IN THE SUPREME COURT OF FLORIDA

Case No. SC10-680

Lower Court Case No. 90-CF-2007B

ANTON KRAWCZUK,
Appellant,

v.
STATE OF FLORIDA,
Appellee.

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

INITIAL BRIEF OF APPELLANT

SUZANNE MYERS KEFFER
Assistant CCRC
Florida Bar No. 0150177

SCOTT GAVIN
Staff Attorney
Florida Bar No. 0058651

OFFICE OF THE CAPITAL COLLATERAL REGIONAL COUNSEL - SOUTH
101 NE 3rd Avenue, Suite 400
Fort Lauderdale, Florida 33301
(954) 713-1284

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Krawczuk's motion for post-conviction relief following an evidentiary hearing. The motion was brought pursuant to Fla. R. Crim. P. 3.851. The following symbols will be used to designate references to the record in this appeal:

"R." -- record on direct appeal to this Court;

"T." -- trial transcripts on direct appeal to this Court;

"PC-R." -- record on the first 3.851 appeal to this Court;

"Supp. PC-R." -- supplemental record on the first 3.850 appeal to this Court;

"PC-R2." -- record on the instant 3.851 appeal to this Court.

REQUEST FOR ORAL ARGUMENT

Mr. Krawczuk has been sentenced to death. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Krawczuk, through counsel, accordingly urges that the Court permit oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

INTRODUCTION

No mitigating evidence was presented on Mr. Krawczuk's behalf by defense counsel and no argument was ever made, as defense counsel admitted that she had not prepared one prior to the penalty phase (R. 219). In fact, counsel did not prepare any mitigation as she failed to investigate potential mitigation entirely. Faced with a client who was depressed and had previously informed the court that he wished to waive all issues regarding the presentation of mitigating evidence, including jury sentencing (R. 398, 402), counsel did nothing to advise Mr. Krawczuk of the potential avenues of mitigation. Defense counsel merely indicated her intention to follow Mr. Krawczuk's directions, citing several cases to the court which she believed supported Mr. Krawczuk's right to waive mitigation evidence (R. 404-405) despite the fact that Mr. Krawczuk's "decision" was the result of the combined effect of defeats early on in his case, his admitted depression and anxiety and, most importantly, counsel's ineffectiveness in failing to investigate and adequately inform her client of the potential mitigation available.

The Honorable James R. Thompson, Circuit Judge, heard a motion to suppress confession on July 25, 1991, and entered an order denying the motion on August 2, 1991. (R. 274-354, 525, 544-545) Thereafter, on September 27, 1991, Mr. Krawczuk entered a guilty plea[1] and asked for imposition of the death penalty

[1] During the plea colloquy Mr. Krawczuk testified he was not forced, threatened or

(R. 386-424).[2]

During the plea colloquy on September 27, 1991, the Court questioned Mr. Krawczuk about his intentions regarding the penalty phase of his trial. After being advised by the prosecutor of the two phases of a murder trial, Mr. Krawczuk indicated he also wanted to waive the right to have the jury make a sentencing recommendation (R. 391-393). Counsel tersely mentioned that she had wanted to call Dr. Richard Keown[3] and Jim Price as mitigation witnesses, but that she was

---

coerced into entering the guilty plea (R. 393). He was on medication, the anti-depressant Elavil. He last took his medication at 8:00 p.m. the previous night (R. 393-394, 412-413). He had not previously suffered from or been treated for any kind of mental disorder or mental health problems (R. 395). He went to the prison psychiatrist because he grew restless as his case neared trial; he wanted a mild sedative to sleep (R. 395). It was Mr. Krawczuk's belief that the medication was not affecting him at the time of his plea (R. 412-413). The court also ascertained that Mr. Krawczuk had completed high school, served in the military for four years and worked as a maintenance person for ten years (R. 395). Mr. Krawczuk indicated he understood the constitutional rights he was waiving. (R. 335-401, 414). Additionally, Mr, Krawczuk waived all pending motions (R. 402-404, 414).

[2] Mr. Krawczuk previously wrote to the court on April 29, 1991 expressing his dissatisfaction with trial counsel and asking that she be dismissed (R. 522-523). The court denied the request on May 30, l991 (R. 524). The court readdressed this issue at the time of accepting Mr. Krawczuk's plea (R. 388). At that time, Mr Krawczuk changed his position and testified that he was completely satisfied with counsel's representation (R. 388, 400-401).

[3] Dr. Richard Keown, conducted a competency evaluation approximately ten months earlier. Dr. Keown's report summarized that Mr. Krawczuk then had mild depressive symptoms but medication intervention was not at that time warranted. He suffered from many feelings of insecurity and low self-esteem, caused by his father rejecting him at an early age and his mother treating him in a demanding and verbally abusive manner. He thus adopted a passive approach to life (R. 606A-

not doing so pursuant to Mr. Krawczuk's instructions (R. 405). There was no further discussion with respect to those witnesses and there is no indication in the record as to who is Jim Price. The Court made only two inquiries of Mr. Krawczuk with respect to his penalty phase intentions. First, the trial court asked him "why he [had] chosen this course of action so [the court could] make a judgment as to whether it's a reasoned decision" (R. 409). Mr. Krawczuk responded only that "[he] shouldn't be allowed to live for what [he] did" (R. 409). Second, the court asked Mr. Krawczuk if he had any previous suicide attempts, to which Mr. Krawczuk responded that he had not (R. 409).[4] The court accepted the waiver, but ruled that it was not irrevocable (R. 416).

Trial counsel informed the court that Mr. Krawczuk's plea and request for the death penalty was against the advice of counsel and that Mr. Krawczuk instructed her not to present witnesses in mitigation (R. 404-405, 407-408). Significantly, Mr. Krawczuk's "decision" to plead guilty and waive penalty was only made after his motion to suppress and attempt to get a different lawyer were unsuccessful. In light of these defeats and his depression, Mr. Krawczuk simply gave up.

---

page 7). Dr. Keown found him competent to stand trial and sane at the time of the crime. Of the two defendants, Mr. Krawczuk was likely the more passive and was influenced by Poirier (R. 606A-pages 4-7).

[4] In fact, this was not true since Mr. Krawczuk did have a previous suicide attempt.

Despite Mr. Krawczuk's request to waive a jury's sentencing recommendation, the State refused to waive the penalty phase, and the court agreed (R. 654-655). Prior to jury selection, a brief colloquy occurred where Mr. Krawczuk reiterated his desire to get the death penalty and put on no evidence in mitigation; that despite continuing to take medication for depression he did not feel he was under the influence; that he waived the right to testify on his own behalf and the right to have his attorney cross-examine witnesses and make argument (R. 695-707). The court ruled that he was sufficiently intelligent and understood the consequences of his decisions, and that he had the legal right to take the course of action he was taking (R. 706). No detailed inquiry was made of Mr. Krawczuk. The court failed to pursue any questioning to elicit any information from Mr. Krawczuk that would demonstrate his knowledge of procedural rules or substantive law, **possible mitigation**, or the nature of the penalty phase. Here, the judge had little or no information about Mr. Krawczuk and conducted only a cursory inquiry into Mr. Krawczuk's ability to waive penalty.

After the presentation of the state's case, Mr. Krawczuk indicated to the court that he was not opposed to the presentation of mitigating evidence, although he was not willing to take the stand, and did not want part of the psychiatric report written by Dr. Keown admitted (R. 218-225). Mr. Krawczuk acknowledged that without the report "there is nothing working with me, it's all against me" (R. 228).

Mr. Krawczuk's contradictory assertions caused the state to express confusion with Mr. Krawczuk's intentions regarding the presentation of mitigation (R. 224).

No indication exists in the record that Mr. Krawczuk's counsel sought any of the extensive mitigating evidence that existed; in fact, as evidenced by her own testimony at the evidentiary hearing she did not investigate any mitigation. Thus, counsel was incapable of explaining its significance to Mr. Krawczuk.

Mr. Krawczuk was never apprised by counsel of all that was available for mitigation. His trial counsel failed to conduct any mitigation investigation, hence, Mr. Krawczuk was never even informed of what might have been presented in his defense for penalty considerations. What is clear from the record is that Mr. Krawczuk was not completely opposed to the presentation of mitigation (R. 218-225), although he did not want to testify and he did not want all of Dr. Keown's report admitted (R. 222). Had counsel done the job she was constitutionally required to do, a wealth of mitigation was available that Mr. Krawczuk would not have opposed.

Against this backdrop and after hearing testimony and argument presented only by the state (R. 201-269), the jury recommended death by a vote of 12-0 (R. 268-263, 584). On February 13, 1992, the circuit court followed the jury’s recommendation imposing a sentence of death for first-degree murder, and imposing a sentence of 15 years in prison for robbery (R. 436, 438, 587-594, 536-

601). The court found the following aggravating factors: (1) the crime as committed in the course of a robbery or for pecuniary gain, which the court merged and considered as one factor; (2) the crime was especially heinous, atrocious, and cruel; (3) the crime was committed in a cold, calculated and premeditated manner with no pretense of moral or legal justification (R. 434-435, 587-594). The court found one statutory mitigating factor, the lack of a significant history of prior criminal activity (R. 435, 557 594) and no non-statutory mitigating factors (R. 435, 587-594, 606A, 606B).

STATEMENT OF THE CASE

The Circuit Court of the Twentieth Judicial Circuit, Lee County, entered the judgments of conviction and sentence under consideration.

Mr. Krawczuk and his codefendant William Poirier were charged by indictment dated October 3, 1990, first degree murder and related offenses (R. 445-446).

Mr. Krawczuk entered a plea of guilty to one count first degree murder, one count felony murder, and one count robbery on September 27, 1991 (R. 388-416).

On February 5, 1992, the jury recommended a death sentence for the first degree murder conviction (R. 286).

On February 13, 1992, the trial court imposed a sentence of death on the count of first-degree murder (R. 434-436). A sentencing order was entered on that

date (R. 596-601).

On May 22, 1992, Mr. Krawczuk's codefendant, William Poirier, plead guilty to second degree murder before a different judge and received a sentence of 35 years on the murder charge to run concurrent with a 15 year sentence for robbery (PCR. 2359-62).[5]

The Florida Supreme Court affirmed Mr. Krawczuk's convictions and sentences on direct appeal. *Krawczuk v. State*, 634 So. 2d 1070 (Fla. 1994); *cert. denied* 115 S. Ct. 216 (1994).

Following this Court's affirmance of Mr. Krawczuk's conviction and sentences, Mr. Krawczuk filed his initial Motion to Vacate Judgment of Convictions and Sentences With Special Request for Leave to Amend in the Circuit Court for the Twentieth Judicial Circuit on October 11, 1995 (PC-R. 3-148). On March 15, 2002, after extensive public records litigation, Mr. Krawczuk filed an Amended Motion to Vacate Judgment of Convictions and Sentences With Special Request for Leave to Amend (PCR. Supp Vol. 1, 19-126).

The circuit court conducted a *Huff* hearing on August 21, 2002 (PCR.1336-1363). On June 30, 2003, the circuit court entered an order granting an evidentiary hearing for all claims alleging ineffective assistance of counsel and/or requiring

[5] At the time of Mr. Krawczuk's evidentiary hearing, Mr. Poirier was scheduled to be released from prison on July 6, 2005 pending gain time award, forfeiture or review (PCR. 2363).

factual development[6] and reserved ruling on purely legal claims which it determined not to require evidentiary development[7] (PCR. 1398-1403).

On January 20 and 21, 2004 and March 8, 2004, an evidentiary hearing was held. Mr. Krawczuk presented testimony including that of Mr. Krawczuk's trial attorney, Barbara LeGrande, Mr. Krawczuk's twin brother, step-father and mother, a childhood friend and his ex-wife, as well as two mental health experts.

Barbara LeGrande, Anton Krawczuk's trial attorney, recalled that Anton wanted only the Judge to determine his sentence and he informed her he did not want her to present anything in mitigation (PCR. 1778). Anton's request to waive a jury was denied (PCR. 1777-78). Based on Ms. LeGrande's understanding of the case law at the time, she felt Anton was entitled to make that decision (Id.). Ms. LeGrande acknowledged that she had not followed the same procedure as was conducted in *Anderson v. State*, 574 So. 2d 87 (Fla. 1991). She testified that she did not put on the record the witnesses or experts she would have called to testify at the penalty phase (PCR. 1780). Ms. LeGrande stated:

> That's correct. And I did not **–** I did not put that on the record at all. **And, in truth, there was not that much that I had done yet to be able to talk to Anton about at that time.**

[6] Claims II, III, V, VI, VII, XI, XIII, XV and XX.

[7] Claims I, IV, VIII, IX, X, XII, XVI, XVII, XVIII, XIX, XXI, XXII, XXIII, and XXIV.

(Id.). Ms. LeGrande could only say that she spoke with Anton's family members very briefly (PCR. 1781). In fact, her time records reflected that she only spoke to Anton's mother and grandmother for a maximum of six minutes each and she had no recollection of the content of those conversations (Id.).

Ms. LeGrande did not hire any experts for the purpose of developing mitigation experts and did not try to find any witnesses (PCR. 1782). Ms. LeGrande indicated that she filed a motion to have an expert assist with mitigation, but once Anton pled guilty she did not follow through with it (Id.). Ms. LeGrande believed that once [Anton] was no longer wanting [her] to defend the mitigation," she "in good faith, could not represent to the Court that [she] needed a mitigation expert" (PCR. 1815-16).

Despite the fact that Ms. LeGrande thought Anton and his codefendant, Poirier, were equally culpable (PCR. 1791), Ms. LeGrande also did not discuss with Anton the issue of presenting the culpability of his codefendant (PCR. 1789). The only conversations they had involved the possibility of Anton taking the stand to testify to Poirier's influence over him (Id.).

Ms. LeGrande agreed that she could not explain to Anton the details of what may have been presented on his behalf because she had not investigated (PCR. 1786). Ms. LeGrande was only able to explain to him superficially what it meant to present mitigation (PCR. 1786-87). Ms. LeGrande explained that she would have

told him "the concepts," not what she actually would have been doing (PCR. 1787). Ms. LeGrande repeated that she did not pursue any mitigation investigation and did not confer with Anton regarding any specific mitigation that could be presented (PCR. 1829, 1832).

Christopher Krawczuk, Anton's fraternal twin brother, testified at the evidentiary hearing that he and Anton had three brothers, one older and two younger (PCR. 1515). Anton and Christopher's biological father was Jon Clifford Krawczuk, whom they only met once because he believes his father left the family before the twins were born or shortly thereafter (PCR. 1516). Christopher described his father, from the stories he heard, as being a heavy drinker and very violent towards his mother including beating her when she was pregnant with Anton and himself (Id.).

Christopher's earliest memories were of living in a one-bedroom flat in the Bronx, New York with his mother Patricia, oldest brother Jon and Anton (PCR. 1517-18). Christopher recalled holes in mattresses and cockroaches; his mother was working at night as a barmaid, she was angry a lot and would "fly off the handle about a lot of different things" (PCR. 1518). Christopher described her violence as "commonplace" (PCR. 1519). Christopher recalled an incident when he was either two or three years old when his mother grabbed him in anger, threw him across the floor and his chin hit a fire truck. This resulted in a trip to the

hospital and his mother asking him not to tell anyone what had happened (PCR. 1518-19). According to Christopher, Anton took the brunt of his mother's rage (PCR. 1520). When Anton was five or six years old, his mother put his head through a plaster wall (Id.).

Christopher emotionally described many violet incidents. On "cleaning days," their mother was particularly violent, hitting them with the metal wand of the vacuum cleaner or making them stand in the corner for hours (PCR. 1520). Christopher emotionally recalled staring at the cracks in the wall while his mother went after Anton because she didn't want to hear him screaming and crying (Id.). Christopher did not know why Anton took the brunt of his mother's violence, but he stated that she was always persistent and more frequent in beating Anton, whereas when he or Jon got "smacked," "it would stop at some point" (PCR. 1521). Anton's mother would hit him with her fist or with her open hand about the head and face (PCR. 1531). Her abuse was daily and the kids would wonder to themselves "which Patricia is going to be there that day?" (Id.). Christopher explained that they were always looking over their shoulders because they never knew what would set their mother off (Id.).

According to Christopher, Anton wet his bed at a very early age. The more Anton's bed wetting persisted, the more violent his mother reacted to it (PCR. 1522). If he soiled his pants, she made Anton wear it on his head. On one occasion

Anton's mother made him wear a poster board which read "I do my doodie in my pants every day" and walk back and forth in front of their apartment building (Id.). Punishment for playing with matches at a very early age was holding Anton's hand over a gas stove burner, and Christopher's as well for watching him (PCR. 1523).

Christopher stated that he and Anton were on their own as children (PCR. 1523). In the winter time in New York, they did not have gloves (PCR. 1524). When Anton cut his hand on a parking meter trying to prevent himself from slipping on the ice as they were walking to school, it was Anton's fault according to his mother (Id.). The refrigerator was often empty and he recalls eating a lot of spaghetti (PCR. 1525). When their mother began working days, the boys were taking care of themselves as early as first grade (Id.).

Christopher explained that when his mother married Santo Calabro, he felt relieved to some extent because there was more stability in their lives, but it did not prevent his mother's persistent violence (PCR. 1526). Instead, she simply was more careful not to act this way in front of other people (Id.). Their mother's verbal and mental abuse continued, telling them they were no good, cursing at them, telling them "to leave her the hell alone" and "swing[ing]" at them for trying to wake her (Id.). Christopher stated that he loved going to school because his mother quit her job to be a homemaker when she was married to Santo.

While Patricia and Santo were married, they moved the family to Wappinger Falls, New York (PCR. 1537). Christopher and Anton became friends with Todd Kasse, another neighborhood boy (PCR. 1537; 1575). Because Anton and Christopher were not allowed to have friends at their house, they would take turns going to Todd's house without telling their mother. On one occasion, Christopher was punched in the mouth by his mother because Anton was at Todd's house when she got home from work (Id.). On another occasion, the boys had to hide Todd in their closet when their mother came home out of fear of what she would do if she found one of their friends at the house (PCR. 1539).

Todd Kasse testified that the few times he did visit Anton at his house he had to hide when their mother came home because he knew they were not allowed to have friends visit (PCR. 1576-77). Todd recalled hiding in the closet, listening to Patricia screaming, swearing and name calling at both Anton and Christopher. Although he was in the closet and did not want to get caught, Todd was able to see Patricia punching both boys with a closed fist (PCR. 1578). He thought she was yelling because the house was messy, but was unsure (Id.). Todd described himself as being very scared and nervous (Id.).

After five years of marriage the tension grew between Santo and Patricia. They were both violent with each other and Santo eventually had enough and left (PCR. 1533). When Santo left, life got worse for Anton and his brothers. Patricia

had to get a second job to support the household. Although Christopher and Anton were only 11 or 12 years old themselves, they were responsible for "raising their younger brothers" (PCR. 1534, 1536). Anton continued to be Patricia's "whipping post" taking the brunt of all her anger (PCR. 1536). Christopher never discussed their childhood with Anton's trial counsel because she never actually contacted him (PCR. 1550, 1553). Christopher would have been willing and available to testify as needed had he been contacted (Id.).

Ultimately, Anton ran away to Todd Kasse's house and lived with his family for almost a year before entering the Marines (PCR. 1542). Todd testified that while he was living with the Kasse family, Anton's mother did not call once, did not come to visit him and did not offer to help with expenses (PCR. 1581). Todd recalled that one time Anton went out and did not come home, which was unusual (PCR. 1582). When Anton did come home, he was badly beaten with lacerations, bruises and red marks on his face. Todd learned that Anton had been abducted and beaten (Id.). The persons responsible put a blanket over his head and beat him with a flashlight (Id.). Anton escaped, stopped at a church and the priest called the police (Id.).

Despite Anton's life at home, Todd described Anton as an excellent artist who liked to draw comics and "basically made everyone laugh" (PCR. 1576).

While Anton lived with the Kasse family he was funny and helpful (PCR. 1581). He helped mow the lawn and did the dishes (Id.).

After Anton left for the Marines, Christopher also left home to stay with the Kasse family (PCR. 1543, 1584). He lived there for almost a year and a half before leaving for the Navy. Again, Patricia never visited or called and did not help out with any expenses (PCR. 1583). Todd's mother remained in contact with Anton over the years and was still in contact with him at the time of the evidentiary hearing (PCR. 1581). Todd was never contacted by Anton's trial attorney, but had he been contacted he would have been willing and available to testify (PCR. 1583).

Santo Calabro, Anton's step father for approximately seven years, testified at the hearing that when he met Patricia she was living in a "very bad neighborhood" of the Bronx (PCR. 1555). Santo described Patricia as a "street girl;" "a tough girl that went around to different bars, you know looking for men" (Id.). Patricia had three children when he met her and he was familiar with her ex-husband (PCR. 1556). Santo had heard her ex-husband was a "brutal person" who drank and beat Patricia and had kicked her in the stomach when she was pregnant with the twins, Anton and Christopher (Id.).

While they were dating, Santo testified that Patricia was violent and had "a mouth like a truck driver" (PCR. 1557). After dating for five years, Santo decided to marry Patricia because he thought he could change her if he showed her he cared

and could take care of her (Id.). They moved out of the Bronx to better areas, but she never changed (Id.). Patricia was violent with Santo and Anton (Id.). Santo explained that during one incident Patricia tried to hit him in the head with a heavy anchor he was using to build a swing set, the anchor hit him in the shoulder and he was out of work for a couple of days due to the injury (Id.).

Santo described how Patricia treated Anton:

> Anton – what – she just didn't like him. She just felt he was like his father. And whatever he did was magnified. Chris and Jon could do the same thing as Anton did and he would be punished, and they would be like, 'Don't do that.' You know? He would get hit. I mean, she would with a closed fist in the head, in the face, it didn't matter. If I was there, I would stop her. You know? I used to have to grab her and pull her off of him.
>
> * * *
>
> And also, you know, she never showed any kind of affection or love to Anton.
>
> * * *
>
> He just got beatings and shots to the head and everything. It was terrible. Terrible.

(PCR. 1558-59). Santo explained that she "beat the crap out of him" for soiling on the floor to the point that Anton had bruises and marks on his face (PCR. 1565). Santo stated that Anton "never got love. Never got to do things right. Never taught how to be social. You know? All he got was beatings and yelled at, you know, from a mother. That's the way their mother was" (PCR. 1565). Santo testified that

the abuse was not just physical, "[s]he would call them F'ing, B . . . and anything else she could think of. And I think what hurt him the most was, uh, the Dumbo ears, or something like that with his ears, made fun of his ears all the time" (PCR. 1567).

Santo explained that Patricia's violence was focused on Anton. He felt bad for Anton because he couldn't be there all the time to stop Patricia. (PCR. 1564). The day he left Patricia, Anton, Christopher and Jon asked him to take them with him because they did not want to stay with their mother (PCR. 1561). After he left, the boys were angry with him for leaving, particularly Jon, so he did not see them much.

Santo had two children with Patricia and he was afraid to leave his children with her (PCR. 1559). After they divorced, Patricia would call him to take his two children because she wanted to go out drinking and to meet other men. He would always agree because his sons were better off with him than with her (Id.). Santo knew Patricia liked to drink and a couple of times found bottles hidden in the bedroom (PCR. 1560). Santo was always concerned for his children living with Patricia because he knew they were not being cared for (PCR. 1563-64). At least once he called the State Child Protective Agency (PCR. 1563).

Santo testified that no one ever contacted him to come to Florida and testify at Anton's penalty phase, but he would have been willing and able to testify had he

been asked (PCR. 1568). Santo and Anton had a good relationship. Santo described Anton as always helpful (PCR. 1562) and always affectionate with him (PCR. 1568). He could not conceive of Anton committing this crime, but felt he understood why it may have happened. Santo explained why:

> Well, because of, you know, the treatment he received. He never got help on how to be a social person. Never got help on how to love people and how to, you know, get along with people. And I guess he just, you know, after I left, he just went off the deep end. And when -- and I understand he was -- you know, later on I heard that he was doing pretty good down here. He was married, he had a child, he had a job, you know, and he was doing well.
>
> * * *
>
> And when Pat sold the house up in -- up in LaGrangeville there, and came down to Florida here and got into his life again, I think that set him off. I really do. Because she came in and tried to, you know, come into his life. "My grandchild this." And all of a sudden like she is grandma, you know, after all they've been through together. And my ex-wife says to me, too, she said to me, 'I'll bet you as soon as she goes down there he's going to go off again.' All right? And that's just what happened.

(PCR. 1568-69).

Anton's mother, Patricia Goss, testified about her relationship with Anton's biological father. Patricia confirmed that John Krawczuk was a "very brutal man" (PCR. 1591). He drank, he pushed her around and hit her with a dog chain when she was pregnant with the twins (Id.). The beatings were frequent when she was

pregnant with the twins and she recalled that she was terrified and wished she was out of her body when she was being beaten (PCR. 1592). Patricia grew up in an environment where her own mother yelled and she was afraid of displeasing her mother (PCR. 1593). She referred to her mother as a "supreme dictator" (Id.). Patricia acknowledged that she treated her children the same way her mother treated her (PCR. 1594).

Patricia admitted that she was angry a lot, screamed, yelled and "smacked [her children] around" (PCR. 1594). When asked what forms of discipline she used, Patricia responded: "Well, punishment was one thing. But a lot of times I hit them" (PCR. 1595). She hit them with her hands and Anton got the worst of it because, according to Patricia, he was an aggravating child and incorrigible (Id.). She described aggravating and incorrigible as "getting into mischief" but could not point to any serious trouble until he was 15 or 16 years old (PCR. 1597). Patricia agreed that she would hit Anton for wetting or soiling his pants because she thought he did it on purpose (PCR. 1601). She "didn't realize he was trying to tell [her] something," she "just thought he hated [her]" (Id.).

When Patricia first heard Anton was in jail, she called and spoke with his attorney Barbara LeGrande to see if Anton could have visitors (PCR. 1602). Ms. LeGrande never contacted Patricia again (PCR. 1601).

Paul Wise testified that he met Anton while working at McDonald's in North Fort Myers in approximately 1980 or 1981 (PCR. 1605). They worked together at the same store for four or five years (PCR. 1606). Paul testified that Anton was one of the best workers he had because he worked on his own and accomplished all of his duties each day (PCR. 1606). For approximately eight or nine months Anton shared an apartment with Paul and his girlfriend and Paul found Anton to be the same at home as he was at work (PCR. 1607). Anton was clean, meticulous and he paid his bills on time (Id.).

Paul stated that Anton could be moody at times, but Paul learned after working with him for some time that he was just having a bad day and needed to blow off steam due to something going on in his personal life (PCR. 1607, 1613). Although Anton was temperamental, Paul never saw him be physically violent (PCR. 1613) and never violent towards other people (PCR. 1615).

Paul testified that Anton did not have a lot of friends, that he was somewhat of a loner and didn't associate much with people (PCR. 1610-11). He described Anton as a follower (PCR. 1610-11) and explained that characterization:

> I think the reason that I said that was mainly because of the fact that he didn't have a lot of friends, and he seemed to kind of latch on a little bit to try to get some friends. And, 'If you want to do that, yeah, I'll go with you.' Things like that.

(PCR. 1615). Paul was aware that Anton was using marijuana and amphetamines during the time he knew him (PCR. 1609).

Judith Nelson, Anton's ex-wife, also testified regarding the drugs he was using while they were married. Anton was smoking marijuana everyday, numerous times a day, both at home and at work (PCR. 2375). Anton would mix hashish oil with the marijuana and also used speed (Id.). Ms. Nelson felt that his drug habit made it difficult on them financially (PCR. 2376).

Ms. Nelson described Anton as not very affectionate. She stated that they had a hard time communicating and that when she and Anton had problems, "he would write letters or notes to [her] explaining if he felt sorry or apologized or whatever the situation might be" (Id.).

While they were together, Ms. Nelson learned from Anton that his mother treated him very badly as a child. Anton told her that when his mother was cleaning, the children would have to sit on each other's laps in their underwear and when she got mad, she would hit them (PCR. 2377). Anton told her that his mother used a belt to hit him and his siblings (Id.). Ms. Nelson later saw Patricia's anger first hand. When Anton's daughter was born, Patricia was a doting grandmother, but after this crime happened, "things changed" (PCR. 2378). Ms. Nelson called Patricia to let her know she was getting remarried. Patricia invited Ms. Nelson to bring her granddaughter to her home to visit. However, when they arrived at

Patricia's house, Patricia became angry and told her to "get the fuck out of her house and take my daughter, that piece of shit daughter of mine, and get out of her house and never come back" (PCR. 2379).

Ms. Nelson testified that she knew William (Bill) Poirier and indicated she knew him as long as she knew Anton (PCR. 2380-81). She did not like Bill and believed that Bill had a lot more influence over Anton. She testified that Bill "would organize and maybe spark an idea, then they would follow through on it" (PCR. 2381).

Dr. Barry Crown testified that he is a licensed psychologist and limits his area of practice to clinical and forensic psychology and neuropsychology (PCR. 1633). The court agreed to consider him an expert in neuropsychology as well as a certified addiction specialist and expert in child abuse as subspecialties of neuropsychology (PCR. 1635-37). Dr. Crown conducted an interview of Anton and administered neuropsychological tests "to determine the relationship between brain function and behavior" (PCR. 1637).

Dr. Crown concluded that Anton has impairment or organic brain damage to the left frontal lobe area of his brain (PCR. 1638-1640). The impairments relate to difficulties neurodevelopmentally, likely occurring perinatally, neonatally, and aggravated throughout the developmental period up to and including the adolescent growth spurt (PCR. 1639). Dr. Crown clarified that "[t]here is damage. There is

also a functional impairment, meaning at a neuropsychological level he's unable to process information that's consistent with some form of impairment in that area" (PCR. 1640). Dr. Crown explained how this type of impairment impacts Anton's functioning:

> [He] shows difficulties determining and understanding the long-term effects of their immediate behavior. In addition, they have difficulties with concentration, attention, reasoning and judgment, and also with what's referred to as language-based critical thinking. And, in simplistic terms, that relates to "if/then" relationships. If I do this, then this will follow, and then this will follow. A, B, C and D sequential understanding of processes. They -- and he becomes confused with that. He also has, related to that, an auditory selective attention deficit, which 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. In addition, he has considerable difficulty in storing information for rapid retrieval. He needs a considerable consolidation period of information before he's able to, in a sense, pull things up and examine it and reach conclusions.

(PCR. 1640). Anton's deficits are further aggravated by stressors. Stressors can be lack of sleep, pressure to make immediate decisions, drugs or alcohol (PCR. 1641). According to Dr. Crown:

> First, a smaller amount of substance has a greater effect. Secondly, he's already impaired, it heightens the level of impairment. And, in his case, that would affect being able to understand or comprehend the long-term consequences of his immediate behavior, understanding what's going on, and the processes involved; and it would

> also impair reasoning and judgment, particularly language-based as opposed to other forms. We all carry on conversations with ourselves, and in simple terms that ability to carry on that conversation with yourself is significantly impaired in that circumstance.

(PCR. 1643). Dr. Crown explained that involving another person would impact Anton as well:

> Well, it would certainly hinder him, because he requires a consolidation period. So if there's a third or fourth party who jumps in and sort of short circuits that, then he's very likely to be impulsive in accepting information and acting, rather than going through that period of consolidation and thought. In a sense, he wouldn't slow down, which is what someone in that situation needs to do, but would impulsively move ahead.

(Id.).

Dr. Crown explained that the full development of the brain's frontal lobe, particularly those portions right up front related to judgment and reasoning and having a sense of values, does not occur until the end of the adolescent growth spurt, sometime between the ages of 11 and 14 (PCR. 1644). If the frontal lobe has been damaged before the full development period, "he's at greater risk because the pieces of the puzzle simply will not fall together and complete themselves" (PCR. 1645). In children who are abused for a prolonged period, whether it is children who experience a non-nurturing and physically violent environment or emotional or verbal abuse, there are fewer synaptic connections resulting in deficits in terms of actual brain development (Id.). Additionally, prolonged verbal abuse, or

screaming and yelling, contributes to auditory selective deficits, " in a sense shutting down and nonresponding, first as a means of surviving, but also neurodevelopmentally in terms of not knowing what to pay attention to" (PCR. 1646-47). The "shutting down" may look like a blank stare, it may be acquiescence and it may result in an impulsive act following the shutting down process, rather than a reasoned act (PCR. 1647).

Ultimately, Dr. Crown opined that Anton was under extreme mental or emotional disturbance based on "neuropsychological impairment, the defect really that creates his difficulties with reasoning and judgment, language-based critical thinking and understanding the long-term consequences of his immediate behavior. All of those things, which can be aggravated situationally by external substances, ingestion of substances or stressors." (PCR. 1648). These circumstances would lead Anton to act impulsively resulting in an inability to conform his conduct to the requirements of the law (PCR. 1649).

Dr. Faye Sultan, a clinical psychologist with an expertise in assessment and treatment of victims of physical, emotional and sexual abuse (PCR. 1682, 1690), testified that she was asked to evaluate Anton and, among other things, identify factors in his life which might be considered mitigating (PCR. 1691). As a result of her evaluation, Dr. Sultan gave Anton several diagnoses.

Dr. Sultan diagnosed Anton with a Cognitive Disorder – Not Otherwise Specified (PCR. 1694). Dr. Sultan explained that this means "that there are areas of psychological dysfunction, of learning problems, of impulse control, there are items in his behavior that are only explained by neuropsychological problems" (PCR. 1694). Dr. Sultan also concluded that Anton suffers from obsessive-compulsive disorder which means he has "great rigidity in his thinking and that he engages in many ritualistic behaviors" (PCR. 1695). Anton's obsessions manifest as a fear of germs and contamination; he has extensive washing rituals that have resulted in open sores on his hands (Id.). It took Anton a few visits with Dr. Sultan before he could admit to her how extensive his inability to stop the cleaning rituals was (PCR. 1696). Everyone that Dr. Sultan spoke to as part of her evaluation described in detail the rituals and cleaning he had done from the time he was a child (Id.).

In terms of Anton's daily behavior and life, the compulsions take up a great deal of time, but with respect to his personality, Dr. Sultan explained:

> [it] involves lots of anxiety, thinking the same things over and over, not being able to change the record, playing the same thoughts over and over. [I]nflexibility in thinking, in general ways. Maybe appearing to be a bit more concrete in thinking, because he can't really look at options outside of the one that you're zooming in on. Those are the things that tend to play out in Mr. Krawczuk's life.

(PCR. 1696).

Anton also meets most of the criteria for Personality Disorder – Not Otherwise Specified. Essentially, as a result of genetics, biology and/or his history, Anton developed certain personality traits which do not rise to the level of a specific illness, but influence how he operates in the world (PCR. 1697). For example:

> Mr. Krawczuk is extremely needy and dependent in interpersonal relationships. Doesn't have a sense of himself or the other person. And so he experiences relationships as frustrating and difficult. And he's quite demanding in those relationships. [S]ometimes harassing. Mr. Krawczuk tends to be either quite, quite passive and easily influenced, which fits in the arena of a personality disorder; and then sometimes kind of bubbles over with anger. Those fit within diagnostic formulations.

(PCR. 1698). Dr. Sultan affirmed that Anton does feel connected to other people and does have feelings of remorse and regret (Id.).

Dr. Sultan's conclusions were based on her review of background materials, consultation with Dr. Crown, review of a deposition of Paul Wise and an affidavit of Elizabeth Pousson,[8] as well as collateral interviews with Ms. Pousson, Santo Calabro, Todd Kaase and Christopher Krawczuk (PCR. 1692-93). Her interviews confirmed that Anton was raised in a home in which all the children, but particularly Anton as he was singled out by his mother, were physically, verbally and emotionally abused (PCR. 1699). The reports from others corroborated what

[8] Elizabeth, or Betty, Pousson is Todd Kasse's mother (PCR. 1704).

she had been told by Anton. According to Dr. Sultan several of the worst incidents stand out in everyone's mind (PCR. 1700-1). Significantly, the abuse was "so catastrophic that anyone present remembered it essentially the same way" (PCR. 1701).

Dr. Sultan learned that Anton was a bed wetter and soiled himself. According to Dr. Sultan, this is one of the major symptoms of early child abuse (PCR. 1701, 1711).[9] One of the most catastrophic events for Anton was being forced to wear the sandwich board reading "I make doo-doo in my pants" while he walked up and down the street in front of their apartment building (PCR. 1701). While this was one of the most humiliating experiences of his life, Dr. Sultan testified that he responded in his "characteristic way of showing no emotion" (Id.). Dr. Sultan explained Anton's emotionless response:

> One of the things that's clear from the record, and from other people's description of Anton Krawczuk's behavior, is that in emotionally-charged situations, Anton Krawczuk learned early on to simply remove himself emotionally from the situation, so that he could be physically present, but they all viewed him as just not there. The psychological term for that is depersonalization. And to some extent or another, all victims of severe child abuse experience

[9] Dr. Sultan also testified that the inappropriate defecation is a sign of sexual abuse. In fact, Anton relayed to Dr. Sultan two incidents of inappropriate sexual contact, the first when he was between 8 and 10 years old with a male friend who sexually stimulated Anton (PCR. 1712), the other being when he was abducted and beaten when he was a teenager (Id.).

> depersonalization. The only way to cope is to remove yourself, so to go hide some place inside so that nothing shows. Chris Krawczuk tells of a situation in which Anton Krawczuk is being beaten -- they're both being beaten –
>
> Q When you say "beaten", what do you mean?
>
> A Smashed in the head with a Lysol can, kicked in the back, hit over the head with a wand of a vacuum cleaner pole, objects thrown at the head. In one situation Anton was taken and thrown through a plaster wall. Cracked the wall and hurt his head, I imagine. What Chris Krawczuk noted was that in those situations, Chris would be crying and screaming and lifting his arms up above his head to defend himself, and he was horrified that Anton did nothing. He simply stood with his arms at his side until his mother was finished. He thought that was very weird. In fact, it's certainly one of the ways that abused children respond, which is to simply leave emotionally.

(PCR. 1702-3).

Dr. Sultan was able to expand on the verbal and psychological abuse in the home based on what she learned in her interviews and indicated that it was probably more damaging then the physical abuse (PCR. 1706). Anton's mother called him stupid and worthless (Id.). She referred to him as "Dumbo, the flying fucking elephant" and that's how she called him to dinner (Id.). Dr. Sultan described the psychological abuse:

> The kids, according to Anton Krawczuk, were terrified of not meeting her every demand, but apparently were unable to meet her demands. That's the real psychological abuse. If a child is peddling as fast as he

> can, doing everything he can to keep from being hurt or to keep from disappointing, and still continuously is a disappointment, that's where the real psychological injury takes place. Because the sense of helplessness takes over.

(PCR. 1706-7). The mother's demands included simple household chores as well as emotional demands. Anton felt he never pleased her emotionally and felt his mother simply didn't like him (PCR. 1707-8).

Dr. Sultan was aware that Anton began stealing cars at approximately 10 or 11 years old. In Dr. Sultan's opinion there were direct and indirect connections between Anton stealing cars and what was going on at home. Dr. Sultan thought that he took a car when he was 10 or 11 "maybe as a way to get away from the house" (PCR. 1710). Dr. Sultan further stated:

> [T]he Krawczuk boys ran away from their home all the time. Mr. Krawczuk -- Anton Krawczuk tells me that he was adjudicated for being a runaway at some point because it was such a chronic behavior. The Judge gave him a choice of going home to mom or going off to a boy's school for juvenile delinquents, and he chose the boy's school. So I'd say that's a pretty direct consequence of what's going on at home. It's also true, by that point, according to Dr. Crown, whatever cognitive disorders exist for him are already in place, so his impulse control is terrible, his reasoning is lousy, he's making really bad decisions already, and on top of that he's not even adolescent yet. So I think those are all probably some consequences of his upbringing as well.

(PCR. 1710-11).

In his adult life, Mr. Krawczuk was unsuccessful in the military and was ultimately discharged (PCR. 1716). In Dr. Sultan's opinion, Anton functioned marginally:

> [T]he highest level of occupational functioning that Mr. Krawczuk achieves is a custodial job at the McDonald's. He performs very well at that job for years, works there for six or seven years. Is excellent at cleaning windows. This is where his obsessive-compulsive disorder serves him well. But is disturbed enough that he doesn't form relationships with peers that are very satisfying. Is still very impulsive in the choices he makes.

(Id.). Anton was using marijuana, speed and had tried LSD (PCR. 1717) and he was drinking consistently throughout his adult life (PCR. 1718). Anton was easily influenced by other people and Anton described to Dr. Sultan being "bossed around" by his codefendant William Poirier, almost like a drill sergeant (PCR. 1719). Dr. Sultan testified that all of Anton's behavior is influenced by his cognitive disorder so that it "needs to be viewed as an overriding blanket of dysfunction" (PCR. 1718). As a result of the dysfunction, Anton makes impulsive choices and then as a result of his obsessive-compulsive disorder, he thinks about them, worries about them and anguishes over his choices (Id.). Dr. Sultan observed that this compulsiveness was evident in his confession and in his desire to plea and to waive the penalty phase and mitigation (PCR. 1726-27, 1730).

Dr. Sultan found numerous mitigating factors in Anton's background: abandonment by his father; emotional isolation as a child; lack of supervision and guidance throughout his childhood; the neuropsychological damage that he sustained and his suffering from other mental disorders; severe physical abuse; depressive symptoms that he experienced throughout his childhood; and the strong possibility of sexual abuse. Additionally, learning difficulties he had in school that made his success impossible and "the impulse control issues that come up as a consequence of his neuropsychological problem has also greatly influenced his life" (PCR. 1724). Dr. Sultan opined that Anton has been suffering disturbance, disorder or defect for most of his life (Id.). All of his psychological components impacted his behavior and existed at the time of the offense (Id.). Because Anton has the most significant deficit in his ability to control impulses and difficulty making good decisions, Dr. Sultan opined that his ability to conform his conduct to the requirements of the law was compromised (PCR. 1724-25).

Both the State and Mr. Krawczuk filed posthearing memoranda subsequent to the conclusion of the hearing.

On January 25, 2010, the circuit court denied Mr. Krawczuk relief as to all his claims raised in his postconvction motion (PCR. 2434-2558). On February 9 2010, Mr. Krawczuk filed a Motion to Disqualify Judge Thompson and a Motion for Rehearing (PCR. 2559, 2568). The disqualification motion was denied on

March 5, 2010 and the motion for rehearing was denied thereafter on March 8, 2010 (PCR. 2592, 2593).

This appeal timely follows.

SUMMARY OF THE ARGUMENT

ARGUMENT I - The lower court erred in denying Mr. Krawczuk's motion to disqualify the judge because the facts alleged in Mr. Krawczuk's motion were sufficient to warrant fear on Mr. Krawczuk's part that he would not receive a fair hearing and resolution of his ineffective assistance of counsel claims based on the lower court's independent judicial investigation into the credibility of a witness.

ARGUMENT II – Mr. Krawczuk received ineffective assistance of counsel at the penalty phase of his trial because trial counsel failed to conduct a reasonable investigation into mitigation such that Mr. Krawczuk could not make a knowing and intelligent waiver of the presentation of mitigation and Mr. Krawczuk was prejudiced by counsel's failure to present mitigation.

ARGUMENT III – Mr. Krawczuk is innocent of the death penalty as a result of his codefendant's disparate sentence.

ARGUMENT IV - Mr. Krawczuk's statements to the police were involuntary due to the combined effects of the circumstances of his arrest and interrogation and Mr. Krawczuk's existing mental disorders. Mr. Krawczuk received ineffective assistance of counsel when trial counsel failed to properly raise and litigate the

voluntariness of his confession.

ARGUMENT V - The prosecutors' acts of misconduct both individually, and cumulatively, deprived Mr. Krawczuk of his rights under the Sixth, Eighth, and Fourteenth Amendments. Defense counsel rendered prejudicially deficient performance in failing to object to the prosecutor's inflammatory and prejudicial comments. The improper argument by the state, the improper instructions by the trial court, and the ineffectiveness of trial counsel combine to make Mr. Krawczuk's sentence unconstitutional.

ARGUMENT

ARGUMENT I - MR. KRAWCZUK WAS DENIED A FULL AND FAIR HEARING BEFORE A FAIR AND IMPARTIAL JUDGE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FEDERAL CONSTITUTION

All parties before a court are entitled to full and fair proceedings, including the fair determination of the issues by a neutral, detached judge. *In re Murchison*, 349 U.S. 133 (1955); *Porter v. Singletary*, 49 F. 3d 1483 (11th. Cir. 1995); *see also Holland v. State*, 503 So. 2d 1354 (Fla. 1987). The lower court denied Mr. Krawczuk a full and fair evidentiary hearing by denying Mr. Krawczuk’s motion to disqualify the judge. The Honorable James R. Thompson, who was also Mr. Krawczuk’s original trial judge, presided over Mr. Krawczuk’s Rule 3.850 proceedings.

During Mr. Krawczuk’s evidentiary hearing, he presented evidence and

testimony, including the testimony of Dr. Barry Crown, in support of his claims that he received ineffective assistance of counsel when his attorney failed to investigate potential mitigation and failed to hire competent mental health experts so that he could make a knowing and voluntary waiver of his right to present penalty phase mitigation.

In his Order Denying Defendant's Amended Motion to Vacate Judgments of Convictions and Sentences, Judge Thompson dismissed the testimony of Dr. Barry Crown as not credible based on his independent investigation of Dr. Crown's participation in other criminal cases. Specifically, Judge Thompson states: "[I]f 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." (PCR. 2451). Judge Thompson's conclusion indicates that he in fact conducted research on Westlaw with respect to cases in which Dr. Crown testified and went so far as to compare the testimony and opinions of those cases with that testified to in Mr. Krawczuk's case.[10] Judge Thompson went outside the record of this case by reviewing information not presented during the evidentiary hearing to make credibility determinations. This was improper.

[10] The factual research conducted by Judge Thompson clearly differs from researching case law for legal precedent. In this situation, Mr. Krawczuk has no opportunity to rebut the facts relied on by Judge Thompson.

Independent judicial investigation into pending issues was strongly condemned by this Court in *Vining v. State*, 827 So. 2d 201, 210 (Fla. 2002)("The judge overstepped his boundaries by conducting an independent investigation and by reviewing information that was not presented during the trial. We caution that such behavior does not promote public confidence in the integrity and impartiality of the judiciary."). A litigant is just as much denied his due process right of notice and meaningful opportunity to be heard by an independent out-of-court judicial investigation, as he is by *ex parte* communication between the presiding judge and opposing counsel. *See Smith v. State*, 708 So. 2d 253 (Fla. 1998). Here, Judge Thompson issued his decision premised upon information provided by neither party, which was not of record, which by his own indication was obtained by independent judicial investigation. Judge Thompson issued his decision without providing Mr. Krawczuk notice and affording him a reasonable opportunity to be heard. This was a clear violation of due process, the Code of Judicial Conduct,[11] and the Florida Supreme Court's condemnation of independent judicial investigations in *Vining v. State*. Judge Thompson's action demonstrates bias

[11] Canon 3 (E)(1)(a) of the Code of Judicial Conduct provides that "[a] judge shall disqualify himself or herself in a proceeding where the judge's impartiality might reasonably be questioned, including but not limited to instances where …the judge…has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary hearing facts concerning the proceedings."

against Mr. Krawczuk.

Based on Judge Thompson's independent research, Mr. Krawczuk moved to disqualify Judge Thompson (PCR. 2559). Mr. Krawczuk feared he did not receive a fair hearing and would not receive a fair resolution of his motion for rehearing before Judge Thompson.

To prevail on a motion to disqualify pursuant to Fla. Stat. § 38.10 and Rule 2.330 of the Florida Rules of Judicial Administration, Mr. Krawczuk had only to show that the motion was legally sufficient. *See Barnhill v. State*, 834 So. 2d 836, 842-43 (Fla. 2002). For the purposes of a motion to disqualify where no judge has previously been disqualified in the case on that motion, the facts alleged by the movant must be taken as true. *See id.*; *see also* §§ 38.02, 38.10; Fla. Stat.; Fla. R. Jud. Admin. 2.330(f); *Cave v. State*, 660 So. 2d 705, 707-708 (Fla. 1995).

Mr. Krawczuk is entitled to full and fair rule 3.851 proceedings. *Holland v. State*, 503 So. 2d 1354 (Fla. 1987); *see also Easter v. Endell*, 37 F.3d 1343 (8th Cir. 1994). This includes a fair determination of the issues by a neutral, detached judge. The circumstances of this case are of such a nature that they are sufficient to warrant an objectively reasonable fear on Mr. Krawczuk's part that he did not receive a fair hearing and did not receive a fair determination of his motion for rehearing. *Suarez v. Dugger*, 527 So. 2d 191, 192 (Fla. 1988). The United States Supreme Court recently reiterated that "[i]t is axiomatic that '[a] fair trial in a fair

tribunal is a basic requirement of due process.'" *Caperton v. A. T. Massey Coal Co., Inc.* 129 S. Ct. 2252, 2259 (2009) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). The Court has long recognized the basic constitutional precept of a neutral, detached judiciary:

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. **This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision making process.** The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. At the same time, it preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done,' by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) (internal citations omitted) (emphasis added). Due process guarantees the right to a neutral, detached judiciary in order "to convey to the individual a feeling that the government has dealt with him fairly, as well as to minimize the risk of mistaken deprivations of protected interests." *Carey v. Piphus*, 425 U.S. 247, 262 (1978).

The facts alleged in Mr. Krawczuk's motion were "sufficient to warrant fear on [Mr. Krawczuk's] part that he would not receive a fair hearing by the assigned

judge." *Suarez v. Dugger*, 527 So. 2d 190 (Fla. 1988). The appearance of impropriety violates state and federal constitutional rights to due process. A fair hearing before an impartial tribunal is a basic requirement of due process. *In re Murchison*, 349 U.S. 133 (1955). "Every litigant[] is entitled to nothing less than the cold neutrality of an impartial judge." *State ex rel. Mickle v. Rowe*, 131 So. 331, 332 (Fla. 1930). Absent a fair tribunal there is no full and fair hearing. Because the lower court erred in denying Mr. Krawczuk's motion, Mr. Krawczuk is entitled to a new evidentiary hearing before an impartial judge.

ARGUMENT II - MR. KRAWCZUK'S PENALTY PHASE VIOLATED THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.[12]

Mr. Krawczuk's trial counsel was constitutionally ineffective in the penalty phase by failing to investigate and present available mitigating evidence. This failure rendered Mr. Krawczuk's decision to waive presentation of mitigating evidence unknowing and involuntary. Defense counsel merely indicated her intention to follow Mr. Krawczuk's directions, citing several cases to the court which she believed supported Mr. Krawczuk's right to waive mitigation evidence (R. 404-405) despite the fact that Mr. Krawczuk's "decision" was the result of the

[12] Because the claims are so interrelated and rely on much of the same record evidence and postconviction evidence and testimony, Mr. Krawczuk combines the argument for Claims II, III and VI of his Amended Rule 3.850 motion here.

combined effect of defeats early on in his case, his admitted depression and anxiety and, most importantly, counsel's ineffectiveness in failing to investigate and adequately inform her client of the potential mitigation available. Trial counsel failed to conduct any mitigation investigation, hence, Mr. Krawczuk was never even informed of what might have been presented in his defense for penalty considerations.

On direct appeal, this Court found that the trial court "carefully and conscientiously considered this case," and found "no error arising from Krawczuk's knowing and voluntary waiver." *Krawczuk v. State*, 634 So. 2d 1070 (Fla. 1994). However, this Court did not have the benefit of the non-record evidence that has been developed during postconviction. This Court could not take into account that Mr. Krawczuk's "waiver" was made without consideration of the potential mitigation. Such a waiver can hardly be considered knowing and this Court's finding is no longer supported by the record in this case.

Counsel cannot advise or make a reasonable decision about that which she has failed to investigate. *See Douglas v. Woodford*, 316 F.3d 1079, 1089 (9th Cir. 2003) ("It is, of course, difficult for an attorney to advise a client of the prospects of success or the potential consequences of failing to present mitigating evidence when the attorney does not know that such evidence exists."). Nor can counsel's client make any "knowing" waiver of evidence of which he is unaware. *State v.*

Lewis, 838 So. 2d 1102, 1113 (Fla. 2002) ("Although a defendant may waive mitigation, he cannot do so blindly; counsel must first investigate all avenues and advise the defendant so that the defendant reasonably understands what is being waived and its ramifications and hence is able to make an informed, intelligent decision."). In this, counsel's performance was deficient and the resulting prejudice was an invalid waiver that resulted in no presentation of mitigation for the judge or the jury to consider.

The lower court erred in denying Mr. Krawczuk's claims that counsel was ineffective for failing to investigate and thereby effectuate a valid wavier. The lower court failed to understand that the resolution of this claim turns on only two points: 1) whether counsel failed to conduct a reasonable investigation into mitigation such that Mr. Krawczuk could not make a knowing and intelligent waiver; and 2) whether Mr. Krawczuk was prejudiced by counsel's failure to present mitigation. *See Ferrell v. State*, 29 So. 3d 959 (Fla. 2010). Competent, substantial evidence does not support the trial court's conclusion that the waiver was knowing and voluntary, nor did the lower court correctly conclude that Mr. Krawczuk was not prejudiced by counsel's failure to investigate and present mitigation evidence.

A. Deficient Performance Rendering Mr. Krawczuk's Waiver Unknowing

The lower court's order is confusing and contradictory on many points. Most significantly, with respect to counsel's ineffectiveness as it relates to the waiver, the lower court finds that at the time of Mr. Krawczuk's case "no particular form of record inquiry was required for a defendant to waive mitigation" therefore, "the basic requirements for a valid record waiver as they existed at the time of this case have been met" (PCR. 2464). This finding is based on the court's conclusion that counsel cannot be deemed deficient for failing to foresee *Koon v. Duggar*, 619 So. 2d 246 (Fla. 1993) (setting forth the procedure to be applied when a defendant refuses to allow presentation of mitigating evidence at the penalty phase). Despite this conclusion, the court goes on to find that 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" (PCR. 2468). These two findings cannot be reconciled. Based on the lower court's finding 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" (PCR. 2468), it is clear that the requirements "for a valid record waiver [of the presentation of mitigation] as they existed at the time of this case" have **not** been met (PCR. 2464).

Additionally, the court's conclusion that counsel cannot be deemed deficient because *Koon* did not exist at the time of Mr. Krawczuk's penalty phase ignores clearly established federal law and the most recent case law from this Court. *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny make clear the duties of counsel in investigating possible mitigation even when the client indicates he does not wish to present any mitigation. Counsel's highest duty is the duty to investigate, prepare, and present the available mitigation. *Rompilla v. Beard*, 545 U.S. 374 (2005) (reaffirming *Wiggins* and finding that "[e]ven when a capital defendant and his family members have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review materials that counsel knows the prosecution will probably rely on as evidence of aggravation at the trial's sentencing phase."); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000). The conclusions in *Wiggins* are based on the principle that "strategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation." *Wiggins*, 539 U.S. at 512. The *Wiggins* Court clarified that "in assessing the reasonableness of an attorney's investigation, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Id.* at 2538. In other words, counsel must conduct a

complete investigation to know what evidence is available before a reasonable decision can be made whether or not to present that evidence.

Throughout the Court's analysis in *Wiggins* of what constitutes effective assistance of counsel, it turned to the American Bar Association (ABA) Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. *See id*. at 524. The Guidelines specifically refer to cases such as Mr. Krawczuk's in which counsel believes that the client does not wish mitigation to be investigated. ABA Guideline 10.7(A) (2003) [13] is clear that "Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty." Guideline 10.7(A) (2) further states that "The investigation regarding penalty should be conducted **regardless of any statement by the client that evidence bearing upon penalty is not to be conducted or presented**." (emphasis added). The principles discussed in *Wiggins* are not new, but rather affirm the dictates of *Strickland*.

[13] The fact that Mr. Krawczuk's case predated the promulgation of the 2003 ABA Guidelines is not a bar to their application to the instant case. As the Sixth Circuit explained in *Hamblin v. Mitchell*, 354 F.3d 482 (6th Cir. 2003), "New ABA Guidelines adopted in 2003 simply explain in greater detail than the 1989 guidelines the obligations of counsel . . . The 2003 ABA guidelines do not depart in principle or concept from *Strickland* [or] *Wiggins*." *Hamblin*, 354 F.3d at 487. Similarly in *Rompilla v. Beard*, 545 U.S. 374 (2005), in which the trial took place in 1989, the Supreme Court applied the 2003 Guidelines. Thus the 2003 guidelines are applicable, as the Sixth Circuit found, to cases tried before they were promulgated in 2003 since they merely explain in more detail the concepts previously promulgated.

The requirement to investigate and inform the defendant of the possible avenues of mitigation existed well before Mr. Krawczuk's trial. In *Thompson v. Wainwright*, the Eleventh Circuit Court of Appeals commented on the scope of mitigation investigation required where the client expresses a desire not to present mitigation: "The reason lawyers may not 'blindly follow' such commands is that although the decision whether to use such evidence in court is for the client, the lawyer first must evaluate potential avenues and advise the client of those offering possible merit." 787 F.2d 1447, 1451 (11th Cir. 1986) (internal citations omitted). In other words, counsel has a duty to investigate possible mitigation and advise the client about what information is available so that the client can make an informed decision regarding whether to use that information.

Mr. Krawczuk's case is not a case where counsel was instructed to not investigate. As the lower court acknowledged, the record does not support a finding that Mr. Krawczuk instructed counsel not to investigate potential mitigation (PCR. 2468). In fact, the record is clear that Mr. Krawczuk was cooperative with Dr. Richard Keown, the psychiatrist who evaluated him for competency. Mr. Krawczuk was forthcoming about his military background during his first meeting with counsel and even informed her he would sign the necessary release to request his military records (PCR. 1795). During this meeting he also mentioned his ex-wife (PCR. 1795), who would have been a source of information.

Trial counsel was also contacted by and spoke very briefly[14] with Mr. Krawczuk's mother and grandmother, but failed to contact them further regarding his family history. Although, according to trial counsel, Mr. Krawczuk may have expressed reluctance about involving his family (PCR. 1831), there is no indication in the record that his family would have been uncooperative, particularly given their initial attempts to speak to counsel (PCR. 1601-3).

The court does not fault counsel for failing to begin her investigation for the penalty phase upon receipt of the case because the court believed that a reasonable standard should not "require counsel on taking a case to immediately begin to investigate for mitigation out of fear the client might later decide to waive mitigation and bar further investigation" (PCR. 2467). This reasoning is contrary to any and all standards of performance. The requirement to investigate despite the client's initial desire not to present mitigation is explained by the commentary to the 2003 Guidelines:

> Because the sentencer in a capital case may consider in mitigation 'anything in the life of the defendant which might militate against the appropriateness of the death penalty for the defendant,' 'penalty phase investigation requires extensive and generally unparalleled investigation into the personal and family history.' At least in the case of the client, this begins with the

[14] Trial counsel indicated that she spoke to each of them for only six minutes or less (PCR. 1781) and Mr. Krawczuk's mother testified that this conversation was only regarding visitation at the jail (PCR. 1602).

> moment of conception. Counsel needs to explore:
>
> (1) Medical history (including hospitalizations, mental and physical illness or injury, alcohol and drug use, pre-natal and birth trauma, malnutrition, developmental delays, and neurological damage);
>
> (2) Family and social history (including physical, sexual, or emotional abuse; family history of mental illness, cognitive impairments, substance abuse, or domestic violence; poverty, familial instability, neighborhood environment, and peer influence); other traumatic events such as exposure to criminal violence, the loss of a loved one, or a natural disaster; experiences of racism or other social or ethnic bias; cultural or religious influences; failures of government or social intervention (e.g., failure to intervene or provide necessary services, placement in poor quality foster care or juvenile detention facilities);
>
> (3) Educational history (including achievement, performance, behavior, and activities), special educational needs (including cognitive limitations and learning disabilities) and opportunity or lack thereof, and activities;
>
> (4) Military service, (including length and type of service, conduct, special training, combat exposure, health and mental health services);
>
> (5) Employment and training history (including skills and performance, and barriers to employability);
>
> (6) Prior juvenile and adult correctional experience (including conduct while under supervision, in institutions of education or training, and regarding clinical services);

Commentary to ABA Guideline 10.7 (2003). Contrary to what the lower court thinks should be a "reasonable standard" (PCR. 2467), the Commentary suggests

that this quality of mitigation investigation "should begin as quickly as possible, because it may affect the investigation of first phase defenses (*e.g.*, by suggesting additional areas for questioning police officers or other witnesses), decisions about the need for expert evaluations (including competency, mental retardation, or insanity), motion practice, and plea negotiations." *Id*. In order to comply with this standard, counsel is obliged to begin investigating both phases of a capital case from the beginning. According to the 2003 ABA Guidelines, section 10.7:

> Counsel's duty to investigate and present mitigating evidence is now well established. The duty to investigate exists regardless of the expressed desires of a client. Nor may counsel sit idly by, thinking that investigation would be futile. Counsel cannot responsibly advise a client about the merits of different courses of action, the client cannot make informed decisions, and counsel cannot be sure of the client's capacity to make such decisions unless counsel has first conducted a thorough investigation with respect to both phases of the case.

ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.7 (2003) . *See also Hamblin v. Mitchell*, 354 F.3d 482, 492 (6th Cir. 2003) ("But ABA and judicial standards do not permit the courts to excuse counsel's failure to investigate or prepare because the defendant so requested . . .").

Because the lower court believed that a reasonable standard should not require counsel to begin investigating mitigation immediately, the court improperly focuses its analysis on "whether counsel was deficient discontinuing further

investigation after the plea and **Mr. Krawczuk's decision to waive mitigation** and seek the death penalty" (PCR. 2467) (emphasis added). This ignores two points. First, by counsel's own testimony, she had not conducted **any** investigation prior to the plea with the exception of Dr. Keown's competency evaluation (PCR. 1780). Second, at the time of making the decision to waive, Mr. Krawczuk must have been apprised of the mitigation that was available. The lower court ignored the crucial fact that Mr. Krawczuk could not have known what he was waiving because counsel conducted no mitigation investigation. Therefore, the proper focus must be on the circumstances prior to Mr. Krawczuk's announcement that he wanted to waive presentation of mitigation.

No proper inquiry regarding the voluntariness of Mr. Krawczuk's decision could be made because counsel was ill-prepared to present mitigation. The only indication in the record that trial counsel may have spoken to any witnesses occurred at Mr. Krawczuk's plea colloquy. At that time counsel stated that she had wanted to call Dr. Richard Keown and Jim Price as mitigation witnesses (R. 405). However, Dr. Keown conducted a psychiatric competency evaluation, not a mitigation evaluation and there is no record of anyone named Jim Price in this case.15 Due to counsel's errors, the trial court failed to take into account that Mr.

[15] The lower court points out that there is no record or mention of a "Jim Price" anywhere in this case, and assumes trial counsel must have been referring to Paul Wise (PCR. 2488). Even if counsel misspoke, it is telling about her knowledge of

Krawczuk's decision was made without consideration of the mitigation available. Based on the evidence not investigated or presented by counsel, such a waiver can hardly be considered knowing, intelligent, or voluntary.

Mr. Krawczuk's case is indistinguishable from this Court's more recent decision granting relief in *Ferrell v. State*, 29 So. 3d 959 (Fla. 2010). In Ferrell, the Court relied on precedent set forth in *Grim v. State*, 971 So. 2d 85 (Fla. 2007) to evaluate whether counsel was deficient:

> In *Grim v. State*, 971 So. 2d 85 (Fla. 2007), this Court explained:
>
> > " 'When evaluating claims that counsel was ineffective for failing to investigate or present mitigating evidence, this Court has phrased the defendant's burden as showing that counsel's ineffectiveness 'deprived the defendant of a reliable penalty phase proceeding.' " ' *Henry [v. State,]* 937 So. 2d [563] at 569 [(Fla. 2006)] (quoting *Asay v. Stat*e, 769 So. 2d 974, 985 (Fla. 2000) (quoting *Rutherford v. State*, 727 So. 2d 216, 223 (Fla. 1998))). "However, along with examining what evidence was not investigated and presented, we also look at counsel's reasons for not doing so." *Sliney v. State*, 944 So. 2d 270, 281-82 (Fla. 2006). Defendants have the right to waive presentation of mitigating evidence. E.g., *Koon [v. Dugger]*, 619 So. 2d [246] at 249 [(Fla. 1993)] ("We have repeatedly recognized the right of a competent

---

the case at that point.

> defendant to waive presentation of mitigating evidence."). However, as we recognized in *Koon*, 619 So. 2d at 250:
>
> When a defendant, against his counsel's advice, refuses to permit the presentation of mitigating evidence in the penalty phase, counsel must inform the court on the record of the defendant's decision. Counsel must indicate whether, based on his investigation, he reasonably believes there to be mitigating evidence that could be presented and what the evidence would be. 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.

Grim, 971 So. 2d at 99-100. Significantly, as to the issues we consider in this case, the Court went on to explain:

> *We have recognized that a defendant's waiver of his right to present mitigation does not relieve trial counsel of the duty to investigate and ensure that the defendant's decision is fully informed. See, e.g., State v. Lewis*, 838 So. 2d 1102, 1113 (Fla. 2002) ("Although a defendant may waive mitigation, he cannot do so blindly; counsel must first investigate all avenues and advise the defendant so that the defendant reasonably understands what is being waived and its ramifications and hence is able to make an informed, intelligent decision.").

Grim, 971 So. 2d at 100 (emphasis supplied).

Ferrel, 29 So.3d 951, 981-82. In this Court's analysis of Ferrell's waiver, it mattered not that *Koon v. Duggar,* 619 So.2d 246 (Fla. 1993) followed his case. *Ferrel* at 982, n.12.

Like in *Ferrell*, "[t]here is simply no indication in [Mr. Krawczuk's] record that trial counsel performed any investigation into the penalty phase so that a knowing and voluntary waiver could take place" *Ferrell* at 984. Also similar to *Ferrell*, "there is no indication that [Mr. Krawczuk] or his family was uncooperative or refused to participate in an investigation into mitigation; [ ] [n]or is this a case where there is any indication that [Mr. Krawczuk] refused to participate in mental health examinations" *Id.*

The lower court's finding that counsel failed to investigate the very significant family history and severe childhood abuse makes clear that Mr. Krawczuk was never apprised by counsel of all that was available in mitigation, or that he knowingly waived any presentation of that evidence because counsel did not conduct the requisite investigation. The lower court's finding also makes clear that Mr. Krawczuk was not unequivocal in his request that counsel not pursue the mitigation (PCR. 2468). Counsel cannot advise or make a reasonable decision about that which she has failed to investigate. Therefore, case law instructs that the waiver could not have been valid as it was not knowing, intelligent or voluntary due to counsel's failure to investigate.

While the lower court found trial counsel deficient for failing to investigate Mr. Krawczuk's family history and childhood abuse,[16] the court erroneously found that counsel was not deficient in investigating the relative culpability of William Poirier and was not deficient in investigating and evaluating Mr. Krawczuk's mental health. The findings that she was not deficient in investigating relative culpability and mental health ignore the testimony and evidence presented at the evidentiary hearing.

Evidence presented at the evidentiary hearing showed that trial counsel failed to investigate and reasonably advise Mr. Krawczuk of the possibility of presenting evidence of culpability to the jury or the judge. The lower court relies on three things to support its finding that counsel was not deficient: Dr. Keown's evaluation was sought to address Mr. Krawczuk's claims that he was influenced by Poirier; Mr. Krawczuk's refusal to testify to that influence; and trial counsel's access to Gary Siegelmier's deposition and statements which she received through discovery (PCR. 2468). First and foremost, trial counsel herself acknowledged that presenting evidence of culpability was not even discussed with Mr. Krawczuk (PCR. 1789). Additionally, nothing in the record suggests that Dr. Keown was

[16] The lower court's finding that counsel's deficient performance with respect to investigating Mr. Krawczuk's family history and childhood abuse, in and of itself renders Mr. Krawczuk's waiver unknowing. However, Mr. Krawczuk maintains that trial counsel was deficient in failing to investigate all areas of mitigation.

hired to address Mr. Krawczuk's allegations of Poirier's influence over him. The lower court, like trial counsel, incorrectly believes that Mr. Krawczuk would have to testify himself to Mr. Poirier's influence. The only discussions counsel and Mr. Krawczuk had involving Poirier's "influence" over him also mistakenly advised Mr. Krawczuk that he would have to take the stand himself to discuss that (Id.). Mr. Krawczuk simply was ill-advised and unaware of how the evidence of culpability could be presented.

The lower court is correct that trial counsel was aware of Gary Siegelmier's statements, but she did nothing with the information she had. In fact, based in part on Siegelmier's statements and Mr. Krawczuk's own statement, trial counsel was aware and believed that Mr. Krawczuk and William Poirier were at a minimum equally culpable. Trial counsel stated: "it was something they jointly decided… that [Staker] had to die. And they assigned each other tasks and, '[w]ell I'll do this and you'll do that.'…And Pourier (sic) had found a person to buy the stolen goods. And Anton went out to look for some place to hide the body. And it—it was—it was a very joint affair that I saw in everything that I read" (PCR. 292). When asked about her overall impression as to whether they were equally culpable, counsel replied "[a]bsolutely" (PCR. 293). Yet, trial counsel failed to follow through on any further investigation or discussion with Mr. Krawczuk of this mitigating evidence (PCR. 1789-90, 1802-3).

At the evidentiary hearing, witnesses stated over and over that Poirier was the instigator. Judith Nelson, Mr. Krawczuk's ex-wife testified that "I think that Billy had a lot more influence. He would organize and maybe spark an idea, then they would follow through with it. I don't think Anton really meant to – I don't know, maybe go through with as much as he did, but Billy would spark an idea, they would feed on that, and go from there." (PCR. 2381) Paul Wise testified that ". . . [Mr. Krawczuk] was somewhat of a - - what I would consider I think he was a follower." (PCR. 1611). Despite the fact that Paul Wise was available at the time of trial and had given a deposition, trial counsel failed to investigate this information further with these witnesses and failed to investigate further either through an adequate mental health evaluation and/or investigation of Mr. Krawczuk's childhood and/or life history.

Contrary to the lower court's opinion, trial counsel was likewise deficient in failing to adequately evaluate Mr. Krawczuk's mental health. Mr. Krawczuk was entitled to competent and independent expert mental health assistance when the State made his mental state relevant to guilt-innocence or sentencing. *Ake v. Oklahoma*, 470 U.S. 68 (1985). Had counsel done any investigating, she would have discovered a wealth of information pertaining to Mr. Krawczuk's long standing history of severe mental and physical abuse, emotional trauma and familial neglect and would have known that further mental health evaluation was

absolutely critical.

The lower court dismisses the substantial mental health mitigation evidence that has now been discovered through reasonable investigation and the assistance of appropriate mental health experts. In finding that counsel was not deficient in investigating Mr. Krawczuk's mental health, the court relies entirely on Dr. Keown's evaluation and mischaracterizes Dr. Sultan's opinion in postconviction as the same as that given by Dr. Keown pretrial (PCR. 2469, 2490). The court overlooked several important differences between the two evaluations.

Dr. Keown is a psychiatrist. Dr. Keown's report was preliminary and unclear as to the focus of his evaluation. In fact, the only conclusion Dr. Keown made is that Mr. Krawczuk was competent to stand trial and was sane at the time of the offense. The structure of his examination was not sufficient to extract information to be used for mitigation (PCR. 1722). Dr. Keown did no psychological testing to determine if Mr. Krawczuk suffered any cognitive impairment (PCR. 1763). Dr. Keown's report did little more than scratch the surface. In fact, Dr. Keown spent only two hours with Mr. Krawczuk. While the lower court felt it would not have been feasible pre-trial to have Dr. Keown's evaluation span two and a half years (PCR. 2469), it certainly is reasonable to spend more than two hours in order to conduct a thorough mitigation evaluation. Although the lower court emphasized that Dr. Sultan's evaluation spanned two and

a half years, it is important to point out that she spent fifteen hours with Mr. Krawczuk (PCR. 1691). Fifteen hours is not an unreasonable amount of time to conduct a mental health mitigation evaluation.

The lower court finds significant that both Dr. Sultan and Dr. Keown opined that Mr. Krawczuk suffered from a personality disorder (PCR. 2490). The court ignored the entirety of Dr. Sultan's opinion on this point and fails to recognize the deficiency in Dr. Keown's report, specifically his failure to evaluate Mr. Krawczuk's cognitive functioning and its impact in diagnosing a personality disorder. Dr. Sultan explained:

> Mr. Krawczuk tends to be either quite, quite passive and easily influenced, which fits in the arena of a personality disorder; and then sometimes kind of bubbles with anger. Those fit within diagnostic formulations. He has committed some crimes over time which are characteristics of antisocial personality disorder. He doesn't meet that diagnosis because he has feelings of connection to other people and experiences regret and remorse. And, because he has a cognitive disorder, no particular diagnosis of personality disorder is even allowed because specifically you can't diagnose antisocial personality disorder if there is a cognitive injury. And no other personality disorder really all together would form a piece. He's sort of got a little bit of this and a little bit of that.

(PCR. 1698). Mr. Krawczuk's cognitive impairments are an important aspect of Mr. Krawczuk's mental illness which were not addressed by Dr. Keown.

Had an evaluation for more than competency been conducted, there is a

reasonable probability that a reasonably competent mental health professional would have recognized the need for a neuropsychological evaluation and learned of Mr. Krawczuk's debilitating mental disorders. Had counsel investigated and presented evidence to her mental health expert, he could have performed a professionally competent examination. Trial counsel's own actions indicate that Dr. Keown was not hired to conduct a complete mitigation evaluation. At the evidentiary hearing, counsel testified that after Dr. Keown's initial competency evaluation, she filed a motion seeking an expert to assist with mitigation evidence (PCR. 1782). Trial counsel believed that when Mr. Krawczuk pled guilty, this motion was dismissed or "stood moot" (Id.). This belief flies in the face of logic given that the court required a penalty phase to be conducted despite Mr. Krawczuk's wishes to waive the proceeding (PCR. 1777-78). In any event, counsel's motion and her testimony demonstrate that no mental health evaluation was conducted for the purpose of identifying possible mitigating circumstances.

Trial counsel's own testimony is the best evidence that she failed to conduct any investigation of potential mitigation. She testified that she did not put on the record the witnesses or experts she would have called to testify at the penalty phase (PCR. 1780) because "there was not that much that [she] had done yet to be able to talk to Anton about at that time" (Id.). Trial counsel did not hire any mitigation experts and did not try to find any witnesses (PCR. 1782). When questioned by the

court, trial counsel repeated that she did not pursue and mitigation investigation and did not confer with Anton regarding any specific mitigation that could be presented (PCR. 1829, 1832). Because she did not do any investigation, trial counsel agreed that she could not explain to Anton the details of what may have been presented on his behalf (PCR. 1786).

Due to the combined effects of trial counsel's failure to investigate potential mitigation and advise Mr. Krawczuk of the mitigation that was available and Mr. Krawczuk's mental state at the time of the waiver, no valid waiver was affected. Had counsel done the job she was constitutionally required to do, a wealth of substantial mitigation was available.

The United State Supreme Court in *Wiggins v. Smith*, 539 U.S. 510 (2003), looked at not whether counsel should have presented a mitigation case, but rather, whether the investigation supporting counsel's decision not to introduce mitigation was itself reasonable. In *Wiggins*, trial counsel decided not to expand their investigation beyond a pre-sentence report and a social services report and in doing so, fell short of capital defense work standards. Counsel's decision to stop investigating, even after learning about Mr. Wiggins' alcoholic mother and his problems in foster care, was unreasonable. The Supreme Court said that any reasonably competent attorney would have realized that pursuing such leads was necessary to making an informed choice. Similarly here, counsel had available to

her several potential leads which upon further investigation would have led to substantial mitigation. For example, trial counsel had been contacted by Mr. Krawczuk's mother and grandmother and knew they were local (PCR. 1781). Additionally, Dr. Keown's competency report identified several areas of mitigation requiring investigation, including the childhood abuse which was briefly referenced in his report. Finally, Mr. Krawczuk himself indicated he was honorably discharged from the military after psychiatric evaluation (PCR. 1795). Here, where trial counsel made no effort to investigate possible mitigation, Mr. Krawczuk's decision to forego presentation of mitigation could not have been informed. As a result, Mr. Krawczuk was prejudiced by counsel's ineffectiveness.

B. Prejudice

In *Wiggins*, the Supreme Court detailed the analysis for determining prejudice. According to *Wiggins*, evaluation of the prejudice resulting from deficient performance requires a particular analysis. First, to determine prejudice from the unreasonable failure to investigate and present mitigating evidence, "we reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins*, 539 U.S. at 534 (emphasis added) ; see also *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000) (court is required to conduct an "assessment of the totality of the omitted evidence" and then to "evaluate the totality of the available mitigation evidence - both that adduced at trial, and the evidence adduced

in the habeas proceeding"). If "the available mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [the defendant's] moral culpability," *Wiggins*, 539 U.S. at 538 (quoting *Williams*, 539 U.S. at 398), prejudice has been shown. Second, the available mitigation creates "a reasonable probability" when enough jurors could have struck a different balance and altered the sentencing recommendation. *Id*. Third, every defendant has "a right–indeed a constitutionally protected right–to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer," *Williams*, 539 U.S. at 393) regardless of the strength of the state's case, the heinous nature of the offense, or the severity of the aggravators. *Williams*, 539 U.S. at 397-398). Fourth, for a fact to be mitigating it does not have to be relevant to the crime–any of "the diverse frailties of humankind," *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976), which might counsel in favor of a sentence less than death, *Lockett v. Ohio*, 438 U.S. 586 (1978), are mitigating. *Williams*, 539 U.S. at 398).

The lower court's prejudice analysis fails with respect to each of these requirements. The mitigating evidence now known is not inconsequential particularly given that the jury heard NOTHING from Mr. Krawczuk at the penalty phase. Importantly, and contrary to the standard for prejudice as enunciated in *Strickland* and its progeny, the court repeatedly failed to evaluate the impact of the mitigation on the JURY. It matters not how much "weight" the lower court would

have given the mitigating factors,[17] but rather whether there is a reasonable probability that the jurors would have considered the evidence. The lower court's prejudice analysis is in error.

At the outset of its order, the lower court improperly rejects entirely the opinions of Dr. Barry Crown and Dr. Faye Sultan. *Porter v. McCollum*, 130 S. Ct. 447 (2009), instructs that the lower court's wholesale discounting of Dr. Crown and Dr. Sultan's testimony and expertise is error. In *Porter v. McCollum*, the United States Supreme Court found this Court's *Strickland* analysis which appeared in *Porter v. State*, 788 So. 2d 917 (Fla. 2001), to be "an unreasonable application of our clearly established law." *Porter v. McCollum*, 130 S. Ct. at 455. This Court's *Strickland* analysis in *Porter v. State* was as follows:

> At the conclusion of the postconviction evidentiary hearing in this case, the trial court had before it two conflicting expert opinions over the existence of mitigation. **Based upon our case law**, it was then for the trial court to resolve the conflict by the weight the trial court afforded one expert's opinion as compared to the other. The trial court did this and resolved the conflict by determining that the greatest weight was to be afforded the State's expert. We accept this finding by the trial court because it was based upon competent, substantial evidence.

Porter v. State, 788 So. 2d at 923 (emphasis added). The United States Supreme

[17] Here, the court's prejudice analysis is simply a sentencing order, listing the aggravators and mitigators the lower court deemed applicable and assigning the weight the court feels each was entitled (PCR. 2439-50).

Court rejected this analysis (and implicitly this Court's case law on which it was premised) as an unreasonable application of *Strickland*:

> The Florida Supreme Court's decision that Porter was not prejudiced by his counsel's failure to conduct a thorough - or even cursory - investigation is unreasonable. The Florida Supreme Court did not consider or unreasonably discounted mitigation adduced in the postconviction hearing. * * * Yet neither the postconviction trial court nor the Florida Supreme Court gave any consideration for the purpose of nonstatutory mitigation to Dr. Dee's testimony regarding the existence of a brain abnormality and cognitive defects. While the State's experts identified perceived problems with the tests that Dr. Dee used and the conclusions that he drew from them, **it was not reasonable to discount entirely the effect his testimony might have had on the jury or the sentencing judge.**

Porter v. McCollum, 130 S. Ct. at 454-55. [18] (emphasis added). In *Porter v. State*,

[18] The United States Supreme Court had previously noted when addressing the materiality prong of the *Brady* standard which is identical to the prejudice prong of the Strickland standard, the credibility findings of the judge who presided at a postconviction evidentiary hearing were not dispositive of whether the withheld information could have lead the jury to a different result. In *Kyles v. Whitley*, 514 U.S. 419, 449 n.19 (1995), the majority in responding to a dissenting opinion explained:

> Justice SCALIA suggests that we should "gauge" Burns's credibility by observing that the state judge presiding over Kyles's postconviction proceeding did not find Burns's testimony in that proceeding to be convincing, and by noting that Burns has since been convicted for killing Beanie. Post, at 1583-1584. Of course neither observation could possibly have affected the jury's appraisal of Burns's credibility at the time of Kyles's trials.

this Court failed to find prejudice due to a truncated analysis, which summarily discounted mitigation evidence not presented at trial, but introduced at a postconviction hearing, *see id*. at 451, and "either did not consider or unreasonably discounted" that evidence. *Id*. at 454. The circuit court in Mr. Krawczuk's case has followed the same flawed analysis. The lower court failed to consider the impact both Dr. Crown and Dr. Sultan's testimony may have had **on the jury**.

Further, the lower court's credibility findings with respect to Dr. Crown are not supported by the record in this case. This Court dismissed the testimony of Dr. Barry Crown as not credible based on his independent investigation of Dr. Crown's participation in other criminal cases. Specifically, this Court states: "[I]f 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." (PCR 2451). The lower court's conclusion indicates that it in fact conducted research on Westlaw with respect to cases in which Dr. Crown testified and went so far as to compare the testimony and opinions of those cases with that testified to in Mr. Krawczuk's case.[19] The lower court went outside

---

Thus, it was made clear in *Kyles* that the presiding judge's credibility findings did not control.

[19] The factual research conducted by Judge Thompson differs from researching case law for legal precedent. In this situation, Mr. Krawczuk has no opportunity to rebut the facts relied on by the Court and more importantly has no knowledge of what those facts are.

the record of this case by reviewing information not presented during the evidentiary hearing to make credibility determinations. This was improper.[20] Here, the lower court issued its decision premised upon information provided by neither party that was not of record that by his own indication was obtained by independent judicial investigation. Certainly, a jury would not have been privy to this non-record evidence. The lower court's credibility findings and misconduct were improper and do not support an appropriate prejudice analysis.

The lower court further evaluates prejudice on the basis of three areas that it finds Mr. Krawczuk is required to show: 1) had counsel done a reasonable investigation she would have discovered the mitigation;[21] 2) if Mr. Krawczuk had been advised of the mitigation evidence he would have permitted counsel to present it; and 3) if the mitigation evidence had been presented, Mr. Krawczuk would have received a life sentence (PCR. 2470).

1. Mr. Krawczuk would have permitted the presentation of mitigation evidence

In finding that Mr. Krawczuk has failed to show prejudice, the lower court

[20] Mr. Krawczuk filed a Motion to Disqualify Judge Thompson based on the improper independent judicial research which was denied as legally insufficient (PCR. 2592). See Argument I.

[21] The lower court found that trial counsel would have discovered evidence of a physically and emotionally abusive childhood had she investigated (PCR. 2468, 2470). Mr. Krawczuk has previously addressed counsel's deficiencies in failing to find the other areas of mitigation and will not repeat that argument here.

places much emphasis on the fact that Mr. Krawczuk would have waived presentation of mitigation even had he been informed. However, there are numerous indications in the record that Mr. Krawczuk would have been amenable to the presentation of mitigation evidence had he been properly informed of the possible mitigation available. First, there is nothing in the record which demonstrates that Mr. Krawczuk prevented trial counsel from conducting an investigation of mitigation. Rather, Mr. Krawczuk was cooperative with Dr. Keown and as the court acknowledged, Mr. Krawczuk provided counsel with the name of Paul Wise. According to Dr. Keown's report, Mr. Krawczuk "wanted every possible legal avenue explored" (PCR. 2203). Additionally, counsel indicated at the evidentiary hearing that Mr. Krawczuk immediately provided her with information that he was in the military so that she could obtain his records (PCR. 1797, 1801).

Furthermore, Mr. Krawczuk allowed counsel to cross-examine one of the State's witnesses during the penalty phase (PCR. 1809) and told counsel he was not opposed to her giving a closing argument (PCR. 1810). After the presentation of the state's case, Mr. Krawczuk indicated to the court that he was not opposed to the presentation of mitigating evidence, although he was not willing to take the stand, and did not want part of the psychiatric report written by Dr. Keown admitted (R. 218-225). Mr. Krawczuk acknowledged that without the report "there

is nothing working with me, it's all against me" (R. 228).

The lower court also overlooked the timing of Mr. Krawczuk's decision to waive penalty phase presentation of evidence. Important to the lower court's analysis should have been the fact that Mr. Krawczuk's so-called decision to plead guilty and waive the penalty phase was only made after Mr. Krawczuk's motion to suppress and attempt to get a different lawyer were unsuccessful. Had Mr. Krawczuk been reasonably informed as to what mitigation was available and how it could have been presented to mitigate against the death penalty, there is a reasonable probability that he would have permitted his counsel to do so.

There is no requirement that Mr. Krawczuk testify that he would have allowed counsel to present mitigation had she done a reasonable investigation. The record evidence is sufficient. Additionally, perhaps the most telling indication that Mr. Krawczuk would have allowed the mitigation to be presented is the fact that after a thorough investigation and adequate mental health evaluation, Mr. Krawczuk has allowed postconviction counsel to present the mitigation both in his postconviction motion and at the evidentiary hearing. In *Cummings v. Sec'y Dept. Corr.*, 588 F. 3d 1331 (2009), the Eleventh Circuit relied in part on the defendant's continued refusal to cooperate in the investigation and presentation of mitigation in the Rule 3.850 proceedings. That is not the case here. Mr. Krawczuk has not refused to cooperate in the investigation, has been cooperative with each of the

mental health experts and did not refuse to present the evidence and testimony at the evidentiary hearing.

2. Confidence in the outcome is undermined

After citing the *Strickland* standard for prejudice, the court states that “is satisfied beyond a reasonable doubt that a sentence of death would have been the result regardless” (PCR. 2472). Requiring Mr. Krawczuk to prove beyond a reasonable doubt that he would have received a different sentence is an impossible standard. *Strickland's* prejudice standard requires showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694. A petitioner is not required to show that counsel's deficient performance "[m]ore likely than not altered the outcome in the case." *Strickland*, 466 U.S. at 693. The Supreme Court specifically rejected that standard in favor of a showing of a reasonable probability: "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Strickland*, 466 U.S. at 693. Based on the evidence presented at the evidentiary hearing, Mr. Krawczuk has shown a reasonable probability that the result of the proceedings would have been different.

a. Family History, Childhood Abuse and Mental Health Mitigation

An abundance of statutory and non-statutory mitigating circumstances has now been presented which demonstrate that Mr. Krawczuk was prejudiced by counsel's failure to investigate and inform him of the mitigation that was available. Dr. Sultan detailed numerous mitigating factors that would have been considered by the jury including his abandonment by his father; his emotional isolation as a child; his lack of supervision and guidance throughout childhood; neuropsychological damage; obsessive compulsive disorder and personality disorder; severe physical and emotional abuse; depression throughout his childhood; and the strong possibility of sexual abuse (PCR 1726). This opinion was corroborated by the numerous lay witnesses who testified regarding Mr. Krawczuk's horrendous childhood. Christopher Krawczuk, Anton's twin brother testified how they were severely abused by their mother as children. They were beaten, humiliated and not nurtured or cared for. They had no father and Anton seemed to be the brunt of his mother's hatefulness (PCR. 1519-48). Santo Calabro, Anton's step father for approximately seven years, testified that the boys' mother was violent and especially cruel towards Anton and while he was at work he feared for their safety (PCR. 1557-59). Todd Kasse testified how he witnessed a brutal beating by Anton's mother while hiding in a closet and how Anton eventually ran away to his house and lived there for approximately one year. During that time,

Anton's mother never called, never came by looking for him and never provided the Kasse house with any monetary support (PCR. 1577-78, 1581).

While the Court dismissed the abuse as something less than what was described by Christopher Krawczuk, Santo Calabro and Todd Kasse but more than what Mr. Krawczuk's mother described, the Court fails to take into consideration that three separate witnesses were consistent in their description of the degree of abuse. The only person who downplayed the abuse was the abuser herself, and she even acknowledged repeatedly that she "hit" her children and "smacked" them around usually in the head or face (PCR. 1594-95). Not one person testified that the abuse did not happen or testified that it was something less than horrific, frightening and unpredictable for the children.

Dr. Sultan also opined that Mr. Krawczuk was under extreme mental or emotional disturbance at the time of the crime based on his long term suffering from disorder, disturbance and defect (PCR. 1724). Furthermore, Mr. Krawczuk has significant deficits in being able to conform his conduct to the requirements of the law, explaining that he is unable to control his impulses, has difficulty making reasoned, good decisions and "certainly with his constellation of disorders it would have compromised his ability to conform his conduct to the requirements of the law." (PCR. 1725). The lower court has ignored this testimony, instead characterizing Dr. Sultan's testimony as the same as Dr. Keown's despite the fact

that Dr. Keown made no evaluation for mitigating circumstances, statutory or otherwise.

Additionally, Dr. Sultan explained his personality disorder is the result of biology, genetics and history which caused him to develop personality traits or "qualities of thinking and action" that "influence the way he operates in the world." (PCR. 1697). Mr. Krawczuk is "extremely needy and dependent in personal relationships." (PCR. 1698). This opinion would have mitigated his culpability and would have further emphasized that his co-defendant was at a very minimum equally culpable. Dr. Sultan explained further:

> I think the existence of Mr. Pourier (sic) on the scene perpetuated the planning. Mr. Krawczuk thought a lot of things, and the existence of the third person on the scene seems to have been the catalyst. It looks that it was sort of a performance that was being done. The stressors that existed in his life at the time were very strong feelings, negative feelings, hostile feelings about homosexuality, about his own bisexuality, and about the sexuality of Mr. Staker. The use of substances at the time. All of those things contributed to what he was experiencing that day.

(PCR. 1765-66).

Dr. Sultan made additional diagnoses which the court has overlooked or completely misunderstands. Dr. Sultan explained how Mr. Krawczuk's obsessive compulsive disorder impacted his thinking:

> [T]he personality part that goes along with this [compulsion] involves lots of anxiety, thinking the same things over and over, not being able to change the record,

> playing the same thoughts over and over. [I]nflexibility in thinking, in general ways. Maybe appearing to be a bit more concrete in thinking, because he can't really look at options outside of the one you're zooming in on. Those are the things that tend to play out in Mr. Krawczuk's life.

(PCR. 1696-97). This is significant mitigation in and of itself. Additionally, however, this compulsion played a significant role in Mr. Krawczuk's waiver of mitigation. In Dr. Sultan's opinion, Mr. Krawczuk seemed confused, yet determined to make the waiver happen (PCR. 1726). Similarly, Mr. Krawczuk's desire to talk about the crime in great detail was fueled by this compulsion (PCR. 1727). Furthermore, making a "clear-cut decision to die" was Mr. Krawczuk's way of avoiding the "messiness" and painfulness of mitigation (PCR. 1730). Had the proper inquiry been made, it would have been revealed that Mr. Krawczuk's lifelong mental and emotional disorders rendered him incapable of knowingly and intelligently waiving his right to present mitigation and would have provided a wealth of mitigation for trial counsel to advise Mr. Krawczuk and present to the jury.[22] The lower court misunderstood Mr. Krawczuk's compulsions entirely (PCR. 2459).

[22] Another critical mental health issue ignored by Mr. Krawczuk's trial counsel was the question of Mr. Krawczuk's competency at the time he made statements to the police. Had counsel provided competent mental health assistance, trial counsel would have been able to argue that due to his mental problems and substance abuse, he was incapable of making a knowing and intelligent waiver of his Miranda rights. See Argument IV.

Dr. Sultan also explained Mr. Krawczuk's typical emotionless responses:

> One of the things that's clear from the record, and from other people's description of Anton Krawczuk's behavior, is that in emotionally-charged situations, Anton Krawczuk learned early on to simply remove himself emotionally from the situation, so that he could be physically present, but they all viewed him as just not there. The psychological term for that is depersonalization. And to some extent or another, all victims of severe child abuse experience depersonalization. The only way to cope is to remove yourself, so to go hide some place inside so that nothing shows.

(PCR. 1702). Dr. Sultan learned that Chris Krawczuk often observed this lack of emotional response:

> Chris Krawczuk noted [ ] that in those situations, Chris would be crying and screaming and lifting his arms up above his head to defend himself, and he was horrified that Anton did nothing. He simply stood with his arms at his side until his mother was finished. He thought that was very weird. In fact, it's certainly one of the ways that abused children respond, which is to simply leave emotionally.

(PCR. 1702-3). This was crucial to refute the State's arguments that Mr. Krawczuk was cold and unremorseful (R. 243, 246-47). It explains his lack of emotion during his confession and would have defended against the nonstatutory aggravator being asserted by the prosecutor during closing argument.

Dr. Crown also explained the tendency to shut down as it relates to Mr. Krawczuk's brain function. Prolonged verbal abuse, or screaming and yelling,

contributes to auditory selective deficits, " in a sense shutting down and nonresponding, first as a means of surviving, but also neurodevelopmentally in terms of not knowing what to pay attention to" (PCR. 1646-47). The "shutting down" may look like a blank stare, it may be acquiescence and it may result in an impulsive act following the shutting down process, rather than a reasoned act (PCR. 1647). This explanation would be particularly relevant given Mr. Krawczuk's descriptions of being "bossed around" by his codefendant William Poirier, almost like a drill sergeant (PCR. 1719).

Dr. Crown concluded that Anton has impairment or organic brain damage to the left frontal lobe area of his brain (PCR. 1638-1640). The impairments relate to difficulties neurodevelopmentally, likely occurring perinatally, neonatally, and aggravated throughout the developmental period up to and including the adolescent growth spurt (PCR. 1639). The lower court discredited entirely the finding of organic brain damage (PCR. 2455).

The lower court's reliance on the findings of other doctors who evaluated Mr. Krawczuk to reject Dr. Crown's finding of organic brain damage is completely misplaced. Not one of the other doctors indicates they did any psychological testing necessary to reveal neuropsychological damage (EH 252). Dr. Keown indicates in his report that the only psychological test he administered was the MMPI-2, a personality test (PCR. 1667, 1694). The lower court also relies on the

report of Dr. Robert J. Wald.[23] According to Dr. Wald's report, he was appointed to do a competency evaluation, and specifically indicates he did no neuropsychological exam (PCR. 1849-1851). Neither of these doctors would have had the means, without conducting such testing, to determine whether there was deficits in cognitive functioning. Dr. Sultan explained that "[n]europsychological testing is specifically designed to show deficits in functioning that you can't observe in a gross kind of way." (PCR. 1763).

Furthermore, contrary to the lower court's conclusions, evidence of average intelligence as demonstrated by an IQ score or average performance in school does not belie the existence of organic brain damage. Dr. Sultan thoroughly explained:

> Mr. Krawczuk's cognitive deficits are not in the arena of can he read? Can he write? Can he tell you what day it is? Does he know who the president is? He may or may not know that. But that's not in the arena of his cognitive dysfunction.
>
> His cognitive dysfunction is in the executive function region of his brain, which has to do with impulse control, the regulation of emotions, the capacity to think things through in a reasoned, sequential way.

(PCR. 1765).

Finally, the lower court's conclusion that Mr. Krawczuk's cognitive

[23] Subsequent to Mr. Krawczuk's sentencing, Mr. Poirier's counsel moved for a second competency evaluation in anticipation of Mr. Krawczuk testifying in Mr. Poirier's trial. Dr. Wald, a psychiatrist, was appointed and conducted an evaluation to determine Mr. Krawczuk's competency to testify.

impairment has little relation to this crime which was planned over a period of time with plenty of opportunity for reflection misunderstands the nature of Mr. Krawczuk's impairments. Dr. Crown explained that frontal lobe impairment does not simply result in impulsiveness in the simplest sense, but rather, individuals like Mr. Krawczuk would

> show difficulties in determining and understanding the long term effects of their immediate behavior. In addition, they have difficulties with concentration, attention, reasoning and judgment, and also what's referred to as language-based critical thinking. And in simplistic terms, that relates to 'if/then' relationships. If I do this, then this will follow, then this will follow.

(PCR. 1640). According to Dr. Crown, Mr. Krawczuk's ability to carry on this logical conversation with himself was significantly impaired (PCR. 1643). Dr. Sultan also points out that Mr. Krawczuk did not make decisions during this crime that were "without emotion, completely reasonably, with a full range of cognitive abilities." (PCR. 1738).

b. Relative Culpability

At the evidentiary hearing, Mr. Krawczuk also presented evidence to show that the culpability of his codefendant should have been presented for mitigation purposes. Specifically, Mr. Krawczuk argued that but for trial counsel's ineffectiveness, Mr. Krawczuk could have raised significant doubt as to whether he was the leader and could have established the existence of compelling and

significant mitigation. Evidence presented at the evidentiary hearing showed that trial counsel failed to present any evidence of proportionality and/or relative culpability to the jury or the judge. The lower court ignored the abundance of record evidence indicating that Mr. Krawczuk and Mr. Poirier were at a minimum equally culpable.

Throughout the events which occurred that night, Poirier was an active participant who was directly responsible for bringing about the death of David Staker. Mr. Krawczuk stated that he and Poirier both planned to go over to Staker's residence roughly three to four days earlier (PCR. 2047). In preparation, Poirier obtained the gloves which he carried with him that night. At Staker's residence, Poirier lulled Staker into a false sense of security by engaging in small talk and banter. After things turned physical and an altercation ensued, Poirier attempted to subdue Staker by bludgeoning him over the head with a lamp from a nearby night table. (PCR. 2089). Poirier jumped on Staker's legs and began holding him down while Krawczuk attempted to strangle him. (PCR. 2064). While Krawczuk was strangling Staker, Poirier held Staker's mouth closed and pinched his nose shut so that Staker could not breathe. (PCR. 2066). Poirier also pushed on Staker's Adam's apple to further cut off oxygen flow. (PCR. 2067). Poirier also administered five to six knee drops to Staker's head and punched Staker in the chest, near Staker's heart. (PCR. 2066, 2127). Poirier also admitted to "strangulation" of the victim

(PCR. 2129).

Both men decided to pour Crystal Vanish down the victim's throat. Poirier held Staker upright in order to permit the Crystal Vanish to travel down his throat. (PCR. 2121). It was Poirier who instructed Krawczuk to grab a cup of water from the Jacuzzi outside to pour down Staker's throat along with a second dose of Crystal Vanish. (PCR. 2120-21). It was Poirier who was responsible for shoving a wash cloth into Staker's mouth. (PCR. 2105, 2121). It was Poirier who then placed masking tape over Staker's mouth to secure the rag. (Id.).

At trial the medical examiner testified that the victim's cause of death was generally due to asphyxiation, secondary to strangulation and smothering. (R. 82). According to the medical examiner the primary manner in which this could have occurred was either from the compression of the neck which actually fractured the bone that caused asphyxia, or the fact that the mouth was stuffed with a rag. (R. 82). The medical examiner testified that either of the two events could have been responsible for the cause of Staker's death. Most important to note about this testimony is that both causes of death listed by the medical examiner can be directly attributable to actions of Poirier. It was Poirier who pushed down on Staker's Adam's apple throughout the initial period of strangulation; it was Poirier who held Staker's nose and mouth closed, and it was Poirier who was also responsible for the brutal knee drops and cavity punch administered immediately

following the initial strangulation. Any one of these actions could have been directly responsible for the facture of the bone which the medical examiner testified caused the asphyxia. Moreover, as to the second possible cause of death, it was also Poirier who placed the rag in Staker's mouth and taped it shut in order to ensure that it remain secure to block any fluids or air from coming in or out of Staker's mouth. Because Mr. Krawczuk also strangled the victim and placed the Crystal Vanish in his mouth, it is not discernible which action caused the death. It is clear however that the actions of BOTH Krawczuk and Poirier are at least equally attributable.

In addition to evidence indicating that Poirier was just as responsible for the cause of death, the evidence also establishes that Poirier was the one who was responsible for providing the connection with Gary Siegelmier in an attempt to fence the stolen goods from Staker's residence. As Mr. Krawczuk detailed in his statement to police, it was Poirier who had discussed with him prior to that night that he would contact Siegelmier to fence the stolen goods for quick cash. (PCR. 2079). Poirier in fact called Siegelmier to inform him that they would be bringing over stolen property (PCR. 2139); Poirier told Siegelmier he was "psyched up," "adrenaline pumping" (PCR. 2140); after the incident, Poirier decided to keep an automatic pistol for himself (PCR. 2142); after the incident, **both** Poirier and Krawczuk were "flushed, excited looking" (PCR. 2145). Siegelmier never

indicates that Poirier was scared or concerned about what had occurred. Additionally, Siegelmier indicates that it is Poirier who "get[s] bored. And he likes to go out and do evil." (PCR. 2138, 2139).

The State's opening and closing remarks to the jury also belie any argument that Mr. Krawczuk was the more culpable of the two defendants. During opening remarks, the State informed the Court that the evidence would show that the events from that night were the product of a scheme which both men had planned out well in advance (R. 12). During closing argument, the State referenced both defendants' culpability in having planned the crime several days prior to actually carrying it out in support of its argument that the aggravator of cold, calculated, and premeditated had been established (R. 238). When referring to the actual strangulation of the victim, the State argued Poirier's equal culpability by stating that the evidence would clearly show that Poirier was responsible for holding the victim's mouth, pinching his nose closed, and administering drop kicks to Staker's head (R. 13). The State again stressed Poirier's culpability in the commission of the events from that night noting that Poirier was entirely responsible for facilitating the connection with the fence, Gary Siegelmier (R. 14).

When discussing the medical examiner's testimony, the State contended that the medical examiner's testimony indicated that the evidence showed that the asphyxiation could have been attributed to a number of possible occurrences, citing

the placing of the rag in the victim's mouth and taping it shut (R. 14). Significantly, Mr. Krawczuk had no responsibility for placing the rag in the victim's mouth, nor taping it shut. Poirier was solely accountable for these actions. The State's theory was obviously one of **at least** equal culpability.

As pointed out previously in this argument, lay witness testimony at the evidentiary hearing also indicated Mr. Poirier was just as responsible for the planning and carrying out of the victim's death. Judith Nelson testified that Poirier was the organizer and had more influence over Mr. Krawczuk (PCR. 2311). Paul Wise affirmed that Mr. Krawczuk was somewhat of a follower (PCR. 1681). Dr. Keown's evaluation likewise supported that Mr. Krawczuk "more than likely" was the more passive of the two defendants (PCR. 2204). While the lower court points out that Dr. Keown felt Mr. Krawczuk was overstating the influence Poirier had over him, this was not the entirety of Dr. Keown's statement. Dr. Keown believed there was some truth to Mr. Krawczuk's allegation that he was influenced by Poirier (Id.).

Both the evidence and testimony at trial, as well as the arguments put forth by the State in support of its case against Mr. Krawczuk, all support the claim of equal culpability of Mr. Poirier and Mr. Krawczuk. The lower court's conclusion that Mr. Krawczuk was the more culpable of the two is simply and utterly unsupported by the trial and postconviction record.

3. Conclusion

Here, where nothing was presented to the jury as a result of trial counsel's failure to investigate and Mr. Krawczuk's improper waiver, it cannot be said that the substantial mitigation would not have made a difference to the jury, despite the existence of three aggravators. Because defense counsel presented no evidence in mitigation, the jury knew a great deal about the murder, but nothing about Mr. Krawczuk. If evidence of these statutory and nonstatutory mitigating factors had been presented to the jury, there is a reasonable probability that the jury would have recommended life and the judge would have no choice but to give that recommendation great weight. As such, Mr. Krawczuk was prejudiced by counsel's failure to reasonably investigate, inform him and present mitigation. Mr. Krawczuk is entitled to a new penalty phase.

ARGUMENT III - MR. KRAWCZUK IS INNOCENT OF THE DEATH PENALTY

The United States Supreme Court has held that, where a person convicted of first degree murder and sentenced to death can show either innocence of first degree murder or innocence of the death penalty, he is entitled to relief for constitutional errors which resulted in the conviction or sentence of death. *Sawyer v. Whitley*, 505 U.S. 333 (1992). This Court has recognized that innocence is a claim that can be presented in a motion pursuant to Rule 3.850. *Johnson v. Singletary*, 19 Fla. L. Weekly S337 (Fla. 1994); *Jones v. State*, 591 So. 2d 911

(Fla. 1991). Additionally, this Court has recognized that innocence of the death penalty also constitutes a claim. *Scott (Abron) v. Dugger*, 604 So. 2d 465 (Fla. 1992). Specifically, *Scott v. Duggar* held that in a case involving equally culpable codefendants, one codefendant's life sentence is cognizable on collateral review where the other codefendant subsequently receives a life sentence. Based on Mr. Poirier's disparate sentence, Mr. Krawczuk can show innocence of the death penalty.

The disparate treatment of Mr. Krawczuk and Mr. Poirier is not justified in this case. Subsequent to Mr. Krawczuk's penalty phase proceedings and sentencing, Mr. Krawczuk's co-defendant, William Poirier was sentenced to 35 years for second degree murder to run concurrent with a 15 year sentence for robbery (PCR. 2359-62). The lower court denied this claim in part on the reasoning that Mr. Krawczuk and Mr. Poirier were not convicted of the same offense, stating that 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 . . . after having already been sentenced to death" (PCR. 2479). The lower court's statements that the State believed that evidence of Poirier's guilt was less is not supported by the record. The State repeatedly advanced arguments to Mr. Krawczuk's jury that both Mr. Krawczuk and Mr. Poirier were equally culpable. The State's opening and closing remarks to the

Court also belie any argument that Mr. Krawczuk was the more culpable of the two defendants (R. 12-14; 238). Additionally, the State indicated at Mr. Poirier's plea hearing that the "chief reason" for the "negotiations" for Mr. Poirier was Mr. Krawczuk's refusal to participate in depositions and that he provided the evidence against Mr. Poirier (PCR. 2545). Both the facts and testimony at trial, as well as the arguments put forth by the State in support of its case against Mr. Krawczuk, all support the claim of equal culpability of Mr. Poirier and Mr. Krawczuk.

In assessing the culpability of Mr. Krawczuk and Mr. Poirier, the lower court discredited the statement of Mr. Poirier because the confession falsely minimizes his involvement (PCR. 2481). The court was of the opinion that Mr. Poirier was an active willing participant, yet, fails to acknowledge Mr. Poirier's equal culpability (Id.). Contrary to the lower court's order, the evidence makes clear that both defendants were at least equally culpable.

To support its conclusion the lower court relied almost entirely on Mr. Krawczuk's own statement. The court failed to discuss the testimony of the medical examiner regarding the cause of death (R. 82), failed to discuss the State's arguments at Mr. Krawczuk's penalty phase (R. 12-14, 238), failed to consider as a whole the deposition of Gary Siegelmier and most significantly ignores the inculpatory statements made by Mr. Poirier. Even in the court's reliance on Mr. Krawczuk's statement, the court ignores any indication by Mr. Krawczuk of Mr.

Poirier's significant involvement.[24]

Mr. Poirier received markedly less punishment than Mr. Krawczuk for what can only be described as at least equal culpability. The disparity here is striking given Mr. Poirier's sentence of 35 years and the fact that he has already been released from prison (PCR. 2363). As far back as 1975, this Court has recognized disproportionate sentences as unconstitutional. In *Slater v. State*, 316 So. 2d 539, 542 (Fla. 1975), the Court noted, "We pride ourselves in a system of justice that requires equality before the law. Defendants should not be treated differently upon the same or similar facts." The Court reemphasized this holding more recently in *Ray v. State*, 755 So. 2d 604, 611 (Fla. 2000), whereby noting that "equally culpable co-defendants should be treated alike in capital sentencing." *See also, Shere v. Moore*, 830 So. 2d 56, 65 n. 10 (Fla. 2002) (referencing over 70 published opinions applying proportionality sentencing principles for co-defendants). Florida law is well settled that death is not a proper penalty when a co-perpetrator of equal or greater culpability has received less than death. *Scott v. State*, 657 So. 2d 1129, 1132 (Fla. 1995) (citing *Harmon v. State*, 527 So. 2d 182 (Fla. 1988)); *Scott v.*

[24] In Argument II, as the relative culpability relates to mitigation that should have been presented to a jury, Mr. Krawczuk has set forth in great detail the record support at both the trial and postconviction hearing for Mr. Poirier's minimally equal culpability. See Argument II, supra at pp. 39-82. As pointed out in Argument II, but for trial counsel's ineffectiveness, Mr. Krawczuk could have raised significant doubt as to whether he was the leader and could have established the existence of compelling and significant mitigation.

Dugger, 604 So. 2d 465, 469 (Fla. 1992). Mr. Krawczuk's death sentence must be vacated in light of Mr. Poirier's sentence and release from prison. Mr. Krawczuk is at a minimum entitled to a life sentence based on the equal culpability of his codefendant that is now abundantly clear in the record.

ARGUMENT IV - MR. KRAWCZUK'S STATEMENTS TO THE POLICE WERE INVOLUNTARY

Mr. Krawczuk received ineffective assistance of counsel when defense counsel Barbara LeGrande failed to properly raise and litigate the voluntariness of his confession. LeGrande filed a motion to suppress Mr. Krawczuk's statements on July 8, 1991 (R. 525). A hearing was held on this motion on July 25, 1991 (R. 273-381). At the time of the hearing, a wealth of material existed relating to Mr. Krawczuk's state of mind and how he was affected by his experience with authorities in the military, how his family background affected him, and how his overall mental information all combined to show the involuntariness of his statements.

Mr. Krawczuk was arrested in the early morning hours of September 23, 1990 (R. 341, 318). He was in the living room of his residence when four law enforcement vehicles turned hard into his driveway (R. 341). Some minutes later, several armed police officers entered Mr. Krawczuk's residence through the back patio door (R. 337, 342). The officers entered Mr. Krawczuk's home with their guns drawn, demanding that he reveal his name and tell them the location of any

guns in the house (R. 342). These officers then proceeded to search Mr. Krawczuk (R. 338). Subsequently, the officers "requested" that Mr. Krawczuk accompany them to the Lee County Sheriff's Department (R. 339-340), but did not inform him that he was under arrest for the homicides with which he was subsequently charged (R. 331).

Mr. Krawczuk was transported to the police station in the back seat of a patrol car, with an officer on each side. (R. 344). He was immediately brought into an interview room at the Sheriff's Department, was read his Miranda rights, after which Mr. Krawczuk made inculpatory statements (R. 333).

At a hearing held prior to Mr. Krawczuk's trial, Mr. Krawczuk testified that he had been greatly shaken and alarmed when law enforcement officials arrived at his house (R. 341). The subsequent invasion and search of his home served to further frighten him (R. 342-344). Mr. Krawczuk stated that he was convinced that the officers who entered his home would shoot him (R. 343). Feeling certain that he was under arrest, Mr. Krawczuk stated that he felt that he had no alternative but to accompany the officers to the police station (R. 344).

Mr. Krawczuk's fear and anxiety had not dissipated upon his arrival at the Sheriff's Department. Mr. Krawczuk informed the court that, in fact, he was so shaken by the way Sheriff's Department officers had barged into his home with guns drawn, he would have gone along with anything they told him to do (R. 345-

347). These previous events, coupled with the intimidating behavior exhibited by officers interrogating Mr. Krawczuk, caused him to feel that he had no option but waive his rights and go along with them. (R. 345-347). Additionally, Mr. Krawczuk informed the Court that he had received only two hours of sleep the night before, and was still feeling the effects of alcohol he had consumed that night. (R. 349, 357). All of these factors affected Mr. Krawczuk during his arrest and subsequent involvement with the police.

While the trial court found that the officers' actions in entering Mr. Krawczuk's home and arresting him were illegal, due to counsel's ineffectiveness, it found that Krawczuk's subsequent statements were voluntary and that there had been a valid waiver of his *Miranda* rights (R. 544-545). The trial court's ruling failed to take into consideration that Mr. Krawczuk's lifelong mental and emotional disorders rendered him incapable of knowingly and intelligently waiving his *Miranda* rights. Trial counsel failed to investigate and present evidence of his mental state.

Mr. Krawczuk suffers from obsessive-compulsive disorder which means he has "great rigidity in his thinking and that he engages in many ritualistic behaviors" (PCR. 1695). In terms of Mr. Krawczuk's daily behavior and life, the compulsions take up a great deal of time, but with respect to his personality, Dr. Sultan explained that the disorder results in anxiety, inflexibility in thinking and

not being able to look at options other than that which he is focused on (PCR. 1696). Dr. Sultan observed that this compulsiveness was evident in his confession and in his desire to plea and to waive the penalty phase and mitigation:

> [O]nce Mr. Krawczuk begins to talk about the crime, for example, he gives many, many, many details, when it's pretty apparent that it's really not in his best interests to do that. So it looks like there's kind of this compulsive need to go on. He tends to be pretty compulsive about the whole thing.

(PCR. 1726-27, 1730). What is clear from Dr. Sultan's testimony is that Mr. Krawczuk's functioning is influenced by his mental disorders (PCR. 1726). In his adult life, Mr. Krawczuk was unsuccessful in the military and was ultimately discharged as a result of his difficulties (PCR. 1716).

The lower court misunderstands entirely Mr. Krawczuk's compulsiveness. The court finds that Mr. Krawczuk's "internal feelings of compulsion to talk support the finding…that his statements were legally voluntary" (PCR. 2505). The compulsion is the product of Mr. Krawczuk's mental disorder, not a desire to act in a certain way. Mr. Krawczuk has no control over the compulsion.

Only when there has been a knowing, intelligent and voluntary waiver of the right to counsel may a custodial interrogation be conducted in the absence of counsel. Whether a voluntary, knowing and intelligent relinquishment has occurred is a matter which depends in each case "upon the particular facts and circumstances surrounding the case, including the background, experience and conduct of the

accused." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *see also Miranda v. Arizona*, 384 U.S. at 475 (applying *Johnson v. Zerbst* standard to waiver of *Miranda* rights); *Faretta v. California*, 422 U.S. 806 (1975).

The trial court erred in determining that Mr. Krawczuk's statements were voluntary. There can be no question after hearing Mr. Krawczuk's suppression hearing testimony that he was under arrest and being subjected to interrogation when these statements were made. A number of hallmarks of coercion were present the morning Mr. Krawczuk's statements were taken. Mr. Krawczuk had been arrested early that morning by armed police officers, who arrived and entered his home in a menacing and intimidating manner. These officers pointed guns at Mr. Krawczuk and spoke to him in a threatening manner. Mr. Krawczuk was dazed and confused as a result a lack of sleep and the alcohol he had consumed on the previous evening.

This confusion, along with police intimidation, continued throughout Mr. Krawczuk's transportation to the sheriff's department and subsequent interrogation. Clearly, these circumstances together with Mr. Krawczuk's existing mental disorders were sufficient to overbear Mr. Krawczuk's will and cause him to give a statement to the police. The fact that *Miranda* warnings were given did not cure the involuntary nature of the statements. These statements should have been suppressed by the trial court. Counsel's failure to investigate and properly litigate

these issues resulted in the denial of Mr. Krawczuk's right to effective assistance of counsel. Mr. Krawczuk's rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment to the United States Constitution were violated.

ARGUMENT V – IMPROPER COMMENTS MADE BY THE PROSECUTOR[25]

The prosecutors' acts of misconduct both individually, and cumulatively, deprived Mr. Krawczuk of his rights under the Sixth, Eighth, and Fourteenth Amendments. Defense counsel rendered prejudicially deficient performance in failing to object to the prosecutor's inflammatory and prejudicial comments.

During voir dire, the prosecutor repeatedly asked prospective jurors if they could vote for a sentence of death, follow the law, and base their decisions on the evidence and facts (R. 771-72, 776, 777, 780, 782, 811, 813). The prosecutor asked the venire if they could decide the case without regard to sympathy (R. 769-70, 811-814), and also told the jurors that it was their duty to follow the law they were instructed on, or be responsible for a "miscarriage of justice" (R. 819-820).

Compounding its statements in voir dire, the prosecutor suggested to the jury during his final argument that the law required them to recommend the death penalty. The prosecutor stated, "your decision in this case will not be a difficult

[25] Claims X and XX of Mr. Krawczuk's Amended Rule 3.850 motion are combined in this argument as both relate to impermissible comments made by the prosecutor during the penalty phase.

one, legally, for you to make" (R. 232). Twice more, the prosecutor suggested to the jury that the "legal" recommendation for them to make was death (R. 233, 250). Contrary to the impression given the jury, the law never requires that a death sentence be imposed. What the law requires is for the jury to consider the evidence introduced in the guilt and/or penalty phases of a trial, and recommend an appropriate sentence. Mr. Krawczuk's jury was never instructed on one of the proper considerations upon which a recommendation of life may be based, mercy. Of mercy as a consideration in the penalty phase of a capital trial, this Court has said:

> Certain factual situations may warrant the infliction of capital punishment, but, nevertheless, would not prevent either the trial jury, the trial judge, or this Court from exercising reasoned judgment in reducing the sentence to life imprisonment. Such an exercise of mercy on behalf of the defendant in one case does not prevent the imposition of death by capital punishment in the other case.

Alvord v. State, 322 So. 2d 533, 540. In other words, mercy, for whatever reason a jury chooses to factor it into their decision, may play a part in arriving at an appropriate sentence. *See*, *Drake v. Kemp*, 762 F.2d 1449 (11th Cir. 1985).

The cumulative effect of the voir dire questions by the state, the state's prejudicial final argument, and the state's suggestion to the jury that mercy should play no part in their decision was to impress upon the jurors that they must, by law, recommend the death penalty. The lower court acknowledged that suggesting to

the jury that they were required to recommend death was error (PCR. 2497). The prejudicial effect of the state's actions were further exasperated by the trial court's instruction to the jury that sympathy should play no part in their decision (R. 255), and Mr. Krawczuk received constitutionally ineffective assistance of counsel when defense counsel failed to object to the trial court's instruction and request a mercy instruction for the jury to hear. The trial court's instruction violated the Eighth Amendment. *Mills v. Maryland*, 486 U.S. 367 (1988); *Franklin v. Lynaugh*, 487 U.S. 164 (1988). Failure to inform the jury of the change in the consideration of mercy improperly left them with the impression that mercy could not be considered in determining an appropriate sentence. This is particularly troubling where no mitigation was presented.

Furthermore, the prosecutor exceeded the boundaries of proper argument during his closing argument when he discussed Mr. Krawczuk's alleged lack of remorse as an aggravator:

> 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 . . .

(R. 243, 246-47). Lack of remorse is not an aggravating factor that can be considered under Florida Law. Defense counsel ineffectively failed to object to the introduction and consideration of non-statutory aggravators. *Kimmelman v. Morrison*, 477 U.S. 363 (1986).

With respect to each of the improper comments by the prosecutor, the lower court found trial counsel was not ineffective for failing to object where Mr. Krawczuk directed her not to participate in the penalty phase proceedings. The difficulty with the court's finding is that Mr. Krawczuk's instructions were not unwavering. In fact, on at least one occasion, Mr. Krawczuk allowed counsel to cross-examine one of the State's witnesses during the penalty phase and told counsel he was not opposed to her giving a closing argument (PCR. 1809-10). "When viewed in conjunction with the other failures of trial counsel regarding the lack of investigation into mitigation, the failure of trial counsel to object to even one of these clearly improper remarks left the State's case virtually untested" *Ferrell v. State*, 29 So. 3d 959, 988 (Fla. 2010). The lower court ignores this cumulative effect.

The improper argument by the state, the improper instruction by the trial court, and the ineffectiveness of trial counsel combine to make Mr. Krawczuk's

sentence unconstitutional. Counsel's errors in failing to object to the prosecutors improper comments can only serve to strengthen the contention that [ ] confidence in the outcome of the penalty phase is undermined" *Id.* Mr. Krawczuk is entitled to relief.

CONCLUSION AND RELIEF SOUGHT

Based on the foregoing Anton Krawczuk respectfully requests that this court immediately vacate his convictions and sentences, including his sentence of death and order a new trial and/or sentencing.

Respectfully submitted,

SUZANNE MYERS KEFFER
Florida Bar No. 0150177
Chief Assistant CCRC-South

SCOTT GAVIN
Florida Bar No.: 0058651
Staff Attorney

Office of the CCRC-South
101 NE 3rd Avenue, Suite 400
Fort Lauderdale, Florida 33301
(954) 713-1284

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Stephen Ake, Assistant Attorney General, Concourse Center 4, Suite 200, 3507 East Frontage Road, Tampa, Florida 33607-7013, by U.S. Mail this 3rd day of January, 2011.

_____
SUZANNE MYERS KEFFER

CERTIFICATE OF FONT

This is to certify that the Petition has been reproduced in 14 Times New Roman type, pursuant to Rule 9.100 (l), Florida Rules of Appellate Procedure.

_____
SUZANNE MYERS KEFFER