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

REPLY BRIEF OF APPELLANT

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INTRODUCTION

Mr. Krawczuk submits this Reply to the State's Answer Brief. Mr. Krawczuk will not reply to every argument raised by the State. However, Mr. Krawczuk neither abandons nor concedes any issues and/or claims not specifically addressed in this Reply. Mr. Krawczuk expressly relies on the arguments made in his Initial Brief for any claims and/or issues that are only partially addressed or not addressed at all in this Reply.

ARGUMENT IN REPLY

ARGUMENT I

MR. KRAWCZUK WAS DENIED A FULL AND FAIR HEARING BEFORE A FAIR AND IMPARTIAL JUDGE

At the outset, the State claims that Mr. Krawczuk's assertion of this claim in the instant appeal is improper based on *Lynch v. State*, 2 So. 3d 47, 78, (Fla. 2008) stating that a "petition for a writ of prohibition is the proper means through which to challenge a lower court's denial of a motion to disqualify." The State overlooks that this Court dismissed Lynch's initial petition for writ of prohibition without prejudice to raise the disqualification issue on appeal. *Lynch* at 79.

The purpose of a writ of prohibition is to correct a harm which cannot be adequately corrected on appeal. *S. Records & Tape Serv. V. Goldman*, 502 So. 2d 413, 414 (Fla.1986) (citing *English v. McCrary*, 348 So. 2d 293 (Fla. 1977)). Prohibition is appropriate if the lower court has not already acted. *English v.*

McCrary, 348 So. 2d 293, 297 (Fla. 1977)). Here, where the improper judicial conduct occurred in the issuance of the lower court's order denying relief, and where the only action remaining was a determination of Mr. Krawczuk's motion for rehearing, it does not stand to reason that the harm cannot be corrected on appeal.

In fact, this Court has repeatedly addressed denials of judicial disqualification during post conviction appeal. In *Rogers v. State*, 630 So.2d 513 (Fla.1993), although evidence of the bias came to light mid-hearing and the resulting denial of a motion to disqualify also occurred mid-hearing, Rogers raised the issue for the first time during the appeal of his Rule 3.850 motion. This Court addressed the issue and reversed for a new evidentiary hearing before an unbiased judge. *See also Maharaj v. State*, 684 So.2d 726 (1996). Therefore, consideration of this issue on appeal is proper.

The State complains that Mr. Krawczuk "couches his claim as a denial of due process and alleges that he was denied a fair and full hearing before an impartial judge, but his allegation relies exclusively on the judge's innocuous comment in his postconviction order and his denial of Appellant's motion to disqualify" (Answer Brief at 20). The State seemingly does not understand that the improper research by Judge Thompson in discounting the testimony of Dr. Crown violates due process and an opportunity to be heard, but also demonstrates bias and

a lack of impartiality. Both Mr. Krawczuk's motion to disqualify and motion for rehearing made these arguments.

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 and a violation of Mr. Krawczuk's due process rights. As a result the lower court denied Mr. Krawczuk a full and fair hearing and a full and fair resolution of the issues presented at his evidentiary hearing. Mr. Krawczuk has not been given the opportunity to refute or distinguish the other cases "with opinions similar to this case" (PCR. 2451). Mr. Krawczuk does not even know what cases the lower court is relying on or the facts of those cases.

In *Vining*, this Court stated:

> Under *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), a sentencing judge who intends to use any information not presented in open court as a factual basis for a sentence must advise the defendant of what the information is and afford the defendant an opportunity to rebut it. *See also Porter v. State*, 400 So.2d 5, 7 (Fla.1981) (vacating death sentence where trial court relied on deposition testimony to support two aggravating factors without advising defendant of intention to use the deposition and affording defendant opportunity to rebut, contradict, or impeach the deposition testimony).

Vining v. State, 827 So. 2d 201, 209 (Fla. 2002). However, the Court pointed out:

> [U]nlike both *Gardner* and *Porter*, Vining was advised by the trial judge of his consideration of extra-record

> information and afforded an opportunity to rebut or impeach the information.

Vining v. State at 209 (Fla. 2002). Mr. Krawczuk was never advised prior to issuance of the lower court's order, that the lower court intended to conduct or had conducted independent research into the credibility of Dr. Crown. Mr. Krawczuk objected in the form of a motion to disqualify and by raising the improper conduct in his motion for rehearing.

The State's characterization of the lower court's comment as "innocuous" (Answer Brief at 14, 18) indicates its misunderstanding of the issue. The lower court's conclusion, "[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[,] [o]ften with opinions similar to those expressed in this case," indicates that the court 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. 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,[1] and the Florida Supreme Court's condemnation of independent judicial investigations in *Vining v. State*. This error was not innocuous.

The State argues that Mr. Krawczuk's motion to disqualify was legally insufficient because it was based on the court's comments while making an adverse ruling and merely expressed a subjective fear (Answer brief at 23). Mr. Krawczuk did not move to disqualify Judge Thompson based on his adverse rulings. Rather, the basis of his motion was the improper independent factual research and the lack of impartiality which that research demonstrated. Mr. Krawczuk had no opportunity to refute the conclusions of the lower court and as a result the lower court discounted Dr. Crown's testimony as not credible, terming him a "go to" witness for capital defendants (PCR. 2451).

The aforementioned circumstances of this case are of such a nature that they are "sufficient to warrant fear on [Mr. Krawczuk's] part that he **[did] not** receive a fair hearing by the assigned judge." *Suarez v. Dugger*, 527 So. 2d 191, 192 (Fla. 1988)(emphasis added). The proper focus of this inquiry is on "matters from

[1] 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."

which a litigant may reasonably question a judge's impartiality rather than the judge's perception of his [or her] ability to act fairly and impartially." *Livingston v. State*, 441 So. 2d 1083, 1086 (Fla. 1983); *Chastine v. Broome*, 629 So. 2d 293, 294 (Fla. 4th DCA 1993). The State's belief that Mr. Krawczuk's fear is subjective is incomprehensible as the judge **actually acted** unfairly as demonstrated by the lower court's order and its independent factual research. Here, the judge **was not** fair and impartial.

Because the lower court's independent factual research violated Mr. Krawczuk's rights to a full and fair evidentiary hearing and a full and fair resolution of the issues presented during his postconviction process and those actions inherently demonstrated a lack of fairness and impartiality, the lower court should have disqualified itself from proceeding to hear Mr. Krawczuk's motion for rehearing and should have granted a new evidentiary hearing. Relief is proper.

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

In its answer brief, the State simply makes wholesale reference to the lower court's order, without any independent analysis of Mr. Krawczuk's arguments or the case law he relies on. Therefore, Mr. Krawczuk, for the most part relies on the

arguments and facts set forth in his initial brief, but will address several factual misrepresentations and misrepresentations of the law. Mr. Krawczuk has proven that his waiver of the presentation of mitigating evidence was not knowing, intelligent and voluntary due to trial counsel's failure to investigate potential mitigation prior to Mr. Krawczuk's decision to waive. As a result, Mr. Krawczuk's penalty phase is unreliable.

The State's assertion that Mr. Krawczuk communicated his intention to waive presentation of mitigation evidence to his attorney "early on" and frustrated her attempts to prepare the penalty phase is inaccurate. Counsel was appointed on September 28, 1990. Mr. Krawczuk did not express his intention to waive presentation of mitigation until he entered his guilty plea on September 27, 1990, one year later. By counsel's own admission she had not done much to investigate for the penalty phase at that point (PCR. 1780). Further, with the exception of trial counsel's testimony that Mr. Krawczuk preferred to "leave his family out of it," there is no evidence that Mr. Krawczuk instructed, nor frustrated counsel's attempts to investigate. Rather, contrary to reasonable standards, trial counsel admitted that she does not investigate mitigation issues until closer to trial (PCR. 1784). Regardless of any of this, the lower court found trial counsel deficient with respect to her investigation of Mr. Krawczuk's family history and childhood abuse (PCR. 2468). What the State overlooks is that Mr. Krawczuk's family history and

history of abuse is ultimately the most significant mitigation. The lower court and the State both underestimate the significance of Mr. Krawczuk's family history and abuse on his mental health and how the two issues are intertwined.

The State further argues that the lower court found that Mr. Krawczuk actively directed trial counsel not to pursue any mitigation. But the State ignores the fact that the lower court's focus as to the timing of Mr. Krawczuk's direction is skewed. The lower court's entire focus is from the time Mr. Krawczuk entered his plea (PCR. 2467). Mr. Krawczuk expressed his desire to waive mitigation for the first time at the plea hearing. Therefore, to determine whether Mr. Krawczuk knowingly waived presentation of mitigation, the proper focus should have been on trial counsel's investigation prior to the plea. Ms. LeGrande was unequivocal that she did not discuss potential specific mitigation with Mr. Krawczuk **before the plea** or subsequent to it (PCR. 1786, 1789, 1832), because she had not done any investigation. Essentially, the lower court's determination that trial counsel was not deficient for failing to continue her investigation post plea with respect to the co-defendant's culpability and mental health is irrelevant.

The proper focus is whether counsel's investigation prior to the plea was reasonable such that it resulted in a knowing waiver of the presentation of mitigation. The only information trial counsel had at that time was the competency evaluation of Dr. Keown and the deposition of Paul Wise, who was characterized

as a character witness who knew and worked with Mr. Krawczuk (PCR. 2466). This was not reasonable given the abundant mitigation which was available.

The State, like the lower court, improperly characterizes Dr. Keown's evaluation. Both indicate that he was hired to address the influence Mr. Poirier had over Mr. Krawczuk. This is completely inaccurate and there is no testimony by trial counsel to that effect. Dr. Keown conducted a psychiatric competency evaluation, not a mitigation evaluation. 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 effect, the areas which Dr. Keown did touch on should have prompted counsel to investigate further. *Wiggins v. Smith*, 539 U.S. 510 (2003).

In arguing that trial counsel was not deficient for failing to investigate and reasonably advise Mr. Krawczuk of the possibility of presenting evidence of culpability to the jury or the judge, the State relies on the same flawed reasoning and incorrect facts as the lower court. The lower court relied 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, as noted above, nothing in the record suggests that Dr. Keown was hired to address Mr. Krawczuk's allegations of Poirier's influence over him. The State and the lower court, like trial counsel, incorrectly believed 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 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.

With respect to proving prejudice, the State, like the lower court, attempts to impose a burden on Mr. Krawczuk to prove prejudice by showing that he would have presented the mitigation evidence had counsel investigated and informed him of the mitigation available. Both the State and 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). In *Ferrell* this Court stated:

> 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. State*, 769 So. 2d 974, 985 (Fla.2000) (quoting *Rutherford v. State*, 727 So.2d 216, 223 (Fla.1998))).

Ferrell at 981. The Court concluded "that the penalty phase in [Ferrell's] case was not reliable without counsel having performed any investigation into mitigation and without a knowing and voluntary waiver of mental mitigation." *Ferrell* at 986. Importantly, there was no requirement that Ferrell show he would have agreed to the presentation of mitigating evidence had trial counsel investigated and informed him of that which was available.

The lower court improperly relied on *Gilreath v. Head*, 234 F.3d 547, 549 (11th Cir. 2000) in finding that Mr. Krawczuk is required to show: 1) had counsel done a reasonable investigation she would have discovered the mitigation; 2) if Mr. Krawczuk had been advised of the mitigation evidence he would have permitted counsel to present it (PCR. 2465). The Eleventh Circuit Court of Appeals in *Gilreath* stated:

> **In the circumstances of this case**, we think that-to establish prejudice-Petitioner actually must make two showings. First, Petitioner must show a reasonable probability that-if Petitioner had been advised more fully about character evidence or if trial counsel had requested a continuance-Petitioner would have authorized trial counsel to permit such evidence at sentencing.

Gilreath v. Head, 234 F.3d 547, 551 (11th Cir. 2000)(emphasis added). The Court's analysis turned on the specific facts of Gilreath's case. In *Gilreath*, there was no allegation that trial counsel failed to investigate and inform the petitioner about available mitigation evidence.[2] Instead, the petitioner's complaints involved counsel's failure to advise him more fully on good character evidence and for failing to ask for a continuance of the sentencing hearing overnight so that he could think more about his decision.

Similarly, the State impoperly relies on *Schriro v. Landrigan*, 550 US 465 (2007) and *Cummings v. Sec'y Dept. Corr.*, 588 F. 3d 1331 (2009) for the proposition that Mr. Krawczuk cannot demonstrate prejudice "without sworn testimony that he would have presented this type of evidence." (Answer brief at

[2] Rather, trial counsel prepared for the penalty phase of trial, spoke with Petitioner before trial and identified several potential witnesses including relatives, friends, and coworkers-who could testify about petitioner's character, his past, his problems with alcohol, and his mental condition. Trial counsel obtained records regarding military service, medical, and mental health records and retained mental-health professionals to examine petitioner. However, during the guilt phase of trial, trial counsel was instructed to present no mitigating evidence. *Gilreath v. Head*, 234 F.3d 547, 549 (11th Cir. 2000).

41). Neither case imposes this requirement and in each instance, the result turns on the specific facts of the case.

Even if this Court were to impose a burden on Mr. Krawczuk to show that had trial counsel fully investigated potential mitigation, he would have agreed to its presentation, the record evidence in this case is sufficient to show that Mr. Krawczuk would have allowed the mitigation to be presented had there been a thorough investigation and adequate mental health evaluation. 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.

Contrary to the State's assertions, Mr. Krawczuk was not unequivocal in his decision to waive the presentation of mitigating evidence. 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). *Cf. Schriro v. Landrigan*, 550 U.S. 465, 476 (2007) (respondent Landrigan repeatedly frustrated counsel's attempt to proffer anything that would have been considered mitigating).

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).

Despite the fact that the State cannot cite to any case requiring Mr. Krawczuk to testify that he would have allowed counsel to present mitigation had she done a reasonable investigation, the State believes that Mr. Krawczuk's failure to testify is fatal to his claim. The State argues that because Mr. Krawczuk chose to waive the presentation of mitigation, he is now precluded from raising counsel's ineffectiveness for failing to prepare for the penalty phase. This argument ignores this Court's waiver of mitigation cases. See *Ferrell v. State*, 29 So. 3d 959 (Fla. 2010); *see also Deaton v. Dugger*, 635 So.2d 4 (Fla.1993); *State v. Lewis*, 838 So. 2d 1102 (Fla. 2002); *State v. Pearce*, 994 So. 2d 1094 (Fla. 2008). Mr. Krawczuk's case is indistinguishable from this long line of cases.

In fact, the State made similar assertions in *State v. Pearce*, 994 So. 2d 1094 (Fla. 2008), arguing that Pearce could not meet the burden of proving his ineffective assistance of counsel claim because Pearce himself was responsible for the failure to present mitigation. *Pearce* at 1101. This Court concluded:

> We find there is competent, substantial evidence to support the trial court's finding that counsel did not spend sufficient time to prepare for mitigation prior to Pearce's waiver…Thus, the evidence supports the trial court's finding that Pearce's waiver of the presentation of mitigating evidence was not knowingly, voluntarily, and intelligently made. Pearce suffered prejudice based on this lack of a knowing waiver because there was substantial mitigating evidence which was available but undiscovered.

State v. Pearce, 994 So. 2d 1094, 1103 (Fla. 2008). The same is true here. Substantial mitigating evidence was available but went undiscovered such that Mr. Krawczuk was prejudiced based on the lack of a knowing waiver.

The State, in assessing prejudice, ignores relevant case law and again regurgitates the circuit court's flawed reasoning. Contrary to the standard for prejudice as enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984) and its progeny, the lower court repeatedly failed to evaluate the impact of the mitigation on the JURY. 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.

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. Numerous mitigating factors exist 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). These mitigating factors are supported by the numerous

lay witnesses who testified regarding Mr. Krawczuk's horrendous childhood. Additionally, the experts presented at the evidentiary hearing found the existence of statutory mitigators including extreme mental or emotional disturbance. The impact this evidence would have had on the jury cannot be discounted. *See Porter v. McCollum*, 130 S. Ct. 447 (2009).

In addition to the numerous mitigating factors related to mental health, family history and childhood abuse, both the evidence and testimony at the evidentiary hearing, as well as the arguments put forth by the State in support of its case against Mr. Krawczuk at trial, all support the claim of equal culpability of Mr. Poirier and Mr. Krawczuk. The jury would have found significant that throughout the events which occurred that night, William Poirier was an active participant who was directly responsible for bringing about the death of the victim.

Mr. Krawczuk's decision to waive the presentation of mitigating evidence was not knowing, intelligent and voluntary because trial counsel failed to investigate mitigation. As a result, Mr. Krawczuk's penalty phase was not reliable. 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. Mr. Krawczuk is entitled to a new penalty phase.

CONCLUSION

Based on the foregoing, as well as the argument set forth in his initial brief, Anton Krawczuk respectfully requests that this Court vacate his convictions and sentences, including his sentence of death and order a new trial and/or sentencing.

Respectfully submitted,

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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 7th day of June, 2011.

_____
SUZANNE MYERS KEFFER

CERTIFICATE OF FONT

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