CASE NO. 17-9214

CAPITAL CASE

IN THE UNITED STATES SUPREME COURT

ANTON KRAWCZUK,

Petitioner,

vs.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

[Capital Case]

Anton Krawczuk and his roommate robbed and brutally murdered David Staker after planning the crimes for days in advance. The two men physically beat and strangled the victim and Krawczuk ultimately poured drain cleaner down the victim's throat, stuffed a washcloth in his mouth, and then taped his mouth shut. The victim died as a result of asphyxia and strangulation.

After losing a motion to suppress his detailed confession, Krawczuk indicated that he planned to change his not guilty plea to guilty on the charged offenses. At the change of plea hearing, Krawczuk informed the court that he did not want to present any mitigation evidence at the penalty phase and that he "shouldn't be allowed to live for what [he] did." Krawczuk's trial counsel informed the court that she had mitigation evidence available to present from two witnesses, a psychiatrist and a coworker/friend of Krawczuk, but her client instructed her not to present such evidence.

At the penalty phase before a jury, Krawczuk again informed the court that he did not want any mitigation evidence presented on his behalf and Krawczuk instructed his counsel not to participate in the proceedings. After the State rested its case, Krawczuk reiterated his position and specifically declined to introduce the psychiatrist's report into evidence and refused to testify regarding any mitigation. Approximately a week later, at a hearing before the sentencing judge only, Krawczuk once again refused to present any mitigating evidence.

In his state postconviction proceedings, Krawczuk claimed that his trial counsel was ineffective for failing to investigate and present mitigation evidence. The postconviction court rejected his claim based on Krawczuk's failure to establish prejudice as the record showed that, even if counsel had performed differently, Krawczuk would not have allowed for the presentation of any mitigation evidence. The Florida Supreme Court affirmed the lower court's decision and found that Krawczuk failed to establish either deficient performance or prejudice.

In his federal habeas petition, Krawczuk argued that the Florida Supreme Court's decision was contrary to or an unreasonable application of this Court's law. The federal district court denied his petition and the Eleventh Circuit Court of Appeals affirmed the denial of habeas relief. Accordingly, the instant petition gives rise to the following question:

> Whether this Court should exercise its certiorari jurisdiction to consider the Eleventh Circuit Court of Appeals' decision affirming the denial of Krawczuk's habeas petition when the court of appeals correctly identified and applied this Court's precedent in determining that the Florida Supreme Court reasonably

found that Krawczuk could not show that his trial counsel rendered prejudicially ineffective assistance of counsel in investigating and presenting mitigation when Krawczuk consistently and repeatedly instructed counsel not to present any mitigating evidence?

PARTIES TO THE PROCEEDINGS

The following were parties to the proceedings in the Eleventh Circuit Court of Appeals:

1) Anton Krawczuk, Petitioner in this Court, was the Petitioner-Appellant below.

2) The Secretary, Florida Department of Corrections, was the Respondent-Appellee below.

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The decision of the Eleventh Circuit Court of Appeals is reported at Krawczuk v. Secretary, Dep’t of Corr., 873 F.3d 1273 (11th Cir. 2017).

JURISDICTION

Petitioner asserts that this Court's jurisdiction is based upon 28 U.S.C. § 1254(1). Respondent agrees that statutory provision sets out the scope of this Court's certiorari jurisdiction, but submits that this case is inappropriate for the exercise of this Court's discretionary jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts Petitioner's statement regarding the applicable constitutional and statutory provisions involved.

STATEMENT OF CASE AND FACTS

Trial Proceedings

In 1992, Petitioner, Anton Krawczuk, was convicted of first degree murder and sentenced to death. The following factual history is taken from the Florida Supreme Court’s opinion affirming Krawczuk’s convictions and death sentence on direct appeal:

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

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

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

According to his confession, Krawczuk had known Staker for about six months and had a casual homosexual relationship with him, as did Poirier. The week before the murder, the pair decided to rob and kill Staker. Krawczuk called and arranged for him and Poirier to visit Staker. Krawczuk picked Poirier up at work and drove him home to change clothes. He parked in a shopping area, and the pair walked to Staker's house. Once there, they watched television for twenty to thirty minutes, and Krawczuk then suggested that they go to the bedroom. With the undressed trio on the bed, Krawczuk started roughing up Staker and eventually began choking him. Poirier assisted by holding Staker's mouth shut and pinching his nose closed. Staker resisted and tried to hit Krawczuk with a lamp, but Poirier took it away from him. The choking continued for almost ten minutes, after which Krawczuk twice poured drain cleaner and water into 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.

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

Prior to trial, Krawczuk's trial counsel wrote a letter to Krawczuk explaining the importance of aggravating and mitigating circumstances in a capital case and included a list of the factors that would be considered by the trial judge and the jury in determining whether to sentence Krawczuk to death if convicted of first degree murder. Counsel identified the aggravating factors the State would likely seek based on the evidence, and identified five mitigating factors that she intended to prove, but explained that a number of these mitigating factors would require Krawczuk's testimony. Krawczuk v. Secretary, Dep't of Corr., 873 F.3d 1273, 1279 (11th Cir. 2017). Counsel told Krawczuk that given the pre-planning involved in the murder and the brutal facts of pouring drain cleaner down the victim's throat and taping it shut, the jury would probably return a death recommendation. Id. Counsel further informed Krawczuk that she had reviewed his military records and had forwarded these records, and other documents, to Dr. Richard Keown, a psychiatrist who had previously been appointed "for the purpose of assisting defense in the presentation of their case." Id.; (R:520-21).

On April 1, 1991, Dr. Keown conducted an extensive examination of Krawczuk and provided a written report to defense counsel detailing his findings. In his 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."
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> 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 martialed 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 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.

Krawczuk, 873 F.3d at 1279-80 (emphasis added).

After Krawczuk unsuccessfully sought to suppress his confession to law enforcement officers, he changed his plea to guilty and requested the imposition of the death penalty. Krawczuk v. State, 634 So. 2d 1070, 1072 (Fla. 1994). During the change of plea hearing on September 27, 1991, defense counsel indicated that Krawczuk was seeking the death penalty and entering the plea against her advice. At the hearing, "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.'" Krawczuk, 873 F.3d at 1280.

Prior to the change of plea hearing, Krawczuk's trial counsel had filed a motion for funds to hire a mitigation expert, but Krawczuk dismissed the motion at the hearing when he changed his plea to guilty. Krawczuk, 873 F.3d at 1280. Counsel informed the trial court that she had two witnesses prepared to testify regarding mitigation, Dr. Keown and Paul Wise (Krawczuk's coworker), and intimated that she had additional evidence, but Krawczuk instructed her not to call these witnesses. Id. Defense counsel stated on the record that Krawczuk was "thwarting my efforts to defend [him] in the way I feel it's necessary." (R:405).

After Krawczuk pleaded guilty to first degree premeditated murder and robbery, Krawczuk wrote a letter to trial counsel reiterating his desire to obtain a death sentence.

> 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?

Krawczuk, 873 F.3d at 1281.

Despite Krawczuk's desire to waive the jury's recommendation at the penalty phase, the State sought a penalty phase before a jury and the trial judge agreed. On February 4-5, 1992, the court conducted the penalty phase before a jury. Prior to the selection of the jury, Krawczuk again informed the court that he did not want his attorney participating in any part of the penalty phase, including selecting the jury, cross-examining the State's witnesses, presenting mitigating evidence, or making a closing argument. Krawczuk informed the court that he was taking this course of action because he preferred being sentenced to death rather than obtaining a life sentence. Id. After conducting an extensive colloquy, the court found Krawczuk competent and determined that he fully understood the consequences of his decision and made his decision intelligently. Id.

After the State's presentation of evidence in support of the aggravating circumstances, the court again inquired as to Krawczuk's decision to waive the presentation of any mitigating evidence.

> Initially, Krawczuk indicated that he might allow the introduction of Dr. Keown's psychiatric report as mitigating evidence. **[Trial counsel] 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.

Krawczuk, 873 F.3d at 1282 (emphasis added). After the defense rested without presenting any evidence, the jury returned a unanimous recommendation for death.

On February 11, 1992, the trial court conducted a hearing pursuant to Spencer v. State, 615 So. 2d 688 (Fla. 1993), before the trial judge only. At this hearing, Krawczuk's counsel informed the judge that she intended to introduce Dr. Keown's psychiatric report as mitigation, but Krawczuk again refused to allow her to present it. Although Krawczuk did not want Dr. Keown's report admitted, the trial judge stated that he would consider the confidential mental health expert's report, as well as a presentence investigation report, for any possible mitigation evidence prior to imposing sentence. Krawczuk, 873

F.3d at 1282.

Two days after the Spencer hearing, the trial judge sentenced Krawczuk to death. The court found three aggravating circumstances: (1) the murder was committed during a robbery and for pecuniary gain; (2) the murder was committed in a heinous, atrocious, or cruel manner (HAC); and (3) the murder was committed in a cold, calculated, and premeditated manner with no pretense of moral or legal justification (CCP). Based on Dr. Keown's psychiatric report and the presentence investigation report, the court found one statutory mitigating factor that Krawczuk had no significant history of prior criminal activity. Krawczuk, 873 F.3d at 1282-83.

State Postconviction Proceedings

Following the Florida Supreme Court's affirmance of Krawczuk's conviction and death sentence, Krawczuk v. State, 634 So. 2d 1070 (Fla.), cert. denied, 513 U.S. 881 (1994), Krawczuk filed a motion for postconviction relief in state court and argued, among other claims, that his trial counsel was ineffective for failing to investigate and present available mitigating evidence. The circuit court granted Krawczuk an evidentiary hearing and he presented testimony from numerous witnesses, including his trial attorney, Barbara LeGrande. Primarily, the testimony at the evidentiary hearing concerned potential mitigation that Krawczuk could have introduced at the time of his penalty phase had he not knowingly waived the presentation of such evidence and sought a death sentence. See generally Krawczuk, 873 F.3d at 1283-86 (discussing the evidence of Krawczuk's family, social, and mental health background).

Krawczuk's trial attorney, Barbara LeGrande, an experienced capital attorney,[1] testified that she was court-appointed to represent Krawczuk on September 28, 1990. (R:444). Prior to Krawczuk's change of plea, trial counsel had spoken with Krawczuk's mother and grandmother, had obtained Krawczuk's military records (which included a psychiatrist's report regarding Krawczuk's discharge) and forwarded that information to her client and to her confidential mental health expert, Dr. Richard Keown, and had made a motion for the appointment of a mitigation expert. However, because Krawczuk changed his plea to guilty and expressly indicated that he did not want to present any mitigating evidence and wanted a death sentence, Ms. LeGrande testified that she could not pursue the appointment of a mitigation expert. Additionally, at the time of his plea, Krawczuk specifically waived the motion for appointment of a mitigation expert.

Ms. LeGrande indicated that she was prepared to present mitigating evidence on behalf of Krawczuk, but he repeatedly instructed her not to present any witnesses. Trial counsel

[1] Ms. LeGrande had previously represented seventeen capital defendants. (R:407).

testified that Krawczuk “did not want me to present anything,” “he didn’t want to testify,” “[h]e didn’t want me to present anything about what occurred,” “he didn’t want me to cross-examine witnesses or anything else,” “[h]e did not even want a sentencing phase.” (PCR:1788, 1806, 1829).

After hearing testimony at the state postconviction evidentiary hearing and reviewing the entire record, the state postconviction court issued a comprehensive order and rejected Krawczuk’s claim that penalty phase counsel was constitutionally ineffective. On appeal to the Florida Supreme Court, the court affirmed the postconviction court’s order and found that Krawczuk failed to establish deficient performance and prejudice as required by Strickland v. Washington, 466 U.S. 668 (1984). Krawczuk v. State, 92 So. 3d 195 (Fla. 2012).

Federal Habeas Proceedings

Krawczuk filed a federal habeas corpus petition and argued that the Florida Supreme Court’s decision denying his ineffective assistance of counsel claim was contrary to or an unreasonable application of clearly established federal law, and that the state court’s determination that Krawczuk instructed his counsel not to pursue mitigation was an unreasonable determination of the facts in light of the evidence presented at the state court proceedings. The district court, without discussing Strickland’s deficient performance prong, “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." Krawczuk, 873 F.3d at 1292 (quoting the district court's order denying habeas relief). The district court concluded that the Florida Supreme Court had a reasonable basis to deny Krawczuk relief and denied a certificate of appealability (COA).

The Eleventh Circuit Court of Appeals 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." Id. Following briefing and oral argument, the court issued an opinion affirming the denial of Krawczuk's federal habeas petition. Krawczuk v. Secretary, Dep't of Corr., 873 F.3d 1273 (11th Cir. 2017).

REASONS FOR DENYING THE WRIT

THIS COURT SHOULD DECLINE TO EXERCISE ITS CERTIRORARI JURISDICTION TO CONSIDER THE ELEVENTH CIRCUIT COURT OF APPEALS' DECISION AFFIRMING THE DENIAL OF KRAWCZUK'S HABEAS CORPUS PETITION AS THE COURT OF APPEALS CORRECTLY IDENTIFIED AND APPLIED THIS COURT'S PRECEDENT IN DETERMINING THAT THE FLORIDA SUPREME COURT REASONABLY FOUND THAT KRAWCZUK COULD NOT SHOW THAT HIS TRIAL COUNSEL RENDERED PREJUDICIALLY INEFFECTIVE ASSISTANCE OF COUNSEL IN INVESTIGATING AND PRESENTING MITIGATION WHEN KRAWCZUK CONSISTENTLY AND REPEATEDLY INSTRUCTED COUNSEL NOT TO PRESENT ANY MITIGATING EVIDENCE.

Krawczuk petitions this Court for a writ of certiorari and erroneously asserts that the Eleventh Circuit Court of Appeals' decision in this case announced a new test for ineffective assistance of counsel claims in contravention of Strickland v. Washington, 466 U.S. 668 (1984). To the contrary, the court of appeals correctly identified and applied this Court's Strickland standards to a case involving a defendant who repeatedly instructed his counsel not to present any mitigating evidence. The instant case is analogous to the situation in Schriro v. Landrigan, 550 U.S. 465 (2007), and the court of appeals followed Strickland and Landrigan and found that the Florida Supreme Court reasonably determined that Krawczuk could not satisfy Strickland's prejudice prong because he failed to show that, even if he had been more fully informed about the available mitigation, he would have allowed counsel to present it on his behalf.[2] The Eleventh Circuit Court Appeals' decision does not conflict with that of any other court of appeals or involve an important or unsettled question of constitutional law. Accordingly, certiorari should be denied.

While Petitioner devotes much of his petition to an allegation that the court of appeals created a new categorial rule for examining the performance prong of an ineffective assistance of counsel claim, such is not the case. The court of appeals properly identified Strickland as the controlling precedent and applied this Court's analysis to Krawczuk's case. See Krawczuk, 873 F.3d at 1293-94 (stating that "[u]nder Strickland, Krawczuk must show (1) that his attorney's performance was deficient and (2) that this deficient performance prejudiced his defense"). Notably, however, while Krawczuk complains about the court's discussion of the performance prong, the court's holding relied exclusively on the prejudice prong of Strickland's analysis. Id. at 1294 ("We now apply these Strickland and Landrigan principles, **which in Krawczuk's case begins and ends with prejudice**.") (emphasis added).

[2] The court of appeals also reviewed Krawczuk's claim *de novo* and determined that Krawczuk could not establish prejudice because "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." Krawczuk, 873 F.3d at 1296-98. Krawczuk does not challenge in any fashion the court of appeals' "alternative and independent" ground for affirming the denial of habeas relief.

While a discussion of the Eleventh Circuit Court of Appeals' decision regarding the performance prong is misplaced given the court's reliance on the prejudice prong, Respondent nevertheless notes that the court of appeals correctly utilized this Court's standards when discussing the requirements for an ineffective assistance of counsel claim. In setting forth the applicable law under Strickland, the court stated that it would focus on cases where the defendant instructs his counsel not to present mitigation.[3]

> A. Performance
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> 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)).

[3] Petitioner claims in a footnote that "the record establishes that Mr. Krawczuk was equivocal at best in his intentions to waive presentation of mitigation evidence." Petition at 26 n.3. Such an assertion is a mischaracterization of the record. As the court of appeals correctly noted, Petitioner repeatedly instructed his counsel, including on the record at three separate court hearings, that he did not want to introduce mitigation evidence. Petitioner further wrote letters to counsel expressing his desire to obtain a death sentence and indicated to his confidential mental health expert that he would rather be sentenced to death than life. Most importantly, at both the penalty phase before the jury and again at the Spencer hearing before the judge, Krawczuk unequivocally indicated that he did not want mitigation evidence presented.

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).

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 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

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).
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> 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).
>
> 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.

Krawczuk, 873 F.3d at 1293-94.

Petitioner claims that the court of appeals' decision "runs afoul" of this Court's pronouncements in Rompilla v. Beard, 545 U.S. 374 (2005), or Porter v. McCollum, 558 U.S. 30 (2009), regarding the performance prong. Unlike the instant case, however, neither of those cases involved situations in which the defendant instructed his attorney not to present any mitigation. Rather, Krawczuk's case is much more analogous to the facts in Schriro v. Landrigan, 550 U.S. 465 (2007).

In Porter, this Court reviewed the deficient performance prong de novo because the state court had not decided the issue[4] and found that trial counsel performed deficiently by failing to conduct a thorough investigation of Porter's background and for failing to present evidence of his mental health, family background, or military service. This Court noted that although Porter was uncooperative with his counsel, the only express limitation that the defendant made regarding counsel's investigation and presentation of mitigation was an instruction not to speak to his ex-wife or son. Porter, 558 U.S. at 40. In Rompilla, this Court did not find any deficiency based on counsels' investigation of potential mitigation evidence, but found that counsel was deficient for "failing to examine the court file on Rompilla's prior conviction" which was used by the State as aggravating evidence. Rompilla, 545 U.S. at 383. Moreover, there is nothing in Rompilla that even suggests that the defendant told his counsel not to present mitigation. In fact, in Schriro v. Landrigan, 550 U.S. 465, 478 (2007), this Court noted that Rompilla "refused to assist in the development

[4] In the instant case, unlike Porter, the Florida Supreme Court found that trial counsel was not deficient for investigating mitigation. The court of appeals found this holding "immaterial

of a mitigation case, but did not inform the court that he did not want mitigating evidence presented." Because neither of these cases involved a defendant who instructed his counsel not to present any mitigation evidence, Petitioner's reliance on these cases is misplaced.

In Schriro v. Landrigan, 550 U.S. 465, 478 (2007), the defendant's trial counsel attempted to present mitigating evidence at trial, but Landrigan refused to allow the presentation of any evidence and requested the death penalty. Landrigan, 550 U.S. at 470. Subsequently, in his state postconviction proceedings, Landrigan argued that his counsel was ineffective for failing "to explore additional grounds for arguing mitigation evidence." Id. at 471. The state court summarily denied his motion and found that Landrigan had instructed his attorney not to present mitigation and his statements at the time of his sentencing "belie his new-found sense of cooperation." Id.

In Landrigan's federal habeas proceedings, the district court found that Landrigan could not demonstrate that he was prejudiced by any error that trial counsel may have made and denied his claim and refused to grant an evidentiary hearing. The Ninth Circuit Court of Appeals reversed and held that Landrigan was entitled to an evidentiary hearing because an investigation

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and irrelevant" due to Krawczuk's failure to establish prejudice. See Krawczuk, 873 F.3d at 1298-99.

into mitigation would have revealed a wealth of mitigation. The court of appeals found that the state court's determination that Landrigan refused to permit the presentation of mitigating evidence was an unreasonable determination of the facts because Landrigan's refusal to permit evidence was only referring to the evidence from his mother and wife and could not excuse counsel's failure to conduct an adequate investigation *prior* to the sentencing. Id. at 472-73 (citing Landrigan v. Schriro, 441 F.3d 638 (9th Cir. 2006)).

This Court reversed the court of appeals and held that Landrigan was not entitled to an evidentiary hearing or federal habeas relief as the state court's determination that Landrigan refused to present any mitigation was a reasonable determination of the facts and Landrigan could not demonstrate prejudice. Landrigan, 550 U.S. at 477. This Court specifically rejected the courts of appeals' holding, derived from Wiggins v. Smith, 539 U.S. 510 (2003), that Landrigan's "apparently last-minute decision cannot excuse his counsel's failure to conduct an adequate investigation *prior* to the sentencing."

> Neither Wiggins nor Strickland addresses a situation in which a client interferes with counsel's efforts to present mitigating evidence to a sentencing court. Wiggins, supra, at 523, 123 S. Ct. 2527 ("[W]e focus on whether the investigation supporting *counsel's* decision not to introduce mitigating evidence of Wiggins' background was itself reasonable" (emphasis added and deleted)). Indeed, we have never addressed a situation like this. In Rompilla v. Beard, 545 U.S. 374, 381, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005), on which the Court of Appeals also relied, the defendant

> refused to assist in the development of a mitigation case, but did not inform the court that he did not want mitigating evidence presented. **In short, at the time of the Arizona postconviction court's decision, it was not objectively unreasonable for that court to conclude that a defendant who refused to allow the presentation of any mitigating evidence could not establish Strickland prejudice based on his counsel's failure to investigate further possible mitigating evidence.**

Landrigan, 550 U.S. at 478 (emphasis added).

In Petitioner's case, the Eleventh Circuit Court of Appeals followed this Court's Strickland and Landrigan decisions and found that the Florida Supreme Court reasonably determined that Krawczuk could not establish prejudice given his clear instructions not to present mitigating evidence. As the court of appeals noted, "Krawczuk rejected his counsel's presentation of mitigation evidence at three separate judicial proceedings, openly sought the death penalty, and repeatedly undercut [trial counsel's] strategy. His actions were not taken in ignorance. [Trial counsel] had advised Krawczuk of the importance of mitigation evidence, and Krawczuk possessed Dr. Keown's report." Krawczuk, 873 F.3d at 1296.

Unlike the situation in Landrigan where the defendant never received an evidentiary hearing in his collateral proceedings, Krawczuk was afforded a full evidentiary hearing in state court on his ineffective assistance of counsel claim and he never presented any evidence which would show that, had he been made more aware of the mitigating evidence, he would have changed his mind and allowed counsel to present it to either the jury or the trial judge. See id. (noting that "the record is devoid of any affidavit, deposition, or statement from Krawczuk, [trial counsel], the mental health experts, or Krawczuk's friends and family even suggesting that Krawczuk would have instructed [trial counsel] differently had he been fully aware of all the available mitigation evidence"). In fact, the record refutes any such claim as Krawczuk was aware of all available mitigating evidence, but he affirmatively waived the presentation of such information at both the penalty phase and before the trial court at the Spencer hearing.[5]

In affirming the denial of habeas relief, the Eleventh Circuit Court of Appeals acted consistently with this Court's case law. There is no conflict between the court of appeals' decision and any case from this Court or other courts of appeal. After examining the record in Petitioner's case, the court of appeals correctly found that it "overwhelmingly supports" the Florida Supreme Court's determination that Krawczuk failed to

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[5] At the state postconviction hearing, Krawczuk's collateral counsel presented voluminous evidence detailing Krawczuk's childhood and mental health. The state postconviction court rejected the testimony of the two mental health experts because they lacked credibility and Krawczuk never challenged that determination. Krawczuk, 873 F.3d at 1297. As to the childhood testimony, although the postconviction evidence would have "painted a more robust picture" of Krawczuk's traumatic childhood, the information was known to Krawczuk, his counsel, and the sentencing judge as it was contained in Dr. Keown's report. Id.

establish prejudice when he instructed counsel not to present mitigation. Krawczuk, 873 F.3d at 1294. Petitioner is seeking review in this Court of nothing more than the application of properly stated rules of law to the specific facts of his case, which is of interest to no one other than the parties to this litigation. See Sup. Ct. R. 10; Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955) (noting that this Court is "consistent in not granting the certiorari except in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties"). Accordingly, Respondent urges this Court to deny the petition for writ of certiorari.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Court DENY the petition for certiorari review of the decision of the Eleventh Circuit Court of Appeals entered below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S BRIEF IN OPPOSITION has been submitted using the Electronic Filing System. I further certify that a copy has been sent by U.S. mail to Todd G. Scher, Law Office of the Capital Collateral Regional Counsel - South, One East Broward Boulevard, Suite 444, Fort Lauderdale, Florida 33301 (tscher@msn.com), on this 2nd day of July, 2018. I further certify that all parties required to be served have been served.

/s/ Stephen D. Ake
Counsel for Respondent