the referee told respondent that it needed "to be mindful of the fact that during the reference hearing we will essentially be going back in time to 1989." (RT 3/19/2007 at p. 46; see also RT 3/19/2007 at p. 54 ["I think the Supreme Court ordered that" the reference hearing is "bound to 1989"].)

As noted however, the referee denied respondent's motion without prejudice, and gave respondent a chance to file a renewed motion and not only show "that the *McPeters'* principle applied in 1989," but that the Santa Clara County District Attorney's Office, in at least one capital case up to and including 1989, had used an expert to evaluate a capital defendant who had put his mental health at issue. (RT 3/19/2007 at pp. 63-64.)[20/]

Respondent filed a renewed motion on June 11, 2007, which petitioner opposed. Although respondent acknowlegded that it was not aware of any capital prosecution, up to and including 1989, in which Santa Clara County prosecutors had used a mental health expert to evaluate a capital defendant who had put his mental health at issue, respondent maintained that the law rendered that fact irrelevant, and the law did not compel the upcoming reference hearing

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20. By "*McPeters'* principle" the referee meant the rule permitting prosecutors to have experts of their choosing conduct examinations of capital defendants who place their mental conditions at issue. (*People v. McPeters* (1992) 2 Cal.4th 1148, 1190; *People v. Carpenter* (1997) 15 Cal.4th 312, 412.) In *Carpenter*, this Court cited *People v. Danis* (1973) 31 Cal.App.3d 782, and *Buchanan v. Kentucky* (1987) 483 U.S. 402, and stated that *McPeters* "logically followed" those cases and thus any argument that the law on this point was unsettled in the early 1980's was "unpersuasive." (*People v. Carpenter*, *supra*, 15 Cal.4th at pp. 412-413.)

to be conducted in all respects as if 2007 were 1989.

On June 16, 2007, the referee found that respondent's renewed motion was essentially a motion for reconsideration and denied it, stating that the denial was for the same reasons she had given on March 19, 2007, when denying the original motion. The referee believed that this Court's reference order and the case law precluded any mental health evidence that the prosecution could not and would not have presented in 1989. (RT 7/16/2007 at pp. 79-80.)

b. Propriety And Relevancy Of Dr. Martell's Proposed Evaluation

As we have outlined, at the reference hearing the only evidence petitioner offered to prove his allegation that he had been sexually abused by his mother was Dr. Morris's opinion testimony. Dr. Morris testified that it was his professional opinion, to a reasonable degree of medical certainty, that petitioner was sexually abused by his mother at a very young age and that this abuse continued through childhood. (Morris Decl., pp. 1, 7, ¶¶ 1, 2, 25.) Dr. Morris reached this conclusion based on petitioner's mental health symptoms as an adult (e.g., drug and alcohol abuse, depression, profound sleep disturbances), his family history (including that his mother was a victim of sexual abuse at the hands of her father) and petitioner's presentation, which he described as consistent with someone who has been sexually abused by his mother. (RT 102, 156-157; Morris Decl. at pp. 8-11, 19.)

However, on cross-examination, Dr. Morris admitted that he had already been informed by counsel that there was "an intimation" that petitioner had been sexually abused, and that this was one of the reasons why counsel had contacted him to evaluate petitioner. (RT 117-118.)

> Q. Make sure I understand this. Were you the person who first raised the possibility that Mr. Crew had been sexually abused?

A. No.

Q. It was raised by whom?

A. By counsel.

Q. By counsel. Did counsel say whether or not Mr. Crew had specifically told him he had been sexually abused?

A. No, that's where the intimations were. There was a possibility that based upon some interviews that he had had. Not specifically.

(RT 118.)

Aside from his review of the documents comprising petitioner's social history, which were provided to him by habeas counsel, Dr. Morris relied on only his February 26, 2002 clinical interview of petitioner, which occurred over the course of approximately five hours. (RT 115-116.) We reiterate that Dr. Morris did not do any objective psychological testing to evaluate the validity of petitioner's alleged sexual abuse, i.e., to rule out the possibility of malingering, because he felt that he could simply rely on the results of his clinical interview. (RT 122-123.) Thus, the ability to assess the veracity of petitioner's self-serving self-report, based on the details of petitioner's report and his affect, must seriously be questioned, particularly in light of Dr. Morris's limited forensic experience in murder cases, (see RT 107-109), and in light of petitioner's admission to his former girlfriend, Emily (Bates) Vander Pauwert that he stopped seeking psychiatric help because he could tell a psychiatrist anything and the psychiatrist could not discern truth from fiction. (RT 328-330.)[21] Furthermore, Dr. Morris did not attempt render any diagnosis of

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21. It was also obvious during Vander Pauwert's cross-examination that she was evasive, having selective memory which she attributed to certain prescription medications she had once taken. (RT 326-330.) Vander Pauwert was a witness with an obvious bias who tried to be as helpful as possible to petitioner. She readily admitted that she hoped her relationship with petitioner would have developed into more than it did. She even went so far as to wear

petitioner using the criteria set forth in the D.S.M., to see if there might be an equally plausible explanation for the behavioral symptoms petitioner exhibited, such as alcohol abuse, sleep disorders, depression and inability to maintain meaningful relationships with women. (RT 129-131.)

To fully adjudicate petitioner's ineffective assistance of counsel claim this Court must determine whether petitioner was indeed sexually abused by his mother. As the record demonstrates, the allegation that petitioner was sexually abused by his mother originated during this habeas proceeding. Petitioner failed to raise this claim at the time of trial and, based on information contained in his habeas petition, as well as Dr. Morris's testimony discussed above, it appears that petitioner disclosed that he was sexually abused by his mother to his attorneys (or someone working on their behalf). Such post-trial disclosure after a death sentence has been imposed must be viewed with cautious skepticism.

Had petitioner alleged at the penalty phase of his trial that he had been sexually abused by his mother, the prosecutor would naturally have investigated the veracity of this claim. As part of his investigation he would have interviewed petitioner's mother. (See Exh. E to Respondent's Renewed Motion to Conduct Psychodiagnostic Evaluation of Petitioner, Decl. of David N. Davies at p. 2.) Such an investigation was impossible during this habeas proceeding because petitioner's mother is deceased. (*Ibid.*; see also RT 143.) This fact alone seriously undermines petitioner's argument that the reference hearing had to be restricted to the information that was available at the time of trial, because petitioner's mother would have been available to testify (assuming petitioner would have even made such an allegation if his mother

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a diamond ring petitioner had given her when she testified at trial. She also visited petitioner eight to ten times while he was in county jail. (RT 323; see also Trial RT 4764, 4766, 4770, 4773, 4779.)

were alive and available to testify).

As noted earlier, respondent sought to have Dr. Martell conduct a psychodiagnostic evaluation of petitioner in order to make a first-hand assessment of petitioner's mental status, obtain a first-person account of his history, and conduct objective psychological testing to determine the exact nature and extent of any diagnosable disorders from which petitioner may be suffering.[22/] As Dr. Martell testified at the reference hearing, he was unable to reach an opinion to a reasonable degree of psychological certainty whether petitioner was sexually abused by his mother based on the materials to which he was limited as a result of the referee's order precluding him from conducting a psychodiagnostic evaluation of petitioner. (RT 411.)

The requested examination by Dr. Martell is clearly relevant to aspects of petitioner's mental health that petitioner put at issue through his ineffective assistance of counsel claim. The relevance is the *credibility* of petitioner's claimed sexual abuse. Simply put, after conducting the requested evaluation of petitioner, Dr. Martell would have been able to opine whether petitioner's mental status is consistent with the sexual abuse and family history he offered, or if there existed some more likely explanation for the behavioral symptoms petitioner has exhibited. That respondent should have been permitted to use Dr. Martell to try to garner evidence on the credibility of petitioner's allegation that he suffered sexual abuse perpetrated by his mother was especially critical because petitioner's mother is dead, and there is no extrinsic evidence that petitioner was sexually abused by his mother. (RT 143, 145-149.)

Furthermore, to the extent that the referee expressed the belief that this Court's reference order prevented respondent from presenting any evidence that would not have been available in 1989, that construction does not serve the

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22. This would include an evaluation of whether petitioner might be malingering.

interests of justice and judicial economy. Respondent submits that, while petitioner's argument and the referee's ruling to this effect might have superficial appeal, it does not withstand closer scrutiny in the state habeas context. Assuming *arguendo* that petitioner obtained habeas relief on this claim, the outcome would be a remand to the trial court for a new sentencing hearing. Presumably, at that new sentencing hearing petitioner would present the same mitigating evidence that he presented at the reference hearing. At that new sentencing hearing there would be no basis for precluding the People from using any post-1989 tests or information to evaluate petitioner.[23/] For similar reasons, the referee's acceptance of petitioner's argument that because respondent was unable to show that the Santa Clara County District Attorney's Office had never conducted such an evaluation of a capital defendant up to and including the time of petitioner's trial as a basis for denying Dr. Martell permission to evaluate petitioner is also misplaced. The prosecution certainly would be able to conduct such an evaluation at a resentencing under *McPeters*.

Accordingly, the trial judge should have permitted Dr. Martell to evaluate petitioner. Without such an evaluation there was an inadequate basis for determining that Dr. Morris's opinion was valid, in light of the information and procedures on which he relied in forming that opinion.

2. The Referee Improperly Precluded Respondent From Calling Petitioner As A Witness At The Reference Hearing

Whether or not petitioner was actually molested by his mother is central to his claim that counsel was ineffective for failing to present such evidence to the jury at the penalty phase. Key in determining the veracity of petitioner's

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23. Nevertheless, should this Court disagree, the referee still should have permitted Dr. Martell to evaluate petitioner, simply restricting him to testing protocols and information available at the time of petitioner's original trial in 1989.

allegation is an exploration of how the knowledge of petitioner's alleged sexual abuse by his mother first came to light post-trial. Curiously, petitioner never offered such evidence either in his petition (including its supporting exhibits) or at the reference hearing. Instead, petitioner has chosen to allow the manner in which this claim had its genesis to remain open to speculation. (See, e.g., RT 118.)

On August 10, 2007, respondent filed a proposed order with supporting declaration directing that petitioner be produced at the reference hearing for the purpose of calling him as a witness, which petitioner opposed. After briefing by the parties, the referee granted petitioner's motion to preclude respondent from calling him as a witness. In an order filed September 5, 2007, the referee stated:

> The issues before the Court revolve around what evidence was available at the time of trial. [Citation.] Petitioner was not available to be called by the prosecution at that time. Respondent's desire to cross-examine Petitioner about his alleged molestation is understandable but would not have been an option at trial.

(Order, Sept. 5, 2007, p.1) Nowhere in her order does the referee address respondent's desire to develop evidence about how petitioner might have hindered his counsel's development and presentation of mitigating evidence. (See Respondent's Letter Brief, Aug. 30, 2007, pp. 2-3.)

As the record demonstrates, neither petitioner nor his father ever disclosed to trial counsel or trial counsel's investigator that petitioner's mother had sexually abused him. (See RT 227, 229.) Nor is there any evidence that petitioner made such a disclosure to any other relatives, friends, his former spouse or his former paramours. (See, e.g., RT 145-146, 325.) Notwithstanding having had a reference hearing, it remains unclear whether petitioner spontaneously volunteered to either current counsel or their investigators or to some unknown and undisclosed third party that his mother sexually abused him, or whether the disclosure came in response to questions

put to petitioner by counsel or some other individual other than Dr. Morris. Respondent submits that the time, manner and place of petitioner's disclosure that his mother sexually abused him is of extreme importance in evaluating the veracity of petitioner's claim, and that respondent should have been permitted to call petitioner and examine about these matters.

Another equally important area respondent would have explored is why petitioner failed to disclose this alleged abuse to counsel during their many pretrial meetings. This information is relevant to the reference question of whether petitioner did anything to hinder counsel's investigation of mitigating evidence.

As this Court has held, a habeas corpus proceeding is civil in nature. (*In re Scott* (2003) 29 Cal.4th 783, 815.) It is not a criminal case, but rather "an independent action the defendant in the earlier criminal case institutes to challenge the results of that case. [Citation.]" (*Ibid.*) Therefore, a "petitioner does not have the privilege not to be called as a witness," but if called, "does have the right to assert the privilege against self-incrimination as to individual questions. . . . [Citations.]" (*Ibid.*) Respondent submits that the referee erred as a matter of law precluding respondent from calling petitioner as a witness. As such, her ruling is subject to independent review. (*Id.* at p. 812.)

Petitioner's out-of-court statements about his alleged molestation, upon which Dr. Morris relied, are self-serving hearsay. A defendant's statements made after the crime and while pending trial do not necessarily satisfy the requirement of trustworthiness. (Cf. Evid. Code, § 1252; *People v. Edwards* (1991) 54 Cal.3d 787, 820.) Here, petitioner's self-serving hearsay occurred long after trial, during the pendency of his habeas corpus proceeding and long after the only other known person who possessed personal knowledge as to the veracity of petitioner's self-serving hearsay had passed away. While petitioner's expert is certainly entitled to rely on such self-serving hearsay to

support his opinion, respondent should have been allowed to call petitioner in order to test the veracity petitioner's allegation of sexual abuse by his mother on which Dr. Morris relied in forming his opinion.

While a court may resolve a habeas corpus petition on the merits without the presence of the petitioner, and it is clearly not error to conduct habeas proceedings outside the presence of petitioner when no request to be present is made. In the instant case, for the reasons given above, petitioner's presence and examination by respondent was warranted. Furthermore, the inquiry sought by respondent did not pose a risk to petitioner of self-incrimination.

3. The Referee Improperly Precluded Respondent From Impeaching Petitioner's Credibility During Ms. Vander Pauwert's Cross-examination

Similarly, the referee improperly precluded respondent from impeaching petitioner's veracity during the cross-examination of Emily Vander Pauwert. (See Evid. Code, § 1101; see also Evid. Code, § 721, subd. (a)(3); cf. Evid. Code § 780.) Furthermore, the referee compounded this error by refusing to allow respondent to make an offer of proof as to the expected testimony of Ms. Vander Pauwert.

On cross-examination, respondent attempted to question Ms. Vander Pauwert about how, while visiting petitioner in jail, he provided her with two different versions of how his wife Nancy had died. (RT 324.) Petitioner objected that the question went to matters beyond the scope of the hearing. (RT 324.) In response, respondent stated that there existed a two-fold purpose: (1) the nature of petitioner's responses went to his moral culpability, a factor or principle considered by a jury when determining whether to impose the death penalty; and (2) that it was evidence of petitioner's lack of veracity and that Dr. Morris's opinion was based, in part, on his assessment that petitioner's statements to him about his mother's alleged sexual abuse of him were truthful.

(RT 324-325.) The referee sustained petitioner's objection and refused to allow respondent to make an offer of proof regarding Ms. Vander Pauwert's anticipated testimony. (RT 324-325.)

In sustaining petitioner's objection, the referee improperly precluded respondent from offering relevant evidence for assessing petitioner's moral culpability, as well as, to discredit part of the basis of Dr. Morris's opinion. (See *People v. Hendricks* (1988) 44 Cal.3d 635, 642.) Courts have traditionally given parties "'wide latitude in the cross-examination of experts in order to test their credibility. [Citations.]'" (*People v. Monteil* (1993) 5 Cal.4th 877, 923-924.) In so doing, "a broader range of evidence may be used on cross-examination to test and diminish the weight to be given an expert opinion than is admissible on direct examination." (*Id.* at p. 324.) And, although *Hendricks* and *Monteil* talk specifically in terms of cross-examining the expert, the rationale underlying that principle certainly extends to other witnesses who have material relevant to an issue on which the expert has offered an opinion. (See *People v. Bell* (1989) 49 Cal.3d 502, 532 [party seeking to attack credibility of expert's opinion may bring to trier of fact's attention relevant material that calls into question veracity of expert's opinion].)

Accordingly, without this evidence, the referee's finding should be disregarded.

4. The Referee Incorrectly Sustained Petitioner's Objection To Dr. Martell's Testimony Regarding The Absence of Any Causal Nexus Between Petitioner's Alleged Sexual Abuse And His Premeditated And Deliberate Murder Of His Wife For Financial Gain

At the end of respondent's direct examination of its forensic psychological expert, Dr. Martell, counsel posed the following question:

> Q. Let me rephrase the question. Again, we'll assume that Mr. Crew was sexually assaulted as he alleges by his mother. Based on the peer-

reviewed and validated professional literature that was available to members of your profession in 1989, can you cite the court to any authority that a male who had been sexually abused as petitioner alleges was at a statistically significant higher risk than someone who had not been so sexually assaulted to commit a premeditated and deliberate murder?

(RT 421.)

The following exchange then commenced:

Ms. Young: Your honor, objection. Relevance. There has been no evidence offered by petitioner regarding the assertion that the abuse evidence that has been presented is connected to the commission of the offense.

The Court: We are just dealing with mitigation here in the penalty phase.

Mr. Pruden: Excuse me, your honor.

The Court: Aren't we solely dealing with issues involving mitigation –

Mr. Pruden: Yes, your honor.

The Court: – That could or should have been presented during penalty phase?

Mr. Pruden: And whether or not that evidence is credible, and what the prosecution might have offered in rebuttal. Those are all parts of the questions put forth by the Supreme Court, your Honor.

The Court: But you are asking about causation. The objection is sustained.

(RT 422.)

The sustaining of petitioner's objection was an abuse of discretion, erroneously preventing respondent from presenting proper rebuttal evidence.

At the penalty phase, the jurors are to make a moral assessment of all relevant facts as they reflect on their decision of whether or not to impose a death sentence. (*People v. Smith* (2003) 30 Cal.4th 581, 634.) This assessment

includes matters presented by the prosecution in aggravation and mitigating evidence presented by the defendant. (See Pen. Code, § 190.3.) The prosecution is also entitled to present rebuttal evidence. (*Ibid.*) The scope of rebuttal evidence is in the discretion of the trial court and will not be disturbed on appeal absent "palpable error." (*People v. Raley* (1992) 2 Cal.4th 870, 912; *People v. Mickey* (1991) 54 Cal.3d 612, 688; *People v. Kelly* (1990) 51 Cal.3d 931, 965).

Once the defense has presented evidence in mitigation under Penal Code, section 190.3, subdivision (k), the prosecution may present evidence in rebuttal that is not limited to the factors enumerated in section 190.3, subdivisions (a)-(j). Such evidence would be admissible as evidence tending to disprove any disputed fact that is of consequence to the determination of the action. (*People v. Anderson* (1990) 52 Cal.3d 453, 475-476; *People v. Rodriguez* (1986) 42 Cal. 3d 730, 791.) Rebuttal evidence at the penalty phase is also admissible to correct misleading impressions created in the defense mitigation case. Such evidence need not relate to "deeds or the character" of the defendant. (*People v. Mason* (1991) 52 Cal.3d 909, 961.)

Respondent submits that Dr. Martell should have been permitted to testify, if for no other reason than to correct any impression, petitioner's concession notwithstanding, that the sexual abuse allegedly suffered by petitioner in any way lessened his moral culpability for his wife's murder. Petitioner's concession is an obvious attempt to minimize the greatest flaw/weakness in this mitigation evidence, i.e., that it does not explain why petitioner committed the gruesome murder that he did. Petitioner's concession is premised on his desire to deflate the lack of connection between the abuse and the murder by essentially asserting that is unimportant. While respondent agrees that the concession does not affect the admissibility or relevance of this mitigation evidence, the lack of connection to the murder does go directly to the

weight the jury should or could assign to it. By sustaining petitioner's objection, the referee deprived respondent of the persuasive force and probative value of Dr. Martell's testimony, offered to limit the weight of petitioner's evidence.

Respondent, should have been allowed to establish that a jury would not have given Dr. Morris's testimony any weight and should have been able to do it the proper way we proposed at the reference hearing. As the United States Supreme Court has said, it is a "Familiar, standard rule . . . that a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the [prosecution] chooses to present it." (*Old Chief v. United States* (1997) 519 U.S. 172, 186-187.) Therefore, the prosecution "'cannot be compelled to accept a stipulation'" or in this case petitioner's concession, "'if the effect would be to be to deprive' their 'case of its persuasiveness and forcefulness.'" (*People v. Waidla* (2000) 22 Cal.4th 690, 723, fn. 5.) "Thus, the prosecution may fairly seek to place its evidence before the jurors, as much to tell a story of guiltiness as to support an inference of guilt, to convince the jurors that a guilty verdict would be morally reasonable as much as to point to the discrete elements of a defendant's legal fault." (*Old Chief, supra*, 519 U.S. at p. 188.) But, even more, "there lies the need for the evidence in all its particularity to satisfy the jurors' expectations about what proper proof should be." (*Ibid.*) It is beyond peradventure that, had respondent failed to examine Dr. Martell about the lack of a causal nexus between petitioner's alleged molestation and his premeditated and deliberate murderous conduct, petitioner would gladly have remained silent and never made his "concession," hoping that the jury would, in fact, infer that a causal nexus existed.

Accordingly, the referee abused her discretion in limiting respondent's direct examination of Dr. Martell.

5. The Referee Incorrectly Sustained Petitioner's Objection To Respondent's Question To Dr. Morris Regarding Petitioner's Motivation For His Wife's Murder

During respondent's cross-examination of Dr. Morris, counsel asked two questions regarding petitioner's motivation for the murder of his wife. Both times, petitioner objected and the referee sustained the objections:

> Q. [Mr. Pruden] Now, this case is not a sexual abuse homicide, Mr. Crew's case, is it?
>
> A. [Dr. Morris] That's my understanding, it is not.
>
> Q. In fact, it's a homicide that's motivated by greed, wasn't it?
>
> Mr. Love: You Honor, I object. Doctor Morris is not an expert on what happened with this murder.
>
> Mr. Pruden: Your Honor, Doctor Morris has read the facts of the criminal case. Certainly, he should be able to for at least a lay opinion, if not a technical legal opinion.
>
> The Court: I'll sustain the objection.
>
> Q. (By Mr. Pruden) Doctor Morris, do you recall that Mr. Crew, in Mr. Crews' case, that the special circumstance of the murder being perpetrated for pecuniary gain was, in fact rendered by the jury?
>
> A. Yes, I am.
>
> Q. And in your review of the facts of Mr. Crew's case – which you said you did in your declaration, correct?
>
> A. That's correct.
>
> Q. Do you recall in your review of those facts that there was testimony by Doug Crew, now Doug Thompkins, that Mr. Crew said that he wanted to see what it was like to kill somebody and see if he could get away with it?
>
> A. Yes, I read that statement.

Q. Would you agree with me that that indicates that part of the motivation then for this killing was, in fact, the thrill of the kill?

Mr. Love: Your Honor, again, I object. This is beyond the scope of direct, and Doctor Morris does not rely on the facts of the crime in rendering his opinion.

Mr. Pruden: I would submit, you Honor, it's not beyond the scope of direct. Doctor Morris has said he relied on all of these things. And he's making rather sweeping findings on what the motivation was for petitioner's commission of this crime, and it's being offered in terms of mitigation.

Mr. Love: Your Honor, Doctor Morris has not said in his testimony that he's relied on the facts of the crime.

The Court: The objection is sustained.

(RT 114-115.)

Respondent submits that, for the same reasons discussed in subsection (4). above, the referee erred in sustaining petitioner's objections. By doing so, she prevented respondent from properly establishing that the referee – and by extension the jury – should not give any weight to Dr. Morris's testimony. Furthermore, petitioner was incorrect in stating that Dr. Morris did not rely on the facts of the crime.[24/]

Accordingly, Dr. Morris should have been permitted to answer both

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24. "The assessment I was asked to perform entailed reviewing social historical documents pertaining to Mr. Crew and his family (including vital records, medical, mental health, school, military, and court records), sworn declarations obtained by current counsel, and a series of documents pertaining to Mr. Crew's capital trial, including a summary of the facts of the case from an appellate court opinion, the transcript of testimony of penalty phase witnesses presented by the defense and prosecution, selected portions of the guilt phase transcript, and police reports. A list of materials I reviewed is attached hereto as Appendix B." (See Exh. 156, Declaration of Larry A. Morris, Ph.D., p. 5, ¶ 16; see also Exh. 66, Declaration of Doug Thompkins, p. 3, ¶14 ["I talked to the police in 1982, about a statement Chris made about wanting to kill someone to see if he could get away with it."].)

questions.

B. The Trial Judge's Conclusion That Petitioner Did Nothing To Hinder Or Prevent The Investigation And Presentation Of Mitigating Evidence Is Not Supported By The Evidence

Contrary to the referee's finding, petitioner did hinder the investigation and presentation of the allegedly mitigating family background and social history he now declares trial counsel should have investigated and presented. As noted earlier, he failed to disclose the alleged sexual abuse by his mother, information for which he was the only viable source. Further, he withheld negative information he had knowledge of, essentially telling trial counsel that his life had been a normal one (except for the divorce of his parents and subsequent problems with his stepmother, stepbrother and drug and alcohol use (RT 225, 227, 269, 271)), and thereby gave counsel no reason to investigate his family background and social history any further. There also is no evidence petitioner ever informed counsel that any of his father's testimony about his background, and any of the testimony of his friends or associates about his background and character at trial, were either incorrect or inadequate. Respondent submits that one can hinder or prevent investigation of mitigating evidence by remaining silent and need not take some affirmative action such as ordering counsel not to undertake certain investigation(s).

ARGUMENT ON THE MERITS

TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO PRESENT THE MITIGATING EVIDENCE PRESENTED BY PETITIONER AT THE REFERENCE HEARING

In his petition for writ of habeas corpus, petitioner contends that he received ineffective assistance of counsel at the penalty phase because counsel failed to adequately investigate and present mitigating evidence. One of the specifics of petitioner's argument is that counsel should have introduced evidence that his mother sexually molested him and was otherwise distant and depressed. Petitioner also asserts that his father was an alcoholic who engaged in sexually inappropriate behavior with others, which caused petitioner to numb the effects of these childhood experiences with alcohol, drugs, and compulsive sexual behavior. (Petition Claim VI (B); see also Order to Show Cause.) Petitioner also offers other specifics in support of his claim of ineffective assistance, which we will discuss where appropriate, but in all events, notwithstanding being given extensive investigation and discovery resources and a five-day evidentiary hearing in which to present the mitigating evidence he claims trial counsel should have presented, petitioner has not demonstrated his entitlement to habeas relief.

A. Relief On Habeas Corpus

The petitioner bears the burden of proving by a preponderance of the evidence that his restraint is invalid and that the facts "establish a basis for relief on habeas corpus." (*In re Visciotti, supra*, 14 Cal.4th at p. 351.)

> "To establish ineffective assistance of counsel under either the federal or state guarantee, a defendant must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that counsel's deficient performance was prejudicial, i.e., that a reasonable probability exists that, but for

> counsel's failings, the result would have been more favorable to the defendant. [Citations.]" [Citations.]

(*In re Roberts* (2003) 29 Cal.4th 726, 744-745.)

With regard to the investigation counsel is obligated to undertake, "'counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." (*In re Cudjo*, *supra*, 20 Cal.4th at p. 692 [citing *Strickland v. Washington* (1984) 466 U.S. 668, 690-691].)

> Moreover, "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information." [Citations.]

(*In re Andrews* (2002) 28 Cal.4th 1234, 1255.) Thus, when deciding whether counsel was ineffective, "a particular decision not to investigate must be directly assessed for reasonableness in all circumstances, applying a heavy measure of deference to counsel's judgments." (*In re Cudjo*, *supra*, 20 Cal.4th at p. 692.)

When, as here, the petitioner challenges a death sentence, "the question is whether there is a reasonable probability that, absent the errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." (*Id.* at p. 695.) In making this decision, the court must consider the totality of the evidence before the jury, realizing that "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." (*Id.* at pp. 695-696.)

Finally, this Court does not need to determine whether counsel's performance was deficient before examining the prejudice petitioner suffered

as a result of the alleged deficiencies. (*In re Alvernaz* (1992) 2 Cal.4th 924, 945.) "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be the case, that course should be followed." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 697; accord *In re Ross* (1995) 10 Cal. 4th 184, 204; *In re Alvernaz*, *supra*, 2 Cal.4th at p. 945.)

B. Petitioner's Position

Petitioner's position is that, because of the absence of adequate time and money (inadequacies for which trial counsel were responsible), counsel failed to undertake a penalty phase investigation aimed at uncovering allegedly relevant mitigating evidence related to petitioner's background and family history. (Petitioner's Pre-Hearing Brief, pp. 1-3, 10-15.)

According to petitioner, a "social history" is a catalog of the psychologically significant events and circumstances that shape and influence life. (*Id.* at pp. 1, 7.) One conducts a social history, petitioner continues, by gathering life-history documents, interviewing family members and others with knowledge of the defendant's background and family history, and then providing the relevant information to mental health experts. (*Id.* at pp. 8, 13-14.)

The "life history" documents relevant to mitigation evidence and to a complete and reliable mental health assessment include, but are not limited to, vital records, school records, medical records, psychiatric records, military records, legal records, and civil and criminal records of petitioner, his parents, siblings, grandparents, and other relatives. (*Id.* at pp. 27-28; see also Petition, p. 101.)

According to petitioner, had trial counsel conducted the foregoing investigation they would have uncovered petitioner's family history of

substance abuse, mental illness, domestic violence, marital discord, physical, sexual and psychological abuse, and neglect and abandonment. (Petitioner's Pre-Hearing Brief, pp. 16-28; see also Petition, pp. 101, 109.)

Petitioner claims this information was not only mitigating in and of itself, but would have led to the discovery of other mitigating evidence as competent counsel would have turned it all over to a mental health professional, and any reasonably competent mental health professional would have inquired whether petitioner had been a victim of sexual abuse, because of the prevalence of perpetrators and victims of sexual abuse in petitioner's family and petitioner's symptoms of depression, substance abuse, and compulsive sexual behavior. (Petitioner's Pre-Hearing Brief, pp. 16-19, 27-28; see also Petition, pp. 101, 109.)

Petitioner claims that, had a reasonably competent mental health professional inquired of petitioner whether he had been the victim of sexual abuse, petitioner would have disclosed that he had been sexually abused by his mother, exposed to sexually inappropriate behavior by his grandfather and sexually victimized by others. (Petitioner's Pre-Hearing Brief, pp. 27-28; see also Petition, pp. 109-110.) The mental health professional could have also tied in the above to petitioner's depression and substance abuse (an abuse he had a genetic predisposition to, according to his family history). After all, petitioner states, the expert would have made clear that "it is common for persons with mood disorders to 'self-medicate' with drugs and alcohol to alleviate the symptoms of their diseases such as overwhelming anxiety and depression," and "it has been well documented that children who are subjected to trauma and abuse are more likely to turn to drugs and alcohol to 'self-medicate' in an attempt to dull the pain they are experiencing." (Petition, pp. 147-155.)

In short, had counsel retained an appropriate mental health expert and provided that expert with the background information counsel should have

discovered through a reasonable investigation and otherwise presented, the expert could have testified regarding petitioner's social history, the sexual abuse and trauma he suffered, and its devastating impact on his life.

Petitioner concludes that such a presentation, together with lay witness testimony, would have provided a sympathetic basis for why he resorted to drugs and alcohol and sexually compulsive behavior at a very young age; i.e., because he was suffering from sexual abuse and its effects, such as sleep disorders and low self-esteem, and because he was genetically and environmentally predisposed to addiction. All of these facts, viewed as a whole and cumulative of the mitigating evidence presented originally, according to petitioner, raises a reasonable probability that the result of the penalty phase would have been different if competent counsel had presented and explained the significance of all the available evidence.

C. Petitioner Has Failed To Carry His Burden Of Proving Prejudice

Respondent submits that petitioner has failed to carry his burden of showing his theory is correct. As we noted above, *Strickland* teaches that where it is easier to dispose of an ineffective assistance claim due to the lack of sufficient prejudice, that course should be followed. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 697.) This is just such a case. There is no reasonable probability that, had petitioner conducted his penalty phase as he now suggests, the jury would have returned a sentence other than death.

1. No Reasonable Juror Would Believe Petitioner's Mother Sexually Abused Him Without Petitioner's Testimony

As respondent acknowledged earlier, petitioner had the right not to testify at either phase of his trial and the jury could not draw any adverse inferences from his failure to do so, nor could the prosecutor comment on his

failure to testify. (See *People v. Boyette* (2002) 29 Cal.4th 381, 454.) Certainly, petitioner had strong incentive not to testify at the penalty phase. Had he testified, he would have run the significant risk of withering cross-examination by a seasoned prosecutor about all aspects of his background, behavior and facts of the crime. (See *People v. Butler* (1967) 65 Cal.2d 569, 575, overruled on other grounds in *People v. Tufunga* (1999) 21 Cal.4th 935; see also RT 216-217 [Attorney Morehead was concerned that mental state testimony at the penalty phase would reopen the question of the homicide itself].) Hence, one readily understands habeas counsel's decision to limit their presentation of sexual abuse evidence to Dr. Morris's opinion. However, the adverse inference at issue under habeas counsel's approach is not directed towards petitioner, rather it concerns the credibility and believability of Dr. Morris's opinion, i.e., the question of the quality of the proof and the fact that petitioner's hearsay statements are being presented through the filter of Dr. Morris.[25/] If petitioner's objective was to garner the jury's sympathy because of his alleged sexual abuse by his mother, it is hard to imagine a more moving way to present such evidence to the jury than through petitioner taking the stand and telling the jury in graphic detail (as he did to Dr. Morris) how that abuse occurred and letting the jury see first-hand how devastating that abuse was to him. Surely, if petitioner were willing to set aside whatever inhibitions are normally felt by such sex abuse victims and discuss this personal information with counsel and his retained expert, it would be eminently reasonable for the jury to base its credibility evaluation of such an allegation on petitioner's willingness to take the stand and tell them about his abuse in his own words.

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25. As noted earlier, Dr. Morris's recital of petitioner's hearsay as a source for his expert opinion does not transform that otherwise inadmissible hearsay into "independent proof" of any fact. (See *People v. Gardeley*, *supra*, 14 Cal.4th at p. 619; *People v. Elliot*, *supra*, 37 Cal.4th at p. 481.)

2. The Jury Would Not Find Dr. Morris's Opinion Credible

First, petitioner has not established that a reasonably competent mental health professional would have pursued "sexual abuse" with petitioner based on the family and social history counsel allegedly should have presented them with. Likewise, there is simply no persuasive evidence that petitioner would have disclosed the alleged molestation and other alleged inappropriate sexual behavior suffered by him. Instead, we know that petitioner maintained to his counsel that his childhood, if not idyllic, had been a normal one. (See RT 225, 227, 269, 271.)

As Dr. Martell testified, the factors Dr. Morris asserts would have caused a reasonably competent mental health professional to have inquired into petitioner's alleged history of sexual abuse (depression, substance abuse, and sexual promiscuity) simply are not "pathognomonic" of sexual abuse, and particularly sexual abuse by one's mother. (RT 411-413.) Rather, the symptoms and history presented are "quite consistent with Antisocial Personality Disorder." (RT 412; see also RT 138-139 [Dr. Morris agreeing that petitioner's symptoms and history presented are consistent with Antisocial Personality Disorder and psychopathy].) As Dr. Martell testified, "If you hear hoof beats, think horses, not zebras." (RT 412.) ". . . [F]rankly, being abused by your mother is a unicorn." (RT 413.) This is especially true where the underlying murder, such as Nancy's, is a "non-sexual homicide." (RT 412.) Aside from petitioner's statements describing the sexual abuse he allegedly suffered at the hands of his mother, which were made during Dr. Morris's February 26, 2002, clinical interview at San Quentin,[26] the other symptoms Dr. Morris relied on to form his opinion occur in a "substantial majority" of the criminal defendants Dr. Martell has evaluated over the course of his 20-plus-

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26. As Dr. Morris conceded on cross-examination, there is no extrinsic proof that petitioner was sexually abused by his mother. (RT 148.)

year forensic career. (RT 417.) To put it another way, petitioner's behavior was quite typical to that of other criminals.

Respondent submits that the logic of Dr. Martell's observations would not be lost on the jury, particularly given petitioner's admission that he could tell psychiatrists anything and they could not discern truth from fiction (RT 328-330), and the facts of this case which clearly demonstrate the cold-blooded, pitiless and gruesome way petitioner carried out Nancy's premeditated and deliberate murder.

Secondly, Dr. Morris's opinion is not supported by the professional literature existent at the time of petitioner's trial. (RT 413.) Sexual abuse of males by their mothers was a topic about which very little was known. (RT 414.) This lack of knowledge was due, in part, to the fact that very few male victims "like to talk about it [male sexual abuse by females] if it happened." The empirical literature "actually suggests that it happens very, very, rarely . . . ." (RT 414, 439; see also RT 148 [Dr. Morris agrees that males find it difficult to disclose their sexual abuse if, in fact, they have suffered sexual abuse, because they never expected to be victims]; 151-152 [common for incest abuse victims not to report abuse to other family members, loved ones and friends].)

Furthermore, ". . . the behavioral effects, the psychopathology and the sequelae, range from the kinds of things Doctor Morris did speak of, the question of substance abuse and issues with sexuality, to no effects at all, to other sets of symptoms. ¶ So, there is no one profile or syndrome or behavioral pattern that one expects to see in these [male sexual abuse] cases." (RT 414.)

Insofar as the ability to draw any meaningful leads from the history of sexual abuse within petitioner's extended family that was directed towards other women in the family by male family members as Dr. Morris claims (see RT 102), Dr. Martell testified that such a history is not an indicator that petitioner

might have suffered any sexual abuse, and particularly sexual abuse at the hands of his mother. (RT 416.)

> There is evidence that the men in the family took advantage of women. And that appears to be true for Mr. Crew as well. [¶] But there is no red flag there. You know, just because there is a history that men in the family abused women, why would a reasonable doctor at that time expect that Mr. Crew was allegedly abused by his own mother? It's just not a logical endpoint to get to based on that set of facts, even with the totality of the circumstances of depression, substance abuse, womanizing, and coming from a chaotic and sexually abused family, that would lead a reasonably competent doctor to reach that conclusion that, oh, he must be a victim of sexual abuse as well.

(RT 416-417.)

The same is true regarding petitioner's exposure to inappropriate sexual behavior by his grandfather and other family members. (RT 416.) What the available evidence shows is that male family members took advantage of women – a behavior in which petitioner engaged as well. (RT 417.) If anything, this sort of history would suggest that petitioner might be the perpetrator of sexual abuse, rather than the victim of sexual abuse. (RT 440.)

Dr. Morris's testimony that a reasonable forensic psychologist in 1989, if he or she had the information about petitioner's background and his family's background that is known now, would have asked petitioner if he had been the victim of sexual abuse, is simply not credible. Dr. Morris knew to ask because, as he testified, before he met with petitioner, he was given an "intimation" from habeas counsel that petitioner had been sexually abused. (RT 117-118.) Furthermore, as Dr. Morris admitted on cross-examination, there is no evidence that petitioner's brother Mike, whose family history is the same as petitioner and who exhibited behaviors similar to petitioner (substance abuse, lack of self-esteem, inability to stay in meaningful relationships), was ever molested by his mother or made allegations that he had been molested by her. (RT 144-145.)

In the same way that petitioner's behavioral symptoms as listed by Dr.

Morris and petitioner's family history of sexual abuse of women family members would not cause a reasonably competent mental health professional to suspect petitioner was sexually abused, particularly by his mother, there is absolutely no basis for concluding that a layperson, including a reasonably competent criminal defense attorney in 1989, should have had such suspicions. (RT 441-443.)

Furthermore, based on petitioner's concession about the limited purpose for which he was offering the evidence of his sexual abuse by his mother, i.e., for sympathy under factor (k) (see RT 422)[27] the People would have been entitled to forcefully argue to the jury the point that petitioner was openly admitting that his sexual abuse by his mother had nothing to do with the fact that he murdered his wife for pecuniary gain; that it in no way explained, much less excused, the gruesome nature of the crime he committed, including the ruse he carefully concocted to allay or minimize any suspicions that Nancy and her family and friends might have about his true motive, the elaborate steps he took to cover up his crime, or the lack of remorse he exhibited by failing to disclose where he had disposed of her body.

"On the side of mitigation, jurors tend to focus most on factors that diminish the defendant's individual responsibility for his actions." (Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* (1998) 98 Columb. L.Rev. 1538, 1539 (hereafter *What Do Jurors Think?*).) Significance is attached to facts and circumstances that show "diminished mental capacity" at the time of the offense. (*Ibid.*) Jurors have "little patience" for defendants who ascribe their wrongdoing to drugs and alcohol. (*Ibid.*) And, while jurors give some mitigating effect to abusive childhood backgrounds, it is limited. (*Ibid.*)

Furthermore, jurors "are strongly disinclined to accept an expert

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27. (See also Exceptions A. 4. and A. 5., *supra*.)

witness's theory or analysis" without the expert showing how it impacted on the defendant's criminal situation. (Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony* (1997) 83 Va. L.Rev. 1109, 1139.) Proper use of a psychological expert requires the expert to explain the defendant's actions, i.e., that the defendant "was the product of up-bringing, social environment, and physical and mental limitations" because "*explanations* control the mitigation phase." (Stebbins & Kenney, *Zen and the Art of Mitigation Presentation, or, The Use of Psycho-Social Experts in the Penalty Phase of a Capital Trial* (1986) 10 Champion 14, 16-17(hereafter *Zen and Mitigation*).)

3. The Additional Family Background Evidence Would Not Have Convinced The Jury To Spare Petitioner's Life

As discussed earlier, in addition to using his "social history" as information for Dr. Morris to rely on in forming his expert opinion, petitioner also presents it as mitigation evidence in its own right. This evidence included numerous "life history" documents, i.e., vital records, school records, medical and mental health records, military records, legal records, and civil and criminal records of petitioner, his parents, siblings, grandparents, and other relative. It also includes the testimonies of relatives and friends presented through declarations, depositions or live testimony at the reference hearing.

However, as with Dr. Morris's testimony about sexual abuse, petitioner has made no attempt to package his "social history" mitigation in any meaningful way for a jury. He has made no effort to demonstrate a nexus between this mitigation evidence and the facts and circumstances of his wife's murder. Instead, he has simply offered it for the jury to consider only for sympathy purposes under factor (k).

For example, petitioner failed to establish that he was even aware of the

fact that his grandfather physically abused others and committed acts of sexual molestation. He also failed to establish that he was aware that his father began drinking early in life, chased women, wanted to "swing" with petitioner's mother and others, and committed at least one act of child molestation. To the extent petitioner was not aware of the behavior of his parents, grandparents or other more distant family members, and to the extent expert witnesses were not employed to specifically tie that behavior to the person petitioner became, the evidence has little, if any, relevance and is totally lacking in probative value. (See generally, Deposition of Eddie Lee Richardson, Deposition of Cheryl Norrid, Exh. 157, Deposition of Debbie Murphy, Exh. 158.)

As this Court has stated, a defendant's background is material to penalty under California law. (*People v. Rowland* (1992) 4 Cal.4th 238, 278.) This ruling "follows from the proposition that 'the sentencer . . . [may] not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death.' [Citations.]" (*Id.* at p. 279, italics in original.) However, "[b]y contrast, the background of the *defendant's family* is of no consequence in and of itself." (*Ibid.*) The reason for this is that, under both the federal constitution and California law, "the determination of punishment in a capital case turns on the defendant's personal moral culpability." (*Ibid.*) Therefore, "[i]t is the '*defendant's* character or record' that 'the sentencer . . . [may] not be precluded from considering' – not *his family's*. [Citations.]" (*Ibid.*, italics added.) Only to the extent that the defendant's family background material relates to the background of the defendant is it material. (*Ibid.*)

Consequently, while petitioner's family background might serve, in part, to explain why petitioner had alcohol and substance abuse problems, suffered bouts of depression and was unable to sustain meaningful relationships with women, it did little, if anything to reduce petitioner's moral culpability for his

wife's murder. (See Garvey, *What Do Jurors Think?*, *supra*, 98 Columb.L.Rev. at p. 1539; Stebbins & Kennay, *Zen and Mitigation, supra*, 10 Champion at p. 18, [expert testimony is necessary to "tell the jury how all the myriad factors in the client's life gathered together to form the person who committed this murder].) The facts of the case as found by this Court on direct appeal, (see Appendix A), clearly demonstrate that Nancy's murder was contemplated and carefully planned over the course of many months, and that petitioner's alcohol and substance abuse problems, bouts of depression and inability to sustain meaningful relationships with women played no part in its planning or execution. Rather, the motive behind Nancy's murder was financial gain, in keeping with the special circumstance found by the jury. Furthermore, petitioner has never expressed any remorse for the murder. Instead, he has consistently schemed to avoid detection and arrest, and has never even disclosed where Nancy's body is located.

Additionally, careful examination of the social history evidence about petitioner's life from the time of his birth until his arrest and trial for Nancy's murder is simply unremarkable. Unlike as is so often the situation in capital cases, both in California and across the nation, there is absolutely no evidence that petitioner ever was subjected to repeated, violent physical abuse. In fact there is not one iota of evidence showing petitioner was every physically abused by anyone. Similarly, there is no evidence demonstrating that petitioner ever wanted for anything in a material sense, much less wanted for the basic necessities of life such as food, clothing and shelter. (Compare *In re Lucas*, *supra*, 33 Cal.4th at pp. 708-712 [finding prejudice where counsel failed to present the following evidence: defendant born out of wedlock, lived in many foster homes and state juvenile facilities, documented long term physical abuse beginning at age five which included beatings, being kicked and having chili powder rubbed on his genitals, being starved, made to sleep on floor behind

stove, under a bed, and on bare springs on the porch, lacking adequate clothing, being made to lie all day in a urine-soaked bed, with *In re Andrews*, *supra*, finding no prejudice where evidence presented at reference hearing did not demonstrate "excessively abusive or impoverished upbringing" or that defendant suffered from any mental deficiencies].)

Accordingly, there is no reasonable probability that the jury would have been moved to spare petitioner's life had it known about his "social history."

D. Counsel's Performance Was Not Deficient

Trial counsel conducted a constitutionally adequate penalty phase investigation and performed competently at the penalty phase.[28/] As noted earlier, the reasonableness of counsel's actions "may be determined or substantially influenced by the defendant's own statements or actions," including "information supplied by the defendant."

First, while counsel may have had limited time and money, they were ever vigilant for mitigating evidence and their penalty phase investigation was open to the discovery of unflattering facts about petitioner and/or his family. Trial counsel knew the importance of such facts to a mitigation case and were open to exploring such a case if that is where their information led them. (RT 219, 267.)

The limited time and money, which was in part attributable to counsel's strongly held belief that the sole special circumstance would be stricken, (see RT 206-207), did not inhibit investigation into the possibility that mitigating

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28. Respondent submits that a careful reading of the testimonies of O'Sullivan and Morehead reveals that they still feel a sense of loyalty to their client, in that they do not want to see his death sentence upheld. Nevertheless, at the same time they appear to appreciate that they provided constitutionally adequate representation. Consequently, both tried to walk a fine line during their testimony, trying to "have it both ways."

facts about petitioner and/or his family existed. Counsel had a mental health expert, Dr. Frederick Phillips, examine petitioner pretrial, and Dr. Phillips learned nothing helpful to a mitigation case. (See RT 197-202.) Trial counsel were aware that petitioner had a substance abuse problem and also spoke to a drug and alcohol expert, Dr. David Smith, regarding the relationship of petitioner's drug and alcohol use to the case, including the penalty phase. (See RT 202, 209, 211-212.) This is the same Dr. David Smith who testified for petitioner at the reference hearing. (See Exh. 99, p. 2, ¶ 10.) Neither Dr. Phillips nor Dr. Smith provided trial counsel with any information they felt was useful in defending petitioner or as mitigation at the penalty phase. Furthermore, neither Dr. Phillips nor Dr. Smith ever told counsel that they required additional information in order to properly evaluate petitioner. (RT 222; see also RT 182; compare *In re Lucas*, *supra*, 33 Cal.4th at p. 701 [defense psychiatrist retained primarily for guilt phase informed counsel he believed there was mitigating evidence to be developed, particularly requested family background evidence and requested permission to conduct additional interview of defendant].)

Although Dr. Phillips testified that he asked petitioner's father to provide him with family background information including information regarding mental illness and treatment, he never received any such information. (RT 170; see also RT 174.) Instead, petitioner's father provided him with photographs, which Dr. Phillips lost. Petitioner's father became angry with Dr. Phillips because of this and there was no further communication between them. Furthermore, there is no evidence that Dr. Phillips ever followed up with petitioner's father about the family background and mental illness/treatment information previously requested, nor is there any evidence that Dr. Phillips alerted counsel to this problem, much less requested their assistance in obtaining this information. (RT 171.) Dr. Phillips also attempted to contact

is no evidence that Dr. Phillips ever alerted counsel about his inability to contact petitioner's mother and that he needed to do so.

Dr. Phillips also testified that he was "unable to generate information" by talking to petitioner on the occasion of his sole visit with petitioner at the county jail. Dr. Phillips went on to state that he (Phillips) was in a foul mood, upset by the long wait to see petitioner, and implied that the close proximity of the security guard during his visit with petitioner inhibited meaningful communication. However, Dr. Phillips further testified that he was of a mixed mind about the presence of the guard (for personal safety reasons) and that he might have mentioned his concern about the guard's presence to Mr. Morehead, but did not ask Mr. Morehead to speak to any of the guard's supervisors about having the guard move out of earshot. (RT 174-175.) Dr. Phillips did ask petitioner "general questions" about how it was while growing up and the nature of his family life, but "got little or no information." (RT 176-177.) Dr. Phillips further described petitioner's answers as "bland" and that he appeared sleepy. (RT 177-178.) Although he could not remember petitioner's exact words, it was his "impression that [petitioner] stated: 'I grew up in a normal home under normal circumstances.'" (RT 177.) When questioned about his relationship with his parents, petitioner gave no response indicating that there were any difficulties between himself and his parents, or that their relationships were strained. Most importantly, petitioner made no sexual abuse allegations concerning his mother. (RT 177-178.) Dr. Phillips believed that petitioner was displeased about being interviewed based on "[h]is lack of response" and "[h]is lack of enlarging answers," most of which were monosyllabic. (RT 178-179.)

Importantly, neither Dr. Phillips nor Dr. Smith ever told counsel they needed to see petitioner a second time in order to more thoroughly evaluate him. (RT 183, 222.)

Counsel were aware that petitioner's background, including potentially

unflattering details about his past might be a potential source of mitigation at the penalty phase. (RT 219.) Morehead testified that he interviewed petitioner's father on numerous occasions and explained to him the purpose of the penalty phase, and described the type of evidence that might be presented there. (RT 224.)[29/] There was no effort by Morehead to focus only on the positive aspects of petitioner's life. (RT 225.) However, the information Morehead received was that petitioner's childhood was normal. It was not until the time of his parents' divorce that alcohol and substance abuse appeared to enter the picture. (RT 225-226.)[30/] Concerning petitioner's relationship with his mother, the only information that Morehead received was that she was cold and withdrawn. (RT 226.) There was never any indication or report of possible sexual molestation of petitioner by his mother. (RT 227; compare *In re Lucas*, *supra*, 33 Cal.4th at pp. 701-702 [defendant told defense psychiatrist his mother physically abused him and counsel otherwise aware of defendant's traumatic family background].)

Likewise, Morehead also explained the nature of the penalty phase to petitioner and solicited his assistance in developing potential mitigating evidence based on petitioner's background. (RT 227.) And while Morehead believes his conversations with petitioner may have focused more on the positive aspects of petitioner's background given the mitigation strategy he was contemplating, there is no evidence that he ever told petitioner he did not want to hear about any negative information regarding his background. (RT 228-229.) This is evidenced by the fact that they did talk about petitioner's alcohol and substance abuse problems and his inability to sustain meaningful

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29. Morehead also interviewed petitioner's grandmother in Texas by telephone about his background. (RT 214.)

30. Petitioner admitted to Morehead that "he drank a lot and used a lot of drugs." (RT 226; see also RT 202, 220-221, 229-230, 241-242, 258.)

relationships with women. (RT 229-230.) But there was never any mention, much less any indication, that petitioner had been sexually abused by his mother. (RT 229.)[31/] Furthermore, petitioner never informed counsel that any of the information his father provided them or testified to at trial was incorrect, incomplete, or inadequate. (RT 227.)

Morehead testified that his concern about using mental health evidence at the penalty phase derived from the fact that the only information the prosecution informed him they intended to produce at penalty had to do with petitioner's alleged escape attempt from the county jail. (RT 216.) "My concern was if I introduce psychiatric testimony as to mental state of Mark Crew, that would certainly allow the prosecution to again reopen the question of the homicide itself, the dismemberment of the body, Mr. Crew's refusal to tell anyone where the body was located. I don't know how I could have kept

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31. In what can only be characterized an attempt to pad his woefully inadequate proof that counsel should have been alert to the possibility that petitioner had been sexually abused by his mother, petitioner had Mr. Morehead testify about the following incident that occurred during a contact visit between petitioner and his mother at trial:

> Q. Do you recall anything about that interaction between Mr. Crew and his mother?
>
> A. Yeah. It was somewhat strange. If I recall, in fact I can recall, the meeting took place in a jury room with a long conference table there. Mr. Crew was – I think he was shackled to the chair. So his hands, I don't think they were free. And the mother came in, greeted him as any mother would her child, gave him a hug and a kiss, which is perfectly normal, and then she sat in his lap. And I thought that was rather unusual. But not for long, though.

(RT 215-216.) No other evidence about this incident was introduced, nor was any there any attempt to solicit counsel's view as to whether or not he perceived such behavior as a "red flag" that petitioner was sexually abused by his mother.

that out if I started opening up his mental status. So that's why I chose to reject that." (RT 216-217; see *Cone v. Bell* (2002) 535 U.S. 685, 701-702 [finding that Tennessee Supreme Court's holding that counsel was not ineffective for waiving penalty phase closing argument, thereby precluding prosecutor from delivering potentially damaging rebuttal argument, was objectively reasonable].)

Instead, with information provided primarily petitioner and petitioner's father, Morehead decided to pursue a different penalty phase strategy as explained in the following exchange:

> Q. When you began to explore the possibility of putting on a penalty phase, what kinds of mitigating circumstances were you considering?
>
> A. Well, I think we could sort of break it down into four separate components.
>
> The first thing I was considering, of course, was the defendant's background. Mr. Crew's background. And it was somewhat unique, in the fact that he had no criminal history. And that I wanted to find witnesses and evidence to establish that, other than this crime, he had a very positive background. In other words, he did very good things in his life.
>
> The second thing I had to worry about was, since the crime involved the killing of a woman, and since there had been testimony during the guilt phase that Mr. Crew's relationships with women were manipulative, I wanted to find women with whom he had a good relationship to establish that his relations with women were not always manipulative and exploitive.
>
> The third thing I was concerned about, in the penalty phase, the ultimate concern the jury would have, is if he was given a life-without-the-possibility-of-parole sentence, as opposed to a death sentence, what kind of prisoner would he be. And for that reason, I also focused on his jail conduct for the three years that he'd been incarcerated in Santa Clara County.
>
> And I also had Mr. Murphy locate and provide Jeri Enomoto, who was formerly the head of the Department of Corrections, and who had

personal experience with people on death row.

So, those were the areas I was focusing on.

(RT 212-213.)

Respondent submits that when trial counsel's investigation, preparation, and execution of the above penalty phase strategy is compared to that of counsel in *Strickland*, *supra*, which was found to comport with the performance component established in that case (see *Strickland v. Washington*, *supra*, 466 U.S. at p. 699), it is plain that counsel's actions here "were well within the range of professionally reasonable judgments," and their decision not to seek additional social history and mental health evidence other than what was already in hand was likewise reasonable. (*Ibid.*; see *In re Andrews*, *supra*, 28 Cal.4th at p. 1255.)

In *Strickland*, at the guilty plea colloquy, the trial judge told defendant he had "'a great deal of respect for people who are willing to step forward and admit their responsibility.'" However, the judge also said "he was making no statement at all about his likely sentencing decision." Against counsel's advice, defendant chose to be sentenced by the trial judge without a jury recommendation. (See Fla. Stat. Ann. § 921.141 (West 1975) [describing the role of the jury in the capital sentencing process].) At sentencing "counsel's strategy was based primarily on the trial judge's remarks at the plea colloquy as well as on his reputation as a sentencing judge who thought it important for a convicted defendant to own up to his crime." Accordingly, "[c]ounsel argued that [defendant's] remorse and acceptance of responsibility justified sparing him from death." Counsel made only limited investigation into defendant's background, by talking with defendant and speaking by telephone with defendant's wife and mother. Counsel did not follow up on his one unsuccessful effort to meet with them in an effort to obtain background and character information, or to corroborate his client's story about the pressures he

was under due to his family's economic hardship. (*Washington v. Strickland* (Former 5th Cir. 1982) 673 F.2d 879, 886.) "He did not otherwise seek out character witnesses," nor did he request a psychiatric examination because his conversations with defendant "gave no indication that [defendant] had psychological problems." (See *Strickland, supra*, 466 U.S. at pp.672-673; see also *Washington v. Strickland, supra*, 673 F.2d at pp. 886-887.)

The facts and circumstances attendant to counsel's investigation in petitioner's case are distinguishable from those which led to findings of deficient and prejudicial performance in *In re Lucas*. The outcome in *Lucas*, was compelled largely by the Supreme Court's opinion in *Wiggins v. Smith* (2003) 539 U.S. 510. (*In re Lucas, supra*, 33 Cal. 4th at p.722.)

Wiggins had been convicted of robbing and murdering an elderly woman. At sentencing, counsel moved to bifurcate the hearing "in order to demonstrate [to the jury], first, that the defendant was not personally responsible for the victim's death." (*Id.* at p. 722.) If counsel failed to do this, they then intended to present psychological reports and expert testimony "'demonstrating Wiggins' limited intellectual capacities and childlike emotional state on the one hand, and the absence of aggressive patterns in his behavior, capacity for empathy, and his desire to function in the world on the other. [Citation.] At no point did [counsel] proffer any evidence of [Wiggins's] life history or family background.' [Citation.]" (*Id.* at pp. 722-723.) In deciding Wiggins's ineffectiveness claim, the Court "explained that its focus was not on whether counsel should have presented a case in mitigation, but on 'whether the investigation supporting counsel's decision not to introduce mitigating evidence of [the defendant's] background was itself reasonable.' [Citation.]" (*Id.* at p. 723.)

The Court noted that Wiggins's counsel relied on three sources for their investigation: (1) a psychologist's report identifying some cognitive difficulties

and evidence of a personality disorder, but offering nothing about defendant's life history; (2) a presentence report containing "a 'one-page account of [the defendant's] "personal history" noting his "misery as a youth," quoting his description of his own background as "'disgusting,'" and observing that he spent most of his life in foster care' [Citation.]"; and, (3) social service records of Wiggins's "various foster care placements." (*Ibid.*)

"[C]ounsel's decision not to expand the investigation into the defendant's life history beyond what had been discovered in the probation report and the social services report" was found to be below professional norms that prevailed in Maryland at the time of trial. (*Ibid.*) Those norms "'included the preparation of a social history report.' [Citation.]" (*Ibid.*) The Court also noted that counsel's decision "fell short" of the American Bar Association's capital defense standards "'to which we long have referred as "guides to determining what is reasonable." [Citations.]'" (*Ibid.*) Those standards provided that counsel should make an effort to "'"discover *all reasonably available* mitigating evidence. . . ." [Citation.]'" (*Ibid.*, original emphasis) The Court concluded, therefore that "the limited investigation into potential evidence in mitigation not only was unreasonable under then-current general standards for investigation, it 'was also unreasonable in light of what counsel actually "discovered" in the defendant's background.'" (*Id.* at p. 724.) That information included reports that Wiggins's mother was an alcoholic, that he was "'shuttled from foster home to foster home,'" that he displayed "'some emotional difficulties'" during his foster home placements,'" that he was frequently absent from school, and that, "'on at least one occasion, his mother left him and his siblings alone for days without food.' [Citation.]" (*Id.*) The Court found that "'any reasonably competent attorney'" would recognize that further investigation into Wiggins's background was necessary in order to make "'an informed" decision about the mitigation case to present. (*Id.*) Counsel's

performance was described as inattentive and not the result of "reasoned strategic judgment." (*Id.*)

In *Lucas*, the petitioner was convicted of the murders of an elderly couple who lived next door to him. (*In re Lucas*, *supra*, 33 Cal.4th at p. 688.) At the penalty phase, counsel failed to present "any evidence in mitigation." (*Id.* at p. 690.) The judge therefore ordered an ex parte hearing before another judge at which counsel stated his reasons for not presenting any mitigating evidence. Counsel indicated that 12 or 13 witnesses had been consulted but he chose not to present their testimony because he deemed it of "minimal value" and "he believed it would be worse to offer these witnesses than to present no evidence at all." (*Id.* at pp. 692, 702.) At this hearing, petitioner also waived his right to testify. (*Id.* at p. 692.) Counsel also had been planning to call petitioner and his wife to testify, but both decided at the last minute not to testify. (*Id.* at p. 702.) Their testimonies were to be offered to humanize petitioner by showing "'his redeeming qualities, and to recount his descent into drug abuse.'" (*Ibid.*) Counsel also intended to have petitioner to testify about his childhood, notwithstanding counsel's belief that he considered evidence that petitioner's grandmother had kept him under the bed for three days to punish him for having wet the bed to be trivial in comparison to the facts of the murders. (*Id.* at p.703.)

However, after a reference hearing, this Court found that

> Evidence readily could have been discovered that would have demonstrated the severe emotional and physical abuse suffered by petitioner as a preschooler and young child. In addition, there was readily discoverable evidence establishing that, beginning at the age of seven years, petitioner was housed in an institution for abused and neglected children that was staffed by abusive, violent adults, and that subsequently he was placed in juvenile correctional facilities that were know for crowding, neglect, and abuse.

(*Id.* at p. 689; see *id.* at pp. 708-712 [providing a more detailed summary of the evidence generally described above].) In short, "'[c]ounsel made no effort to

confirm or otherwise follow up on information in their possession indicating that petitioner was physically and emotionally abused as a child.' [Citation.]" (*Id.* at p. 703.) This information was available to counsel from relatives to whom they had talked, the limited records they had obtained, and from the expert they had hired. (*Id.* at pp. 702-703.) Accordingly, this Court stated that counsel had "an obligation to 'pursue diligently those leads indicating the existence of evidence favorable to the defense.' [Citation.]" (*Id.* at p. 726.) Therefore, because counsel had been put on notice by other sources of this potential mitigating evidence, this Court held that petitioner's failure to inform counsel about the childhood abuse he suffered did not excuse counsel's "perfunctory investigation." (*Id.* at p.729.)

Unlike the situation in both *Wiggins* and *Lucas*, counsel here did not have any information that reasonably would have caused them to pursue the information presented at the reference hearing. First, petitioner, who from all available evidence appears intelligent and clearly capable of understanding counsel's explanations about what the penalty phase entailed, failed to tell counsel about his mother's supposed sexual molestation of him. Second, petitioner described his childhood as a normal one. This description was corroborated by both petitioner's father and grandmother. The only problems of which counsel had notice were related to his parents' divorce, the step-family with whom he lived for a short time, and his mother's cold and distant behavior towards him. This, as noted earlier, was the evidence presented at the penalty phase – evidence that petitioner never complained to counsel was either inaccurate or inadequate in its depth of presentation.

Neither Dr. Phillips nor Dr. Smith provided any information that would have alerted counsel that something was amiss in petitioner's background. Counsel concluded, based on the information known to them, that petitioner's alcohol and substance abuse was directly related to his pursuit of numerous

women, who from the evidence available all seem to be extremely needy and vulnerable individuals – perfect prey for petitioner.

Finally, when one reviews all the evidence presented at the reference hearing, one fails to find the compelling evidence of physical and emotional abuse suffered by the defendants in *Wiggins* and *Lucas*. Also absent is any evidence that the basic necessities of life had been withheld from petitioner, as they had been from the defendants in *Wiggins* and *Lucas*. Finally, there has been no showing how any of the alleged mitigating evidence put on at the reference hearing explains petitioner's criminal conduct, something that both the Supreme Court and this Court found in *Wiggins* and *Lucas*. (*In re Lucas*, *supra*, 33 Cal.4th at p. 736.)

Accordingly, counsel's investigation was not deficient. Rather it was reasonable based on the information they received from petitioner, petitioner's father, petitioner's grandmother, and the two experts they retained.

CONCLUSION

For the reasons stated above, respondent respectfully excepts to the referee's findings. Respondent further submits that regardless of respondent's exceptions, the referee's findings do not entitle petitioner to any relief on his claim that trial counsel rendered ineffective assistance at the penalty phase.

Dated: May 1, 2008

Respectfully submitted,

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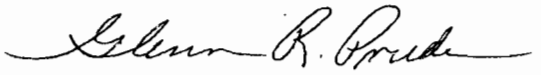

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APPENDIX A

Defendant met Nancy Jo Wilhelmi Andrade (Nancy), a nurse, at the Saddle Rack bar in San Jose in 1981, shortly after Nancy's divorce. Nancy owned a purebred horse and a Ford pickup truck. Nancy and defendant were romantically involved until November or December 1981, after which they did not see each other until April of 1982, when they resumed the relationship.

In January 1982, when Nancy and defendant were not romantically involved, Nancy and her friend Darlene Bryant planned a trip across the United States for the summer, and that spring Nancy bought a yellow Corvette for the trip. In May 1982, Richard Elander, one of defendant's best friends began work at a ranch in Utah run by Richard Glade. Before Elander left for Utah, defendant had talked to him about killing Nancy during a trip across the country. While in Utah, Elander asked Glade about carrying a body into the wilderness of the Utah mountains. Disturbed by the conversation, Glade fired Elander.

Defendant asked Nancy to move to Greer, South Carolina, where defendant's mother and stepfather lived. When Nancy replied she did not want to move so far away unless married, defendant agreed to marry her. The wedding took place on June 4, 1982.

The marriage soon floundered. Nancy was living with Darlene at the latter's home, but defendant was rarely there. Nancy twice saw defendant with some women at the Saddle Rack bar. She told several friends she was thinking of an annulment of the marriage.

Defendant had been romantically involved with Lisa Moody, to whom he proposed marriage in June 1982, the same month he married Nancy. Defendant and Moody did not set a date for the wedding.

In July 1982, defendant and his friend Richard Elander moved to Greer, South Carolina, where they stayed with defendant's parents and started a truck service business. That same month, Nancy and her friend Darlene took their planned vacation

trip across the country. They stopped in Greer, South Carolina, and Nancy spent the night with defendant.

After Nancy's visit to South Carolina, defendant and his stepfather, Bergin Mosteller, decided to return to California to kill Nancy. Defendant discussed with Elander different ways of killing her, including suffocation, hitting her with a large wrench, and "bleeding her in the shower so she wouldn't make any mess." They also discussed leaving her body in the Utah wilderness, where they could bury her or "hang her in a tree, let the bears eat her."

After returning to California in early August 1982, Nancy often spoke on the telephone with defendant. She decided to move to South Carolina in an effort to make the marriage work, and she began to make arrangements to do so. She gave custody of her two children from a prior marriage to their father [petitioner had urged Nancy to leave the children with their father so they could get the horse business up and running (Trial RT 3587)] and closed out her bank account, obtaining $10,500 in cash and a money order for $2,500. When Deborah Nordman, one of Nancy's friends, remarked that Nancy might be left in the desert during the trip with defendant to South Carolina, Nancy replied, "If you don't hear from me in two weeks, sent the police."

On August 21, 1982, defendant and his stepfather came to Darlene's house, where Nancy was living, in a station wagon pulling a horse trailer. They loaded Nancy's belongings into the trailer and picked up Nancy's horse from a stable in Gilroy. The plan was for Mosteller to drive the station wagon to Texas, where he would leave the horse with relatives. Nancy and defendant would follow in Nancy's Corvette and truck. They would leave the truck in Texas, where defendant's friend, Richard Elander, would retrieve the truck, the horse, and Nancy's belongings and take them all to South Carolina. Nancy and defendant would then leave Texas in Nancy's Corvette to go on a two-week honeymoon. Mosteller, however, never went to Texas. He boarded the horse in a stable in San Jose, drove to Nevada, and finally flew to South Carolina.

On August 23, Nancy and defendant went to Nancy's parents home in Santa Cruz, California, where they picked up Nancy's dog and some of her belongings, including a microwave, stereo components still in the original cartons, and personal documents. That same day, Nancy and defendant ostensibly left for South Carolina.

That same night, however, defendant checked into a Motel 6 in Fremont, California, where he registered to stay two nights. The next day, he arrived at the home of Lisa Moody, the woman who had accepted defendant's marriage proposal shortly after his marriage to Nancy. Over the next two days, defendant gave Lisa a stereo and a microwave, took her to see a horse in a San Jose stable, and arranged for her to convert $5,000 in cash into a cashier's check payable to Bergin Mosteller, defendant's stepfather.

On August 28, 1982, defendant and Lisa left for South Carolina in a pickup truck with a horse in a trailer. They stopped in Texas, where they stayed at defendant's grandmother's house for a couple of days. While there, defendant became upset and agitated after receiving a phone call. After defendant and Lisa arrived in Greer, South Carolina, defendant opened a bank account in which he deposited Nancy's $2,500 money order. Elander and Mosteller sold Nancy's clothing and possessions at a flea marked for about $500, burned her documents in a backyard, and sold the horse trailer and Nancy's horse.

Defendant and Lisa returned to San Jose in mid-September. Defendant then sold Nancy's truck for $4,200, giving the purchaser a certificate of title with Nancy's forged signature. On October 13, 1982, defendant told Lisa that the phone call he received in Texas while they were at his grandmother's house was about a woman who loved him and was telling people in South Carolina she was going to marry him. According to defendant, the woman went to the head of the Mafia in Arizona to complain about defendant, but the Mafia killed her instead. Defendant told Lisa that he was forced to dispose of the body to avoid being blamed for the woman's death, and that he buried it in his friend Bruce Gant's backyard. The phone call defendant had received

in Texas was actually from Gant who told him that the "body was beginning to stink." That same day, defendant returned to South Carolina in Nancy's Corvette.

Richard Elander testified under a grant of immunity. He said that on the day defendant and Lisa arrived in Greer, South Carolina, defendant told him the details of Nancy's killing. According to Elander, after defendant and Nancy left San Jose, California, they stopped and walked up a hillside into the woods. While Nancy and defendant were sitting on the hillside talking, defendant shot her in the back of the head and rolled the body down a ravine where he covered it with blankets. Defendant then drove one of the cars to Bruce Gant's house in Campbell, California. Defendant and Gant returned to the scene and retrieved the other vehicle.

The next evening, defendant and Gant got drunk and returned to the site where defendant had shot Nancy. When defendant walked down to her body, it had moved. Defendant "freaked out," ran back to the truck, and told Gant. Gant went down the ravine where he tried to strangle Nancy and break her neck. He eventually cut off Nancy's head. Defendant told Elander that they put Nancy's body in a 55-gallon drum filled with cement and buried it in Gant's backyard. They put her head in a five-gallon bucket filled with cement and threw it off the Dumbarton Bridge between Alameda and San Mateo Counties, California.

A few days after defendant returned to South Carolina, Elander testified, he sold Nancy's Corvette to Marion Mitchell. When Mitchell repeatedly asked for title to the car, Elander told him that defendant had killed his wife by shooting her, cutting off her head, putting the body in a barrel filled with concrete, and burying it in a backyard. Elander then forged defendant's signature on a bill of sale and gave it to Mitchell.

In January 1983, defendant made arrangements to stay in Connecticut with Jeanne Meskell, with whom he previously had a relationship. While there, defendant told Meskell that he had killed a girl, that she was in two pieces in two drums filled with

cement, and that one drum was in the San Francisco Bay and one was in a backyard. In March 1983, the San Jose police searched Bruce Gant's house, where they recovered a Tiffany lamp identical to one of Nancy's. A search of Gant's yard with steel probes in March 1983 and again in 1984 did not reveal anything. Nancy's body was never found. (*People v. Crew*, *supra*, 31 Cal.4th at pp. 828-831.) Additionally, at trial, the jury heard Doug Crew testify that in April/May 1982, petitioner stated to him, while clear-headed and sober, "Doug, I've done so many things. I think I could kill someone, just to see if I could get away with it." (Trial RT 4358-4359.)

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **In re Mark Christopher Crew** No.: **S107856**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On **May 1, 2008**, I served the attached **EXCEPTIONS TO REFEREE'S FINDINGS FACT AND BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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Honorable Andrea Y. Bryan, Judge
Santa Clara County Superior Court
Hall of Justice (West Wing)
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San Jose, CA 95113

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **May 1, 2008**, at San Francisco, California.

Gloria J. Milina
Declarant

Signature

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