IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-10

ANTON KRAWCZUK,

Petitioner,

v.

EDWIN G. BUSS, Secretary
Florida Department of Corrections,

Respondent.

REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

Mr. Krawczuk submits this Reply to the State's Response to the Petition for Writ of Habeas Corpus. 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 Petition for any claims and/or issues that are only partially addressed or not addressed at all in this Reply.

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.

A. The Florida Supreme Court's failure to conduct a meaningful proportionality review

To the extent that the State has argued in its response that Mr. Krawczuk's claim challenging this Court's prior proportionality review on direct appeal is not properly before this Court in the instant petition, (Response at 8), Mr. Krawczuk provides below a brief summary of his arguments and a recitation of case law previously provided in his Initial Petition to negate this argument.

As noted in Mr. Krawczuk's Initial Habeas Petition, (Initial Petition at 5), pursuant to *Dixon v. Florida*, 283 So. 2d 1, 7 (Fla. 1973) the Florida Supreme

Court is compelled to review every death sentence imposed in Florida in order to make certain that the death sentence is being reserved for only the most aggravated and unmitigated of serious crimes. This obligation finds its origins from the United State Supreme Court mandate issued in *Furman v. Georgia*, 408 U.S. 238 (1972) requiring a channeling of the discretion provided to both juries and courts in imposing the death sentence and to ensure against systematic arbitrary and capricious application of the death penalty. Proportionality review arises from the exclusive jurisdiction of the Florida Supreme Court, pursuant to Article V, Sec. 3(b)(1) *Fla. Const..,* over death penalty appeals and its purpose is to ensure uniformity in death penalty law.

Pursuant to that obligation this Court's proportionality review entails qualitative review of the underlying basis for each aggravator and mitigator, *Urbin v. State*, 714 So. 2d 411, 416 (Fla. 1998), as well as making a determination whether the crime falls within the most aggravated and least mitigated of murders. *Dixon,* 238 So. 2d at 7. This review requires this Court to consider the totality of the circumstances in a case and compare the case with other capital cases. *Voorhees v. State*, 699 So. 2d 602, 614 (Fla. 1997). More specifically, this method of comparative proportionality review is conducted in two ways: inter-case comparative review and intra-case comparative review.

As noted in Mr. Krawczuk's initial habeas petition, this Court's review of his sentence on direct appeal failed to properly perform both methods of comparative proportionality review.[1] The inter-case comparative proportionality review conducted by this Court in Mr. Krawczuk's case failed to expressly provide any mention of comparison of the record facts and sentence in his case with other defendants sentenced to death. Likewise, a review of the trial court record on appeal and this Court's decision affirming Mr. Krawczuk's sentence supports the argument that this Court's intra-case comparative review of the proportionality of sentences between Mr. Krawczuk and his codefendant William Poirier was also deficient for precisely the reasons announced in *Furman*.

Repeatedly, this Court's own jurisprudence has noted that the relative culpability of the defendants as established by the trial record is part of the proper focus when conducting a proportionality review. As noted in Mr. Krawczuk's initial habeas petition (Initial Petition at 15-19), review of other similar codefendant cases demonstrates that his sentence cannot withstand a valid inter-

[1] In conducting its inter-case comparative review, the Florida Supreme Court is required to review its past cases in which a comparative proportionality review was conducted and determine 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. *See Voorhees v. Florida*, 699 So. 2d 533 (Fla. 1975). In conducting an intra-case comparative proportionality review of multiple defendant death sentence cases this Court is required 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).

case comparative review. *See Salvatore v. State*, 366 So. 2d 745, 752 (Fla. 1978); *Cook v. State*, 581 So. 2d 141 (Fla. 1991); *Hayes v. State* 581 So. 2d 121 (Fla. 1991); *Tafero v. State*, 403 So. 2d 355, 362 (Fla. 1981); *Jennings v. State*, 718 So. 2d 144, 153-54 (Fla. 1998); *Hunter v. State*, 817 So. 2d 786 (Fla. 2002). Unlike each of the cases above, the level of involvement and culpability in the planning and execution of the crime between Mr. Krawczuk and his codefendant William Poirier is decidedly different from the codefendants in the other cases.

Likewise, upon review of the record at trial and postconviction Mr. Krawczuk's sentence cannot withstand a valid intra-case comparative review. This Court's previous review of Mr. Krawczuk's sentence on direct appeal failed to independently access the abundance of record evidence demonstrating at minimum the equal culpability of codefendant William Poirier. The only discussion provided by this Court on the issue of intra-case comparative proportionality came in a footnote discussing the issue of disparate treatment for purposes of non-statutory mitigation. *Krawczuk v. State*, 634 So. 2d 1070, 1073 (Fla. 1994). In the footnote this Court relied solely upon the lower court's findings in reaching the determination that Mr. Krawczuk had not received disparate treatment from his co-defendant William Poirier. The findings however, are rebutted by the record

evidence presented during the penalty phase of Mr. Krawczuk's trial.[2] By failing to conduct its own independent consideration of the trial court's findings and provide its own assessment of the totality of the circumstances of Mr. Krawczuk's case, this Court failed to uphold the obligation imposed upon it by the Florida Constitution to conduct an adequate disparate treatment analysis and proportionality review. *See* Art. I, Sec. 9, Fla. Const.

Moreover, any attempt at a legitimate proportionality review has been impossible until this time. Because Mr. Krawczuk received ineffective assistance during both the trial and direct appeal stages, the entire record with respect to the relative culpability of the codefendants and the available mitigation in Mr. Krawczuk's background was never fully developed until postconviction. The

[2] The post arrest statement of Mr. Krawczuk which was played at trial established that both men planned out the murder days in advance (R. 12); both men participated in attempting to subdue the victim on the bedroom floor (R. 143); Poirier assisted in choking the victim, holding his mouth shut, and pinching his nose closed (R. 143); Poirier pushed on the victim's Adam's apple to help cut off the flow of oxygen; Poirier repeatedly hit the victim on the side of the face and performed several knee drops directly to his face and chest cavity area (R. 143-45); Poirier bludgeoned the victim with a lamp (R. 175); Poirier assisted in pouring crystal vanish down the victim's mouth by holding his mouth open (R. 147); Poirier was responsible for shoving a wash cloth into the victim's mouth and placing masking tape over it to secure the rag (R. 14); Poirier initiated rounding up things from the victim's house following the murder; and it was Poirier's former co-worker Gary Sigelmeir who they contacted to attempt to fence the stolen goods. Additionally, testimony from the medical examiner indicated that the primary manner of death occurred from either asphyxia brought on by fracture of a bone in the neck or as a result of the rag stuffed in the victim's mouth. Both of which are possible causes directly attributable to actions of Poirier.

record from Mr. Krawczuk's trial and postconviction hearings, which entails a more fully developed factual background of the actual crime, as well as a full presentation of all available mitigation, supports a finding that his sentence is disproportionate in comparison to other codefendant cases with similar mitigation backgrounds and where only one codefendant received a sentence of death.

Trial counsel's deficient performance and failure to present any mitigation evidence during the penalty phase rendered this Court incapable of conducting an effective inter-case and intra-case comparative proportionality review. The record from both the trial and that which has been established in postconviction establishes at a minimum the equal culpability of the two defendants in the victim's death. An abundance of evidence exists which establishes that the actions of both Krawczuk and Poirier were at least equally attributable to the victim's death.[3] (Initial Petition at 21-23). Consideration of this evidence was essential to providing Mr. Krawczuk his constitutionally protected right to valid proportionality review on direct appeal.

In its response the State contends that Mr. Krawczuk's claim challenging this Court's deficient proportionality review is not properly raised before this Court because it fails to raise any allegation of ineffective assistance of appellate counsel. (Response at 8). However, contrary to the State's assertion Mr. Krawczuk has

[3] *See* footnote 2 supra.

claimed throughout the entirety of his habeas petition that direct appeal counsel's deficient performance in failing to fully develop the record and present argument challenging both the disparate treatment of Mr. Krawczuk and his codefendant and the proportionality of Mr. Krawczuk's sentence, rendered any prior attempt by this Court at a valid, full throated proportionality review impossible. Thus, with respect to the portion of Mr. Krawczuk's habeas petition challenging this Court's previous attempt at proportionality review on direct appeal, his argument is inexorably intertwined with his claim of ineffective assistance of direct appeal counsel and counsel's failure to properly develop and present argument to this Court on the issue of proportionality. As such, contrary to the State's assertion, his claim is properly before this Court in his initial habeas petition.

Additionally, the State also contends that Mr. Krawczuk's proportionality claim is not properly before this Court because it had previously been performed on direct appeal. (Response at 8 n.1). This argument, however, misstates the law. In support of its argument the State relies upon *Blanco v. State*, 963 So. 2d 173, 179 (Fla. 2007) for the proposition that challenges to proportionality review are not cognizable in a habeas petition. Pursuant to *Blanco*, the State argues that since proportionality review is inherently conducted on direct appeal Mr. Krawczuk's claim challenging the proportionality of his sentence is not properly before this

Court. This interpretation of *Blanco* is both misleading and inapplicable to the facts of Mr. Krawczuk's case.

Merely because proportionality review was conducted on direct appeal, albeit without full development of all the facts available, does not prohibit Mr. Krawczuk from challenging that review in his habeas petition. In *Blanco*, this Court rejected the defendant's claim challenging its prior proportionality review based upon the fact that it found "no deficiency in the record that would have precluded an effective review at that time." *Blanco*, 963 So. 2d at 179). As state above, Mr. Krawczuk's claim challenging this Court's proportionality review is premised upon the fact that the record upon which this Court conducted that review was deficient due to the failure of both appellate counsel and trial counsel to effectively present evidence detailing the extent of the involvement and culpability of both codefendants as well as the full mitigation background of Mr. Krawczuk. These deficiencies in the record upon which the Court conducted its proportionality review on direct appeal render Mr. Krawczuk's case factually distinct from *Blanco*.

Pursuant to the Florida Constitution it is solely the responsibility of this Court to conduct 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 postconviction that any valid

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 under both a inter-case and intra-case comparative review. Mr. Krawczuk's is entitled to relief.

B. Ineffective Assistance of Appellate Counsel

Mr. Krawczuk received ineffective assistance of counsel on direct appeal when appellate counsel failed to fully develop and present evidence supporting a claim challenging the disparate treatment between Mr. Krawczuk and his codefendant William Poirier and the proportionality of his sentence. Upon review of the entire record established at both trial and in postconviction Mr. Krawczuk is capable of establishing both deficient performance on behalf of appellate counsel and the resulting prejudice which ensued. As such, Mr. Krawczuk is entitled to relief in the form of a life sentence.

The standard of review for a claim of ineffective assistance of appellate counsel parallels the standard enunciated in *Strickland v. Washington,* 466 U.S. 668 (1986) for establishing ineffective assistance of trial counsel. *Wilson v. Wainwright,* 474 So. 2d 1162, 1163 (Fla. 1985). Habeas relief is permitted on the basis of appellate counsel's ineffectiveness in situations where the petitioner establishes that appellate counsel's performance was deficient because first, "the alleged omissions are of such magnitude as to constitute a serious error or

substantial deficiency falling measurably outside the range of professionally acceptable performance" and second, that the petitioner was prejudiced because appellate counsel's deficiency "compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. *Thompson v. State*, 759 So. 2d 650, 660 (Fla. 2000); (quoting *Groover v. Singletary*, 656 So. 2d 424, 425 (Fla.1995)); *Teffeteller v. Dugger*, 734 So. 2d 1009, 1027 (Fla. 1999).

As this Court has stated, "[h]abeas petitions are the proper vehicle to advance claims of ineffective assistance of appellate counsel. *See Thompson v. State*, 759 So. 2d 650, 660 (Fla.2000); *Teffeteller v. Dugger*, 734 So. 2d 1009, 1026 (Fla.1999); *Rutherford v. Moore*, 774 So. 2d 637, 643 (Fla. 2000). Mr. Krawczuk's claim challenging the disparate sentencing between he and his codefendant William Poirier is properly raised before this Court in this habeas petition. Contrary to the State's assertion, this is neither a recouching of a previous argument contained in Mr. Krawczuk's initial brief on appeal of denial of his postconviction motion nor an attempt to litigate claims of trial counsel's deficient performance in a disingenuous manner.

The State attacks Mr. Krawczuk's claim of ineffective assistance of appellate counsel and faults him improperly for providing details of trial counsel's ineffectiveness. The State contends that Mr. Krawczuk has attempted to advance allegations regarding trial counsel's deficient performance which are not

cognizable in a habeas corpus petition. (Response at 9). However, the State confuses Mr. Krawczuk's argument and misses the point of his reference to trial counsel's deficiencies entirely.

As a result of trial counsel's ineffectiveness the entirety of the record was not established with respect to either the issue of relative culpability of the two defendants or the available mitigation evidence. In order to effectively present his claim of direct appeal counsel's ineffectiveness it is necessary to also include discussion of trial counsel's deficient performance below. To the extent that trial counsel rendered deficient performance below in failing to develop this evidence, it in turn rendered appellate counsel incapable of providing effective representation on direct appeal. Contrary to the State's assertion, (Response at 10), raising these facts in a habeas petition is neither inappropriate, unnecessarily taxing, or an attempt by Mr. Krawczuk to waste this Court's time.

Mr. Krawczuk's claim of ineffective assistance of appellate counsel for failing to raise a claim of disparate treatment on direct appeal is properly before this Court in his habeas petition and is both factually correct and meritorious. In support of its argument that this claim lacks merit, the State cites to the fact that Poirier was convicted of the lesser charge of second degree murder and therefore as a matter of law not "equally culpable." (Response at 11). Respondent cites to several cases for the proposition that claims of disparate treatment have been

rejected by this Court where the codefendant(s) pled guilty to a lesser crime as part of a plea deal. (Response at 12). The State's reliance upon these cases, however, is misplaced and mischaracterizes the legal standard with respect to the import of a codefendant's lesser sentence for purposes of proportionality review.

This Court's jurisprudence has long held that "[a] codefendant's sentence may be relevant to a proportionality analysis where the codefendant is equally or more culpable. *See, e.g., Scott v. Dugger*, 604 So. 2d 465, 468-69 (Fla.1992) *Hayes v. State*, 581 So. 2d 121, 127 (Fla. 1991); *Diaz v. State*, 513 So. 2d 1045, 1049 (Fla.1987); *Cardona v. State*, 641 So. 2d 361, 365 (Fla. 1994). As this Court stated in *Campbell v. State*, 571 So. 2d 415, 419 at n.4 (Fla. 1990), "nonstatutory mitigating circumstances include, but are not limited to, the following: abused or deprived childhood; contribution to the community of 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 culpable co-defendant***; and charitable or humanitarian deeds." (emphasis added).

This Court has rejected claims of disparate treatment "where the codefendant's lesser sentence was the result of a plea agreement [with the State] or prosecutorial discretion." *England v. State*, 940 So. 2d 389, 406 (Fla. 2006); citing *Kight v. State*, 784 So. 2d 396, 401 (Fla. 2001); see also San *Martin v. State*, 705 So. 2d 1337, 1350-51 (Fla. 1997) *Brown v. State*, 473 So. 2d 1260, 1268-69 (Fla.

1985) *Farina v. State*, 937 So. 2d 612, 619 (Fla. 2006). However, in those decisions the common factual thread running through each is that the codefendant who received the lesser sentence as a result of plea agreement or judicial discretion was less culpable than the defendant sentenced to greater punishment.[4] The State's reliance upon these cases in its response and the argument that Poirier's plea agreement nullifies any disparate treatment analysis overlooks this distinction. Furthermore, this Court has on occasion departed from this precedent in the past. *See Witt v. State*, 342 So. 2d 497 (Fla. 1977) (conducting a disparate treatment

[4] This Court noted that distinction repeatedly throughout the cases cited by the State. *See Howell v. State*, 707 So. 2d 674, 682-83 (Fla. 1998) (disparate treatment relief permissible where defendant sentenced to lesser penalty is more culpable than codefendant); *Hayes v. State*, 581 So. 2d 121, 127 (Fla. 1991) (rejecting argument of disproportionate sentence based upon disparate treatment where ample support in the record supported that defendant was more culpable of other participants); *Cook v. State*, 581 So. 2d 141, 143 (Fla. 1991) (rejecting claim of disproportionate sentence where codefendants participation in the murder was clearly less than defendants'); *Brown v. State*, 473 So. 2d 1260 (Fla. 1985) (disparate judicial and prosecutorial treatment of codefendant permitted where evidence introduced at trial showed that appellant's role in murder was more significant than those of his accomplices); *Kight v. State*, 784 So. 2d 396 (Fla. 2001) (denial of claim of disparate treatment resulting from codefendant's plea agreement to life where even with consideration of newly discovered evidence nothing to support that codefendant was more culpable participant); *Cardona v. State*, 641 So. 2d 361 (Fla. 1994) (rejection of disparate treatment argument because record supports the trial court's finding that defendant was more culpable of two defendants).

analysis despite the fact that the lesser sentenced codefendant had been sentenced subject to a plea agreement with the State).[5]

When reviewed in its entirety, the evidence presented at trial and during the post conviction evidentiary hearing demonstrates that Mr. Krawczuk's codefendant William Poirier was at a minimum equally culpable in the planning and carrying out the crime and contributing to the victim's death.[6] As a result it was incumbent upon direct appeal counsel to fully develop the record in support of a claim of both disparate treatment and proportionality. Despite this obligation direct appeal counsel failed to perform this duty.

While the State correctly cites to the fact that direct appeal counsel made reference to the sentence of codefendant William Poirier in the direct appeal brief, *See* Initial Brief of Appellant at 1, 55, *Krawczuk v. State*, (Case No. 79, 491) this cursory reference contained in one mere paragraph and on the last page of the brief

[5] In that case this Court noted that despite the fact the codefendant had been sentenced subject to a plea agreement, "it could not ignore the discretionary inconsistency." *Witt*, 473 So. 2d at 500. In affirming the sentence this Court justified the disparate treatment of the codefendant based upon the fact that it found Witt the more culpable of the two as a result of evidence demonstrating Witt's codefendant had a severe mental or emotional disturbance and was subject to domination by Witt. Conversely, at Mr. Krawczuk's trial, evidence was presented in a pretrial psychological evaluation report which indicated Mr. Krawczuk suffered from issues with depression and emotional disturbance along with being subject to domination by his lesser sentenced codefendant William Poirier.

[6] *See* footnote 2 *supra*.

was not sufficient for purposes of discharging the obligation to effectively litigate the issue of disparate treatment or the proportionality of Mr. Krawczuk's sentence. Beyond this passing reference, nothing further was provided by appellate counsel in support of either argument. Despite the fact that there existed some evidence, while not as complete as the postconviction record, which supported at a minimum the equal culpability of codefendant William Poirier, appellate counsel presented none of it in support of either argument.

Appellate counsel has a duty to raise meritorious issues. While an appellate counsel need not raise every conceivable claim, an appellate counsel who fails to raise a meritorious issue is ineffective. *Smith v. Wainwright*, 484 So. 2d 31 (Fla. Dist. Ct. App. 4th Dist. 1986). As this Court has stated:

> It is true that we have imposed upon ourselves the duty to independently examine each death penalty case. However, we will be the first to agree that our judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role of that advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process.

Wilson v. Wainwright, 474 So. 2d 1162, 1165 (Fla. 1985). Appellate counsel for Mr. Krawczuk failed to effectively perform this responsibility. Given the available evidence, appellate counsel had an obligation to fully develop this issue and raise it in a manner designed to effectively argue it before this Court on direct appeal.

Appellate counsel's failure to do so rendered his performance outside the range of professional norms and denied Mr. Krawczuk due process.

Appellate counsel for Mr. Krawczuk rendered deficient performance by failing to effectively present argument challenging the issue of proportionality and disparate treatment, and failed to fully develop the record with respect to the facts in support of the relative culpability of the codefendant William Poirier. The result is that appellate counsel's error denied Mr. Krawczuk the opportunity to effectively challenge his conviction and sentence of death. As such, confidence in the fairness and correctness of the outcome of Mr. Krawczuk's appellate result has been undermined. Upon review of the entirety of the record developed both at trial and in postconviction Mr. Krawczuk has established that his sentence is both disparate and disproportionate in violation of his rights under Article 1, section 9 of the Florida Constitution and the corresponding rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Relief is warranted.

CONCLUSION

For the foregoing reasons, the reasons set forth in his initial petition and in the interest of justice, Mr. Krawczuk respectfully urges this Court to grant habeas corpus relief.

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.

_____
SUZANNE MYERS KEFFER
Chief Assistant CCRC-South

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