In the Supreme Court of the State of California

In re

In re MARK CHRISTOPHER CREW,

On Habeas Corpus

CAPITAL CASE

No. S107856

Santa Clara County Superior Court, Case No. 101400
The Honorable Andrea Y. Bryan, Judge

RESPONDENT'S SUPPLEMENTAL BRIEF

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Contrary to Petitioner Crew's assertion in his recently filed supplemental brief, the cited United States Supreme Court cases published since the parties last briefed this case do not support his claim for relief on grounds of ineffective assistance of counsel. Indeed, each case referenced by petitioner is inapposite.[1]

A. *Sears v. Upton* (2010) ___ U.S. ___, 130 S.Ct. 3259 (per curiam)

Sears involved an ineffective assistance of penalty phase counsel claim adjudicated on post-conviction in the Georgia courts. (*Id.* at p. 3261.) The state post-conviction court, after finding counsel's performance constitutionally deficient under *Strickland v. Washington* (1984) 466 U.S. 668, "found itself unable to assess whether counsel's inadequate investigation might have prejudiced Sears." (*Sears v. Upton, supra*, 130 S.Ct. at p. 3261.) The high court found two errors in the state court's analysis of the ineffective assistance claim Sears presented. First, the state court "curtailed a more probing prejudice inquiry because it placed undue

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[1] Crew also cites to this Court's recent opinion *In re Valdez* (2010) 49 Cal.4th 1049. In *Valdez*, the Court found that the referee's 108-page report of findings summarizing the testimony of 13 witnesses was supported by substantial evidence, and upheld the referee's finding that the new mitigation evidence presented at the reference hearing was not credible. (*Id.* at pp. 728, 737.) Crew notes that this Court held that the *Valdez* record "provides convincing reasons to suspect the veracity of the claims by petitioner's family and friends that hew was repeatedly physically abused by his father, but that no one mentioned it while testifying at the penalty phase or when speaking to [trial counsel] because [he] failed to ask." (*Id.* at p. 737; see Petitioner's Supplemental Brief at p. 10.) He argues that this finding in *Valdez* "provides stark contrast" to his case where, after hearing or reading the testimony of 15 witnesses, the referee in her 19-page report of findings found credible the new mitigating evidence, that counsel did not interview any witnesses for the purpose of eliciting any negative information about Crew's background and that Crew did deny having been abused. However, the referee's findings in Crew's case are unsupported when subjected to careful scrutiny.

reliance on the assumed reasonableness of [trial] counsel's mitigation theory." (*Id.* at p. 3265.) The Supreme Court stated that although a mitigation "theory might be reasonable in the abstract," that fact did "not obviate the need to analyze whether counsel's failure to conduct an adequate mitigation investigation before arriving at this particular theory prejudiced Sears." (*Ibid.*) "Second, and more fundamentally, the [state] court failed to apply the proper prejudice inquiry." (*Id.* at pp. 3265-3266.) "A proper analysis of prejudice under *Strickland* would have taken into account the newly uncovered evidence of Sears' 'significant' mental and psychological impairments, along with the mitigation evidence introduced during Sears' penalty phase trial, to assess whether there is a reasonable probability that Sears would have received a different sentence after a constitutionally sufficient mitigation investigation." (*Id.* at p. 3267.) Therefore, the state court's judgment was vacated and the case was remanded for further proceedings consistent with the opinion, i.e., a new prejudice analysis by the state court. (*Id.* at 3267.) Significantly, the Supreme Court did not hold that the evidence before the state court demonstrated that Sears had sustained his burden of proof for establishing prejudice, as petitioner seems to imply. (*Id.* at p. 3267 (dis. opn. of Scalia, J.).)[2]

Respondent submits that the *Sears* opinion adds nothing to the briefing already before the Court, since respondent in no way questions this Court's understanding of, and ability to conduct, a proper *Strickland* analysis of Crew's ineffective assistance claim.

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[2] "In my view there was no error of law, and the Court today remands for the state court to do what it has already done: find no reasonable likelihood that the mitigation evidence the Court details in its opinion would have persuaded a jury to change its mind about the death sentence for this brutal rape-murder." (*Ibid.*)

B. *Padilla v. Kentucky* (2010) ___ U.S. ___, 130 S.Ct. 1473

In *Padilla*, the issue before the Supreme Court was "whether as a matter of federal law, Padilla's counsel had an obligation to advise him that the offense to which he was pleading guilty would result in his removal from this country." (*Id.* at p. 1478.) The high court found that "constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation." "Whether he is entitled to relief," the court observed, "depends on whether he has been prejudiced, a matter that we do not address." (*Ibid.*; see also *id.* at pp. 1483-1484 [having found deficient performance under *Strickland*, whether Padilla is entitled to relief on his ineffective assistance claim will depend on whether he can satisfy *Strickland*'s prejudice prong, "a matter we leave to the Kentucky courts to consider in the first instance"].)

In determining whether the performance of Padilla's counsel was constitutionally deficient, the Court stated that it had long recognized that the American Bar Association (ABA) standards are "guides to determining" or "valuable measures of" what the "prevailing professional norms of effective representation" might be. (*Id.* at p. 1482.) However, the Court also added that the ABA standards are "not 'inexorable commands.'" (*Id.*) The high court's statement regarding the appropriate use of the ABA standards in any *Strickland* analysis is something this Court has recognized and followed. (See *In re Lucas* (2004) 37 Cal.4th 682, 725.) Respondent is not advocating that this Court deviate from the high court's treatment of the ABA standards in its review of Crew's ineffective assistance claim. *Padilla*, therefore, adds nothing new to the arguments already before this Court.

C. *Porter v. McCollum* (2009) ___ U.S. ___, 130 S.Ct. 447 (per curiam)

In *Porter*, a federal habeas corpus case, the Supreme Court found, contrary to the holding of the Eleventh Circuit, that the Florida Supreme Court's determination that Porter was not prejudiced by trial counsel's deficient performance at the penalty phase of his capital trial was an objectively unreasonable application of *Strickland v. Washington*, to the facts of Porter's case. (*Id.* at p. 448.) Porter's case bears virtually no resemblance to Crew's.

For most of the pretrial proceedings and during the beginning of his trial, Porter proceeded *pro se*, with standby counsel. (*Ibid.*) "Near the completion of the State's case in chief, Porter pleaded guilty." (*Ibid.*) Porter was convicted of two counts of first degree murder for killing his former girlfriend and her then-boyfriend. (*Ibid.*)

At that time, Porter also changed his mind about proceeding *pro se*, and standby counsel was appointed as counsel for the penalty phase, approximately one month prior to the sentencing proceeding. (*Id.* at pp. 448, 453.) "At the post-conviction hearing, [trial counsel] testified that he had only one short meeting with Porter regarding the penalty phase. He did not obtain any of Porter's school, medical, or military service records or *interview any members of Porter's family*." (*Id.* at p. 453, emphasis supplied.) The defense case at the penalty phase consisted of the testimony of Porter's ex-wife and an excerpt from a deposition. (*Id.* at p. 449.) "The sum total of the mitigating evidence was inconsistent testimony about Porter's behavior when intoxicated and testimony that Porter had a good relationship with his son." (*Ibid.*) Although counsel argued to the jury that Porter "'has other handicaps that weren't apparent during the trial' and Porter was not 'mentally healthy,' he did not put on any evidence related to Porter's mental health." (*Ibid.*) The jury recommended a death sentence

for each of the murders.[3] The trial judge found that the State had proved all four aggravating circumstances alleged in regard to the former girlfriend's murder, but only two of the four in regard to her then-boyfriend's murder, and that no mitigating circumstances existed. Therefore, contrary to the jury's recommendation, the judge imposed a death sentence for only the former girlfriend's murder. (*Ibid.*)

The Florida Supreme Court affirmed the death sentence over the dissent of two justices and struck one of the aggravating factors. The two dissenting justices would have reversed the death sentence "because the evidence of drunkenness, 'combined with evidence of Porter's emotionally charged, desperate, frustrated desire to meet with his former lover is sufficient to render the death penalty disproportional punishment in this instance.'" (*Ibid.*, citation omitted.)

Over the course of a two-day post-conviction evidentiary hearing, "Porter presented extensive mitigating evidence, all of which was apparently unknown to his penalty-phase counsel." (*Ibid.*) This new evidence described Porter's abusive childhood, his heroic military service during the Korean War and the trauma he suffered as a result of that service, his long-term substance abuse, and his impaired mental health and mental capacity. (*Ibid.*; see generally *id.* at pp. 449-451 [providing a more detailed description of the additional mitigating evidence adduced at the post-conviction hearing].)

As detailed in respondent's exceptions to the referee's findings of fact and brief on the merits, Crew's trial counsel did vastly more investigation and preparation for the penalty phase than did Porter's

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[3] Under Florida law then in effect, the jury made a non-binding sentencing recommendation to the trial judge who actually determined the sentence to be imposed. (See *Marshall v. Crosby* (Fla. 2005) 911 So.2d 1129, 1136; see also Fla. Stat. Ann. §921.141(2)-(3) (1986).)

attorney. This included consulting with mental health expert, Dr. Frederick Phillips, and drug and alcohol expert, Dr. David Smith. Neither expert provided counsel with any potentially useful mitigation. In fact, when Dr. Phillips asked Crew questions about his background and family life he "got little or no information," and described Crew's answers as "bland" and his presentation as sleepy. (RT 176-178.)[4]

Additionally, both counsel and their investigator, John Murphy, talked with Crew about his family background, and this included an explanation by attorney Morehead about the nature of the penalty phase and the type of evidence that might prove useful. (See RT 227-229, 241-242, 265-268.)

To the extent that any meaningful parallel exists between Crew's case and Porter's it is that both served in the Army. However, that is where the similarity ends. Unlike Porter, who saw extensive and extremely harrowing combat action, including being twice wounded by enemy gunfire, Crew served during peacetime and spent his enlistment as a driver for the headquarters' commander and working at the post recreation center boathouse at Fort Gordon, Georgia.[5] (See TRT 4841, 4846.) As a result of

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[4] The designation "RT" refers to the Reporter's Transcript from the reference hearing. The designation "TRT" refers to the Reporter's Transcript from the criminal trial.

[5] In the battle at Kunu-ri, Porter's unit held off an advance by Chinese forces for five days so that the remaining units could withdraw. The fighting included "'fierce hand-to-hand" combat with the Chinese. Porter's unit was the last to disengage from the fight. (*Porter*, *supra*, 130 S.Ct. at p. 450.) Three months later, Porter fought in the battle at Chip'yong-ni, where his "regiment was cut off from the rest of the Eighth Army and defended itself for two days and two nights under constant fire." (*Ibid.*) As part of this operation, Porter's company was ordered to retake defensive positions on high ground that had been overrun. This required an uphill advance under direct mortar, artillery and machine gun fire, resulting in his company sustaining more than 50% casualties. (*Ibid.*) Porter's unit (continued...)

his horrific combat experiences, Porter "suffered dreadful nightmares and would attempt to climb his bedroom walls with knives at night." (*Porter*, *supra*, 130 S.Ct. at p. 450.)[6] His drinking problem became so severe that "he would get into fights and not remember them at all." (*Id.* at p. 451.)[7]

At his post-conviction hearing, Porter also presented evidence of the physical abuse he suffered personally and witnessed being visited upon his mother by his father. The beatings of Porter's mother were described as a routine occurrence and, on one occasion, she was beaten so severely "that she had to go to the hospital and lost a child." (*Porter*, *supra*, 130 S.Ct. at p. 449.) His siblings described Porter as his father's "favorite target" on the weekends, "particularly when Porter tried to protect his mother," and also recounted one instance where Porter's father shot at him and missed when Porter came home late and then proceeded to beat him. (*Ibid.*) Crew's background includes nothing remotely similar to these events.

Porter also presented evidence that he was a "slow learner[]" and dropped out of school "when he was 12 or 13." (*Ibid.*) He also presented expert testimony that he possessed "substantial difficulties with reading, writing, and memory," and "suffered from brain damage that could manifest in impulsive, violent behavior." (*Id.* at p. 451.) Again, there is

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(...continued)
received the Presidential Unit Citation and Porter was awarded two Purple Hearts and the Combat Infantryman's Badge (CIB). (*Ibid.*)

[6] According to one of Porter's post-conviction mental health experts, his symptoms "would 'easily' warrant a diagnosis of posttraumatic stress disorder (PTSD)." (*Id.* at p. 450, fn. 4.)

[7] To be sure, Crew had a substance abuse problem, but in contrast to the situation in *Porter*, this was a matter of which his trial counsel were aware. (See RT 202, 221, 229.) As a result, they consulted with Dr. David Smith who was unable to provide them with any significant insight into this problem that provided meaningful mitigation. (See RT 209.) Accordingly, counsel evaluated these behaviors as something Crew employed to "achieve sexual gains." (See RT 269, 273.)

nothing remotely comparable in Crew's background. It was not until Crew's parents divorced that he began to have any difficulty in school. (See RT 225, 227.)

Finally, the nature of the murder Porter committed stands in stark contrast to Crew's cold-blooded, premeditated and deliberate murder of his wife. As the Florida Supreme Court's rejection of the especially heinous, atrocious, or cruel aggravating circumstance demonstrated, Porter's murder of his ex-girlfriend was "'consistent with . . . a crime of passion' even though premeditated to a heightened degree." (*Porter*, *supra*, 130 S.Ct. at p. 454, citation omitted.) The same cannot be said of petitioner's murder of Nancy Crew. As Dr. Martell (respondent's mental health expert) testified, Nancy Crew's murder was a "'non-sexual'" homicide. Rather than a crime of passion, the evidence showed that Crew devised and carried out Nancy's murder in a cold-blooded, pitiless and gruesome manner – devising a carefully concocted ruse to allay or minimize any suspicions that Nancy and her family and friends might have about his true motive (including pecuniary gain), the elaborate steps he took to cover up his crime, and the lack of remorse he exhibited by failing to disclose the location of her remains. At trial, Crew's stepbrother Doug recounted Crew saying months before Nancy's murder, "Doug, I've done so many things. I think I could kill someone, just to see if I could get away with it." (TRT 4358-4359.)

Accordingly, *Porter* does not further Crew's argument before this Court.

CONCLUSION

None of the recently decided supplemental authorities cited by Crew and discussed above support his claim that counsel provided ineffective assistance at the penalty phase. The petition for writ of habeas corpus should be denied.

Dated: October 20, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S SUPPLEMENTAL BRIEF uses a 13 point Times New Roman font and contains 2,512 words.

Dated: October 20, 2010

EDMUND G. BROWN JR.
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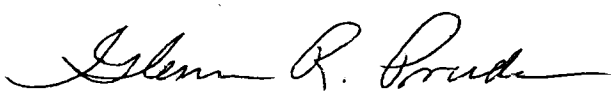

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DECLARATION OF SERVICE BY U.S. MAIL

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 October 20, 2010, I served the attached **RESPONDENT'S SUPPLEMENTAL BRIEF** 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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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 October 20, 2010, at San Francisco, California.

Nelly Guerrero
Declarant

Signature

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