No. _____

OCTOBER TERM 2017

IN THE SUPREME COURT OF THE UNITED STATES

ANTON KRAWCZUK,

Petitioner,

v.

JULIE JONES, Secretary,
Florida Department of Corrections,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CAPITAL CASE

TODD G. SCHER *
Florida Bar No. 0899641
CCRC-South
1 EAST BROWARD BLVD. SUITE 444
FORT LAUDERDALE, FL 33301
(954) 713-1284

* *Counsel of Record*

CAPITAL CASE

QUESTIONS PRESENTED

In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court announced the now-familiar two-pronged test for establishing a meritorious claim of ineffective assistance of counsel. Those two prongs are (1) deficient performance and (2) prejudice.

Since *Strickland*, the Court has not fundamentally altered the underpinnings of the deficient performance and prejudice prongs. But the Eleventh Circuit now has. In Petitioner's case, the Eleventh Circuit tinkered significantly with both the deficiency and prejudice prongs of the well-settled *Strickland* test in a way that contravenes *Strickland* and its progeny and resulting in a new legal test that makes establishing deficient performance and prejudice (an already difficult standard to meet) virtually impossible to do.

The Questions presented in this case are:

1. Does the Eleventh Circuit Court of Appeals' newly-minted test for establishing both the deficient performance and prejudice prongs of the *Strickland* test violate *Strickland* and its progeny as well as the Sixth Amendment to the United States Constitution?

2. Did the Petitioner meet the well-settled two-pronged *Strickland* test and establish that he received ineffective assistance of counsel, in violation of the Sixth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDINGS BELOW

The Petitioner, Anton Krawczuk, was the Defendant/Appellant in the state court proceedings and the Petitioner/Appellant in federal proceedings.

The Respondent, Julie Jones, Secretary, Florida Department of Corrections, was the Respondent/Appellee in the federal proceedings. The State of Florida was the Plaintiff/Appellee in the state court proceedings.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

PETITION FOR A WRIT OF CERTIORARI

Petitioner Anton Krawczuk prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Eleventh Circuit.

CITATIONS TO OPINION BELOW

The opinion of the United State Court of Appeals for the Eleventh Circuit in this cause, reported as *Krawczuk v. Sec'y, Dep't of Corrections*, 873 F.3d 1273 (11th Cir. 2017), is found in the accompanying Appendix as "Attachment A." The order denying panel rehearing and/or rehearing en banc is non-published is "Attachment B." The order denying federal habeas corpus relief in the federal district court is non-published and is "Attachment C." The Florida Supreme Court opinion affirming the state circuit court's denial of postconviction relief and denying the state habeas petition is reported as *Krawczuk v. State*, 93 So.3d 195 (Fla. 2012), and is "Attachment D." The Florida Supreme Court opinion affirming the convictions and death sentence on direct appeal is reported as *Krawczuk v. State*, 634 So.2d 1070 (Fla.), *cert. denied*, 513 U.S. 881 (1994), and is "Attachment E."

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit on the basis of 28 U.S.C. § 1254(1). The Court of Appeals issued its decision on October 18, 2017, and denied Petitioner's timely petition for rehearing and/or rehearing en banc on January 3, 2018. Counsel sought an additional 60 days for filing of this Petition, which was granted up to and including June 2, 2018. This petition is timely filed.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . . [and] to be confronted with the witnesses against him, to have compulsory process of obtaining witnesses in his favor, and to have the assistance of counsel.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

Mr. Krawczuk was indicted along with his co-defendant William Poirier on October 3, 1990. Initially, Mr. Krawczuk pled not guilty to all charges. Prior to the start of trial, the court conducted a hearing on a motion filed by Mr. Krawczuk to suppress statements made to police following his arrest. Following that hearing the court denied the motion and thereafter Mr. Krawczuk subsequently pled guilty to one count of first-degree murder, one count felony murder, and one count of robbery on September 27, 1991. (R. 386-424).

At that same hearing Mr. Krawczuk also requested that he receive the death penalty and indicated his desire to waive his right to a jury recommendation in the penalty phase. (R. 391-393). The court then conducted a brief colloquy with Mr. Krawczuk asking only two questions. First, the court inquired why he was choosing

the course of action he was so that the court could make a judgement as to whether it was a "reasoned decision." Mr. Krawczuk replied to the court only that he "shouldn't be allowed to live for what [he] did" (R. 409). Second, the court asked whether Mr. Krawczuk had ever had any prior suicide attempts. Mr. Krawczuk responded in the negative to the court's inquiry. (*Id.*). Following that brief exchange the court accepted Mr. Krawczuk's waiver but ruled that it would not be irrevocable. (R. 416). Mr. Krawczuk's counsel informed the court that she had advised Mr. Krawczuk against entering the plea and requesting the death penalty and that Mr. Krawczuk had instructed her to not present any witnesses in mitigation. (R. 404-05, 407-08).

The State refused to waive the penalty phase and the court agreed. (R. 654-55). At the beginning of jury selection the court once again conducted a colloquy of Mr. Krawczuk during which he once again expressed his desire to receive the death penalty and present nothing in support of mitigation. (R. 695-707). Mr. Krawczuk also indicated that he wished to waive his right to testify and his right to have his attorney cross-examine witnesses or present any argument. (*Id.*). The court determined that he understood the consequences of his decisions and was making his decisions intelligently and within the bounds of his legal rights to do so. (R. 706). Nothing additional was asked by the court regarding Mr. Krawczuk's knowledge of the substantive law, the nature of mitigation, and the possible mitigation that was available to him should he want it presented.

Following presentation of the State's case, Mr. Krawczuk then stated to the court that he was not opposed to presentation of mitigating evidence but did not

want to testify on his own behalf or have a psychiatric report written by Dr. Keown to be submitted into evidence. (R. 218-225). Following those contradictory comments the State expressed confusion with respect to Mr. Krawczuk's intentions regarding the presentation of mitigation evidence. (R. 224). Regardless of any confusion that existed at that hearing what is clear from the record is that Mr. Krawczuk was not completely opposed to the presentation of mitigation. (R. 218-225).

After hearing testimony and argument from the State only, the penalty phase jury recommended death by a vote of 12-0. (R. 268-273, 584). In accordance with the jury's advisory recommendation, the trial court imposed a sentence of death (R. 436, 438, 587-594, 536-601) finding three aggravators: 1) the crime as committed in the course of a robbery or for pecuniary gain, which the court merged and considered as one factor; (2) the crime was especially heinous, atrocious, and cruel; (3) the crime was committed in a cold, calculated and premeditated manner with no pretense of moral or legal justification (R. 434-435, 587-594). The court found one statutory mitigating factor, the lack of a significant history of prior criminal activity (R. 435, 557 594) and no non-statutory mitigating factors (R. 435, 587-594, 606). A sentencing order was entered on that same day. (R. 596-601).

The Florida Supreme Court affirmed Mr. Krawczuk's convictions and sentences on direct appeal. *Krawczuk v. State,* 634 So. 2d 1070 (Fla.), *cert. denied,* 513 U.S. 881 (1994) [hereinafter *Krawczuk I*].

Following affirmance on direct appeal Mr. Krawczuk filed a Motion to Vacate Judgment of Convictions and Sentences With Special Request for Leave to Amend in the Circuit Court for the Twentieth Judicial Circuit. (PCR 3-148). Thereafter,

following public record production on March 15, 2002, Mr. Krawczuk filed an Amended Motion to Vacate Judgment of Convictions and Sentences With Special Request for Leave to Amend. (PCR. Supp. Vol. 1, 19-126).

On June 30, 2003, the circuit court entered an order granting an evidentiary hearing on all claims alleging ineffective assistance of counsel and/or requiring factual development but reserving ruling on all purely legal claims which it determined to not require evidentiary development. (PCR. 1398-1403). An evidentiary hearing was held on January 20-21 and March 8, 2004. Thereafter, almost six years later, on January 25, 2010, the court issued its Order Denying Motion to Vacate Judgments of Conviction and Sentence. (PCR. 2434-2558).

Mr. Krawczuk timely appealed to the Florida Supreme Court and, along with his Initial Brief, filed a petition for a Writ of Habeas Corpus. In an opinion issued on April 12, 2012, the Florida Supreme Court affirmed the denial of postconviction relief and denied the petition for a writ of habeas corpus. *Krawczuk v. State,* 93 So.3d 195, (Fla. 2012) [hereinafter *Krawczuk II*]. Mr. Krawczuk filed a motion for rehearing which was denied on June 29, 2012. The Mandate issued from the Florida Supreme Court on July 18, 2012.

A federal habeas petition was timely filed by Mr. Krawczuk (DE 1). The petition remained pending in the District Court until it was denied on August 5, 2015 in a 62 page opinion. (DE 31). Mr. Krawczuk filed a motion to alter and amend pursuant to Fed. R. Civ. P. 59(e) which was denied the by the District Court on October 13, 2015 (DE 37). A timely appeal to the Eleventh Circuit Court of Appeals was taken.

After a Certificate of Appealability was granted by a panel of the Eleventh Circuit, briefing took place followed by oral argument. On October 18, 2017, a panel of the Court issued its opinion affirming the denial of relief; Judge Beverly Martin issued a separate opinion concurring in the judgment. *See Krawczuk v. Sec'y, Dep't of Corrections,* 873 F.3d 1273 (11th Cir. 2017). A timely-filed petition for rehearing/rehearing en banc was denied on January 3, 2018.

Justice Thomas granted a sixty-day extension of time to Mr. Krawczuk to file his Petition for Writ of Certiorari, and this Petition follows.

RELEVANT FACTUAL BACKGROUND

In this petition, Mr. Krawczuk asks the Court to grant certiorari to review the decision of the Eleventh Circuit Court of Appeals rejecting the claim that he received ineffective assistance of counsel at penalty phase where counsel failed to conduct a timely and adequate investigation into his mitigation background and failed to fully inform him of all readily available mitigation at his disposal. Counsel's failure to discharge these obligations rendered her performance deficient for purposes of *Strickland v. Washington*, 466 U.S. 668 (1984), and rendered Mr. Krawczuk's putative waiver of mitigation unknowing and involuntary. Below, Mr. Krawczuk presents a brief summary of the facts pertinent to this issue.

1. Trial

Prior to the start of trial a motion to suppress Mr. Krawczuk's alleged confession was held on June 25, 2011. (R. 274-354). On August 2, 1991 the court issued an order denying the motion. (R. 544-45). Following the court's denial, on September 27, 1991, Mr. Krawczuk pled guilty to one count first degree murder, one

count felony murder, and one count robbery on September 27, 1991. (R. 388-416). At the time of entering his plea, Mr. Krawczuk also requested imposition of the death penalty. (*Id.*). The court then conducted a brief colloquy during which Mr. Krawczuk informed the court he was currently taking the antidepressant Elavil and was suffering from anxiety. (R. 393-95). Following the colloquy Mr. Krawczuk waived all pending motions and indicated his desire to waive his right to a jury recommendation at sentencing. (R. 391-393, 402-04, 414). Trial counsel Barbara LeGrande indicated that she wanted to call two witnesses in mitigation, Jim Price and Dr. Richard Keown, but that she was not going to do so pursuant to Mr. Krawczuk's instructions. (R. 405). There was no further discussion regarding these two witnesses.

The court then inquired of Mr. Krawczuk as to why he had chosen this course of action and whether he had had any previous suicide attempts (R. 409). Mr. Krawczuk indicated that he believed "he shouldn't be allowed to live for what [he] did," and that he had not ever previously attempted to commit suicide (R. 409). The court then accepted the waiver but ruled it revocable if necessary. (R. 416).

The State objected to Mr. Krawczuk's waiver of his penalty phase jury and the court began jury selection. Prior to the start the court again conducted a brief colloquy of Mr. Krawczuk, inquiring into his understanding of his legal rights and competency. (R. 695-706). No further detailed inquiry was made of Mr. Krawczuk's knowledge of procedural rules and substantive law or the potential available mitigation on his behalf. Following the State's presentation of penalty phase evidence Mr. Krawczuk indicated to the court that he was now not opposed to

presentation of mitigating evidence. He informed the court that he still did not wish to testify on his own behalf and was reluctant to admit a portion of the psychiatric report by Dr. Keown. (R. 218-225). However, he further noted that without the report, "there is nothing working with me, it's all against me." (R. 228).

2. Postconviction

During the state court evidentiary hearing, Mr. Krawczuk presented testimony supporting mitigation from several witnesses: Barbara LeGrande, his trial attorney, two mental health experts, his mother, his step-father, a childhood friend, and his former wife.

LeGrande recalled that Mr. Krawczuk did not want her to present mitigation and wished the judge only to determine his sentence. (PCR. 1778). She testified that she believed the decision as to whether to present mitigation at penalty phase was Mr. Krawczuk's decision to make but that she was aware that she did not follow the procedure that was established at that time for waiving presentation under *Anderson v. State*, 574 So.2d 87 (Fla. 1991). She failed to put on the record, as required, the witnesses and experts she would have called to testify on Mr. Krawczuk's behalf at the penalty phase. (PCR. 1780).

LeGrande had not done much at the time of Mr. Krawczuk's waiver to have been able to speak with him about potential available mitigation. (*Id.*). She was only able to recall having spoken with Mr. Krawczuk's family members briefly. (PCR. 1781). Time records from her files also further reflected that the extent of her contact with the family consisted of meeting with Mr. Krawczuk's mother and grandmother for six minutes each. (*Id.*). She was unable to recall anything

regarding the content of those conversations. (*Id.*).

LeGrande hired no experts for the purpose of developing mitigation and did not try to find any witnesses (PCR. 1782). She filed a motion to have an expert assist with mitigation but once Mr. Krawczuk pled guilty she failed to follow through with it (PCR. 1782). LeGrande testified that she believed once Mr. Krawczuk no longer wanted her to defend against the conviction she could not "in good faith . . . represent to the Court that [she] needed a mitigation expert" (PCR. 1815-16).

LeGrande also failed to discuss with Mr. Krawczuk the presentation of evidence regarding the relative culpability between Mr. Krawczuk and his co-defendant William Poirier. (PCR. 1789). She vaguely recalled discussing the possibility of Mr. Krawczuk testifying to Poirier's influence over him. (*Id.*). She could not have explained the details to Mr. Krawczuk about what may have been presented on his behalf because she had not conducted any investigation. (PCR. 1786). She testified that she would only have been able to explain to him the "concepts" and provide superficial explanation as to what mitigation meant, not what she had actually been doing in his specific case. (PCR. 1787).

Mr. Krawczuk's fraternal twin brother, Christopher Krawczuk, testified that he never discussed anything about their childhood and family history with LeGrande because she never actually contacted him (PCR. 1550, 1553). Had he been contacted, he would have been willing and available to testify. (PCR. 1553). Christopher explained that he and Anton had three brothers, one older and two younger (PCR. 1515). Anton and Christopher's biological father was Jon Clifford

Krawczuk, whom they only met once because he left the family before the twins were born or shortly thereafter (PCR. 1516). Christopher described their father, from the stories he heard, as being a heavy drinker and very violent towards his mother, including beating her when she was pregnant with Anton and himself (PCR. 1516).

Christopher's earliest memories were of living in a one-bedroom flat in the Bronx with his mother Patricia, oldest brother Jon and Anton (PCR. 1517-18). He recalled holes in mattresses and cockroaches; that his mother worked at night as a barmaid, and was often angry and would "fly off the handle about a lot of different things" (PCR. 1518). He described her violence as "commonplace" (PCR. 1519). He recalled an incident when he was either two or three years old when his mother grabbed him in anger, threw him across the floor and his chin hit a fire truck. This resulted in a trip to the hospital and his mother asking him not to tell anyone what had happened (PCR. 1518-19).

According to Christopher, Anton took the brunt of his mother's rage (PCR. 1520). When Anton was five or six years old, his mother put his head through a plaster wall (*Id.*). On "cleaning days," their mother was particularly violent, hitting them with the metal wand of the vacuum cleaner or making them stand in the corner for hours (*Id.*). Christopher did not know why Anton took the brunt of his mother's violence, but he stated that she was always persistent and more frequent in beating Anton (PCR. 1521). Anton's mother would hit him with her fist or with her open hand about the head and face (PCR. 1531). The abuse was daily and Christopher explained that they were always looking over their shoulders because

they never knew what would set their mother off (*Id.*).

Anton wet his bed at a very early age and the more it persisted, the more violent his mother reacted to it (PCR. 1522). If he soiled his pants, she made Anton wear them on his head. On one occasion she made him wear a poster board which read "I do my doodie in my pants every day" while walking back and forth in front of their apartment building (PCR. 1522). Punishment for playing with matches at a very early age was holding Anton's hand over a gas stove burner, and Christopher's as well, for watching him (PCR. 1523).

Christopher explained that he and Anton were on their own as children (*Id.*). Basic necessities such as gloves in the winter were not provided (PCR. 1524). When Anton cut his hand on a parking meter trying to prevent himself from slipping on the ice as they were walking to school, it was Anton's fault according to his mother (*Id.*). The refrigerator was often empty and the boys were taking care of themselves as early as first grade (PCR. 1525).

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

While Patricia and Santo were married, they moved the family to Wappinger

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

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

After five years of marriage Santo eventually had enough of Patricia and left (PCR. 1533). Following his departure life got worse for Anton and his brothers. Patricia had to get a second job to support the household. Christopher and Anton, only 11 or 12 years old, were responsible for "raising their younger brothers" (PCR. 1534, 1536). Anton continued to be Patricia's "whipping post" taking the brunt of all her anger (PCR. 1536).

Ultimately, Anton ran away to Todd's house and lived with his family for almost a year before entering the Marines (PCR. 1542). Todd testified that while he was living with the Kasse family, Anton's mother did not call once, did not come to

visit him and did not offer to help with expenses (PCR. 1581). Todd recalled that one time Anton went out and did not come home, which was unusual (PCR. 1582). When Anton did come home, he was badly beaten with lacerations, bruises and red marks on his face. Todd learned that Anton had been abducted and beaten (*Id.*). The persons responsible put a blanket over his head and beat him with a flashlight; Anton escaped, stopped at a church and the priest called the police (*Id.*).

Despite Anton's life at home, Todd described him as an excellent artist who liked to draw comics and "basically made everyone laugh" (PCR. 1576). While Anton lived with the Kasse family he was funny and helpful, helping to do the dishes and mow the lawn (PCR. 1581).

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

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

Patricia and had kicked her in the stomach when she was pregnant with the twins, Anton and Christopher (*Id.*).

Santo recalled that Patricia was violent and had "a mouth like a truck driver" (PCR. 1557). After dating for five years, Santo decided to marry Patricia because he thought he could change her if he showed her he cared and could take care of her (*Id.*). They moved out of the Bronx to better areas, but she never changed (*Id.*). Patricia was violent with Santo and with Anton (*Id.*). Santo explained that during one incident Patricia tried to hit him in the head with a heavy anchor he was using to build a swing set, the anchor hit him in the shoulder and he was out of work for a couple of days due to the injury (*Id.*).

Santo testified Patricia "just didn't like" Anton and that everything "he did was magnified." (PCR. 1558-59). Patricia would hit Anton with a closed fist in the head or face and never showed affection (*Id.*). He recalled that she "beat the crap out of" Anton for soiling on the floor to the point that Anton had bruises and marks on his face (PCR. 1565). Santo remembered how Anton "never got love. Never got to do things right. Never taught how to be social. You know? All he got was beatings and yelled at, you know, from a mother. That's the way their mother was" (PCR. 1565). Santo testified that the abuse was not just physical, "[s]he would call them F'ing, B . . . and anything else she could think of. And I think what hurt him the most was, uh, the Dumbo ears, or something like that with his ears, made fun of his ears all the time" (PCR. 1567).

Santo felt bad for Anton because he couldn't be there all the time to stop Patricia. (PCR. 1564). The day he left Patricia, Anton, Christopher and Jon asked

him to take them with him because they did not want to stay with their mother (PCR. 1561). After he left, the boys were angry with him for leaving, particularly Jon, so he did not see them much. He feared for his two other children whom he had with Patricia and was afraid to leave them with her. (PCR. 1559). After they divorced, Patricia would call him to take his two children because she wanted to go out drinking and to meet other men. He would always agree because his sons were better off with him than with her (*Id.*). Santo knew Patricia liked to drink and recalled a few instances where he discovered bottles of alcohol hidden in her bedroom (PCR. 1560). He was always concerned for his children living with Patricia because he knew they were not being cared for (PCR. 1563-64). At least once he called the State Child Protective Agency (PCR. 1563).

No one ever contacted Santo to testify at Anton's penalty phase. (PCR. 1568). Had he been contacted Santo would have been willing and able to testify. (*Id.*).

Mr. Krawczuk's mother, Patricia Goss, testified that Anton's biological father, John Krawczuk, was a "very brutal man" who drank, he pushed her around and hit her with a dog chain when she was pregnant with the twins (PCR. 1591). Patricia grew up in an environment where her own mother yelled and she was afraid of displeasing her mother (PCR. 1593). Patricia acknowledged treating her children the same way her mother treated her (PCR. 1594).

Patricia was angry a lot and "smacked [her children] around" (PCR. 1594-95). Anton got the worst of it and she would hit Anton for wetting or soiling his pants because she thought he did it on purpose (PCR. 1601). She "didn't realize he was trying to tell [her] something," she "just thought he hated [her]" (*Id.*).

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

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

Anton did not have a lot of friends and was a loner and a follower (PCR. 1610-11), and explained that he "seemed to kind of latch on a little bit to try to get some friends. And, 'If you want to do that, yeah, I'll go with you.' Things like that." (PCR. 1615). Anton was using marijuana and amphetamines during the time he knew him (PCR. 1609).

Judith Nelson, Mr. Krawczuk's ex-wife, also testified regarding the drugs he was using while they were married. Anton was smoking marijuana every day, numerous times a day, both at home and at work, and would mix hashish oil with the marijuana and also used speed (PCR. 2375). Anton was not very affectionate and they had a hard time communicating. When she and Anton had problems, "he would write letters or notes to [her] explaining if he felt sorry or apologized or whatever the situation might be" (PCR. 2376)).

While they were together, Nelson learned that Anton's mother treated him very badly as a child. He told her that when his mother was cleaning, the children

would have to sit on each other's laps in their underwear and when she got mad, she would hit them (PCR. 2377). He also told her that his mother used a belt to hit him and his siblings (PCR. 2377). Nelson later saw Patricia's anger first hand. When Anton's daughter was born, Patricia was a doting grandmother, but after this crime happened, "things changed" (PCR. 2378). Nelson called Patricia to let her know she was getting remarried. Patricia invited Ms. Nelson to bring her granddaughter to her home to visit. However, when they arrived at Patricia's house, Patricia became angry and told her to "get the fuck out of her house and take my daughter, that piece of shit daughter of mine, and get out of her house and never come back" (PCR. 2379).

Nelson knew William (Bill) Poirier and believed that Bill had a lot more influence over Anton. She testified that Bill "would organize and maybe spark an idea, then they would follow through on it" (PCR. 2381).

Mr. Krawczuk also presented to testimony of two mental health experts at the evidentiary hearing. Dr. Barry Crown, a licensed psychologist and neuropsychologist, conducted an interview of Mr. Krawczuk and administered neuropsychological tests "to determine the relationship between brain function and behavior" (PCR. 1637).

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

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

> [He] shows difficulties determining and understanding the long-term effects of their immediate behavior. In addition, they have difficulties with concentration, attention, reasoning and judgment, and also with what's referred to as language-based critical thinking. And, in simplistic terms, that relates to "if/then" relationships. If I do this, then this will follow, and then this will follow. A, B, C and D sequential understanding of processes. They -- and he becomes confused with that. He also has, related to that, an auditory selective attention deficit, which means that when there are a lot of things going on, he finds it extremely difficult, if not impossible, to determine what he should be paying attention to out of the numbers of different things that are available to pay attention to. In addition, he has considerable difficulty in storing information for rapid retrieval. He needs a considerable consolidation period of information before he's able to, in a sense, pull things up and examine it and reach conclusions.

(PCR. 1640). Mr. Krawczuk's deficits were further aggravated by stressors including lack of sleep, pressure to make immediate decisions, drugs or alcohol (PCR. 1641-43). Involving another person would impact Mr. Krawczuk as well:

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

(*Id.*).

Dr. Crown explained that the full development of the brain's frontal lobe, particularly those portions right up front related to judgment and reasoning and having a sense of values, does not occur until the end of the adolescent growth spurt, sometime between the ages of 11 and 14 (PCR. 1644). If the frontal lobe was damaged before the full development period, "he's at greater risk because the pieces of the puzzle simply will not fall together and complete themselves" (PCR. 1645). In children who are abused for a prolonged period, there are fewer synaptic connections resulting in deficits in terms of actual brain development (*Id.*). Additionally, prolonged verbal abuse, or screaming and yelling, contributes to auditory selective deficits, " in a sense shutting down and nonresponding, first as a means of surviving, but also neurodevelopmentally in terms of not knowing what to pay attention to" (PCR. 1646-47). The "shutting down" may look like a blank stare, it may be acquiescence and it may result in an impulsive act following the shutting down process, rather than a reasoned act (PCR. 1647).

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

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

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

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

> Mr. Krawczuk is extremely needy and dependent in interpersonal relationships. Doesn't have a sense of himself or the other person. And so he experiences

> relationships as frustrating and difficult. And he's quite demanding in those relationships. [S]ometimes harassing. Mr. Krawczuk tends to be either quite, quite passive and easily influenced, which fits in the arena of a personality disorder; and then sometimes kind of bubbles over with anger. Those fit within diagnostic formulations.

(PCR. 1698). Dr. Sultan affirmed that Mr. Krawczuk did feel connected to other people and did have feelings of remorse and regret (*Id.*).

Dr. Sultan's conclusions were based on her review of background materials, consultation with Dr. Crown, review of a deposition of Paul Wise and an affidavit of Elizabeth Pousson,[1] as well as collateral interviews with Ms. Pousson, Santo Calabro, Todd Kaase and Christopher Krawczuk (PCR. 1692-93). Her interviews confirmed that Mr. Krawczuk was raised in a home in which all the children, but particularly Anton as he was singled out by his mother, were physically, verbally and emotionally abused (PCR. 1699). The reports from others corroborated what she had been told by Mr. Krawczuk. According to Dr. Sultan several of the worst incidents stood out in everyone's mind (PCR. 1700-1). Significantly, the abuse was "so catastrophic that anyone present remembered it essentially the same way" (PCR. 1701).

Dr. Sultan learned that Mr. Krawczuk was a bed wetter and soiled himself, a red-flag of early child abuse (PCR. 1701, 1711).[2] One of the most catastrophic events

---

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

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

was being forced to wear the sandwich board reading "I make doo-doo in my pants" while walking up and down the street in front of his home (PCR. 1701). While this was one of the most humiliating experiences of his life, Dr. Sultan testified that he responded in his "characteristic way of showing no emotion" (*Id.*). Dr. Sultan explained Mr. Krawczuk's emotionless response:

> One of the things that's clear from the record, and from other people's description of Anton Krawczuk's behavior, is that in emotionally-charged situations, Anton Krawczuk learned early on to simply remove himself emotionally from the situation, so that he could be physically present, but they all viewed him as just not there. The psychological term for that is depersonalization. And to some extent or another, all victims of severe child abuse experience depersonalization. The only way to cope is to remove yourself, so to go hide some place inside so that nothing shows. Chris Krawczuk tells of a situation in which Anton Krawczuk is being beaten -- they're both being beaten –
>
> Q: When you say "beaten", what do you mean?
>
> A: Smashed in the head with a Lysol can, kicked in the back, hit over the head with a wand of a vacuum cleaner pole, objects thrown at the head. In one situation Anton was taken and thrown through a plaster wall. Cracked the wall and hurt his head, I imagine. What Chris Krawczuk noted was that in those situations, Chris would be crying and screaming and lifting his arms up above his head to defend himself, and he was horrified that Anton did nothing. He simply stood with his arms at his side until his mother was finished. He thought that was very weird. In fact, it's certainly one of the ways that abused children respond, which is to simply leave emotionally.

(PCR. 1702-3).

Dr. Sultan testified that the psychological abuse was probably more

damaging to Anton than the physical abuse (PCR. 1706). His mother called him stupid and worthless, referred to him as "Dumbo, the flying fucking elephant" and that is how she called him to dinner (*Id.*). The mother's demands included simple household chores as well as emotional demands. Mr. Krawczuk felt he never pleased her emotionally and felt his mother simply didn't like him (PCR. 1707-8).

In his adult life, Mr. Krawczuk functioned only marginally (PCR. 1716). He was using marijuana, speed, had tried LSD, and was drinking consistently (PCR. 1717-18). He was easily influenced by other people and felt "bossed around" by his co-defendant William Poirier, almost like a drill sergeant (PCR. 1719). Dr. Sultan testified that Mr. Krawczuk's behavior was influenced by his cognitive disorder so that it "needs to be viewed as an overriding blanket of dysfunction" (PCR. 1718). As a result Mr. Krawczuk makes impulsive choices and then as a result of his obsessive-compulsive disorder, he thinks about them, worries about them and anguishes over his choices (*Id.*). Dr. Sultan observed that this compulsiveness was evident in his confession and in his desire to plea and to waive the penalty phase and mitigation (PCR. 1726-27, 1730).

Dr. Sultan found numerous mitigating factors in Mr. Krawczuk's background: abandonment by his father; emotional isolation as a child; lack of supervision and guidance throughout his childhood; the neuropsychological damage that he sustained and his suffering from other mental disorders; severe physical abuse; depressive symptoms that he experienced throughout his childhood; and the strong possibility of sexual abuse. Additionally, learning difficulties he had in school that made his success impossible and "the impulse control issues that come up as a

consequence of his neuropsychological problem has also greatly influenced his life" (PCR. 1724). Dr. Sultan opined that Mr. Krawczuk has been suffering disturbance, disorder or defect for most of his life (*Id.*). All of his psychological components impacted his behavior and existed at the time of the offense (*Id.*). Because Mr. Krawczuk has the most significant deficit in his ability to control impulses and difficulty making good decisions, Dr. Sultan opined that his ability to conform his conduct to the requirements of the law was compromised (PCR. 1724-25).

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD REVIEW THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS BECAUSE IT ANNOUNCES NEW TESTS FOR ESTABLISHING THE DEFICIENCY AND PREJUDICE PRONGS OF THE TEST FOR INEFFECTIVE ASSISTANCE OF COUNSEL, IN TOTAL DISREGARD FOR PRECEDENT FROM THIS COURT. UNDER THE APPROPRIATE TEST, PETITIONER ESTABLISHED THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT.

The Eleventh Circuit Court of Appeals affirmed the district court's denial of the one claim on which a Certificate of Appealability was granted: whether Mr. Krawczuk's counsel at the penalty phase of his capital trial rendered ineffective assistance of counsel within the meaning of the Sixth Amendment and under the well-settled two part test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Krawczuk v. Sec'y, Dep't of Corrections,* 873 F.3d at 1273 (11th Cir. 2017). The Eleventh Circuit's newly minted tests for establishing the two prongs of *Strickland* cannot withstand scrutiny under well settled jurisprudence from this Court and thus certiorari to the Eleventh Circuit Court of Appeals is warranted.

A. Performance Prong

With regard to the performance prong of the *Strickland* test, the Eleventh Circuit acknowledged the well-settled standard. *See Krawczuk,* 873 F.3d at 1293 ("In death penalty cases, trial counsel is obliged to investigate and prepare mitigation evidence for his client") (citing *Porter v. McCollum*, 558 U.S. 30, 39-40 (2009)). However, in the context of the facts underlying Mr. Krawczuk's claim, where there was a putative "instruction" by the capital defendant to counsel not to

investigate or present mitigating evidence,[3] the Eleventh Circuit majority decision created a different test—a variation of the *Strickland* test but not the test articulated by this Court—that would heretofore apply in capital cases in the districts comprising the Eleventh Circuit. Thus, despite recognizing that the scope of counsel's duty to investigate mitigation is "more limited" where a defendant "clearly instructs" counsel either not to investigate or not to present any mitigating evidence, 873 F.3d at 1293 (quoting *Cummings v. Sec'y, Dep't of Corr.*, 588 F. 3d 1331, 1357 (11th Cir. 2009), the Eleventh Circuit panel went on to formulate a *categorical rule* which completely contravenes the more limited nature of a mitigation investigation when there is a defeatist defendant: "**we now hold**" that the duty to investigate mitigation in a capital case "does not include a requirement" to disregard a "mentally competent client's sincere and specific instructions about an area of defense *and to obtain a court order in defiance of his wishes.*" 873 F.3d at 1293-94 (emphasis added) . In other words, if a defendant facing the death penalty

[3] Mr. Krawczuk's case is hardly one involving an unequivocal demand to counsel either not to investigate or to present mitigating evidence. As Judge Martin noted in her concurring opinion: "My review of the record has revealed no evidence that Mr. Krawczuk instructed counsel not to involve his family. The most compelling evidence to this effect is trial counsel's testimony at the post-conviction hearing that Mr. Krawczuk 'kind of wanted to leave his family out of it.'" *Krawczuk,* 873 F.3d 1301 n.1 (Martin, J., concurring in the judgment). This is simply not a case where the defendant continued to refuse to cooperate in the investigation and presentation of mitigation. In fact, the record establishes that Mr. Krawczuk was equivocal at best in his intentions to waive presentation of mitigation evidence. Mr. Krawczuk allowed counsel to cross-examine one of the State's witnesses during the penalty phase (PCR. 1809), and told counsel he was not opposed to her giving a closing argument (PCR. 1810). After the presentation of the state's case, Mr. Krawczuk indicated to the court that he was not opposed to the presentation of mitigating evidence, although he was not willing to take the stand, and did not want part of the psychiatric report written by Dr. Keown admitted (R. 218-225).

at any time during the representation—upon arrest, during the middle of the pretrial investigation, or right before the penalty phase—expresses a reluctance to assist counsel in the mitigation investigation, the Eleventh Circuit's newly minted test alleviates capital counsel of any obligation to investigate mitigation (or later present it at a penalty phase). Not only does the Eleventh Circuit improperly merge the "duty to investigate" aspect with the "duty to present mitigation" aspect of an ineffective assistance of counsel claim, its seeming formulation of a categorical rule does not comport with this Court's jurisprudence.[4]

No Supreme Court jurisprudence supports the view that inadequate mitigation investigation (or *no* mitigation investigation) can be excused or justified—**as a matter of law**—by a client's reluctance to have counsel contact particular witnesses. Contrary to the Eleventh Circuit majority's newly formulated categorical rule, a client's assistance, or lack thereof, with regard to capital counsel's duty to investigate mitigation is not dispositive. *See* 873 F.3d at 1302 n. (Martin, J., concurring in the judgment) ("I also disagree with the majority's suggestion that

---

[4] The cases cited by the Eleventh Circuit as establishing support for the categorical rule it announced do not admit of the unconditional holding of the panel. For example, in *Blankenship v. Hall*, 542 F.3d 1253, 1277 (11th Cir. 2008), the Eleventh Court merely held that "significant deference" is owed to a failure to investigate premised on a client's specific instruction not to involve his family. This is a far cry from the unconditional nature of the rule announced by the Eleventh Circuit panel in Mr. Krawczuk's case that excuses *as a matter of law* the duty to investigate mitigation when there is a reluctant or uncooperative client. Likewise, in *Newland v. Hall*, 527 F.3d 1162 (11th Cir. 2008), all the Eleventh Circuit held was that a client's instructions were one of a number of factors to be considered when analyzing the performance prong of *Strickland*. *Id.* at 1202. Neither *Blankenship* nor *Newland* conflicts with the well-settled principles of *Strickland*. But the Eleventh Circuit's decision in Mr. Krawczuk's case most assuredly does.

trial counsel's duty to perform a constitutionally adequate mitigation investigation is obviated by a defendant's communication to his attorney that he does not wish to present mitigation") .

For example, in *Rompilla v. Beard*, 125 S.Ct. 2456 (2005), this Court found that trial counsel in a capital case rendered prejudicially deficient performance at the penalty phase despite the fact that Rompilla's "own contributions to any mitigation case were minimal." *Id.* at 2462. Much like counsel's testimony in Mr. Krawczuk's case, Rompilla's counsel had found Rompilla "uninterested in helping," "minimized any problems he may have had in his childhood," and "was even actively obstructive by sending counsel off on false leads." *Id.* The Eleventh Circuit's categorical rule announced in Mr. Krawczuk's case runs afoul of *Rompilla*.

The Eleventh Circuit's rule also contravenes *Porter v. McCollum*, 558 U.S. 30 (2009). There, as here, the defendant "instructed [counsel] not to speak" with particular witnesses and was described as "fatalistic and uncooperative." *Id.* at 40. But this Court found deficient performance (and prejudice) because Porter's lawyer "failed to uncover and present any evidence of Porter's mental health or mental impairment, his family background, or his military service." *Id.* The fact that Porter had instructed counsel not to contact his ex-wife or son did not "obviate the need for defense counsel to conduct *some* sort of mitigation investigation." *Id.*

Strickland does not excuse counsel's failure to investigate because her client may be less than enthusiastic, or even uncooperative, about assisting in the mitigation investigation. The "ABA and judicial standards do not permit the courts to excuse counsel's failure to investigate or prepare because the defendant so

requested." *Hamblem v. Mitchell*, 354 F.3d 482, 492 (6th Cir. 2003). In *Wiggins v. Smith*, 539 U.S. 510 (2003), this Court looked to the ABA standards as guideposts for counsel's performance in capital cases; those standards contravene the Eleventh Court's newly minted categorical rule: "The investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered." *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, 11.4.1 (C) (1989).

The Eleventh Circuit's rule announced in Mr. Krawczuk's case also is inconsistent with other decisions of the Eleventh Circuit. For example, in *Hardwick v. Crosby*, 320 F.3d 1127 (11th Cir. 2003), the Eleventh Circuit wrote: "Even if Hardwick did ask [counsel] not to present witnesses at the sentencing proceeding . . . [counsel] had a duty to Hardwick at the sentencing phase to present available mitigating witnesses as Hardwick's defense against the death penalty." *Id* at 1190. In *Blanco v. Singletary*, 943 F.2d 1477 (11th Cir. 1991), the Eleventh Circuit found counsel ineffective for "latch[ing] onto" client's assertions that he did not want to call penalty phase witnesses and failing to conduct an investigation sufficient to allow the client to make an informed decision to waive mitigation.

Because the Eleventh Circuit's assessment of *Strickland*'s performance prong is itself contrary to and unreasonably applies *Strickland*, Mr. Krawczuk submits that this matter is worthy of certiorari review. The categorical rule announced by the panel does not comport with settled Supreme Court jurisprudence. And it encourages trial counsel to use a client's temporary resistance to mitigation investigation as a reason to abandon the mitigation effort entirely. Worse still, the

golden bullet of a client's purported "obstruction" can provide a post-hoc, self-serving explanation when trial counsel fails to pursue a professional adequate mitigation investigation and is later confronted with a claim of ineffective representation.

B. Prejudice Prong

The Eleventh Circuit panel also determined that Mr. Krawczuk failed to satisfy *Strickland*'s prejudice prong. And as it did with the performance prong, the panel used Mr. Krawczuk's case to announce a new gloss on the traditional prejudice analysis that finds no support in *Strickland* or its progeny. Certiorari review is also therefore warranted to address the newly announced test for establishing prejudice in cases where the defendant purportedly "instructs" counsel not to present mitigation at the penalty phase.

The Eleventh Circuit eschews the traditional *Strickland* test for prejudice in favor of a new and nearly impossible-to-meet standard:

> to establish *Strickland* prejudice after instructing counsel not to present mitigating evidence at trial, we hold that a capital defendant must satisfy two requirements: (1) establish a reasonable probability that, had he been more fully advised about the available mitigating evidence, he would have allowed trial counsel to present that evidence at the penalty phase; and (2) establish a reasonable probability that, if such evidence had been presented at the penalty phase, the jury would have concluded that the balance of the aggravating and mitigating factors did not warrant the death penalty.

873 F.3d at 1294.

The only Supreme Court case cited by the panel for this proposition is *Schriro v. Landrigan*, 550 U.S. 465 (2007), but nothing in *Landrigan* supports the Eleventh

Circuit's remarkable gloss on the traditional *Strickland* prejudice test. This is particularly true for the type of proof that the Eleventh Circuit now holds must be presented in order to meet this new test (without which a defendant apparently cannot under any circumstances prevail on the prejudice prong): "the record is devoid of any affidavit, deposition, or statement from Krawczuk, LeGrande, the mental health experts, or Krawczuk's friends and family even suggesting that Krawczuk would have instructed LeGrande differently had he been fully aware of all the available mitigation evidence." 873 F.3d at 1296. Not only is this type of proof absent from *Strickland*s prejudice analysis,[5] thus depriving Mr. Krawczuk of the opportunity in state court to even present such "proof" assuming it even were to be required,"[6] it seems that no matter what a defendant presents it will be categorically insufficient absent evidence of the specific proof identified by the Eleventh Circuit. For example, the Eleventh Circuit panel acknowledged that Mr.

---

[5] This "proof" certainly was not required by this Court when it granted relief in *Porter*, a Florida case, where Porter was "fatalistic" and "uncooperative." *Porter*, 130 S.Ct. at 453. Rather, this Court looked to the evidence that was not presented to the jury due to counsel's failure to investigate, conducted the appropriate objective analysis, and concluded that Porter was prejudiced within the meaning of *Strickland* and the Sixth Amendment.

[6] The Florida Supreme Court has never adopted the "proof" now required by the Eleventh Circuit, nor has the Florida Supreme Court ever made such "proof" a pleading requirement in a postconviction motion in a capital case. A capital defendant is required to plead—and prove—the two prongs of *Strickland*, *i.e.* deficient performance and prejudice. Prejudice is defined as a reasonable probability of a different outcome. These were the pleading requirements at the time of Mr. Krawczuk's state court postconviction proceedings. It violates due process for the Eleventh Circuit to announce a heretofore unarticulated type of specific proof that Mr. Krawczuk failed to adduce and, at the same time, fault Mr. Krawczuk for failing to adduce this proof.

Krawczuk *had* pointed to evidence demonstrating his cooperation with counsel and aspects of the mitigation investigation. 873 F.3d at 1296 ("Krawczuk points to evidence showing that he cooperated with Dr. Keown, volunteered details about his military service, signed releases for counsel to obtain psychological information about his military service, offered general information about his wife and family, and at one point wavered slightly about mitigation evidence"). But the Eleventh Circuit swatted that evidence aside because Mr. Krawczuk had not "affirmatively established" that he would have allowed the presentation of the undiscovered mitigation evidence. *Id.* In other words, he did not establish the elements of the "proof" now identified by the Eleventh Circuit in his state court collateral proceedings, where such "proof" was neither required by nor articulated in Florida jurisprudence. This is not only inconsistent with *Strickland*, it is also patently unfair.[7]

The shortcomings and problems with the Eleventh Circuit's majority decision as to the prejudice prong and its application of *Landrigan* were, to an extent, pointed out by Judge Martin's concurring opinion. For example, Judge Martin wrote that the majority had wrongly expanded *Landrigan*'s holding to make it so broad as

---

[7] The majority opinion also overlooked some of the particular allegations in Mr. Krawczuk's federal petition. For example, he alleged: "Had counsel done the job she was constitutionally required to do, a wealth of mitigation was available *that Mr. Krawczuk would not have opposed"* (DE1 at 58) (emphasis added). *See also* DE30 at 17-18 ("Even if this court were to impose a burden on Petitioner to show that had trial counsel fully investigated potential mitigation, he would have agreed to its presentation, the record evidence in this case is sufficient to show that Petitioner would have allowed the mitigation to be presented had there been a thorough investigation and adequate mental health evaluation").

to make it all encompassing. In Judge Martin's view, *Landrigan* "did not [] establish a *rule* that if *any* defendant tells his lawyer he wants no mitigation presented, he can never show prejudice" under *Strickland*. 873 F.3d at 1301 n.2 (emphasis added) (Martin, J., concurring in the judgment). Critical of the majority's seeming formulation of a categorical rule with regard to prejudice in cases involving uncooperative defendants, Judge Martin concluded, correctly, that "[t]o the extent that the majority's opinion equates the requirements of our circuit's precedent with that of the Supreme Court's precedent, I believe it is mistaken." *Id.*

CONCLUSION

For the reasons set forth above, Petitioner Anton Krawczuk respectfully prays that the Court will issue its writ of certiorari to review the decision of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

TODD G. SCHER
Fla. Bar No. 0899641
Assistant CCRC
Capital Collateral Regional
Counsel - South
1 East Broward Blvd, Suite 444
Fort Lauderdale, FL 33301
P: (954) 713-1284
F: (954) 713-1299
COUNSEL FOR PETITIONER