IN THE SUPREME COURT OF FLORIDA

ANTON KRAWCZUK,

Petitioner,

v.

CASE NO. SC11-10
L.T. No. 90-2007 CF-B
DEATH PENALTY CASE

EDWIN G. BUSS,
Secretary, Florida
Department of Corrections,

Respondent.
_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS
AND
MEMORANDUM OF LAW

COMES NOW, Respondent, EDWIN G. BUSS, Secretary, Florida Department of Corrections, by and through the undersigned counsel, and hereby responds to the Petition for Writ of Habeas Corpus filed in the above-styled case. Respondent respectfully submits that the petition should be denied, and states as grounds therefore:

FACTS AND PROCEDURAL HISTORY

The facts of this case are recited in this Court's opinion on direct appeal of Petitioner's conviction and sentence, Krawczuk v. State, 634 So. 2d 1070, 1071-72 (Fla. 1994):

> On September 13, 1990, a decomposing body was found in a rural wooded area of Charlotte County. Earlier, David Staker's employer notified Lee County authorities that he had missed several days of work and had not picked up his paycheck. When she went to

his home, she found the door open, and it appeared that the house had been robbed. Near the end of September, the Charlotte County body was identified as Staker, and Gary Sigelmier called the Charlotte County Sheriff's office to report that he may have bought the property stolen from Staker's home. Sigelmier identified Krawczuk and Billy Poirier as the men who sold him the stolen goods, and Lee and Charlotte deputies went to the home Krawczuk and Poirier shared in Lee County. They found both men at home and took them to the Lee County Sheriff's office where, after waiving his Miranda [FN1] rights, Krawczuk confessed to killing Staker.

FN1. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

According to his confession, Krawczuk had known Staker for about six months and had a casual homosexual relationship with him, as did Poirier. The week before the murder, the pair decided to rob and kill Staker. Krawczuk called and arranged for him and Poirier to visit Staker. Krawczuk picked Poirier up at work and drove him home to change clothes. He parked in a shopping area, and the pair walked to Staker's house. Once there, they watched television for twenty to thirty minutes, and Krawczuk then suggested that they go to the bedroom. With the undressed trio on the bed, Krawczuk started roughing up Staker and eventually began choking him. Poirier assisted by holding Staker's mouth shut and pinching his nose closed. Staker resisted and tried to hit Krawczuk with a lamp, but Poirier took it away from him. The choking continued for almost ten minutes, after which Krawczuk twice poured drain cleaner and water into Stake's mouth. When fluid began coming from Staker's mouth, Poirier put a wash cloth in it and tape over Staker's mouth. Krawczuk tied Staker's ankles together, and the pair put him in the bathtub. They then stole two television sets, stereo equipment, a video recorder, five rifles, and a pistol, among other things, from the house and put them in Staker's pickup truck. After putting the body in the truck as well, they drove to Sigelmier's. Sigelmier bought some of the stolen items and agreed to store the others. Krawczuk and Poirier returned to their car, transferred Staker's body to

it, and abandoned Staker's truck. Krawczuk had scouted a rural location earlier, and they dumped Staker's body there.

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

Krawczuk refused to allow his counsel to participate in selecting the penalty phase jury and forbade her from presenting evidence on his behalf. The jury unanimously recommended that he be sentenced to death. Afterwards, the court set a date for hearing the parties and a later date for imposition of sentence. At the next hearing the judge, over Krawczuk's personal objection, stated that he would look at the presentence investigation report and the confidential defense psychiatrist's report for possible mitigating evidence. At the final hearing the court sentenced Krawczuk to death, finding three aggravators and one statutory mitigator.[FN2]

> FN2. Poirier pled guilty to second-degree murder and robbery in exchange for a 35-year sentence.

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

On direct appeal to this Court, Petitioner raised the following four issues:

> ISSUE I: THE APPELLANT'S CONFESSION WAS OBTAINED IN VIOLATION OF HIS FEDERAL AND STATE CONSTITUTIONAL RIGHTS; DENIAL OF HIS MOTION TO SUPPRESS WAS ERROR, AND THE MERITS OF THE SUPPRESSION ISSUE ARE A NECESSARY AND PROPER SUBJECT OF REVIEW IN A DEATH PENALTY CASE WHERE THE INADMISSIBLE STATEMENTS AND THE INSUFFICIENT PLEA COLLOQUY GO TO THE VALIDITY AND VOLUNTARINESS OF THE PLEA.
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> ISSUE II: THE APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED BY THE FAILURE OF THE TRIAL COURT TO CONDUCT A PROPER COLLOQUY OR GIVE SUFFICIENT ATTENTION TO SIGNIFICANT FACTORS WHICH, WHEN COMBINED, RAISED A SUFFICIENT DOUBT OF COMPETENCY TO REQUIRE FURTHER INQUIRY OR EVALUATION.
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> ISSUE III: THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON THE AGGRAVATING FACTOR OF HEINOUS, ATROCIOUS, AND CRUEL AND IN FINDING THE AGGRAVATOR APPLICABLE TO THIS CASE.
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> ISSUE IV: THE TRIAL COURT ERRED IN FAILING TO PROPERLY CONSIDER AND FIND NON-STATUTORY MITIGATING FACTORS.

Initial Brief of Appellant, Krawczuk v. State, Florida Supreme Court Case No. 79,491. This Court affirmed Petitioner's conviction and death sentence. Krawczuk v. State, 634 So. 2d 1070, 1074 (Fla. 1994). A petition for writ of certiorari was filed, and was denied on October 3, 1994. Krawczuk v. Florida, 513 U.S. 881, 115 S. Ct. 216 (1994).

Krawczuk initiated postconviction proceedings on October 3, 1995, with the filing of a motion pursuant to Florida Rule of Criminal Procedure 3.850. (PCR1:3-148). The trial judge, the

Honorable James R. Thompson, presided over numerous status hearings, primarily with regard to the collection of public records. On March 15, 2002, Krawczuk filed an Amended Motion to Vacate (PCR S1:19-126) and the State timely filed a response. (PCR13:1104-1292). On January 20-21, 2004 and March 8, 2004, the trial court conducted an evidentiary hearing on Krawczuk's motion for postconviction relief. (PCR17-18:1491-1847; 20:2370-90). After hearing the testimony from the evidentiary hearing, the trial court entered a detailed 105-page order denying Krawczuk's postconviction motion. (PCR21:2434-2558). The appeal from the denial of postconviction relief is currently pending before this Court. Krawczuk v. State, (SC10-680).

ARGUMENT IN OPPOSITION TO CLAIMS RAISED

Petitioner alleges that extraordinary relief is warranted because he was denied the effective assistance of appellate counsel. The standard of review applicable to ineffective assistance of appellate counsel claims mirrors the Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), standard for claims of trial counsel ineffectiveness. Valle v. Moore, 837 So. 2d 905 (Fla. 2002). Such a claim requires an evaluation of whether counsel's performance was so deficient that it fell outside the range of professionally acceptable performance and, if so, whether the deficiency was so egregious that it compromised the appellate process to such a degree that it undermined confidence in the correctness of the result. Groover v. Singletary, 656 So. 2d 424, 425 (Fla. 1995); Byrd v. Singletary, 655 So. 2d 67, 68-69 (Fla. 1995). A review of the record demonstrates that neither deficiency nor prejudice has been shown in this case.

Petitioner's argument is based on appellate counsel's alleged failure to raise an issue regarding the disparate treatment of sentences between Petitioner's death sentence and his codefendant's sentence of thirty-five years for his conviction of second degree murder. However, contrary to

Petitioner’s assertion, appellate counsel did in fact raise this issue on direct appeal, but this court rejected the argument.

ARGUMENT IN OPPOSITION TO CLAIM RAISED

PETITIONER'S CLAIM THAT HIS APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE A CLAIM OF DISPARATE TREATMENT IS WITHOUT MERIT.

Petitioner argues on pages 4-29 of his petition that this Court failed to perform a proper proportionality review of his case on direct appeal, but Petitioner does not raise any allegation of ineffective assistance of appellate counsel. As this Court has repeatedly held, a "[h]abeas corpus is not to be used for additional appeals of issues that could have been, should have been, or were raised on appeal or in other postconviction motions." Mills v. Dugger, 559 So. 2d 578, 579 (Fla. 1990). Petitioner's complaint regarding this Court's proportionality review is not properly raised in the instant habeas petition and should be denied.[1]

Furthermore, even if appellate counsel would have raised a challenge to this Court's proportionality review based on observations made by the American Bar Association in a 2006

[1] As this Court has stated, "[p]roportionality is inherently reviewed on direct appeal, regardless of whether such review is mentioned in this Court's published opinions." Blanco v. State, 963 So. 2d 173, 179 (Fla. 2007). In Petitioner's direct appeal, this Court reviewed the proportionality of his sentence and noted, "there is competent substantial evidence to support the conclusion that death is the appropriate sentence." Krawczuk, 634 So. 2d 1070, 1074 (Fla. 1994). Clearly, this Court properly found Petitioner's sentence proportional given the three weighty aggravators (during the course of a robbery and for pecuniary gain, HAC, and CCP) and the existence of only a single mitigating factor, lack of significant prior criminal activity.

report, such a claim would have been rejected by this Court. As this Court noted in Smith v . State, 998 So. 2d 516, 528-29 (Fla. 2008), a claim that this Court's proportionality review is legally insufficient and unconstitutional because it is does not include review of other factors, such as death cases from other states, is without merit. See also Rutherford v. State, 940 So. 2d 1112, 1118 (Fla. 2006); Rolling v. State, 944 So. 2d 176, 181 (Fla. 2006); Diaz v. State, 945 So. 2d 1136, 1146 (Fla. 2006). Because Petitioner's challenge to this Court's proportionality review is procedurally barred and without merit, this Court should deny this aspect of Petitioner's claim.

In addition to repeating the arguments contained in his Initial Brief on the appeal of the denial of his postconviction motion that his *trial* counsel was ineffective for failing to properly raise or preserve an issue regarding the disparate treatments of Petitioner and his codefendant, William Poirier, Petitioner also alleges that *appellate* counsel was ineffective for failing to raise this claim. First, Respondent submits that the allegations regarding *trial* counsel's alleged ineffectiveness are not cognizable in a habeas corpus petition and should not be included in this petition. See Breedlove v. Singletary, 595 So. 2d 8, 10 (Fla. 1992); King v. Dugger, 555 So. 2d 355, 358 (Fla. 1990) ("[C]laims of ineffective assistance

of trial counsel should be raised under Florida Rule of Criminal Procedure 3.850, not habeas corpus.”). Petitioner’s instant claim mirrors allegations in Claims II and III of his Initial Brief on the appeal of the denial of his motion for postconviction relief. See Initial Brief of Appellant, Krawczuk v. State, (SC10-680). Obviously Petitioner is aware that this claim was cognizable in his postconviction motion but still burdens this Court with the same claim in the instant petition. Such a tactic is inappropriate and unnecessarily taxing. Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987).

As to the only properly-raised claim in the instant petition, that his *appellate* counsel was ineffective for failing to raise a claim of disparate treatment on direct appeal, this claim is factually incorrect and without merit. As noted in Claim III of the Answer Brief of Appellee, Krawczuk v. State, (SC10-680), codefendant William Poirier entered into a negotiated plea deal with the State and pled no contest to second degree murder on May 22, 1992, a few months after Petitioner filed the Notice of Appeal in his case. Petitioner’s appellate counsel noted the codefendant’s plea deal and sentence in his Initial Brief before this Court on direct appeal, and

argued that Poirier was at least equally culpable.[2] See Initial Brief of Appellant at 1, 55, Krawczuk v. State, (Case No. 79,491). This Court likewise noted the codefendant's sentence and affirmed the lower court's finding that there was no disparate treatment between the two defendants. See Krawczuk, 634 So. 2d at 1072-74 n.2, n.5; see also Steinhorst v. State, 638 So. 2d 33 (Fla. 1994) (codefendant's sentence for second degree murder, imposed prior to conclusion of defendant's direct appeal, was not newly discovered evidence and was irrelevant to disparate treatment analysis of defendant's death sentence for first degree murder). Thus, because this claim was raised and rejected on direct appeal, Petitioner cannot establish that his appellate counsel was ineffective for failing to raise this claim.

Likewise, contrary to Petitioner's assertions, Poirier was not equally culpable to Petitioner. Codefendant Poirier, unlike Petitioner, was convicted of the lesser charge of second degree murder and, as a matter of law, was not "equally culpable." See Farina v. State, 937 So. 2d 612, 618-19 (Fla. 2006) (noting that codefendant's life sentence was "irrelevant" to defendant's

[2] Krawczuk's appellate counsel stated that "[s]ubsequent to the Appellant's sentence of death, the co-defendant Poirier, who if not more culpable was at least as culpable, pled to second-degree murder and robbery for a sentence totaling thirty-five years." Initial Brief of Appellant at 55, Krawczuk v. State, (Case No. 79-491).

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

Additionally, as the trial court properly found, both at trial, and after the postconviction evidentiary hearing, Poirier was not as culpable in this murder as Petitioner. See Krawczuk, 634 So. 2d at 1073-74 (affirming the trial court's finding that

there was no disparate treatment between the two defendants); (PCR21:2479-84). Although the trial court found that Poirier was a willing and active participant in the planning and the execution of the murder, the court nevertheless found that Petitioner was the more culpable of the two men. See (PCR21:2479-84); Answer Brief of Appellee, Claim III, Krawczuk v. State, (SC10-680). The court noted that Petitioner knew the victim and cultivated the relationship and took Poirier to the victim's house on only one occasion. Petitioner was the person who scouted a place to dispose of the victim's body prior to the murder. On the day of the murder, Petitioner initiated contact with the victim and, once at the victim's residence, Petitioner suggested that they go into the bedroom. Petitioner also was responsible for initiating the "rough-housing," to gauge the victim's resistance, and Petitioner was responsible for beginning the fatal attack by choking the victim. Petitioner also decided to pour Crystal Vanish down the victim's throat. Finally, the court noted that Petitioner was older and larger than Poirier, and according to witness Siegelmier, Petitioner was the more aggressive of the two men. (PCR21:2481-82). Thus, even if Krawczuk's appellate counsel had more vigorously argued the relative culpability of the two men or their disparate sentences for different crimes, the argument would not have

resulted in a different outcome on appeal because there is substantial, competent evidence supporting the lower court's factual finding that the two men were not equally culpable. Accordingly, because Petitioner has failed to establish that his appellate counsel was ineffective, this Court should deny the instant petition for writ of habeas corpus.

CONCLUSION

In conclusion, Respondent respectfully requests that this Honorable Court DENY the instant petition for writ of habeas corpus.

CERTIFICATE OF SERVICE

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

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this response is 12-point Courier New, in compliance with Fla. R. App. P. 9.100(*l*).

Respectfully submitted,

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