IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-680

ANTON KRAWCZUK,

Petitioner,

v.

JAMES MCDONOUGH, Secretary
Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

This is Petitioner's first habeas corpus petition in this Court. This petition for habeas corpus relief is being filed in order to preserve Mr. Krawczuk's claims arising under recent United States Supreme Court decisions and to address substantial claims of error under Florida law and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution; claims demonstrating that Mr. Krawczuk was deprived of the effective assistance of counsel on direct appeal and that the proceedings that resulted in his convictions and death sentences violated fundamental constitutional guarantees.

Citations to the record on the direct appeal shall be as "R. _____." Citations to the postconviction record shall be as "PC-R. _____." All other citations shall be self-explanatory.

JURISDICTION

A writ of habeas corpus is an original proceeding in this Court governed by Florida Rule of Appellate Procedure 9.100. This Court has original jurisdiction under Florida Rule of Appellate Procedure 9.030(a)(3) and Article V, Section 3(b)(9), Florida Constitution. The Constitution of the State of Florida guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Article I, Section 13, Florida Constitution. This petition presents issues

which directly concern the constitutionality of Mr. Krawczuk's convictions and sentences of death.

Jurisdiction in this action lies in this Court, *see e.g. Smith v. State*, 400 So. 2d 956, 960 (Fla. 1981), because the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Krawzuck's direct appeal. *See Wilson v. Wainwright*, 474 So. 2d 1162, 1163 (Fla. 1985); *Baggett v. Wainwright*, 229 So. 2d 239, 243 (Fla. 1969). The Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors is warranted in this case.

REQUEST FOR ORAL ARGUMENT

Mr. Krawczuk requests oral argument on this petition.

PROCEDURAL HISTORY AND STATEMENT OF CASE AND FACTS

Petitioner was indicted on October 3, 1990, along with the co-defendant, William Poirier, on three counts-first degree premeditated murder; first degree felony murder in violation of section 782.04, Florida Statues (1989) and section 777.011, Florida Statutes (1989); and for robbery in violation of section 812.13, Florida Statutes (1989). (R. 445-446). Petitioner entered a plea of guilty on September 27, 1991. In February of 1992 the trial court sentenced the Petitioner to

death for first degree murder and 15 years in prison for robbery. (R. 436, 587-594, 596-601).

This Court upheld the convictions and sentences on direct appeal. *Krawczuk v. State*, 634 So. 2d 1070 (Fla. 1994); *cert. denied*, 513 U.S. 881 (1994). Following this Court's affirmance of Mr. Krawczuk's conviction and sentences, Mr. Krawczuk filed a Rule 3.850 Motion to Vacate Judgment of Convictions and Sentences With Special Request for Leave to Amend in the Circuit Court for the Nineteenth Judicial Circuit. On January 20-21 and March 8, 2004, an evidentiary hearing was held. On January 25, 2010, the circuit court denied Mr. Krawczuk relief.

Following the trial court's order denying his Rule 3.850 Motion for Postconviction Relief Mr. Krawczuk filed a motion for rehearing and a motion to disqualify Judge Thompson. Both motions were denied. Mr. Krawczuk timely filed an appeal.

The Petitioner relies on the facts as presented in his initial brief. This Petition is being filed simultaneously with Mr. Krawczuk's initial brief following the denial of his motion for post-conviction relief.

CLAIM I

MR. KRAWCUZK'S SENTENCE VIOLATES *FURMAN v. GEORGIA* BECAUSE IT IS DISPROPORTIONATE, DISPARATE AND INVALID IN COMPARISON TO HIS CO-DEFENDANT AND TO OTHER DEATH SENTENCES CONTRARY TO ART I, SEC. 9 OF THE FLORIDA CONSTITUTION AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Over 30 years ago, the U.S. Supreme Court announced that under the Eighth Amendment, the death penalty must be imposed fairly, and with reasonable consistency, or not at all. *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (per curiam). In *Furman*, the Petitioners, relying upon statistical analysis of the number of death sentences being imposed and upon whom they were imposed, argued that the death penalty was cruel and unusual within the meaning of the Eighth Amendment. Five justices agreed, and each wrote a separate opinion setting forth his reasoning.[1] As a result, *Furman* stands for the proposition most succinctly

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[1] *Furman*, 408 U.S. at 253 (Douglas, J., concurring) ("We cannot say from facts disclosed in these records that these defendants were sentenced to death because they were black. Yet our task is not restricted to an effort to divine what motives impelled these death penalties. Rather, we deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12."); *Id.* at 293 (Brennan, J., concurring) ("it smacks of little more than a lottery system"); *Id.* at 309 (Stewart, J., concurring) ("[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual"); *Id.* at 313 (White, J., concurring)

explained by Justice Stewart in his concurring opinion: "The Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be . . . wantonly and . . . freakishly imposed" on a "capriciously selected random handful" of individuals. *Id.* at 310.[2]

Following the Supreme Court's disposition in *Furman*, State courts, as part of their responsibility in ensuring effective channeling with respect to imposition of the death penalty, were obligated to conduct a proportionality review.[3] Pursuant to this responsibility this Court announced in *Dixon v. Florida* that the Florida

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("there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not"); *Id.* at 365-66 (Marshall, J., concurring) ("It also is evident that the burden of capital punishment falls upon the poor, the ignorant, and the underprivileged members of society. It is the poor, and the members of minority groups who are least able to voice their complaints against capital punishment. Their impotence leaves them victims of a sanction that the wealthier, better-represented, just-as-guilty person can escape. So long as the capital sanction is used only against the forlorn, easily forgotten members of society, legislators are content to maintain the status quo, because change would draw attention to the problem and concern might develop.") (footnote omitted).

[2] It is important to recognize that the decision in *Furman* did not turn upon proof of arbitrariness as to one individual claimant. Instead, the court looked at the **systemic arbitrariness**.

[3] *Furman* was interpreted by state courts to prohibit death sentencing systems that permitted the imposition of the death penalty on the basis of constitutionally impermissible factors or that fails to provide any meaningful basis for distinguishing between those relatively few defendants who receive the death penalty and the many other defendant's guilty of capital murder who do not. David C. Baldus, et. al., *Equal Justice and the Death Penalty: A Legal and Empirical Analysis* 12-13 (1990).

Constitution compelled the court to review every death sentence imposed in Florida in order to make certain that the death sentence was being reserved for only the most aggravated and unmitigated of serious crimes." 283 So. 2d 1, 7 (Fla. 1973). This Court asserted that their review of proportionality of sentences would:

> "[G]uarantee that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case….If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great. Thus, the discretion charged in *Furman v. Georgia* can be controlled and channeled until the sentencing process becomes a matter of reasoned judgment rather than an exercise in discretion at all."

Id at 10.

Proportionality review arises, in part, by necessary implication from the mandatory and exclusive jurisdiction of this Court over death penalty appeals. Art. V, Sec. 3(b) (1) *Fla. Const*. The purpose of this grant of jurisdiction is to ensure the uniformity of death-penalty law by preventing the disagreement over controlling points of law that may arise from the lower courts. Proportionality review is a unique and highly serious function of this court, the purpose of which is to foster uniformity in death penalty law.

This Court interpreted the Florida Constitution to impose "an absolute obligation" on the Court to determine whether death is a proportionate penalty. The Court's proportionality review entails (1) performing a qualitative review of the underlying basis for each aggravator and mitigator; and (2) determining whether

the crime falls within the category of both the "most aggravated" and the "least mitigated murders." This Court noted in *Porter v. State*:

> Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of the circumstances in a case and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances.

564 So. 2d 1060, 1064 (Fla. 1990) (citations omitted). Thus review must consider the totality of the circumstances in the case under review and compare it to cases in which the death penalty was imposed. This method of comparative proportionality review takes two distinct forms: inter-case comparative review and intra-case comparative review.

a. Inter-case Comparative Review

Inter-case comparative review is the process by which the appellate court compares a death sentence before it to other cases within the jurisdiction in order to guard against arbitrariness and inconsistency in sentences. In conducting this approach the Florida Supreme Court reviews its past cases in which a comparative proportionality review was conducted and determines whether the case under review is more comparable to past cases where the Court either vacated or affirmed death sentences imposed by a trial court. In doing so the Court has stated that it is required to consider the totality of the circumstances in a case and to compare the case with other capital cases. *See Voorhees v. Florida*, 699 So. 2d 533 (Fla. 1975).

One glaring aspect of this review which merits note is the fact that the Florida Supreme Court has narrowed the universe of cases which it reviews in its comparative proportionality review to only those which have previously been reviewed for proportionality. This means that the court does not review the factual circumstances of cases in which the trial court imposed a sentence of life. *See* Phillip L. Durham, *Review in Name Alone*: *The Rise and Fall of Comparative Proportionality Review of Capital Sentences by the Supreme Court of Florida*, 17 ST. THOMAS L REV. 299, 314 (2004).[4] Under this statutorily defined system for reviewing and evaluating those cases in which the death penalty is imposed, this Court is obligated to review all cases in which a death sentence is imposed to determine whether death is a proportionate penalty. However, because the Florida Supreme Court only reviews cases "where the death penalty was not imposed in cases involving multiple co-defendants," their proportionality review is skewed. In

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[4] As noted by Durham, "this aspect of the Florida system of comparative proportionality review poses a distinct dilemma for the Supreme Court of Florida in undertaking comparative proportionality review." First, since the court is limited only to reviewing other death cases it must labor under the assumption that those defendants who cases contain low levels of aggravation and high levels of mitigation are rarely sentenced to death. Second, as a result of this framework of review, the Florida Supreme Court is required to conduct its own initial value judgment in order to determine which levels of aggravation are sufficiently low and those levels of mitigation which are sufficiently high to raise concerns of arbitrariness. This type of review is arguably problematic as it requires the court to determine by its own accord which cases would be death appropriate given the levels of aggravation and mitigation present. Durham at 313.

order to ensure the meaningfulness of its proportionality review, the Court should expand its review to cases where a defendant did not receive a death sentence.

In September 2006 the American Bar Association, in association with the Florida Death Penalty Assessment Team, conducted a study to research and report upon the death penalty scheme in place in Florida. The report which came out of that study was titled "Evaluating Fairness and Accuracy in the State Death Penalty Systems. The Florida Death Penalty Assessment Report" *See* American Bar Association, Evaluating Fairness and Accuracy in the State Death Penalty Systems: The Florida Death Penalty Assessment Report, September 17, 2006 (hereinafter ABA Report). The report identified numerous aspects of the Florida Capital sentencing scheme which stood in violation of the mandate issued in *Furman v. Georgia*. ABA Report on Florida at xxii. Most specifically, the ABA assessment team noted disturbing trends in the Florida Supreme Court's proportionality review.

The ABA Report on Florida's Death Penalty system examined 272 death sentences which had been reviewed for proportionality by the Florida Supreme Court between January 1, 1989 and December 31, 2003. The empirical data raised a number of questions pertaining to the meaningfulness of the Court's proportionality review and demonstrated that the Court's review has been much less successful in identifying disproportional death sentences since 1999.

Specifically, the study found that the Florida Supreme Court's average rate of vacating death sentences significantly decreased from 20 percent during 1989-1999 to 4 percent during 2000-2003. ABA Report on Florida at 212. It also found that the Court has affirmed death sentences in cases with low levels of aggravation and high levels of mitigation—cases with the lowest level of criminal culpability—at a much higher rate in 2000-2003 than it did in 1989-1999. The ABA Report noted "that this drop-off resulted from the Florida Supreme Court's failure to undertake comparative proportionality review in the 'meaningful and vigorous manner' it did between 1989 and 1999." ABA Report at 213. The shift in the affirmance rate and in the manner in which the proportionality review was conducted is an arbitrary factor. Whether a death sentence was or is affirmed on appeal depends in part upon what year the appellate review was or is conducted.

Despite the fact that Mr. Krawczuk's sentence was affirmed by this court in 1994, this fact is not dispositive of his claim that he was denied a legitimate proportionality review. Similar to the 2000-2003 time period established by the ABA Report, Mr. Krawczuk contends that this Court failed in its review of his case on direct appeal to undertake its obligation to conduct a comparative proportionality review in a meaningful and vigorous manner.

Because of the limitations which the Florida Supreme Court has placed upon its proportionality review, the meaningfulness of the Court's review is

questionable. There is not a "meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not" *Furman*, 408 U.S. at 313 (White, J., concurring) . As a result "the imposition and carrying out of the death penalty in [Mr. Krawczuk's] case[] constitute[s] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Furman,* 408 U.S. at 239-40.

As noted above, as part of its obligation to ensure proportionality of sentences in capital cases the Florida Supreme Court has adopted the precedent seeking or comparative culpability approach as the methodology with which it undertakes inter-case comparative proportionality review. In doing so, the Florida Supreme Court searches its precedents to determine whether the case under review is more comparable to past cases in which this Court either vacated or affirmed death sentences imposed by a trial court after having conducted a proportionality review on direct appeal. In performing this review the Florida Supreme Court has stated that it is not a "comparison between the number of aggravating and mitigating circumstances," *Tillman v. Florida* 591 So. 2d 167, 169 (Fla. 1990), nor is it within the court's province to "reweigh or reevaluate the evidence presented as to aggravating or mitigating circumstances." *Hudson v. Florida*, 538 So. 2d 829, 831 (Fla. 1989). The Supreme Court of Florida has noted that it is a qualitative review by the Court of the underlying basis for each aggravator and mitigator

requiring the court to consider the totality of the circumstances in a case and to compare the case with other capital cases.

The Florida Supreme Court failed to conduct this quality of inter-case proportionality review of Mr. Krawczuk's case. Nowhere in this court's opinion on direct appeal is there any language discussing the court's review of the record facts and sentence in Mr. Krawczuk's case and comparison of those facts to those of other defendants sentenced to death. The only possible consideration of proportionality came in a footnote discussing the issue of disparate treatment for purposes of non-statutory mitigation. This is not sufficient for purposes of the Eighth Amendment or the Florida Constitution. This court's failure to conduct a genuine, full throated review of Mr. Krawczuk's case in comparison to those of the other death sentenced defendants who were convicted on similar factual backgrounds violates the mandates of *Furman* and the Florida Constitution.

Review of Florida case law supports Mr. Krawczuk's argument that his sentence cannot withstand a valid inter-case comparative proportionality review. This Court's own jurisprudence regarding proportionality review has repeatedly acknowledged that the proper focus is upon the relative culpability of the defendants as established by facts in the trial record. Review of other co-defendant cases in which a sentence of death was imposed upon only one defendant and the facts underlying the extent of their relative culpability supports the argument that

Mr. Krawczuk's sentence is disproportionate. *See Salvatore v. State*, 366 So. 2d 745, 752 (Fla. 1978) (sentencing of the defendant to death where co-defendant received lesser sentence of second degree murder was not disproportionate based upon fact that defendant formulated plan to kill victim and co-defendant refused to actually hit the victim or participate in beating victim to death); *Cook v. State*, 581 So. 2d 141 (Fla. 1991) (Court rejected claim of disproportionate sentencing based upon fact that accomplice's level of participation in the murder was clearly less than death sentenced defendant who actually killed the victims.); *Hayes v. State* 581 So. 2d 121 (Fla. 1991) (defendant's death sentence not disproportionate to co-defendants where trial court found, with ample support in the record, that defendant was more culpable than co-defendants where evidence demonstrated that defendant was primarily responsible for planning the crime, initiating the scheme, and was actual shooter); *Tafero v. State*, 403 So. 2d 355, 362 (Fla. 1981) (holding that fact that co-defendant received life sentences upon pleading to second degree murder and kidnapping did not invalidate defendant's sentence where defendant was lone shooter and evidence demonstrated he was leader of the group); *Jennings v. State*, 718 So. 2d 144, 153-54 (Fla. 1998) (holding that fact co-defendant received life sentence did not prevent imposition of the death penalty on defendant, whom the trial court found to be the actual killer and to be more culpable); *Hunter v. State* 817 So. 2d 786 (Fla. 2002) (co-defendant's lesser sentence of second

degree murder proportionate where co-defendant not actual shooter and conduct less aggravating than that of death sentenced defendant).

Because Mr. Krawczuk received ineffective assistance during both the trial and direct appeal stages, the entire record of available mitigation was never fully developed until postconviction. As such, any meaningful attempt at a legitimate proportionality review has been impossible until this time. The fully developed record from Mr. Krawczuk's trial and postconviction hearings supports a finding that his sentence is disproportionate in comparison to other co-defendant cases where only one defendant received a sentence of death. Unlike *Salvatore*, the record establishes that Poirier also hit the victim repeatedly and actively participated in the bringing about the victim's death. Unlike *Cook*, Poirier's participation was equally if not greater than Mr. Krawczuk's. Unlike *Hayes*, both Poirier and Mr. Krawczuk planned the crime together as well as initiating the scheme at the victim's house. Unlike *Tafero*, evidence in the fully developed record establishes that Mr. Krawczuk was not the leader of the group nor was he the lone individual responsible for the cause of the victim's death. Finally, also unlike *Hunter*, evidence established that both individuals conduct was equally aggravating. Both men participated in the robbery for pecuniary gain, both men planned out the aspects of the crime prior to carrying it out, and both men assisted at various junctures in conduct which possibly caused the defendant's death.

The fully developed record from Mr. Krawczuk's trial and postconviction hearings not only supports a finding that his sentence is disproportionate in comparison to other co-defendant cases where only one defendant received a sentence of death, but also supports the argument that his is NOT one of the most aggravated and least mitigated capital cases. On direct appeal, this Court affirmed three aggravating circumstances: cold, calculated and premeditated; heinous, atrocious and cruel; and during the course of a robbery and for pecuniary gain merged. *Krawczuk v. State*, 634 So. 2d 1070 (Fla. 1994). The only mitigating circumstance found was the fact that Mr. Krawczuk had no significant criminal history. *Id.* An abundance of statutory and non-statutory mitigating circumstances has now been presented including Mr. Krawczuk's 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 (PC-R 1726). Additionally, two experts have opined that Mr. Krawczuk was under extreme mental or emotional disturbance at the time of the crime (PC-R. 1724) and Mr. Krawczuk has significant deficits in being able to conform his conduct to the requirements of the law (PC-R. 1725).

In *Ray v. State*, 755 So. 2d 604 (Fla. 2000), this Court held that Ray's death

sentence was disproportionate both in terms of a comparison with the co-defendant's life sentence and in terms of an independent analysis of the applicable aggravating and mitigating circumstances. As for the independent basis for finding Ray's sentence disproportionate, irrespective of the co-defendant's sentence, the Court noted the presence of two aggravating factors and five non-statutory mitigating factors. *Id.* at 607, 612.

In *Campbell v. State*, 571 So. 2d 415 (Fla. 1990) this Court specifically addressed the issue of what is required by the sentencing court when considering mitigating circumstances. A sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of non-statutory factors, it is truly of a mitigating nature. *Id.* at 419. (citing *Rogers v. State*, 511 So. 2d 526 (Fla. 1987)). A court is required to find as a mitigating circumstance each proposed factor that is mitigating in nature and [that] has been established by the greater weight of the evidence. *Id.* This determination is a question of fact and the court's finding will be presumed to be correct and upheld on review if supported by sufficient competent evidence in the record." *Id.* (citing *Brown v. Wainwright*, 392 So. 2d, 1331 (Fla. 1981)).

Mitigating factors need not be established beyond a reasonable doubt. If the Court is reasonably convinced they exist, they can be considered established. *Id.*

(citing Fla. Std. Jury Instr.(Crim.) at 81). The court is then required to weigh the aggravating and mitigating circumstances and expressly consider in its order each established mitigating circumstance. *Id.* What is considered mitigating in nature is a question of law. It has been broadly defined as "any aspect of defendant's character or record and any of the circumstances of the offense" that reasonably may serve as a basis for imposing a sentence less than death. *Lockett v. Ohio*, 438 U.S. 586 (1978). Valid nonstatutory mitigating circumstances include but are not limited to the following: abused deprived childhood; contribution to community or society as evidenced by an exemplary work, military, family, or other record; remorse and potential for rehabilitation; good prison record; disparate treatment of an equally culpably codefendant; and charitable or humanitarian deeds. *Campbell*, 571 at 420, n.5.

Similar to this Court's finding in *Ray*, Mr. Krawczuk's sentence is disproportionate. Mr. Krawczuk's trial court found the presence of three aggravating factors and one statutory mitigating factor. The record developed during postconviction establishes that an abundance of additional statutory and non-statutory mitigation should have been considered by the court in reaching its sentencing determination but was not due to ineffective assistance of counsel. Had this evidence been presented and properly considered by the court, the imposition of a sentence of death would be inappropriate as it establishes that Mr. Krawczuk's

case is not one of the most aggravated and least mitigated of serious crimes. When conducting an independent analysis of the applicable aggravating and mitigating circumstances and contrasting and comparing Mr. Krawczuk's case to other similarly situated death sentenced defendants, it is clear that his sentence is disproportionate.

Pursuant to the Florida Constitution it is solely the responsibility of this Court to conduct inter-case proportionality review for purposes of ensuring the accuracy and reliability of Mr. Krawczuk's sentence. Mr. Krawczuk contends that it is only after review of the fully developed record from postconvction that any valid, qualitative inter-case comparative proportionality review can be conducted. Upon review of the fully developed record from postconviction, this court should find it clear that Mr. Krawczuk's sentence is disproportionate to other defendant's who have been sentenced to death where their co-defendants received a lesser sentence. Mr. Krawczuk's is entitled to relief.

b. Intra-case Comparative Review

Intra-case comparative review is conducted for multiple defendant cases. It requires the Florida Supreme Court to review the multiple levels of criminal culpability of the defendants in a multiple defendant case. *See Pucio v. Florida*, 701 So. 2d 858 (Fla. 1997). If the court finds that the codefendants have equal levels of culpability, one of the codefendants may not be sentenced to death while

the other is not.

This Court prides itself in a system of justice that requires equality before the law and reviews cases to ensure that defendants are not treated differently upon the same or similar facts. *See United States v. Jackson*, 390 U.S. 570 (1968). When the facts are the same, the law should be the same. *Slater v. State*, 316 So. 2d 539, 542 (Fla. 1975). This is not what occurred in Mr. Krawczuk's case. Mr. Krawczuk received disparate treatment in relation to his co-defendant William Poirier and was denied a legitimate proportionality review by this Court.

A review of the trial court record on appeal and the Florida Supreme Court's decision affirming Mr. Krawczuk's conviction and sentence makes apparent that the Court's review of the proportionality of sentences between Mr. Krawczuk and his co-defendant William Poirier was deficient for many of the same reasons the schemes at issue in *Furman* were found to be unconstitutional. Mr. Krawczuk received a death sentence for his participation in the crime. His co-defendant William Poirier, who also participated in the crime, pled guilty to the lesser included offense of second degree murder, received a sentence of 35 years, and since that time has been released from prison prior to completing the entirety of his sentence. Additionally, Mr. Krawczuk and Mr. Poirier were sentenced by different judges, thus making it impossible for one judge to properly sentence the co-defendants and construct the proper record for the Florida Supreme Court's

proportionality review. Moreover, because Mr. Krawczuk's trial attorney failed to present any evidence of mitigation during the penalty phase this Court was incapable of reviewing the abundant evidence which was readily available that established at minimum the equal culpability of the two defendants. As such, this Court has not conducted a thorough and adequate disparate treatment analysis or an accurate proportionality review of Mr. Krawczuk's case as is constitutionally required. *See*, Art. I, Sec. 9, Fla. Const.

In its review of the trial court's findings, the Florida Supreme Court ignored an abundance of record evidence indicating that Mr. Krawczuk and Mr. Poirier were at a minimum equally culpable. In doing so, the Court ultimately failed to give full consideration to the totality of the circumstances of Mr. Krawczuk's case and uphold the absolute obligation imposed upon it by the Florida Constitution to ensure the proportionality of his penalty. The record at the original trial and in postconviction demonstrates the relative involvement of the co-defendants and establishes their equal culpability in the victim's death.

1. Failure to conduct an appropriate review based upon evidence before this court on direct appeal

This Court's proportionality review on direct appeal ignored facts in the trial record which demonstrated the extent of the involvement of Mr. Krawczuk and Mr. Poirier in the victim's death. The facts and evidence introduced at trial support Mr. Krawczuk's claim that Poirier was at minimum equally culpable in the

commission of the crimes charged.

Mr. Krawczuk's post arrest statement to police that was played for the jury during penalty phase also supports the argument regarding equal culpability of the two co-defendants. Both men participated in attempting to subdue the victim on the bedroom floor. (R. 143). Poirier assisted in choking Staker, holding his mouth shut and pinching Staker's nose closed. (R. 143). While the struggle ensued Poirier also repeatedly hit Staker on the side of the face and performed several knee drops directly to his face and chest cavity area. (R. 143-45). At some point in the altercation Staker attempted to hit the two men with a lamp which was nearby on a nightstand next to the bed. Poirier took the lamp from Staker and then bludgeoned him with it to attempt to further subdue him. (R. 175). After initially subduing Staker, as Krawczuk attempted to pour crystal vanish into Staker's mouth, Poirier assisted by holding Staker's mouth open. (R. 147). Both men carried the victim to the adjacent bathroom to attempt to further subdue him. After helping bind Staker's feet and hands, Poirier then began rounding up things from the house. And it was Poirier's former co-worker Gary Sigelmeir who they contacted to attempt to fence the stolen goods.

The medical examiner testified that the victim's cause of death was generally due to asphyxiation, secondary to strangulation and smothering. (R. 82). The medical examiner testified that 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). According to the medical examiner either of the two events could have been responsible for the cause of Staker's death. Most important to note about the medical examiner's testimony is that both causes of death listed can be directly attributable to actions of Poirier. It was Poirier who pushed down on the victim's Adam's apple throughout the initial period of strangulation; it was Poirier who held the victim's nose and mouth closed, it was Poirier who placed the rag in the victim's mouth and taped it shut, 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.

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 of that night. (R. 12). During closing argument, the State referenced both defendant's 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 Sigelmier (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 equal culpability.

The State repeatedly advanced arguments to Mr. Krawczuk's jury that both Mr. Krawczuk and Mr. Poirier were equally culpable. 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 his sentencing order, trial Judge James Thompson noted that the critical factors that he felt justified the imposition of the death sentence came from Mr. Krawcuzk's taped confession which was played for the jury and the court during the penalty phase. Specifically, Judge Thompson noted:

> The defendant's confession establishes that it was he who scouted the site to dispose the body, made the arrangements with the victim to go to his house, initiated the attack, physically strangled the victim **with the co-defendant's assistance**, placed the drain cleaner in the victims mouth and steadied the co-defendant when he was on the point of becoming sick.

(R. 587-593) (emphasis added). Following the disposition of Mr. Poirier's case, this Court was entrusted with conducting a proportionality review of Mr. Krawczuk's case based upon the facts in the record below. In this Court's opinion denying relief on direct appeal, no direct mention was made regarding proportionality review. The only language which dealt with the issue of proportionality was found in a footnote which discussed the issue of disparate treatment for purposes of non-statutory mitigation. *Krawczuk v. State*, 634 So. 2d

1070, 1073 (Fla. 1994). In that footnote this Court relied solely upon Judge Thompson's findings in reaching its determination that Mr. Krawczuk had not received disparate treatment. These findings, however, are rebutted by the evidence developed during the penalty phase of Mr. Krawczuk's trial. Testimony from the State's own witnesses establishes that Poirier was intricately involved in the planning of the crime and at minimum equally culpable. Testimony established that Poirier played a vital role in planning and causing the victim's death, and in establishing the connection with Sigelmier to fence the stolen goods.

In addressing Mr.Krawczuk's claim that the lower court had erred in failing to find the existence of non-statutory mitigators, this court noted that the trial court had properly followed the dictates of *Campbell v. State*, 571 So. 2d 415 (Fla. 1990) and *Rogers v. State*, 511 So. 2d 526 (Fla. 1987), *cert. denied*, 484 U.S. 1020 (1988) and this Court believed that "there [existed] [] competent substantial evidence to support the conclusion that death is the appropriate sentence." *Cf. Durocher v. State*, 604 So. 2d 810 (Fla. 1992), *cert. denied*, 113 S. Ct. 1660 (1993); *Pettit v. State*, 591 So. 2d 618 (Fla. 1992), *cert. denied*, 113 S. Ct. 110 (1992).

This court drew upon the lower court's findings to support its determination that the trial record supported the existence of the following aggravators: committed in a cold, calculated, and premeditated manner; committed in a heinous, atrocious and cruel manner; and committed during a robbery for pecuniary gain.

This court agreed with Judge Thompson's findings and determined that the record demonstrated the existence of the three aggravators beyond a reasonable doubt and approved their application in this case. *Krawczuk*, 634 So. 2d at 1073.

This court then reviewed the mitigation, or lack thereof, that was presented to Judge Thompson. No prior criminal history was given little weight. No other statutory or non-statutory mitigation was considered by Judge Thompson to have been established. This court adopted those findings. It then relied upon Judge Thompson's order to dispense with Mr. Krawczuk's argument that the lower court erred in failing to find the existence of nonstatutory mitigators. This Court found that the lower court had carefully considered the psychiatrist's report and the presentence investigation report and properly found that the record did not support the establishment of any nonstatutory mitigators.[5] *Id.*, at 1073.

Specifically, in reference to the psychiatrist's report the lower court had found, "Consideration of the statements in the psychiatrist report relevant to this defendant being the more passive of the two defendants and his being influenced by the codefendant [*sic*]. The court does not find this to be so to any degree that

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[5] Prior to trial Mr. Krawczuk was evaluated by a psychiatrist appointed by the court. The report from that evaluation was entered into the record at penalty phase for purposes of presenting Judge Thompson with potential mitigation evidence regarding Mr. Krawczuk's relative culpability in the crime. Additionally, Judge Thompson was also presented with a presentence investigation report which had been created after evaluation of Mr. Krawczuk upon his arrest.

would justify consideration as a mitigating circumstance. The psychiatrist, himself, was of the opinion that the defendant was over stating this . . .” (Circuit Court Order at 6). This Court adopted those findings and Judge Thompson’s statement on the record that in addition to the above items, he had considered “anything else [he had] been able to discern from the[] proceedings.” *Id.* at n.4.

This Court’s reliance upon *Campbell* and *Rogers* and the lower court’s application of their dictates is misplaced. In *Rogers* this Court rearticulated its prior holdings determining that “lesser sentences imposed on accomplices may be considered in mitigation, *Rogers*, 511 So. 2d at 535*; see e.g. Gafford v. State*, 387 So. 2d 333 (Fla. 1980), and that defendant’s should not be treated differently upon the same or similar facts. *Id.*, (citing *Slater v. State*, 316 So. 2d 539, 542 (Fla. 1975)). This court went on to deny Rogers’ claim that he had been treated disparately from his co-defendant because the evidence indicated that Rogers perpetrated the murder without aid or counsel from the accomplice. Citing to *Jackson v. State*, this Court held that where the facts are not the same or similar for each defendant, unequal sentences are justified. 366 So. 2d 752 (Fla. 1978).

This Court’s reliance upon the trial court’s order, referencing both *Campbell* and *Rogers* in support of its conclusion that the trial court properly evaluated and rejected the establishment of any non-statutory mitigation, is flawed. Unlike the factual scenario in *Campbell*, Mr. Krawczuk did not receive effective assistance of

counsel during his penalty phase. Trial counsel's failure to properly investigate and present all of the readily available mitigating evidence seriously prejudiced Mr. Krawczuk in fully developing the entire picture of his mitigation background. Additionally, unlike the factual record in *Campbell*, the evidence presented during the penalty phase[6] considered in conjunction with that which has been developed during postconviction establishes that Mr. Krawczuk was treated disparately from his equally culpable co-defendant Mr. Poirier.[7]

Likewise, this Court's citation to *Rogers* in support of the lower court's rejection of nonstatutory mitigation is also unavailing. In *Rogers* this Court denied the defendant's claim of disparate treatment for purposes of non-statutory mitigation because the record had established that the accomplice had perpetrated the murder without aid or counsel from the accomplice. *Rogers*, 511 So. 2d at 535. This is exactly the opposite of the evidence which was produced at both Mr. Krawczuk's initial trial and during postconviction.

Abundant evidence existed which demonstrated that Poirier was not only an

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[6] The PSI Report and the Psychiatrist report.

[7] Also worthy of note is that in *Campbell* this Court vacated the defendant's sentence and remanded for resentencing based upon several factors, one of which being that the lower court had improperly rejected the defendant's deprived and abusive childhood which this Court determined had been established as a mitigating factor.

active participant in the crime but arguably more culpable. Additionally, the psychologist report which was entered during the penalty phase also indicated that Mr. Krawczuk was the more passive of the two defendants and was influenced by Poirier. The trial court dismissed this portion of the report based upon the fact that the psychiatrist had also noted that the defendant was over stating the extent of this influence. The trial court further noted that regardless of any aspect of this potential mitigating evidence, Mr. Krawczuk's confession alone established he was the more culpable of the two defendants. The trial court's piecemeal rejection of significant portions of the psychologist's report and disregard of the abundant testimony provided in the record which established at a minimum the equal culpability of both defendants, was improper. This Court's reliance upon those findings in support of its affirmance of Mr. Krawczuk's sentence was likewise in error. Sufficient competent evidence does not support the lower court's findings, or this Court's affirmance, that Mr. Krawczuk failed to present evidence which established his disparate treatment from his co-defendant for purposes of non-statutory mitigation.

The court's only reference to the issue of proportionality came in a footnote stating that "the lower court found no disparate treatment between Krawczuk and Poirier", noting that Krawczuk "scouted the site to dispose [of] the body, made the arrangements with the victim to go to his house, physically strangled the victim

with the co-defendant's assistance, placed the drain cleaner in the victim's mouth and steadied the co-defendant when he was on the point of becoming sick' and that the psychiatrist thought Krawczuk was overstating when he said he had been influenced by Poirier. Additionally, Krawczuk was older and bigger than Poirier." *Krawczuk,* 634 So. 2d at 1073. However, from the evidence set forth above, it is clear that both defendants were at least equally culpable. As previously mentioned, in *Ray v. State*, 755 So. 2d 604 (Fla. 2000), this Court held that Ray's death sentence was disproportionate in terms of a comparison with the co-defendant's life sentence. In finding the sentence disproportionate, the Court found it significant that the record reflected the possibility that the co-defendant was the shooter. *Id.* at 611.

Similar to *Ray*, evidence in the record establishes that conduct attributable solely to Mr. Krawczuk's co-defendant was possibly responsible for the victim's death. Like *Ray*, evidence in the record also establishes at a minimum that the two men were equally culpable, with both men participating in planning the murder, executing their plan, carrying out the robbery, disposing of the body, and fencing the stolen goods. Also similar to *Ray,* much of the evidence introduced at trial points to Mr. Krawczuk's co-defendant being the more dominant individual in the crimes.

2. IAC of Direct Appeal Counsel for Failure to Raise Issue on Direct Appeal

Had Mr. Krawczuk's direct appeal attorney raised a claim of disparate treatment and presented the evidence that was readily available in conjunction with the knowledge that Mr. Poirier had received a life sentence, Mr. Krawczuk would have received a life sentence upon review by this Court. The aggravating circumstances against Mr. Krawczuk were the same as those found against Poirier, the critical difference between the two cases being that Mr. Poirier's attorneys were effective and successful in obtaining a lesser sentence of 35 years. Mr. Krawczuk's trial attorney was ineffective and failed to investigate and prepare a defense for the penalty phase. His attorney permitted Mr. Krawczuk to waive the guilt phase of his trial and for all intents and purposes, waive any real presentation of evidence during his penalty phase. The result of these failures is that Mr. Krawczuk's sentencing jury and judge were never made aware of the abundance of evidence dealing with both the relative culpability of the two co-defendants and Mr. Krawczuk's background. Likewise, Mr. Krawczuk's direct appeal counsel rendered deficient performance by failing to raise a claim on direct appeal to this court addressing the issue of disparate treatment. It was not until postconviction proceedings were held that the full extent of the mitigating facts surrounding Mr. Krawczuk's participation in the crime and his background were developed. To the extent that direct appeal counsel failed to investigate and present this issue to this court on direct appeal, he rendered deficient performance.

3. Due to ineffectiveness of trial counsel the entirety of the record to support a claim of disparate treatment was not available until post conviction

Proportionality review in death cases rests on the recognition that death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than would lesser penalties. Art. I, Sec. 9, *Fla. Const.*; *Porter v. State*, 564 So. 2d 1060, 1064 (Fla. 1990). This Court's prior proportionality review on direct appeal was premature and incomplete based upon the lack of mitigation presented by trial counsel to the trial court. This Court's proportionality analysis on direct appeal consisted of merely a footnote which deferred to the findings listed in the trial court order. This Court based its finding that Mr. Krawczuk's sentence was proportional upon the same facts listed by the lower court.[8] Most important, these were the same facts upon which Mr. Poirier received a sentence of 35 years.

On September 27, 1991 Mr. Krawczuk informed the Court that he wished to waive presentation of his guilt phase and enter a plea of guilty to one count of first degree murder, one count of robbery, and one count of felony murder. (R. 388). The Court conducted a colloquy of Mr. Krawczuk to attempt to determine his reasoning for waiving the presentation of his guilt phase. (R. 389-415). Following the colloquy, the Court was sufficiently convinced that his waiver was knowing

[8] See Circuit Court order (R. 587-593).

and intelligent and accepted the waiver. (R. 416-21).

During the plea colloquy the Court also questioned Mr. Krawczuk about his intentions regarding the penalty phase of his trial. The Court advised Mr. Krawczuk of the two phases of a murder trial and his right to a jury sentencing recommendation. Mr. Krawczuk indicated that he also wished to waive his right to have a jury provide a sentencing recommendation. (R. 391-393). The Court inquired with Mr. Krawczuk as to why he was choosing this course of action (R. 409). Mr. Krawczuk's response was only that "[he] shouldn't be allowed to live for what [he] did." (R. 409). The Court accepted the waiver but ruled that it was not irrevocable. (R. 416).

Mr. Krawczuk's trial counsel informed the court that Mr. Krawczuk's plea and request for the death penalty was against her advice and that Mr. Krawczuk had also instructed her not to present any witnesses in mitigation. (R. 404-405, 407-08). Despite Mr. Krawczuk's request to waive his right to a jury's sentencing recommendation, the State refused to waive the penalty phase. (R. 654-55). The Court agreed and denied his request. A jury was then voir dired, empaneled and a penalty phase hearing conducted to determine Mr. Krawczuk's sentence.[9]

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[9] Prior to jury selection the court again conducted a colloquy of Mr. Krawczuk. During the colloquy Mr. Krawczuk reiterated his desire to receive the death penalty and put on no evidence in mitigation. He also stated for the record that despite continuing to take medication for depression he did not feel he was under

Mr. Krawczuk's penalty phase proceedings took place on February 4-5, 1992. Following presentation of the State's case Mr. Krawczuk indicated that he was not opposed to the presentation of mitigating evidence but maintained that he still did not wish to take the stand to testify nor did he want part of the psychiatric report written by Dr. Keown admitted. (R. 218-225).

Despite Mr. Krawczuk's reluctance to have Dr. Keown's report admitted, the court ultimately did review the report as well as a presentence investigation report which had been prepared. Dr. Keown's report stated that Krawczuk suffered from depression, was the more passive of the two defendants, and was often influenced by Poirier. Upon review the trial court failed to find the report as mitigation however. No other mitigating evidence was presented upon Mr. Krawczuk's behalf.

Throughout the duration of the penalty phase trial counsel Barbara LeGrande presented no mitigating evidence nor did she challenge the State's case in aggravation. (R. 694, 701, 703, 712-838). Nothing in the record indicates that counsel sought any of the mitigating evidence that existed. This was confirmed by

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the influence. Additionally, he also informed the court that he wished to waive his right to testify on his own behalf and his right to have counsel cross-examine witnesses and make argument. (R. 695-707). The Court ruled 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).

trial counsels' testimony at the evidentiary hearing in postconviction. Mr. Krawczuk was never instructed by counsel of all the mitigating evidence that was available. Despite indicating that he was not completely opposed to presentation of mitigation, counsel failed to effectively investigate, inform, and present a wealth of available mitigation on Mr. Krawczuk's behalf.

Following the conclusion of the penalty phase hearing the jury returned with an advisory recommendation of 12-0 sentencing Mr. Krawczuk to death. On February 13, 1992, the circuit court followed the jury's recommendation and returned a sentence of death for the charge of first degree murder and an additional sentence of 15 years for robbery. (R. 436, 438, 587-94, 536-601).

Following Mr. Krawczuk's trial, Poirier pled guilty to second degree murder and robbery in May of 1992. Mr. Krawczuk's trial had been concluded the year before and he was in the process of appealing his conviction to this Court for direct review. Because of Mr. Krawczuk's unwillingness to testify at Poirier's trial, Poirier was permitted to plead guilty to the lesser included offense of second degree murder and *nolo contendere* to the count III robbery charge. Poirier was sentenced by the Court to 35 years for second degree murder and 15 years for robbery, with the latter sentence to run concurrent.

Mr. Krawczuk filed his original post-conviction motion on October 11, 1995. After extended public records litigation an amended motion was filed on

March 15, 2002. An evidentiary hearing was granted by the trial court on numerous claims contained within his Rule 3.850 Motion to Vacate Judgments of Conviction and Sentence. The evidentiary hearing was held on January 20, 21 and March 8, 2004. It was not until that hearing that Mr. Krawczuk was able to fully establish evidence in support of his claims of both ineffective assistance of trial counsel for failure to investigate and present all available mitigating evidence and evidence of the disparate treatment between himself and his co-defendant William Poirier. Thus, because the entirety of the record necessary to support his claim of disparate treatment was not able to be established until postconviction, this is Mr. Krawczuk's first opportunity to present the fully developed claim of disparate treatment to this Court.

Mr. Krawczuk's attorney Barbara LeGrande testified in postconviction that she was shocked to find out that Poirier had received a sentence of 35 years, and that she couldn't believe it, "I didn't have any dream that that was going to happen." (PC-R. 311). Regarding the topic of proportionality review, LeGrande indicated that she had not ever discussed the topic of the culpability of his codefendant with Mr. Krawczuk, only having basic conversations about it but not in terms of culpability or specifically utilizing the term proportionality. (PC-R. 291).

LeGrande's failure to discuss the topic of culpability and/or proportionality

with Mr. Krawczuk is even more compelling given that when asked of her own opinion of the codefendants culpability given the evidence she reviewed, she 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" (PC-R. 292). When asked point blank about her overall impression as to whether they were equally culpable, LeGrande replied "[a]bsolutely." (PC-R. 293).

Lay witness testimony provided during the postconviction evidentiary hearing also supported Mr. Krawczuk's claim of disparate treatment. Testimony provided by several witnesses at that hearing established the dynamics between the two codefendants and further supported the claim that Mr. Poirier actively participated in the planning and carrying out of the crime, arguably being the more responsible of the two for the victim's death. 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." (PC-R. 2381) Paul Wise testified that ". . . he was somewhat of a – what I would

consider a think he was a follower." (PC-R. 1610-11). Dr. Sultan's opinions support the conclusion that Mr. Poirier was a catalyst in the development and follow through of the plan (PC-R. 267-68). Dr. Keown's evaluation likewise supported that Mr. Krawczuk "more than likely" was the more passive of the two defendants (PC-R. 2203).

Evidence provided during the evidentiary hearing on postconviction also substantiated that Poirier was an active participant throughout the events which occurred that night and was directly responsible for bringing about the death of David Staker. Krawczuk's taped statement to the police which was played before the jury during the penalty phase provided detailed description regarding the extent of Poirier's involvement. In that statement Krawczuk indicated to police that he and Poirier had both planned to go over to Staker's residence roughly three to four days earlier (PC-R 2050). In preparation, Poirier obtained the gloves which he carried with him the night of the murder (PC-R. 2050). 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. (PC-R. 2089). Poirier jumped on Staker's legs and began holding him down while Krawczuk attempted to strangle him. (PC-R. 2064). While Krawczuk was strangling Staker, Poirier held Staker's mouth closed and pinched his nose shut so

that Staker could not breathe. (PC-R. 2066). Poirier also pushed on Staker's Adam's apple to further cut off oxygen flow. (PC-R. 2067). Poirier also administered five to six knee drops to Staker's head and punched Staker in the chest, near Staker's heart. (PC-R. 2066).

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. (PC-R. 2068). Poirier 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. (PC-R. 2069). Poirier was responsible for shoving a wash cloth into Staker's mouth. (PC-R. 2070). Poirier then placed it masking tape over Staker's mouth to secure the rag.

In addition to evidence indicating that Poirier was just as likely responsible for the cause of death, the evidence also establishes that Poirier was the one who was responsible for furnishing the connection with Gary Sigelmier to fence the stolen goods from Staker's residence. As Krawczuk detailed in his statement to police, it was Poirier who had discussed with him prior to that night that he would contact Sigelmier to fence the stolen goods for quick cash. (PC-R. 2079). In Sigelmier's statement he indicated that it was Poirier who called to inform him that they would be bringing over stolen property; Poirier telling Sigelmier that he was "psyched up," "adrenaline pumping" after the incident; Poirier who decided to

keep an automatic pistol for himself; and after the incident, it was both Poirier and Krawczuk who looked "flushed, excited looking." Sigelmier never indicated that Poirier was scared or concerned about what had occurred. Moreover, it was Sigelmier who also indicated that it was Poirier who "get[s] bored. And he likes to go out and do evil." (PC-R. 1940).

These statements establish that Poirier and Krawczuk were at minimum equally responsible for the planning and commission of the crime. However, because of trial counsel's ineffectiveness, evidence of the dynamics of the relationship between the two co-defendants, Mr. Krawczuk's background, the actual cause of the victim's death, and other facts surrounding the crime were never presented at Mr. Krawczuk's penalty phase. The result was that neither the trial court at the time of sentencing, nor the Florida Supreme Court in conducting its proportionality review, had before it accurate facts upon which to make appropriate determinations of culpability, disparate treatment, and proportionality.

Mr. Krawczuk's trial attorney's lack of understanding regarding how the Florida Supreme Court conducts its proportionality analysis, her failure to properly make the record to preserve the issue for review, and the fact that the co-defendants' cases were disposed of by two separate judges, made it impossible for either court to have before it all of the relevant facts affecting a proportionality determination. Clearly there was debatable evidence as to who planned and carried

out various aspects of the crime, as well as who was more culpable for the cause of death of the victim. Judge Thompson's reasons stated in his order for distinguishing between the two co-defendants and sentencing Mr. Krawczuk to death were seriously flawed.

Had the fact that Mr. Poirier received a plea deal of second degree murder and a sentence of 35 years been considered by the sentencing court, and had the judge also had before him all the evidence which was presented during Mr. Krawczuk's postconviction hearing, the result would probably have been a life sentence. This information was mitigating and was never presented to the trial court due to ineffective assistance of trial counsel or the timing of the disposition of the two codefendant's cases.

This Court recognized in *Scott v. Dugger*, 604 So. 2d 465 (Fla. 1992), that a postconviction court is authorized to address on collateral review the proportionality of two equally culpable defendants when one defendant is sentenced to death and the other co-defendant is sentenced to life imprisonment. This Court has held that such a claim can be an additional legal basis for a new penalty phase. The disparate treatment between Mr. Krawczuk and Mr. Poirier was precisely what was anticipated in *Scott*. *See also Slater v. State*, 316 So. 2d 539 (Fla. 1975) (defendants should not be treated differently upon the same or similar facts); *Cf. Hannon v. State*, 941 So. 2d 1109, 1144 (Fla. 2006) (no disparate

treatment where Hannon more culpable defendant); *Ventura v. State*, 794 So. 2d 553, 571 (Fla. 2001) (not equally culpable when Ventura was triggerman and received insurance proceeds). In this case the evidence established at trial and during postconviction substantiates that both men actively participated in the planning of the crime and that both men were at least equally culpable in bringing about the victim's death. This Court must conduct a *de novo* proportionality review based on the corrected facts from the post-conviction proceeding.

A review of the trial court record on appeal and the Florida Supreme Court's decision affirming Mr. Krawczuk's conviction and sentence makes apparent that the Court's review of the proportionality of sentences between Mr. Krawczuk and his co-defendant William Poirier was deficient for many of the same reasons the schemes at issue in *Furman* were found to be unconstitutional. Mr. Krawczuk received a death sentence for his participation in the crime. His co-defendant William Poirier, who also participated in the crime, pled guilty to the lesser included offense of second degree murder, received a sentence of 35 years, and since that time has been released from prison prior to completing the entirety of his sentence. Additionally, Mr. Krawczuk and Mr. Poirier were sentenced by different judges, thus making it impossible for one judge to properly sentence the co-defendants and construct the proper record for the Florida Supreme Court's proportionality review. Moreover, because Mr. Krawczuk's trial attorney failed to

present any evidence of mitigation during the penalty phase this Court was incapable of reviewing the abundant evidence which was readily available that established at minimum the equal culpability of the two defendants. As such, this Court has not conducted a thorough and adequate disparate treatment analysis or an accurate proportionality review of Mr. Krawczuk's case as is constitutionally required. *See*, Art. I, Sec. 9, Fla. Const.

c. Conclusion

Based upon this Court's mandate to ensure uniformity in death penalty law, it is this Court's responsibility alone to perform this unique function of reviewing Mr. Krawczuk's case with an accurate and complete record of the facts of the case in light of the substantial mitigation which was available to trial counsel, was not presented during the penalty phase, and has since been developed during postconviction. Last it is also significant to note that Mr. Poirier received a sentence of 35 years and is now currently released from incarceration despite being charged upon the same facts and aggravators as Mr. Krawczuk's case.

Had trial counsel effectively investigated and presented the readily available evidence, the factors relied upon by both the trial court and this Court in reviewing Mr. Krawczuk's sentence for proportionality and for distinguishing between the two co-defendants would no longer be valid. This Court should feel compelled to conduct a new proportionality review, grant Mr. Krawczuk penalty phase relief,

and reduce his sentence or, order a new penalty phase proceeding.

Mr. Krawczuk entreats this Court to find that his sentence to death was either disproportionate or disparate and grant his request to impose a life sentence, or in the alternative, order a new penalty phase proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus has been furnished by United States Mail, postage prepaid, to Stephen Ake, Asst. Attorney General, Concourse Center 4, 3507 E. Frontage Road, Suite 200, Tampa, Florida 33607, this 3rd day of January, 2011.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Petition for Writ of Habeas Corpus is formatted in Microsoft Word, with 14 point New Times Roman font in compliance with Fla. R. App. P. 9.100(1) and 9.210(a) (2).

_____

SUZANNE MYERS KEFFER
Chief Assistant CCRC-South