

No. _____

OCTOBER TERM 2017

IN THE SUPREME COURT OF THE UNITED STATES

ANTON KRAWCZUK,

Petitioner,

v.

JULIE JONES, Secretary,
Florida Department of Corrections,

Respondent.

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

VOLUME I OF I

CAPITAL CASE

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APPENDIX A

873 F.3d 1273
United States Court of Appeals,
Eleventh Circuit.

Anton J. KRAWCZUK, Petitioner--Appellant,
v.
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, Respondent--Appellee.

No. 15-15068
|
(October 18, 2017)

Synopsis

Background: Following affirmance of his Florida conviction for first-degree murder and death sentence, petitioner filed federal habeas petition. The United States District Court for the Middle District of Florida, D.C. Docket No. 2:13-cv-00559-JES-CM, John E. Steele, Senior Judge, 2015 WL 4645838, denied the petition. Petitioner appealed.

Holdings: The Court of Appeals, Hull, Circuit Judge, held that:

- [1] state court's determination, that petitioner instructed his counsel not to present mitigating evidence at his capital murder trial, was not unreasonable determination of the facts;
- [2] petitioner did not establish reasonable probability that, had he been more fully advised about available mitigation evidence, he would have allowed counsel to present it on his behalf at penalty phase of capital murder trial;
- [3] it was not reasonably probable that presentation of defendant's entire mitigating evidence at penalty phase would have resulted in imposition of a life sentence rather than death penalty; and
- [4] defense counsel's lack of investigation of mitigation evidence was immaterial to prejudice or deficiency prongs of petitioner's claim of ineffective assistance.

Affirmed.

Martin, Circuit Judge, filed opinion concurring in the judgment.

West Headnotes (27)

[1] Habeas Corpus ➡ Federal Review of State or Territorial Cases

A state court's decision rises to the level of an "unreasonable application" of federal law, and thus warrants federal habeas relief, only where the ruling is objectively unreasonable, not merely wrong; even clear error will not suffice. 28 U.S.C.A. § 2254(d).

Cases that cite this headnote

[2] **Habeas Corpus** ⇌ Federal Review of State or Territorial Cases

The unreasonable application of federal law standard for granting federal habeas relief is meant to be a difficult one to meet. 28 U.S.C.A. § 2254(d).

Cases that cite this headnote

[3] **Habeas Corpus** ⇌ State Determinations in Federal Court

Antiterrorism and Effective Death Penalty Act (AEDPA) imposes a highly deferential standard for evaluating state-court rulings in federal habeas cases and demands that state-court decisions be given the benefit of the doubt. 28 U.S.C.A. § 2254(d).

Cases that cite this headnote

[4] **Habeas Corpus** ⇌ Adequacy and Effectiveness of Counsel

Habeas Corpus ⇌ Counsel

Because federal habeas court reviews a petitioner's ineffective assistance of counsel claim through the lenses of both *Strickland* and Antiterrorism and Effective Death Penalty Act (AEDPA), its analysis is doubly deferential. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d).

Cases that cite this headnote

[5] **Habeas Corpus** ⇌ Federal Review of State or Territorial Cases

Pursuant to Antiterrorism and Effective Death Penalty Act (AEDPA), federal habeas court may only grant relief where the state court's ruling contained an error so clear that fair-minded people could not disagree about it. 28 U.S.C.A. § 2254(d).

Cases that cite this headnote

[6] **Habeas Corpus** ⇌ Review de novo

Court of Appeals reviews de novo the district court's decision in a federal habeas case about whether the state court acted contrary to clearly established federal law, unreasonably applied federal law, or made an unreasonable determination of fact. 28 U.S.C.A. § 2254(d).

Cases that cite this headnote

[7] **Criminal Law** ⇌ Deficient representation and prejudice in general

Under *Strickland*, defendant must show: (1) that his attorney's performance was deficient and (2) that this deficient performance prejudiced his defense. U.S. Const. Amend. 6.

Cases that cite this headnote

[8] **Criminal Law** ⇌ Deficient representation in general

The relevant inquiry under *Strickland* is whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. U.S. Const. Amend. 6.

Cases that cite this headnote

[9] **Criminal Law** ⇌ Presumptions and burden of proof in general

Court reviewing a claim of ineffective assistance of counsel must indulge a strong presumption that counsel exercised reasonable professional judgment. U.S. Const. Amend. 6.

Cases that cite this headnote

[10] **Criminal Law** ⇌ Adequacy of investigation of mitigating circumstances

In death penalty cases, trial counsel is obliged to investigate and prepare mitigation evidence for his client. U.S. Const. Amend. 6.

Cases that cite this headnote

[11] **Criminal Law** ⇌ Deficient representation in general

Because the attorney acts based on information he receives from the defendant, whether counsel acted reasonably, for purposes of a claim of ineffective assistance of counsel, depends in part on the actions or statements of the defendant. U.S. Const. Amend. 6.

Cases that cite this headnote

[12] **Criminal Law** ⇌ Preparation for trial

What investigation decisions by defense counsel are reasonable, for purposes of a claim of ineffective assistance, depends critically upon the information the defendant furnishes to his counsel. U.S. Const. Amend. 6.

Cases that cite this headnote

[13] **Criminal Law** ⇌ Adequacy of investigation of mitigating circumstances

The scope of defense counsel's duty to investigate mitigation evidence in death penalty cases is substantially affected by defendant's actions, statements, and instructions. U.S. Const. Amend. 6.

Cases that cite this headnote

[14] **Criminal Law** ⇌ Adequacy of investigation of mitigating circumstances

When a competent defendant clearly instructs counsel either not to investigate or not to present any mitigating evidence in a death penalty case, the scope of counsel's duty to investigate is significantly more limited than in the ordinary case. U.S. Const. Amend. 6.

Cases that cite this headnote

[15] **Criminal Law** ⇌ Adequacy of investigation of mitigating circumstances

Defense counsel's duty to investigate mitigation evidence in death penalty cases 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. U.S. Const. Amend. 6.

Cases that cite this headnote

[16] **Criminal Law** ⇌ Prejudice in general

To establish prejudice, as element of a claim of ineffective assistance, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. U.S. Const. Amend. 6.

Cases that cite this headnote

[17] **Habeas Corpus** ⇌ Post-trial proceedings;sentencing, appeal, etc

Habeas Corpus ⇌ Reception of evidence;affidavits;maters considered

When deciding whether a habeas petitioner has shown prejudice from defense counsel's investigation of mitigation evidence in a death penalty case, as element of a claim of ineffective assistance, the court must evaluate the totality of the available mitigation evidence, both that adduced at trial, and the evidence adduced in the habeas proceeding, and reweigh it with the aggravating evidence. U.S. Const. Amend. 6.

Cases that cite this headnote

[18] **Criminal Law** ⇌ Adequacy of investigation of mitigating circumstances

A competent defendant's clear instruction not to investigate or present mitigation evidence in a death penalty case impacts the prejudice prong of the ineffective assistance of counsel test, in that if the defendant affirmatively instructed his counsel not to offer any mitigating evidence, then counsel's failure to investigate further could not have been prejudicial under *Strickland*. U.S. Const. Amend. 6.

Cases that cite this headnote

[19] **Criminal Law** ⇌ Presentation of evidence in sentencing phase

To establish *Strickland* prejudice after instructing counsel not to present mitigating evidence at trial, a capital defendant must satisfy two requirements: (1) establish a reasonable probability that, had he been more fully advised about the available mitigation 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. U.S. Const. Amend. 6.

Cases that cite this headnote

[20] **Habeas Corpus** ⇌ Post-trial proceedings;sentencing, appeal, etc

State court's determination, that petitioner instructed his counsel not to present mitigating evidence at his capital murder trial, was not an unreasonable determination of the facts, as would warrant federal habeas relief; at hearing at which he pleaded guilty, petitioner communicated his desire not to present mitigating evidence, stated that he had instructed counsel not to present mitigating evidence despite her strong advice to the contrary, and dismissed counsel's motion for funds to hire mitigation expert, at this time, he had psychiatrist's report that contained details of his abusive childhood, military psychiatric report, and past encounters with the law, and at penalty phase he averred that he wished not to present mitigating evidence and that he instructed counsel not to participate in the proceedings. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d).

Cases that cite this headnote

[21] **Criminal Law** ⇌ Presentation of evidence in sentencing phase

Defendant did not establish reasonable probability that, had he been more fully advised about available mitigation evidence, he would have allowed counsel to present it on his behalf at penalty phase of capital murder trial, as required to establish prejudice prong of claim of ineffective assistance; defendant rejected counsel's presentation of mitigation evidence at three separate judicial proceedings, openly sought the death penalty, and repeatedly undercut counsel's strategy, his actions were not taken in ignorance, as counsel had advised him of importance of mitigation evidence and he possessed psychiatrist's report containing mitigation evidence, and during post-conviction relief proceedings, he presented no evidence indicating that, had he been made aware of the available mitigation evidence before the penalty phase, he would have allowed counsel to present it. U.S. Const. Amend. 6.

Cases that cite this headnote

[22] **Criminal Law** ⇌ Presentation of evidence in sentencing phase

Defendant's burden to prove prejudice element of a claim of ineffective assistance of counsel, after instructing counsel not to present mitigating evidence at capital murder trial, cannot be met with evidence showing merely that the defendant cooperated with counsel's efforts to investigate his personal background and that he at one point was open to presenting some mitigation evidence. U.S. Const. Amend. 6.

Cases that cite this headnote

[23] **Criminal Law** ⇌ Presentation of evidence in sentencing phase

To prove prejudice element of a claim of ineffective assistance of counsel, when defendant had instructed counsel not to present mitigating evidence at capital murder trial, defendant must affirmatively establish that he would have allowed the presentation of the undiscovered mitigation evidence. U.S. Const. Amend. 6.

Cases that cite this headnote

[24] **Criminal Law** ⇌ Presentation of evidence in sentencing phase

It was not reasonably probable that presentation of defendant's entire mitigating evidence at penalty phase of capital murder trial would have resulted in imposition of a life sentence rather than death penalty, as required to establish prejudice prong of claim of ineffective assistance; although mitigating evidence discovered after defendant's sentencing would have painted more robust picture of emotional and physical abuse and tragic difficulties that he faced during childhood, sentencing judge was aware that defendant was subjected to some amount of serious emotional and physical abuse during his life, and more fulsome details of defendant's childhood difficulties would not have overcome aggravating factors, including that defendant planned for several days to murder victim with his bare hands to profit from selling goods stolen from victim's home and because of his disdain for victim's sexual preferences. U.S. Const. Amend. 6.

Cases that cite this headnote

[25] **Criminal Law** ⇌ Adequacy of investigation of mitigating circumstances

Because defendant issued unmistakable instructions to his attorney not to present any mitigation evidence at penalty phase of capital murder trial, his attorney's lack of investigation of mitigation evidence was immaterial to the prejudice or deficiency prongs of defendant's claim of ineffective assistance. U.S. Const. Amend. 6.

Cases that cite this headnote

[26] **Criminal Law** ⇌ Adequacy of investigation of mitigating circumstances

If a capital murder defendant instructed his counsel not to offer any mitigating evidence, then counsel's failure to investigate such evidence further could not have been prejudicial under *Strickland*. U.S. Const. Amend. 6.

Cases that cite this headnote

[27] **Sentencing and Punishment** ⇌ Reception of evidence

Defense counsel was not required to have conducted thorough or even adequate investigation of mitigating evidence, and to have informed defendant about such investigation, in order for defendant to have validly waived the opportunity to present mitigation evidence at the penalty phase of his capital murder trial, where defendant instructed counsel not to present mitigation evidence. U.S. Const. Amend. 6.

Cases that cite this headnote

*1277 Appeal from the United States District Court for the Middle District of Florida, D.C. Docket No. 2:13-cv-00559-JES-CM.

Attorneys and Law Firms

Scott Gavin Direct, Capital Collateral Regional Counsel—South, Fort Lauderdale, FL, Todd Gerald Scher, Law Office of Todd G. Scher, PL, Dania Beach, FL, for Petitioner—Appellant.

Stephen D. Ake, Attorney General's Office—Criminal Division, Tampa, FL, for Respondent—Appellee.

Before HULL, WILLIAM PRYOR, and MARTIN, Circuit Judges.

Opinion

HULL, Circuit Judge:

Florida death row inmate Anton Krawczuk appeals the district court's denial of his 28 U.S.C. § 2254 petition for a writ of habeas corpus. At issue is Krawczuk's claim that his counsel rendered ineffective assistance in the investigation and presentation of mitigation evidence during his penalty phase proceedings. After review and with the benefit of oral argument, we conclude that the state court's denial of Krawczuk's ineffective trial counsel claim was not contrary to, or an unreasonable application of, clearly established federal law, nor was it based on an unreasonable determination of the facts. Accordingly, we affirm the district court's denial of Krawczuk's § 2254 petition.

I. BACKGROUND

We first recount the evidence and procedural history.

A. Murder and Robbery

On September 12, 1990, Krawczuk and his roommate Billy Poirier brutally murdered and robbed David Staker. Krawczuk v. State, 634 So.2d 1070, 1071 (Fla. 1994) ("Krawczuk I"). Both Krawczuk and Poirier, who shared a home in Lee County, *1278 Florida, were sexually involved with Staker during the months leading up to the murder. Id. Krawczuk and Poirier planned the murder and robbery three or four days in advance, arranging to carry out the crimes while visiting Staker at his home. Id.

The night of the murder, Krawczuk and Poirier went together to Staker's home. Id. They brought gloves with them to use while carrying out the murder and parked their vehicle some distance away from the victim's house. After the three men watched television in the living room for twenty to thirty minutes, Krawczuk suggested that they go to the bedroom. Id.

After a series of other events in the bedroom, Krawczuk retrieved his gloves, began acting aggressively, and proceeded to choke Staker with both hands. Id. Meanwhile, Poirier assisted by holding Staker's mouth shut and pinching his nose closed. Id. Staker fought back and even tried to hit Krawczuk with a lamp, but Poirier was able to overtake Staker and wrestle the lamp away. Id. After almost ten minutes, Staker relented. See id. Believing that Staker might be "faking it," however, Krawczuk twice poured drain cleaner and water into Staker's mouth until it overflowed. Id. Poirier then stuffed a washcloth into Staker's mouth and covered it with tape. Id. Krawczuk then bound Staker's ankles, and the assailants deposited the body in the bathtub. Id. It was later determined that Staker died of asphyxia and strangulation.

In accordance with their established plan, Krawczuk and Poirier then stole a number of Staker's possessions, including television sets, stereo equipment, a video recorder, five rifles, and a pistol. Id. They loaded these items into Staker's pickup truck, along with Staker's body, and drove to the home of Gary Sigelmier, who bought some of the stolen items and agreed to store the rest. Id. at 1071–72. Krawczuk and Poirier then loaded Staker's body into their own vehicle, abandoned Staker's pickup truck, and drove to a rural area, which Krawczuk had scouted before the murder, to dump Staker's body. Id. at 1072. They discarded Staker's body in the woods and left. Id.

B. Investigation, Confession, and Indictment

In the days following the murder, Staker's employer noticed that Staker had not shown up for work or picked up his paycheck. Id. at 1071. She went looking for Staker at his home, where she found the door open and what looked like the scene of a robbery. Id. She immediately contacted Lee County authorities. Id.

On September 13, 1990, authorities found a body, later identified as Staker's, in a wooded area in Charlotte County, Florida. Id. Later that month, Sigelmier reported to the Charlotte County Sheriff's office that he bought property stolen from Staker's home and that he had acquired it from Krawczuk and Poirier. Id.

On September 18, 1990, sheriff's deputies from Lee County and Charlotte County went to Krawczuk and Poirier's home and took both men into custody. Id. at 1071–72. After waiving his rights under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), Krawczuk confessed to Staker's murder. Krawczuk I, 634 So.2d at 1072.

On October 3, 1990, a grand jury indicted Krawczuk and Poirier for (1) first degree premeditated murder, (2) first degree felony murder, and (3) robbery.¹

¹ Codefendant Poirier pled guilty to second degree murder in exchange for a sentence of thirty-five years' imprisonment. Krawczuk I, 634 So.2d at 1072 n.2.

*1279 C. LeGrande's Letter Regarding Aggravation and Mitigation

On March 8, 1991, Krawczuk's appointed trial counsel, Barbara LeGrande,² wrote a letter to Krawczuk explaining the importance of aggravating and mitigating circumstances in a capital case. She informed Krawczuk that she had reviewed his military records and had provided them to Dr. Richard C. Keown, who conducted a psychiatric evaluation of Krawczuk. In her letter, LeGrande included a list of all the statutory aggravating and mitigating factors that would be considered by the jury and judge in determining whether to sentence Krawczuk to death.

² At the time of her representing Krawczuk, Counsel LeGrande had been appointed previously to seventeen capital cases.

In her letter, LeGrande predicted the five aggravating factors the State would try to prove and evaluated the likelihood that the State would succeed in proving each one. LeGrande identified five mitigating factors that she intended to prove on Krawczuk's behalf and explained that proving most of them would require Krawczuk to testify at trial. She explained to Krawczuk that facts—including pre-planning the murder, pouring drain cleaner down the victim's throat, and hiding the body—would probably cause the jury to return a recommendation of death.

D. Dr. Keown's Psychiatric Evaluation and Report

During the pretrial proceedings, counsel LeGrande sought funds for a psychiatric evaluation to determine both Krawczuk's sanity at the time of the evaluation and his mental state at the time of Staker's murder. The state trial court granted Krawczuk's motion and ordered an examination by Dr. Keown, who prepared a psychiatric report of his findings.

In his April 9, 1991 report, Dr. Keown summarized Krawczuk's brief history of mental health treatment. When Krawczuk was eleven or twelve years old, he attended court-ordered counseling because of his tendency to get into trouble and run away from home. Later, during his time serving as a United States Marine, Krawczuk was referred to a military psychiatrist because of Krawczuk's "apathetic and disinterested attitude about marine life, suicidal intentions, and conflicts with military life." Dr. Keown's report noted that though the military psychiatrist identified no evidence of neurosis, psychosis, brain syndrome, or homicidal or suicidal thoughts, she did find that Krawczuk suffered from a mixed personality disorder and exhibited traits like immaturity, passive-aggressiveness, and antisocial personality patterns. LeGrande had forwarded a copy of Krawczuk's military records to Dr. Keown. Dr. Keown's report highlighted that Krawczuk was "of at least average intelligence with no significant cognitive deficits."

As to Krawczuk's family history, Dr. Keown noted that Krawczuk had no meaningful relationship with his father, that his mother was physically and verbally abusive, and that his stepfather often beat him. Krawczuk told Dr. Keown that his poor family life drove him to misbehavior, truancy, and even criminal activity.

While serving in the Marines, Krawczuk was (1) disciplined for fighting and misusing military equipment, (2) was court martialled for being away without leave, and (3) served six months in military confinement. Krawczuk eventually received an administrative separation from his military service. Krawczuk also explained to Dr. Keown that "he would rather have death *1280 than twenty-five years in jail" if he was found guilty.

Ultimately, Dr. Keown found that Krawczuk suffered from mild depressive symptoms but did not require medication. Dr. Keown concluded that Krawczuk was competent to stand trial and was sane at the time of Staker's murder. By May 8, 1991, Krawczuk had received Dr. Keown's report from LeGrande.

E. Pretrial Motion to Suppress Confession

On July 8, 1991, Krawczuk filed a motion to suppress his confession, which the state trial court denied. *Id.* The state trial court determined that Krawczuk's confession was admissible because it was given voluntarily after he was advised of, and waived, his *Miranda* rights. *Id.*

F. Change of Plea Hearing and Guilty Plea

On September 27, 1991, Krawczuk informed the state trial court that he intended to plead guilty to all three counts in the indictment—first degree premeditated murder, first degree felony murder, and robbery—and requested the death penalty. *Id.* The state trial court held a hearing on Krawczuk's change of plea.

At the outset, Krawczuk informed the state trial court that he was prescribed Elavil because he became increasingly nervous in the days leading up to the trial and the medication had a calming effect to help him sleep. *Id.* at 1073. Krawczuk took this medication the day of the hearing, but he could not feel its effects and, at any rate, it did not prevent him from making a reasoned decision about his plea. Krawczuk stated that he otherwise had never suffered from mental illness before.

During the plea colloquy, Krawczuk indicated that he understood that an adjudication of guilt for murder could result in imposition of the death penalty. Krawczuk acknowledged his understanding that the proceedings would include a penalty phase to determine whether death would be an appropriate sentence. The state trial court explained to Krawczuk that he was entitled to have a jury make this determination during the penalty phase and that the jury's recommendation carried great weight.

As to penalty phase proceedings, Krawczuk affirmed that he wished to waive the jury determination in favor of a determination by the state trial court and that he did not want to present any mitigating evidence. When asked why he intended to plead guilty and waive the opportunity to present mitigating evidence, Krawczuk answered that he “shouldn't be allowed to live for what [he] did.”

At the plea hearing, the state trial court also addressed with Krawczuk whether he was satisfied with the representation of LeGrande. By a letter to the trial court dated April 29, 1991, Krawczuk had requested that LeGrande be dismissed and that he be appointed different counsel. Krawczuk reversed course at the hearing, however, stating that he was satisfied with LeGrande's representation and no longer wanted her removed. In addition, Krawczuk reported that he and LeGrande had fully discussed the implications of his guilty plea.

Before the plea hearing, LeGrande had filed a motion for funds to hire a mitigation expert, but Krawczuk dismissed that motion at the hearing. LeGrande explained that she had advised Krawczuk not to plead guilty and was prepared to present mitigating evidence. In particular, LeGrande planned to present the testimony of Dr. Keown and Paul Wise, Krawczuk's coworker, but Krawczuk instructed her not to. LeGrande intimated that she would present additional mitigating evidence, but she did not specify what evidence. LeGrande understood that, under Florida *1281 law, it was Krawczuk's right to instruct her not to present mitigation evidence.

The state trial court found that Krawczuk was competent, determined that his guilty plea was entered freely and voluntarily, and adjudicated him guilty of first degree premeditated murder and robbery.

G. Krawczuk's Letter Following Sentencing Hearing

After the state trial court accepted his guilty plea, Krawczuk wrote a September 30, 1991 letter to LeGrande reiterating his desire to be sentenced to death and expressing hope that his guilty plea would help ensure his receiving the death penalty:

As for my sentencing hearing, do you feel I can achieve my goal of receiving the death sentence? From the sounds of it, [the prosecutor] is very much for it as well, isn't he? By my pleading guilty to the charges, doesn't that increase the aggravating circumstances against me, and basically ensure my death penalty? After all, I am assisting the prosecution in their proving of my total guilt, aren't I?

In that same letter, Krawczuk lauded LeGrande's representation, stating:

As far as I'm concerned, you have proven to be a shining example for a lawyer, and I have nothing but praise for you [and] your work. You have examined each and every aspect, as I have requested. In fact, I feel that you have done far more than was actually required. If I have put you in a bind by pleading guilty, it wasn't my intention. Thank you for remaining as my counsel, through this most critical of all phases.

H. Penalty Phase Proceedings

After Krawczuk's guilty plea, in a separate hearing on October 29, 1991, the State argued a penalty phase trial before a jury would be necessary despite Krawczuk's waiver. The state trial court agreed and ordered a jury trial, which took place on February 4 and 5, 1992.

Before jury selection began, Krawczuk reiterated that he did not want LeGrande to participate in any part of the penalty phase trial, including selecting the jury, cross-examining the State's witnesses, presenting mitigation evidence, or making a closing argument. LeGrande again explained that she had advised Krawczuk against this course of action. When asked why he had chosen this course, Krawczuk replied: "Because I just feel basically twenty-five years as opposed to a death penalty is one in the same, either way you look at it, your life is gone."

Later this colloquy occurred:

THE COURT: It's my understanding from your remarks—and I don't want to put words in your mouth. But your response for taking this course of action, or one of the principal reasons is that the sentence of life with the minimum mandatory twenty-five years, um, is equally abhorrent and undesirable to you, as would be a death sentence. Would you consider them equivalent for your purposes?

MR. KRAWCZUK: Yes, Sir.

After extensive colloquy, the state trial court determined that Krawczuk was competent, that he understood the consequences of his decision, and that he was sufficiently intelligent to make this decision.

After a jury was impaneled, the State gave its opening statement. Neither LeGrande nor Krawczuk made any opening statement. The State then proceeded with its case.

The State's first witness was Staker's roommate, Charles Staub, who identified several of the items stolen on the night of the murder. The State then called Pete Sabori, an investigator with the Charlotte County Sheriff's Office, who had helped *1282 identify Staker's body, had investigated the murder, and was present for Krawczuk's arrest.

Gary Sigelmier, the third witness, testified about how he met with Krawczuk and Poirier on the night of the murder and agreed to buy and store the items stolen from Staker's house. The State also presented the testimony of Ed Tamayo, a sergeant with the Lee County Sheriff's Office, who investigated the report that Staker was missing, recovered items stolen from Staker's house, and was present for Krawczuk's arrest.

Dr. R. H. Imani, the Medical Examiner for the District of Charlotte County, testified as an expert in forensic pathology. Dr. Imani performed the autopsy on Staker's body and determined that Staker died from asphyxia and strangulation.

The State then called Michael Savage, a detective with the Charlotte County Sheriff's Office, who helped investigate Staker's murder. Detective Savage was present when Krawczuk waived his Miranda rights and confessed to killing Staker.

In the jury's presence, the State played an audio tape of Krawczuk's confession, in which he explained in gruesome detail how he and Poirier pre-planned and carried out Staker's murder, robbed Staker's house, and disposed of Staker's body. During his confession, when asked why he was motivated to kill Staker, Krawczuk stated that he was "frustrate[d] from the homosexual community that thrive[d]" where he lived and that he "wanted to exterminate it."

After the State rested and outside the presence of the jury, the state trial court again raised the issue of whether Krawczuk intended to present any mitigating evidence. Initially, Krawczuk indicated that he might allow the introduction of Dr. Keown's psychiatric report as mitigating evidence. LeGrande explained that Krawczuk was willing to do this not because he wished to avoid the death penalty but as a way of helping LeGrande discharge her duties as trial counsel and to prevent his death sentence being overturned on appeal.

The state trial court hinted that it was inclined to allow Dr. Keown's report to be admitted into evidence, but Krawczuk abruptly changed his mind and directed LeGrande not to introduce the report during his penalty phase case. Krawczuk then stated, as before, that he did not wish to present any mitigating evidence or testify and that he was directing LeGrande not to make any closing argument. Once again, LeGrande represented that she had strongly advised Krawczuk against this course of action. Krawczuk also stated that he did not wish for the record to reflect the reasons for his decision due to their "very personal" nature.

As Krawczuk wished, the defense rested without presenting any evidence. After the State's final argument, the defense waived its opportunity to do the same. At the end of the penalty phase, the jury unanimously recommended the death penalty.

I. Spencer Hearing and Sentencing

On February 11, 1992, the state trial court held a hearing pursuant to Spencer v. State, 615 So.2d 688 (Fla. 1993). LeGrande again stated that she intended to introduce Dr. Keown's psychiatric report as mitigation evidence, but Krawczuk directed her not to. Nonetheless, the state trial court indicated that, in making its sentencing determination, it would take into account both Dr. Keown's psychiatric report and the presentence investigation report, Krawczuk I, 634 So.2d at 1072.

On February 13, 1992, the state trial court sentenced Krawczuk to death.³ Id. *1283 Based on the evidence, the state trial court found three statutory aggravating factors: (1) the murder was committed in the course of a robbery or for pecuniary gain; (2) the murder was especially heinous, atrocious, or cruel; and (3) the murder was committed in a cold, calculated, and premeditated manner with no pretense of moral or legal justification. Upon consideration of the presentence investigation report and Dr. Keown's psychiatric report, the state trial court found one statutory mitigating factor: that Krawczuk had no significant history of prior criminal activity.

³ As to Krawczuk's robbery conviction, the state trial court sentenced Krawczuk to fifteen years' imprisonment.

J. Direct Appeal

On direct appeal, the Florida Supreme Court affirmed Krawczuk's first-degree murder conviction and death sentence. Id. at 1074. The Florida Supreme Court concluded, inter alia, that sufficient evidence supported Krawczuk's murder conviction and that the state trial court adequately considered Dr. Keown's psychiatric report and the presentence investigation report in reaching its sentencing decision. Id. at 1073.

The United States Supreme Court denied Krawczuk's petition for writ of certiorari, Krawczuk v. Florida, 513 U.S. 881, 115 S.Ct. 216, 130 L.Ed.2d 143 (1994) (mem.).

II. STATE POSTCONVICTION PROCEEDINGS

On October 3, 1995, Krawczuk filed his initial motion for state postconviction relief under Rule 3.850 of the Florida Rules of Criminal Procedure.⁴ Krawczuk v. State, 92 So.3d 195, 200 (Fla. 2012) ("Krawczuk II"). On March 15, 2002, Krawczuk filed an amended 3.850 motion raising twenty four claims. Id. After a hearing pursuant to Huff v. State, 622 So.2d 982 (Fla. 1993), the state 3.850 court granted an evidentiary hearing on several issues, including the relevant Strickland issues. At the hearing, Krawczuk asserted LeGrande should have developed and presented evidence to show: (1) his physically and emotionally abusive childhood; (2) his substance and alcohol abuse; (3) that he was a good worker at his maintenance job at McDonalds; (4) that he cooperated with authorities; (5) that he was under a mental or emotional disturbance at the time of the murder; and (6) that he was allowed to plead guilty to a lesser charge and receive only a prison sentence. Id. We summarize the extent of this evidence at the 3.850 hearing.

⁴ Krawczuk filed his postconviction motion prior to the adoption of Rule 3.851 of the Florida Rules of Criminal Procedure, which now governs postconviction motions filed by petitioners who have been sentenced to death. See Fla. R. Crim. P. 3.851.

A. Family and Social Background

Krawczuk's twin brother, Christopher Krawczuk, testified about his and Krawczuk's difficult childhood. They never had much of a relationship with their father, who left in their infancy. Christopher had heard that their father was a heavy drinker who was often violent with their mother, Patricia. For much of their childhood, the boys were raised by their mother, who was especially physically and verbally abusive toward Krawczuk and often doled out extreme punishments. When Krawczuk got in trouble for playing with matches, for example, their mother Patricia once forced him to hold his hand over a lit gas stove burner. She also used to strike the boys with the metal wand of a vacuum cleaner. When Krawczuk soiled himself, their mother made him walk down the street wearing a sign reading, "I do my doodie in my pants every day." LeGrande never contacted *1284 Christopher, but he would have been willing to testify.

Santo Calabro, who married Krawczuk's mother, also testified about Krawczuk's turbulent home life. Calabro felt that Krawczuk's mother Patricia directed most of her anger toward Krawczuk and punished him more severely than her other children. She not only denied Krawczuk her affection but also subjected him to violent beatings. Although willing to testify, Calabro was never contacted.

Krawczuk's childhood friend, Todd Kaase, also witnessed the mother's violence to Krawczuk. When Krawczuk was around fifteen or sixteen years old, he escaped his mother's abuse and lived full time with Kaase's family. During the year Krawczuk lived with the Kaase family, Patricia never visited or even called to check on Krawczuk. Although never contacted, Kaase would have been willing to testify.

Krawczuk's mother Patricia also testified about Krawczuk's upbringing. She described Krawczuk's father as a "brutal man" who drank and beat her while she was pregnant with Krawczuk and Christopher. Patricia was verbally and physically abusive toward all her children, but especially toward Krawczuk because he was an unaffectionate and difficult child. Patricia tried to show him love and affection, but Krawczuk was "aloof."

Patricia had a hard time dealing with Krawczuk's misbehavior. When Krawczuk was only fifteen or sixteen years old, for instance, he was arrested for stealing cars and spent time in a youth detention facility. Patricia beat Krawczuk as a way of disciplining him for his "incorrigible" behavior.

When Patricia found out that Krawczuk was in jail for Staker's murder, she called LeGrande about visiting him. LeGrande seemed surprised to hear from Patricia and never contacted her again regarding Krawczuk's penalty phase trial. Patricia was unsure whether she would have testified during Krawczuk's penalty phase, but she at least would have been willing to talk to LeGrande.

Paul Wise, Krawczuk's former coworker and roommate, testified that Krawczuk was a hard worker but was often moody and occasionally used marijuana. Socially, Wise described Krawczuk as loner and a "follower."

Judith Nelson, Krawczuk's former wife, testified that she and Krawczuk married in 1986, had one child together, and divorced after about a year and a half of marriage. While he was married to Nelson, Krawczuk used marijuana on a daily basis and occasionally took speed. Krawczuk was not very affectionate and had a hard time communicating with her, but Krawczuk also had a good side and at times she enjoyed his company.

Krawczuk told Nelson about the issues he faced during his childhood, including his mother Patricia's abusive behavior. Nelson had a positive relationship with Patricia during her marriage to Krawczuk, but things turned sour after the divorce when Nelson decided to remarry.

Nelson did not think highly of Poirier, Krawczuk's codefendant. Poirier and Krawczuk spent a lot of time together, and Nelson eventually learned that they spent some of this time "doing sex swap things" and burglarizing homes. Although Nelson testified that Poirier always emulated Krawczuk's behavior, she felt that Poirier had more influence in their friendship and was the one who organized their criminal activity.

B. Mental Health Experts

During the 3.850 hearing, Krawczuk also presented the testimony of two mental health experts: Dr. Barry Crown and Dr. Faye Sultan.

***1285** Dr. Crown, a psychologist, testified as an expert in neuropsychology with a special focus on child abuse and drug addiction. Dr. Crown interviewed Krawczuk and administered neuropsychological tests to determine the relationship between his brain function and behavior. Dr. Crown did not review any background materials or previous psychiatric information before evaluating Krawczuk.

Based on his evaluation, Dr. Crown found that Krawczuk had normal intellectual functioning but poor intellectual efficiency, with the critical thinking skills of a ten-year-old and the mental processing skills of a thirteen-year-old. Dr. Crown also found that Krawczuk showed signs of organic brain damage, which was likely related to developmental issues and was aggravated by head trauma and drug and alcohol use. As to statutory mitigators, Dr. Crown opined that at the time of Staker's murder, Krawczuk was under the influence of an extreme mental or emotional disturbance and lacked the capacity to conform his conduct to the requirements of the law.

Dr. Sultan, also a psychologist, testified as an expert in the field of clinical psychology with a focus on the assessment and treatment of victims of abuse. Dr. Sultan met with Krawczuk on seven separate occasions, conducted formal psychological testing, reviewed background materials provided by Krawczuk's postconviction counsel, reviewed Dr. Crown's neuropsychological report, and spoke with several of Krawczuk's family members and friends.

Through her background research, Dr. Sultan learned that Krawczuk suffered severe childhood abuse and frequently ran away from home. Krawczuk told Dr. Sultan that, when he was fifteen or sixteen years old, he was briefly abducted, sexually abused, and beaten by a group of strangers. Dr. Sultan diagnosed Krawczuk with a general cognitive disorder, obsessive-compulsive disorder, and a general personality disorder. Dr. Sultan described Krawczuk as a passive person who was easily influenced and exhibited traits consistent with antisocial personality disorder.

Like Dr. Crown, Dr. Sultan determined that two statutory mitigating factors applied at the time of Staker's murder: Krawczuk was under the influence of an extreme mental or emotional disturbance and he was unable to conform his conduct to the requirements of the law. As to non-statutory mitigators, Dr. Sultan found it relevant that Krawczuk: (1) was abandoned by his father; (2) was isolated during childhood; (3) was not supervised during his childhood;

(4) sustained neuropsychological damage; (5) had mental disorders; (6) endured emotional and physical abuse; (7) experienced depressive symptoms; and (8) suffered sexual abuse.

When asked about Krawczuk's decision not to present mitigating evidence at the penalty phase, Dr. Sultan opined that Krawczuk's mental disorders likely influenced this decision. Dr. Sultan also felt, however, that Krawczuk's thinking was not impaired by Elavil, the antidepressant medication he was taking at the time of his plea hearing.

C. Barbara LeGrande

Trial counsel LeGrande testified about her representation of Krawczuk. LeGrande recalled that Krawczuk asked her not to present mitigation evidence and it was her understanding that Krawczuk was entitled to make that decision on his own. At the time Krawczuk made this decision, LeGrande did not put on the record the full list of witnesses and experts she would have called in mitigation.

As to her investigation of mitigating evidence, LeGrande explained that she had done little mitigation research in advance *1286 of the plea hearing. Other than obtaining a psychiatric evaluation and report from Dr. Keown, LeGrande did not try to find other expert witnesses. LeGrande spoke briefly with Krawczuk's mother and grandmother, but she could not recall the content of these conversations. LeGrande tried to gather more information about Krawczuk's family so that she could talk with them, but stated Krawczuk was not cooperative with this effort and wanted to leave his family out of it.

LeGrande explained that, had Krawczuk allowed her to present a case at the penalty phase, she would have engaged in further investigation of mitigating evidence, including hiring experts and looking into other potential witnesses. LeGrande tried to hire a mitigation expert to assist in this process, but at the plea hearing, Krawczuk dismissed her motion for expert funds. In light of Krawczuk's stated desire not to present a penalty phase case, LeGrande felt that she could not "in good faith ... represent to the Court that [she] needed a mitigation expert."

LeGrande acknowledged that Poirier's relative culpability for the murder and influence over Krawczuk were relevant to Krawczuk's penalty phase proceedings. In fact, she discussed with Krawczuk the possibility of his taking the stand to testify that Poirier had influenced him to participate in the murder. But because Krawczuk was unwilling to testify at the penalty phase proceedings, she did not discuss this relative culpability issue with Krawczuk in great detail. At any rate, because Poirier pled guilty to the murder months after Krawczuk pled guilty, LeGrande had no way of knowing at the time of Krawczuk's penalty phase whether Poirier would receive a sentence that was proportional to his culpability and thus had no reason to explore this issue as it related to mitigation.

Ultimately, because Krawczuk did not wish to make a case at the penalty phase, LeGrande was unable to explain to Krawczuk the details of what mitigating evidence might have been presented on his behalf. Instead, she could only provide Krawczuk with a general conceptual explanation of mitigating evidence and how it might help him avoid the death penalty.

D. State's Evidence

For its part, the State introduced two exhibits. First, the State introduced the psychiatric report of Dr. Robert J. Wald, who performed a psychiatric evaluation to determine whether Krawczuk was competent to testify as a witness in codefendant Poirier's criminal case. Dr. Wald examined Krawczuk in March 1992, after the state trial court sentenced Krawczuk to death.

Dr. Wald found that Krawczuk's intelligence was normal or slightly above and that he exhibited no signs of hallucinations, delusional thinking, paranoia, or suicidal or homicidal thoughts. Krawczuk told Dr. Wald that he felt the

punishment he received fit the crime for which he was convicted and that he stood to gain nothing by testifying against Poirier. Dr. Wald concluded that Krawczuk was competent to testify in Poirier's criminal proceedings.

Second, the State introduced into evidence the transcript of a deposition given by Dr. Keown. Among other things, Dr. Keown stated that, during his meeting with him, Krawczuk emphasized that Poirier led the effort to rob and kill Staker and that he was merely a follower. In Dr. Keown's clinical opinion, Krawczuk was "overstating" Poirier's influence over him.

III. STATE POSTCONVICTION COURT'S DENIAL OF 3.850 MOTION

In a comprehensive order dated January 25, 2010, the state postconviction court denied *1287 Krawczuk's 3.850 motion for postconviction relief. As relevant to this appeal, the state 3.850 court rejected Krawczuk's claim that LeGrande rendered ineffective assistance in the investigation and presentation of mitigating evidence.

At the outset, the state 3.850 court found the testimony of Krawczuk's two mental health experts—Dr. Crown and Dr. Sultan—to be incredible. As to Dr. Crown's conclusions that, at the time of the murder, Krawczuk was under the influence of an extreme mental or emotional disturbance and was unable to conform his conduct to the requirements of the law, the state 3.850 court found that the weight of the evidence so strongly refuted this claim as to render it incredible:

[T]he other evidence including, particularly, Mr. Krawczuk's confession but also including Mr. Krawczuk's letters, the statement and deposition of Gary Sigelmier, the statement of Mr. Poirier, the testimony of the family members and friends, the other mental health professionals, reports and depositions, and other credible evidence in this case so resoundingly refute this opinion as to discredit [it] as well the related opinion that Mr. Krawczuk suffers from organic brain damage.

The state 3.850 court also rejected Dr. Sultan's conclusions that Krawczuk was under the influence of an extreme mental or emotional disturbance and was unable to conform his conduct to the requirements of the law. Although Dr. Sultan testified that she relied extensively on Dr. Crown's evaluations in reaching her own conclusions, the record shows that Dr. Sultan's last meeting with Krawczuk occurred well before Dr. Crown evaluated him. The state 3.850 court also found that Dr. Sultan's conclusions were contrary to the weight of the evidence, which strongly indicated that these statutory mitigating factors did not apply.

A. Krawczuk's Legitimate Waiver

Regarding Krawczuk's decision not to present a penalty phase case, the state 3.850 court recognized that under Florida law, "[a] competent defendant may waive presentation of mitigation evidence." See Hojan v. State, 3 So.3d 1204, 1211 (Fla. 2009) ("Competent defendants who are represented by counsel maintain the right to make choices in respect to their attorneys' handling of their cases. This includes the right to either waive presentation of mitigation evidence or to choose what mitigation evidence is introduced by counsel."). Florida law also provides that, where a defendant seeks to waive the presentation of evidence against the advice of counsel, counsel must inform the trial court on the record of the defendant's decision and indicate what mitigation evidence, if any, is available to be presented. Koon v. Dugger, 619 So.2d 246, 250 (Fla. 1993). The trial court must then require the defendant to confirm on the record that his counsel had discussed these matters with him and that he nonetheless intended to waive the presentation of mitigation evidence. Id.

The state 3.850 court explained, however, that Koon was decided after Krawczuk's sentencing hearing in February 1992 and thus did not bind LeGrande during her representation. In any event, the state 3.850 court noted that the rule announced in Koon is a creature of state law only and that this procedure likely is not required as a matter of federal law. See Anderson v. Sec'y, Dep't of Corr., 462 F.3d 1319, 1330–31 (11th Cir. 2006) ("Although Koon requires counsel to

state on the record what the evidence in mitigation would be ..., '[a] state's interpretation of its own laws or rules provides no basis for federal habeas corpus relief, since no question of constitutional nature is involved.' " (second alteration in original) (citing *1288 McCullough v. Singletary, 967 F.2d 530, 535 (11th Cir. 1992))). It further found that Krawczuk was and is mentally competent and validly waived the presentation of mitigation evidence, stating:

at the time of this case no particular form of record inquiry was required for a defendant to waive mitigation (waive the presentation of evidence) and as it is not subject of serious dispute that Mr. Krawczuk was, and is, a mentally competent man ... who was counseled by his attorney and asked and inquired of by the court and the prosecutor on multiple occasions ... regarding his decision to waive mitigation[,] the basics [sic] requirements for a valid record waiver as they existed at the time of this case have been met.

B. Ineffective Counsel

Turning to Krawczuk's ineffective counsel claim, the state 3.850 court discussed the legal principles in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). It noted that Strickland requires the petitioner to show both that counsel's performance was deficient under the then-prevailing professional norms and that petitioner's case was prejudiced such that, but for counsel's alleged errors, the result of the proceedings would have been different.

As to counsel's performance, the state 3.850 court analyzed LeGrande's representation with respect to her investigation of several mitigation factors. Regarding family and background evidence, it found that before Krawczuk pled guilty, LeGrande had prepared two mitigation witnesses and that Krawczuk "appear[ed] ... reasonably aware of what [they] would testify to." It also found that at the point of entering his plea, Krawczuk "was not just passively not cooperating with any investigation for mitigation but he was active in directing his counsel not to pursue mitigation."

The state 3.850 court stated that the "only excuse that [would] be recognized for failing to investigate family background for mitigation [was] direct unequivocal instructions from the client not to." It determined that LeGrande's performance was deficient for failing to investigate Krawczuk's family history and failing to obtain clear directions from Krawczuk not to pursue family history, stating:

[a]lthough it is probable that given Mr. Krawczuk's position counsel acted reasonably in discontinuing an investigation into his family history the case law is extremely compelling on the need for an unequivocal expression from a defendant not to pursue this type of information. Permitting an investigation for mitigation and refusing to allow presentation of mitigation are closely related but different. In this case the record will not support the unequivocal direction to not investigate the court believes [was] required by the law as it existed at the time in question.

As to all other aspects of LeGrande's investigation—including relative culpability, substance abuse, work ethic, and mental health—the state 3.850 court found no deficiencies in LeGrande's representation.

As to Strickland prejudice, the state 3.850 court outlined the requirements to establish prejudice where a defendant, like Krawczuk, waived the presentation of mitigating evidence. In such circumstances, the state 3.850 court found that the Krawczuk must make three showings: (1) that, had trial counsel conducted a reasonable investigation, she would have discovered mitigating evidence; (2) a reasonable probability that, if he had been advised more fully of the available mitigation evidence, the petitioner would have instructed trial counsel to present the evidence at the penalty phase; and (3) a reasonable probability that, had the available mitigation *1289 evidence been presented, the jury would have recommended a life sentence.

As to the first showing, the state 3.850 court determined that obtaining physical and emotional abuse evidence from Krawczuk's childhood would have been difficult, although not impossible, for LeGrande. Specifically, it noted that this

would have required LeGrande to “rely on Mr. Krawczuk and[,] given his expressed desire not to involve his family[,] that most likely would have been a dead end.” However, “on this record” it could not find that the evidence of family history would not have been “discovered had counsel done a reasonable investigation.” It found that all other evidence of mitigation was known to, developed by, or unhelpful for LeGrande.

As to the second showing, the state 3.850 court found that Krawczuk had not shown “a reasonable probability that if he had been more fully advised about the potential mitigation evidence[,] he would have authorized trial counsel to present such evidence at either the penalty phase trial or at the Spencer hearing.” It noted that “[p]robably the best indication of how Mr. Krawczuk would have treated other mitigation was how he treated the known mitigation.” Namely, Krawczuk was aware of some available mitigating evidence, including Dr. Keown's report and Paul Wise's testimony, but directed LeGrande not to develop it and, after initially conceding admission of Dr. Keown's report, commanded her not to present any mitigation evidence at the penalty phase.

In support of his desire not to present mitigation evidence, Krawczuk “indicated he had personal reasons ... [that he] did not want to put ... on the record.” Likewise, his original acquiescence to introducing Dr. Keown's report was “not a desire that mitigation be considered but that a death sentence not be reversed for a failure to present mitigation.” As additional evidence of his steadfast conviction, Krawczuk waived all of his defensive motions, including LeGrande's motion for a mitigation specialist. In light of the firmness with which Krawczuk insisted that LeGrande not present a case at the penalty phase, the state 3.850 court determined that the discovery of more evidence would not have changed Krawczuk's decision.

As to the third showing, whether Krawczuk established a reasonable probability that the new mitigating evidence would have changed the outcome of the proceedings, the state 3.850 court balanced the aggravating and mitigating evidence. It found that the State had proven these aggravating factors beyond a reasonable doubt: (1) the murder was committed during a robbery and for pecuniary gain; (2) the murder was especially heinous, atrocious, or cruel; and (3) the murder was cold, calculated, and premeditated without any pretense of moral or legal justification. Though the state 3.850 court found no statutory mitigating factors, it did find these non-statutory mitigators: (1) Krawczuk endured an abusive childhood; (2) Poirier received a lesser sentence; (3) Krawczuk had a history of drug and alcohol use; (4) Krawczuk was a hard-working employee; (5) Krawczuk had a less-than-extreme mental or emotional disturbance; and (6) Krawczuk cooperated with law enforcement.

Weighing these factors, the state 3.850 court determined that Krawczuk failed to show a reasonable probability that, had the additional mitigating evidence adduced at the postconviction hearing been presented at the penalty phase, the proceedings would have resulted in a sentence of life imprisonment. It noted twice its confidence “beyond a reasonable doubt that a sentence of death would have been the result regardless.”

*1290 IV. FLORIDA SUPREME COURT AFFIRMS DENIAL OF 3.850 MOTION

On appeal, the Florida Supreme Court affirmed the state postconviction court's denial of Krawczuk's 3.850 motion for postconviction relief.⁵ Krawczuk II, 92 So.3d at 209. As to Krawczuk's claim that LeGrande rendered ineffective assistance of counsel in the investigation and presentation of mitigation evidence, the Florida Supreme Court concluded that the state 3.850 court properly denied this claim. Id. at 203.

⁵ Krawczuk also filed with the Florida Supreme Court a petition for a writ of habeas corpus, which it denied. Krawczuk II, 92 So.3d at 209. Though this habeas petition included an ineffective counsel claim, it related only to his appellate counsel's failure to raise on direct appeal the issue of disparate treatment. Id. at 208.

Before addressing the merits of this claim, the Florida Supreme Court correctly identified the principles governing ineffective assistance of counsel claims. The Florida Supreme Court explained that, to succeed on such a claim, the petitioner must show both deficiency and prejudice:

First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined.

Id. at 202 (quoting *Bolin v. State*, 41 So.3d 151, 155 (Fla. 2010)).

A. Performance

The Florida Supreme Court also explained what is required to show that counsel's performance was deficient, stating:

There is a strong presumption that trial counsel's performance was not deficient. See *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689, 104 S.Ct. 2052. The defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* "[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *Occhicone v. State*, 768 So.2d 1037, 1048 (Fla. 2000).

Id. at 202–03 (quoting *Johnston v. State*, 63 So.3d 730, 737 (Fla. 2011)).

Regarding counsel's obligation to investigate and prepare mitigating evidence, the Florida Supreme Court explained that assessment of the reasonableness of counsel's investigation must include "a context-dependent consideration of the challenged conduct" from counsel's perspective, stating:

[O]ur principal concern in deciding whether [counsel] exercised "reasonable professional judgment" is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence ... was itself reasonable. In assessing counsel's investigation, we must conduct an objective review of their performance, *1291 measured for "reasonableness under prevailing professional norms," which includes a context-dependent consideration of the challenged conduct as seen "from counsel's perspective at the time."

Id. at 203 (quoting *Orme v. State*, 896 So.2d 725, 731 (Fla. 2005)).

The Florida Supreme Court noted that, in cases like Krawczuk's where the defendant instructs counsel not to present mitigating evidence, "trial counsel could not be deemed ineffective for following their client's wishes not to present mitigation." *Id.* at 205; *Brown v. State*, 894 So.2d 137, 146 (Fla. 2004) ("An attorney will not be deemed ineffective for honoring his client's wishes."). At the outset of its decision, the Florida Supreme Court set forth some of the findings that the Florida Supreme Court had affirmed on direct appeal. As to those findings, the Florida Supreme Court noted in particular: that Krawczuk "informed the court that [he] wished to waive the penalty proceeding," that he "forbade [his counsel] from presenting evidence on his behalf" during the penalty phase, and that he "refused to allow counsel to present" the evidence of his family history, which was available from Dr. Keown's report. *Krawczuk II*, 92 So.3d at 199, 205.

The Florida Supreme Court also stated that “the record demonstrates that Krawczuk would not permit his attorney to involve his family.” *Id.* at 205. It stated that “counsel’s ability was limited by the defendant’s desire not to include his family.” *Id.* As a result, the Florida Supreme Court concluded that “counsel’s actions could not be deemed ineffective.” *Id.* (citing *Brown*, 894 So.2d at 146). Thus, the Florida Supreme Court did not agree with the 3.850 court that trial counsel’s performance was deficient as to family history.

B. Prejudice

The Florida Supreme Court also found that Krawczuk had not established prejudice. Although there was significant mitigation evidence available that LeGrande did not discover, the Florida Supreme Court concluded that it was “equally clear that Krawczuk repeatedly insisted that counsel not pursue mitigation and not involve his family.” *Id.* The Florida Supreme Court stated that “the postconviction court found that the information that would have been presented by the family was available through Dr. Keown’s report, which Krawczuk also refused to allow counsel to present” and that “[b]ecause of Krawczuk’s instructions to counsel not to involve his family, we find that Krawczuk cannot establish prejudice.” *Id.*

In other words, Krawczuk had Dr. Keown’s report, which discussed his childhood abuse and family history, but Krawczuk had refused to allow LeGrande to present even this evidence. Thus, the Florida Supreme Court determined that Krawczuk could not establish the requisite prejudice to succeed on this claim about LeGrande’s investigation and presentation of mitigating evidence. *Id.* The Florida Supreme Court did not address the state 3.850 court’s alternative conclusion that all the additional mitigation evidence, even if introduced at trial, would not have led to a different sentence. *See id.*

V. FEDERAL HABEAS PROCEEDINGS

On July 18, 2013, Krawczuk filed a petition in the United States District Court for the Middle District of Florida seeking a writ of habeas corpus under 28 U.S.C. § 2254. The petition asserted four claims, including that LeGrande rendered ineffective assistance of counsel in the investigation and presentation of mitigating evidence.

*1292 On August 15, 2015, the district court denied Krawczuk’s habeas petition in its entirety, including this ineffective counsel claim. The district court did not discuss whether LeGrande’s performance was deficient and addressed only prejudice.⁶ After reviewing the state courts’ decisions and all of the evidence, the district court concluded that Krawczuk had not established prejudice because (1) “[t]he state court reasonably concluded that [Krawczuk] gave LeGrande unmistakable instructions not to present mitigation evidence” and (2) “[n]othing in the record suggests that [Krawczuk] would have changed his directions to counsel had he been more fully informed about mitigating evidence.” The district court pointed out that Krawczuk offered no evidence during the postconviction proceedings indicating that, had he been made aware of all mitigating evidence, he would have instructed counsel differently.

⁶ *See Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069 (holding that a court deciding a claim of ineffective assistance of counsel need not decide the issue of deficiency if the claim can be disposed of solely on the basis of lack of prejudice).

Accordingly, because the Florida Supreme Court had a reasonable basis to deny Krawczuk relief, the district court denied Krawczuk’s ineffective counsel claim. It also denied Krawczuk a certificate of appealability (“COA”). Krawczuk timely filed a notice of appeal.

This Court granted Krawczuk a COA as to one issue: “Whether the Florida state courts’ ruling that counsel provided constitutionally effective assistance in investigating and presenting mitigation evidence at the penalty phase hearing

was contrary to or an unreasonable application of clearly established federal law, or was based on an unreasonable determination of the facts in light of the evidence presented.”⁷

⁷ To the extent that Krawczuk's brief argues that he was denied competent and independent mental health assistance under Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), such a claim is outside the scope of the COA and we do not address it. See Rivers v. United States, 777 F.3d 1306, 1308 n.1 (11th Cir. 2015).

VI. STANDARD OF REVIEW

Under 28 U.S.C. § 2254, as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 (“AEDPA”), our review is limited. A federal court may only grant a writ of habeas corpus to a state prisoner on a claim adjudicated on the merits in a state court where the state court's decision “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,” or “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d).

[1] [2] [3] [4] A state court's decision rises to the level of an unreasonable application of federal law only where the ruling is “objectively unreasonable, not merely wrong; even clear error will not suffice.” Virginia v. LeBlanc, 582 U.S. —, —, 137 S.Ct. 1726, 1728, 198 L.Ed.2d 186 (2017) (per curiam) (quoting Woods v. Donald, 575 U.S. —, —, 135 S.Ct. 1372, 1376, 191 L.Ed.2d 464 (2015) (per curiam)). This standard is “meant to be” a difficult one to meet. Harrington v. Richter, 562 U.S. 86, 102, 131 S.Ct. 770, 786, 178 L.Ed.2d 624 (2011). AEDPA thus “imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt.” Trepal v. Sec'y, Fla. Dep't of Corr., 684 F.3d 1088, 1107 (11th Cir. 2012) (quoting Hardy v. Cross, 565 U.S. 65, 66, 132 S.Ct. 490, 491, 181 L.Ed.2d 468 (2011) (per curiam)). Because we review Krawczuk's ineffective assistance claim through the *1293 lenses of both Strickland and AEDPA, our analysis is “doubly” deferential. Harrington, 562 U.S. at 105, 131 S.Ct. at 788.

[5] [6] Pursuant to AEDPA, we may only grant relief where the state court's ruling contained an error so clear that fair-minded people could not disagree about it. Wright v. Sec'y, Fla. Dep't of Corr., 761 F.3d 1256, 1277 (11th Cir. 2014). “We review de novo the district court's decision about whether the state court acted contrary to clearly established federal law, unreasonably applied federal law, or made an unreasonable determination of fact.” Trepal, 684 F.3d at 1107 (quoting Johnson v. Upton, 615 F.3d 1318, 1330 (11th Cir. 2010)).

VII. STRICKLAND PRINCIPLES

[7] On appeal, Krawczuk contends that the Florida Supreme Court unreasonably applied Strickland and its progeny and made unreasonable factual determinations in denying his ineffective counsel claim as to LeGrande's investigation and presentation of mitigation evidence. Under Strickland, Krawczuk must show (1) that his attorney's performance was deficient and (2) that this deficient performance prejudiced his defense. 466 U.S. at 687, 104 S.Ct. at 2064. We discuss these Strickland principles with emphasis on decisions where a defendant instructed counsel not to present mitigation evidence.

A. Performance

[8] [9] In determining whether counsel's performance was deficient, we ask whether counsel exhibited “objectively reasonable attorney conduct under prevailing professional norms.” Pooler v. Sec'y, Fla. Dep't of Corr., 702 F.3d 1252, 1269 (11th Cir. 2012) (quoting Johnson v. Upton, 615 F.3d 1318, 1330 (11th Cir. 2010)). The relevant inquiry is “whether,

in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.” Strickland, 466 U.S. at 690, 104 S.Ct. at 2066. We must “indulge a strong presumption” that counsel exercised reasonable professional judgment. Pooler, 702 F.3d at 1269 (quoting Rhode v. Hall, 582 F.3d 1273, 1280 (11th Cir. 2009)).

[10] [11] [12] [13] In death penalty cases, trial counsel is obliged to investigate and prepare mitigation evidence for his client. See Porter v. McCollum, 558 U.S. 30, 39–40, 130 S.Ct. 447, 453, 175 L.Ed.2d 398 (2009). Because the attorney acts based on information he receives from the defendant, however, whether counsel acted reasonably depends in part on the actions or statements of the defendant. See Strickland, 466 U.S. at 691, 104 S.Ct. at 2066 (“The reasonableness of counsel’s actions may be determined or substantially influenced by the defendant’s own statements or actions.”). Thus, “‘what investigation decisions are reasonable depends critically’ upon the information the defendant furnishes to his counsel.” Pooler, 702 F.3d at 1269 (quoting Strickland, 466 U.S. at 691, 104 S.Ct. at 2066), “[T]he scope of the duty to investigate mitigation evidence is substantially affected by defendant’s actions, statements, and instructions.” Cummings v. Sec’y, Dep’t of Corr., 588 F.3d 1331, 1357 (11th Cir. 2009).

[14] [15] When a competent defendant clearly instructs counsel either not to investigate or not to present any mitigating evidence, “the scope of counsel’s duty to investigate is significantly more limited than in the ordinary case.” Id. at 1358–59. This Court has recognized, and we now hold, that “the duty to investigate ‘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.’ ” Id. at 1357 (quoting *1294 Rutherford v. Crosby, 385 F.3d 1300, 1313 (11th Cir. 2004)); see Blankenship v. Hall, 542 F.3d 1253, 1277 (11th Cir. 2008) (“Significant deference is owed to failures to investigate made under a client’s specific instructions not to involve his family.”); Newland v. Hall, 527 F.3d 1162, 1202 (11th Cir. 2008) (“We have also emphasized the importance of a mentally competent client’s instructions in our analysis of defense counsel’s investigative performance under the Sixth Amendment.”).

B. Prejudice

[16] [17] To establish prejudice, the defendant must show that there is a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Strickland, 466 U.S. at 694, 104 S.Ct. at 2068. When deciding whether the defendant has shown prejudice, we must “evaluate the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding,” and reweigh it with the aggravating evidence. Williams v. Taylor, 529 U.S. 362, 397–98, 120 S.Ct. 1495, 1515, 146 L.Ed.2d 389 (2000).

[18] However, “[a] competent defendant’s clear instruction not to investigate or present mitigation evidence also impacts the prejudice prong of the ineffective assistance test.” Cummings, 588 F.3d at 1359. If the defendant affirmatively “instructed his counsel not to offer any mitigating evidence,” then “counsel’s failure to investigate further could not have been prejudicial under Strickland.” Schriro v. Landrigan, 550 U.S. 465, 475, 127 S.Ct. 1933, 1941, 167 L.Ed.2d 836 (2007).

[19] Rather, 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 mitigation 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. Landrigan, 550 U.S. at 481, 127 S.Ct. at 1944; see Pope v. Sec’y, Fla. Dep’t of Corr., 752 F.3d 1254, 1266 (11th Cir. 2014) (concluding that a capital defendant who instructs his counsel not to present mitigating evidence must satisfy these two requirements to show prejudice); Gilreath, 234 F.3d at 551–52 (adopting these two requirements even before the Landrigan decision). The defendant bears the burden of establishing both elements. Strickland, 466 U.S. at 696, 104 S.Ct. at 2069; Pope, 752 F.3d at 1267.

We now apply these Strickland and Landrigan principles, which in Krawczuk's case begins and ends with prejudice. Strickland, 466 U.S. at 697, 104 S.Ct. at 2052 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice ... that course should be followed.").

C. The Florida Supreme Court Reasonably Determined Krawczuk Instructed LeGrande Not to Present Mitigating Evidence

[20] Krawczuk's instructions to his counsel regarding the penalty phase are pivotal to our prejudice analysis. We explain why the Florida Supreme Court reasonably determined that Krawczuk instructed his counsel not to present mitigating evidence.

The record evidence overwhelmingly supports the state court's decision. For starters, at three separate judicial proceedings, Krawczuk repeatedly insisted that he did not want mitigation evidence presented. For example, at his plea hearing, *1295 Krawczuk clearly communicated his desire not to present mitigating evidence and affirmatively dismissed his counsel's motion for funds to hire a mitigation expert. At that same hearing, LeGrande stated that Krawczuk had instructed her not to present mitigating evidence despite her strong advice to the contrary. LeGrande told the court she had prepared two mitigation witnesses but Krawczuk had forbidden her to call these witnesses and was "thwarting [her] efforts to defend [him] in the way [she felt was] necessary." The state trial court was convinced that Krawczuk was competent during this hearing.

At this time, Krawczuk had Dr. Keown's report that contained details of Krawczuk's abusive childhood, military psychiatric report, and past encounters with the law. LeGrande informed the court she had told Krawczuk that she believed it was in his best interest to call Dr. Keown but Krawczuk had commanded her not to call him.

After the plea hearing, in a letter dated September 30, 1991 to LeGrande, Krawczuk again confirmed that he did not wish to present mitigating evidence, stating that his goal was to receive a death sentence. Krawczuk's letter indicated his understanding that he could more easily secure a death sentence by ensuring that the aggravating circumstances outweighed any evidence in his favor.

The penalty phase before the jury was no different, as Krawczuk once again averred that he wished not to present mitigating evidence and that he was instructing LeGrande not to participate in the penalty phase proceedings. The one concession Krawczuk made to his lawyer's wishes was calculated to ensure a death sentence. Krawczuk allowed LeGrande to make a closing argument but only "for the purpose of preventing a reversal on the fact that no mitigating circumstances [were] introduced." Krawczuk also declined to testify.⁸

⁸ Before the jury entered the courtroom at the penalty hearing on February 5, 1992, prompting by the court led Krawczuk to state that he was "willing to let [LeGrande] present mitigating evidence, and that "part of [Dr. Keown's] report would be good." But this concession was quickly followed by a strong caveat. LeGrande relayed to the court that Krawczuk's "desire to have [the report] admitted has nothing to do with attempting to sway the jury on mitigating circumstances." Krawczuk still "desire[d] to have the death penalty imposed ... [and was] just attempting to prevent tying [LeGrande's] hands to the point ... that the Appellate Court would overturn a death penalty."

When questioned by the trial court, Krawczuk confirmed his strategy. Regardless, this permission was short lived. When the court agreed to admit Dr. Keown's report, Krawczuk told LeGrande that he had changed his mind. The court then asked Krawczuk if "that [was his] final word on the matter," to which Krawczuk responded, "Yes, it is." Krawczuk also affirmatively replied when the court again sought clarification that Krawczuk did not "want to present any mitigating evidence [or] ... testify as to additional mitigating evidence." Finally, Krawczuk confirmed that he understood the consequences of his actions and that he wished to waive closing argument.

Once again, at the subsequent Spencer sentencing hearing before the trial judge, LeGrande stated that Krawczuk had instructed her not to present any mitigating evidence. Krawczuk again refused to introduce Dr. Keown's report or provide his own comments in support of mitigation.

In light of this substantial evidence, the Florida Supreme Court's determination, that Krawczuk instructed his counsel not to present mitigating evidence, was not an unreasonable determination of the facts. Given this finding, we next explain why the Florida Supreme Court's ultimate decision—that Krawczuk had not established prejudice—was not contrary to or an unreasonable application of clearly established law.

***1296 D. Krawczuk Did Not Satisfy Landrigan's First Requirement**

[21] To establish prejudice, Krawczuk must satisfy the first Landrigan requirement: a reasonable probability that, had he been more fully advised about the available mitigation evidence, he would have allowed counsel to present it on his behalf. Landrigan, 550 U.S. at 481, 127 S.Ct. at 1944; Strickland, 466 U.S. at 696, 104 S.Ct. at 2069. Krawczuk's pattern of obstruction gave the Florida Supreme Court every reason to determine that Krawczuk could not show prejudice. Krawczuk rejected his counsel's presentation of mitigation evidence at three separate judicial proceedings, openly sought the death penalty, and repeatedly undercut LeGrande's strategy. His actions were not taken in ignorance. LeGrande had advised Krawczuk of the importance of mitigation evidence, and Krawczuk possessed Dr. Keown's report.

Later, during the 3,850 proceedings, Krawczuk presented no evidence indicating that, had he been made aware of the available mitigation evidence before the penalty phase, he would have allowed LeGrande to present it. Notably, 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.

[22] In this appeal, Krawczuk contends that the Florida Supreme Court unreasonably applied Strickland by overlooking evidence indicating that there was a reasonable probability that he would have allowed the presentation of mitigation evidence. 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. As this Court recognized in Pope, however, the petitioner's burden to prove prejudice, as required under Strickland and Landrigan, cannot be met with evidence showing merely that the petitioner cooperated with counsel's efforts to investigate his personal background and that he at one point was open to presenting some mitigation evidence. Pope, 752 F.3d at 1266–67.

[23] Rather, Krawczuk must “affirmatively establish” that he would have allowed the presentation of the undiscovered mitigation evidence. Id. at 1267. To hold that evidence of cooperation alone is sufficient would be to “reverse[] [Krawczuk's] burden.” Id. The record as a whole gave the Florida Supreme Court ample grounds to conclude that Krawczuk had no interest in actually employing any mitigation evidence. He repeatedly stated that he sought the death penalty, wished to avoid reversal on appeal, and opposed the presentation of mitigation evidence. If anything, Krawczuk's early cooperation in producing mitigation evidence makes his later suppression of this information all the more voluntary and meaningful.

Simply put, because Krawczuk did not offer evidence affirmatively showing that he would have been willing to allow LeGrande to present the mitigation evidence that was uncovered during the 3,850 proceedings, he has not satisfied Landrigan's first requirement and is not entitled to habeas relief. See Landrigan, 550 U.S. at 481, 127 S.Ct. at 1944; Strickland, 466 U.S. at 696, 104 S.Ct. at 2069; Pope, 752 F.3d at 1266–67.

E. Krawczuk Did Not Satisfy Landrigan's Second Requirement

[24] Even under *de novo* review, we hold that Krawczuk has failed to satisfy *1297 *Landrigan*'s second prejudice requirement that a petitioner must establish a reasonable probability that, had the available mitigating evidence been presented at the penalty phase, he would have received a life sentence instead of the death penalty. See *Strickland*, 466 U.S. at 696, 104 S.Ct. at 2069; *Landrigan*, 550 U.S. at 481, 127 S.Ct. at 1944. As an alternative and independent ground for the denial of Krawczuk's ineffective counsel claim, we conclude that, after balancing the totality of the available mitigation evidence against the aggravating evidence, Krawczuk has not shown that he would have received a different sentence had the available mitigation evidence been presented.

The state trial court found three statutory aggravating factors: (1) the murder was committed during a robbery and for pecuniary gain; (2) the murder was especially heinous, atrocious, or cruel; and (3) the murder was cold, calculated, and premeditated without any pretense of moral or legal justification. Krawczuk does not argue that these findings were error.

As to statutory mitigating factors, we recognize that Krawczuk's mental health experts, Dr. Crown and Dr. Sultan, testified that Krawczuk was under the influence of an extreme mental or emotional disturbance and was incapable of conforming his conduct to the requirements of the law. However, the state 3.850 court discounted the testimony of both mental health experts, and Krawczuk does not challenge this credibility determination as unreasonable.

This leaves only Krawczuk's non-statutory mitigating factors. We further recognize that there is evidence that Krawczuk: (1) was abandoned by his father; (2) was isolated during childhood; (3) was not supervised during his childhood; (4) sustained neuropsychological damage; (5) had mental disorders; (6) endured emotional and physical abuse; (7) experienced depressive symptoms; and (8) suffered sexual abuse on one occasion by strangers.

However, under *de novo* review, we readily conclude that Krawczuk failed to establish a reasonable probability that, had he presented the above mitigating evidence, the outcome of the proceedings would have been different. See *Landrigan*, 550 U.S. at 481, 127 S.Ct. at 1944; *Williams*, 529 U.S. at 397–98, 120 S.Ct. at 1515. In reaching this conclusion, we weigh the totality of the mitigating evidence against the aggravating factors, considering the substantial weight due to aggravation in light of the brutal nature of Staker's murder.

Though the mitigating evidence discovered after Krawczuk's sentencing would have painted a more robust picture of the emotional and physical abuse and tragic difficulties that Krawczuk faced during his childhood, the sentencing judge was already aware, from Dr. Keown's report, that Krawczuk was subjected to some amount of serious emotional and physical abuse during his life. The more fulsome details of these childhood difficulties would not have been sufficient to overcome the severe aggravation inherent in the nature of Staker's murder. The evidence adduced at the penalty phase, and especially through Krawczuk's confession, establish that he planned for several days to murder Staker with his own bare hands and that he did so not only to profit from selling goods stolen from Staker's home, but also because of his disdain for Staker's sexual preferences. The method of Krawczuk's crime was particularly brutal. Krawczuk choked Staker for ten minutes before twice pouring drain cleaner down Staker's throat and taping a cloth over his mouth. This Court has upheld death sentences in other gruesome murder cases. See, e.g., *Boyd v. Allen*, 592 F.3d 1274, 1303–04 (11th Cir. 2010); *1298 *Clisby v. State*, 26 F.3d 1054, 1057 (11th Cir. 1994); *Thompson v. Wainwright*, 787 F.2d 1447, 1453–54 (11th Cir. 1986). Notably, there is no evidence of intellectual deficiency here, but rather powerful and substantial evidence of a carefully planned and brutal torture of Staker. Krawczuk's cruelty and premeditation make it unlikely that he would have received a different sentence.

In light of all the available evidence considered as a whole, it is not reasonably probable that the presentation of Krawczuk's entire mitigating evidence would have resulted in the imposition of a life sentence rather than the death penalty. In these circumstances, the presentation of new mitigating evidence “would barely have altered [Krawczuk's] sentencing profile.” See *Strickland*, 466 U.S. at 700, 104 S.Ct. at 2071.

On appeal, Krawczuk argues that the Florida Supreme Court failed to conduct any balancing of all mitigating and aggravating factors, and thus unreasonably applied Strickland in making its ultimate prejudice determination. See Porter v. McCollum, 558 U.S. 30, 42–43, 130 S.Ct. 447, 454–55, 175 L.Ed.2d 398 (2009). It is true, as Krawczuk notes, that the Florida Supreme Court did not explicitly address the available mitigation evidence or weigh it against the aggravating evidence in reaching its prejudice decision. But this seems to be the case because the Florida Supreme Court determined that Krawczuk would not have allowed his counsel to present mitigation evidence. Krawczuk II, 92 So.3d at 205.

Krawczuk's failure to meet this first prejudice requirement under Landrigan is sufficient to support the Florida Supreme Court's ultimate determination that Krawczuk did not establish prejudice. The Florida Supreme Court thus did not need to address the second requirement of the Landrigan prejudice analysis, which requires the petitioner to show that, had the mitigating evidence been presented, the outcome of the proceedings would have been different. Accordingly, because Krawczuk did not establish a reasonable probability that he would have allowed the presentation of mitigating evidence, the Florida Supreme Court did not act unreasonably by failing to weigh the totality of the mitigating and aggravating evidence. Where it is clear that mitigating evidence would not have actually been presented to the jury, that alone means there is no prejudice. See Gilreath, 234 F.3d at 551 n.12 (“If Petitioner would have precluded [the] admission [of mitigating evidence] in any event, Petitioner was not prejudiced by anything that trial counsel did.”).

In sum, on this record and even under de novo review, we hold that Krawczuk has not shown a reasonable probability that, had he presented all mitigating evidence, the outcome of the proceedings would have been different.

F. The Decision of the Florida Supreme Court Was Not Unreasonable as to Investigation of Mitigating Evidence

Before concluding, we address Krawczuk's several separate claims about his trial counsel's investigation and why they are immaterial and irrelevant to the prejudice analysis.

[25] Krawczuk argues that the Florida Supreme Court made an unreasonable determination of fact by concluding that Krawczuk instructed LeGrande not to investigate mitigating evidence. In particular, Krawczuk points to the Florida Supreme Court's statements that “Krawczuk would not permit his attorney to involve his family” and that he “repeatedly insisted that counsel not pursue mitigation and not involve his family.” Krawczuk II, 92 So.3d at 205. According to Krawczuk, these determinations made by the Florida *1299 Supreme Court are at odds with the state 3.850 court's findings that “the record will not support the unequivocal direction to not investigate” mitigating evidence and that “counsel's performance was deficient in failing to pursue further investigation of the family history or to obtain clear direction from Mr. Krawczuk that she was not to do so.”

The problem for Krawczuk is the issue of LeGrande's investigation of mitigating evidence is not essential or even material to the Florida Supreme Court's conclusion that Krawczuk failed to establish prejudice. Given the record shows Krawczuk told his counsel not to present mitigation evidence, this precludes any need to examine the scope of counsel's investigation.

[26] “[I]f a petitioner ‘instructed his counsel not to offer any mitigating evidence,’ then ‘counsel's failure to investigate further could not have been prejudicial under Strickland.’” Pope, 752 F.3d at 1265 (quoting Landrigan, 550 U.S. at 475, 127 S.Ct. at 1940–41). “This principle rests on the theory that an obstructionist client would have prevented the introduction of any mitigation evidence that may have been discovered from a fuller search.” Pope, 752 at 1265–66. The Supreme Court has never held that trial counsel must still undertake to investigate mitigating evidence where a competent defendant affirmatively and repeatedly instructs his attorney not to present mitigating evidence because he wants the death sentence. Rather, under Landrigan, the first requirement assumes that a defendant was more fully advised of the mitigation evidence and asks whether the defendant has shown he would have allowed counsel to present it. See 550 U.S. at 479–81, 127 S.Ct. at 1942–44. Krawczuk has not satisfied that requirement.

The Supreme Court also has “never imposed an ‘informed and knowing’ requirement upon a defendant's decision not to introduce evidence.” Id. at 479, 127 S.Ct. 1933. Therefore, because Krawczuk issued unmistakable instructions to his

attorney not to present any mitigation evidence, his trial counsel's lack of investigation is immaterial to the prejudice analysis.

Furthermore, while Krawczuk's instructions regarding the investigation of mitigating evidence are relevant to the deficiency prong of the Strickland analysis, the Florida Supreme Court's decision rested not on the deficiency vel non of counsel's performance, but rather on the independent conclusion that Krawczuk failed to establish prejudice. Krawczuk II, 92 So.3d at 205. For purposes of establishing prejudice under the circumstances presented here, the inquiry depends only on (1) whether the defendant instructed his counsel not to present mitigating evidence and (2) whether the defendant has satisfied the two Landrigan requirements. See Landrigan, 550 U.S. at 481, 127 S.Ct. at 1944 (concluding that the petitioner was not entitled to habeas relief because the petitioner "would not have allowed counsel to present any mitigating evidence" and "the mitigating evidence he seeks to introduce would not have changed the result" (emphasis added)).

The distinction between instructions not to investigate and instructions not to present mitigating evidence is underscored by the United States Supreme Court's above-quoted observation in Landrigan that, if the defendant "instructed his counsel not to offer any mitigating evidence," then "counsel's failure to investigate further could not have been prejudicial under Strickland," Id. at 475, 127 S.Ct. at 1941; see Allen v. Sec'y, Fla. Dep't of Corr., 611 F.3d 740, 763-64 (11th Cir. 2010) (applying Landrigan and concluding that, in light of the defendant's decision not to present mitigating evidence, counsel's failure to *1300 conduct pre-waiver investigation of mitigating evidence was not prejudicial). To some extent, Krawczuk's reply brief acknowledges the distinction, stating that issues pertaining to investigation of mitigation and presentation of mitigation "are closely related but different."

Accordingly, whether or not the Florida Supreme Court unreasonably determined that Krawczuk instructed LeGrande not to investigate mitigating evidence is not relevant to the outcome of the prejudice analysis in his case. What matters for purposes of prejudice is whether Krawczuk instructed counsel not to present mitigating evidence.

[27] Relatedly to the issue of LeGrande's investigation of mitigating evidence, we also reject Krawczuk's argument that his waiver of the opportunity to present mitigation evidence was not sufficiently informed and knowing because LeGrande conducted only a limited pre-waiver investigation of mitigating evidence. In Landrigan, the United States Supreme Court noted that it has "never imposed an 'informed and knowing' requirement upon a defendant's decision not to introduce evidence." 550 U.S. at 479, 127 S.Ct. at 1942. Krawczuk identifies no Supreme Court authority post-Landrigan indicating that a competent capital defendant's decision not to present any mitigating evidence may be informed or knowing only if trial counsel first thoroughly or even adequately investigates the mitigating evidence and tells her client about it. To the contrary, there is no such investigation requirement in this type of case where the defendant instructs his counsel not to present mitigation evidence.

VIII. CONCLUSION

For all of the foregoing reasons, we conclude that Krawczuk is not entitled to habeas relief on his ineffective assistance of counsel claim as to mitigating evidence in the penalty phase and affirm the district court's denial of Krawczuk's § 2254 petition.

AFFIRMED.

MARTIN, Circuit Judge, concurring in the judgment:

I concur in the result reached by the majority because binding circuit precedent precludes relief for Mr. Krawczuk here.¹ This Court's rule is that a defendant who instructs his attorney not to present mitigating evidence at trial "must make two showings" to demonstrate prejudice in support of an ineffective assistance of counsel claim. Gilreath v. Head, 234 F.3d 547, 551 (11th Cir. 2000). First, the defendant must show "a reasonable probability that—if [he] had been advised more fully about [mitigating] evidence or if trial counsel *1301 had requested a continuance—[he] would have authorized trial counsel to permit such evidence at sentencing." Id. at 551. Second, he must show that "if such evidence had been presented at sentencing, a reasonable probability exists that the jury would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Id. at 552 (quotation omitted). My review of the record reflects that Mr. Krawczuk failed to make these showings.

¹ I have some doubt that the Florida Supreme Court's decision warrants deference under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(d). The Florida Supreme Court based its decision—at least in part—on Mr. Krawczuk's "repeated[] insist[ence] that counsel not pursue mitigation and not involve his family." Krawczuk v. State, 92 So.3d 195, 205 (Fla. 2012). 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." My doubts make no difference to Mr. Krawczuk, however. Even if we set aside the Florida Supreme Court decision and conduct our own de novo review of his claims, Mr. Krawczuk still would not, in my view, win this appeal.

This Court has said the rule established in Gilreath "is consistent with" the Supreme Court's decision in Schriro v. Landrigan, 550 U.S. 465, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007).² Cummings v. Sec'y for Dep't of Corr., 588 F.3d 1331, 1360 (11th Cir. 2009). Therefore, Mr. Krawczuk can succeed on his ineffective assistance claim only if he demonstrates a reasonable probability that, if he had been more fully advised about the mitigating evidence and its significance, he would have allowed trial counsel to present the evidence at sentencing. Mr. Krawczuk presented no such evidence. That means, under the law of this circuit, he cannot meet his burden to show prejudice under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

² Of course, saying a rule established by our Court is consistent with Supreme Court precedent is different from saying that the rule is required by Supreme Court precedent. I fear the majority treats Gilreath's two-part prejudice standard as being required under Landrigan in every case where a defendant tells his lawyer he does not want to present mitigation. See Maj. Op. at 1294, 1295. The Supreme Court's decision in Landrigan was not so broad. Mr. Landrigan actively interfered with his counsel's efforts to present mitigation by "repeatedly [interrupting] when counsel tried to proffer anything that could have been considered mitigating," regardless of its form. Landrigan, 550 U.S. at 476, 127 S.Ct. at 1941 (emphasis added). Applying AEDPA's deferential standard of review, the Supreme Court decided that the state court reasonably determined "that Landrigan would have undermined the presentation of any mitigating evidence that his attorney might have uncovered." Id. at 477, 127 S.Ct. at 1941. Thus the Supreme Court held, in turn, that the District Court did not abuse its discretion when it found that Mr. Landrigan would have refused to allow his counsel to present any mitigation whatsoever and for that reason failed to show prejudice. Id. at 477, 127 S.Ct. at 1942. Landrigan did not, however, establish a rule that if any defendant tells his lawyer he wants no mitigation presented, he can never show prejudice under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), unless he satisfies the two-part test required under Gilreath. See Blystone v. Horn, 664 F.3d 397, 424–26 (3d Cir. 2011) (limiting Landrigan to cases where the defendant has demonstrated a strong determination not to present any mitigating evidence, and concluding "[t]he fact that [the defendant] chose to forego the presentation of his own testimony and that of [] two family members ... simply does not permit the inference that, had counsel competently investigated and developed expert mental health evidence and institutional records, [the defendant] would have also declined their presentation"). To 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. I also disagree with the majority's suggestion that 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. See Maj. Op. at 1288–89. Landrigan never addressed the performance prong of Strickland, and so it did nothing to alter trial counsel's perennial "obligation to conduct a thorough investigation of the defendant's background." Williams v. Taylor, 529

U.S. 362, 396, 120 S.Ct. 1495, 1515, 146 L.Ed.2d 389 (2000). Again however, even setting these problems aside, I don't believe Mr. Krawczuk can prevail in this appeal.

Because Mr. Krawczuk's failure to present evidence that he would have allowed *1302 presentation of a mitigation case is dispositive of his claim, there is no need for the panel to reach the second prong of the prejudice inquiry. See Conner v. GDCP Warden, 784 F.3d 752, 769 & n.17 (11th Cir. 2015). The majority's discussion of this topic is therefore unnecessary. I mention this because I respectfully disagree with how the majority resolved this issue, once it undertook to decide it. Like the majority, I look at this question *de novo*. See Maj. Op. at 1297. For me, there is certainly a reasonable probability that, if the available mitigation evidence had been presented, Mr. Krawczuk would have received a life sentence.³

3 In reviewing the record in this case, I became troubled by an issue related to Mr. Krawczuk's failure to present a mitigation case, which is not before the court in this appeal. There is an indication that Mr. Krawczuk may have been misguided by his trial counsel's statements, to think that he would only be allowed to present mitigation evidence if he agreed to testify. In a letter dated March 8, 1991, counsel advised Mr. Krawczuk on what she believed were potential mitigating factors, and wrote that some of the mitigation "will depend upon your testimony at trial and the findings of Dr. Keown." Then at the jury trial on penalty, when the trial judge asked if counsel would be making a closing argument, she replied that no mitigating evidence had been presented and so "it would be necessary for [Mr. Krawczuk] to take the stand to present the mitigating evidence" in order for her to make an argument based on mitigation.

There is, of course, no requirement under state or federal law that a defendant must testify in order to present mitigation evidence in his capital trial. Therefore, if trial counsel improperly indicated to Mr. Krawczuk that he was required to testify at the penalty phase in order to introduce mitigation, this would constitute deficient performance. See Hinton v. Alabama, 571 U.S. —, 134 S.Ct. 1081, 1089, 188 L.Ed.2d 1 (2014) ("An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under Strickland.").

At the postconviction evidentiary hearing, several witnesses testified to the "catastrophic" emotional and physical abuse Mr. Krawczuk experienced throughout his childhood. This testimony described the constant physical violence Mr. Krawczuk received at the hands of his "brutal" mother. There was testimony that she used Mr. Krawczuk as her "whipping post" and punished him by holding his hand to a hot stove burner. Witnesses also told of the severe emotional abuse and neglect Mr. Krawczuk experienced. His mother made fun of his ears, calling him "Dumbo, the flying fucking elephant," and she "never showed any kind of affection or love to [him.]" When Mr. Krawczuk would sometimes soil or wet himself as a child, his mother would force him to wear the soiled garments on his head or, on one occasion, stand in front of his home wearing a sign that said "I do my doodie in my pants every day."

Mr. Krawczuk also presented testimony from two mental health experts. Dr. Barry Crown testified that Mr. Krawczuk had brain damage resulting in impaired reasoning and judgment and that his mental processing abilities were at the level of a thirteen-year-old. According to Dr. Crown, these mental problems impaired Mr. Krawczuk's ability to understand the long-term effects of his behavior. Dr. Faye Sultan testified that Mr. Krawczuk suffered from a cognitive disorder that resulted in decreased impulse control, impaired reasoning, and learning problems. She testified that this "overriding blanket of dysfunction" influenced "all of his behavior."

None of this testimony was rebutted. And all of it was clearly relevant mitigation. *1303 See Porter v. McCollum, 558 U.S. 30, 41–43, 130 S.Ct. 447, 454–55, 175 L.Ed.2d 398 (2009) (considering evidence of defendant's "brain abnormality and cognitive defects" as relevant mitigation); Williams v. Taylor, 529 U.S. 362, 398, 120 S.Ct. 1495, 1515, 146 L.Ed.2d 389 (2000) ("[T]he graphic description of Williams[s] childhood, filled with abuse and privation ... might well have influenced the jury's appraisal of his moral culpability."); Penry v. Lynaugh, 492 U.S. 302, 319, 109 S.Ct. 2934, 2947, 106 L.Ed.2d 256 (1989) ("[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." (quotation omitted)).

Yet the jury who recommended that Mr. Krawczuk be put to death heard nothing in mitigation—not even a bare plea for mercy from trial counsel. Mr. Krawczuk's lawyer spoke not a word to the jury about what penalty to impose. At the Spencer hearing before the trial judge,⁴ counsel again offered no mitigating evidence or argument. That meant all the sentencing judge had to aid him in arriving at the sentence for Mr. Krawczuk was the presentence investigation report and a seven-page report from Dr. Richard Keown, who was the psychiatrist who conducted a pretrial competency evaluation. The psychiatric report referred to Mr. Krawczuk's abusive upbringing, but—as the state postconviction court found—it did not “contain the quality of the evidence regarding his mother's abuse that was later brought out in the evidentiary hearing.”

⁴ Under Florida law, a Spencer hearing gives the defendant, his counsel, and the State the opportunity to be heard and to present additional evidence to the sentencing judge after the jury has offered its recommendation. See Spencer v. State, 615 So.2d 688, 691 (Fla.1993) (per curiam).

Thus, this is not a case where the new mitigation evidence “would barely have altered the [defendant's] sentencing profile.” Strickland, 466 U.S. at 700, 104 S.Ct. at 2071. Under Florida law at the time, the trial judge was required to give the jury's advisory verdict on the sentence “great weight.” See Hurst v. Florida, 577 U.S. —, 136 S.Ct. 616, 620, 193 L.Ed.2d 504 (2016) (quotation omitted).⁵ At trial, the jury heard nothing that would humanize Mr. Krawczuk or help put into context the horrible crime he committed. If the available mitigation had been presented, the jury would have learned of “the kind of troubled history [the Supreme Court] ha[s] declared relevant to assessing a defendant's moral culpability.” Wiggins v. Smith, 539 U.S. 510, 535, 123 S.Ct. 2527, 2542, 156 L.Ed.2d 471 (2003). It would have also learned of Mr. Krawczuk's brain damage and mental problems. I recognize that Mr. Krawczuk committed a terrible crime. But if the jury had heard the available mitigating evidence, there is surely a reasonable probability that it would have recommended a life sentence. See Porter, 558 U.S. at 41–44, 130 S.Ct. at 453–55 (considering the probable effect of the unrepresented mitigation on the jury's recommended sentence). This recommendation would have been entitled to “great weight” *1304 by the sentencing judge, who would have also heard the true extent of the abuse Mr. Krawczuk suffered throughout his childhood and learned of his mental impairments. On this record, I believe Mr. Krawczuk has demonstrated a reasonable probability of a different outcome. Because the majority and I come to a different conclusion on the issue of whether Mr. Krawczuk was prejudiced by having no mitigation case presented, I cannot join its opinion.

⁵ Florida has since amended its capital sentencing scheme, and the Florida Supreme Court has held that “in order for the trial court to impose a sentence of death, the jury's recommended sentence of death must be unanimous.” Hurst v. State, 202 So.3d 40, 44 (Fla. 2016) (per curiam).

As to whether Mr. Krawczuk can prevail in this appeal, however, I must agree with the majority that he cannot.

All Citations

873 F.3d 1273, 27 Fla. L. Weekly Fed. C 329

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 15-15068-P

ANTON J. KRAWCZUK,

Petitioner - Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent - Appellee.

Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: WILLIAM PRYOR, MARTIN and HULL, Circuit Judges.

PER CURIAM:

The Appellant's Petition for Rehearing is DENIED and no Judge in regular service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Appellant's Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Frank M. Hull
UNITED STATES CIRCUIT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

ANTON J. KRAWCZUK,

Petitioner,

v.

Case No: 2:13-cv-559-FtM-29CM

SECRETARY, FLORIDA
DEPARTMENT OF CORRECTIONS
and ATTORNEY GENERAL, STATE
OF FLORIDA,

Respondents.¹

OPINION AND ORDER

This case is before the Court on a petition for habeas corpus relief filed by death row inmate Anton Krawczuk ("Petitioner" or "Defendant") (Doc. 1, filed July 18, 2013). Upon consideration of the petition, the Court ordered Respondent to show cause why the relief sought should not be granted (Doc. 13). Thereafter, Respondent filed a response in compliance with this Court's instructions and with the Rules Governing Section 2254 Cases in the United States District Courts (Doc. 25). Petitioner filed a reply (Doc. 30).

¹ When the petitioner is incarcerated and challenges his present physical confinement "the proper respondent is the warden of the facility where the prisoner is being held, not the Attorney General or some other remote supervisory official." Rumsfeld v. Padilla, 542 U.S. 426, 436 (2004) (citations omitted). In Florida, the proper respondent in this action is the Secretary of the Florida Department of Corrections. Therefore, the Florida Attorney General will be dismissed from this action.

Petitioner raises four claims for relief in his petition. Upon due consideration of the pleadings and the state court record, each claim must be denied. Because the Court may resolve the Petition on the basis of the record, an evidentiary hearing is not warranted. See Schriro v. Landrigan, 550 U.S. 465, 474 (2007) (if the record refutes the factual allegations in the petition or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing).

I. Statement of the Facts

The facts, as set forth by the Florida Supreme Court, are as follows:

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 rights, Krawczuk confessed to killing Staker.

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 Staker'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.

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

II. Procedural History

On or about October 3, 1990, Petitioner and co-defendant William Poirier ("Poirier") were indicted for first degree premeditated murder (count one), first degree felony murder (count

two), and robbery (count three) (Ex. A3 at 446).² Petitioner filed a motion to suppress his confession (Ex. A4 at 525), and after a hearing on the motion, it was denied (Ex. A2 at 274-354; Ex. A5 at 544).

Thereafter, on September 27, 1991, Petitioner entered a guilty plea to the charges, and asked that the court impose the death penalty (Ex. A3 at 386-424). The trial court advised Petitioner that he could not waive a penalty hearing and that a defendant's request for the death penalty "[i]n all probability it would not enter into the decision as to whether to impose it or not." Id. at 390. The state refused to waive a jury at the penalty phase, and the trial court agreed (Ex. A7 at 654-55).

Prior to jury selection for the penalty phase, Petitioner reiterated his desire that counsel not participate in the penalty phase or offer any mitigation evidence (Ex. A8 at 695). The trial court explained that Petitioner had the right to present mitigation evidence, but Petitioner insisted that he did not wish to do so and that he had instructed his attorney to offer no mitigation (Ex. A8 at 9-10, 11-12, and 13). Petitioner also told the trial court that he did not wish for counsel to participate in jury selection, call witnesses, or make a closing argument. Id. at 15-16. Counsel Barbara LeGrande ("LeGrande") told the court that she

² References to exhibits are to those filed by Respondent on March 21, 2014 (Doc. 27).

strongly advised Petitioner against waiving his right to present mitigation evidence. Id. at 16-18.

A penalty phase commenced on February 4, 1992 (Ex. A1; Ex. A2). Legrande told the trial court that Petitioner did not want to offer mitigation evidence. Petitioner was questioned several times by the court, but he insisted that no mitigation evidence be offered (Ex. A2 at 190-231). The jury unanimously recommended death (Ex. A2 at 268; Ex. A5 at 584). After a Spencer³ hearing, the trial court sentenced Petitioner to death (Ex. A5 at 590). He was also sentenced to fifteen years in prison for the robbery conviction (Ex. A5 at 593).⁴ The Florida Supreme Court affirmed

³ Spencer v. State, 615 So. 2d 688 (Fla. 1993) (a trial judge may not formulate his or her sentencing decision prior to giving the defendant an opportunity to be heard).

⁴ The trial court found three aggravating factors: (1) the murder was committed in the course of a robbery and was committed for pecuniary gain; (2) the murder was especially heinous, atrocious, or cruel (HAC); and (3) the murder was committed in a cold, calculated, and premeditated manner without any pretense of legal or moral justification (CCP) (Ex. A5 at 587-90). The trial court also found that one statutory mitigator (Petitioner had no significant history of criminal activity) was established. Id. at 590. The court found no non-statutory mitigators. Id. The court gave great weight to the second and third aggravating circumstances and "significantly less weight" to the first aggravating circumstance and the mitigating circumstance. Id. at 592. The court made a specific finding that it had "received the benefit of all possible material mitigating circumstances from the psychiatrist report and from the presentence investigation[.]" Id. at 591. The court also dismissed the psychiatrist's conclusion that Petitioner was the more passive of the two defendants. Id. at 592. The court followed the jury's recommendation and imposed the death penalty for the first-degree murder conviction. Id. at 593.

Petitioner's convictions and sentences. Krawczuk v. State, 634 So. 2d 1070 (Fla. 1994) (hereinafter, "Krawczuk I").

On October 3, 1995, Petitioner filed a motion for post-conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure ("Rule 3.850 motion").⁵ He filed an amended motion on March 15, 2002, raising twenty-four separate claims (Ex. D24). An evidentiary hearing was held on each of Petitioner's claims alleging ineffective assistance of counsel or requiring factual development (Ex. D17; Ex. D18; Ex. D20).

At the evidentiary hearing, Petitioner introduced testimony about his troubled background. Testimony was heard from Petitioner's brother, Christopher Krawczuk ("Christopher"). Christopher testified that their mother was both verbally and physically abusive and that, although there were several boys in the family, Petitioner received the brunt of their mother's anger. In addition, when Petitioner eventually left home to live with a friend, his mother did not check on him or offer any assistance (Ex. D17 at 1514-43). Santo Calabro, Petitioner's former stepfather, also testified that Petitioner's mother was violent towards all of her children, but focused her violence on

⁵ Petitioner filed his motion before the Florida Supreme Court created Rule 3.851 of the Florida Rules of Criminal Procedure, the post-conviction rule currently applicable to death-sentenced petitioners.

Petitioner. Petitioner would seek negative attention from his mother because she showed him no love. Id. at 1555-93. Petitioner's friend Todd Kaase ("Kaase") testified that he had witnessed Petitioner's mother hit her sons and that after Petitioner came to live with Kaase's family, Petitioner's mother never checked on him. Id. at 1575-87. Petitioner's mother testified that she would often get angry with her children and "smack" them around. Petitioner received the brunt of her anger because he was not a loving child and because he was "aggravating and incorrigible." She did not believe that her abuse caused Petitioner to murder Staker. Id. at 1589-1602. Petitioner's former co-worker, Paul Wise, testified that Petitioner had lived with him for eight or nine months and that he was a dependable worker, although he was moody at times. Id. at 1606-15. Petitioner's ex-wife, Judy Nelson, testified that Petitioner had told her about his abusive mother and that Petitioner's mother had been verbally abusive towards her as well. She also testified that Petitioner used marijuana numerous times per day. She did not like Poirier, and referred to him as Petitioner's "protégé." She testified that Petitioner and Poirier frequently robbed together and that Poirier usually came up with the ideas (Ex. D20 at 2375-81).

In addition to background witnesses, Petitioner introduced the testimony of two mental health experts. Dr. Barry Crown

testified that he had conducted a brief interview with Petitioner and administered a battery of neuropsychological tests to determine the relationship between Petitioner's brain function and his behavior (Ex. D17 at 1633-37). Dr. Crown found Petitioner exhibited no evidence of malingering, normal intellectual functioning, and poor intellectual efficiency. He believed that Petitioner had the critical thinking skills of a ten year old, the mental processing of a thirteen year old, and organic brain damage to the anterior of the brain. Id. at 1638. Dr. Crown believed that Petitioner was under the influence of extreme mental or emotional disturbance when he murdered David Staker. Id. at 1648. He also believed that Petitioner had no capacity to conform his conduct to the requirements of the law. Id. at 1648-49. Dr. Crown did not review other psychiatric reports prior to his examination of Petitioner and did not know that Dr. Keown had concluded that Petitioner showed no signs of organic brain damage. Id. at 1650, 1653.⁶ Dr. Crown was unaware that Petitioner had discussed murdering his victim for a week prior to the crime; was unaware that David Staker was Petitioner's sexual partner; and was unaware that Petitioner refused to testify against co-defendant Poirier. Id. at 1658-61.

⁶ Dr. Keown was the psychiatrist appointed by the trial court prior to trial to perform a psychiatric evaluation and to provide assistance to the defense in the presentation of their case (Ex. D19B at 2198).

Psychologist Faye Sultan testified that she had interviewed Petitioner at length and also interviewed his family (Ex. D17 at 1699). She detailed the abuse Petitioner had suffered at the hands of his mother and stated that Petitioner told her that he had been sexually molested when he was eight or ten years old. Id. at 1711. She diagnosed Petitioner with cognitive dysfunction and impulse control. Id. at 1765. She concluded that Petitioner had been under extreme mental or emotional disturbance when he killed David Staker. Id. at 1724. She also concluded that Petitioner was unable to conform his conduct to the requirements of the law. Id. She admitted that there had been a great deal of planning involved in Staker's murder, but concluded that brain damage does not necessarily stop a person from being able to plan. Id. at 1735-44. As far as Petitioner's waiver of presenting mitigation evidence, she believed that Petitioner would have found mitigation "messy" and "if he made the decision to die, [he] didn't have to consider it." Id. at 1730.

The post-conviction court did not find Dr. Crown's testimony credible, noting:

Dr. Crown expressed the opinions that Mr. Krawczuk was under the influence of extreme mental or emotional disturbance at the time of the crime and his ability to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired. The court holds so strongly to the view that the other evidence including, particularly, Mr.

Krawczuk's confession but also including Mr. Krawczuk's letters, the statement and deposition of Gary Sigelmier, the statement of Mr. Poirier, the testimony of the family members and friends, the other mental health professionals, reports and deposition, and other credible evidence in this case so resoundingly refute this opinion as to discredit as well the related opinion that Mr. Krawczuk suffers from organic brain damage.

(Ex. D21 at 2455). The court also concluded that Dr. Sultan was not a credible witness, specifically noting that she "testified extensively about Dr. Crown's contributions to her understanding," even though Dr. Crown examined Petitioner almost two months after Dr. Sultan's last interview with Petitioner. Id. at 2457. The court also listed several instances that Dr. Sultan's testimony was not supported by other evidence. Id. at 2458-59. As with Dr. Crown, the court noted that the evidence "so resoundingly refutes" Dr. Sultan's opinion that the statutory mental health mitigating factors applied, that her other opinions were discredited as well. Id. at 2460.

After the hearing, the trial court denied all of the claims in a detailed order (D21 at 2434-2558). The post-conviction court specifically found that, even considering the additional mitigating factors presented at the evidentiary hearing, the aggravating circumstances far outweighed the mitigating

circumstances (Ex. D21 at 2440).⁷ The court stated that "it was satisfied beyond a reasonable doubt that a sentence of death would have been the result regardless." Id. Further, in addressing Petitioner's ineffective assistance claims, the post-conviction court concluded that Petitioner could not demonstrate prejudice:

Further, if the alleged errors are based solely on claims of ineffective assistance of counsel, Mr. Krawczuk has not shown and cannot show (his burden) "prejudice" - that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome, see Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). Again, the court is satisfied beyond

⁷ After listening to the testimony presented at the evidentiary hearing, the court concluded that the state had proven that the murder of David Staker was committed during a robbery and for pecuniary gain (significant weight); the murder was especially heinous, atrocious and cruel (great weight); and the murder was cold, calculating, and premeditated without any pretense of legal or moral justification (great weight). The court found that no statutory mitigating circumstances had been established. The court found six non-statutory mitigating circumstances: Petitioner suffered an abusive and emotionally deprived childhood (slight weight); Poirier pleaded to a lesser charge and received a prison sentence (slight weight); there was some evidence of substance abuse/chronic marijuana use (very slight weight); Petitioner was a good worker, hard worker at his maintenance job at McDonalds (slight weight); he had a mental or emotional disturbance less than extreme (moderate weight); and Petitioner cooperated (slight weight). The court also concluded that even if Petitioner "has organic brain damage that damage as diagnosed, [it] is in the category of a 'mild cognitive disorder' and would not add sufficient weight to the consideration given for Mr. Krawczuk's mental condition to affect the final result of the court's overall weighting of the aggravators and mitigators." (Ex. D21 at 2439).

a reasonable doubt that a sentence of death would have been the result regardless.

Id. at 2440.

Petitioner appealed five issues to the Florida Supreme Court (Ex. D26). Petitioner simultaneously filed a state petition for writ of habeas corpus with the Florida Supreme Court in which he alleged ineffective assistance of appellate counsel (Ex. D29). In a consolidated opinion, the Florida Supreme Court denied all relief. Krawczuk v. State, 92 So. 3d 195 (Fla. 2012) (hereinafter "Krawczuk II").

III. Governing Legal Principles

A. Standard of Review Under the Antiterrorism Effective Death Penalty Act ("AEDPA")

Pursuant to the AEDPA, federal habeas relief may not be granted with respect to a claim adjudicated on the merits in state court unless the adjudication of the claim:

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). This standard is both mandatory and difficult to meet. White v. Woodall, 134 S. Ct. 1697, 1702 (2014). A state court's summary rejection of a claim, even without explanation, qualifies as an adjudication on the merits which warrants

deference. Ferguson v. Culliver, 527 F.3d 1144, 1146 (11th Cir. 2008). Notably, a state court's violation of state law is not sufficient to show that a petitioner is in custody in violation of the "Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); Wilson v. Corcoran, 562 U.S. 1, 16 (2010).

"Clearly established federal law" consists of the governing legal principles, rather than the dicta, set forth in the decisions of the United States Supreme Court at the time the state court issues its decision. White, 134 S. Ct. at 1702; Carey v. Musladin, 549 U.S. 70, 74 (2006) (citing Williams v. Taylor, 529 U.S. 362, 412 (2000)). That said, the Supreme Court has also explained that "the lack of a Supreme Court decision on nearly identical facts does not by itself mean that there is no clearly established federal law, since 'a general standard' from [the Supreme Court's] cases can supply such law." Marshall v. Rodgers, 133 S. Ct. 1446, 1449 (2013) (quoting Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)). State courts "must reasonably apply the rules 'squarely established' by [the Supreme] Court's holdings to the facts of each case. White, 134 S. Ct. at 1706 (quoting Knowles v. Mirzayance, 556 U.S. 111, 122 (2009)).

Even if there is clearly established federal law on point, habeas relief is only appropriate if the state court decision was "contrary to, or an unreasonable application of," that federal law. 29 U.S.C. § 2254(d)(1). A decision is "contrary to" clearly

established federal law if the state court either: (1) applied a rule that contradicts the governing law set forth by Supreme Court case law; or (2) reached a different result from the Supreme Court when faced with materially indistinguishable facts. Ward v. Hall, 592 F.3d 1144, 1155 (11th Cir. 2010); Mitchell v. Esparza, 540 U.S. 12, 16 (2003).

A state court decision involves an "unreasonable application" of the Supreme Court's precedents if the state court correctly identifies the governing legal principle, but applies it to the facts of the petitioner's case in an objectively unreasonable manner, Brown v. Payton, 544 U.S. 133, 134 (2005); Bottoson v. Moore, 234 F.3d 526, 531 (11th Cir. 2000), or "if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." Bottoson, 234 F.3d at 531 (quoting Williams, 529 U.S. at 406). The unreasonable application inquiry "requires the state court decision to be more than incorrect or erroneous," rather, it must be "objectively unreasonable." Lockyer v. Andrade, 538 U.S. 63, 75-77 (2003) (citation omitted); Mitchell, 540 U.S. at 17-18; Ward, 592 F.3d at 1155. The petitioner must show that the state court's ruling was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement."

White, 134 S. Ct. at 1702 (quoting Harrington v. Richter, 562 U.S. 86 (2011)). Moreover, "it is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by [the Supreme] Court." Knowles, 556 U.S. at 122.

Finally, when reviewing a claim under § 2254(d), a federal court must bear in mind that any "determination of a factual issue made by a State court shall be presumed to be correct[,]" and the petitioner bears "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); Burt v. Titlow, 134 S. Ct. 10, 15 (2013) ("[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance.") (quoting Wood v. Allen, 558 U.S. 290, 293 (2010)).

B. Standard for Ineffective Assistance of Counsel

In Strickland v. Washington, the Supreme Court established a two-part test for determining whether a convicted person is entitled to relief on the ground that his counsel rendered ineffective assistance. 466 U.S. 668, 687-88 (1984). A petitioner must establish that counsel's performance was deficient and fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense. Id. This is a "doubly deferential" standard of review that gives both the state

court and the petitioner's attorney the benefit of the doubt. Burt, 134 S. Ct. at 13, (citing Cullen v. Pinholster, 131 S. Ct. 1388, 1403 (2011)).

The focus of inquiry under Strickland's performance prong is "reasonableness under prevailing professional norms." Strickland, 466 U.S. at 688-89. In reviewing counsel's performance, a court must adhere to a strong presumption that "counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. Indeed, the petitioner bears the heavy burden to "prove, by a preponderance of the evidence, that counsel's performance was unreasonable[.]" Jones v. Campbell, 436 F.3d 1285, 1293 (11th Cir. 2006). A court must "judge the reasonableness of counsel's conduct on the facts of the particular case, viewed as of the time of counsel's conduct," applying a "highly deferential" level of judicial scrutiny. Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000) (quoting Strickland, 466 U.S. at 690).

As to the prejudice prong of the Strickland standard, Petitioner's burden to demonstrate prejudice is high. Wellington v. Moore, 314 F.3d 1256, 1260 (11th Cir. 2002). Prejudice "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. That is, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different." Id. At 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

IV. Analysis

A. Claim One

Petitioner asserts that he was denied effective assistance of counsel at the penalty phase of his trial (Doc. 1 at 20). Specifically, he claims that LeGrande conducted a less than complete investigation into available mitigation evidence. He argues:

Trial counsel's omissions were not the result of any reasonable strategic decision, but instead were based on a wholly inadequate (and indeed non-existent) investigation. This failure rendered Mr. Krawczuk's putative waiver of mitigation unknowing and involuntary. The result is that significant mitigation evidence never reached Mr. Krawczuk's sentencing jury. In fact, the state circuit court determined that Mr. Krawczuk's counsel rendered deficient performance.

(Doc. 1 at 54).

Petitioner raised this issue as claim three of his Rule 3.850 motion, and an evidentiary hearing was held. The post-conviction court concluded that counsel's performance was deficient for failing to investigate Petitioner's family history to reveal instances of abuse or to "obtain clear direction from Mr. Krawczuk that she was not to do so." (Ex. D21 at 2468). The post-conviction

court also concluded that counsel's performance was not deficient for failing to investigate the plea agreement reached by Petitioner's codefendant; Petitioner's alleged substance abuse; Petitioner's work ethic; Petitioner's mental or emotional disturbance; or Petitioner's cooperation. Id. at 2469-70.

The post-conviction court further concluded that Petitioner could not demonstrate prejudice from any of counsel's alleged failures (Ex. D21 at 2471). The court noted that Petitioner "has not shown a reasonable probability that if he had been more fully advised about the potential mitigation evidence he would have authorized trial counsel to present such evidence at either the penalty phase trial or at the Spencer hearing. Id. at 2471. The court reiterated:

[G]iven the strength and weight of these aggravating circumstances, as described by Mr. Krawczuk himself, and supported by other evidence, and the relative weakness of the mitigating circumstances and the evidence Mr. Krawczuk presented in the original and post-conviction proceedings, the court finds there is no reasonable probability that, absent any alleged error or any alleged deficient performance of counsel, whether considered individually or all considered cumulatively, the outcome of the post plea proceedings would have been different (State's burden). The court is satisfied beyond a reasonable doubt that a sentence of death would have been the result regardless.

Id. at 2472; see also discussion supra Part I.

On appeal, the Florida Supreme Court also found no merit in this claim. The Florida Supreme Court recognized that the post-conviction court found LeGrande deficient for failing to discover mitigation related to Petitioner's background, but had determined that Petitioner did not suffer resulting prejudice "because he was emphatic that counsel not contact his family and probably would not have permitted counsel to present the information during the penalty phase." Krawczuk II, 92 So. 3d at 203. Citing extensively from Grim v. State, 971 So. 2d 85 (Fla. 2007) and Waterhouse v. State, 792 So. 2d 1176, 1184 (Fla. 2001), the Florida Supreme court side-stepped the issue of whether LeGrande's performance was deficient in any respect, concluding instead that Petitioner could not establish Strickland prejudice:

In each of these cases, we concluded that trial counsel could not be deemed ineffective for following their client's wishes not to present mitigation. "An attorney will not be deemed ineffective for honoring his client's wishes." Brown v. State, 894 So.2d 137, 146 (Fla. 2004) (citing Waterhouse, 792 So.2d at 1183); Sims v. State, 602 So.2d 1253, 1257-58 (Fla. 1992)); see also Sims v. State, 602 So.2d 1253, 1257-58 (Fla. 1992) ("[W]e do not believe counsel can be considered ineffective for honoring the client's wishes"). The record demonstrates that Krawczuk would not permit his attorney to involve his family. Accordingly, counsel's ability was limited by the defendant's desire not to include his family. See Brown, 894 So.2d at 146. Therefore, we agree that counsel's actions could not be deemed ineffective. Id.

It is clear that there was significant mitigation available that was not uncovered by counsel. However, it is equally clear that Krawczuk repeatedly insisted that counsel not pursue mitigation and not involve his family. Further, the postconviction court found that the information that would have been presented by the family was available through Dr. Keown's report, which Krawczuk also refused to allow counsel to present. Because of Krawczuk's instructions to counsel not to involve his family, we find that Krawczuk cannot establish prejudice.

Krawczuk II, 92 So. 3d at 205. Petitioner argues that the Florida Supreme Court's decision is contrary to, or an unreasonable application of, Strickland and that its determination that Petitioner instructed counsel to not pursue mitigation is an unreasonable determination of the facts in light of the evidence presented in the state court proceeding (Doc. 1 at 53) (citing 28 U.S.C. § 2254(d)(2)).

This Court need not address whether counsel performed deficiently because the Florida Supreme Court had a reasonable basis for concluding that Petitioner had not established Strickland prejudice. See Strickland, 466 U.S. at 697 ("[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies . . . [i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.").

The United States Supreme Court has specifically addressed the situation in which a habeas petitioner alleges that counsel was ineffective for failing to investigate potential mitigation evidence when the petitioner asserted at the state level that he did not want to present a mitigation defense. In Schriro v. Landrigan, 550 U.S. 465 (2007), Landrigan argued that his counsel was ineffective for failing to interview his biological father and other relatives to confirm that his biological mother had used drugs and alcohol while pregnant. Id. at 471. The state contended that Landrigan had instructed his counsel not to offer any mitigation evidence. Id. at 479. The Court determined that "[i]f Landrigan issued such an instruction, counsel's failure to investigate further could not have been prejudicial under Strickland." Id. Therefore, Landrigan could not demonstrate prejudice because the post-conviction court "reasonably determined that Landrigan instructed his attorney not to bring any mitigation to the attention of the [sentencing] court" and the district court "was entitled to conclude that regardless of what information counsel might have uncovered in his investigation, Landrigan would have interrupted and refused to allow his counsel to present any such evidence." Id. at 477.

The Eleventh Circuit's earlier decision in Gilreath v. Head, 234 F.3d 547 (11th Cir. 2000) is consistent with Landrigan. In Gilreath, the court determined that a habeas petitioner who

instructed his counsel to present no mitigation evidence during his penalty phase would need to show two things to demonstrate Strickland prejudice:

First, Petitioner must show a reasonable probability that - if Petitioner had been advised more fully about character evidence or if trial counsel had requested a continuance- Petitioner would have authorized trial counsel to permit such evidence at sentencing. Second, Petitioner must establish that, if such evidence had been presented at sentencing, a reasonable probability exists that the jury "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, 104 S. Ct. at 2069[.]

Id. at 551-52 (citing Mills v. Singletary, 63 F.3d 999, 1026 (11th Cir. 1995); Bolender v. Singletary, 16 F.3d 1547, 1560-61 (11th Cir. 1994); Bush v. Singletary, 988 F.2d 1082, 1090 (11th Cir. 1993)) (footnote omitted). The Gilreath court further explained that to show prejudice, "Petitioner must show that - but for his counsel's supposedly unreasonable conduct - helpful character evidence actually would have been heard by the jury. If Petitioner would have precluded its admission in any event, Petitioner was not prejudiced by anything that trial counsel did." Id. at 551 n. 12; see also Cummings v. Sec'y for the Dep't of Corr., 588 F.3d 1331, 1360 (11th Cir. 2009) ("[T]here cannot be a reasonable probability of a different result if the defendant would have refused to permit the introduction of mitigation evidence in any event.") (citing Strickland, 466 U.S. at 694); Pope v. Sec'y for

the Dep't of Corr., 752 F.3d 1254, 1266 (11th Cir. 2014) ("To establish Strickland prejudice, then, a petitioner who has told trial counsel not to present mitigation evidence must show a reasonable probability that, if he had been more fully advised about the mitigating evidence and its significance, he would have permitted trial counsel to present the evidence at sentencing.") (citing Gilreath, 234 F.3d at 551).

The state record is clear that Petitioner was aware of the necessity of presenting mitigation evidence at trial. On March 8, 1991, LeGrande wrote a detailed letter to Petitioner in which she explained the likely aggravating circumstances the state would seek to prove and the statutory mitigating circumstances which must be considered (Ex. D19C at 2316-17). Specifically, LeGrande stated, "As to mitigation, we can try to use #1, 2, 5, 6, & 8."⁸

⁸ The statutory mitigating factors, as defined by Florida Statute § 921.141(6) are as follows:

- (a) The defendant has no significant history of prior criminal activity.
- (b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
- (c) The victim was a participant in the defendant's conduct or consented to the act.
- (d) The defendant was an accomplice in the capital felony committed by another

Numbers 2, 5, 6, and 8 will depend upon your testimony at trial and the findings of Dr. Keown." Id. at 2317. Counsel explained:

Because of the pre-planning of this murder and the pouring of Drano down the victim's throat, and the hiding of the body will probably cause a jury in Fort Myers to come back with a recommendation of death. Judge Thompson has never sentenced anyone to death at this time, but that does not mean he will not do so.

Id. at 2317.

The record is also clear that Petitioner instructed LeGrande not to present any mitigating evidence to the jury. At his plea colloquy, Petitioner expressed a desire to receive a death sentence (Ex. A3 at 390). The trial court advised Petitioner that he could

person and his or her participation was relatively minor.

- (e) The defendant acted under extreme duress or under the substantial domination of another person.
- (f) The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired.
- (g) The age of the defendant at the time of the crime.
- (h) The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.

Fla. Stat. § 921.141(6) (a)-(h) (1989).

not waive a penalty hearing and that the court was obligated to weigh aggravating and mitigating factors prior to making a final decision. Id. at 390. The court noted that a defendant's request for the death penalty "[i]n all probability it would not enter into the decision as to whether to impose it or not." Id. at 390.

LeGrande informed the court that she had advised Petitioner against entering a guilty plea (Ex. A3 at 405). She said that she and Petitioner had talked about his decision to plead guilty and that he had given the decision "considerable consideration." Id. at 415. LeGrande told the court that she had arranged for mitigation witnesses, but that Petitioner instructed her not to call them. Id. LeGrande explained: "I have told [Petitioner] that I believe it's in his best interest to call these individuals. He has commanded me not to call the individuals." Id. The court expressed concern about Petitioner's desire not to present mitigation evidence, but LeGrande noted that the law provided that a defendant has the right not to call mitigation witnesses. Id. at 405, 407. When asked why he had chosen such action, Petitioner stated that "I just feel it's - I shouldn't be allowed to live for what I did." Id. at 409.

After his plea was accepted, Petitioner sent a letter to LeGrande in which he reiterated his desire to receive the death penalty:

Do you think my sentencing date of October 29th will remain as such, or will there be a chance for a further delay? Please keep me updated on it, so I will be prepared on that date. As for my sentencing hearing, do you feel I can achieve my goal of receiving the death sentence? From the sounds of it, Mr. Bower is very much for it as well, isn't he? By my pleading guilty to the charges, doesn't that increase the aggravating circumstances against me, and basically ensure my death penalty? After all, I am assisting the prosecution in their proving of my total guilt, aren't I?

. . . .

As far as I'm concerned, you have proven to be a shining example for a lawyer, and I have nothing but praise for you and your work. You have examined each and every aspect, as I have requested. In fact, I feel that you have done far more than was actually required. If I have put you in a bind by pleading guilty, it wasn't my intention. Thank you for remaining as my counsel, through this most critical of all phases.

(Ex. D19C at 2296-97).

A penalty phase commenced on February 4, 1992 (Ex. A1; Ex. A2). During the penalty phase, the trial court asked Petitioner whether he still wished that no mitigation evidence be offered (Ex. A1 at 190). Petitioner indicated that he did not want to offer anything in mitigation. Id. at 191. After the close of the state's case, the trial court again asked whether Petitioner had any desire to present a case in mitigation (Ex. A2 at 218). LeGrande told the court:

Mr. Krawczuk has advised me, he would have no objection to my making a closing argument for

the purpose of preventing a reversal on the fact that no mitigating circumstances was introduced.

However, I advised him in order to argue, again, it would be necessary for him to take the stand to present the mitigating evidence. I can only argue evidence that which has been presented from the witness box. He declines to take the witness stand, and I find little in the State's evidence that I would be able to argue for mitigation.

. . .

Other than the fact, he has pled, which is not a mitigating circumstance. He has then instructed me, it's not necessary. He was concerned about reversal if nothing was introduced, and he doesn't want to introduce any.

Id. at 218-19. The court pondered whether "it would probably still be possible to make some kind of argument based on - I don't know if you wish to do so - or wish to think about that or what."

Id. at 219. Counsel replied:

I don't think [Krawczuk] wants to present mitigating circumstances. From what I understand from him, he only just wants to make sure that everything is appropriate for the appellate process, so there wouldn't be a reversal.

(219). The court questioned Petitioner.

COURT: What is your position as far as having your attorney present any mitigating evidence?

PETITIONER: I am willing to let her do it, but I am not willing to get on the stand myself, because I am just opposed to that idea. But I don't know.

COURT: Have you discussed any other mitigating evidence that might be presented that you could - I don't know if at this point you could introduce the psychiatric report for whatever benefit that may have?

LEGRANDE: I am willing to do that, but I don't know if the State would.

PETITIONER: Not the whole thing, but part of it would be good.

COURT: You can talk it over with your lawyer. It would probably be all or nothing at best. I am not sure how the State's position might be or how I might rule on that.

(Ex. A2 at 220). The state objected to the introduction of any portion of Dr. Keown's psychiatric report because it would be unable to call rebuttal witnesses. Id. at 222-23. The State queried whether Petitioner "really wanted anything offered on his behalf or is he not going to want anything admitted on his behalf?"

Id. at 224. LeGrande stated:

Mr. Krawczuk has just indicated to me that his desire to have this admitted has nothing to do with attempting to sway the jury on mitigating circumstances. He is not looking for mitigation. It's still his desire to have the death penalty imposed. He is just attempting to prevent tying my hands to the point of presenting his case that the Appellate Court would overturn a death penalty.

Id. at 224-25. The court agreed to admit Dr. Keown's psychiatric report. Id. at 229. The state told the court that "if [the mental

health report is] going to be admitted, I am going to refer to certain items in there verbally." Id. at 229. Petitioner then told counsel that he did not want the psychiatric report admitted:

LEGRANDE: Mr. Krawczuck indicates he does not want it admitted.

COURT: All right, is that your final word on the matter, Mr. Krawczuk?

PETITIONER: Yes, it is.

COURT: Okay. Now it's my understanding, at this point at least, that you do not want to present any mitigating evidence, and that you do not want, yourself, to testify as to additional mitigating evidence; is that correct?

PETITIONER: Yes, it is.

COURT: And we have been all through this thing, and I think you have a pretty good understanding of the trial process, but you understand the consequences of that you may well expose yourself to the death penalty or at least a recommendation by this jury that you get a death penalty.

PETITIONER: Yes, sir.

COURT: What about final argument, will there be non or -

LEGRANDE: There won't be any final argument, Your Honor.

COURT: All right, are you going to tell the jury that in some

fashion, have you thought about that?

LEGRANDE: I think I am just going to waive final argument and I am advising the Court that is what my client is wanting me to do.

COURT: Is that correct?

PETITIONER: That is correct.

COURT: Are you directing your attorney to take no further action on your behalf as far as final argument or presentation of any further evidence?

PETITIONER: After discussion, that is about all I can do.

LEGRANDE: For the purposes he has outlined, that is what he has indicated. He has his own reasons, he didn't want Dr. Keown's report introduced. He has his own reason why he doesn't want the final argument, which we have discussed, and I have attempted to dissuade him on that approach, but -

COURT: Are those reasons that are appropriate to put on the record?

LEGRANDE: No, sir, they are very personal reasons to him.

COURT: Does she speak correctly?

PETITIONER: Yes, sir.

Id. at 230-31. After hearing closing argument from the state, the jury unanimously recommended death (Ex. A2 at 268; Ex. A5 at 584).

At the Spencer hearing, counsel told the court that she intended to offer Petitioner's psychiatric report into evidence, but that Petitioner did not want her to do so (Ex. A3 at 430). Petitioner was asked whether he wished to have the court consider anything in reference to his sentence, but Petitioner declined. Id.

At the post-conviction evidentiary hearing on this claim, LeGrande testified that Petitioner told her that he did not want her to present mitigation evidence on his behalf (Ex. D18 at 1778). He did not want to testify or allow her to "present anything about what occurred. And he didn't want [her] to cross-examine witnesses, or anything else." Id. at 1788. She reiterated:

Okay, and we have had discussions on that, so, um, as I indicated at the time, Mr. Krawczuk indicated he wanted to plead guilty and he wanted the death penalty. He did not even want a sentencing phase. But that was forced upon him. Did not want me to cross-examine witnesses. Did not want me to present any evidence. Did not want me to make any closing arguments. And, at sentencing, did not want anything added at that time.

Id. at 1806. She stated that if Petitioner had allowed her to do so, she would have looked at other doctors and explored other issues. Id. at 1785. She may have looked for a neuropsychologist. Id. at 1786. She would have secured more experts at the penalty phase if Petitioner had not expressly asked her not to do so. Id. at 1826, 1829. After LeGrande was examined by the state and by

Petitioner's post-conviction counsel, the following exchange occurred between LeGrande and the court:

COURT: I've got a couple of questions, which is always frightening. I think it's in my notes, but I'm not exactly sure.

Was there some point in your representation of [Petitioner] when he actually said he didn't want you to do anything?

LEGRANDE: At the - at the - Yes, he came in and he entered a plea, and he asked at that time that he wanted the death penalty.

COURT: Um-hmm.

LEGRANDE: And you informed him that you had to have the mitigation stage. And, as I remember it, during the mitigation phase trial, um, after each witness I would confer with him, and I would announce to the Court, "I have no questions because - at the request of my client." And he did not want me to pursue.

I then, after that was over, and they came back with the recommendation, I also indicated to him that he still could present evidence to you at the sentencing. And that he did not want that. So I did not pursue anything else.

COURT: But it was - it was up through the plea, and then it was either shortly at that time, or shortly after, that he indicated that he didn't want the penalty phase evidence?

LEGRANDE: At the plea, he indicated that he did not even want to wait for a penalty, he wanted you to sentence

him, I believe. And then, after that, he did not want any -

Well, he was not cooperative with me on getting-

COURT: Um-hmm.

LEGRANDE: -I information about family and those type of things to talk to. Um, he kind of wanted to leave his family out of it.

But I did get calls from, according to my records, from his mother and his grandmother.

(D18 at 1829-31). Petitioner did not testify at the evidentiary hearing. Id. at 1833.

The state court reasonably concluded that Petitioner gave LeGrande unmistakable instructions not to present mitigation evidence. Therefore, in order to establish Strickland prejudice, Petitioner must demonstrate both: (1) a reasonable probability that he would have authorized LeGrande to present mitigation evidence if had been more fully advised about the available evidence; and (2) a reasonable probability that his evidence would have convinced a jury that the death penalty was unwarranted based on the aggravating and mitigating factors. Pope, 752 F.3d at 1266 (citing Landrigan, 550 U.S. at 475-77; Strickland, 466 U.S. at 694; Gilreath, 234 F.3d at 551-52). Petitioner cannot meet the first of these requirements.

Nothing in the record suggests that Petitioner would have changed his directions to counsel had he been more fully informed

about mitigating evidence. Petitioner argues that Strickland does not require that he make such a showing (Doc. 30 at 17). This Court does not agree. A petitioner bears the burden of proof on the performance prong as well as the prejudice prong of a Strickland claim. See Williams v. Allen, 598 F.3d 778, 789 (11th Cir. 2010). Moreover, the Eleventh Circuit, has specifically held that in order to show prejudice, the petitioner "must affirmatively establish that, despite his instructions to his attorney and his comments to the court, there is a reasonable probability that he would have allowed mitigation evidence about his mental health or personal history to be presented if properly advised." Pope, 752 F.3d at 1254. Just as the petitioner in Pope, Petitioner has "offered no affidavit, deposition, or statement from himself, his counsel, or even from his mental health experts claiming that [he] would have changed his instructions to counsel if advised of mitigation evidence." Id. at 1267.

Petitioner argues that he has not refused to cooperate with post-conviction counsel and has been cooperative with his post-conviction mental health experts (Doc. 30 at 18). Presumably then, Petitioner asks this Court to infer from his lack of obstruction during his post-conviction proceedings, that there is a reasonable probability that he would have allowed mitigation evidence about his mental health or personal history to be presented at his penalty phase of his trial or at the Spencer

hearing. "This argument ignores [Petitioner's] explicit statements to the contrary and reverses his burden." Pope, 752 F.3d at 1267. Petitioner has not affirmatively established that, despite his repeated assertions otherwise, he would have allowed mitigation to be presented had he been properly advised. Accordingly, the Florida Supreme Court had a reasonable basis to deny relief, and Petitioner is not entitled to federal habeas relief on Claim One.

B. Claim Two

Petitioner asserts that trial counsel was ineffective for failing to "object to improper prosecution arguments and comments[.]" (Doc. 1 at 92). Specifically, he urges that counsel was ineffective for: (1) not objecting to the prosecutor's statements during voir dire in which he "asked the jury if they could decide the case without regard to sympathy . . . and told the jurors that it was their duty to follow the law they were instructed on, or be responsible for a miscarriage of justice"; (2) not objecting to the prosecutor's statements during final argument that "the 'legal' recommendation for them to make was death."; (3) failing to request a specific instruction on mercy as a consideration in the penalty phase of a capital trial; and (4) not objecting to the prosecutor's comments on Petitioner's lack of remorse. Id. at 92-95. Each subclaim will be addressed separately.

1. Counsel was not ineffective for failing to object to the prosecutor's statements during voir dire

Petitioner asserts that counsel was ineffective for failing to object when the prosecutor asked the prospective jurors if they could decide the case without regard to sympathy (Doc. 1 at 93). Specifically, he points to the prosecutor's following statements to the prospective jury:

This case is going to raise a lot of emotion in you, and maybe even sympathy feelings. Maybe sympathy feelings for Mr. Krawczuk, sympathy feelings for a person who was killed in this case, a person by the name of David Staker. Anybody know David Staker?

. . . .

Do all of you realize that sympathy, either for the victim in this case, David Staker, or for the Defendant, Anton Krawczuk - the judge will tell you feelings of sympathy do not and should not be a part of your deliberations.

And do all of you think you can set aside any feelings of sympathy you may have for either Mr. Krawczuk or Mr. Staker or Mr. Staker's family?

(Ex. A8 at 769-70). Another discussion was had with members of the panel when a prospective juror expressed that she would have difficulty setting aside feelings of sympathy for the victim. Id. at 811-14. The prosecutor told the jury that any decision must be based only on evidence. Id. at 813. The prosecutor queried and explained:

Does anyone here feel that they would not be able to attempt to set aside feelings of sympathy or hatred or whatever else may come

up, and base your decision solely on the evidence and the law as the Judge gives it to you? Everyone here think they can try to do that?

Okay. Because it would not be fair to the State of Florida, and it would not be fair to Mr. Krawczuk if you didn't try to do that. Does everybody understand that?

(813-14). Petitioner claims that "[t]he prejudicial effect of the state's actions were further exasperated by the trial court's instruction to the jury that sympathy should play no part in their decision." (Doc. 1 at 94).⁹

The post-conviction court denied this claim, noting that any claim of trial court error was procedurally barred because it was not raised on appeal.¹⁰ The post-conviction court then concluded that there was no error because similar anti-sympathy instructions have been approved by the United States Supreme Court (Ex. D21 at 528) (citing California v. Brown, 479 U.S. 538 (1987); Saffle v. Parks, 494 U.S. 484 (1990)). The court also noted that, subsequent

⁹ As part of the court's instructions to the jury, it stated:

Number five, feelings of prejudice, bias or sympathy are not legally reasonable doubts and they should not be discussed by any of you in any way. Your verdict must be based on your views of the evidence and on the law contained in these circumstances.

(Ex. A2 at 255).

¹⁰ Petitioner raises the instant claim as only a claim of ineffective assistance of counsel.

to Petitioner's trial, the Florida Supreme Court approved death penalty cases including "virtually the same anti-sympathy instruction." Id. Finally, the post-conviction court rejected Petitioner's assertion that his sentence was unreliable because "the judge believed Florida law precluded considerations of sympathy and mercy." The post-conviction court noted that the only support for Petitioner's assertion was that the court read "what had now become the current standard instruction in penalty proceedings." Id.

Petitioner appealed the post-conviction court's denial of this claim (Ex. D6). The Florida Supreme Court concluded that "we find no deficiency where counsel was not permitted to participate in the proceedings." Krawczuk II, 92 So. 3d at 195. The Florida Supreme Court further noted:

[A] defendant is "not prejudiced by the improper statements of the prosecutors [where] the juries were given the proper instructions for analyzing aggravating and mitigating circumstances." [Anderson v. State, 18 So. 3d 501, 517 (Fla. 2009)]. As noted by the post-conviction court, the record indicates that the jury was properly instructed. Accordingly, we find that Krawczuk has not demonstrated prejudice.

Krawczuk, 92 So. 3d at 207. Finally, the Florida Supreme Court determined that counsel was not ineffective for failing to object to the standard jury instruction which stated that "[t]his case must not be decided for or against anyone because you feel sorry

for anyone or are angry at anyone. Fla. Std. Jury Instr. (Crim.) 3.10." Id. at 205.

Petitioner now argues that Petitioner's instructions regarding LeGrande's participation in the penalty phase "were not unwaivering" and that Petitioner did not "have the authority or ability to instruct his attorney to object or not to object." (Doc. 1 at 96). Petitioner asserts that the Florida Supreme Court's decision was contrary to Mills v. Maryland, 486 U.S. 367 (1988) and Franklin v. Lynaugh, 487 U.S. 164 (1988). Specifically, he claims that the jury was left with the impression that mercy could not be considered when determining Petitioner's sentence (Doc. 1 at 95). Petitioner's arguments do not entitle him to federal habeas relief.¹¹

¹¹ These cases do not lend support to Petitioner's claims. The petitioner in Mills argued that the court's instructions and verdict slip served "to require the imposition of a death sentence if the jury unanimously found an aggravating circumstance, but could not agree unanimously as to the existence of any particular mitigating circumstance." 486 U.S. at 371. The Supreme Court vacated Mills' sentence because the jurors "well may have thought they were precluded from considering mitigating evidence unless all 12 jurors agreed in the existence of a particular such circumstance." Id. at 384. Petitioner does not now allege that the court instructed the jury that it must agree unanimously on mitigation factors.

In Franklin, the Supreme Court rejected a petitioner's challenge to the Texas jury instructions in capital cases because the instructions did not preclude "jury consideration of any relevant mitigating circumstances in this case, or otherwise unconstitutionally limited the jury's discretion[.]" 487 U.S. at 183. Similarly, in the instant case, Petitioner's sentencing

As discussed in Claim One, supra, based upon the record, the Florida Supreme Court reasonably concluded that Petitioner instructed LeGrande not to participate in the penalty phase of his trial. Accordingly, the Florida Supreme Court reasonably concluded that LeGrande's performance could not be deficient for failing to do so. See Roberts v. Dretke, 356 F.3d 632, 638 (5th Cir. 2004) (noting that defendant may not obstruct his attorney's efforts, then claim ineffective assistance of counsel); Owens v. Guida, 549 F.3d 399, 412 (6th Cir. 2008) ("A defendant cannot be permitted to manufacture a winning IAC claim by sabotaging her own defense, or else every defendant clever enough to thwart her own attorneys would be able to overturn her sentence on appeal.").

In addition, Petitioner has not provided grounds on which LeGrande could have objected to the prosecutor's statements or to the jury instructions. The Florida Supreme Court has rejected similar claims regarding the role of sympathy in a jury's consideration of mitigation. See Zack v. State, 753 So. 2d 9, 23-24 (Fla. 2000) ("[T]he State's argument concerning sympathy was a proper admonition for the jurors to consider the mitigation evidence without resort to their emotions.") (footnote omitted); Gonzalez v. State, 136 So. 3d 1125, 1158 (Fla. 2014) (rejecting a defendant's claim regarding jury instructions on the role of

court did not give any jury instruction limiting the jury's discretion to consider all mitigating factors.

sympathy); see also Saffle v. Parks, 494 U.S. 484, 489 (1990) (the Eighth Amendment does not require that jurors be allowed to base its sentencing decision upon sympathy it feels for the defendant). Although each of these cases was decided after Petitioner's penalty phase trial, the courts' subsequent rejections of similar "sympathy" arguments, combined with the lack of authority allowing or requiring a jury to use sympathy to guide its deliberations, indicates that any objection by counsel would have been futile. Counsel's performance is not deficient for failing to make a futile objection. Chandler v. Moore, 240 F.3d 907, 917 (11th Cir. 2001) (counsel is not ineffective for failing to raise a non-meritorious objection); James v. Borg, 24 F.3d 20, 27 (9th Cir. 1994) (counsel's failure to make futile motions does not constitute ineffective assistance)

Moreover, when viewed in context, the anti-sympathy statements made by the prosecution and the court appeared to be directed towards ensuring that the jury's recommendation was not based upon sympathy for the victim. Even had counsel not been constrained from making an objection to the "sympathy" comments, reasonable counsel could have concluded that it was not in Petitioner's best interests to do so. See Castillo v. Sec'y, Fla. Dep't of Corr., 722 F.3d 1281, 1285 n.2 (11th Cir. 2013) ("The relevant question under Strickland's performance prong, which calls for an objective inquiry, is whether any reasonable lawyer

could have elected not to object for strategic or tactical reasons, even if the actual defense counsel was not subjectively motivated by those reasons.").

2. Counsel was not ineffective for failing to request a jury instruction on mercy

Petitioner's claim that LeGrande provided ineffective assistance by failing to request a specific "mercy" instruction is without merit. In Boyde v. California, the Supreme Court concluded that the legal standard for reviewing jury instructions claimed to restrict a jury's consideration of relevant mitigating evidence is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence. 494 U.S. 370, 378-80 (1990).

The trial court did not issue any instruction that prevented the jury's consideration of mitigation evidence. To the contrary, the trial judge specifically instructed the jury that they were to consider, as possible mitigation, "any other aspect of the defendant's character or record, or any other circumstance of the offense." (Ex. A2 ta 257). The instructions did not prevent jurors from giving meaningful consideration to any mitigating factor, including their feelings of mercy for Petitioner. Accordingly, Petitioner cannot demonstrate Strickland prejudice from counsel's failure to request a separate jury instruction on mercy. See Downs

v. Moore, 801 So. 2d 906, 913 (Fla. 2001) ("[T]he 'catch-all' standard jury instruction on nonstatutory mitigation when coupled with counsel's right to argue mitigation is sufficient to advise the jury on nonstatutory mitigating circumstances."); Zakrzewski v. State, 717 So. 2d 488, 495 (Fla. 1998) ("[T]he trial court is only required to give the 'catch-all' instruction on nonstatutory mitigating evidence."); Correll v. Dugger, 558 So.2d 422, 425 (Fla. 1990) (appellate counsel not ineffective for failing to argue on appeal that trial court had failed to give a specific penalty phase instruction that the jury could consider mercy during the course of its deliberations).

3. **Counsel was not ineffective for failing to object to the prosecutor's statements indicating that the law required the jury to recommend the death penalty**

Petitioner asserts that "the prosecution suggested to the jury during its final argument that the law required them to recommend the death penalty (Doc. 1 at 93). Petitioner directs the Court to three specific statements made by the prosecutor:

I know it's not an easy situation you have been placed in, in fact it's probably one of the most difficult you have been placed in. But I submit to you, **your decision in this case will not be a difficult one, legally, for to you [sic] make.**

Of course, it will be a difficult one for you to make, personally, because it effects the outcome of a human being, Anton Krawczuk. Remember that you all indicated during voir

dire, that both the State as well as Mr. Krawczuk deserve a fair trial.

You have also indicated you would follow the law as the Judge gives it to you. And I submit to you that you are going to find, once the Judge has instructed you on the law, that the State has met its burden of proof, and we have proven beyond and to the exclusion of a reasonable doubt aggravating circumstances that warrant the imposition of the death penalty against Anton Krawczuk.

Now as the Judge is going to instruct you, if you do find there are aggravating circumstances, you will next then look to see whether or not there are any mitigating circumstances. This is not a numbers game. This is the weight. If you have one aggravating circumstance, and you find that there are mitigating circumstances, if that one outweighs all of the mitigating, you are still legally required to return a recommendation that the death penalty be imposed.

. . . .

And I submit to you, ladies and gentlemen of the jury, that the evidence in this case is clear. There was a heinous and atrocious, premeditated plan to kill Mr. Staker and to take his property. And I ask you to take your oath seriously, to look at the evidence seriously, and to return a legal recommendation to this Court, and that recommendation, I submit to you, should be that Anton Krawczuk should be put to death, thank you.

(Ex. A2 at 232-33, 255). Petitioner argues that the law "never requires that a death sentence be imposed. What the law requires is for the jury to consider the evidence introduced in the guilt

and/or penalty phases of a trial and recommend an appropriate sentence." Id. at 93.

Petitioner raised this claim in his Rule 3.850 motion where it was denied by the post-conviction court. The Florida Supreme Court affirmed as follows:

Krawczuk argues that at trial the prosecutor made several erroneous remarks that led the jury to believe that they had no choice but to return a recommendation for the death sentence. Krawczuk further argues that the trial court improperly instructed the jury, which compounded this error. Finally, Krawczuk argues that trial counsel was ineffective for her failure to object or otherwise attempt to correct these errors. Each of these claims must fail.

Turning to the prosecutor's remarks, Krawczuk claims that during voir dire and closing arguments, the prosecutor suggested that the law required the jury to recommend the death penalty if the aggravating circumstances outweighed the mitigating circumstances. Additionally, Krawczuk argues that the prosecutor suggested on multiple occasions that the jury should decide the case without regard for sympathy. The postconviction court correctly concluded that the claim was procedurally barred because trial counsel failed to object to the comments and the issue was not raised on direct appeal, nor did the remarks constitute fundamental error. See Rogers v. State, 957 So.2d 538, 547 (Fla. 2007) ("We have consistently held that substantive claims of prosecutorial misconduct could and should be raised on direct appeal and are thus procedurally barred from consideration in a postconviction motion.") (citations and internal quotations omitted); Lamarca v. State, 931 So.2d 838, 851 n. 8 (Fla. 2006).

As for Krawczuk's claim that counsel was ineffective for failing to object to these remarks, we find no deficiency where counsel was not permitted to participate in the proceeding. As it relates to the prosecutor's comments regarding the jury's recommendation, we have said:

Florida law provides that a penalty phase jury, after deliberating, shall render an advisory sentence to the court. That sentence is to be based on:

- (a) Whether sufficient aggravating circumstances exist...
- (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
- (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

§ 921.141(2)(a), Fla. Stat. (2008). "[A] jury is neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors." Cox v. State, 819 So.2d 705, 717 (Fla. 2002) (quoting Henyard v. State, 689 So.2d 239, 249-50 (Fla. 1996)).

Anderson v. State, 18 So.3d 501, 517 (Fla. 2009). Further, we found that a defendant is "not prejudiced by the improper statements of the prosecutors [where] the juries were given the proper instructions for analyzing aggravating and mitigating circumstances." Anderson, 18 So.3d at 517. As noted by the postconviction court, the record indicates that the jury was properly instructed. Accordingly, we find that Krawczuk has not demonstrated prejudice.

Krawczuk II at 206-07. The Florida Supreme Court reasonably concluded that LeGrande's performance was not deficient because she was not permitted to participate in Petitioner's penalty proceedings. See discussion supra Claim One.

In addition, the Florida Supreme Court reasonably concluded that Petitioner cannot demonstrate prejudice from the prosecution's inaccurate statements about Florida's weighing process because the trial court instructed the jury that it was to follow the law as given in his instructions (Ex. A2 at 254, 255). Petitioner does not argue that the jury instructions read by the trial court are inconsistent with the law. Rather, he complains that the jury did not receive an additional, separate instruction on "mercy" in light of the prosecutor's misstatements regarding the jury's legal requirements (Doc. 1 at 93). The Florida Supreme Court was entitled to conclude that a separate instruction was not necessary and that the court's jury instruction requiring the jury to "consider all the evidence tending to establish one or more mitigating circumstances, and give that evidence such weight as you feel it should receive in your reaching your conclusion as to the sentence that should be imposed" adequately cured any harm from the prosecutor's earlier misstatements (Ex. A2 at 257). See Johnson v. Alabama, 256 F.3d 1156, 1184 (11th Cir. 2001) ("[E]ven if we assumed performance error, any prejudice to Johnson was cured by the trial court's jury instructions."); Shriner v. Wainwright,

715 F.2d 1452, 1459 (11th Cir. 1983) ("[W]ith a properly instructed jury, there is nothing to show the jury relied on the prosecutor's remarks."); Darling v. Sec'y, Dep't of Corr., 619 F.3d 1279, 1282 (11th Cir. 2010) (Florida Supreme Court reasonably concluded that the trial court's correct jury instructions cured prosecutor's misstatement of the law). The Florida Supreme Court's decision was a reasonably application of Strickland's prejudice prong. See also discussion Claim II(1), (2).

4. Counsel was not ineffective for failing to argue that lack of remorse is not an aggravating factor

Petitioner asserts that "the prosecutor exceeded the boundaries of proper argument during his closing argument when he discussed Mr. Krawczuk's alleged lack of remorse as an aggravator." (Doc. 1 at 95). Specifically, Petitioner points to a portion of the state's closing argument in which the prosecutor urged that the state had satisfied its burden of showing the murder of David Staker was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification (Doc. 1 at 95). The prosecutor described a portion of Petitioner's taped confession as follows:

Ladies and gentlemen, you listen to that tape. This person, Mr. Krawczuk, delivered that in a cold manner. To use one of his words from the taped statement, it was "clinical." There was no remorse in his voice. Yeah, I planned it out. Yeah, we took gloves. Yeah, I strangled him to death. I listened to him gurgle. I poured Vanish down his throat. And

a stuffed a rag in his mouth with the help of my buddy. I took him to a prearranged site and dumped his body.

. . .

And when his buddy, William says, "I think I might get sick", Krawczuk says, "Don't get sick now." That wasn't bothering Mr. Krawczuk. His plan was all coming together. He was exterminating David Staker. And what else does he say that shows you his total lack of remorse and total indifference to the life of David Staker?

(Ex. A2 at 243, 246). Petitioner argues that lack of remorse is not an aggravating factor that can be considered under Florida law and that LeGrande was ineffective for failing to object to the introduction and consideration of non-statutory aggravators." Id. (citing Kimmelman v. Morrison, 477 U.S. 365 (1986)).¹²

Petitioner raised this claim in his Rule 3.850 motion, and the post-conviction court determined that LeGrande's performance was not deficient because Petitioner instructed her not to participate in the penalty phase proceedings (Ex. D21 at 2526). The post-conviction court further concluded that the prosecutor's "brief and isolated references to lack of remorse are of minor consequence and harmless beyond a reasonable doubt." Id. Finally, the court noted that the prosecutor made it clear that only three

¹² In Kimmelman, the petitioner raised an ineffective assistance of counsel claim based on his trial counsel's failure to timely file a motion to suppress evidence allegedly obtained in violation of the Fourth Amendment. 477 U.S. at 365. Kimmelman, was not a death penalty case and has no bearing on this claim.

aggravating circumstances were at issue and that the trial court instructed the jury that it was limited to considering only those three aggravating circumstances. Id. at 257. Petitioner appealed the denial to the Florida Supreme Court (Ex. D26). The Florida Supreme Court made no written finding on this claim.

Petitioner cannot demonstrate prejudice because both the prosecutor and the trial judge told the jury that it was to consider only three aggravating factors: (1) whether the crime was committed while Defendant was engaged in a robbery; (2) whether the crime was especially wicked, evil, atrocious, or cruel; and (3) whether the crime was committed in a cold, calculated and premeditated manner without any pretense of moral justification (Ex. A2 at 233, 235, 237, 255). Juries are presumed to follow instructions. Jamerson v. Sec'y, Dep't of Corr., 410 F.3d 682, 690 (2005). Finally, Florida courts have consistently found that a prosecutor's isolated reference to a defendant's lack of remorse constitutes harmless error. See Floyd v. State, 808 So. 2d 175, 185 (Fla. 2002) ("Even if appellate counsel had raised this issue on appeal we would have concluded that the prosecutor's isolated reference to Floyd's lack of remorse during the State's closing argument constituted harmless error."); Shellito v. State, 701 So.2d 837, 842 (Fla. 1997) (brief reference to lack of remorse constituted harmless error).

Given that the error, if any, complained of was harmless, Petitioner cannot demonstrate prejudice from counsel's failure to object. See Boland v. Sec'y, Dep't of Corr., 278 F. App'x 876, *4 (11th Cir. 2008) (it was reasonable for the state courts to conclude that Boland was not prejudiced because the error of which he complained was harmless); Johnson v. Blackburn, 778 F.2d 1044, 1050 (5th Cir. 1985) ("If an error is shown to be harmless, then the error cannot satisfy the prejudice prong of Strickland").

The state court's denial of relief on each of the sub-claims raised in Claim Two was not contrary to or an unreasonable application of Strickland, and Petitioner is not entitled to relief. 28 U.S.C. § 2254(d).

C. Claim Three

Petitioner asserts that he is innocent of the death penalty because co-defendant William Poirier received a disparate sentence (Doc. 1 at 97). Specifically, Poirier pleaded guilty to second degree murder after Petitioner's conviction and sentence. Id. at 97-98. Poirier was sentenced to 35 years in prison on the murder charge and a concurrent term of 15 years in prison on the robbery charge. Id. at 98. Petitioner cites Sawyer v. Whitley, 505 U.S. 333 (1992) for the proposition that "he is entitled to relief for constitutional errors which resulted in the conviction or sentence of death." (Doc. 1 at 97).

Petitioner raised this claim in his Rule 3.850 (Ex. D26), and it was rejected by the post-conviction court on three separate grounds: (1) Petitioner and Poirier were not convicted of the same offense; (2) the claim was procedurally barred because it had already been considered and rejected in the original appeal; and (3) Petitioner was more culpable than Poirier (Ex. D21 at 2479). The Florida Supreme Court also rejected the claim on the grounds that the claim was procedurally barred, Poirier received a lighter sentence because he pleaded guilty to second-degree murder, and Petitioner was the more culpable of the two. Krawczuk II, 92 So. 3d at 207-08.¹³

¹³ Despite the post-conviction court's conclusion that the issue "was considered and rejected" on direct appeal, the records are not clear on this matter. Petitioner did not raise this issue as a separate claim in his brief on direct appeal (Ex. A9). In Krawczuk I, the Florida Supreme Court summarized, in a footnote, the trial court's conclusions regarding Petitioner's relative culpability:

The court found no disparate treatment between Krawczuk and Poirier, noting that Krawczuk "scouted the site to dispose [of] the body, made the arrangements with the victim to go to his house, physically strangled the victim with the co-defendant's assistance, placed the drain cleaner in the victim's mouth and steadied the co-defendant when he was on the point of becoming sick" and that the psychiatrist thought Krawczuk was overstating when he said he had been influenced by Poirier. Additionally, Krawczuk was older and bigger than Poirier.

634 So. 2d at 1074 n.5. In Krawczuk I, the Florida Supreme Court made no comment on whether it agreed with the trial court's

Although Petitioner presents Claim Three as a constitutional claim, the Supreme Court has never required a state court to compare the culpability and sentences of co-defendants in capital cases. To the contrary, the Supreme Court has determined that absent a showing that a system operated in an arbitrary and capricious manner, a petitioner "cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did not receive the death penalty." McCleskey v. Kemp, 481 U.S. 279, 306-07 (1987) (emphasis in original); see also Williams v. Illinois, 399 U.S. 235, 243 (1970) ("The Constitution permits qualitative differences in meting out punishment and there is no requirement that two persons convicted of the same offense receive identical sentences."); Pulley v.

findings on Petitioner's and Poirier's relative culpability; the note was made in regards to Petitioner's argument that the trial court erred when it failed to find the existence of nonstatutory mitigators. Id. at 1073.

In Krawczuk II, the Florida Supreme Court suggested that Petitioner did not raise the issue on direct appeal by stating that, "[a]ppellate counsel did mention Poirier's sentence in the initial brief, although not as a distinct issue." Krawczuk II, 92 So. 3d at 209. The Florida Supreme Court also noted that "[b]ecause this claim was, or should have been, raised on direct appeal, the lower court correctly found that it was procedurally barred." Id. at 207 (noting that the issue had been addressed in a footnote in its original order on Petitioner's direct appeal). Because this claim fails on the merits, this court need not address whether it is also unexhausted. See 28 U.S.C. § 2254(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.").

Harris, 465 U.S. 37, 50-51 (1984) ("There is thus no basis in our cases for holding that comparative proportionality review by an appellate court is required in every case in which the death penalty is imposed and the defendant requests it.").

Moreover, the Florida Supreme Court has spoken directly to Petitioner's claim that Poirier was the more culpable of the two murderers. Affirming the denial of Petitioner's Rule 3.850 motion, the Florida Supreme Court found Petitioner, not Poirier, to be the more culpable party:

As summarized by the lower court's findings: (1) Krawczuk met the victim six months before the incident and started going to the victim's house three months prior, but Poirier had only been with Krawczuk to the victim's house one time prior to the murder; (2) Krawczuk initiated the events by suggesting they go to the bedroom, he initiated the roughhousing, he pinned the victim down, choked him, poured Crystal Vanish down the victim's throat, and poured water in; and (3) Krawczuk was older and bigger than Poirier, more aggressive, and Poirier was called Krawczuk's protégé. See Krawczuk, 634 So.2d at 1074 n. 5 ("Krawczuk 'scouted the site to dispose [of] the body, made the arrangements with the victim to go to his house, physically strangled the victim with the co-defendant's assistance, placed the drain cleaner in the victim's mouth and steadied the co-defendant when he was on the point of becoming sick' and ... the psychiatrist thought Krawczuk was overstating when he said he had been influenced by Poirier. Additionally, Krawczuk was older and bigger than Poirier.").

Krawczuk II, 92 So. 3d at 207-208. Even if this proportionality claim were cognizable in federal habeas, the findings of the

Florida Supreme Court are neither contrary to, nor an unreasonable application of, clearly established federal law. Nor has Petitioner presented clear and convincing evidence showing that the state court's conclusion that Petitioner was more culpable than Poirier was an unreasonable determination of the facts. To the extent, Petitioner asserts that the Florida Supreme Court misapplied state law in its adjudication of this claim, "[a] federal court may not issue the writ on the basis of a perceived error of state law." Harris, 465 U.S. at 41.

Petitioner is not entitled to federal habeas relief on Claim Three.

D. Claim Four

Petitioner asserts that the trial court erred by failing to properly consider and weigh mitigation evidence (Doc. 1 at 100).

Petitioner asserts:

The Eighth Amendment forbids a sentencer in a capital case from refusing to consider any relevant mitigating evidence presented by the defendant, nor can it give such mitigating evidence no weight by excluding it from consideration. Eddings v. Oklahoma, 455 U.S. 104 (1982). In Mr. Krawczuk's case, such an Eighth Amendment violation occurred, and the Florida Supreme Court's decision is contrary to and/or an unreasonable application of Eddings. See Krawczuk I at 1073-74.

It was incumbent upon the trial court judge in Mr. Krawczuk's case to analyze any possible nonstatutory mitigating circumstances. The court, however, failed to do so. First, the court failed to inquire or seek any medical

testimony about Mr. Krawczuk despite his psychological history, his increasing depression, and his use of medications. While Mr. Krawczuk's trial counsel advised the court that there were mitigation witnesses, the court made no further inquiry. Several factors that unquestionably comprise nonstatutory mitigating factors were not considered by the court, including Mr. Krawczuk's deprived childhood, where his father failed to acknowledge him and his mother was abusive; his service in the military which was shortened by mental illness; and increased depression and feelings of built. Moreover, the Presentence Investigation Report in this case recommended life imprisonment. Because the trial court failed to consider these factors in mitigation, the Eighth Amendment was violated.

(Doc. 1 at 100-01).

Petitioner raised this claim on direct appeal where it was rejected by the Florida Supreme Court. The court determined that the trial court "carefully considered the psychiatrists report and the presentence investigation report and found that the record did not support the establishment of any nonstatutory mitigators." Krawczuk I, 634 So. 2d at 1073. The Florida Supreme Court also pointed to the trial court's oral statement that, in addition to those items, he considered "anything else [he] had been able to discern from these proceedings." Id. at 1073 n.4. The Florida Supreme Court's conclusions are supported by the record.

At Petitioner's Spencer hearing, the trial court noted that "[w]ith respect to mitigating factors, I believe that I may well be entitled to consider matters in the report and the matters in

the presentence investigation for the purpose of mitigating, finding mitigating factors. It appears, at least there may be several. At least there is the one, that is fairly insignificant criminal record. So, um, I will be looking at that further." (Ex. A3 at 419-20). At the oral pronouncement of Petitioner's sentence, the trial court stated that it had "looked to the presentence investigation and psychiatrist's report¹⁴ in this case, solely for the purpose of considering whether they contain any mitigating factors." Id. at 425. The court concluded that he could not find any non-statutory mitigating factors "based on those documents or anything else [he had] been able to discern in these proceedings." Id. The court did not state that it refused to consider mitigating circumstances; rather, it simply found none. Other than re-arguing that counsel should have put more evidence

¹⁴ The trial court's sentencing order also references "the psychiatrist report (in the record sealed)" and notes that the psychiatrist was of the opinion that the Petitioner overstated Poirier's influence over Petitioner (Ex. A5 at 590, 592). The court does not explain whether he refers to Dr. Keown's report or to a different psychiatric report. At the Spencer hearing, Petitioner indicated that he did not wish for the court to have access to Dr. Keown's report. However, Keown's report did note that "more than likely [Petitioner] is the more passive of the two defendants, and so I think there is some truth to his allegation that he was influenced by his co-defendant. However, I think he is probably overstating this." (Ex. D19B at 2204). Moreover, the Florida Supreme Court stated that the court, "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." Krawczuk I, 634 So. 2d at 1072. Accordingly, it appears that the trial court considered Keown's report when making its decision.

before the sentencing court, Petitioner does not explain how the state court's adjudication was contrary to clearly established law.

To the extent Petitioner argues that the trial court should have ignored Petitioner's request to waive mitigation and ordered that additional mitigation evidence be presented despite Petitioner's explicit waiver, he has presented no support for this claim. In fact, the courts which have addressed this issue have found that a defendant is allowed to waive a mitigation case. See Singleton v. Lockhart, 962 F.2d 1315, 1322 (8th Cir. 1992) ("If a defendant may be found competent to waive the right of appellate review of a death sentence, we see no reason why a defendant may not also be found competent to waive the right to present mitigating evidence that might forestall the imposition of such a sentence in the first instance"); Tyler v. Mitchell, 416 F.3d 500, 503-04 (6th Cir. 2005) (holding that because a capital defendant's counsel is not constitutionally ineffective when a competent defendant prevents him from investigating and presenting mitigation evidence, it follows that the Constitution does not prohibit a competent capital defendant from waiving the presentation of mitigation evidence); Chandler v. United States, 218 F.3d 1305, 1319 n. 25 (11th Cir. 2000) ("the cases concerning the constitutional right of defendants not to be precluded or limited by the state or the court in their presentation of

mitigation evidence at sentencing do not support the proposition that, if counsel does not present all possible mitigation at sentencing, then defendant has been denied some constitutional right"); James v. Culliver, No. CV-10-S-2929-S, 2014 WL 4926178, at * 91 (N.D. Ala. 2014) ("A competent defendant can waive the presentation of mitigating evidence during the penalty phase."); Landrigan, 550 U.S. at 479 ("We have never imposed an 'informed and knowing' requirement upon a defendant's decision not to introduced evidence.") (citing Iowa v. Tovar, 541 U.S. 77, 88 (2004)).

Petitioner's reliance on Eddings is misplaced. In Eddings, the Supreme Court found that a sentence may not refuse to consider, *as a matter of law*, any relevant mitigating evidence." 455 U.S. at 114 (emphasis in original). In its sentencing order, the trial court specifically acknowledged that it considered all available mitigation evidence and found that a sentence of death was supported by the facts of the case. This Court is not convinced that Eddings stands for the proposition that a sentencing judge is constitutionally required to independently seek out and consider additional mitigating evidence against the express wishes of the defendant. Petitioner has cited no federal law even marginally supportive of this proposition, much less establishing it as a requirement. Because there is no Supreme Court law on this issue, the Florida Supreme Court's rejection of Petitioner's

claim is not contrary to, and does not involve an unreasonable application of, clearly established federal law as determined by the Supreme Court. Claim Four is denied pursuant to 28 U.S.C. § 2254(d).

Any of Petitioner's allegations not specifically addressed herein have been found to be without merit.

V. Certificate of Appealability¹⁵

A prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition. 28 U.S.C. § 2253(c)(1). Rather, a district court must first issue a certificate of appealability ("COA"). "A [COA] may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing, Petitioner must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," Tennard v. Dretke, 542 U.S. 274, 282 (2004) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)), or that "the issues presented were 'adequate to deserve encouragement to proceed further.'" Miller-El, 537 U.S. 322, 335-36 (2003).

¹⁵ Pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Courts, the "district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." As this Court has determined that Petitioner is not entitled to habeas corpus relief, it must now consider whether Petitioner is entitled to a certificate of appealability.

Petitioner has not made the requisite showing on any of his claims, and a certificate of appealability will be denied.

Accordingly, it is hereby **ORDERED AND ADJUDGED** as follows:

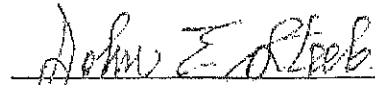
1. The Florida Attorney General is **DISMISSED** as a respondent.

2. Each claim in the Petition for Writ of Habeas Corpus filed by Anton J. Krawczuk is **DENIED**.

3. Petitioner is **DENIED** a certificate of appealability.

4. The Clerk of the Court is directed to terminate all pending motions, enter judgment accordingly, and close this case.

DONE AND ORDERED at Fort Myers, Florida, this 5th day of August, 2015.



JOHN E. STEELE
SENIOR UNITED STATES DISTRICT JUDGE

SA: Or1P-4

Copies to: Counsel of Record

92 So.3d 195
Supreme Court of Florida.

Anton KRAWCZUK, Appellant,
v.
STATE of Florida, Appellee.
Anton Krawczuk, Petitioner,
v.
Kenneth S. Tucker, etc., Respondent.

Nos. SC10-680, SC11-10.

|
April 12, 2012.

|
Rehearing Denied June 29, 2012.

Synopsis

Background: Following affirmance of first-degree murder conviction and death penalty, 634 So.2d 1070, defendant filed motion to vacate conviction and sentence. The Circuit Court, Lee County, James R. Thompson, J., denied motion. Defendant appealed and filed petition for writ of habeas corpus.

Holdings: The Supreme Court held that:

- [1] defendant failed to establish that judge was biased;
- [2] trial court's improper consideration of extra-record information regarding credibility of defendant's expert witness was harmless error;
- [3] defense counsel was not ineffective for honoring defendant's instructions that he not pursue mitigation and not involve his family;
- [4] defendant failed to establish ineffective assistance in counsel's failure to object to prosecutor's statements to jury; and
- [5] defendant's death sentence was not improperly disparate, even though co-defendant, who pleaded guilty to a lesser offense, received a sentence of thirty-five years.

Affirmed petition for writ of habeas corpus denied.

Pariente, J., concurred in result and filed opinion.

West Headnotes (31)

[1] **Criminal Law** ⚖️ Review De Novo

The question of whether a motion to disqualify a judge is legally sufficient is a question of law, which is reviewed de novo. West's F.S.A. § 38.10; West's F.S.A. R.Jud.Admin.Rule 2.330.

Cases that cite this headnote

[2] **Judges** ⇌ Determination of objections

When ruling on a motion to disqualify, the trial judge is limited to determining the legal sufficiency of the motion. West's F.S.A. § 38.10; West's F.S.A. R.Jud.Admin.Rule 2.330.

1 Cases that cite this headnote

[3] **Judges** ⇌ Bias and Prejudice

Judges ⇌ Sufficiency of objection, affidavit, or motion

The standard for viewing the legal sufficiency of a motion to disqualify a judge is whether the facts alleged, which must be assumed to be true, would cause the movant to have a well-founded fear that he or she will not receive a fair trial at the hands of that judge; this fear of judicial bias must be objectively reasonable. West's F.S.A. § 38.10; West's F.S.A. R.Jud.Admin.Rule 2.330.

2 Cases that cite this headnote

[4] **Judges** ⇌ Sufficiency of objection, affidavit, or motion

The subjective fear by a party that he or she will not receive a fair trial is not sufficient to support motion to disqualify a judge; rather, the facts and reasons given for the disqualification of a judge must tend to show the judge's undue bias, prejudice, or sympathy. West's F.S.A. § 38.10; West's F.S.A. R.Jud.Admin.Rule 2.330.

2 Cases that cite this headnote

[5] **Judges** ⇌ Sufficiency of objection, affidavit, or motion

Where the claim of judicial bias is based on very general and speculative assertions about the trial judge's attitudes, no relief is warranted. West's F.S.A. § 38.10; West's F.S.A. R.Jud.Admin.Rule 2.330.

1 Cases that cite this headnote

[6] **Judges** ⇌ Bias and Prejudice

Capital defendant failed to establish that judge considering his postconviction motion was biased, and thus defendant was not entitled to disqualification of judge; judge's improper consideration of extra-record information regarding credibility of expert witness was not indicative of bias, and judge provided multiple reasons for finding that expert's testimony was not credible, one of which was that expert, who sought to establish possible mitigation, had only briefly met with defendant. West's F.S.A. § 38.10; West's F.S.A. R.Jud.Admin.Rule 2.330.

Cases that cite this headnote

[7] **Criminal Law** ⇌ Admissibility

Trial court, ruling on capital defendant's postconviction motion, could not properly consider extra-record information regarding credibility of defendant's expert witness.

1 Cases that cite this headnote

[8] **Criminal Law** ⇌ Post-conviction relief

Trial court's improper consideration of extra-record information regarding credibility of capital defendant's expert was harmless error in postconviction proceedings; expert had sought to establish possible mitigation, two other experts testified regarding defendant's mental health, the extra-record information was not used to sentence defendant, the information was readily available, and the court's order denying relief referenced facts that were established at the evidentiary hearing in addition to the extra-record information.

Cases that cite this headnote

[9] **Sentencing and Punishment** ⇌ Notice of evidence and witnesses

If a trial judge uses information not stated in open court to make a determination that the death sentence is appropriate, he or she must give the defendant an opportunity to rebut the information.

Cases that cite this headnote

[10] **Criminal Law** ⇌ Competency of Experts

Trial judges sitting as finders of fact in evidentiary hearings are strongly discouraged from performing their own research, outside of open court, into the credentials of expert witnesses.

Cases that cite this headnote

[11] **Criminal Law** ⇌ Presumptions and burden of proof in general

There is a strong presumption that trial counsel's performance was not deficient, U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[12] **Criminal Law** ⇌ Adequacy of Representation

A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

Cases that cite this headnote

[13] **Criminal Law** ⇌ Strategy and tactics in general

Defendant asserting ineffective assistance of counsel carries the burden to overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy, U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[14] **Criminal Law** ⇌ Adequacy of Representation

Judicial scrutiny of counsel's performance must be highly deferential, U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[15] **Criminal Law** ⇌ Strategy and tactics in general

Strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[16] **Criminal Law** ⇌ Particular Cases and Issues

Where the Supreme Court previously has rejected a substantive claim on the merits, counsel cannot be deemed ineffective for failing to make a meritless argument. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[17] **Criminal Law** ⇌ Prejudice in general

In demonstrating prejudice, defendant alleging ineffective assistance of counsel must show a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different; a reasonable probability is a probability sufficient to undermine confidence in the outcome. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[18] **Criminal Law** ⇌ Review De Novo

Criminal Law ⇌ Counsel

Because both prongs of the *Strickland* test for ineffective assistance of counsel present mixed questions of law and fact, appellate court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent, substantial evidence, but reviewing the circuit court's legal conclusions de novo. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[19] **Criminal Law** ⇌ Presentation of evidence in sentencing phase

Where defense counsel failed to present mitigation evidence at the penalty portion of a capital case, the principal concern in deciding whether counsel exercised reasonable professional judgment is not whether counsel should have presented a mitigation case; rather, the reviewing court's focus is on whether the investigation supporting counsel's decision not to introduce mitigating evidence was itself reasonable. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[20] **Criminal Law** ⇌ Adequacy of investigation of mitigating circumstances

In assessing counsel's investigation into mitigation evidence in a capital case, reviewing court must conduct an objective review of counsel's performance, measured for reasonableness under prevailing professional norms, which includes a context-dependent consideration of the challenged conduct as seen from counsel's perspective at the time.

1 Cases that cite this headnote

[21] **Criminal Law** ⇌ Adequacy of investigation of mitigating circumstances

Criminal Law ⇌ Presentation of evidence in sentencing phase

Defense counsel could not be deemed ineffective for failing to investigate and present mitigation evidence regarding defendant's background at penalty phase of capital murder prosecution, where defendant repeatedly insisted that counsel not pursue mitigation and not involve his family. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[22] **Criminal Law** ⇌ Particular Cases and Issues

An attorney will not be deemed ineffective for honoring his client's wishes. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[23] **Criminal Law** ⇌ Objecting to instructions

Counsel for capital defendant could not be deemed ineffective for failing to object to trial court's standard instruction that sympathy should play no role in deliberations. U.S.C.A. Const.Amend. 6; Fla. Std. Jury Instr. (Crim.) 3.10.

Cases that cite this headnote

[24] **Criminal Law** ⇌ Matters Already Adjudicated

Capital defendant was procedurally barred from re-arguing in postconviction proceedings the merits of trial court's denial of motion to suppress confession.

Cases that cite this headnote

[25] **Criminal Law** ⇌ Plea

Criminal Law ⇌ Declarations, confessions, and admissions

Defendant failed to establish that trial counsel rendered ineffective assistance in capital murder prosecution by failing to raise and litigate the voluntariness of his confession, where trial court did raise the voluntariness of defendant's confession in a motion to suppress, and defendant did not allege that he would not have pleaded guilty but for counsel's alleged deficiency. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[26] **Criminal Law** ⇌ Declarations, confessions, and admissions

Defendant failed to establish that trial counsel rendered ineffective assistance in capital murder prosecution by failing to offer testimony of mental health experts and others at hearing on motion to suppress confession; trial counsel completely and fully litigated the motion to suppress and defendant presented no additional evidence that would have changed the court's denial of the motion to suppress. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[27] **Criminal Law** ⇌ Post-conviction proceeding not a substitute for appeal

Defendant was procedurally barred from raising in postconviction petition claim of prosecutorial misconduct alleged committed during penalty phase of capital murder prosecution, where trial counsel failed to object to the comments and the issue was not raised on direct appeal.

1 Cases that cite this headnote

[28] **Criminal Law** ⇌ Argument and comments

Defendant failed to establish that trial counsel rendered ineffective assistance in penalty phase of capital murder prosecution by failing to object to prosecutor's comments that the law required the jury to recommend the death penalty if the aggravating circumstances outweighed the mitigating circumstances, where jury was properly instructed. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

[29] **Criminal Law** ⇌ Post-conviction proceeding not a substitute for appeal

Criminal Law ⇌ Affirmance of conviction

Defendant was procedurally barred from raising in postconviction petition claim that his death sentence constituted a disparate sentence because he was as culpable or less culpable than co-defendant who received a sentence of thirty-five years, where claim was, or should have been, raised on direct appeal.

2 Cases that cite this headnote

[30] **Sentencing and Punishment** ⇌ Sentence or disposition of co-participant or codefendant

Defendant's death sentence following conviction for first-degree murder did not constitute a disparate sentence, even though his co-defendant received a sentence of thirty-five years, where co-defendant pleaded guilty to second-degree murder, and defendant was the more culpable party.

2 Cases that cite this headnote

[31] **Habeas Corpus** ⇌ Post-Conviction Motions or Proceedings

Habeas Corpus ⇌ Appeal, Error, or Other Direct Review of Conviction

A petition for habeas corpus is not the proper method for raising a claim that could have been raised on appeal or in a postconviction proceeding.

1 Cases that cite this headnote

Attorneys and Law Firms

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Pamela Jo Bondi, Attorney General, Tallahassee, FL, and Stephen D. Ake, Assistant Attorney General, Tampa, FL, for Appellee/Respondent.

Opinion

PER CURIAM.

Anton Krawczuk appeals an order of the circuit court denying his motion to vacate his conviction of first-degree murder and sentence of death filed under Florida Rule of Criminal Procedure 3.851 and petitions this Court for a writ of habeas corpus. We have jurisdiction. See art. V, § 3(b)(1), (9), Fla. Const.

FACTS

The facts of the underlying murder were detailed in this Court's opinion on direct appeal and are provided below:

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 *199 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* [v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)] rights, Krawczuk confessed to killing Staker.

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 Staker'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 *200 possible mitigating evidence. At the final hearing the court sentenced Krawczuk to death, finding three aggravators and one statutory mitigator.

Krawczuk v. State, 634 So.2d 1070, 1071–72 (Fla.), *cert. denied*, 513 U.S. 881, 115 S.Ct. 216, 130 L.Ed.2d 143 (1994). On appeal, Krawczuk raised four claims: (1) that the trial court erred in denying his motion to suppress his confession, (2) that the trial court failed to conduct a proper plea colloquy to ensure that his plea was knowingly and intelligently given, (3) that the trial judge improperly instructed the jury on the heinous, atrocious, or cruel aggravator and erred in finding that it applied, and (4) that the trial court erred in failing to find the existence of nonstatutory mitigation. This Court denied each of his claims, and found competent substantial evidence to affirm his conviction and sentence. *Id.* at 1073–74.

Krawczuk filed his initial motion for postconviction relief on October 3, 1995 under Florida Rule of Criminal Procedure 3.850. On March 15, 2002, he filed an amended motion to vacate, raising twenty-four claims. A *Huff*¹ hearing commenced on August 21, 2002, at which the lower court granted an evidentiary hearing for several claims, which was held on January 20–21, 2004, and March 8, 2004.

¹ *Huff v. State*, 622 So.2d 982 (Fla.1993).

After hearing the evidence, Judge James Thompson denied Krawczuk's motion in an expansive order.² Krawczuk now seeks review of some of his claims. As discussed in more detail below, we find no merit in Krawczuk's claims and affirm the order denying postconviction relief and deny his petition for habeas relief.

² We take this opportunity to note that the delay between the evidentiary hearing and the issuance of the order denying relief was unusually long. Although the evidentiary hearings were held in January and March 2004, the court did not issue its order until January 25, 2010. During oral argument, appellate counsel could not offer an explanation for the delay. We are concerned that this sort of delay undermines the interests of justice.

Judicial Bias

In this issue Krawczuk argues that the postconviction court improperly denied his motion to disqualify the judge and that the judge demonstrated bias by relying on extra-record information. Because, Krawczuk cannot demonstrate bias, we disagree.

[1] The question of whether a motion to disqualify is legally sufficient is a question of law, which is reviewed de novo. See *Lynch v. State*, 2 So.3d 47, 78 (Fla.2008). To the extent that Krawczuk is arguing that the trial court improperly denied his motion to disqualify, we conclude that this claim is without merit. To the extent that Krawczuk is alleging that the trial court erred by relying on extra-record information in violation of *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), we conclude that although there was error, the error was harmless.

[2] [3] [4] [5] A motion to disqualify is governed by section 38.10, Florida Statutes (2011), and Florida Rule of Judicial Administration 2.330. See *Parker v. State*, 3 So.3d 974, 981 (Fla.2009) (citing *Cave v. State*, 660 So.2d 705, 707 (Fla.1995)). When ruling on the motion, the trial judge is limited to determining the legal sufficiency of the motion:

The term “legal sufficiency” encompasses more than mere technical compliance with the rule and the statute. The standard for viewing the legal sufficiency of a motion to disqualify is whether the facts alleged, which must be assumed

to be true, would cause the movant to have *201 a well-founded fear that he or she will not receive a fair trial at the hands of that judge. See Fla. R. Jud. Admin. 2.330(d)(1). Further, this fear of judicial bias must be objectively reasonable. See *State v. Shaw*, 643 So.2d 1163, 1164 (Fla. 4th DCA 1994). The subjective fear of a party seeking the disqualification of a judge is not sufficient. See *Kowalski v. Boyles*, 557 So.2d 885 (Fla. 5th DCA 1990). Rather, the facts and reasons given for the disqualification of a judge must tend to show "the judge's undue bias, prejudice, or sympathy." *Jackson v. State*, 599 So.2d 103, 107 (Fla.1992); see also *Rivera v. State*, 717 So.2d 477, 480-81 (Fla.1998). Where the claim of judicial bias is based on very general and speculative assertions about the trial judge's attitudes, no relief is warranted. *McCrae v. State*, 510 So.2d 874, 880 (Fla.1987).

Parker, 3 So.3d at 982.

[6] First, to the extent that Krawczuk is arguing that Judge Thompson improperly denied the motion to recuse himself, his claim is without merit. To establish bias, Krawczuk must demonstrate that he "fears that he ... will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge." Fla. R. Jud. Admin. 2.330. In the instant case, the court properly denied Krawczuk's motion to disqualify. Nothing in the record indicates that Judge Thompson was biased or prejudiced. As discussed below, although Judge Thompson's actions were error, they were not indicative of bias. Judge Thompson provided multiple reasons for finding that Dr. Crown's testimony was not credible, one of which was that Dr. Crown had only briefly met with Krawczuk.

[7] [8] [9] Next, to the extent that Krawczuk is alleging that the court improperly relied on extra-record information, there was error, but the error was harmless beyond a reasonable doubt. The United States Supreme Court has condemned the practice of judges using extra-record information to impose the death penalty. *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). Further, we have recognized the impropriety of such actions and have stated:

In *Gardner*, the United States Supreme Court reminded us that the sentencing process, as well as the trial itself, must satisfy the requirements of the due process clause. *Gardner* held that using portions of a presentence investigation report without notice to the defendant and without an accompanying opportunity afforded to the defendant to rebut or challenge the report denied due process. That ruling should extend to a deposition or any other information considered by the court in the sentencing process which is not presented in open court. Should a sentencing judge intend to use any information not presented in open court as a factual basis for a sentence, he must advise the defendant of what it is and afford the defendant an opportunity to rebut it.

Porter v. State, 400 So.2d 5, 7 (Fla.1981) (citations omitted). Thus, it is well settled that if a trial judge uses information not stated in open court to make a determination that the death sentence is appropriate, he or she must give the defendant an opportunity to rebut the information.

We have found some instances of reliance on extra-record information to be harmless error:

[W]hile the sentencing order did state that the judge read all of the depositions, read the medical examiner's report, and checked the victim's probate records, all of which constitute extra-record materials, the trial judge revealed his consideration of these matters *202 both in letters to the parties and during a motion hearing prior to the penalty phase. Thus, unlike both *Gardner* and *Porter*, Vining was advised by the trial judge of his consideration of extra-record information and afforded an opportunity to rebut or impeach the information. Further, like *Consalvo*, the information relied upon in the sentencing order to support the aggravating factors was otherwise proven at trial. And like *Lockhart*, "given the overwhelming evidence supporting [the] aggravating factors, this error did not injuriously affect [the defendant's] substantial rights."

Vining v. State, 827 So.2d 201, 209-10 (Fla.2002) (citation omitted) (quoting *Lockhart v. State*, 655 So.2d 69, 74 (Fla.1995)); see also *Consalvo v. State*, 697 So.2d 805 (Fla.1996) ("Although we find that it was error for the trial court to utilize these out-of-court deposition statements, we find these errors are harmless beyond a reasonable doubt [because]

the trial court here made reference to facts which were established at trial by evidence other than that referred to in the sentencing order.”); *Lockhart v. State*, 655 So.2d 69, 74 (Fla.1995) (finding a *Gardner* error where “the sentencing order indicate[d] that the judge relied on information from the newspaper articles to support his finding of no mitigation” but also finding “given the overwhelming evidence supporting three aggravating factors, this error did not injuriously affect Lockhart's substantial rights”). We also find the error here harmless. Although Dr. Crown's testimony was provided to establish possible mitigation, two other experts testified regarding Krawczuk's mental health, which served as a part of the basis for Judge Thompson's findings.

[10] We find it disconcerting for a judge, sitting as finder of fact in an evidentiary hearing, to perform his own research into the credentials of an expert witness. We strongly discourage trial judges from performing such actions in the future. There is no reason apparent to this Court for the trial judge to perform his or her own research on the credibility of an expert witness outside of open court. However, in this case, we find the error to be harmless beyond a reasonable doubt because (1) the information was not used to sentence Krawczuk, (2) the information was readily available, and (3) the court's order denying relief references facts that were established at the evidentiary hearing in addition to the extra-record information.

Ineffective Assistance of Counsel

Krawczuk raises several claims of ineffective assistance of counsel. We find that the postconviction court properly denied relief on these claims.

[11] [12] [13] [14] [15] [16] [17] [18] Following the United State Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), this Court has held that for ineffective assistance of counsel claims to be successful, the defendant must demonstrate both deficiency and prejudice:

First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined.

Bolin v. State, 41 So.3d 151, 155 (Fla.2010) (quoting *Maxwell v. Wainwright*, 490 So.2d 927, 932 (Fla.1986)).

There is a strong presumption that trial counsel's performance was not deficient. See *203 *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052. “A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.” *Id.* at 689, 104 S.Ct. 2052. The defendant carries the burden to “overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’ ” *Id.* (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). “Judicial scrutiny of counsel's performance must be highly deferential.” *Id.* “[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct.” *Occhicone v. State*, 768 So.2d 1037, 1048 (Fla.2000). Furthermore, where this Court previously has rejected a substantive claim on the merits, counsel cannot be deemed ineffective for failing to make a meritless argument. *Melendez v. State*, 612 So.2d 1366, 1369 (Fla.1992).

In demonstrating prejudice, the defendant must show a reasonable probability that “but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. Because both prongs of the *Strickland* test present mixed questions of law and fact, this Court employs a mixed standard of review, deferring to

the circuit court's factual findings that are supported by competent, substantial evidence, but reviewing the circuit court's legal conclusions de novo. *See Sochor v. State*, 883 So.2d 766, 771–72 (Fla.2004).

Johnston v. State, 63 So.3d 730, 737 (Fla.2011) (parallel citations omitted).

[19] [20] As this Court has said, “the obligation to investigate and prepare for the penalty portion of a capital case cannot be overstated.” *State v. Lewis*, 838 So.2d 1102, 1113 (Fla.2002).

[O]ur principal concern in deciding whether [counsel] exercised “reasonable professional judgment” is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence ... *was itself reasonable*. In assessing counsel's investigation, we must conduct an objective review of their performance, measured for “reasonableness under prevailing professional norms,” which includes a context-dependent consideration of the challenged conduct as seen [n] “from counsel's perspective at the time.”

Orme v. State, 896 So.2d 725, 731 (Fla.2005) (quoting *Wiggins v. Smith*, 539 U.S. 510, 522–23, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)).

[21] First, Krawczuk claims that counsel was ineffective for failing to investigate and present mitigation. Further, Krawczuk claims that counsel's failure rendered his waiver of mitigation in the penalty phase invalid. The lower court found counsel deficient for failing to discover mitigation related to Krawczuk's background, but found that Krawczuk was not prejudiced because he was emphatic that counsel not contact his family and probably would not have permitted counsel to present the information during the penalty phase. The postconviction court properly denied this claim.

*204 In *Grim v. State*, 971 So.2d 85 (Fla.2007), the defendant was tried and found guilty of first-degree murder and instructed his attorneys not to present mitigating evidence. The trial court conducted a *Koon*³ hearing and determined that Grim freely, voluntarily, and knowingly decided to waive mitigation. *Grim*, 971 So.2d at 91. Grim expressed his desire multiple times during the proceedings to receive either a not guilty verdict or the death penalty. During postconviction proceedings, Grim argued that counsel was ineffective for failing to fully investigate and present mitigation and that these failures rendered his waiver invalid. *Id.* at 99. We noted:

³ *Koon v. Dugger*, 619 So.2d 246 (Fla.1993). *Koon* is not applicable to the present case because the penalty phase occurred in 1992, before *Koon* was decided. *See, e.g., Waterhouse v. State*, 792 So.2d 1176, 1184 (Fla.2001) (“*Koon* is technically inapplicable to this case because the penalty phase proceedings below occurred some three years prior to the *Koon* decision becoming final....”); *Allen v. State*, 662 So.2d 323, 329 (Fla.1995) (noting that the ruling in *Koon* was prospective).

When a defendant, against his counsel's advice, refuses to permit the presentation of mitigating evidence in the penalty phase, counsel must inform the court on the record of the defendant's decision. Counsel must indicate whether, based on his investigation, he reasonably believes there to be mitigating evidence that could be presented and what the evidence would be. The court should then require the defendant to confirm on the record that his counsel has discussed these matters with him, and despite counsel's recommendation, he wishes to waive presentation of penalty phase evidence.

Grim, 971 So.2d at 100 (quoting *Koon*, 619 So.2d at 250). We further noted:

We have recognized that a defendant's waiver of his right to present mitigation does not relieve trial counsel of the duty to investigate and ensure that the defendant's decision is fully informed. *See, e.g., State v. Lewis*, 838 So.2d 1102, 1113 (Fla.2002) (“Although a defendant may waive mitigation, he cannot do so blindly; counsel must first investigate all avenues and advise the defendant so that the defendant reasonably understands what is being waived and its ramifications and hence is able to make an informed, intelligent decision.”).

Grim, 971 So.2d at 100. Ultimately, we found that the record did not support a claim of failure to investigate because counsel “did not latch onto Grim’s desire not to present mitigation, but instead, repeatedly tried to dissuade him.” *Id.* Likewise, in *Waterhouse*, we found:

[T]his was not simply a case where a defense attorney latched on to a defendant’s refusal to present mitigating evidence. The evidence in support of mitigation had already been investigated and accumulated as part of Waterhouse’s previous collateral and habeas proceedings. In fact, the record in this case includes the affidavit of Dr. Fred S. Berlin, who concluded that Waterhouse may have been under the influence of an extreme emotional disturbance at the time of the commission of the crime and that this may have impaired his capacity to conform his conduct to the requirements of the law. Defense counsel had also obtained the necessary paperwork to bring Waterhouse’s brother from Louisiana, but Waterhouse indicated that if that were done, he would contact his brother and tell him to avoid the proceedings. Additionally, after the trial court appointed Dr. Charles H. Wheaton to examine Waterhouse for the possibility that he might suffer from organic *205 brain damage, Waterhouse refused to meet with the doctor.

Accordingly, because the only reason why mitigating evidence was not presented was entirely due to Waterhouse’s own conduct, we cannot deem defense counsel deficient for failing to present such evidence. Thus, we conclude that the trial court correctly denied an evidentiary hearing as to this claim.

Waterhouse, 792 So.2d at 1184 (footnote omitted).

[22] In each of these cases, we concluded that trial counsel could not be deemed ineffective for following their client’s wishes not to present mitigation. “An attorney will not be deemed ineffective for honoring his client’s wishes.” *Brown v. State*, 894 So.2d 137, 146 (Fla.2004) (citing *Waterhouse*, 792 So.2d at 1183); *Sims v. State*, 602 So.2d 1253, 1257–58 (Fla.1992); see also *Sims v. State*, 602 So.2d 1253, 1257–58 (Fla.1992) (“[W]e do not believe counsel can be considered ineffective for honoring the client’s wishes”). The record demonstrates that Krawczuk would not permit his attorney to involve his family. Accordingly, counsel’s ability was limited by the defendant’s desire not to include his family. See *Brown*, 894 So.2d at 146. Therefore, we agree that counsel’s actions could not be deemed ineffective. *Id.*

It is clear that there was significant mitigation available that was not uncovered by counsel. However, it is equally clear that Krawczuk repeatedly insisted that counsel not pursue mitigation and not involve his family. Further, the postconviction court found that the information that would have been presented by the family was available through Dr. Keown’s report, which Krawczuk also refused to allow counsel to present. Because of Krawczuk’s instructions to counsel not to involve his family, we find that Krawczuk cannot establish prejudice.

Next, Krawczuk combines three of his postconviction claims and argues that the prosecutor made inappropriate remarks during the trial, that the trial court improperly instructed the jury, and that he received ineffective assistance of counsel because she failed to object to the comments made by the prosecutor and failed to request a jury instruction on mercy. The lower court denied these claims finding that they were procedurally barred and without merit, that any error made by the prosecutor was harmless, and that Krawczuk could not establish deficient performance. Because Krawczuk’s claim is not supported by the record and, even if it were, because Krawczuk cannot establish prejudice, the lower court properly denied relief on this claim.

[23] Third, Krawczuk argues that counsel was ineffective for failing to object to the trial court’s instruction that sympathy should play no role in their deliberations, this claim is without merit. The trial judge used the standard jury instruction, stating that “[t]his case must not be decided for or against anyone because you feel sorry for anyone or are angry at anyone.” Fla. Std. Jury Instr. (Crim.) 3.10. Counsel cannot be deemed ineffective for failing to object to the standard instruction.

[24] [25] Fourth, Krawczuk argues that he received ineffective assistance of counsel when trial counsel failed to raise and litigate the voluntariness of his confession. The lower court granted an evidentiary hearing on this issue, but determined that Krawczuk was not entitled to relief because the claim was procedurally barred and without merit. Because Krawczuk is re-arguing the merits of the trial court's denial of the motion to suppress his confession, the claim is procedurally barred. His *206 assertion that he received ineffective assistance of counsel is without merit. Additionally, his claim of ineffective assistance of counsel for failure to raise and litigate the voluntariness of his confession, the claim is insufficiently pleaded and without merit. As noted by this Court on direct appeal and by the lower court in its order denying postconviction relief, trial counsel raised this issue in a motion to suppress. *See Krawczuk*, 634 So.2d at 1072–73. Further, Krawczuk failed to allege that he would not have pleaded guilty but for counsel's alleged deficiency. Because the record reflects that counsel raised the voluntariness of Krawczuk's confession in a motion to suppress and demonstrates that Krawczuk did not allege prejudice, we do not find that counsel was ineffective.

[26] Finally, Krawczuk argues that trial counsel was ineffective for failing to offer testimony of mental health experts and others at the hearing on the motion for suppression. The lower court properly found the claim was unsupported by the evidence or law. Specifically, the lower court found that trial counsel completely and fully litigated the motion to suppress and that Krawczuk presented no additional evidence at his postconviction evidentiary hearing that would have changed the court's denial of the motion to suppress.

Accordingly, we find that the lower court properly found that Krawczuk was unable to prove prejudice.

Prosecutor's Remarks

Krawczuk argues that at trial the prosecutor made several erroneous remarks that led the jury to believe that they had no choice but to return a recommendation for the death sentence. Krawczuk further argues that the trial court improperly instructed the jury, which compounded this error. Finally, Krawczuk argues that trial counsel was ineffective for her failure to object or otherwise attempt to correct these errors. Each of these claims must fail.

[27] Turning to the prosecutor's remarks, Krawczuk claims that during voir dire and closing arguments, the prosecutor suggested that the law required the jury to recommend the death penalty if the aggravating circumstances outweighed the mitigating circumstances. Additionally, Krawczuk argues that the prosecutor suggested on multiple occasions that the jury should decide the case without regard for sympathy. The postconviction court correctly concluded that the claim was procedurally barred because trial counsel failed to object to the comments and the issue was not raised on direct appeal, nor did the remarks constitute fundamental error. *See Rogers v. State*, 957 So.2d 538, 547 (Fla.2007) (“We have consistently held that substantive claims of prosecutorial misconduct could and should be raised on direct appeal and are thus procedurally barred from consideration in a postconviction motion.”) (citations and internal quotations omitted); *Lamarca v. State*, 931 So.2d 838, 851 n. 8 (Fla.2006).

[28] As for Krawczuk's claim that counsel was ineffective for failing to object to these remarks, we find no deficiency where counsel was not permitted to participate in the proceeding. As it relates to the prosecutor's comments regarding the jury's recommendation, we have said:

Florida law provides that a penalty phase jury, after deliberating, shall render an advisory sentence to the court. That sentence is to be based on:

(a) Whether sufficient aggravating circumstances exist ...

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist;
and

*207 (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

§ 921.141(2)(a), Fla. Stat. (2008). “[A] jury is neither compelled nor required to recommend death where aggravating factors outweigh mitigating factors.” *Cox v. State*, 819 So.2d 705, 717 (Fla.2002) (quoting *Henyard v. State*, 689 So.2d 239, 249–50 (Fla.1996)).

Anderson v. State, 18 So.3d 501, 517 (Fla.2009). Further, we found that a defendant is “not prejudiced by the improper statements of the prosecutors [where] the juries were given the proper instructions for analyzing aggravating and mitigating circumstances.” *Anderson*, 18 So.3d at 517. As noted by the postconviction court, the record indicates that the jury was properly instructed. Accordingly, we find that Krawczuk has not demonstrated prejudice.

Innocent of the Death Penalty

[29] [30] Krawczuk claims that he is innocent of the death penalty because he received a disparate sentence even though he was as culpable or less culpable than Poirier, who received a sentence of thirty-five years. Because this claim was, or should have been, raised on direct appeal, the lower court correctly found that it was procedurally barred.⁴ Further, even if we consider the claim, it is without merit because Poirier pleaded guilty to second-degree murder. See *Smith v. State*, 998 So.2d 516, 528 (Fla.2008); *England v. State*, 940 So.2d 389, 406 (Fla.2006); *Kight v. State*, 784 So.2d 396, 401 (Fla.2001) (“[I]n instances where the codefendant's lesser sentence was the result of a plea agreement or prosecutorial discretion, this Court has rejected claims of disparate sentencing.”); *Brown v. State*, 473 So.2d 1260, 1268 (Fla.1985). Here, because Poirier pleaded guilty to second-degree murder and was sentenced to thirty-five years, Krawczuk's claim is without merit. *Melendez v. State*, 612 So.2d 1366, 1368–69 (Fla.1992) (“Arguments relating to proportionality and disparate treatment are not appropriate where the prosecutor has not charged the accomplice with a capital offense.”).

4 We addressed the issue in a footnote:

The court found no disparate treatment between Krawczuk and Poirier, noting that Krawczuk “scouted the site to dispose [of] the body, made the arrangements with the victim to go to his house, physically strangled the victim with the co-defendant's assistance, placed the drain cleaner in the victim's mouth and steadied the co-defendant when he was on the point of becoming sick” and that the psychiatrist thought Krawczuk was overstating when he said he had been influenced by Poirier. Additionally, Krawczuk was older and bigger than Poirier.

Krawczuk, 634 So.2d at 1073 n. 5 (quoting trial court's order).

Lastly, we previously found that Krawczuk was the more culpable party. As summarized by the lower court's findings: (1) Krawczuk met the victim six months before the incident and started going to the victim's house three months prior, but Poirier had only been with Krawczuk to the victim's house one time prior to the murder; (2) Krawczuk initiated the events by suggesting they go to the bedroom, he initiated the roughhousing, he pinned the victim down, choked him, poured Crystal Vanish down the victim's throat, and poured water in; and (3) Krawczuk was older and bigger than Poirier, more aggressive, and Poirier was called Krawczuk's protégé. See *Krawczuk*, 634 So.2d at 1074 n. 5 (“Krawczuk ‘scouted the site to dispose [of] the body, made the arrangements with the victim to go to his house, physically strangled the victim with the co-defendant's assistance, placed the drain cleaner in the victim's mouth and steadied *208 the co-defendant when he was on the point of becoming sick’ and ... the psychiatrist thought Krawczuk was overstating when he said he had been influenced by Poirier. Additionally, Krawczuk was older and bigger than Poirier.”).

Krawczuk's Confession

With respect to Krawczuk's argument that his statement to the police was involuntary, the lower court properly found this claim procedurally barred because the issue was already considered and rejected by this Court on direct appeal. See

Krawczuk, 634 So.2d at 1072 (“[W]e hold that the court’s ruling on the motion to suppress is not cognizable on appeal.... [Even] if the issue had been preserved ... we would find it to have no merit.”). Accordingly, Krawczuk’s attempt to raise this claim anew is procedurally barred.

PETITION FOR HABEAS CORPUS

Krawczuk’s single claim on petition for habeas corpus can be summarized as a complaint against this Court’s proportionality review. The subparts to this claim are that (a) this Court failed to complete a meaningful proportionality review because it did not look to other cases, (b) this Court’s review was hindered by the incomplete investigation into mitigating factors, and (c) appellate counsel did not raise disparate treatment on appeal. Because each of these subclaims should be denied, we deny the petition.

[31] First, relating to Krawczuk’s first two points, a petition for habeas corpus is not the proper method for raising a claim that could have been raised on appeal or in a postconviction proceeding. *Mills v. Dugger*, 559 So.2d 578, 579 (Fla.1990) (“Habeas corpus is not to be used for additional appeals of issues that could have been or ... were raised on appeal or in other postconviction motions.”). Accordingly, Krawczuk’s allegations regarding trial counsel’s ineffectiveness and the lack of mitigation on the record are not properly before this Court. Additionally, they are a rehashing of his arguments in his postconviction appeal.

Further, to the extent that Krawczuk claims that this Court failed to perform a proportionality review, his argument is not supported by the record or caselaw. On direct appeal in the instant case, we stated:

The trial court followed the dictates of *Campbell v. State*, 571 So.2d 415 (Fla.1990), and *Rogers v. State*, 511 So.2d 526 (Fla.1987), *cert. denied*, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988), and there is competent substantial evidence to support the conclusion that death is the appropriate sentence. *Cf. Durocher v. State*, 604 So.2d 810 (Fla.1992), *cert. denied*, 507 U.S. 1010, 113 S.Ct. 1660, 123 L.Ed.2d 279 (1993); *Pettit v. State*, 591 So.2d 618 (Fla.), *cert. denied*, 506 U.S. 836, 113 S.Ct. 110, 121 L.Ed.2d 68 (1992).

Krawczuk v. State, 634 So.2d 1070, 1073–74 (Fla.1994). Thus, the Court found the death sentence appropriate. This Court has stated, “[A] proportionality review is inherent in this Court’s direct appellate review and the issue is considered regardless of whether it is discussed in the opinion or raised by a party....” *Patton v. State*, 878 So.2d 368, 380 (Fla.2004). The *Patton* court further explained:

“The mere fact that proportionality is not mentioned in the written opinion does not mean that no proportionality review was conducted.” *Ferguson v. Singletary*, 632 So.2d 53, 58 (Fla.1994) (citing *Booker v. State*, 441 So.2d 148, 153 (Fla.1983)). In *Booker*, this Court explained that failure to mention proportionality in its opinion does not mean that the *209 Court did not consider it. *See* 441 So.2d at 153. This Court stated that a proportionality review “is an inherent aspect of our review of all capital cases. We need not specifically state that we are doing that which we have already determined to be an integral part of our review process.” *Id.*

Patton, 878 So.2d at 380. Further, relating to the argument that the Court did not mention other cases in its review, we have said:

[A]lthough we did not specifically mention other capital cases in our decision on Booker’s direct appeal, we did in fact undertake proportionality review. That review is an inherent aspect of our review of all capital cases. We need not specifically state that we are doing that which we have already determined to be an integral part of our review process.

Booker v. State, 441 So.2d 148, 153 (Fla.1983). Additionally, we have stated, “We reject the assertion that in our written opinion we must explicitly compare each death sentence with past capital cases.” *Messer v. State*, 439 So.2d 875, 879 (Fla.1983). Accordingly, Krawczuk’s argument that this Court’s failure to explicitly weigh the proportionality of his sentence in its opinion must fail.

Finally, as it relates to Krawczuk’s third point and to the extent that Krawczuk argues that appellate counsel failed to raise his and Poirier’s disparate sentencing, this argument is not supported by the record. Appellate counsel did mention Poirier’s sentence in the initial brief although not as a distinct issue. Further, even if it had been raised as a distinct issue it would have been rejected by this Court because Poirier pleaded to, and was convicted of, a lesser offense. We noted in our opinion that Krawczuk was the more culpable defendant. *See Krawczuk*, 634 So.2d at 1073 n. 5. We have repeatedly upheld death sentences where a codefendant pleaded guilty and received a life sentence. *See Smith v. State*, 998 So.2d 516, 528 (Fla.2008); *England v. State*, 940 So.2d 389, 406 (Fla.2006); *Kight v. State*, 784 So.2d 396, 401 (Fla.2001) (“[I]n instances where the codefendant’s lesser sentence was the result of a plea agreement or prosecutorial discretion, this Court has rejected claims of disparate sentencing.”); *Brown v. State*, 473 So.2d 1260, 1268 (Fla.1985). We do not address the remainder of Krawczuk’s petition because it is a reassertion of his claims on appeal of the denial of his postconviction motion.

For the foregoing reasons, we affirm the court’s denial of Krawczuk’s motion for postconviction relief. Additionally, we deny his petition for writ of habeas corpus.

It is so ordered.

CANADY, C.J., and LEWIS, QUINCE, POLSTON, LABARGA, and PERRY, JJ., concur.

PARIENTE, J., concurs in result with an opinion.

PARIENTE, J., concurring in result.

I concur in denying postconviction relief, but write to emphasize the importance of counsel conscientiously investigating all avenues of mitigation, even in light of a difficult defendant. The defendant claimed that his waiver of mitigation was neither knowing nor voluntary; I agree that postconviction relief on this issue was properly denied. However, I disagree with the majority’s reasoning that Krawczuk failed to establish prejudice based on his refusal to allow counsel to contact his family. *See* majority op. at 205. Rather, when a defendant waives mitigation, the finding of prejudice must be centered on whether the waiver of mitigation is knowing and voluntary. *See, e.g., Deaton v. Dugger*, 635 So.2d 4, 8 (Fla.1993).

*210 In this case, the trial court in fact found that defense counsel’s investigation was deficient because the record did “not support the unequivocal direction to not investigate ... required by the law as it existed at the time in question.” Ultimately, however, the trial court found that even if Krawczuk had been more fully advised about the potential mitigation evidence, he failed to show that “he would have authorized trial counsel to present such evidence at either the penalty phase trial or at the *Spencer* hearing.”

It is undeniably a challenge for defense counsel, faced with a client who states that he does not want to pursue mitigation or have the lawyer contact his family, to nevertheless comply with the duties that have been imposed by case law. However, because we are dealing literally with a life or death matter and a client who may not have yet faced the reality that the death penalty may be imposed, counsel’s very weighty obligations do not end with the fact that the client expresses the desire to not present mitigation or contact family members. As was explained in *Grim v. State*, 971 So.2d 85, 100 (Fla.2007), despite the client’s wishes, the lawyer appropriately “recognized he still had a duty to develop mitigation.” Therefore, the lawyer in *Grim* did not “latch onto Grim’s desire not to present mitigation, but instead, repeatedly tried to

dissuade him.” *Id.* Further, the lawyer uncovered a substantial amount of mitigation, obtained a mental health expert, and contacted several mitigation witnesses. For all of these reasons, we upheld the trial court's conclusion that that trial counsel conducted a reasonable investigation in light of Grim's decision to waive mitigation and determined that trial counsel's actions were not deficient and that Grim could not establish prejudice. *Id.* at 100–01; *see also Waterhouse v. State*, 792 So.2d 1176, 1183–84 (Fla.2001) (rejecting an ineffective assistance of counsel claim where the defendant refused to permit his attorney to present mitigating evidence and refused to meet with the mental health expert in light of the fact that his attorney had already investigated potential mitigation).

In addition, in *Grim*, despite the waiver of mitigation, the trial court ordered a presentence investigation report and appointed special counsel to investigate and present available mitigation. *Grim*, 971 So.2d at 90. In other words, not only did counsel act properly, but the court also proceeded diligently by taking the extra step of appointing special counsel. *See, e.g., Muhammad v. State*, 782 So.2d 343, 363–64 (Fla.2001) (approving the procedure that allows trial courts to call witnesses on their own to determine whether mitigating circumstances apply and granting trial courts the discretion to appoint special counsel to assist in discovering mitigation). These extra steps assist this Court in ensuring that a death sentence for a defendant who insists on waiving mitigation does not lead to the death penalty being arbitrarily imposed on any particular defendant. *See Muhammad*, 782 So.2d at 368–69 (Pariente, J., concurring specially); *Russ v. State*, 73 So.3d 178, 200–02 (Fla.2011) (Pariente, J., concurring).

At the evidentiary hearing in this case, Krawczuk presented testimony from his brother and stepfather that related to extensive abuse he had endured at the hands of his mother. However, at the time of the waiver, counsel had the report of Dr. Keown that indicated the abuse had occurred and that report had been furnished to Krawczuk. In addition, trial counsel had obtained military records and a psychiatrist's report, both of which had been given to Dr. Keown. Given the facts developed *211 at the evidentiary hearing and the findings of the postconviction court, I do not find a basis for concluding that the waiver of mitigation was not knowing or voluntary and therefore agree that Krawczuk cannot establish prejudice.

Thus, I concur in the affirmance of the denial of postconviction relief.

All Citations

92 So.3d 195, 37 Fla. L. Weekly S270

APPENDIX D

APPENDIX E

634 So.2d 1070
Supreme Court of Florida.

Anton J. KRAWCZUK, Appellant,
v.
STATE of Florida, Appellee.

No. 79491.

March 17, 1994.

Rehearing Denied April 20, 1994.

Synopsis

Defendant plead guilty to first-degree murder and was sentenced to death by the Circuit Court, Lee County, James R. Thompson, J. Defendant appealed. The Supreme Court, held that: (1) defendant's guilty plea resulted in procedural bar to appeal challenging denial of suppression motion; (2) psychiatric evaluations were not required before guilty plea; (3) defendant was procedurally barred from challenging jury instruction on heinous, atrocious or cruel aggravator; and (4) failing to find nonstatutory mitigators was not error.

Affirmed.

West Headnotes (7)

[1] Criminal Law — Issues Considered

Capital murder defendant waived right to appeal denial of suppression motion by later pleading guilty after adequate plea colloquy was conducted.

3 Cases that cite this headnote

[2] Criminal Law — Reception of Evidence

Ruling on suppression motion is presumed to be correct.

Cases that cite this headnote

[3] Arrest — Possession, Disposal, or Concealment of Article; Flight or Hiding

Probable cause to arrest capital murder defendant existed after authorities received report that defendant may have sold goods taken from murder victim's home, and thus, defendant's subsequent confession, made after *Miranda* warnings were given and defendant waived his constitutional rights, was not product of illegal arrest. U.S.C.A. Const. Amend. 4.

3 Cases that cite this headnote

[4] Criminal Law — Right to Plead Guilty; Mental Competence

Mental Health — Examination and Determination as to Mental Disorder

Capital murder defendant's increasing nervousness as trial date approached did not establish need for further psychiatric evaluations or render defendant's guilty plea involuntary; neither defense nor state requested further evaluation and nothing in record demonstrated reasonable ground for court to order evaluation on its own. West's F.S.A. RCrP Rule 3.210(b).

1 Cases that cite this headnote

[5] **Criminal Law** ⇌ Elements of Offense and Defenses

Murder defendant was procedurally barred from challenging validity of jury instruction on heinous, atrocious, or cruel aggravator based on defendant's failure to object to wording of instruction given to jury, even though instruction was later invalidated in another case.

Cases that cite this headnote

[6] **Sentencing and Punishment** ⇌ Harmless and Reversible Error

Any error in giving standard jury instruction in capital murder prosecution on heinous, atrocious, or cruel aggravator, which was later invalidated by another case, was harmless; murder giving rise to charge was heinous, atrocious, or cruel under any definition of those terms.

Cases that cite this headnote

[7] **Sentencing and Punishment** ⇌ Factors Extrinsic to Statute or Guideline in General

Failing to find nonstatutory mitigators in capital murder prosecution was not error after sentencing court carefully considered psychiatrist's report and presentence investigation report along with record.

1 Cases that cite this headnote

Attorneys and Law Firms

*1071 James Marion Moorman, Public Defender, and Jennifer Y. Fogle, Asst. Public Defender, Tenth Judicial Circuit, Bartow, for appellant.

Robert A. Butterworth, Atty. Gen., and Robert J. Krauss, Asst. Atty. Gen., Tampa, for appellee.

Opinion

PER CURIAM.

Anton Krawczuk appeals his conviction of first-degree murder and sentence of death. We have jurisdiction pursuant to article V, section 3(b)(1), Florida Constitution, and affirm both the conviction and sentence.

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*¹ rights, Krawczuk confessed to killing Staker.

¹ *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 Staker'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 *1072 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.²

² Poirier pled guilty to second-degree murder and robbery in exchange for a 35-year sentence.

[1] Krawczuk now argues that the court erred in denying his motion to suppress. The state, on the other hand, contends that by pleading guilty without preserving the right to appeal the suppression ruling Krawczuk waived the right to contest any pre-plea rulings. We agree.

As stated in *Robinson v. State*, 373 So.2d 898, 902 (Fla.1979):

Once a defendant enters a plea of guilty, the only points available for an appeal concern actions which took place contemporaneously with the plea. A plea of guilty cuts off any right to an appeal from court rulings that preceded the plea in the criminal process, including independent claims relating to deprivations of constitutional rights that occur prior to the entry of the guilty plea.

During the plea colloquy, the trial judge told Krawczuk: "By entering a plea of guilty you give up the right to appeal anything this Court may have done up to this point. Do you understand?" After Krawczuk answered affirmatively, the judge asked if he were willing to give up the right to appeal, and Krawczuk again responded affirmatively. The record demonstrates an adequate plea colloquy and a valid guilty plea. Therefore, we hold that the court's ruling on the motion to suppress is not cognizable on appeal.

[2] [3] If the issue had been preserved, however, we would find it to have no merit. A ruling on a motion to suppress is presumed to be correct, *Medina v. State*, 466 So.2d 1046 (Fla.1985), as is the instant ruling. As stated by the United States Supreme Court, and relied on by the trial court,

where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the State's use of a statement made by the defendant outside of his home, even though the statement is taken after an arrest made in the home in violation of *Payton*.

New York v. Harris, 495 U.S. at 21, 110 S.Ct. at 1645. The trial court held, and the record supports, that the authorities had probable cause to arrest both Krawczuk and Poirier *1073 when they went to their home.³ Therefore, Krawczuk's later confession, made after receiving and waiving his *Miranda* rights, did not require suppression.

3 "The probable cause standard for a law enforcement officer to make a legal arrest is whether the officer has reasonable grounds to believe the person has committed a felony. The standard of conclusiveness and probability is less than that required to support a conviction." *Blanco v. State*, 452 So.2d 520, 523 (Fla.1984), *cert. denied*, 469 U.S. 1181, 105 S.Ct. 940, 83 L.Ed.2d 953 (1985).

[4] Krawczuk also argues that his mental state had deteriorated prior to trial and that a sufficient plea colloquy would have demonstrated the need for further psychiatric evaluations. We disagree. Florida Rule of Criminal Procedure 3.210(b) provides in pertinent part:

If, at any material stage of a criminal proceeding, the court of its own motion, or on motion of counsel for the defendant or for the state, has reasonable ground to believe that the defendant is not mentally competent to proceed, the court shall immediately enter its order setting a time for a hearing to determine the defendant's mental condition....

A psychiatrist evaluated Krawczuk in April 1991 and found him mildly depressed. Later Krawczuk became increasingly nervous as his trial date approached, and the jail psychiatrist prescribed Elavil for him. At the plea colloquy Krawczuk was questioned extensively about his taking this medication and about its effect on him. Krawczuk testified that he had never attempted suicide and that the Elavil had a calming effect and helped him to go to sleep.

It is understandable that a defendant facing trial for first-degree murder would become increasingly nervous and depressed. Neither the defense nor the state, however, requested further evaluation, and we find nothing in the record showing a reasonable ground for the court to order such on its own. We hold, therefore, that the court conducted a proper and sufficient plea colloquy and that this argument has no merit.

Sufficient competent evidence supports Krawczuk's conviction, and we hereby affirm it.

[5] [6] Turning to the sentencing phase, Krawczuk claims that he should be given a new sentencing proceeding because of *Espinosa v. Florida*, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), which invalidated our former standard jury instruction on the heinous, atrocious, or cruel aggravator. This issue is procedurally barred because Krawczuk did not object to the wording of the instruction given to his jury. *Thompson v. State*, 619 So.2d 261 (Fla.) *cert. denied*, 510 U.S. 966, 114 S.Ct. 445, 126 L.Ed.2d 378 (1993). Moreover, this murder was heinous, atrocious, or cruel under any definition

of those terms and, thus, any error in the instruction was harmless beyond a reasonable doubt. *Thompson; Happ v. State*, 618 So.2d 205 (Fla.), *cert. denied*, 510 U.S. 925, 114 S.Ct. 328, 126 L.Ed.2d 274 (1993).

The trial court found that the following aggravators had been established: committed during a robbery and for pecuniary gain; committed in a heinous, atrocious, or cruel manner; and committed in a cold, calculated, and premeditated manner. The record demonstrates the existence of these aggravators beyond a reasonable doubt, and we approve their application in this case. The trial court found a single statutory mitigator, i.e., that Krawczuk had no significant history of prior criminal activity.

[7] Krawczuk now argues that the court erred in failing to find the existence of nonstatutory mitigators. The court, however, carefully considered the psychiatrist's report and the presentence investigation report⁴ and found that the record did not support the establishment of any nonstatutory mitigators.⁵ The trial court followed the dictates *1074 of *Campbell v. State*, 571 So.2d 415 (Fla.1990), and *Rogers v. State*, 511 So.2d 526 (Fla.1987), *cert. denied*, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988), and there is competent substantial evidence to support the conclusion that death is the appropriate sentence. *Cf. Durocher v. State*, 604 So.2d 810 (Fla.1992), *cert. denied*, 507 U.S. 1010, 113 S.Ct. 1660, 123 L.Ed.2d 279 (1993); *Pettit v. State*, 591 So.2d 618 (Fla.), *cert. denied*, 506 U.S. 836, 113 S.Ct. 110, 121 L.Ed.2d 68 (1992).

⁴ Orally the judge stated that, in addition to these items, he considered "anything else I have been able to discern from these proceedings."

⁵ The court found no disparate treatment between Krawczuk and Poirier, noting that Krawczuk "scouted the site to dispose [of] the body, made the arrangements with the victim to go to his house, physically strangled the victim with the co-defendant's assistance, placed the drain cleaner in the victim's mouth and steadied the co-defendant when he was on the point of becoming sick" and that the psychiatrist thought Krawczuk was overstating when he said he had been influenced by Poirier. Additionally, Krawczuk was older and bigger than Poirier.

Therefore, in addition to Krawczuk's conviction we also affirm his sentence of death.

It is so ordered.

BARKETT, C.J., and OVERTON, McDONALD, SHAW, GRIMES, KOGAN and HARDING, JJ., concur.

All Citations

634 So.2d 1070, 19 Fla. L. Weekly S134