IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

PETITIONER'S SUPPLEMENTAL BRIEF

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Petitioner Mark Crew hereby files this supplemental brief to address relevant decisions of the United States Supreme Court that have been issued subsequent to the briefing in this case: *Sears v. Upton* (2010) __ U.S. __, 130 S.Ct. 3259, *Padilla v. Kentucky* (2009) __ U.S. __, 130 S.Ct. 1473, and *Porter v. McCollum* (2009) __ U.S. __ 130 S. Ct. 447. In addition, petitioner will discuss this Court's decision in *In re Valdez* (2010) 49 Cal.4th 715. Each of these rulings provides further support for granting petitioner relief on his ineffective assistance of counsel claim.

Particularly instructive is *Sears v. Upton*, *supra*, 130 S.Ct. 3259. In that case, trial counsel presented "some mitigation evidence" at the penalty phase, but "not the significant mitigation evidence a constitutionally adequate investigation would have uncovered." (*Id.* at p. 3261.) After determining that trial counsel's performance was deficient under *Strickland v. Washington* (1984) 466 U.S. 668, the state court "found itself unable to assess whether counsel's inadequate investigation might have prejudiced Sears." (*Ibid.*) The state court "could not speculate as to what the effect of additional evidence would have been." (*Ibid.*)

As in petitioner's case, counsel in *Sears* presented evidence at trial "describing his childhood as stable, loving, and essentially without incident." (*Sears, supra,* 130 S.Ct. at p. 3261.) This included evidence that Sears came from a middle-class background, that his actions shocked his relatives, and his execution would devastate his family. (*Id.* at p. 3262.) Strikingly similar to what occurred in petitioner's case, the prosecutor in *Sears* used the defendant's purportedly advantaged background and lack of childhood trauma against him at closing argument: "[w]e don't have a deprived child from an inner city; a person who[m] society has turned its back on at an early age. But yet, we have a person, privileged in every way, who has rejected every opportunity afforded him." (*Id.* at p. 3262; compare Crew Trial RT 5068-5069 ["There's nothing tragic about his circumstances . . . He had more advantages than many . . . There's no evidence in his early years of truancy, misconduct, inability to get along in school . . . learning disabilities, drug or alcohol abuse"]; see also Crew Trial RT 5065 ["He has a charisma, you heard from people, that talents [sic], that he has intelligence, that capability, what I consider to be a good and decent background, that he turned his back on. Love of family, ability to do things, ability to get along, leadership abilities. He had all of these things. And he used them for incredible evil"].)

Also, as happened in petitioner's case, facts emerged in state post-conviction proceedings showing that Sears did not live such a privileged life, and that the prosecutor's theory for why Sears deserved to die could have been undermined by a competent social history investigation. His parents had a physically abusive relationship, they divorced when Sears was young, he suffered sexual abuse at the hands of an adolescent male cousin, his parents were verbally abusive to him and his father disciplined him with

military-style drills. (*Sears, supra*, 130 S.Ct. at p. 3262.) In addition, Sears struggled in school and was severely learning disabled. Sears also suffered from brain damage. (*Id.* at pp. 3262-3263.) Potential mitigation also included the fact that Sears's brother was a convicted drug dealer and user who introduced Sears to a life of crime.[1]

Significantly, just as in petitioner's case, where some of Crew's less positive traits that emerged at trial (e.g., lying, womanizing, drinking) could have been explained by the new mitigation theory (i.e., as symptoms of Crew's traumatic upbringing), in *Sears*, "[c]ompetent counsel should have been able to turn some of the adverse evidence into a positive – perhaps in support of a cognitive deficiency mitigation theory." (*Id.* at 3264.) While, "'[t]his evidence might not have made Sears any more likeable to the jury, . . . it might well have helped the jury understand Sears, and his horrendous acts – especially in light of his purportedly stable upbringing." (*Ibid.*)

In *Sears*, the state court held that "because counsel put forth a reasonable theory with supporting evidence . . . [Sears] failed to meet his burden of proving that there is a reasonable likelihood the outcome at trial would have been different if a different mitigation theory had been advanced." (*Sears, supra*, 130 S.Ct. at pp. 3264-3265.) The Supreme Court noted two errors in this analysis. First, the state court "placed undue reliance on the assumed reasonableness of counsel's mitigation theory." (*Id.* at p. 3265.) The Court explained that "[t]he [state] court's

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[1] The Court stated that "the fact that some of such evidence may have been 'hearsay' does not necessarily undermine its value – or its admissibility – for penalty purposes." (*Sears, supra*, 130 S.Ct. at p. 3263.) Notably, the evidence of sexual abuse upon which the majority relies (*id.* at p. 3262) consisted of what Justice Scalia in dissent describes as an "uncorroborated second-hand claim." (*Id.* at p. 3269, dis. opn. of Scalia, J.)

determination that counsel had conducted a constitutionally deficient mitigation investigation should have, at the very least, called into question the reasonableness of this theory." (*Id.* at 3265.) Furthermore, "that a theory might be reasonable in the abstract, does 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.*) Thus, the "reasonableness" of counsel's theory when determining prejudice was beside the point. "Sears might be prejudiced by counsel's failures, whether his haphazard choice was reasonable or not." (*Ibid.*) Moreover, the "reasonableness of the theory is not relevant when evaluating the impact of evidence that would have been available and likely introduced, had counsel completed a constitutionally adequate investigation before settling on a particular mitigation theory." (*Id.* at p. 3265, fn. 10.) Accordingly, in petitioner's case, whether or not counsel's "good guy" theory may have been a reasonable strategy in the abstract is totally beside the point in assessing prejudice because counsel failed to conduct an adequate investigation before deciding on this strategy.

The second error made by the state court in *Sears* was its failure to apply the proper prejudice inquiry. The Supreme Court stated that it has never limited its prejudice inquiry to cases where there has been little or no mitigation presented. While it has found no prejudice when new mitigating evidence "'would barely have altered the sentencing profile presented' to the decisionmaker," *Sears*, *supra*, 130 S.Ct. at p. 3266, quoting *Strickland v. Washington, supra,* 466 U.S. at p. 700, the Court has found prejudice "in other cases in which counsel presented what could be described as a superficially reasonable mitigation theory during the penalty phase." (*Id.* at p. 3266, citing *Williams v. Taylor* (2000) 529 U.S. 362, 398 [remorse and

cooperation with police]; *Rompilla v. Beard* (2005) 545 U.S. 374, 378 [residual doubt]; *Porter v. McCollum*, *supra*, 130 S. Ct. at p. 449 [drunkenness].)

In *Porter,* which involved a 1988 trial, counsel failed to conduct a reasonable mitigation investigation that would have uncovered the defendant's abusive upbringing, his heroic military service and its traumatizing impact, his long-term substance abuse, and his impaired mental state. The Supreme Court reversed the lower court's ruling that there was no reasonable probability the sentence would have been different if the mitigating evidence that counsel failed to uncover would have been introduced. (*Porter, supra,* 130 S.Ct. at p. 448.)

As in this case, Porter's counsel had little time to prepare for the penalty phase. In petitioner's case, second counsel to whom the penalty phase was delegated had only a few short months to prepare for trial and was required to first focus on the guilt phase, leaving the penalty phase investigation until after the trial was well under way. In *Porter*, the defendant had been representing himself when his standby counsel became counsel for the penalty phase about a month prior to the penalty phase. (*Porter*, *supra*, 130 S.Ct. at p. 453.)

As with second counsel in petitioner's case, counsel in *Porter* had not previously represented a defendant in a death penalty case and failed to undertake an adequate social history investigation that should have included gathering records and conducting interviews. (*Porter*, *supra*, 130 S.Ct. at p. 453.) Trial counsel "described Porter as fatalistic and uncooperative," and claimed Porter had instructed him not to speak with his ex-wife or son. (*Id.* at p. 453.) According to counsel, this was why he failed to uncover and present "any evidence of Porter's mental health or mental impairment, his

family background, or his military service." (*Id.* at 453.) In petitioner's case, by all accounts, the client was quite cooperative. The problem was that he was never asked – by either counsel or by counsel's investigator – whether he had been abused as a child. Crew admittedly failed to disclose evidence of a traumatic upbringing but such evidence was never sought. In *Porter*, the client was far more recalcitrant. Nevertheless, the Court found the decision not to investigate "did not reflect reasonable professional judgment." (*Ibid.*) "Porter may have been fatalistic or uncooperative, but that does not obviate the need for defense counsel to conduct *some* sort of mitigation investigation." (*Id.* at 453, citing *Rompilla v. Beard, supra*, 545 U.S. at pp. 381-382.)

At the state post-conviction hearing in *Porter*, a mental health expert, Dr. Dee, testified that Porter suffered from brain damage, a finding that was disputed by the state's experts. (*Porter, supra*, 130 S.Ct. at p. 451.) The Supreme Court held that the lower court erred in failing to consider the mitigating impact this evidence would have had on the finder of fact: "While the State's experts identified perceived problems with the tests that Dr. Dee used and the conclusions that he drew from them, it was not reasonable to discount entirely the effect that his testimony might have had on the jury or the sentencing judge." (*Id.* at pp. 455-456; see also *Sears, supra*, 130 S.Ct. at pp. 3262-3263 [significant frontal lobe abnormalities constituted relevant mitigation regardless of its cause].)

Similarly, respondent urges this Court to discount entirely the mitigating impact of Dr. Morris's expert opinion that petitioner was sexually abused by his mother. (Respondent's Exceptions and Brief on the Merits, p. 46.) Assuming without in any way conceding that this Court questions the strength of Dr. Morris's testimony regarding mother-son

incest – the only aspect of the mitigation challenged by respondent – it would be error to "discount entirely the effect that his testimony might have had on the jury. . . ." (*Porter, supra,* 130 S.Ct. at pp. 455-456.) This is especially true given the referee's finding that this evidence was entirely credible. (Findings of Fact, at p. 16.) In *In re Scott* (2003) 29 Cal.4th 783, 822, this Court found it "highly unlikely that a reasonable juror would credit evidence that the referee finds incredible." It should follow that where the referee finds the evidence credible, it is likely that at least one juror would also find it credible.[2]

In any event, sexual abuse by the mother, according to Dr. Morris, was only one of a cluster of traumatizing experiences in Crew's life that had an adverse effect on his functioning and mental state. (See, e.g., Morris Declaration, pp. 7, 40-41; Evidentiary Hearing RT 154-156.)[3] Dr. Morris further testified that even assuming Crew was not molested by his mother, his mental health symptoms, his family history and his presentation are consistent with someone with a traumatic background. (Evidentiary Hearing RT 102.) In other words, given the undisputed evidence in the social history, there is "something amiss in this person's background . . . We know that we usually don't present with this picture without having

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[2] Significantly, the two judges who have heard evidence in this case, the trial judge (who granted the motion to modify the sentence pursuant to Penal Code section 190.4(e) even without the benefit of the available mitigating evidence) and the referee for the evidentiary hearing were both persuaded by the strength of the case for life.

[3] The availability and credibility of these other factors were not disputed by respondent. They include: extreme parental neglect, sexual exploitation of Crew by his grandfather, depression, and long-term drug and alcohol addiction.

some kind of inappropriate kinds of activities in childhood." (Evidentiary Hearing RT 155.)

The Court concluded in *Porter* that it does not "require a defendant to show 'that counsel's deficient conduct more likely than not altered the outcome' of his penalty proceeding, but rather that he establish 'a probability sufficient to undermine confidence in [that] outcome.'" (*Porter*, *supra*, 130 S.Ct. at pp. 455-456, quoting *Strickland v. Washington, supra*, 466 U.S. at pp. 693-694.) Utilizing this standard, petitioner has established prejudice given the lack of any aggravation other than the capital crime, the testimony of Dr. Morris, including but not limited to sexual abuse, as well as Dr. Smith's unchallenged testimony that Crew suffered from long-term drug and alcohol dependence, lay witness testimony of Crew's family history, upbringing and mental health symptoms, and the mitigation evidence presented at trial.

With regard to deficient performance, petitioner previously cited to the 1989 ABA Guidelines that were in effect at the time of trial in support of his contention that counsel's failure to undertake a timely and thorough social history investigation was inconsistent with prevailing professional norms. (See Petitioner's Brief on the Merits, p. 8, citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989).) In *Bobby v. Van Hook* (2009) __ U.S. __, 130 S. Ct. 13, 16, the Supreme Court castigated the Sixth Circuit for relying on the 2003 ABA Guidelines which were announced eighteen years *after* the defendant's trial. More recently, in *Padilla v. Kentucky* (2009) __ U.S. __, 130 S.Ct. 1473, the Court reaffirmed "that '[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable.'" (*Id.* at p. 1482 [citations omitted].) The

Court held that although not "'inexorable commands,'" *id.* at p. 1482, quoting *Bobby*, *supra*, 130 S.Ct. at p. 17, "these standards may be valuable measures of the prevailing professional norms of effective representation . . . ." (*Padilla*, *supra,* 130 S.Ct. at p. 1482.)

Finally, in *In re Valdez* (2010) 49 Cal.4th 715, this Court recently rejected a claim of penalty phase ineffective assistance of counsel. As in petitioner's case, the mitigation presented at trial consisted of a positive portrayal of the defendant. Valdez's father described his son as a good worker who was obedient and respectful to his parents, and other witnesses testified that he was not violent. There was no evidence that Valdez was abused as a child. (*Valdez*, *supra*, 49 Cal.4th at p. 734.) At the reference hearing, in contrast to the trial evidence, Valdez presented evidence that his father was an alcoholic who was verbally and physically abusive. There was also expert testimony that Valdez suffered from complex post-traumatic stress disorder and evidence of brain dysfunction. (*Ibid.*)

Unlike in petitioner's case, however, the referee in *Valdez* found virtually none of the mitigation presentation to be credible. The referee believed trial counsel's assertion that he "specifically asked petitioner if his father or anyone else had abused him and petitioner replied in the negative," and concluded that "petitioner's denial was truthful." (*In re Valdez*, *supra*, 49 Cal.4th p. 737.) The referee found that counsel interviewed witnesses prior to trial who subsequently claimed to have witnessed abuse but with the exception of one incident, failed to disclose any beatings. These witnesses, who contended at the hearing that counsel never asked them about abuse, were not credible. (*Ibid.*) The referee also determined that Valdez failed to prove that he developed PTSD or suffered from brain damage. Thus, according to the referee, trial counsel's preparation was

reasonable and petitioner failed to prove that "substantial mitigating evidence existed at the time of his trial." (*Ibid.*)

This Court determined that the referee's findings were supported by substantial evidence, holding that the record "provides convincing reasons to suspect the veracity of the claims by petitioner's family and friends that he 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 [counsel] failed to ask." (*Id.* at p. 737.)

This provides a stark contrast to petitioner's case in which substantial evidence supports the referee's findings that: 1) the lay and expert witnesses provided credible mitigating evidence at the hearing; 2) trial counsel did not interview witnesses for the purpose of eliciting anything negative in petitioner's upbringing; and 3) while petitioner did not disclose any childhood abuse or trauma, he did not deny having been abused. Indeed, unlike in *Valdez*, petitioner was never asked whether he had been abused. Thus, while this Court found trial counsel in *Valdez* to have conducted an adequate penalty phase investigation and presentation, the same cannot be said for petitioner's counsel.

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Petitioner is entitled to relief on his claim of ineffective assistance of counsel.

Dated: September 29, 2010

Respectfully submitted,

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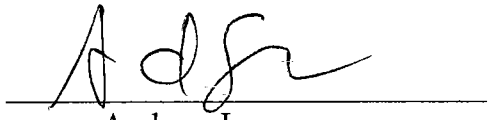
(CAL. RULES OF COURT, RULE 8.630))

I, Andrew Love, am the Supervising Deputy State Public Defender assigned to represent petitioner, Mark Crew, in these habeas corpus proceedings. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 2,784 words in length excluding the tables and certificates.

Dated: September 29, 2010



Andrew Love

DECLARATION OF SERVICE

Re: In re Mark Christopher Crew, S107856

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

PETITIONER'S SUPPLEMENTAL BRIEF

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

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and causing said envelope to be sealed and deposited in the United States mail, with postage thereon fully prepaid, at San Francisco.

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KECIA BAILEY