IN THE SUPREME COURT OF FLORIDA

ANTON KRAWCZUK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC10-680
L.T. No. 90-2007 CF-B
DEATH PENALTY CASE

ON APPEAL FROM THE CIRCUIT COURT
OF THE TWENTIETH JUDICIAL CIRCUIT,
IN AND FOR LEE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The following factual history is taken from this Court's opinion affirming Krawczuk's convictions and death sentence on direct appeal.

> On September 13, 1990, a decomposing body was found in a rural wooded area of Charlotte County. Earlier, David Staker's employer notified Lee County authorities that he had missed several days of work and had not picked up his paycheck. When she went to his home, she found the door open, and it appeared that the house had been robbed. Near the end of September, the Charlotte County body was identified as Staker, and Gary Sigelmier called the Charlotte County Sheriff's office to report that he may have bought the property stolen from Staker's home. Sigelmier identified Krawczuk and Billy Poirier as the men who sold him the stolen goods, and Lee and Charlotte deputies went to the home Krawczuk and Poirier shared in Lee County. They found both men at home and took them to the Lee County Sheriff's office where, after waiving his Miranda [FN1] rights, Krawczuk confessed to killing Staker.
>
> FN1. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).
>
> According to his confession, Krawczuk had known Staker for about six months and had a casual homosexual relationship with him, as did Poirier. The week before the murder, the pair decided to rob and kill Staker. Krawczuk called and arranged for him and Poirier to visit Staker. Krawczuk picked Poirier up at work and drove him home to change clothes. He parked in a shopping area, and the pair walked to Staker's house. Once there, they watched television for twenty to thirty minutes, and Krawczuk then suggested that they go to the bedroom. With the undressed trio on the bed, Krawczuk started roughing up Staker and eventually began choking him. Poirier assisted by holding Staker's mouth shut and pinching his nose closed. Staker resisted and tried to hit Krawczuk with a lamp, but Poirier took it away from him. The choking

continued for almost ten minutes, after which Krawczuk twice poured drain cleaner and water into Staker's mouth. When fluid began coming from Staker's mouth, Poirier put a wash cloth in it and tape over Staker's mouth. Krawczuk tied Staker's ankles together, and the pair put him in the bathtub. They then stole two television sets, stereo equipment, a video recorder, five rifles, and a pistol, among other things, from the house and put them in Staker's pickup truck. After putting the body in the truck as well, they drove to Sigelmier's. Sigelmier bought some of the stolen items and agreed to store the others. Krawczuk and Poirier returned to their car, transferred Staker's body to it, and abandoned Staker's truck. Krawczuk had scouted a rural location earlier, and they dumped Staker's body there.

When the deputies went to Krawczuk's home, they had neither a search warrant nor an arrest warrant. Krawczuk moved to suppress his confession as the product of an illegal arrest. In denying that motion the court held that the deputies had probable cause to arrest Krawczuk when they went to his house but that Poirier's mere submission to authority did not provide legal consent to enter the house. Although the judge found that Payton v. New York, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980), had been violated, he also found Krawczuk's confession, made after Miranda rights were given and waived, admissible under New York v. Harris, 495 U.S. 14, 110 S. Ct. 1640, 109 L. Ed. 2d 13 (1990). After losing the motion to suppress, Krawczuk sought to change his plea to guilty. The court held an extensive plea colloquy, during which Krawczuk was reminded that pleading guilty cut off the right to appeal all prior rulings. Krawczuk and his counsel also informed the court that Krawczuk wished to waive the penalty proceeding. Neither the state nor the court agreed to this, and the penalty phase took place in early February 1992.

Krawczuk refused to allow his counsel to participate in selecting the penalty phase jury and forbade her from presenting evidence on his behalf. The jury unanimously recommended that he be sentenced to death. Afterwards, the court set a date for hearing the parties and a later date for imposition of sentence.

> At the next hearing the judge, over Krawczuk's personal objection, stated that he would look at the presentence investigation report and the confidential defense psychiatrist's report for possible mitigating evidence. At the final hearing the court sentenced Krawczuk to death, finding three aggravators and one statutory mitigator.[FN2]
>
> FN2. Poirier pled guilty to second-degree murder and robbery in exchange for a 35-year sentence.

Krawczuk v. State, 634 So. 2d 1070, 1071-72 (Fla. 1994).

This Court denied Krawczuk's motion for rehearing on April 20, 1994, and issued its mandate on May 20, 1994. On June 30, 1994, Krawczuk filed a petition for writ of certiorari in the United States Supreme Court, which was denied October 3, 1994. Krawczuk v. Florida, 513 U.S. 881, 115 S. Ct. 216 (1994).

Krawczuk initiated postconviction proceedings on October 3, 1995, with the filing of a motion pursuant to Florida Rule of Criminal Procedure 3.850. (PCR1:3-148). The trial judge, the Honorable James R. Thompson, presided over numerous status hearings, primarily with regard to the collection of public records. On March 15, 2002, Krawczuk filed an Amended Motion to Vacate (PCR S1:19-126), and the State timely filed a response. (PCR13:1104-1292).

On January 20-21, 2004 and March 8, 2004, the trial court conducted an evidentiary hearing on Krawczuk's motion for postconviction relief. (PCR17-18:1491-1847; 20:2370-90). At the evidentiary hearing, collateral counsel presented testimony

from numerous witnesses, including Krawczuk's trial attorney, Barbara LeGrande. Primarily, the testimony at the evidentiary hearing concerned potential mitigation that Krawczuk could have introduced at the time of his trial had he not knowingly waived the presentation of such evidence and sought a death sentence. Krawczuk's trial attorney, Barbara LeGrande, an experienced capital attorney, testified that she was court-appointed to represent Krawczuk in 1990-1992.[1] (PCR18:1775). On September 27, 1991, prior to LeGrande being able to conduct much of an investigation into potential mitigation evidence, Krawczuk pled guilty to first degree murder and indicated that he wanted the death penalty and wanted to waive the presentation of mitigating evidence.[2] (DAR3:386-422; PCR18:1780-82). Ms. LeGrande testified that in the early 1990s, she would work the guilt phase portion of the case and then start working on the penalty phase portion closer to the time of trial. (PCR18:1783-84). In this case, she had briefly spoken with Krawczuk's mother and grandmother,[3] had Krawczuk evaluated by Dr. Richard Keown,[4] and

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[1] The court appointed Ms. LeGrande on September 28, 1990. (DAR3:444).

[2] The State requested a penalty phase jury proceeding and the trial court granted the State's request.

[3] Appellant was not cooperative with trial counsel regarding his family and he "wanted to leave his family out of it." (PCR18:1831).

[4] Trial counsel provided Dr. Keown with numerous documents (PCR21:2473), and testified that Dr. Keown, after examining

had made a motion for the appointment of a mitigation expert. (PCR18:1782; PCR19B:2198-2204). Because Appellant did not want to present any mitigating evidence and pled guilty, Ms. LeGrande testified that she could not pursue the appointment of a mitigation expert. She testified that had Krawczuk allowed her to present mitigation, she would have called mitigation witnesses and presented evidence.[5] (PCR18:1829).

Collateral counsel also questioned trial counsel LeGrande regarding her perception of the relative culpability of Krawczuk and his codefendant, William Poirier, and she testified that in her opinion, the two men were equally culpable. Collateral counsel introduced documents indicating that, after Krawczuk's sentence, Poirier had pled guilty to second degree murder and had been sentenced to 35 years in prison and was scheduled to be released in 2005. (PCR18:1787-94). Trial counsel had also conducted a lengthy interview with Krawczuk and was aware of her client's version of how the murder took place and his alleged culpability. (PCR18:1794-1802). Collateral counsel questioned Ms. LeGrande on her reasons for failing to present argument to

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Krawczuk, did not recommend that she investigate any further types of mental health mitigation. (PCR18:1785).

[5] When Appellant pled guilty and requested the imposition of the death penalty, trial counsel LeGrande informed the court that she had "the names that he has provided, we have Dr. Keown and Jim Price who would appear as mitigation witnesses but he has instructed me not to do that." (DAR3:405).

the jury or the trial judge regarding the two defendants' relative culpability, and Ms. LeGrande explained that Appellant did not want a sentencing phase, did not want her to cross-examine any witnesses or make any arguments, but simply wanted to be sentenced to death. (PCR18:1806). Based upon the caselaw applicable at the time of Appellant's proceedings, trial counsel opined that she provided effective assistance of counsel and did everything that was necessary based upon her client's wishes. (PCR18:1807). Counsel acknowledged that under present caselaw, her performance could be considered deficient. (PCR18:1808).

In addition to trial counsel LeGrande, collateral counsel presented numerous mitigation witnesses at the postconviction hearing regarding Krawczuk's family history and his mental condition. Appellant's twin brother, Charles Krawczuk, testified about their childhood upbringing in New York. Appellant's father left soon after his birth and Appellant was raised primarily by an abusive mother. (PCR17:1514-1540). According to Charles Krawczuk, their mother was verbally and physically abusive to Appellant, and although their mother was abusive to all the children, Appellant bore the brunt of her violence. (PCR17:1519).

Santo Calabro was married to Appellant's mother, Patricia Goss, for approximately seven years during Appellant's childhood

and testified about her abusive and violent nature. (PCR17:1554-70). Santo Calabro also testified that Appellant's mother's anger was magnified toward Appellant relative to her other children. (PCR17:1558).

Patricia Goss, Appellant's mother, testified at the evidentiary hearing and stated that she was beaten by Appellant's biological father while she was pregnant with the twin boys. (PCR 17:1590-94) She acknowledged that she hit Appellant the most, but testified that of all of her children, he was the most incorrigible and aggravating. (PCR17:1595). She testified that she only struck Appellant when he did something in order to discipline him and to teach him to behave in a proper manner. (PCR17:1600). Ms. Goss testified that Appellant was in trouble with the law as a teenager for stealing cars. (PCR17:1597). After his arrest for the instant murder, she and her mother visited Appellant at the jail and asked him why he had killed the victim, and Appellant responded, "Well, the fella was gay anyway." (PCR 17:1598).

Collateral counsel presented the testimony of Paul Wise, a witness who worked with Appellant at McDonalds and who lived with Appellant for about nine months in the early 1980s. (PCR17:1605-07). Mr. Wise testified that Appellant smoked marijuana and used amphetamines. (PCR17:1609). Mr. Wise was

involved in Appellant's case in the early 1990s and had given a deposition.[6] At the evidentiary hearing, he was impeached with his deposition testimony wherein he indicated that the only drug he knew Appellant ever used was marijuana. Mr. Wise also described Appellant in the deposition as "violent" and "moody." (PCR17:1612-13).

Judith Nelson testified that she was married to Appellant for about one to one and a half years in 1986, and they had a child together. She testified that Appellant smoked marijuana regularly. (PCR20:2374-75). Ms. Nelson knew Appellant's codefendant, William Poirier, and described him as Appellant's protégé, because he was always trying to emulate everything Krawczuk did. (PCR20:2380). The witness subsequently learned that Appellant and Poirier were doing "sex swap things" and burglarizing homes and filling pillow cases with stolen goods. (PCR20:2380).

In addition to lay witnesses, collateral counsel presented testimony from psychologists Barry Crown and Faye Sultan. Dr. Crown testified that he was retained by collateral counsel to perform a neuropsychological examination of Appellant, and met

[6] At the time of Appellant's plea, trial counsel LeGrande stated that she had mitigation witnesses, including "Jim Price." As the lower court noted, this was probably a misstatement as all indications are that the witness was actually Paul Wise because he had been deposed and there has never been a "Jim Price" involved in this case.

with him on December 10, 2003. (PCR17:1633, 1637). Dr. Crown testified that he had testified in about 100 cases, twenty of which were capital cases, but he could not recall if he had ever testified for the State. (PCR17:1664). According to Dr. Crown, the neuropsychological testing he conducted showed that Appellant was not malingering, had normal intellectual functioning levels, but poor intellectual efficiency, i.e., in layman's terms, Appellant "can't use the brains he's got." (PCR17:1637-38). Dr. Crown opined that Appellant has organic brain damage to the anterior portion of his brain. (PCR17:1638). The witness testified that this condition was not likely a recent development, but rather, was related to neurodevelopmental difficulties. Additionally, Appellant's brain condition could be aggravated by a past head injury and the usage of drugs and alcohol. (PCR17:1639).

Dr. Crown also found that Appellant had an auditory selective attention deficit. This condition "means that when there are a lot of things going on, he finds it extremely difficult, if not impossible, to determine what he should be paying attention to out of the numbers of different things that are available to pay attention to." (PCR17:1640-41). Given these conditions, Dr. Crown testified that he thought Appellant was under the influence of extreme mental or emotional

disturbance at the time of the murder. (PCR17:1648). He further opined that Appellant's ability to conform his conduct to the requirements of the law was impaired because his mental condition would cause him to act impulsively. (PCR17:1648-49).

On cross-examination, Dr. Crown conceded that he had not reviewed any background material regarding Appellant's case, except this Court's direct appeal opinion. (PCR17:1650, 1653, 1658, 1668). Dr. Crown based his opinion solely on the results of his admittedly "brief" interview of Appellant and his "thorough" testing procedure. (PCR17:1651-54). Dr. Crown acknowledged that he did not perform any medical testing or brain scans on Appellant, had never seen any medical records regarding Appellant's head injury, and relied on Appellant's self-reporting regarding his drug and alcohol usage. (PCR17:1651-53). Additionally, Dr. Crown had never reviewed Dr. Richard Keown's report from April 9, 1991, indicating that Appellant did not have any organic brain damage when he served in the military. (PCR17:1663). The doctor further acknowledged that the "vast majority" of his testimony in criminal capital cases was for the defense, and he could not recall a single case where he had ever testified for the State. (PCR17:1664).

Dr. Faye Sultan, a psychologist from North Carolina, met with Appellant seven times between 1999 and 2003, and although

she performed two hours of psychological testing including the MMPI-2,[7] she testified primarily as a mitigation specialist relaying information she obtained from her conversations with Appellant's family and friends; the same witnesses who had earlier testified at the evidentiary hearing. (PCR18:1698-1723). Dr. Sultan diagnosed Appellant as having cognitive disorder – not otherwise specified, which "means that there are areas of psychological dysfunction, of learning problems, of impulse control, there are items in his behavior that only are explained by neuropsychological problems." (PCR18:1694-95). She also opined that Appellant suffered from obsessive-compulsive disorder resulting in rigid thinking and ritualized behaviors. (PCR18:1695). Dr. Sultan further noted that Appellant had been previously diagnosed in the military and by Dr. Keown with personality disorder – not otherwise specified. (PCR18:1697).

When asked by collateral counsel if she thought Appellant was under extreme mental or emotional disturbance at the time of the murder, she responded:

> I do. I think that Mr. Krawczuk has been suffering from disturbance, disorder for all or most of his life. Those psychological components that I just

[7] As part of his 1991 evaluation, Dr. Keown had also administered the MMPI-2 to Appellant. (PCR19B:2203). The only other test given by Dr. Sultan, the Incomplete Sentences Blank, "didn't tell [her] much of anything." (PCR18:1694).

> talked about, in all of the ways that they impact his behavior, certainly existed at the time of the offense.

(PCR18:1722-24). She further opined that Krawczuk had significant deficits in his ability to conform his conduct to the requirements of the law due to his inability to control his impulses and make good decision. (PCR18:1724-25). Collateral counsel further inquired whether Dr. Sultan's opinion regarding Krawczuk's mental condition affected his decision to waive the presentation of mitigation evidence, but the witness could not offer an opinion on the voluntariness of the waiver. (PCR18:1726-27, 1756).

After the presentation of the evidence at the evidentiary hearing, the parties submitted written closing arguments. (PCR20:2393-97, 2401-14). On January 25, 2010, the trial court issued a detailed 105-page order denying Appellant's motion for postconviction relief. (PCR21:2434-558). On February 9, 2010, collateral counsel filed a motion for rehearing and a second motion to disqualify Judge James R. Thompson. (PCR2:178-85, 187-88; PCR21:2559-91). As will be discussed in more detail in Issue I of this Answer Brief, collateral counsel alleged that the trial judge had engaged in "independent investigation" when discussing Dr. Barry Crown's opinion testimony.[8] On March 5,

[8] In pertinent part, the trial court stated:

2010, the trial court denied the motion as "legally insufficient." (PCR21:2592). On March 8, 2010, the trial court denied Appellant's motion for rehearing, and this appeal follows. (PCR21:2593-98).

> Dr. Crown appears to be an expert relied on by defendants, exclusively, in capital cases in penalty phase and post convictions proceedings. In addition to his testimony, 20 times in capital cases, EH 171, (court infers from answers that all of the times he was called by the defense) if his name is run in Westlaw, "Barry Crown" (Florida State and Federal cases data base) it appears in numerous such cases for the defense. Often with opinions similar to those expressed in this case. He presents as a "go to" witness for a defendant in a capital case in need of mental health mitigation.

(PCR21:2451).

SUMMARY OF THE ARGUMENT

Appellant's claim that he was denied a fair and full hearing on his postconviction claims because the trial judge was biased is without merit. In denying Appellant's postconviction motion, the trial judge noted in its written order that it did not find Appellant's mental health expert's opinions credible given the evidence in the case. The court noted that the expert, Dr. Barry Crown, had testified in numerous other capital cases and had given similar mental health testimony. The court's innocuous comment regarding Dr. Crown did not give rise to an objective, well-founded fear that Appellant would not get a fair hearing before the judge. Rather, Appellant's subjective fear was based solely on the court's adverse ruling rejecting the witness's opinion testimony. Thus, the trial judge properly denied Appellant's motion to disqualify.

Appellant's claim that his trial counsel was ineffective for failing to investigate mitigation evidence and that this deficiency caused his waiver of the presentation of such evidence to be involuntary and unknowing is without merit. Trial counsel had conducted some mitigation investigation, including having Appellant evaluated by a mental health expert, and informed Appellant of this evidence. Nevertheless, Appellant went against the advice of his attorney and pled

guilty and requested the imposition of the death penalty. Appellant has never alleged, nor testified, that he would have presented evidence of mitigation at trial had his counsel conducted a more thorough investigation. In addition to being unable to demonstrate prejudice based on his failure to testify, Appellant also fails to establish that the outcome would have been different even had he presented mitigating evidence. As the lower court properly determined, there is no reasonable probability of a different outcome given the substantial aggravation in this case and the minimal mitigation presented at the postconviction evidentiary hearing.

Appellant's claim that he is innocent of the death penalty because his codefendant was "equally culpable" and only received a thirty-five year prison sentence is without merit for a number of reasons. First, this claim is procedurally barred because this Court was aware of the codefendant's sentence at the time of Appellant's direct appeal and affirmed the lower court's finding that there was no disparate treatment. Additionally, as a matter of law, the codefendant's sentence was irrelevant to any proportionality review because the codefendant was convicted of the lesser crime of second degree murder. Finally, contrary to Appellant's assertions, the two men were not "equally" culpable. As the lower court properly noted based on the

evidence in this case, Krawczuk was the more culpable of the two men.

Appellant's claim that his trial counsel was ineffective for failing to properly litigate a motion to suppress is procedurally barred and without merit because Appellant pled guilty and did not reserve his right to appeal the pretrial ruling on his motion to suppress. Appellant has not alleged in his postconviction motion, nor did he testify, that he would not have pled guilty and insisted on going to trial had trial counsel performed differently. Additionally, Appellant's ineffectiveness claim is without merit because trial counsel did not perform deficiently in allegedly failing to investigate his mental condition and he cannot establish prejudice because, even if trial counsel presented evidence that Appellant suffered from a compulsive personality, it would not have affected the trial court's ruling that he voluntarily waived his Miranda rights.

The postconviction court properly denied Appellant's claim that trial counsel was ineffective for failing to object to the prosecutor's comments during the penalty phase and for failing to object to the trial court's jury instructions. The trial court properly analyzed Appellant's claim and found that Appellant could not establish prejudice under Strickland because any error in failing to object to the prosecutor's comments was

harmless error and trial counsel did not perform deficiently by failing to object to the standard jury instructions that properly informed the jury of the applicable law.

ARGUMENT

ISSUE I

APPELLANT'S ARGUMENT THAT HE WAS DENIED A FULL AND FAIR HEARING BEFORE AN IMPARTIAL JUDGE IS WITHOUT MERIT.

Judge James R. Thompson presided over Krawczuk's original trial proceedings in 1990-92, and presided over the entire postconviction proceedings in this case, including the evidentiary hearing. At the evidentiary hearing, collateral counsel presented evidence from their retained mental health expert, Dr. Barry Crown, and he stated that he had testified in about twenty capital cases, but could not recall whether he had ever testified for the State. (PCR17:1664). Ultimately, after hearing all of the testimony, the trial court issued an extremely detailed order denying postconviction relief. In that order, Judge Thompson discussed Dr. Crown's opinion testimony, and stated:

> Dr. Crown appears to be an expert relied on by defendants, exclusively, in capital cases in penalty phase and post convictions proceedings. In addition to his testimony, 20 times in capital cases, EH 171, (court infers from answers that all of the times he was called by the defense) if his name is run in Westlaw, "Barry Crown" (Florida State and Federal cases data base) it appears in numerous such cases for the defense. Often with opinions similar to those expressed in this case. He presents as a "go to" witness for a defendant in a capital case in need of mental health mitigation.

(PCR21:2451).

Based on the judge's comment in his order denying postconviction relief, Appellant filed a motion to disqualify[9] Judge Thompson and alleged that he had an "objectively reasonable fear . . . that he did not receive a fair hearing and will not receive a fair determination of his motion for rehearing." (PCR21:2562). The trial court denied the motion for disqualification as legally insufficient and also denied the motion for rehearing. (PCR21:2592-98). Appellant now asserts on appeal that he did not receive a fair and full hearing before an impartial judge because the trial judge engaged in independent investigation when he consulted Westlaw and reviewed cases where Dr. Crown had testified. The State submits that Appellant's argument is without merit and that the record clearly establishes that he received a fair and full postconviction hearing before an impartial judge and that his motion to disqualify was legally insufficient.

Appellant couches his claim as a denial of due process and alleges that he was denied a fair and full hearing before an impartial judge, but his allegation relies exclusively on the judge's innocuous comment in his postconviction order and his

[9] Appellant's motion, filed on February 9, 2010, appears to be timely filed within ten days following the discovery of the facts constituting the grounds for the motion as collateral counsel states that she did not receive the trial court's order denying relief until February 1, 2010. See Fla. R. Jud. Admin. 2.330.

denial of Appellant's motion to disqualify. As this Court stated in Lynch v. State, 2 So. 3d 47, 78 (Fla. 2008), "[a] petition for writ of prohibition is the proper means through which to challenge a lower court's denial of a motion to disqualify." Thus, because Appellant failed to properly file this claim pursuant to a writ of prohibition, the State submits that Appellant has improperly raised this issue in the instant appeal.

Even if this Court addresses Appellant's claim, there has been no showing that a reasonably prudent person would have been placed in fear of not receiving a fair and impartial hearing before Judge Thompson based on his legal research in this case. As this Court noted in Lynch, the question of whether a motion to disqualify is legally sufficient is a question of law which is reviewable by the *de novo* standard of review. Id.; see also Arbelaez v. State, 898 So. 2d 25 (Fla. 2005); Barnhill v. State, 834 So. 2d 836 (Fla. 2002). In this case, the trial judge abided by rule 2.330 and denied the motion to disqualify as legally insufficient and did not take issue with the factual allegations. The trial court did not dispute any assertions contained in the motion and did not become involved in a swearing match with Appellant. See Young v. State, 671 So. 2d 277, 277 (Fla. 2d DCA 1996) ("After defense counsel moved for

recusal, the trial court properly denied the motion as legally insufficient, stated no other reason for the denial, and did not take issue with the motion.").

In order to decide whether a motion for disqualification is legally sufficient, "[a] determination must be made as to whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial." Livingston v. State, 441 So. 2d 1083, 1087 (Fla. 1983); see also Mansfield v. State, 911 So. 2d 1160 (Fla. 2005) (noting that "[a] motion to disqualify must be well-founded and contain facts germane to the judge's undue bias, prejudice, or sympathy"). It is well settled that subjective fears of bias or prejudice are not legally sufficient to justify disqualification when they are based simply on adverse rulings. Id.; see also Barwick v. State, 660 So. 2d 685, 692 (Fla. 1995); Jackson v. State, 599 So. 2d 103, 107 (Fla. 1992).

Appellant's allegations of bias or prejudice based on the trial judge's brief written comment[10] is a subjective fear on the part of Appellant and based solely on an adverse ruling by the trial judge. The court's legal research of running Dr. Crown's name through Westlaw and noting that he was a "go to" defense

[10] The trial judge's order is extremely detailed and covers over 100 single-spaced pages. Appellant only points to the court's brief comment regarding Dr. Crown as evidence of alleged bias.

expert witness in capital cases who often gave similar mental health testimony is not an improper factual investigation demonstrating bias against Appellant. A review of the trial court's order regarding Dr. Crown's opinion testimony clearly establishes that the trial judge rejected Dr. Crown's opinions based on the evidence presented at trial and the postconviction proceedings and the court's decision was not based on an improper comparison of Dr. Crown's opinions from other unrelated capital cases. Compare Vining v. State, 827 So. 2d 201 (Fla. 2002) (rejecting claim that defendant was denied a full and fair sentencing hearing where trial court reviewed depositions, the medical examiner's report, and checked the victim's probate records, all of which were extra-record materials, but nevertheless expressed dissatisfaction over the trial court's act of conducting an independent investigation and reviewing information that was not presented during the trial); Lynch v. State, 2 So. 3d 47 (Fla. 2008) (rejecting claim of judicial bias when trial judge test fired a gun placed in evidence without notice to counsel); Brown v. St. George Island, Ltd., 561 So. 2d 253 (Fla. 1990) (holding that trial judge should be disqualified when he received an affidavit from defendant Stocks and, without hearing any testimony from Mr. Stocks, stated "if Mr. Stocks were here I wouldn't believe him anyway"); Owens-Corning

Fiberglass Corp. v. Parsons, 644 So. 2d 340 (Fla. 1st DCA 1994) (finding that trial judge erred in denying motion for disqualification when judge made comment, based on his previous experience with company, that "their credibility with me is about as thin as a balloon").

In the instant case, the trial judge did not make a gratuitous comment about a party's veracity which was unnecessary and unrelated to any court ruling. Here, the court found it necessary to address Dr. Crown's credibility when making his ruling on the postconviction claims.[11] Thus, Appellant's motion to disqualify was legally insufficient as it was based on the court's comments when making an adverse ruling and merely expressed a subjective fear on Appellant's part. The comments upon which Appellant's motion was founded do not suggest the trial judge harbored any bias or prejudice against the defendant. See Barwick v. State, 660 So. 2d 685, 692 (Fla. 1995) (the fact that the trial judge makes an adverse ruling is not a sufficient basis for establishing prejudice); Dragovich v.

[11] As will be discussed in more detail in Issue II, infra, Dr. Crown's opinions regarding mental mitigation are irrelevant in this case because Appellant pled guilty and waived the presentation of all mitigating evidence at trial and refused to allow his attorney to present any argument against the death penalty. As Appellant has never testified that he would not have waived the presentation of mitigating evidence and it is unrebutted that this was a knowing and intelligent waiver, any mental mitigation from Dr. Crown would have never been placed before the jury or trial judge.

State, 492 So. 2d 350 (Fla. 1986) (finding that without a showing of some actual bias or prejudice so as to create a reasonable fear that a fair trial cannot be had, affidavits supporting a motion to disqualify are legally insufficient). There has been no showing that Appellant would not receive a fair and impartial resolution of his postconviction claims before this judge or that his due process rights were violated. Because Appellant's subjective fears are insufficient to require the disqualification of the trial judge, this Court should affirm the court's denial of Appellant's motion to disqualify.

ISSUE II

THE TRIAL COURT PROPERLY DENIED APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON ALLEGATIONS THAT TRIAL COUNSEL PERFORMED DEFICIENTLY IN INVESTIGATING MITIGATING EVIDENCE AND THAT HIS WAIVER OF THE PRESENTATION OF SUCH EVIDENCE WAS UNKNOWING AND INVOLUNTARY.

In his second issue, Appellant combines a number of his postconviction claims and argues that trial counsel was ineffective for failing to investigate and present available mitigating evidence and trial counsel's alleged failures in this regard rendered his decision to waive the presentation of mitigating evidence unknowing and involuntary. After conducting an evidentiary hearing on these related claims, the trial court issued a detailed order denying relief. The State submits that the lower court properly concluded that Appellant was not entitled to relief on his ineffective assistance of counsel claims based on his failure to establish both deficient performance and prejudice as required by Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984).

In order for a defendant to prevail on a claim of ineffective assistance of counsel claim pursuant to the United States Supreme Court's decision in Strickland, a defendant must establish two general components.

> First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside

> the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined.

Maxwell v. Wainwright, 490 So. 2d 927, 932 (Fla. 1986). When addressing the prejudice prong of a claim directed at penalty phase counsel's performance, the defendant "must demonstrate that there is a reasonable probability that, absent trial counsel's error, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Cherry v. State, 781 So. 2d 1040, 1048 (Fla. 2000). Furthermore, as the Strickland Court noted, there is a strong presumption that counsel's performance was not ineffective. Id. at 690. A fair assessment of an attorney's performance requires that every effort be made to eliminate the distorting effects of hindsight and to evaluate the conduct from counsel's perspective at the time. Id. at 689. The defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id.

When reviewing a trial court's ruling on an ineffectiveness claim, this Court must defer to the trial court's findings on factual issues, but reviews the trial court's ultimate conclusions on the deficiency and prejudice prong *de novo*.

Bruno v. State, 807 So. 2d 55, 62 (Fla. 2001). In this case, contrary to collateral counsel's assertions, the lower court properly identified the applicable law in analyzing Appellant's claims, correctly applied this law to the facts as presented in the trial and postconviction proceedings, and concluded that Appellant was not entitled to postconviction relief. In the order denying relief, the court began its analysis by addressing the various standards to be applied to Appellant's postconviction claims and noted that, in regard to his ineffective assistance of counsel claims, the court was required to apply the standards set forth by the United States Supreme Court in Strickland and that Appellant had the burden of establishing that trial counsel's performance was deficient and that he was prejudiced as a result, i.e., "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." PCR21:2436-60).[12]

[12] Collateral counsel asserts in his brief that the lower court erred in his Strickland prejudice analysis by requiring Appellant to establish "beyond a reasonable doubt" that the outcome would have been different. Initial Brief at 68. Although the court utilized this language in certain instances when discussing its harmless error analysis as to other claims, it is clear that the court properly utilized the "reasonable probability" standard when addressing Appellant's ineffective assistance of counsel claims. (PCR21:2440, 2464-65, 2470-72).

In addressing Appellant's claims, the trial court noted, in pertinent part:

> The issues in these claims are intertwined or are the same and the claims will be addressed as one. Claim II generally contest[s] the validity/extent of the record inquiry of Mr. Krawczuk's decision to waive presentation of mitigation and includes allegations that trial counsel's failure to investigate and inform Mr. Krawczuk of available mitigation contributed to an unknowing waiver. Claim III challenges counsel's conduct in failing to investigate and present mitigation and contends this failure rendered Mr. Krawczuk's decision to waive presentation of mitigation involuntary.
>
> The court will begin its analysis with a statement of the law, then discuss the Strickland prongs, deficient performance, i.e., whether counsel's performance failed to meet the standard of reasonableness under prevailing professional norms and prejudice, i.e., whether there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different, and then detail the facts with citations to the record.
>
> 1. Law:
>
> A competent defendant may waive presentation of mitigation evidence Hojan v. State, 3 So.3d 1204, 1211 (Fla. 2009), Hamblen v. State, 527 So.2d 800 (Fla. 1988). When a defendant is represented by counsel and seeks to waive the presentation of mitigation the court is not required to conduct a Faretta inquiry. Anderson v. State, 574 So.2d 87 (Fla. 1991). The court would note that at the beginning of the penalty phase an extensive inquiry was made and most if not all of the questions and admonitions required in a Faretta hearing were addressed. RA 691-706. In Koon v. Dugger, 619 So.2d 246 (Fla. 1993) the Florida Supreme Court established a prospective rule to be applied when a defendant, against his counsel's advice, refuses to permit the presentation of mitigating evidence in the penalty phase. In such situation counsel was required to inform the court on the record of the defendant's

decision, indicate whether, based on his investigation, he reasonably believes there to be mitigating evidence that could be presented and what that evidence would be and then the court should then require the defendant to confirm on the record that his counsel has discussed these matters with him, and despite counsel's recommendation, he wishes to waive presentation of penalty phase evidence. **This rule was established after this case and counsel cannot be deemed deficient for failing to foresee Koon**. See, Anderson v. State, 822 So.2d 1261 (Fla. 2002) at 1268. Also the procedures established by the prospective rule announced in Koon do not appear to be required by the U.S. Constitution, see Anderson v. Secretary for Dept. of Corrections, 462 F.3d 1319 (11th Cir. 2006) at 1330 (Moreover, the requirement that counsel state on the record what the mitigating evidence would be is solely a requirement of state law).

Therefore, it appears to the court that at the time of this case no particular form of record inquiry was required for a defendant to waive mitigation (waive the presentation of evidence) and as it is not subject to serious dispute that Mr. Krawczuk was, and is, a mentally competent man of at least average intelligence who was counseled by his attorney and asked and inquired of by the court and the prosecutor on multiple occasions beginning with the guilty plea, continuing at the beginning of and during the penalty phase some 4-5 months later and finally at the Spencer hearing some weeks after that regarding his decision to waive mitigation the basics requirements for a valid record waiver as they existed at the time of this case have been met.

The issue, however, is really one to be addressed as a claim of ineffective assistance of counsel. Did counsel's performance in her investigation for mitigation and in informing Mr. Krawczuk of existing mitigation fail to meet the standard of reasonableness under the then prevailing professional norms and if so has Mr. Krawczuk shown a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability being a probability sufficient to undermine confidence in the outcome.

Some three years after the evidentiary hearing in this case, the United States Supreme Court first addressed a case similar to this one in which a defendant unequivocally refused to permit the presentation of mitigating evidence, Schriro v. Landrigan, 550 U.S. 465, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007) (it was not objectively unreasonable for that court to conclude that a defendant who refused to allow the presentation of any mitigating evidence could not establish Strickland prejudice based on his counsel's failure to investigate further possible mitigating evidence.) The court split 5-4. The Supreme Court opinions in this case, majority and dissenting, the 9th Circuit panel opinion, 272 F.3d 1221, and the 9th Circuit en banc opinion, 441 F.3d 638, all inform this court. These opinions make clear that the issues are very close and that a proper resolution is very dependent on the facts of particular case. **They also make clear that the issues raised by the circumstances of this case are to be analyzed and resolved as claims of ineffective assistance of counsel and the rules to be applied are those set forth in Strickland and its progeny.**

In order to satisfy the prejudice prong in these circumstances Mr. Krawczuk is required to make three showings. First he must show that had counsel done a reasonable investigation she would have discovered the mitigating evidence. Second, he must show a reasonable probability that if he had been advised more fully of the mitigation evidence he would have authorized trial counsel to present the evidence at the penalty phase and/or at the Spencer hearing, see Gilreath v. Head, 234 F.3d 547,551,552 (11th Cir. Ga. 2000), cf., Grosvenor v. State, 874 So.2d 1176 (Fla. 2004). Third, he must show a reasonable probability that, if such evidence had been presented at the penalty phase the jury's recommendation would have been for a life sentence.[FN8] It would also seem that failing that he could also establish prejudice by establishing a reasonable probability that in spite of a jury recommendation of death had the evidence been presented at either the penalty phase or the Spencer hearing there is a reasonable probability that, absent trial counsel's error, the sentencer would have

> concluded that the balance of aggravating and mitigating circumstances did not warrant death. See Marguard v. State, 850 So.2d 417, 431 (Fla. 2002)

(PCR21:2463-65) (emphasis added) (footnotes omitted). After correctly identifying the relevant issues and applicable law, the trial court conducted a detailed analysis of the three separate issues: (1) whether trial counsel performed a reasonable investigation of potential mitigating evidence; (2) whether there was a reasonable probability that had trial counsel discovered this evidence and informed Appellant of the opportunity to present it, would Appellant have changed his mind and allowed trial counsel to present mitigating evidence; and (3) whether there is a reasonable probability that, if such mitigating evidence had been presented, would the outcome of the proceedings have been different.

(1) Trial counsel's investigation into mitigation

The trial court made numerous factual findings regarding trial counsel's investigation into potential mitigation evidence. The court focused his inquiry on "whether counsel was deficient in failing to conduct further investigation for mitigation before the plea and/or in her discontinuing all investigation of mitigation after Mr. Krawczuk pled and sought the death penalty." (PCR21:2466). The court noted that trial counsel had "developed two mitigation witnesses, Dr. Richard

Keown, . . . who, on motion of the defense, had been appointed 'to perform a psychiatric evaluation of Mr. Krawczuk and to provide assistance to defense counsel in the presentation of their case,' and Paul Wise,[13] . . . a general character witness who knew and worked with Mr. Krawczuk in the past. Although trial counsel testified at the evidentiary hearing that she had not discussed specific mitigation with Mr. Krawczuk it appears he was reasonably aware of what Dr. Keown and Paul Wise would testify to. He was furnished Dr. Keown's report by letter dated May 8, 1991, and he had given the name of Paul Wise to his counsel." (PCR21:2466-67) (record citations omitted). Trial counsel obtained Appellant's military records, including a psychiatrist's report regarding Appellant's discharge, and she provided these documents, among others, to Dr. Keown. (PCR21:2473). The court further found that Appellant did not just passively hinder trial counsel's investigation, but was actively directing trial counsel not to pursue mitigation. Appellant did not want trial counsel to involve his family and wanted to leave them out of the process. (PCR21:2467).

[13] The lower court noted that, at the time of Appellant's change of plea and waiver, trial counsel misspoke and identified this prospective witness as "Jim Price," rather than Paul Wise. As the court stated, Paul Wise was a former coworker with Appellant and was deposed by the State after the change of plea and was the witness called by collateral counsel at the evidentiary hearing, and "Jim Price has never come up before or after counsel's statement. (PCR21:2474).

After carefully considering the law and the facts as presented in the evidentiary hearing, the trial court concluded that trial counsel was deficient in failing to pursue further investigation into Appellant's family history. (PCR21:2467-68). The court found that trial counsel had not performed deficiently in investigating the relative culpability of the codefendant, in investigating Appellant's substance and/or alcohol abuse, or investigating his mental or emotional disturbance. The State submits that competent evidence supports the trial court's factual findings that trial counsel did not perform deficiently in these instances.

In addressing trial counsel's investigation into the relative culpability of codefendant William Poirier, the trial court noted that Poirier pled to second degree murder *after* Appellant was sentenced to death. The court noted that trial counsel had obtained Dr. Keown, in part, to determine whether Poirier had any influence over Appellant at the time of the murder. As further noted, Appellant refused to testify to any alleged influence by Poirier despite discussions with trial counsel regarding this subject, and Appellant further refused to allow Dr. Keown's testimony or report into evidence. Also, trial counsel had deposed another witness who had information regarding the crime, Gary Sigelmier, and had reviewed his

written statement during discovery. Finally, the court noted that Appellant's detailed confession to law enforcement established that he was the more culpable of the two men, thus, under these circumstances, the court found that trial counsel was not deficient in failing to further investigate this claim.

Clearly, the evidence supports the trial court's finding in this case regarding trial counsel's investigation into this circumstance. Trial counsel had Dr. Keown examine Appellant to determine whether codefendant Poirier had influence over Appellant, and Dr. Keown reported that "[m]ore than likely [Appellant] is the more passive of the two defendants, and so I think there is some truth to his allegation that he was influenced by his co-defendant. However, I think he is probably over stating this. Although he was going along with what his co-defendant wanted to do, he clearly knew what was taking place and clearly participated in the planning by locating a place to dump the body and in the actual murder of the victim." (PCR19B:2204). Of course, as the trial court properly noted, trial counsel was prohibited from presenting any of this evidence by Appellant when he specifically refused to testify regarding Poirier's alleged influence and when he knowingly and voluntarily waived the introduction of any evidence from Dr. Keown or others. (PCR18:1789). Additionally, as will be

discussed in more detail in Issue III, infra, the trial court's determination that Appellant was the more culpable of the two men is a factual finding that is supported by competent evidence.[14] See Puccio v. State, 701 So. 2d 858, 860 (Fla. 1997) ("A trial court's determination concerning the relative culpability of the co-perpetrators in a first-degree murder case is a finding of fact and will be sustained on review if supported by competent substantial evidence.").

Likewise, the trial court properly found that trial counsel was not deficient in investigating Appellant's substance and/or alcohol abuse. As noted in Dr. Keown's report, Appellant denied any problems with alcohol and stated that he only drank occasionally. "He reported little in the way of drug abuse, but did acknowledge starting to use marijuana at the age of fourteen. He stated that he would sometimes smoke a couple times a week and on weekends. This usually consisted of one joint after dinner which he used to fall asleep. He felt that it helped him to wind down." (PCR19B:2199). Furthermore, as counsel explained, based on Appellant's statements to her and Dr. Keown, she would not have done much investigation into alcohol or drug usage given Appellant's minimal usage.

[14] The fact that trial counsel testified that it was her personal opinion that the two men were equally culpable is not persuasive given the evidence to the contrary.

(PCR18:1785-86). Thus, the State submits that the trial court properly found that trial counsel's performance in failing to further investigate this aspect of mitigation was not deficient.

In addressing collateral counsel's allegation that trial counsel was deficient in failing to investigate mental mitigating evidence, the trial court reiterated that he did not find collateral counsel's postconviction experts' credible. The court stated:

> The court has previously addressed the testimony of the two mental health experts called by the defense at the postconviction proceeding. [See PCR21:2450-60]. Dr. Crown's opinion of organic brain disorder is rejected and to the extent Dr. Sultan is expressing expert opinions within the expertise of a clinical psychologist and not testifying as a mitigation specialist her opinions, divorced from those of Dr. Crown are the same, in the court's opinion, as those of Dr. Keown's but with a little more favorable spin for Mr. Krawczuk.
>
> According to Dr. Sultan even with her Mr. Krawczuk was not forthcoming and she had to spend quite a lot of time with for him to be forthcoming. She had a total of seven visits from March 15, 1999 and ending October 16, 2003. During that period her evaluation consisted of seven clinical interviews, about 13 hours, and the administration of the MMPI-2, marginally acceptable results, and the Rotter's Incomplete Sentences Blank, no information from test, about 2 hours. In other words 15 clinical hours about 2 hours of which were formal psychological testing.
>
> **This was the same diagnostic technique used by Dr. Keown, a psychiatrist, over a shorter time frame. Certainly at the time of this case a reasonable investigation would not in this court opinion have required counsel to have a defendant examined by a**

> **clinical psychologist over a period of two and one-half years and for fifteen hours.**
>
> **Also, in light of Dr. Keown's evaluation and the fact he made no recommendation regarding seeking other mental health experts trial counsel did not plan on going any further in the physical and psychological area.**
>
> The court also notes that when as here neither a psychiatric evaluation, Dr. Keown's, nor counsel's observations indicated that Mr. Krawczuk suffered from mental illness counsel performs reasonably in not seeking further evaluation. See, e.g., Newland v. Hall, 527 F.3d 1162 C.A. 11 (Ga.), 2008 and Housel v. Head, 238 F.3d 1289, 1296 (11th Cir.2001). The court believes this was particularly true in 1991-1992.
>
> See also. Ponticelli v. State, 941 So.2d 1073 (Fla. 2006). See Rivera v. State, 859 So.2d 495, 504 (Fla.2003) (citing Asay, 769 So.2d at 986, for the proposition that "counsel's reasonable mental health investigation and presentation of evidence is not rendered incompetent 'merely because the defendant has now secured the testimony of a more favorable mental health expert'").
>
> Under these circumstances there is no deficient performance in counsel's investigation of this circumstance.

(PCR21:2469) (record citations omitted) (emphasis added). In the instant case, trial counsel had Appellant evaluated by a psychiatrist, Dr. Keown, prior to Appellant pleading guilty and waiving the presentation of mitigation. Trial counsel testified that, based on Dr. Keown's recommendations, she would not have pursued any further psychological evidence. (PCR18:1785). As the trial court correctly noted in its order, the fact that collateral counsel has retained different experts during the

postconviction proceedings with more favorable testimony does not equate to a finding that trial counsel's investigation was deficient. See Asay v. State, 769 So.2d 974, 986 (Fla. 2000) (stating that trial counsel's reasonable investigation is not rendered incompetent merely because the defendant has now secured the testimony of a more favorable expert in postconviction).

Thus, the only area where the trial court found that counsel performed deficiently was in failing to pursue further investigation into Appellant's family background and childhood. On this point, the court noted that this was a difficult finding given Appellant's reluctance to involve his family in his case:

> 1. Physically and emotionally abusive childhood. This mitigating circumstance is the most troubling in this part of the analysis. An investigation of the family background is standard in these cases. The only excuse that will be recognized for failing to investigate family background for mitigation is direct unequivocal instructions from the client not to. Mr. Krawczuk gave an extensive family and personal history to Dr. Keown. It is indicative of an abusive childhood but does not contain the quality of the evidence regarding his mother's abuse that was later brought out in the evidentiary hearing principally from the brother and stepfather. Counsel had knowledge of the existence of Mr. Krawczuk's mother and grandmother in this area. The mother was the alleged principal abuser and the grandmother was an alleged abuser of the mother. The grandmother's testimony is not before the court and the mother's, Patricia Goss's, does not appear very helpful to Mr. Krawczuk. It is really a question of would a reasonable investigation have produced the twin brother and the step father as mitigation witnesses? This question must be answered considering

> the facts Mr. Krawczuk has not testified and the therefore unrebutted, testimony of his counsel that he was not cooperative with counsel in getting information about family and those type of things to talk to and that he wanted to leave his family out of it, and his repeated refusals to permit the other mitigation, Dr Keown and Mr. Wise, that counsel had developed.
>
> Although it is probable that given Mr. Krawczuk's position counsel acted reasonably in discontinuing any investigation into his family history the case law is extremely compelling on the need for an unequivocal expression from a defendant not to pursue this type of information. Permitting an investigation for mitigation and refusing to allow presentation of mitigation are closely related but different. In this case the record will not support the unequivocal direction to not investigate the court believes required by the law as it existed at the time in question.
>
> Therefore the court is of the opinion that counsel's performance was deficient in failing to pursue further investigation of the family history or obtain clear direction from Mr. Krawczuk that she was not to do so.

(PCR21:2467-68).

The only deficiency found by the trial court revolved around trial counsel's failure to fully investigate Appellant's childhood and family background. Although trial counsel had not spoken in depth with Appellant's family members pursuant to Appellant's request to leave his family out of it, and was therefore unaware of the detailed testimony which was presented at the postconviction evidentiary hearing, counsel *was* aware that Appellant was abused by his mother and stepfather, had a

terrible childhood and suffered low self-esteem as a result. This information was described in Dr. Keown's report that trial counsel received and provided to Appellant.

(2) Appellant's waiver of mitigation

Having found that trial counsel performed deficiently by failing to further investigate Appellant's family background, the court next turned to the question of whether Appellant would have authorized trial counsel to present this evidence at the penalty phase or the Spencer hearing. In this regard, the court properly noted that a defendant cannot show prejudice under Strickland if he would not have permitted his counsel to present mitigating evidence at trial. **Notably, Appellant has never testified that he would have allowed the presentation of *any* mitigating evidence, including evidence of an abusive childhood.** This fact alone is fatal to Appellant's claim that he is entitled to postconviction relief based on this claim. Collateral counsel asserts that "[t]here is no requirement that Mr. Krawczuk testify that he would have allowed counsel to present mitigation had she done a reasonable investigation." Initial Brief at 67. However, given Appellant's unequivocal statements at the time of his plea and waiver, it is clear that he would not have allowed the presentation of any mitigating evidence. Appellant was granted a postconviction evidentiary

hearing and he could have easily testified that he would have presented this mitigating evidence had his trial counsel informed him of it, but he did not. Accordingly, this Court should find that Appellant cannot demonstrate prejudice under Strickland without sworn testimony that he would have presented this type of evidence. See Schriro v. Landrigan, 550 U.S. 465, 127 S. Ct. 1933 (2007); Cummings v. Secretary, Dep't of Corr., 588 F.3d 1331 (11th Cir 2009).

The fact that Krawczuk chose, against the advice of counsel, to waive the presentation of mitigating evidence precludes Krawczuk from raising an allegation that his defense attorneys were ineffective for failing to prepare for the penalty phase. Appellant did not want to present mitigating evidence, communicated his intention to his attorney early on in this case and frustrated her attempts to prepare for the penalty phase. In Landrigan, the defendant refused to allow defense counsel to call two family members, the defendant's mother and ex-wife, in mitigation. The Supreme Court reversed the Ninth Circuit Court of Appeals' decision to grant an evidentiary hearing on the defendant's ineffective assistance of counsel claim for failing to investigate and present evidence during the penalty phase. In doing so, the Court noted that Landrigan was responsible for the failure to present mitigating evidence and

under such circumstances he could not make a colorable claim for relief. The Court stated, "[i]f Landrigan issued such an instruction [to his counsel not to offer any mitigating evidence], counsel's failure to investigate further could not have been prejudicial under Strickland," and "regardless of what information counsel might have uncovered in his investigation, Landrigan would have interrupted and refused to allow his counsel to present any such evidence." Landrigan, 550 U.S. at 475, 477.

Because Appellant waived the presentation of all mitigating evidence, including evidence from Dr. Keown's report detailing Appellant's abusive childhood (PCR19B:2199-2201), he cannot now claim that he was prejudiced by trial counsel's failure to further investigate and present this evidence. As the trial court properly held, Krawczuk "has not shown a reasonable probability that if he had been more fully advised about the potential mitigation evidence he would have authorized trial counsel to present such evidence at either the penalty phase trial or at the Spencer hearing." (PCR21:2471).

(3) Whether there is a reasonable probability of a life sentence had Appellant allowed trial counsel to present mitigating evidence

Finally, although not required to further address Appellant's claim based on his failure to establish prejudice as

required by Strickland, the State submits that the trial court properly found that Appellant could not establish that, even had the mitigating evidence been presented to the jury or the court, there would be a reasonable probability that he would have received a life sentence. The court discussed in great detail all of the mitigating evidence presented at the postconviction hearing and found that, even if Appellant had presented such evidence, there was no reasonable probability that he would have obtained a life sentence given the substantial aggravation in this case.

As this Court noted on direct appeal, the evidence supports the existence of three aggravating factors: (1) committed during a robbery and for pecuniary gain; (2) committed in a heinous, atrocious, or cruel manner (HAC); and (3) committed in a cold, calculated, and premeditated manner (CCP). Krawczuk, 634 So. 2d at 1073. In mitigation, the court originally found one statutory mitigating circumstance, no significant history of prior criminal activity, but had Appellant presented the mitigating evidence from the postconviction hearing, the court would have rejected this mitigating factor.[15] (PCR21:2442). After hearing the evidence from the postconviction hearing, the

[15] The court noted that credible evidence was presented at the postconviction hearing establishing that Appellant was a "serial burglar," and thus, the statutory mitigator would not have been applicable or given any weight. (PCR21:2442).

court was reasonably convinced that six non-statutory mitigators had been established by the evidence and he gave them the weight he would have assigned had they been presented at the time of sentencing: (1) Appellant suffered an abusive and emotionally deprived childhood (slight weight); (2) the codefendant pled to a lesser charge and received a prison sentence (slight weight); (3) substance abuse/chronic marijuana use (very slight weight); (4) good worker at his maintenance job with McDonalds (slight weight); (5) mental or emotional disturbance less than extreme (moderate weight); and (6) cooperation (slight weight). Given the three weighty aggravating factors and the insubstantial mitigation, the court properly concluded that there was no reasonable probability of a life sentence.

Collateral counsel faults the trial court for rejecting the postconviction mental health experts' opinions, but competent substantial evidence supports the trial court's findings that their opinions were not credible. As previously discussed, Dr. Crown's testimony that Appellant had mild organic brain damage that caused him problems with impulse control was contradicted by the facts of the crime, including the lengthy nature of Appellant's planning of the murder and robbery as evidenced by his detailed confession to law enforcement. See Foster v. State, 679 So. 2d 747, 755 (Fla. 1996) (holding that even

uncontroverted expert opinion testimony may be rejected if that testimony cannot be reconciled with the other evidence in the case). Additionally, the trial court noted that Appellant's school records, the correspondence he wrote to trial counsel, and other mental health experts' opinions, did not support Dr. Crown's opinion that Appellant had organic brain damage. (PCR21:2453-55).

Likewise, the court rejected the opinions of Drs. Crown and Sultan that the two statutory mental mitigators were established in this case. The court noted that the experts' opinions were "resoundingly refuted" by the other evidence in this case, particularly Appellant's confession, as well as his letters, the statement and deposition of Gary Sigelmier, the statement of codefendant Poirier, the testimony of the family members and friends, the other mental health professionals, reports and depositions, and other credible evidence in this case. (PCR21:2473). The State submits that competent substantial evidence supports the trial court's findings in this regard.

Accordingly, the testimony from the evidentiary hearing supports the trial court's finding regarding the existence of the non-statutory mitigation. However, as previously noted, the vast majority of this evidence was known by trial counsel and Appellant, and was specifically waived by Appellant against the

advice of his counsel. Despite being given the opportunity, Appellant has never indicated that he would have allowed trial counsel to present this evidence. Thus, there can be no finding of prejudice as required by Strickland. Even assuming that Appellant had presented this evidence, the trial court properly concluded that there is no reasonable probability of a life sentence. Accordingly, the State requests that this Court affirm the trial court's denial of postconviction relief.

ISSUE III

APPELLANT'S CLAIM OF INNOCENCE OF THE DEATH PENALTY BASED ON HIS CODEFENDANT'S SENTENCE FOR SECOND DEGREE MURDER IS WITHOUT MERIT.

Appellant claims that he is innocent of the death penalty because his codefendant, William Poirier, entered into a plea deal with the State wherein Poirier pled guilty to second degree murder and received a 35-year prison sentence. Appellant relies on Scott v. Dugger, 604 So. 2d 465 (Fla. 1992), and asserts that, "in a case involving equally culpable codefendants, one codefendant's life [sic] sentence is cognizable on collateral review where the other codefendant subsequently receives a life sentence." Initial Brief of Appellant at 83. For a number of reasons, Appellant's claim is without merit and should be denied.

In Scott, this Court recognized that a capital defendant could raise a newly discovered evidence claim in his postconviction proceedings when an equally culpable codefendant receives a lesser sentence subsequent to the defendant's sentence. Scott, 604 So. 2d at 468-69. This Court applied the newly discovered evidence standard set forth in Jones v. State, 591 So. 2d 911 (Fla. 1991), and stated that, in order to prevail on his claim, Scott had to establish that (1) the asserted facts "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that defendant or his counsel could not have known them by the use of diligence," and (2) "the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial." Id. at 468. In Scott, this Court found that the equally culpable codefendant's life sentence, which was not imposed until after Scott's direct appeal had been completed, would have caused this Court to reverse Scott's death sentence on proportionality grounds. Id. at 468-69.

In the instant case, Appellant cannot establish the basis of a newly discovered evidence claim based on the test set forth in Jones. Here, codefendant William Poirier entered into a negotiated plea deal with the State and pled no contest to second degree murder on May 22, 1992, a few months after

Appellant filed the Notice of Appeal in his case.[16] (PCR21:2543-58; DAR5:603-04). Appellate counsel for Krawczuk noted the codefendant's plea deal and sentence in his Initial Brief before this Court on direct appeal, and argued that Poirier was at least equally culpable. See Initial Brief of Appellant at 1, 55 (Case No. 79,491). This Court likewise noted the codefendant's sentence and affirmed the lower court's finding that there was no disparate treatment between the two defendants. See Krawczuk, 634 So. 2d at 1072-74 n.2, n.5; see also Steinhorst v. State, 638 So. 2d 33 (Fla. 1994) (codefendant's sentence for second degree murder, imposed prior to conclusion of defendant's direct appeal, was not newly discovered evidence and was irrelevant to disparate treatment analysis of defendant's death sentence for first degree murder). Thus, because this claim was raised and rejected on direct appeal, it is procedurally barred.

Even if not procedurally barred, Appellant's claim is without merit because Poirier, unlike Appellant, was convicted of the lesser charge of second degree murder and was not "equally culpable." See Farina v. State, 937 So. 2d 612, 618-19 (Fla. 2006) (noting that codefendant's life sentence was "irrelevant" to defendant's proportionality review because the

[16] At Poirier's plea hearing, the prosecuting attorney noted the State's position that Poirier had a "lesser culpability" than Appellant. (PCR21:2545).

codefendant's sentence was reduced to life because he was a juvenile); Kight v. State, 784 So. 2d 396 (Fla. 2001) (rejecting disparate treatment argument when codefendant entered plea deal with State to second degree murder); Howell v. State, 707 So. 2d 674, 682-83 (Fla. 1998) (rejecting claim of disparate sentencing where codefendant pled to second-degree murder and received sentence of forty years); Cardona v. State, 641 So. 2d 361, 365 (Fla. 1994) (rejecting claim of disparate sentencing where codefendant pled guilty to second-degree murder and testified against defendant); Cook v. State, 581 So. 2d 141, 143 (Fla. 1991) (rejecting claim of disparate sentencing where codefendants pled guilty to second-degree murder and received sentences of twenty-three and twenty-four years); Hayes v. State, 581 So. 2d 121, 127 (Fla. 1991) (rejecting claim of disparate sentencing where codefendant pled guilty to second-degree murder and testified against defendant); Brown v. State, 473 So. 2d 1260, 1268 (Fla. 1985) (rejecting claim of disparate sentencing where codefendant pled guilty to second-degree murder).

In this case, as the trial court properly found when denying this claim, and as affirmed by this Court on direct appeal, Poirier was not equally culpable in this murder. As the lower court noted:

This claim is denied on three grounds. The first ground is that the defendant and the codefendant were not convicted of the same offense. Mr. Poirier was allowed to plead guilty to second degree murder because the state believed the evidence of his guilt was less and because of the uncertainty of how Mr. Krawczuk might testify if called to testify in his case after already having been sentenced to death. See transcript of Poirier plea, Exhibit A to this Order. Under these circumstances the sentences are not considered disproportionate or disparate. See Smith v. State, 998 So. 2d 516 (Fla. 2008), Knight v. State, 784 So.2d 396 (Fla. 2001) at 400, 401 and cases cited but also see Sexton v. State, 775 So.2d 923 (Fla. 2000).

The second ground is that that this issue is procedurally barred because it has been considered and rejected in the original appeal. See Krawczuk v. State, 634 So.2d 1070 (Fla. 1994) FN 2 and FN 5.

The third ground is that Mr. Krawczuk is the more culpable of the codefendants and under this circumstance the law does not bar his death sentence.

Under Florida law in order to prevail on a claim of actual innocence of the death penalty a movant must show that each aggravating circumstance found by the court was invalid or that there is newly discovered evidence that would result in movant being innocent of the death penalty. See for example Miller v. State, 926 So.2d 1243 (Fla. 2006). See also Tompkins v. State, 994 So.2d 1072 (Fla. 2008) regarding Florida's treatment of "actual innocence" claims. See also Hannon v. State, 941 So.2d 1109 (Fla. 2006)

Under this claim the three aggravating circumstances found by the court, 1. Committed in course of robbery, FS 921.141(5)(d) and committed for pecuniary gain, FS 921.141(5)(f) two factors merged, 2. HAC, FS 921.141(5)(h) and 3. CCP, FS 921.141 (5)(i), are not challenged. Therefore the court only notes here that based on Mr. Krawczuk's confession those aggravators are established beyond any reasonable doubt and the Florida Supreme Court also found the record demonstrated the existence of those aggravators beyond a reasonable doubt, Krawczuk v.

State, 634 So.2d 1070 (Fla. 1994) at 1073. See Sochor v. State, 883 So.2d 766, 788 (Fla. 2004) (rejecting the defendants "innocent of the death penalty" claim because the Court determined on direct appeal that the evidence supported the existence of three aggravating circumstances)

The basis of this claim is Mr. Krawczuk's assertion that there is newly discovered evidence in the circumstance of the equally culpable (his contention) codefendant receiving a life sentence as a result of a plea agreement after Mr. Krawczuk's sentence to death and that demonstrates Mr. Krawczuk is actually innocence of the death penalty.

It is established law in Florida that in a death case involving equally culpable codefendants the death sentence of one codefendant is subject to collateral review under rule 3.850 when another codefendant subsequently receives a life sentence. See for example Scott v. Dugger, 604 So.2d 465 (Fla. 1992) (we hold that in a death case involving equally culpable codefendants the death sentence of one codefendant is subject to collateral review under rule 3.850 when another codefendant subsequently receives a life sentence.), Hannon v. State, 941 So.2d 1109 (Fla. 2006), Marguard v. State, 850 So.2d 417 (Fla. 2002). However, where the circumstances indicate that the defendant receiving the death sentence is more culpable than a codefendant receiving a lesser sentence disparate treatment is impermissible and a claim such as this should be denied. See Marguard v. State, supra.

Therefore, the determination material to the court's third grounds for denying this claim is whether Mr. Krawczuk is more culpable than Mr. Poirier or stated another way was Mr. Krawczuk the "dominant participant in this crime." Marek v. S., __ So. 2d __, 34 F.L.W. S461 (Fla. 7/16/2009) or Marek v. State, --- So.3d ----, 2009 WL 2045416 Fla., 2009. (Opinion not final). The court found and finds Mr. Krawczuk is more culpable than Mr. Poirier.

Among the actions, occurrences and portions of the record and file, Patton v. State 784 So.2d 380

(Fla. 2000) consideration of file, the Court considers material to this Claim are the following.

1. On May 22, 1992 approximately three (3) months after Mr. Krawczuk's sentence of death on February 13, 1992 and two and a half months after Mr. Krawczuk filed a Notice of Appeal on March 5, 1992 the codefendant, William A. Poirier, who had been charged with the same offenses as Mr. Krawczuk pled guilty pursuant to a plea agreement with the state. He pled guilty to a one count of robbery and one count of second degree murder, Lee County case 90-2007 CFA. He was sentenced as material here to 15 years for robbery and 35 years for second degree murder. The time was to run concurrent for a total sentence of 35 years.

The reasons for the plea and sentence were Mr. Krawczuk's failure to cooperate as a witness for the prosecution, the prosecution's concern about how a person in his circumstances, under sentence of death and with nothing to lose might testify in a trial of Mr. Poirier, see Exhibit A to this order, transcript of Poirier's' plea hearing and Report of Robert J Wald, M.D. (Psychiatrist) dated March 17, 1992. SHX 1, copied to state and Mr. Poirier's counsel, indicating Mr. Krawczuk felt he had "nothing to gain by testifying" and the fact Mr. Poirier's confession was far less inculpatory of him than Mr. Krawczuk's was of them both, See DHX 5 Tab 4, Mr. Poirier's confession. In Mr. Poirier's confession he minimizes his involvement and maximizes Mr. Krawczuk's. He claims no prior plan and that Mr. Krawczuk called him to go to victim's house as a social visit, i.e. drink a couple of beers. He knew the victim thorough Mr. Krawczuk and had only met him one time before and been at his house one time before 3½ - 4 months earlier. He states Mr. Krawczuk initiated physical violence with the victim and that Mr. Krawczuk strangled the victim.

2. In assessing the relative culpability the court notes that the only direct evidence of the circumstances of the planning and the execution of the murder is found in the confession of Mr. Krawczuk, RA 104-185 and in the confession of Mr. Poirier, DHX 5 Tab 4. Although the court will point out some of the circumstances it finds creditable and which it

believes support its assessment of the relative culpability, a reader wishing to confirm the court's assessment of culpability should read those confessions in detail. The court finds Mr. Krawczuk's creditable. The court does not find Mr. Poirier's confession credible when he denies the incident was planned, that he participated in the planning or that he knew they were going to the victim's house to rob and kill him. In short in his confession he is falsely minimizing his involvement in the incident. Based on the two confessions and the deposition, DHX-l, and statement, DHX-5, Tab 5, of Gary Siegelmier, the court is of the opinion that Mr. Poirier was a willing, active and enthusiastic participant in the planning and the execution of the murder. However while recognizing that circumstance it is also clear to the court that Mr. Krawczuk is the more culpable of the two. From Mr. Krawczuk's confession the court finds the following to be significant and correct:

> a. Events leading up to event supporting assessment of culpability. Mr. Krawczuk met the victim about 6 months before the incident, RA 110, or 4 months, RA 111. About 3 months before the incident Mr. Krawczuk began going to the victim's house, RA 112. He had been to victim's about 6 times before the incident, RA 115. After the first visit he had the victim's phone number but did not give the victim his. Mr. Krawczuk thereafter initiated contacts with the victim, RA 115. The victim engaged in homosexual acts with Mr. Krawczuk. Mr. Krawczuk brought Mr. Poirier to the victim's house one time about a month before the murder, RA 117. Both knew the victim was a homosexual and Mr. Poirier received oral sex from the victim on that occasion. Three to four days prior to the murder he and Mr. Poirier decided they were going to kill the victim with their bare hands, RA 118, 119. Mr. Krawczuk contacted the victim and arranged for him and Mr. Poirier to come over, RA 119. Mr. Krawczuk drove them to the victim's house, RA 121. Earlier in the evening Mr. Krawczuk had scouted out a place to dispose of the body.

b. Events at time of event supporting assessment of culpability. Mr. Krawczuk initiated the events leading up to the incident by suggesting they go to the bedroom, RA 130-A. He initiated the roughhousing of the victim, RA 133. As Mr. Poirier was receiving oral sex from the victim Mr. Krawczuk was being rough to the victim, RA 134. He pulled the victim performing oral sex on Mr. Poirier off Mr. Poirier and sat on top of his, victim's, shoulders with his knees pinning him down, RA 136. RA 137 "cause all I was doing was gauging him to see where — you know, how aggressive he got. This wasn't the real murder." Began giving Mr. Poirier oral sex again and Mr. Krawczuk pulled him away, and was on top of him but at that time wasn't actually trying to strangle him, just being rough on him, RA 139. Mr. Krawczuk threw the victim to the ground forcefully, kneeled on his stomach and began chocking him with both hands, RA 142. Choked him for 5 to 10 minutes, during which time Mr. Poirier helped by holding his mouth and nose closed and did numerous knee drops on the victim, RA 143. Mr. Krawczuk poured crystal vanish in the victims mouth to totally make sure it would kill him because they were not sure he was dead, RA147, he poured water in and. Mr. Poirier held his mouth open, RA 147

c. Miscellaneous circumstances supporting assessment of culpability. Age and size. Anton Krawczuk was 31 years old (DOB 6/8/59), 6 feet tall and weighed 175 pounds, HDX 5, tab 6 and RA 108 or 180 pounds, RA 106. William Poirier was 23 years old (DOB 11/10/66), 5' 8" tall, and weighed 195 pounds, HDX 9.

d. Circumstances developed during evidentiary hearing further supporting assessment of culpability.

1. Deposition of Gary Siegelmier, HDX-l. Page 12, Tony (Mr. Krawczuk) was, in his opinion, the more aggressive of the two.

> 2. Judith Lynn Nelson, PH, March 8, 2004 session. Mr. Krawczuk's ex-wife. EH, March 8, 2004 session, Page 11. Referring to Mr. Poirier. I called him his protégé, because he was always kind of emulating anything Anton did.

3. In "Other Matters", ¶2 of the sentencing order, RA 587-593, the court addressed the relative culpability of the codefendants in the process of commenting on the psychiatrist's report as follows: (The court at the time did not have foreknowledge that the codefendant would later plead to a lesser offense)

> 2. Consideration of the statements in the psychiatrist report relevant to this defendant being the more passive of the two defendants and his being influenced by the codefendant. The court does not find this to be so to any degree that would justify consideration as a mitigating circumstance. The psychiatrist, himself, was of the opinion that the defendant was over stating this; however, beyond that the defendant's confession establishes that it was he who scouted the site to dispose of the body, made the arrangements with the victim to go to his house, initiated the attack, physically strangled the victim with the codefendant's assistance, placed drain cleaner in the victim's mouth and steadied the codefendant when he was on the point of becoming sick. RA 592.

4. In the direct appeal, Krawczuk v. State, 634 So.2d 1070 (Fla. 1994), the appellate court included the following statements:

> Krawczuk at 1072. At the final hearing the court sentenced Krawczuk to death, finding three aggravators and one statutory mitigator.FN2
>
> FN2. Poirier pled guilty to second-degree murder and robbery in exchange for a 35-year sentence.
>
> Krawczuk at 1074, 1075. The court, however, carefully considered the psychiatrists report and the presentence investigation report FN4 and

> found that the record did not Support the establishment of any nonstatutory mitigators.FN5
>
> FN4. Orally the judge stated that, in addition to these items, he considered "anything else I have been able to discern from these proceedings."
>
> FN5. The court found no disparate treatment between Krawczuk and Poirier, noting that Krawczuk "scouted the site to dispose [of] the body, made the arrangements with the victim to go to his house, physically strangled the victim with the co-defendant's assistance, placed the drain cleaner in the victim's mouth and steadied the co-defendant when he was on the point of becoming sick" and that the psychiatrist thought Krawczuk was overstating when he said he had been influenced by Poirier. Additionally, Krawczuk was older and bigger than Poirier.
>
> This court notes the following from these portions of the opinion. FN2 is possibly not accurate. Poirier's plea occurred after Mr. Krawczuk's sentence and notice of appeal. The statutory mitigation found by the court was "no significant history of prior criminal activity", RA 590. However, this does indicate appellate counsel brought this circumstance, codefendant's plea, to the court's attention and that court considered and approved the fact the trial court did not find a non-statutory mitigator of disparate sentencing in FN5.

(PCR21:2479-84).

As the lower court properly found, Appellant's claim is procedurally barred and without merit. Codefendant Poirier's plea to second degree murder and his 35-year prison sentence, which was brought to this Court's attention on direct appeal, is irrelevant to any disparate treatment or proportionality analysis as a matter of law. Furthermore, because there is

substantial, competent evidence to support the court's factual finding that Krawczuk was the more culpable of the two men, Appellant's claim is without merit and should be denied.

ISSUE IV

THE TRIAL COURT PROPERLY DENIED APPELLANT'S CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY LITIGATE THE MOTION TO SUPPRESS.

In his fourth claim, Appellant asserts that his trial counsel was ineffective for failing to properly litigate the voluntariness of his confession because she allegedly failed to investigate and present evidence of Krawczuk's mental state when she unsuccessfully argued the motion to suppress. In his brief, collateral counsel repeats the same arguments urged by appellate counsel on direct appeal regarding the trial court's ruling on the motion, and adds the allegation that Appellant's compulsiveness rendered his statements involuntary. The postconviction court rejected the instant claim and found that Appellant had "neither alleged nor testified that if counsel had not rendered the alleged ineffective assistance pled in his postconviction motion he would not have pled guilty and would have insisted on going to trial," and also found that the claim was procedurally barred and without merit. (PCR21:2484, 2502).

At the outset, the trial court properly found that Appellant's allegations of ineffective assistance of counsel were insufficient because Krawczuk did not allege, much less establish, that he would not have pled guilty had trial counsel performed differently. See generally Hill v. Lockhart, 474 U.S.

52, 106 S. Ct. 366 (1985); Zakrzewski v. State, 866 So. 2d 688 (Fla. 2003); Grosvenor v. State, 874 So. 2d 1176 (Fla. 2004). In Zakrzewski, the defendant alleged that his trial counsel was ineffective for failing to file a motion to suppress, and unlike Krawczuk, alleged in his postconviction motion that he would not have accepted trial counsel's advice to plead guilty had trial counsel informed him of his right to challenge the search of his home. Zakrzewski, 866 So. 2d at 694. This Court rejected the defendant's ineffectiveness argument because he failed to show deficient performance and, "[a]lthough Zakrzewski alleged prejudice in his motion; i.e., that he would not have pled guilty, there was no evidence presented at the evidentiary hearing to establish this allegation and no reason to assume that had the motion been denied, Zakrzewski would not have still pled guilty, reserving the right to appeal." Id. at 695.

In the instant case, as the trial court properly found, Appellant did not even allege prejudice in his postconviction motion. See PCR Supp1:79-84. Additionally, Krawczuk did not testify at the evidentiary hearing that he would not have pled guilty had trial counsel performed differently. Furthermore, Krawczuk pled guilty without reserving his right to appeal the trial court's ruling on his motion to suppress. See Krawczuk, 634 So. 2d 1070 (Fla. 1994) (noting that the trial court's

ruling on the motion to suppress was not cognizable on appeal because Krawczuk pled guilty and waived his right to appeal any pre-trial rulings). Thus, following Zakrzewski, this Court must affirm the lower court's denial of this claim due to Appellant's failure to allege or establish prejudice.

Additionally, the State would note that the trial court properly rejected this claim because it is procedurally barred and without merit. To the extent that collateral counsel challenges that trial court's ruling on the motion to suppress, this claim is procedurally barred as it was raised and rejected by this Court on direct appeal. See Krawczuk, 634 So. 2d at 1072-73. On direct appeal, this Court found that Appellant had failed to preserve this claim based on his guilty plea, and further found that, even if preserved, his claim was meritless as law enforcement officers had probable cause to arrest Krawczuk when they went to his residence and his confession was made after receiving and waiving his Miranda rights. Id.

Collateral counsel's claim that trial counsel was ineffective for failing to investigate his mental health and arguing that his compulsiveness rendered his confession involuntary is also without merit. The postconviction court correctly found that the lay witness and mental health testimony from the evidentiary hearing did not support collateral

counsel's claim that Krawczuk's statements were involuntary. As the court noted, the only relevant evidence to this claim was presented by Dr. Sultan, who opined that Appellant was compulsive and felt the need to talk to law enforcement officers about the details of the murder despite it being against his best interest. The court properly noted, however, that Dr. Sultan did *not* testify that Appellant's condition prevented him from understanding his Miranda rights. Dr. Sultan acknowledged that she was "not prepared to offer an opinion about exactly how voluntary" Appellant's statements were. (PCR18:1727-28). Additionally, the lower court noted that there was no information in the two mental health experts' reports from 1991 and 1992 that would support a finding that Appellant was incapable of understanding his Miranda rights or that those rights were unknowingly or unintelligently waived by him.[17]

[17] Notably, Dr. Keown, who examined Appellant months before trial counsel filed and litigated the motion to suppress, performed the same psychological testing as done by Dr. Sultan, namely the MMPI-2. Dr. Sultan claimed, without elaboration, that the results of the MMPI-2 were "marginally acceptable" and underlined some of Appellant's personality characteristics. (PCR18:1694). Dr. Keown administered the same MMPI-2 and found that Appellant "responded in an extremely exaggerated manner, endorsing a wide variety of inconsistent symptoms and attitudes," and these results most likely reflected Appellant's "desire to look as bad as he could in the hope this might help him legally." (PCR19B:2203).

Another mental health expert, Dr. Robert Wald, examined Appellant in 1992, shortly after his sentence, based on a motion

Because the evidence from the evidentiary hearing supports the trial court's finding that this claim is procedurally barred and without merit, this Court should affirm the trial court's ruling.

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by the codefendant's attorney in anticipation of the possibility of Krawczuk testifying against Poirier. (PCR19:1849-51).

ISSUE V

THE POSTCONVICTION COURT PROPERLY DENIED APPELLANT'S ALLEGATION OF INNEFECTIVE ASSISTANCE OF PENALTY PHASE COUNSEL BASED ON COUNSEL'S FAILURE TO OBJECT TO COMMENTS MADE BY THE PROSECUTOR AND FOR FAILING TO REQUEST A JURY INSTRUCTION ON MERCY.

Appellant combines several of his postconviction issues and asserts that his trial counsel was ineffective for failing to object to improper comments made by the prosecutor at the penalty phase and for failing to request a jury instruction on mercy. The lower court denied these allegations in a detailed order. (PCR21:2436-60, 2496-502, 2526-28). The State submits that the lower court properly denied these claims because Appellant failed to establish deficient performance and prejudice as required by Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984).

In addressing Appellant's claim that trial counsel was ineffective for failing to object to the prosecutor's argument and for failing to object to the court's jury instructions or request an instruction on mercy, the lower court stated:

> This Claim is closely related to and duplicates to some degree Claim XXI, AM page 95, alleging prosecutorial argument and inadequate jury instructions misled the jury regarding its ability to exercise mercy. The court's discussion of that claim should be considered together with its discussion of this claim.
>
> The court is informed on the applicable law by the opinions in Anderson v. State, 18 So.3d 501, (Fla.

2009); Bailey v. State, 998 So.2d 545 (Fla. 2008); Cox v. State, 819 So.2d 705 (Fla. 2002); Frangui v. State, 804 So.2d 1185 (Fla. 2001); Garron v. State, 528 So.2d 353 (Fla. 1988); California v. Brown, 479 U.S. 538, 107 S.Ct. 837 (1987); Saffle v. Parks, 494 U.S. 484 (1990). It is also noteworthy that the Florida Supreme Court has recently approved for publication updated jury instructions in death penalty cases that include virtually the same anti sympathy instruction. SCO5-960 — In Re: Standard Jury Instructions In Criminal Cases — Report No. 2005-2 at page 27, Opinion released October 29, 2009 and that the instructions given in this case are close to those updated instructions.

Counsel has pled this claim in a manner to combine a number of issues.

The first issue results from the prosecutor's suggestion on multiple occasions both during voir dire and final argument that the law required the jury to recommend the death penalty if the aggravating circumstances outweigh the mitigating circumstances. RA 772, RA 233. The law does not require a jury to recommend the death penalty and these statements were error. See, Anderson, supra, Cox, supra. However, the court will not grant relief on this issue for the following reasons:

a. The error is procedurally barred because counsel failed to object and it was not raised on appeal. The court correctly instructed the jury of its role under Florida law and considering the instructions and the comments the error is not fundamental. See Cox, supra, at 717,718. Additionally Mr. Krawczuk barred his counsel from participating in the penalty phase and thus cannot claim counsel was ineffective in failing to object.

b. The error is harmless beyond any reasonable doubt and to the extent this is a claim of ineffective assistance of counsel Mr. Krawczuk has not shown prejudice. Mr. Krawczuk did not present mitigation and barred his attorney from participating in the penalty phase. See extensive discussion of harmless error and lack of prejudice at beginning of this order.

The second issue results from the prosecutor's suggestion on multiple occasions that the jury should decide the case without regard for sympathy and from the court's giving as part of the final instructions Instruction 3.10, #8, Florida Standard Jury Instructions in Criminal Cases. "feelings of prejudice bias or sympathy are not legally reasonable doubts and they should not be discussed by any of you in any way. Your verdict must be based on your views of the evidence and on the law contained in these instructions." RA 255. This issue is the subject of Claim XXI, AM page 95, and the discussion under that claim is referenced. However, to repeat the court will not grant relief on this issue for the following reasons:

a. Any error is procedurally barred because counsel failed to object, RA 218, and it was not raised on appeal. Any error does not rise to the level of fundamental error. Counsel was not ineffective in failing to make objections when Mr. Krawczuk directed her not to participate in the penalty phase proceedings or offer mitigation.

b. Any error is harmless beyond any reasonable doubt and to the extent this is a claim of ineffective assistance of counsel Mr. Krawczuk has not shown prejudice. Mr. Krawczuk did not present mitigation and barred his attorney from participating in the penalty phase. See extensive discussion of harmless error and lack of prejudice at beginning of this order.

c. There is no error. Similar anti sympathy instructions have been approved by the United States Supreme Court. See California v. Brown, 479 U.S. 538, 107 S.Ct. 837 (1987) and Saffle v. Parks, 494 U.S. 484 (1990). The principal objection to an anti-sympathy instruction is that it interferes with the jury's consideration of the mitigating evidence, specifically non statutory mitigating circumstances. In this case as noted there was no mitigating evidence to be interfered with. This same circumstance supports a finding of no error in the states comments or that at worst that any error is only harmless error.

It is also noteworthy that the Florida Supreme Court has recently approved for publication updated jury instructions in death penalty cases that include with slight modification virtually the same anti sympathy instruction. SCO5-960 — In Re: Standard Jury Instructions In Criminal Cases — Report No. 2005-2 at page 27, Opinion released October 29, 2009.

A third group of issue arises out of multiple allegations in paragraph 5, page 60- 61 of AM.

As to claim of cumulative error the court notes that the errors subject to this claim are procedurally barred and therefore not to be included in a cumulative error analysis. Additionally as explained in the court's harmless error and lack of prejudice discussion at the beginning given the lack of mitigation and number and weight of the aggravators any errors in this part of the proceedings, both individually and cumulatively are harmless beyond a reasonable doubt.

As to the claim of ineffective assistance of counsel based on allegations of failure to object to the court's instructions and to request a mercy instruction the court would note that the court's instructions were proper and that counsel cannot be held ineffective for failing to object to correct instructions. Additionally the Florida Supreme Court has repeatedly held the Florida Standard Jury Instructions in Criminal Cases, 7.11 Penalty Proceedings — Capital Cases to be adequate to instruct juries. It has never required the addition of a so called "mercy instruction and the court does not consider failure to request a mercy instruction deficient performance.

Further, Mr. Krawczuk has simply not shown, as required by Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (U.S.1984), that counsel's performance was deficient as alleged in this claim because he barred his counsel from participating in the penalty phase or has he shown that there is a probability that any failure is sufficient to undermine confidence in the outcome of this case when he refused to permit mitigation and when the jury was presented with his

confession detailing an aggravated murder and establishing the three aggravators, two very strong, beyond any reasonable doubt.

Among the actions, occurrences and portions of the record and file, Patton v. State, 784 So.2d 380 (Fla. 2000), the Court consider material to this Claim are the following.

1. Mr. Krawczuk barred his attorney from participating in the penalty phase proceeding. He was repeatedly at different times was questioned extensively and thoroughly on this decision. RA 693-706. See also RA 785, RA 788, RA 826, 827, RA 218-231. During the evidentiary hearing on the motion for postconviction relief his trial counsel confirmed his desire not to present anything, see EH 290, 291, 308, and 310. 314, 328, 331, 332, 333. Any limited participation Mr. Krawczuk may have allowed his counsel was motivated not by a desire to present mitigation but by a desire to prevent a reversal for not offering mitigating evidence, ER 312.

2. Prosecutor's Voir dire. The prosecutor's initial questioning concerning the death penalty is found from RA 764-785. The prosecutors final questioning concerning the death penalty, occurring on new jurors being seated to replace those excused, is found from RA 808-815. The court finds the following material to the issues raised in this claim.

> a. RA 770. "Do all of you realize that sympathy, either for the victim in this case, David Staker, or for the defendant, Anton Krawczuk — the judge will tell you feelings of sympathy do not and should not be part of your deliberation.
>
> And do all of you think you can set aside any feelings of sympathy you may have for either Mr. Krawczuk or Mr. Staker?"
>
> b. RA 772. RA 772. "*** once the Judge tells you what the law is in the State of Florida with regard to this part of the trial, and he would tell you something to the effect of you have got to look at the aggravating circumstances and

weigh them against any mitigating circumstances, and then make a decision if the aggravating circumstances outweigh the mitigating, your recommendation should be death. Do you think you could follow the law in that type of case?"

"But if you do find there are aggravating, and they outweigh any mitigating, then it's your duty to return a recommendation of death. Do you think you could do that?"

c. RA 776. Questioning by the prosecutor indicating that sympathy, either for Mr. Krawczuk or for the victim should not enter into their decision

d. RA 777. "Do you think you would be able to follow the law as the Judge gave it to you?

e. RA 780. Cited by Mr. Krawczuk but the court notes nothing material. Prosecutor merely appears to be impressing on the jury how important their recommendation is.

f. RA 781-782. "Do you believe you would be able to follow the law as the judge gives it to you?

** * * * * * * ** * * * * **

Even if you don't like it? And I am not meaning to imply that you are not going to like the law of the State of Florida, but I won't know that, that is why I am asking you these questions. Everyone here agrees they can follow the law?

g. RA 811. "do you agree, ***, that your decision as to what recommendation to make to Judge Thompson has to be based solely on the evidence you see and hear in this courtroom or the exhibits that you see here in this courtroom?

h. RA 811-814. Extensive questioning by the prosecutor indicating that sympathy either for the victim or for Mr. Krawczuk should not enter in to their decision

2. Court’s opening instructions, RA 833-838 and RA 5-9. (Same instructions appear in record at two places).

   a. RA 834 or RA 5. Now your verdict must be based solely on the evidence or the lack of evidence and the law. (Part of Florida Standard Jury Instructions in Criminal Cases, 2.1, Preliminary Instructions.)

   b. RA 834 or RA 6. You are instructed that this evidence is presented in order that you might determine first, whether sufficient aggravating circumstances exist that would justify the imposition of the death penalty; and second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any. (This is a material part of Florida Standard Jury Instructions in Criminal Cases, 7.11 Penalty Proceedings — Capital Cases).

3. Prosecutor’s Opening Statement, RA 10-15. The court does not find anything in this statement material to this claim.

4. Prosecutor’s Final Argument, RA 232-250.

   a. RA 232. “But I submit to you, your decision in this case will not be a difficult one, legally, for you to make.”

   b. RA 233. “This is not a numbers game. This is the weight. If you have one aggravating circumstance, and you find there are mitigating circumstances, if that one outweighs all of the mitigating, you are still legally required to return a recommendation that the death penalty be imposed.”

   c. RA 250. “And I ask you to take your oath seriously, to look at the evidence seriously, and to return a legal recommendation to this Court, and that recommendation, I submit to you,

should be that Anton Krawczuk should be put to death."

5. Court's Final Instructions, RA 250-261 (Instructions given are very close to the updated penalty phase instructions recently approved for publication by the Florida Supreme Court, see SCO5-960 — In Re: Standard Jury Instructions In Criminal Cases — Report No. 2005-2 at page 27, Opinion released October 29, 2009).

a. RA 250. "however, it is your duty to follow the law that will now be given you by the court and render to the court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist. (This is a material part of Florida Standard Jury Instructions in Criminal Cases, 7.11 Penalty Proceedings — Capital Cases).

b. RA 254. "You must follow the law as it is set out in these instructions. If you fail to follow the law, your verdict would be a miscarriage of justice. There is no reason for failing to follow the law in this case. All of us are depending on you to make a wise and legal decision in this matter." (Florida Standard Jury Instructions in Criminal Cases normally given in the guilt phase, see Instruction 3.10, Rules for Deliberation #1). (This instruction slightly modified is included in the recently approved for publication Florida Standard Jury Instructions, 7.11 Penalty Proceedings—Capital Cases).

c. RA 254. Number 3, this case must not be decided for or against anyone because you feel sorry for anyone or are angry at anyone. (Florida Standard Jury Instructions in Criminal Cases normally given in the guilt phase, see Instruction 3.10, Rules for Deliberation #3) (This instruction slightly modified is included

in the recently approved for publication Florida Standard Jury Instructions, 7.11 Penalty Proceedings—Capital Cases)

d. RA 255. "Number five, feelings of prejudice bias or sympathy are not legally reasonable doubts and they should not be discussed by any of you in any way. Your verdict must be based on your views of the evidence and on the law contained in these instructions. (Florida Standard Jury Instructions in Criminal Cases normally given in the guilt phase, see Instruction 3.10., #8) (This instruction slightly modified is included in the recently approved for publication Florida Standard Jury Instructions, 7.11 Penalty Proceedings—Capital Cases)

e. RA 256. Now if you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole for 25 years.

Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances. Among the mitigating circumstances you may consider, if established by the evidence, are: (This is a material part of Florida Standard Jury Instructions in Criminal Cases, 7.11 Penalty Proceedings — Capital Cases, § 921.141(6), Fla.Stat.)

6. RA 195-218. Charge conference. Defense had no objection to the instructions. RA 218.

(PCR21:2496-2502).

The postconviction court properly found that Appellant's claim is without merit. In Anderson v. State, 18 So. 3d 501, 517-18 (Fla. 2009), this Court noted that it had previously held

in Henyard v. State, 689 So. 2d 239, 249-50 (Fla. 1996), and Cox v. State, 819 So. 2d 705, 717 (Fla. 2002), that a prosecutor's statements that the jury must return a recommendation of death when the aggravating factors outweigh the mitigating factors is a misstatement of law, and in Anderson's case, his trial counsel's failure to object to similar misstatements of the law by the prosecutor was deficient performance. Although trial counsel was deficient for failing to object, Anderson could not establish prejudice because the trial court properly instructed the jury on the law. Id.; see also Cox, 819 So. 2d at 717 (finding prosecutor's statements harmless error given trial court's instructions); Franqui v. State, 804 So. 2d 1185, 1193-94 (Fla. 2001); Henyard, supra. Likewise, in this case, even assuming that trial counsel was deficient for failing to object based on Appellant's direction to his counsel not to participate in the penalty phase hearing, Appellant cannot establish prejudice as required by Strickland given that the trial court properly instructed the jury on the applicable law. (DAR2:250-60). Given the trial judge's instructions, any misstatement of the law by the prosecutor was harmless error.

Likewise, the lower court properly denied Appellant's claim that trial counsel was ineffective for failing to object to the court's instructions that sympathy should play no role in their

deliberations and for failing to request an instruction on mercy. In this case, the trial judge utilized the standard jury instruction and informed the jury that their verdict should not be influenced by feelings of sympathy and should "not be decided for or against anyone because you feel sorry for anyone or are angry at anyone." (DAR2:254-55). As the lower court noted, the principal objection to an anti-sympathy instruction is that it may interfere with the jury's consideration of mitigating evidence, but in this case, Appellant waived the presentation of mitigating evidence so there was no such evidence for the jury to consider. Furthermore, although this Court recently amended the standard jury instructions, a similar version of this instruction is still in effect. See In re Standard Jury Instructions in Criminal Cases-Report No. 2005-2, 22 So. 3d 17 (Fla. 2009) ("Your recommendation must not be based upon the fact that you feel sorry for anyone, or are angry at anyone."). Similarly, trial counsel is not ineffective for failing to request a jury instruction on mercy because the standard jury instructions advises the jury that it can consider any other aspect of the defendant's character and any other circumstances of the offense. See Moore v. State, 820 So. 2d 199, 210 (Fla. 2002); Correll v. Dugger, 558 So. 2d 422, 425 (Fla. 1990).

Appellant further argues that trial counsel was ineffective for failing to object when the prosecutor argued "lack of remorse" during closing argument. Appellant argues that the prosecutor exceeded the boundaries of proper argument when he argued the nonstatutory aggravating factor of lack of remorse and stated:

> Ladies and gentlemen, you listen to that tape. This person, Mr. Krawczuk, delivered that in a cold manner. To use one of his words from the taped statement, it was "clinical." There was no remorse in his voice.
>
> . . .
>
> And what else does he say that shows you his total lack of remorse and total indifference to the life of David Staker?
>
> . . .
>
> Ladies and Gentlemen of the jury, I submit to you that the evidence in this case is overwhelming with regard to those aggravating circumstances.

(DAR2:243, 246-47). The lower court denied Appellant's claim and found that trial counsel cannot be ineffective for honoring Krawczuk's direction not to participate in the penalty phase, citing Brown v. State, 894 So. 2d 137 (Fla. 2004), and Cummings-El v. State, 863 So. 2d 246, 266 (Fla. 2003). Furthermore, the court noted that when considering the prosecutor's argument as a whole, the brief and isolated references to lack of remorse are of minor consequence and harmless beyond a reasonable doubt. See Floyd v. State, 808 So. 2d 175, 185 (Fla. 2002); Shellito v.

State, 701 So. 2d 837, 842 (Fla. 1997); Wuornos v. State, 644 So. 2d 1000, 1010 (Fla. 1994). Here, as the court noted, the jury was specifically instructed that the aggravating circumstances they may consider were limited to three: committed while engaged in robbery, HAC and CCP. Also, the prosecutor stressed these were the only three aggravators the jury could consider. Thus, as the lower court properly found, the two brief references to lack of remorse were harmless, and Appellant cannot establish prejudice based on trial counsel's failure to object to these two isolated comments. Accordingly, this Court should affirm the lower court's denial of Appellant's ineffective assistance of counsel claims.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm the lower court's order denying Appellant postconviction relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Suzanne Myers Keffer, Chief Assistant CCRC, Office of the Capital Collateral Regional Counsel, Southern Region, 101 N.E. 3rd Ave., Suite 400, Ft. Lauderdale, Florida 33301-1162, this 8th day of April, 2011.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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