IN THE SUPREME COURT OF FLORIDA

WILLIAM K. TAYLOR,

Appellant,

v. **Case No. SC09-2417**
Lower Tribunal No. 01-CF-00-8692A

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellant William K. Taylor was convicted of the first-degree murder of Sandra Kushmer, the attempted murder of William Maddox, and other related offenses; he was sentenced to death in 2004. This Court outlined the relevant facts in its opinion affirming the convictions and sentences imposed, Taylor v. State, 937 So. 2d 590, 592-97 (Fla. 2006):

> On August 25, 2001, a grand jury returned an indictment for appellant William Taylor on one count of first-degree premeditated murder for the murder of Sandra Kushmer, one count of attempted first-degree murder for the attempted murder of William Maddox, one count of robbery with a deadly weapon, one count of robbery with a firearm, and one count of armed burglary of a dwelling.
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> At trial, Renata Sikes established that on Friday, May 25, 2001, she, along with her daughter Sandra Kushmer and her son William Maddox, went to visit her husband in the hospital. Kushmer and Maddox left the hospital in a rental car. At approximately 10:30 p.m. that night, Sikes called her home and spoke to Kushmer, who advised that "Ken" was there with Kushmer and Maddox,[FN1] and, according to Sikes, it sounded as though she was having fun. Thirty minutes later, Sikes again called home to inform her children that she would remain at the hospital, but there was no answer. Sikes called her home repeatedly thereafter, but the calls were never answered. At approximately 3:30 p.m. on Saturday, May 26, 2001, Sikes returned home. Upon arriving, Sikes noticed that the rental car was gone, and she observed blood on the outside of her house. In addition, Sikes discovered her daughter's medication, purse, and shoes lying outside on the ground. Upon entering the house, Sikes found Kushmer lying in a puddle of blood. As Sikes walked further into the house, she discovered Maddox lying on the bed in a back bedroom. Sikes observed that Maddox's face was black and blue, his pillow black with blood, but he was still alive. Sikes later

determined that cameras belonging to her husband which had been stored in the closet of Maddox's room were missing.

[FN1] Taylor's middle name is Kenneth.

Cynthia Byrnes was working at Harry's Country Bar on the night of Friday, May 25, 2001, the night of these events. She saw Kushmer and Maddox enter the bar that night, while Taylor was also present. According to Byrnes, Maddox was drinking the most expensive liquor sold at the bar, paying for his drinks with twenty-dollar bills, and leaving good tips. Byrnes testified that Maddox, Kushmer, and Taylor left the bar together.

On Saturday, May 26, 2001, Tommy Riley awoke to see Taylor on his doorstep. Later that morning, Taylor asked Riley to cash a $580 check, but Riley refused. The name on the two-party check was William Maddox, and it was from a bank in California, where Maddox lived. Later that evening, Taylor was in a bar where Riley worked as a bartender, paying for drinks with twenty-dollar bills. The following morning, Sunday, May 27, 2001, Riley was advised by an employee at Harry's Bar, where Taylor, Kushmer, and Maddox had been the night of the murder, that detectives were looking for Taylor. Riley conveyed this information to Taylor, and he immediately left Riley's house in his pickup truck.

The detective in charge of investigating these crimes obtained information that Maddox's credit cards had been used in Tampa, Florida; Valdosta, Georgia; and Memphis, Tennessee. Based on this information, she contacted the United States Marshal's Office in Tampa, which then relayed the information to the Marshal's Office in Tennessee. Deputy Marshal Scott Sanders of the Memphis office received the information on May 29, 2001, from the Tampa office that two warrants for Taylor's arrest for federal probation violations were outstanding and that Taylor might be in the Memphis area because he was believed to be in possession of credit cards that were being used in that location.

The Tennessee marshals located Taylor's pickup truck at a motel, and he was taken into custody. Sanders wanted to search Taylor's motel room at that time but he was unable to do so because he could not

locate a Marshal's Office consent form. He then obtained a consent form from the Shelby County Sheriff's Office, added the words "and the U.S. Marshals Office" to the top of the form, and filled it out, writing in the motel name and the room number to be searched. Sanders explained the form to Taylor and told him the consent form was for his motel room. According to Sanders, Taylor did not express any hesitation in signing the form.

The search of Taylor's room revealed a checkbook wallet containing checks in the name of Bill Maddox, three credit cards issued to Maddox, credit card receipts, a ticket from a pawn shop in Memphis, a Discover credit card issued to Sandra Kushmer, and a Texaco card issued to Barry Sikes, which Renate Sikes testified she had given to Kushmer. Receipts dated May 29, 2001, indicated that the Maddox credit card had been used to purchase a gold chain and a wedding band. The pawn shop ticket with the same date indicated that Taylor had pawned the two items.

When the lead Florida detective met with Taylor in Tennessee on May 30, 2001, she asked him for consent to search his truck. She read the applicable consent to search form to Taylor and he signed it. Taylor was then presented a consent to interview form which he also signed. The interview revealed that on Friday, May 25, 2001, Taylor called Kushmer and arranged a meeting at Harry's Bar. Taylor disclosed that early that evening, he encountered an unnamed individual who lived near the bar, and he told this individual that he (Taylor) wanted to rob the Sikes home. This other person also had an interest in participating in the crime. Later that evening, Maddox and Kushmer left the bar with Taylor and they went to the Sikes home. Taylor confirmed that after the trio had beer and sandwiches, Taylor and Kushmer left the house and traveled to another bar, where they remained until approximately 12:30 a.m. They then returned to the Sikes home. When they arrived, the individual with whom Taylor had previously discussed the crime was in the driveway. This individual struck Kushmer on the back of the head with a long black bar. Kushmer fell to the ground, and Taylor removed two credit cards from her purse. Taylor admitted that he then went into the Sikes home and discovered Maddox lying in a puddle of blood. Taylor described the scene as the other

unnamed individual in the bedroom going through the dresser drawers and a jewelry box. According to Taylor, his partner in this crime heard a noise, checked outside, and advised Taylor that Kushmer was now sitting up against the house. Taylor stated that this other individual then took a shotgun that was leaning against the wall, telling Taylor, "I'm just going to hit her with it." While Taylor was removing the bag containing cameras from Maddox's room, he heard a gunshot and went to the back of the house, where this other individual stated that he had shot Kushmer. Taylor then carried Kushmer into the house and placed her on the floor. Taylor then fled from the scene in his truck. The next morning, Taylor and Jose Arano went to Ybor City. Taylor said it was in a bar there that he used Maddox's credit cards to pay for drinks, and a card was also used to purchase food.

The day after the interview, the lead Florida detective searched Taylor's truck and found a black bag on the floorboard which contained cameras and camera accessories. The detective presented these items to Sikes, who identified them as belonging to her husband. The detective then went to a bar in Memphis at which Taylor had used the Maddox credit cards and spoke with Pamela Williams, who disclosed that Taylor had purchased drinks for her at the bar on the night of May 28, 2001, and introduced himself to her as William Maddox. She also showed the detective a note given to her by Taylor which he signed as "Bill Maddox" and identified himself as the owner of his own financial corporation.

After speaking with Williams, the detective returned to interview Taylor again. When Taylor was advised by the detective that she did not believe everything he had related the day before, Taylor told her the interview was over. However, Taylor continued to speak, and at one point, he said, "I shot her." The detective inquired if Taylor understood that he had terminated the interview and whether he wished to continue. Taylor replied that he did wish to continue. Taylor then changed his prior version of the events and stated that after Kushmer had been hit by the unnamed individual with him, Taylor armed himself with a shotgun from his truck. Taylor then stated that after he had burglarized the house and as he was leaving, he saw a movement and fired the shotgun in

that direction. Taylor described that when he discovered that he had shot Kushmer, he carried her inside the house, placed her on the floor, threw the gun in the back of his truck, and immediately left. Taylor then stated that he pawned the shotgun and threw the clothes he was wearing in a dumpster.

Almost a month later, the lead Florida detective was informed that Taylor wished to again speak with her at the jail. When she arrived, Taylor gave the detective a letter that he had written which stated that during the earlier interviews, the detective had been "absolutely correct in [her] constant believing in the [unidentified] person being [Jose Arano]." According to his letter, after Arano picked up Taylor's ex-wife, Lorena, Taylor instructed him to go to the Sikes home and hide in front of the house with Lorena. Taylor's letter disclosed that as Taylor and Kushmer approached the front of the house at approximately 1:20 a.m., Lorena came from her concealment and hit Kushmer with a crowbar. Taylor then removed Kushmer's keys from her purse, the three of them entered the Sikes home, and Taylor retrieved the shotgun from his truck. Taylor's letter stated that it was Arano who had beaten Maddox with the crowbar. According to the letter, Lorena then heard a noise outside. As Taylor went outside, someone turned the corner, and Taylor fired the gun in that direction. When he realized that it was Kushmer, he brought her inside the house. Taylor took the cameras, a couple of watches, and the keys to the rental car. Taylor and Arano drove away from the Sikes home in separate vehicles (with Lorena riding in Taylor's truck), and Taylor threw the car keys for the rental car in a ditch. The three stopped at a 7-11, where Arano cleaned the crowbar and placed it in Lorena's car. Taylor gave Lorena the money and the watches and advised her to go to Miami.

The medical examiner, Dr. Lee Miller, testified that the cause of Kushmer's death was a shotgun wound to the head that penetrated her arteries and veins, which caused her to bleed to death. Based on the available evidence, at the time of the shooting the shotgun had been pressed against Kushmer's mouth. The wound path was consistent with Kushmer having been in a sitting position. The medical examiner was of the opinion that Kushmer's wound was inconsistent with

being shot by a person standing in the doorway of the house as she appeared around the corner. Additionally, the laceration on the back of Kushmer's head was consistent with being struck by the butt of a shotgun.

A blood spatter expert opined that the blood smears on the outside wall of the Sikes home were likely caused by Kushmer's bloody hair. Further, high-velocity blood spatter located to the left of the smears indicated that the spatter was caused by a gunshot wound. The impact site was consistent with a victim who had been shot in the mouth while sitting or kneeling at the time. The blood patterns inside the Sikes home were consistent with Kushmer's body having been carried into the home and swung in an arc-like manner before being dropped on the floor.

Latent fingerprints were lifted from beer bottles found in the garbage at the scene. A fingerprint expert matched one latent fingerprint with the known print of Taylor's right index finger. The Hillsborough County Sheriff's Office collected the shotgun and the pawn ticket from the shop where Taylor had pawned the item. A different fingerprint examiner was of the opinion that a thumbprint on the pawn ticket from the shotgun transaction also matched the known fingerprints of Taylor. The Florida Department of Law Enforcement tested the shotgun, and two areas tested positive for blood. DNA testing on the blood from these two areas generated partial DNA profiles that matched the profile of Maddox at three and four genetic points.

After hearing the evidence, the jury rendered a verdict finding Taylor guilty of first-degree murder as to the death of Kushmer, attempted first-degree murder as to William Maddox, robbery with a deadly weapon as to Maddox, robbery with a firearm as to Kushmer, and armed burglary of a dwelling. During the penalty phase, the State presented the testimony of the victims of crimes from Taylor's prior convictions for burglary, first-degree assault, and possession of a deadly weapon during the commission of a felony, who described the circumstances surrounding the crimes. The parties also stipulated that at the time of the murder, Taylor was on federal felony probation. Victim impact statements prepared by Renate Sikes, William Maddox, and William Maddox, Sr. (Kushmer's father) were read to the jury.

During the penalty phase, the defense presented videotaped depositions of three witnesses and live testimony from three additional witnesses. Taylor's maternal aunt disclosed that his stepfather physically and mentally abused him and beat his mother. Josephine Quattrociocchi, who met Taylor in prison while visiting another inmate, was of the view that Taylor was a sincere and nice person. Taylor worked as a painter at one time, and his employer summarized that Taylor was an excellent worker, had initiative and a good work ethic, his work product was good, he could follow special instructions, and he did not require excessive supervision. A former counselor at Glades Correctional Institution informed the jury that Taylor had completed a drug program that he operated, and afterwards Taylor became a facilitator who assisted inmates in the drug program.

The defense also presented mental health experts. One diagnosed Taylor as suffering from a cognitive disorder, with deficits related primarily to the frontal lobe. He also opined that Taylor met the criteria for Antisocial Personality Disorder and most of the criteria for Borderline Personality Disorder. This expert also noted that Taylor himself and medical reports indicated that Taylor suffered a traumatic brain injury by falling from a scaffold in or around 1981, and after that, Taylor began to have headaches and seizures. This expert ultimately concluded that Taylor has a chronic emotional disorder; i.e., frontal lobe syndrome, which was aggravated or exacerbated on the night of the murder by Taylor's extensive consumption of alcohol. Due to the circumstances of that evening and Taylor's frontal lobe syndrome, his judgment was compromised to the extent that his ability to conform his conduct to the requirements of the law was impaired.

A second expert diagnosed that Taylor had presented brain dysfunction in the form of frontal lobe impairment and evidenced impairment with regard to the formulation of intent and impulse control. He concluded that Taylor suffered from epilepsy, which is consistent with a traumatic brain injury, based on the history that Taylor relayed and the medical records which detailed Taylor's response to the antiseizure medication Dilantin.

A State expert responded to this mental health evidence and concluded that Taylor met the criteria for both Borderline and Antisocial Personality Disorders. In his view, while Taylor may have suffered seizures after the head injury that Taylor claimed to have suffered, there was no indication of a permanent seizure disorder. The State expert found no evidence of frontal lobe or temporal lobe impairment in Taylor, and he concluded that Taylor's reported head injury in the 1980s did not result in any permanent brain damage. This expert concluded that on the night of the murder, Taylor did not suffer from any mental disease or defect that substantially impaired his capacity to appreciate the criminal nature of his conduct or his ability to conform his conduct to the requirements of the law.

After consideration of the evidence, the jury returned a recommendation of death by a vote of twelve to zero. During the *Spencer* [FN2] hearing, a defense mental health expert estimated that Taylor consumed ten beers and eight ounces of tequila and had smoked two or three marijuana joints on the day of the murder. He testified that Taylor's poor performance on tests that measure frontal lobe function was strongly indicative of frontal lobe damage and his neuropsychological deficits were more likely developmental in nature and likely preceded the head injury that Taylor suffered in the 1980s.

[FN2] *Spencer v. State, 615 So. 2d 688 (Fla. 1993)*.

The trial judge sentenced Taylor to death for the murder of Kushmer. In pronouncing Taylor's sentence, the trial court determined that the State had proven the existence of three statutory aggravators: (1) the murder was committed while Taylor was on felony probation, *see § 921.141(5)(a), Fla. Stat.* (2001); (2) Taylor had previously been convicted of a felony involving a threat of violence to the person, *see § 921.141(5)(b), Fla. Stat.* (2001); and (3) the murder was committed for pecuniary gain, *see § 921.141(5)(f), Fla. Stat.* (2001). The trial court assigned each of these factors great weight. The court did not find that any statutory mitigators existed, but found a total of thirteen nonstatutory mitigating

> circumstances, two of which were assigned modest weight, six were assigned some weight, two assigned little weight, and three were assigned minimum weight. [FN3] In imposing a sentence of death, the trial court concluded that "[t]he aggravating circumstances in this case far outweigh the mitigating circumstances."
>
> > [FN3] The trial court found the following nonstatutory mitigating circumstances: (1) Taylor was under some mental or emotional disturbance at the time of the crime (some weight); (2) psychological trauma due to abuse and neglect in formative years (some weight); (3) psychological trauma due to deprivation in parental nurturing (some weight); (4) stepfather provided no emotional or parental support (modest weight); (5) neurological impairments affecting ability to control impulses (some weight); (6) learning disabilities, attention deficit problems, and problems with social interactions (some weight); (7) obtained GED in prison (minimum weight); (8) attempts to address and recover from drug dependence (modest weight); (9) good worker and dependable employee (minimum weight); (10) agreed to be interviewed and cooperated with the police (minimum weight); (11) history of substance abuse dating back to pre-teen years (some weight); (12) under the influence of alcohol at time of crime (little weight); and (13) appropriate conduct during trial (little weight).

Taylor did not seek certiorari review in the United States Supreme Court. He filed a motion for postconviction relief on October 8, 2007 (V2/346-81) and an amended motion on February 15, 2008 (V3/424-580). An evidentiary hearing was granted on seven claims in Taylor's amended motion alleging ineffective assistance of trial counsel, and testimony was presented on January 5-6, 2009, and concluded on April 29, 2009. Five

witnesses were offered: trial attorneys John Skye and Debra Goins, and mental health professionals Dr. Joseph Sesta, Dr. James Merikangas, and Dr. Donald Taylor.

Dr. Sesta is an expert in forensic neuropsychology, retained by Taylor's trial attorneys to evaluate Taylor and assist the defense in preparing its case (V35/4161-62). Sesta determined that Taylor's testing indicated impairment and prepared a report on March 11, 2002, which was admitted as Defense Exhibit 2 (V35/4163-64). Sesta recommended that Taylor be examined by another neuropsychologist, Dr. David McCraney, to see if Sesta's findings could be refuted or substantiated (V35/4164). Sesta was directed not to ask Taylor about the facts of his case and he was not asked to evaluate Taylor for penalty phase mitigation purposes (V35/4162-63).

Dr. Sesta was not used as a witness and was not provided any explanation at the time of trial as to why he would not be called to testify for the defense (V35/4165-67). He had previously worked with Ms. Goins, one of Taylor's attorneys, on capital cases and he knew he was not always able to assist the defense when retained (V35/4165, 4167). However, in reviewing the testimony of the experts that did testify for Taylor at the penalty phase, Dr. Krop and Dr. McCraney, Sesta concluded that he could have added more information to the expert testimony

that had been offered (V35/4165). For example, he could have discussed the neurological data more in depth than Dr. Krop did, as Krop was not a neuropsychologist; Sesta also could have explained the different methods of inference in neuropsychology (V35/4165-66).

Dr. Sesta noted that, in the past, he has assisted defense attorneys with difficult and/or mentally ill clients, serving as a liaison and helping the attorney to understand how the mental illness is impacting communication and to help attorneys and their clients interact in meaningful ways; this is a typical role for psychologists (V35/4167-68). He felt that he could have helped in this case by assisting with plea negotiations and assuring Taylor's competency (V35/4168).

Dr. Sesta was retained by Taylor's postconviction attorneys in 2007, and reviewed numerous records and prepared a new report, admitted below as Defense Exhibit 4 (V35/4168-69, 4173). Reviewing a summary of his data from 2002, Sesta noted that Taylor had low-average intelligence, suffered from Antisocial Personality disorder, and had mild to moderate static neurological impairment in his brain functioning (V35/4181, 4195, 4197). Sesta found that Taylor was not psychotic and did not suffer from any severe mental illness or psychiatric disturbance (V35/4195). He observed that Taylor's medications

might have contributed to the brain dysfunction he noted (V35/4198-99).

Taylor's impairment was attributed to a closed head injury which occurred when Taylor fell off a roof in 1977 or 1985; Taylor had reported different dates for the incident (V35/4198, 4202). The area affected is Taylor's frontal lobe and temporal lobe, resulting in memory deficits and impairment in executive functions such as reasoning, organization, and behavior inhibition (V35/4199-4200, 4204).

In 2008, Dr. Sesta spoke with Taylor about the facts of the offense (V35/4205-06). Sesta related and gave consideration to Taylor's version, in which Taylor "snapped" when the murder victim, Sandra Kushmer, hit him in a spontaneous fight at Sandra's house (V35/4209-11, 4222-25). Based on this version, Sesta opined that both statutory mental mitigating factors applied in this case (V35/4211-12). Sesta did not believe that Taylor intended to kill Sandra but thought her murder to be an impulsive act (V35/4222-25, 4268-69).

John Skye is an assistant public defender with prior experience in the state attorney's office, private practice, and the public defender's office since graduating from law school in 1974 (V36/4280-81). At the time of his assignment to the case in 2002, Skye had worked primarily capital cases since starting

with the public defender's office in 1994 (V36/4281). He had been chief of the capital division for several years and had participated in about 25 first-degree murder trials (V36/4354). His co-counsel, Deb Goins, was already working on the case when Skye was assigned to assist her (V36/4287-90). They conferred extensively on trial strategy and worked as a team, although Goins focused on the penalty phase and Skye focused on the guilt phase because that was where they were most experienced (V36/4297-98). They wanted a defense that would be consistent through sentencing in the event of a penalty phase (V36/4298).

When Skye first came in to the case, Taylor wanted to plead guilty in exchange for the State waiving the death penalty; he did not recall Taylor wanting to offer a plea with the penalty intact (V36/4296, 4352). Skye conveyed the offer to the State in January or February 2003 (V36/4296). However, there were never any actual plea "negotiations" because the State never offered a plea deal; there was no offer on the table and the parties did not undertake any bargaining process (V36/4318-19). Taylor wanted to plead and his attorneys discussed it and felt it was in his best interest to do so, so they approached the State about a deal, with Taylor's agreement and blessing (V36/4319). Prosecutor Bondi was cool to the idea, but promised to relay it to the homicide committee for consideration

(V36/4169). On February 13, 2003, Goins noted a call from Bondi in the file indicating that the homicide committee had unanimously rejected the offer (V36/4320-21).

The issue arose again in late 2003 or early 2004, with Taylor indicating again that he would like to plea and asking them to convey his offer to the State (V36/4324-25). Skye drafted a memorandum on March 14, 2004, indicating that while this offer was under consideration by the State, Taylor notified his attorneys that he wanted to withdraw the offer, but the State rejected it anyway so Taylor's consent was not an issue (V36/4325). Memos in the file accurately relate the various plea discussions; Skye disagreed with the allegations in the postconviction motion which characterized a plea as a "strong likelihood" and noted that it was never more than a mere possibility (V36/4327-28, 4356). Skye attempted to keep the process open with the State, and at one point the State indicated they might consider a plea, but they wanted assurance that Taylor would follow through on the deal (V36/4328-32). At that point Taylor had decided against entering a plea and Skye advised Bondi that they would go to trial (V36/4336-39). Skye did not think the trial transcript necessarily provides an accurate representation of the issue, as it appeared to him that Prosecutor Harmon was saying things on the record that were

inconsistent with information which Prosecutor Bondi had related to the defense (V36/4350, 4379). Taylor went to trial in March, 2004, but the case was mistried; there were no additional plea discussions after that time (V36/4292).

Skye recalled that Taylor had written a number of letters, including to Skye's boss, Public Defender Julianne Holt, expressing unhappiness and complaining that counsel was interfering with Taylor's desire to plead guilty (V36/4301). Taylor's letters asserted that there was a conflict of interest and apparently at one point Taylor filed a grievance with the Florida Bar which was later withdrawn (V36/4301, 4304). Skye did not feel that Taylor's complaints warranted any judicial action, as he considered them insufficient to trigger an inquiry under the dictates of Nelson v. State, 274 So. 2d 256 (Fla. 4th DCA 1974).

Skye's practice was to go and talk to Taylor upon receiving one of his letters or complaints (V36/4305). Taylor never expressed a problem when Skye visited in person and, when asked about the letters, Taylor would just shrug them off (V36/4306). Taylor was never angry or confrontational with Skye; Skye understood Taylor was in a difficult position and considered the letters to be a way for Taylor to let off steam at his attorneys, an easy target (V36/4306-07). Skye testified that

his relationship with Taylor was cordial and productive 100% of the time they met together in person, and while Taylor might indicate frustration in between those times, nothing ever came of it (V36/4307). Skye also responded to Taylor in writing (V36/4302, 4313-15).

Skye acknowledged that Taylor was a difficult client, manipulative, and resistant to authority or being told what to do, even by his attorneys (V36/4341-42). However, Skye never observed anything out of the ordinary or had any reason to suspect that Taylor was being overmedicated (V36/4347). From his experience with criminal defendants, Skye had a good working knowledge of competency and medication issues (V37/4422-24). Often, people charged with first degree murder suffer psychiatric symptoms, and he tries to be alert to the frequent mental health issues that arise (V37/4424). He met with Taylor numerous times for extended periods, but he never observed any sign or suggestion of incompetence; Taylor never acted confused or incoherent, and behaved appropriately in court (V37/4420-21, 4425-26). Skye was also familiar generally with serotonin, but the concept of lower serotonin levels causing impulsive behavior was not that helpful to him in this case, because nothing about this case suggested any impulsive act; there was a lot of

evidence showing a very thought out, planned criminal act (V37/4432-34).

Skye was familiar with some cases or situations where a third party was involved to assist a difficult client with plea discussions, as sometimes a family member, professional expert or even another inmate may be of assistance in convincing a defendant of the wisdom of entering a plea (V36/4348-49). That was not done here, although Skye might have been tempted to solicit help in this regard if the State had actually made an offer (V36/4349). Without a deal on the table, Skye believed that involving other individuals in the process did not seem warranted and would be counterproductive to their relationship with Taylor (V36/4349). As his memos reflect, he and Taylor talked extensively about entering a plea and Taylor made his decision, seeming to understand what he was doing, and did not waver or express any uncertainty (V36/4371-75).

With regard to the mental health experts, Skye noted that Goins was the attorney primarily responsible for this aspect of the case (V36/4298). Dr. Sesta had already been retained when Skye came on the case; Skye had worked with Sesta before and felt that Sesta has good credentials and is well-intentioned, but does not always make a good witness because he becomes too much of an advocate and loses his appearance as a disinterested

witness (V36/4299, 4398-4401). Skye prefers to use Dr. Krop or Dr. McCraney or Dr. Taylor when they are available (V36/4299). He and Goins discussed the advantages and disadvantages and made a mutual decision to use McCraney and Krop in this case, keeping Sesta in abeyance (V36/4200). Skye recalled that Goins was concerned about the conflicts between McCraney, Krop and Sesta if all three were presented (V36/4401-02).

According to Skye, Taylor did not have any seizures at trial, or need any medical attention during the course of his representation (V36/4293-94; V37/4413). If this had occurred, Skye would have brought it to the court's attention and documented it for the record (V37/4413).

Debra Goins obtained her law degree in Iowa and had worked as an assistant public defender for five years there before coming to Florida in 1987 (V37/4448). She had worked at the public defenders' offices in Polk and Hillsborough counties, and was serving as head of the capital division in Polk County at the time of her testimony (V37/4449). At the time of Taylor's trial, she had tried 12 death cases through penalty phase, all of which resulted in life sentences; another capital case had resulted in a conviction for second-degree murder (V37/4477-78).

Like Skye, Goins felt that the State had a strong case on Taylor's guilt; Goins agreed that there was no way to avoid a

verdict of at least felony murder and thought the chance of securing anything other than a first degree murder conviction was "nil" (V37/4436, 4450-51). She was also concerned, given the nature of the offense, that the mitigation would not outweigh the aggravating factors (V37/4451).

Goins corroborated Skye's testimony about the plea discussions, and agreed with his assessment that this was not a case where it was necessary to bring in a third party to assist with plea discussions (V37/4450-56). She recalled that Taylor had "flip-flopped" on the issue, taking contradictory positions at different times as they approached trial (V37/4456-57). She shared Skye's impression that the State needed to know if Taylor was going to go through with the plea, so they went to see him that Sunday (V37/4451-54). She agreed that the plea would have been the best option for Taylor, if he would have agreed to it (V37/4454).

Goins agreed that she was primarily responsible for the mental health experts, and that it was a strategic decision to use Dr. Krop and Dr. McCraney rather than Dr. Sesta as penalty phase witnesses (V37/4449, 4467-69). Both Dr. Sesta and Dr. Krop had conducted neuropsychological testing, with similar results; she, Sesta and Krop discussed them in a phone conference on April 25, 2003 (V37/4466, 4469). However, Sesta's

battery included personality testing which Goins had not requested Sesta to do, resulting in Sesta's diagnosis of antisocial personality disorder, which the defense did not consider helpful (V37/4466-72). While Krop had identified features of antisocial personality disorder, he did not offer this as a diagnosis, which made him a better defense witness in Goins' opinion (V37/4468-70).

Goins and Skye both testified about the technique of "firewalling" experts, segregating their roles to keep them focused on a particular area of expertise (V36/4403; V37/4477). It was a common practice both Goins and Skye had used before in preparing penalty phase testimony, and Goins used it here in telling Dr. Sesta and Dr. McCraney to avoid asking Taylor about the facts of the offense, while having Dr. Krop talk about the facts with Taylor (V36/4403; V37/4458, 4475). Skye noted that the defense had not wanted several different versions from Taylor floating around (V36/4402). Goins testified that she would have had Sesta talk to Taylor about the facts at some point, if she had decided to use him as a witness (V37/4475).

Dr. James Merikangas is an expert in forensic psychiatry from Maryland, retained by Taylor's collateral attorneys to conduct a postconviction evaluation of Taylor (V38/4502, 4504, 4508). He saw Taylor at UCI in 2007, and noted that Taylor had

not been on any medication for about two years (V38/4511-12). He identified several abnormalities, including motor impersistence of the tongue, orthostatic hypertension, unilateral headaches, and olfactory deficits (V38/4512-13). While Merikangas agreed with Dr. Sesta's finding of front lobe and temporal lobe impairment, he also agreed with Dr. Taylor's trial testimony, that Taylor's low frontal lobe levels are a result of his personality disorder rather than frontal lobe damage (V38/4514-15).

Based on Taylor's history and Merikangas' observations, Merikangas believed that Taylor suffers from a seizure disorder (V38/4518). Merikangas interpreted Taylor's records as indicating that medical personnel had witnessed seizures and that Taylor had been prescribed anti-seizure medication (V38/4518-19). Merikangas was aware of the EEG taken by Dr. Greer in 1991 which revealed no abnormalities but considered this insignificant, stating that EEGs on this are not helpful unless someone actually experiences a seizure while hooked up to the machine (V38/4520-23). Merikangas noted that people can experience seizures in their sleep or without knowing it and that you can't always tell, just by looking at someone, that they are having a seizure (V38/4518-19).

Merikangas noted that Taylor's jail records indicate that Taylor received Dilantin while awaiting trial and that, in July, 2001, Taylor overdosed on Dilantin and had a seizure (V38/4524). Merikangas agreed that Taylor was not on anti-seizure medication during some of the time he was waiting for trial, and suggested that Taylor's unexplained and unwitnessed head injuries since 1991 could have been seizure activity (V38/4526).

Merikangas agreed with the diagnosis of borderline personality disorder offered at trial by Dr. Krop and Dr. Taylor (V38/4528). Merikangas also classified Taylor as an alcoholic and found that Taylor suffered major depression in 2002, all of which affected his thinking, mood and behavior (V38/4533, 4536-37).

Merikangas reviewed records relating to Taylor's medication history and prepared a chart, Defense Exhibit 8, reflecting the medications Taylor was taking leading up to trial; he concluded that the documentation did not adequately explain why Taylor's medications were changed when they were, or why some medications were given together (V38/4550-4584). Proper medical supervision would also require that blood tests be administered and changes in medication explained, but Taylor's records did not reflect this had been done (V38/4572). Merikangas also offered his opinion as to the implications of the medications. For example,

Merikangas testified that the Dilantin overdose in July, 2001 was a suicide attempt attributable to Taylor's borderline personality disorder (V38/4555-56). He opined Taylor was appropriately medicated in March, 2002, when Taylor had been evaluated by Dr. Sesta and taking normal doses, but felt that Taylor's medications in January, 2003, were not working, as Taylor was meeting with his attorneys to discuss possible plea options, behavior which Merikangas characterized as self-damaging (V38/4556, 4565-66). Similarly, Merikangas concluded that Taylor's "refusing to submit to Miranda" was due to paranoia from his borderline personality disorder and noted that Taylor's insistence on going to court in jail clothes was suicidal behavior (V38/4595-96). Merikangas determined that, at times, Taylor was overmedicated, and would have been too heavily sedated, affecting his ability to think and make good decisions (V38/4569-73, 4576-79). Merikangas reviewed a transcript where Judge Fleischer had questioned Taylor on the record at trial, and did not feel that Taylor's responses - indicating that Taylor was on medication but was not confused - were irrelevant, as Merikangas did not believe that Taylor would have the ability to judge whether he was confused at the time (V38/4588-90).

Dr. Merikangas suggested that part of Taylor's problem stemmed from a serotonin "disorder" (V38/4599-4600). Merikangas

explained that serotonin is not completely understood but it is found in the brain as well as other areas of the body, and when the transmitters are not in balance things go wrong in various ways (V38/4545-46). Arsonists, violent people, and people who are impulsive or depressed often have low serotonin levels, as do alcoholics and people with borderline personality disorder; aggression and a history of alcoholism have both been linked to low serotonin levels (V38/4543-46, 4599-4600). Most antidepressants act on the serotonin system, raising serotonin levels to normalize behavior (V38/4543-44). Because Taylor had been prescribed selective serotonin reuptake inhibitors [SSRIs] while awaiting trial, Merikangas believed the State doctors treating Taylor in jail must have agreed he was mentally ill (V38/4544-45). Serotonin levels can be tested in spinal fluid and while Taylor has never been tested, Merikangas thought it was quite probable that Taylor's levels were low (V38/4546-47, 4623).

Dr. Merikangas believed that both the "extreme disturbance" and "substantial impairment" statutory mitigating factors should apply in this case (V38/4596-99). While Merikangas could not link Taylor's mental state with the facts of the crime, in his opinion, a person with borderline personality disorder, or any social personality disorder or alcoholism, is incapable of

directed, premeditated, thoughtful action (V38/4627-29). Merikangas did not ask Taylor about the facts of the case and did not consider the facts to be important to his assessment of Taylor's mental state (V38/4606-07). Merikangas understood the incident to have involved impulsive, thoughtless and irrational acts, and described the murder as a consequence of a fight or drunken brawl (V38/4601-02).

The last witness at the evidentiary hearing was Dr. Donald Taylor, a forensic psychiatrist from the University of South Florida (V38/4629-78). Dr. Taylor testified on behalf of the State at Taylor's penalty phase in 2004 (V38/4631). Taylor disagreed with Merikangas's testimony about personality disorders precluding deliberate acts (V38/4632). He evaluated Taylor on June 10, 2004, after Taylor's conviction but before the penalty phase (V38/4633). Taylor scored nearly perfect on a brief psychometric examination and stayed alert during the entire four hour evaluation, despite being medicated on Tegrotal, Prozac and Vistaril at the time (V38/4634-38). Taylor was coherent, relevant, and appeared able to comprehend with no indication of impairment (V38/4636).

Dr. Taylor had reviewed Dr. Merikangas's chart, Defense Exhibit 8, and compared it with Taylor's jail medication records, finding a number of discrepancies (V38/4640-45).

Often, medications were prescribed for sixty or ninety days, but because the chart was organized month-by-month, the medication would not appear in the months when it had not been prescribed, even though Taylor was still taking the drug (V38/4642-45). As a result, the chart inaccurately reflected that the prescriptions were inconsistent and appeared to start and stop for no reason (V38/4642-45). Dr. Taylor also examined Taylor in December, 2006, for a postconviction competency evaluation (V38/4653-54). The Department of Corrections had taken Taylor off all antiseizure medication when he was transferred to their custody, and Taylor had not had a seizure in the two years since then; Dr. Taylor also observed that Taylor had not been on seizure medication from 1991 to 2000 and had not had any seizures during that time (V38/4675).

Dr. Merikangas was recalled and testified in rebuttal that Dr. Taylor's corrections to his medication chart only strengthened Merikangas's opinion that Taylor had been overmedicated while awaiting trial (V38/4678-80).

Following the evidentiary hearing, the parties submitted post-hearing written arguments (V5/764-791, 792-874). On November 19, 2009, the court denied Taylor's motion for postconviction relief, in a lengthy Order with voluminous attachments (V6/897-924). The court below reviewed each claim

of ineffective assistance of counsel and did not find any deficient performance by his attorneys or the requisite prejudice as to any claim (V6/901, 904-05, 909, 912, 915, 919, 922, 923).

SUMMARY OF THE ARGUMENT

The court below properly denied Taylor's postconviction claims. His claims of ineffective assistance of counsel were all denied following an evidentiary hearing. The testimony from the hearing established that Taylor's trial attorneys did not perform deficiently and that no prejudice could be found even if some deficient performance could be shown. Taylor's claims of cumulative error and potential incompetency at the time of execution were properly summarily denied under this Court's precedent. As no error has been demonstrated in the denial of Taylor's postconviction motion, this Court must affirm the ruling entered below.

ARGUMENT

ISSUE I

IAC - MISADVICE ABOUT MOVING TO DISCHARGE COUNSEL

Taylor's first issue asserts that his trial counsel provided ineffective assistance when counsel advised Taylor about moving to discharge counsel before trial. This claim was denied following an evidentiary hearing; the trial court's factual findings are reviewed with deference while the legal conclusions are considered *de novo*. Stephens v. State, 748 So. 2d 1028, 1033 (Fla. 1999). As will be seen, this claim was properly denied below, and this Court must affirm the ruling to deny relief.

The legal standards to be applied to Taylor's claims of ineffective assistance of counsel are well established. The seminal case of Strickland v. Washington, 466 U.S. 668 (1984), governs the analysis of a constitutional challenge to the adequacy of legal representation. In Strickland, the United States Supreme Court established a two-part test for reviewing claims of ineffective assistance of counsel, which requires a defendant to show that (1) counsel's performance was deficient and fell below the standard for reasonably competent counsel and (2) the deficiency affected the outcome of the proceedings. The first prong of this test requires a defendant to establish that

counsel's acts or omissions fell outside the wide range of professionally competent assistance, in that counsel's errors were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687, 690. Only a clear, substantial deficiency will meet this test. See Johnson v. State, 921 So. 2d 490, 499 (Fla. 2005). The second prong requires a showing that the "errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable," and thus there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Strickland, 466 U.S. at 687, 695. The deficiency must have affected the proceedings to such an extent that confidence in the outcome is undermined. Johnson, 921 So. 2d at 500.

Proper analysis of this claim requires a court to eliminate the distorting effects of hindsight and evaluate the performance from counsel's perspective at the time, and to indulge a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689; Chandler v. United States, 218 F.3d 1305, 1313-19 (11th Cir. 2000), cert. denied, 531 U.S. 1204 (2001); Johnson, 921 So. 2d 499-500; Asay v. State, 769 So. 2d 974, 984 (Fla. 2000). Judicial scrutiny of

attorney performance must be highly deferential. "It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689. The defendant bears the heavy burden of proving that counsel's representation was unreasonable under prevailing professional standards and was not a matter of sound trial strategy, and that prejudice resulted. Strickland, 466 U.S. at 689; Chandler, 218 F.2d at 1313; Johnson, 921 So. 2d at 500; Asay, 769 So. 2d at 984.

In this case, Taylor was represented by Assistant Public Defenders John Skye and Debra Goins, both of whom shared a wealth of experience with defendants accused of capital crimes (V36/4281-83, 4353-54; V37/4448-49, 4477-78). When reviewing the performance of such seasoned trial attorneys, the strong presumption of correctness ascribed to their actions is even stronger. Chandler, 218 F.3d at 1316.

Finally, this Court has repeatedly recognized that "the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." Henry v. State, 937 So. 2d 563, 573 (Fla. 2006),

quoting Stewart v. State, 801 So. 2d 59 (Fla. 2001), and Cherry v. State, 781 So. 2d 1040, 1050 (Fla. 2000).

Taylor's first issue, claiming misadvice by counsel rendered his conviction unconstitutional, fails both factually and legally. Taylor claims that he wrote letters prior to trial which asserted that he was not satisfied with his attorneys and alleged a conflict of interest; in return, his attorneys provided misleading advice about the consequences of filing a *pro se* motion to discharge counsel. This claim is defeated factually because Taylor did not testify in support of his claim; he did not even establish that he ever wanted the court to discharge his attorneys or that he affirmatively relied on any misadvice in failing to file a motion to discharge counsel. Moreover, the advice that was given to Taylor in counsel's letter of December, 2002, was legally correct. Accordingly, the court below properly found that neither deficient performance nor prejudice had been demonstrated in this issue.

It should be noted initially that Taylor's claim is legally insufficient, as Taylor has not even alleged the necessary prejudice. Taylor asserts that the prejudice results from the fact that Taylor did not bring his "claims" to the attention of the trial court, "despite his strong initial desire to do so," (Appellant's Initial Brief, p. 13), and accordingly there was no

chance of Taylor being appointed new counsel. While this assertion was not established factually since Taylor did not testify at the evidentiary hearing, even if Taylor had testified in support of the allegations, relief would be denied. Taylor does not allege that any request for additional counsel would have been granted, or that new counsel would have been successful, or any other basis to establish any reasonable probability of a different trial outcome had counsel offered "better" advice. He has not identified any "claim" which would have compelled the appointment of new counsel or otherwise demonstrated any possibility of a different outcome, let alone the reasonable probability of such as required under Strickland.

Even if prejudice had been sufficiently alleged, no relief would be due. Taylor's claim focuses on Skye's letter of December 15, 2002. In the letter, Skye advises Taylor that new counsel would only be appointed if Taylor could prove that his current attorneys were performing incompetently and that, in the absence of such proof, the only other option would be for Taylor to represent himself. Taylor implies that this advice was wrong, asserting that a trial court is "required" to make an inquiry any time a defendant "expresses his desire to the trial judge to discharge his court-appointed counsel" (Appellant's Initial Brief, pp. 10-11). But in fact, Skye's advice was

entirely consistent with the applicable law, which holds that an inquiry is not available simply for the asking but requires more than generalized complaints and statements of dissatisfaction with counsel. Guardado v. State, 965 So. 2d 108, 113-15 (Fla. 2007). As the court specifically found below, Taylor was never specific with regard to the source of his unhappiness with counsel (V6/901); consequently, no Nelson hearing would have been required.

Seemingly aware that the advice given was correct, Taylor goes on to argue that Skye's input was misleading, because Taylor understood it to mean that it was Taylor's burden to prove his attorney was not performing competently and that, if Taylor failed to prove his allegations of incompetence, his motion to discharge would still be granted and he would be required to represent himself at trial. Since Taylor did not testify below, his understanding or misunderstanding of Skye's advice was not in any way before the trial court and clearly has no evidentiary support at this time. And although it is offered as the "only logical conclusion," the suggestion that a failure of proof would result in the granting of the motion and in relief which Taylor was not requesting is entirely illogical. To the contrary, the only logical conclusion to be drawn from Skye's letter is the correct legal result: if Taylor's

attorneys were performing competently, the court would not discharge them at Taylor's request but would allow Taylor the opportunity to represent himself if he did not want to continue the representation as appointed.

As noted, Taylor did not testify at the evidentiary hearing, and therefore failed to substantiate his allegations on this claim. In addition, the claim was affirmatively refuted by the testimony that was presented at the hearing. Trial counsel John Skye testified that his relationship with Taylor was cordial and productive (V36/4307). Debra Goins confirmed that her relationship with Taylor was typically good; while there were disagreements and frustrations at times, overall there was understanding and Taylor was not violent or threatening (V37/4479-80). Skye observed that there were times when Taylor wrote angry letters, sometimes suggesting there was a "conflict of interest" with the public defender's office, but when Skye and Goins met with Taylor in person, Taylor was not difficult or confrontational (V36/4301, 4305-07; V37/4415). The attorneys considered that Taylor was in a difficult situation, and wrote his letters as a way to let off steam; his attorneys did not fault him for that (V36/4307; V37/4415). Although Taylor used language indicating a "conflict," and at least threatened to complain to various authorities, he never identified any

particular problem or the source of his unhappiness (V36/4301-05, 4317-18, 4387-88). His letters were not well-founded, and nothing ever came of them (V36/4307, 4314).

John Skye and Debra Goins were very experienced attorneys and both had worked extensively with defendants accused of capital crimes (V36/4281-83, 4353-54; V37/4448-49, 4477-78). The letters of complaint from Taylor did not rise to the level of an actionable conflict, and Taylor's allegations were not sufficient to require a hearing into counsel's performance under Nelson v. State, 274 So. 2d 256 (Fla. 4th DCA 1974) (V36/4303). Taylor understood the legal process and was not confused about his right to an attorney (V36/4303). The public defender's office never moved to withdraw their representation, and Skye was never aware of any reason to withdraw (V36/4304; V37/4415). No justifiable reason for withdrawal has been offered by Taylor.

No constitutionally deficient performance by counsel has been identified on this issue. Counsel's advice to Taylor, as recalled at the hearing and demonstrated by the relevant correspondence, accurately stated the law and accurately assessed the unlikelihood of Taylor successfully securing new counsel (V36/4390-96). See Guardado, 965 So. 2d at 113-15; Bundy v. State, 455 So. 2d 330, 348 (Fla. 1984) (noting indigent criminal defendants have no right to counsel of their own

choosing). Taylor has not established any "misadvice" or any other deficiency in counsel's performance.

Even if some deficient performance could be presumed, as noted previously, Taylor has not alleged, let alone established, it could have possibly resulted in any different outcome. As counsel acknowledged at the evidentiary hearing, the State's case for guilt was very strong and weighty aggravating factors compelled a sentence of death (V36/4339; V37/4434-38, 4450-51, 4479). Taylor's confession alone established at least felony murder (V37/4436). There is no basis for a loss of confidence in the conclusion of this case, and there is no reason to suspect that a lesser verdict or sentence could have been secured, even if a successful motion to discharge had been filed and different counsel been obtained.

Taylor has failed to demonstrate any basis for a finding of ineffective assistance of counsel in this issue, and this Court must deny this claim.

ISSUE II

IAC - ALLEGED FAILURE TO INVESTIGATE OVERMEDICATION

Taylor next asserts that his attorneys were ineffective for failing to fully investigate his prescription drug history while awaiting trial. This claim was denied following an evidentiary hearing; the trial court's factual findings are reviewed with deference and the legal conclusions are considered *de novo*. Stephens, 748 So. 2d at 1033. A full review of this issue will confirm the propriety of the court's ruling below to deny relief.

In rejecting this claim, the court below found that, while it is "entirely possible" Taylor may have been undermedicated or overmedicated at times while awaiting trial, this possibility did not provide a basis for finding counsel had been ineffective (V6/904-05). The trial court expressly found that counsel met with Taylor repeatedly for extended periods of time; that his attorneys were aware of his medical history, including his medications; and that counsel never observed anything leading them to believe that Taylor was overmedicated, in that Taylor was always in control of his faculties and never confused or incoherent (V6/904-05). The court noted that Merikangas's testimony was based on "possibly incomplete records" and observed that Dr. Sesta, who had examined Taylor prior to trial

and testified at the evidentiary hearing, did not corroborate Dr. Merikangas's opinion in this regard or express any concerns about Taylor's medications or dosages prior to or during trial (V6/905). The court also noted that other doctors from the jail and the community were evaluating and treating Taylor and did not ever express any concern about Taylor being overmedicated (V6/905). Finally, the court found that Taylor had failed to explain how the trial could have resulted differently had Taylor's medications been prescribed to Dr. Merikangas's satisfaction (V6/905).

The court's findings are well supported by the record of the evidentiary hearing. Attorneys Skye and Goins confirmed that they rendered adequate assistance in this regard. The attorneys met with Taylor repeatedly, for extensive periods of time (V36/4306, 4420-21). They were familiar with Taylor's medical history and aware of the medications that had been prescribed (V36/4290-91, 4347; V37/4459-60, 4473). Skye recalled that Taylor's prescriptions were changing, as Taylor was taken on and off medications, and the doses were modified (V36/4347). He saw nothing out of the ordinary that would suggest Taylor was overmedicated (V36/4347). Skye testified that, in discussing a possible plea in March, 2004, Taylor was

thinking clearly, and seemed to be coherent and rational (V36/4375).

Skye's vast experience as a defense attorney had led him to develop a good handle on competency issues; he was always looking for signs of any communication problem or anything suggesting a lack of understanding (V37/4422-24). People charged with first degree murder often suffer some sort of psychiatric symptoms, and Skye tries to be alert to the frequent mental health issues presented (V37/4424). His primary concern with Taylor's medication was its affect on Taylor's ability to interact with him in a relevant, goal-oriented, coherent fashion (V37/4424). In all the time Skye spent with Taylor, Skye never saw any sign or suggestion of incompetence, or that Taylor was under the influence or adversely affected by his medications (V37/4425). Taylor was always in control of his faculties, and was never confused or incoherent (V37/4425-26). During the trial, Taylor participated and took notes, interacted with his attorneys, exhibited appropriate courtroom behavior, and appeared to be paying attention; there were no issues about his medications (V37/4428-30, 4432).

The only evidence in support of this claim was presented by Dr. Merikangas; Merikangas was the only mental health expert to testify in postconviction that had not evaluated Taylor around

the time of trial. Merikangas reviewed a chart, Defense Exhibit 8, which outlined the medications Taylor was prescribed while in jail awaiting trial; Merikangas discussed the particular prescriptions extensively and concluded that Taylor's medications would interfere with his thinking and decision making (V38/4554-84). He testified that he believed Taylor was overmedicated during this time period, and had been given doses and combinations of prescription medications which effectively placed Taylor in a chemical straightjacket (V38/4578-80). According to Merikangas, Taylor was essentially intoxicated through the trial, sedated by the affects of his medications (V38/4570-71, 4583). However, the witnesses that were familiar with Taylor prior to trial confirmed that he was alert, coherent, and actively participating with his attorneys (V37/4425-30; V38/4633, 4636-37).

A review of the testimony from Merikangas establishes that he was particularly concerned about the lack of documentation to support prescription changes, and the apparent lack of monitoring and supervision by medical personnel (V38/4554-84, 4679). While he opined that Taylor was overmedicated, Merikangas did not speak with the treating physicians, and he did not elaborate on the causes or consequences of any overmedication. Taylor has not attempted to explain how the

result of the trial would have been different had his medications been prescribed to Merikangas's satisfaction.

Dr. Sesta examined Taylor prior to trial, in 2002, to assess Taylor's mental functioning (V35/4161-63). Although he testified at the evidentiary hearing, he did not corroborate Dr. Merikangas's opinion that Taylor had been overmedicated, and in fact did not express any concerns[1] about Taylor's prescription drug use prior to trial. Merikangas failed to identify any observable signs or indications which would have put Taylor's attorneys on notice of any prescription error, but observed that it is not always apparent to a lay person that another individual is impaired due to medication errors (V38/4592). Merikangas's opinion of Taylor's overmedication was not based on any behavioral observations, but only on a review of Taylor's prescriptions as outlined in Defense Ex. 8 (V38/4592).

Once again no attorney neglect has been demonstrated. Taylor was being treated by doctors at the jail, and he was examined confidentially, over a period of time, by defense mental health experts (V37/4455). None of these professionals relayed any concern to the defense attorneys. The only witness

[1] Dr. Sesta observed that Taylor was taking anticonvulsant medications at the time of Sesta's examination, which may slow the thinking process and which may, at least, have contributed to the brain impairment observed in neurological testing (V35/4198-99).

to have concluded that Taylor was overmedicated was the one witness that had not evaluated or observed Taylor prior to trial, and his conclusion was based on a review of inaccurate records rather than any personal observation. This witness, Dr. Merikangas, was not credible due to his steadfast belief that this crime involved spontaneous, impulsive acts, when the true facts reveal a well thought out, planned robbery, a clearly premeditated murder, and a brutal, unprovoked attack on a sleeping victim (V37/4434-37; V38/4511, 4601, 4605-15, 4629). Even if Merikangas's opinion was credible, Taylor's attorneys saw nothing out of the ordinary to suggest that Taylor was overmedicated, and no unreasonable acts or omissions can be attributed to them in this regard (V36/4347).

Even Dr. Merikangas supported the court's ruling below, since he acknowledged that Taylor's problem may not have been apparent to a layperson, as Taylor may appear and behave "perfectly normal" even while overmedicated (V38/4592). According to Taylor, his attorneys should have been aware that there was a problem from several sources: a letter Taylor wrote to his attorneys indicating that he thought he was taking too many medications; a letter Taylor wrote to a corrections official stating that he was "jittery" about his upcoming trial and wanted more Depakote; a number of "Signal 67" in the jail

logs, indicating a mental problem; and Taylor's entire medical history, suicide attempts, and abrupt changes of mind regarding a possible plea. While these facts should lead a reasonable attorney to investigate a defendant's mental health, it is undisputed in this case that Taylor's attorneys extensively explored his mental condition through several mental health experts prior to trial. Taylor does not offer any reason for his attorneys to have believed that the expert assistance they had obtained was actually contributing to Taylor's mental problems.

Taylor places undue reliance on the federal court order from June, 2001, directing that Taylor receive Dilantin rather than a generic anticonvulsant drug (V18/3353). This order was issued shortly after Taylor was taken into custody, and about a month before Taylor attempted to commit suicide by overdosing on Dilantin. This was nearly three years before the critical events of March, 2004, when the case was nearly resolved with a plea. The federal judge was not identified as a medical doctor and the order was not a medical prescription, yet Taylor has repeatedly urged that because the court indicated Dilantin was necessary, the record suggests that he was not properly medicated while awaiting trial. Of course, it is significant that the order directed the Dilantin, "as prescribed by a

physician" and that Taylor "receive immediate medical attention" and "have his condition monitored daily or as otherwise ordered by a physician" (V18/3353). From all appearances, it is a routine direction to ensure that Taylor receive appropriate medical care while in federal custody; it is substantively immaterial to the issue of whether Taylor's attorneys were constitutionally negligent for failing to investigate his pretrial medication history.

Even if some deficient performance could be presumed, Taylor has clearly failed to establish any possible prejudice. Had Merikangas been involved with Taylor prior to trial, Merikangas may have demanded an explanation or been privy to additional medical documentation about the medications prescribed. While this may have resulted in a better quality standard of care, there is no basis to believe that Taylor would not have been convicted of murder and sentenced to death if different medications had been prescribed while Taylor was in jail. Taylor presented no evidence to suggest that he could have been more successfully treated with different medications or that correcting or eliminating any possible prescription error would have changed the outcome in this case.

Taylor claims prejudice by asserting there is a reasonable probability that he was tried while he was incompetent.

Taylor's claim of potential incompetency is entirely speculative and unsupported; not even Dr. Merikangas testified to any possibility that Taylor had been incompetent at the time of trial. Of course, Taylor was evaluated for competency by Dr. Krop, and he did not even present Dr. Krop as a witness at the evidentiary hearing (V37/4455). To the extent that Taylor suggests the competency question presents a different issue than that explored at trial or that the standard is heightened because this is a capital case, he is mistaken; there is no different or special competency standard to apply on these facts. The standard for competency does not change based on the nature of the case or the decision at issue, although some decisions may require the showing of a voluntary waiver in addition to the competence needed to waive a constitutional right. Godinez v. Moran, 509 U.S. 389, 399-400 (1993).

The evidence presented at the hearing refuted Taylor's claim of attorney ineffectiveness based on his alleged overmedication prior to and during trial. The court below properly denied relief, and Taylor has not offered any reasonable basis to disturb that ruling. This Court must affirm the denial of relief on this issue.

ISSUE III

IAC - CUTTING OFF PLEA NEGOTIATIONS

Taylor next claims that his attorneys were ineffective by cutting off plea negotiations with the State. As this claim was denied following an evidentiary hearing, the trial court's factual findings are reviewed with deference and the legal conclusions are considered *de novo*. Stephens, 748 So. 2d at 1033. Once again, the testimony from the evidentiary hearing failed to substantiate this claim, and the court below properly denied relief.

Trial attorneys Skye and Goins provided consistent testimony about the plea possibilities in this case. Both recalled that early in the case, Taylor had offered to enter a guilty plea in exchange for a life sentence, commonly referred to as an avoidance plea because the only advantage to the defendant is the opportunity to avoid the death penalty (V36/4296; V37/4451-52). Skye related Taylor's offer to the State in January or February of 2003; prosecutor Pam Bondi was cool to the idea, but agreed to run it by the State Attorney's Homicide Committee (V36/4319). On February 13, 2003, Bondi called the defense attorneys to advise them that the Homicide Committee had unanimously rejected Taylor's offer (V36/4320). By that time, Taylor had already advised them that he had

changed his mind and wanted to go to trial (V36/4325-26). The subject came up again in early 2004; Taylor started talking to his attorneys again about his desire to enter a plea if the State would agree to waive the death penalty (V36/4321-25). Skye thought the State might reconsider, and told Taylor he would call the State Attorney's office and convey the plea when Skye got back to his office, but when he got there, about fifteen minutes later, there was a phone message indicating that Taylor had changed his mind again and wanted to go to trial (V36/4326-28).

On March 5, 2004, Skye and Bondi had a discussion, with Bondi telling Skye that if Taylor was still interested in a plea, she would talk to the family and to the Homicide Committee (V36/4328). However, the State had a strong case, and Bondi was not going to go to a lot of trouble, so she needed assurance that Taylor was serious about entering a plea (V36/4328). Skye told Bondi he would talk to Taylor and get back with her with an answer (V36/4329-32). Skye's testimony is corroborated by Defense Ex. 6, a copy of a memo Skye drafted on March 14, 2004, which outlined the conversations relating to Taylor's offer (V36/4325, 4345, 4372).

Skye and Goins agreed that there was never any plea bargaining process in this case. The State never offered any

plea deal (V36/4318-19, 4356, 4362). Taylor indicated a willingness to enter a plea at times, and at other times he advised his attorneys to prepare for trial as no plea would be forthcoming (V36/4325-28; V37/4457). It was an issue on which Taylor changed his mind (V37/4456-57). While his attorneys thought an avoidance plea would be in his best interest, they were not going to browbeat Taylor or convince him to do something he did not want to do (V36/4339, 4370-71, 4376, 4451-54). Skye correctly described the role of an attorney advising a defendant on taking a plea: the attorney should discuss the options, advantages, and disadvantages, but, ultimately, it is the defendant's decision (V36/4370-71, 4375-76). He felt, in this case, that trying to browbeat Taylor into accepting a plea would devastate Taylor and negatively affect their relationship, so he didn't force the issue (V36/4371).

The record reflects that Taylor's attorneys acted competently in this regard. The attorneys discussed the options with Taylor, kept communications open, and provided reasonable advice. Taylor has failed to identify any particular deficiency in counsel's performance.

The facts which Taylor offers to support this claim are speculative and contrary to the evidence presented below. For example, Taylor claims that his attorneys made "no" attempt to

persuade him or convince him to enter a plea (Appellant's Initial Brief, p. 40). However, Skye's memorandum memorializing the critical discussion of March 7, 2004 indicates that after speaking with Taylor at length about the issue, "neither Ms. Goins nor I made any ***further*** attempts" (emphasis added) to convince Taylor to accept the plea, as counsel determined that continuing to discuss the issue would anger Taylor and be counter-productive (V21/3945). Obviously, attempts were made, counsel was simply unsuccessful in changing Taylor's mind, for which Taylor now faults counsel.

Taylor offered absolutely no evidence below to support his speculative conclusion that, had his attorneys performed differently, a plea to life in prison would have been offered and accepted. Taylor relies exclusively on comments offered by Prosecutor Harmon at a pretrial status hearing, suggesting that plea discussions could be ongoing, but the undisputed testimony at the evidentiary hearing was that Harmon's comments were not consistent with what Prosecutor Bondi had indicated to Mr. Skye earlier (V36/4350, 4379). Taylor even reads additional information into Harmon's comments, insisting that the State Attorney's Homicide Committee had already agreed to the plea and that the only thing left to be done was a "formal meeting" with the family "to finalize the outcome" (Appellant's Initial Brief,

p. 43) - facts with absolutely no support in the record. After a hearing where no witness testified that the family would have been willing or the State would have offered a plea to life, Taylor now asserts a reasonable probability of both based on a vague memorandum about a year earlier indicating that the family was concerned and nervous about the trial. However, at the time of the March 2004 discussion, the State indicated to Skye that the family was resistant to any plea deal (V21/3944).

With regard to the family's position, Taylor goes so far as to assert that "An argument that the family members may have been opposed to such an offer could only be based on speculation" (Appellant's Initial Brief, p. 44). First of all, since there was no direct evidence presented on the issue at all, any possible conclusion is necessarily speculative. Taylor's speculation that a deal would be accepted is based on an interoffice memo drafted about a year prior to the March 2004 discussions, indicating that the family had concerns about Bill Maddox's physical health and being a witness; the possibility of any potential plea for consideration at that time was not even mentioned in the memo. The "speculation" that the family would oppose a plea is based on the comment in Skye's memo of March 7, 2004, indicating that the State had considered a plea but they "were facing resistance from the victims' family" (V21/3944).

Of course, the State was not required to prove that the family would not have agreed to a deal; it is the defendant's burden to prove every element of his claim, and postconviction relief cannot be granted based on speculation.

More fundamentally, Taylor did not even offer testimony to the court to support the suggestion that he would have accepted any plea that might have been forthcoming. A defendant that enters a plea cannot subsequently challenge the validity of the plea based on faulty advice received from his attorney unless he demonstrates that he would have gone to trial absent the faulty advice. See Hill v. Lockhart, 474 U.S. 52, 59 (1984) ("in order to satisfy the 'prejudice' requirement [when claiming ineffective assistance of counsel with regard to entry of a plea], the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial"); Ey v. State, 982 So. 2d 618, 623-24 (Fla. 2008); Grosvenor v. State, 874 So. 2d 1176, 1181 (Fla. 2004) (applying Hill). In this case, that reasoning applies to require Taylor to demonstrate that, but for counsel's deficient performance, he would have entered a plea and obtained a life sentence. However, there was no evidence presented at the postconviction hearing to support such a finding, and Taylor has clearly failed

to prove, or even allege, the prejudice necessary to prevail on this issue.

Thus, Taylor did not establish that a successful plea would have been obtained had his attorneys performed any differently in this regard. Taylor's claim that his attorneys were ineffective with regard to plea negotiations was refuted by the evidence presented, and this Court must reject this issue.

ISSUE IV

IAC - USING MENTAL HEALTH EXPERT FOR PLEA NEGOTIATIONS

Taylor also claims that his attorneys should have used a mental health expert to assist with plea negotiations. As this claim was denied following an evidentiary hearing, the trial court's factual findings are reviewed with deference and the legal conclusions are considered *de novo*. Stephens, 748 So. 2d at 1033. Once again relief was properly denied, because Taylor failed to demonstrate any deficient performance or prejudice.

In rejecting this claim, the court below specifically found that the plea discussions were never firm enough to merit the involvement of a third party expert, and concluded that no deficient performance or prejudice had been shown (V6/912). Taylor has not challenged this finding or explained how his claim can survive it.

Both John Skye and Debra Goins testified that they were aware of situations and cases where mental health professionals, or other third party individuals such as family members, were brought in to assist in dealing with a difficult client, or helping a client to understand the benefits of a particular plea deal (V36/4348-49; V37/4455). However, both agreed that this was not necessary on the facts of this case (V36/4349; V37/4455). Skye observed that, had the State actually offered a

plea deal which Taylor was refusing to consider, Skye may have attempted to engage another person to help convince Taylor to accept the deal, but that situation was never presented (V36/4349). Skye felt that bringing in someone else would be counterproductive to his relationship with Taylor (V36/4349).

It is well established that the defense team consulted with a number of mental health experts prior to trial. Skye noted that he relied on Dr. Sesta, Dr. Krop and Dr. McCraney to recognize any relevant competency issues, and that their reports confirmed his observations, that Taylor was manipulative but fully understood what was going on (V37/4431). Of course, both Taylor's trial attorneys were very experienced and had extensive history in working with clients accused of capital crimes. As such, they had little need to be educated about the importance of understanding a defendant's mental health issues.

Although Taylor now claims that engaging an expert specifically for plea purposes would have assisted counsel in understanding Taylor's reactions and could have assured counsel of Taylor's competence, counsel had experts available to assist with those issues. In fact, the record reflects that Dr. Krop's assistance included exploring a possible deal. Goins, who was the attorney primarily responsible for the penalty phase and the mental health experts, recalled that, while she did not

specifically consult any expert about Taylor's medications and their effects on the plea process, she did discuss the possibility of a plea with Dr. Krop, she knew that Dr. Krop had questioned Taylor about the facts of the offense, and that Krop and Taylor had discussed the possibility of a plea (V37/4455-59).

Taylor relies on the ABA guidelines and the testimony of Dr. Sesta and Dr. Merikangas to prove his claim. The ABA guidelines discuss using a third party to help a defendant understand and accept a beneficial plea deal, but as quoted by Taylor they do not contemplate using a mental health expert but discuss bringing in family members or even other inmates. Dr. Sesta testified that it is a typical role for psychologists to assist attorneys in dealing with difficult or mentally ill clients, and that he has previously assisted in this manner to help attorneys to understand how mental illness may be impacting the quality of communication and to help them interact with defendants in meaningful ways (V35/4167-68). He felt that he could have assisted the trial attorneys in this case during plea negotiations, by assuring Taylor's competency (V35/4168). Dr. Merikangas testified that he previously assisted an attorney with a difficult client, a client that suffered from borderline personality disorder as Taylor does, but he has only done this

on one occasion, in a civil proceeding, and that had been within the last year (V38/4543, 4627).

None of these facts demonstrate that use of an expert for this particular purpose was constitutionally compelled in this case. There was no testimony presented below to support any conclusion that any reasonable attorney representing Taylor would specifically request his mental health experts to assist with plea negotiations which were not even taking place. Rather, the testimony was undisputed that such a course of action was not necessary in this case. Thus, no deficient performance has been demonstrated.

Even if deficiency were presumed, no prejudice could be found since there was no testimony below that an acceptable plea would probably have resulted from the participation of an expert. Dr. Merikangas had never served in such a role at the time of Taylor's trial, and Dr. Sesta indicated his usefulness would have been in assuring Taylor's competency - but according to defense expert Dr. Krop, Taylor's competency was never in question (DA. V27/2783). Thus, Taylor has not even shown what having expert assistance with the plea might have accomplished. This Court must affirm the denial of relief.

ISSUE V

IAC - LINKING SEROTONIN AND VIOLENCE

Taylor also asserts that his attorneys failed to investigate and present evidence showing that Taylor's violence was related to his low levels of serotonin. As this claim was denied following an evidentiary hearing, the trial court's factual findings are reviewed with deference and the legal conclusions are considered *de novo*. Stephens, 748 So. 2d at 1033.

In denying this claim, the trial court found that Taylor's attorneys made a reasonable strategic decision against presenting this evidence (V6/915). The court also determined that, in light of the heavy aggravating factors to apply, presentation of this evidence would not have made any difference in the sentence imposed (V6/915). These findings are fully supported by the record and soundly defeat Taylor's claim.

John Skye testified that he is generally familiar with serotonin (V37/4432). He is aware of the theory that a drop in serotonin level can cause impulsive behavior, but did not see a persuasive link in this case, because the facts of this crime showed Taylor's actions to be very thought out and well planned (V37/4433). While a large part of the defense case for mitigation was based on Taylor's alleged frontal lobe damage and

the impact that had on Taylor's impulse control, Skye felt from a common sense standpoint the mitigation was not that convincing due to the premeditated nature of the crime (V37/4433). Neither Skye nor Goins testified, even in hindsight, that evidence about serotonin should have been presented in mitigation.

Consistent with Skye's understanding, Dr. Merikangas repeatedly tied low serotonin levels to impulsive behavior (V38/4543-46). Although Dr. Sesta testified that antisocial personality disorder can be associated with lower serotonin levels, and that Taylor has antisocial personality disorder, most of the testimony about serotonin was offered by Dr. Merikangas (V35/4195, 4255). Dr. Merikangas testified that Taylor had been prescribed and was taking antidepressants (V38/4544-45). Most antidepressants act on the serotonin system, raising serotonin levels because generally people that are impulsive and violent have low brain serotonin (V38/4543). Merikangas concluded that, because Taylor was prescribed antidepressants which included selective serotonin reuptake inhibitors (SSRIs), his doctors must have agreed that he was mentally ill with low serotonin levels (V38/4544-45). Merikangas observed that arsonists, violent and impulsive people, and many depressed people have low serotonin levels (V38/4545-46). Aggression and a history of alcoholism are also

linked to low serotonin levels, and Taylor has both of these traits as well (V38/4546).

Taylor asserts that Dr. Merikangas relied on the facts of the case as outlined in this Court's opinion on direct appeal (Appellant's Initial Brief, p. 62). In fact, Merikangas disavowed any reliance on the facts; he testified only that he accepted them as what the Court found, but he did not think that anyone could really know the facts (V38/4511). According to Merikangas, this is not a problem because the facts are not important to his conclusions anyway (V38/4607). Merikangas did not explore the facts with Taylor or through any other source, but he believed the crime to involve impulsive, thoughtless, and irrational acts (V38/4605-09).

Notably, although Taylor asserts that his attorneys were constitutionally required to have Taylor's serotonin levels tested through a lumbar puncture or spinal tap at the jail, this test still has not been administered. Dr. Merikangas did not test Taylor's serotonin level, although the level can be determined by freezing and testing spinal fluid; however, he believes it was "quite probable" that Taylor's serotonin level was low at the time of the offense, because Taylor was exhibiting the type of behavior that someone with low serotonin levels will exhibit (V38/4546-47, 4622-23).

Taylor has failed to establish that Skye's conclusion that serotonin evidence would not be persuasive in this case was unreasonable, or that any reasonable attorney would have presented expert testimony on serotonin in mitigation. He has not identified any other capital case in Florida where such evidence has been given any mitigating value or even presented for consideration. The three cases he does cite to support his assertion that "such evidence was being presented in other cases" (Appellant's Initial Brief, p. 64), refute rather than support his claim. Of the three, only State v. Odom, 137 S.W. 3d 572 (Tenn. 2004), presents a scenario where evidence of low serotonin levels was offered as mitigation. In Odom, the defendant presented Dr. Steven Paul Rossby, the national expert on serotonin; Rossby had tested Odom's spinal fluid and determined that Odom only had about half the normal level of serotonin. Rossby testified that this result was "severely, extremely abnormal," and the lowest he had ever seen in testing at his lab. Rossby cited studies which link low serotonin levels to impulsive behavior, aggression, violence and rage, although he admitted there were no studies conclusively linking serotonin to violence and agreed that low serotonin levels are also associated with nonviolent behaviors such as eating disorders and gambling addiction. Rossby could not state that

Odom's low serotonin level caused him to kill the victim in that case.

In one of the cases, evidence of serotonin was not offered for mitigation purposes at all; the defendant wanted to present "evidence that he suffers from a bipolar affective disorder that is aggravated by low serotonin levels in his brain, type 2 alcoholism, and polydrug abuse," in support of a diminished capacity defense for guilt phase consideration, and the appellate court upheld the exclusion of the evidence. State v. Sanders, 2000 WL 1006574 (Ohio App. 2 Dist. 2000).

In the last case, the serotonin evidence was presented at a postconviction evidentiary hearing, just as in Taylor's case. Hines v. State, 2004 WL 1567120 (Tenn. Crim. App. 2004). Dr. Rossby was one of six mental health experts to testify with regard to the defendant's claims of ineffective assistance of trial counsel. Rossby testified in Hines that the first time he ever testified regarding serotonin as mitigation was in 1999, and he was not aware of any other expert to offer such testimony prior to that time. Hines's claim of ineffective assistance was denied based on the finding that the testimony on serotonin was not available at the time of Hines's 1989 resentencing. Although this suggests that Dr. Rossby was available to offer this testimony in 2004, it does not support any suggestion that

all reasonable attorneys were constitutionally compelled to present serotonin mitigation within five years of it first being available.

Even if some possible deficiency could be presumed on these facts, the record fully refutes any allegation of prejudice. As Skye acknowledged, a lower serotonin level may well provide mitigation for an impulsive criminal act, yet no reasonable juror would characterize Sandra's murder as impulsive. Taylor's claim of prejudice asserts that if the serotonin evidence had been presented, the court would have found both statutory mental mitigating factors, probably resulting in a life sentence. However, both Dr. Sesta and Dr. Merikangas opined that both statutory mental mitigators applied, but neither attributed this opinion to the low serotonin levels. Thus, the postconviction testimony regarding statutory mental mitigation was much like the evidence offered at trial from Dr. Krop and Dr. McCraney, both of whom testified at the penalty phase that the factors applied without reference to Taylor's serotonin level.

To support his opinion on the statutory mitigators, Sesta noted Taylor's significant psychological distress, brain impairment and seizer disorder; there is no mention of low serotonin levels (V35/4211-12). Although Dr. Merikangas briefly noted Taylor's "serotonin disorder" in his discussion of the

statutory mental mitigators, he described low serotonin level as a common symptom found in individuals with many of the same other physical and psychological deficits as Taylor - including personality disorders which counsel did not want to emphasize to the jury (V37/4467-70; V38/4546, 4596-4600). If Dr. Merikangas can conclude that Taylor had low serotonin levels based on the fact that Taylor was violent, aggressive, and taking antidepressants prior to trial, a similar conclusion could probably be offered about any death row defendant. All of which merely reinforces the conclusion that a low serotonin level is not, in and of itself, particularly mitigating.

The aggravating factors in this case were well established and were entitled to, and given, great weight. Taylor had two prior violent felonies, was on felony probation at the time of the murder, and committed the crime for pecuniary gain. The trial court heard extensive evidence of Taylor's physical, mental, and neurological shortcomings, but only nonstatutory mitigation was found; the jury recommendation for death was twelve to zero. The trial court concluded, on balance, that the aggravating factors "far" outweighed the mitigation, and the postconviction court agreed that the serotonin evidence offered in postconviction would not change this result. Once again the denial of relief must be affirmed.

ISSUE VI

IAC - ADVISING THE COURT ON SEIZURES AND MEDICATION

Taylor next asserts that his attorneys failed to adequately inform the court of his history of seizures and medication. As this claim was denied following an evidentiary hearing, the trial court's factual findings are reviewed with deference and the legal conclusions are considered *de novo*. Stephens, 748 So. 2d at 1033. Review of this issue will confirm the trial court's finding that no deficient performance or prejudice was demonstrated in this issue.

Taylor specifically disputes the comment in the sentencing order that Taylor had not reported any seizures or treatment for seizures "since 1991" (DA. V8/1318). Taylor alleged that this comment amounted to a finding that Taylor had not experienced any seizures from 1991 to 2004, and that his attorneys performed deficiently in failing to present medical records indicating that Taylor began taking antiseizure medications while in jail following his arrest in this case and that he suffered seizures as a result of overdosing on Dilantin in July, 2001. In granting an evidentiary hearing on this issue, the court below clarified that the comment in the sentencing order related to Taylor's mental state at the time of the offense (V4/626), and therefore evidence of seizures and medications after Taylor was

arrested and in jail would not have affected this penalty phase finding.

There was no credible testimony presented at the hearing that Taylor suffered any seizure or was prescribed any anticonvulsant medications from the time Dr. Greer terminated his treatment in 1991 until the time of the crime. Instead, Taylor presented evidence that two factors which support a finding that Taylor did not have seizures - the lack of any documented seizure activity and Dr. Greer's "normal" EEG in 1991 - are not dispositive and do not necessarily mean that Taylor did not experience seizures during this time. Since there was no affirmative evidence of any seizure in the relevant time period, Taylor did not establish that his attorneys performed deficiently in failing to inform the trial court of Taylor's seizures.

Although Dr. Sesta testified that Taylor was supposed to be taking Dilantin prior to the crime, and that Taylor had indicated that he had a seizure about a month or so before the crime, these vague assertions of Taylor's self-reporting did not provide any basis to believe that there had been a seizure; even Dr. Sesta did not appear to accept this history, but testified that the lack of any seizure or seizure medications from the time Dr. Greer terminated treatment in 1991 to the May, 2000

crime did not mean that Taylor had not suffered epilepsy at some point in his life, and still may have it (V35/4242). Taylor's self-report to Sesta is inconsistent with what he told Dr. Taylor at the time of trial (V38/4675). To the extent Taylor's postconviction experts suggested that it was possible Taylor had seizures that had not been observed or documented, they did not provide anything beyond what Taylor's trial experts had related to his sentencing jury at the penalty phase.

As Dr. Sesta did not find Taylor's report to be credible, there was no deficient performance in failing to present testimony that Taylor claimed to have had a seizure and been prescribed Dilantin prior to the crime. In addition, there was no testimony presented to demonstrate how Taylor's trial attorneys would even know about his statements. Taylor did not testify, and there is no indication that he, or anyone else, ever related this information to counsel or to anyone else at the time of trial.

The record clearly reflects that Taylor's mental state was thoroughly explored in the penalty phase, and Taylor has not created any doubt as to the accuracy of the testimony that was presented on the issue. Taylor's medical history, including a prior fall from a ladder and prior diagnoses of epilepsy and seizure disorder, was fully investigated and presented as

purported mitigation. The problem for the defense was the undisputed testimony that in 1991, nearly a decade before the crime, Dr. Greer had obtained an EEG that showed no abnormality, and that Greer suspended Taylor's treatment for seizures without any new seizures occurring (V37/4473; V38/4675). Although Dr. Merikangas testified that he did not believe the 1991 EEG to be significant, the EEG clearly fails to affirmatively support any claim of deficit or impairment. Taylor's history from 1991 to 2001 made it difficult for the trial attorneys to convince any reasonable fact-finder that Taylor's medical history had anything to do with Sandra Kushmer's murder, greatly reducing the probative value of any such mitigation.

Taylor's reliance on the order entered by a federal magistrate on June 8, 2001, following Taylor's arrest for these charges and directing that Taylor be prescribed Dilantin and not a generic equivalent, is misplaced. This order, which was known to the defense and in the defense file (V36/4291), does not establish that Taylor was suffering seizures prior to the crime. As the trial court was aware that Taylor was on Dilantin and other anticonvulsants after Taylor was in custody on these charges (DA. V27/2822-24; V28/2915), the federal order adds nothing of significance, and does not support a finding that

Taylor's attorneys were deficient in their penalty phase presentation.

Once again the egregious facts and aggravated nature of this crime demonstrates that death is the appropriate sentence, and there is no reasonable probability of a different outcome had Taylor's attorneys performed any differently in this regard. Both Skye and Goins acknowledged at the evidentiary hearing that the State had a strong case for a death sentence (V36/4339; V37/4433-36, 4451, 4479). Taylor failed to establish any deficient performance or prejudice, and this Court must affirm the denial of postconviction relief on this issue.

ISSUE VII

IAC - DR. SESTA AS PENALTY PHASE WITNESS

Taylor's last claim of ineffective assistance of counsel challenges counsels' decision against presenting Dr. Sesta as a witness at the penalty phase of Taylor's trial. As this claim was denied following an evidentiary hearing, the trial court's factual findings are reviewed with deference and the legal conclusions are considered *de novo*. Stephens, 748 So. 2d at 1033. Once again an examination of the facts regarding this claim supports the trial court's finding that no deficient performance or prejudice was established.

In denying relief on this issue, the court below specifically found that the failure to present Dr. Sesta as a penalty phase witness was the result of a reasonable strategic decision by counsel (V6/922). This finding is fully supported by the record, as both John Skye and Debra Goins testified that Taylor had been evaluated by competent mental health professionals, and that a strategic decision was made to use Dr. Krop and Dr. McCraney for the mental mitigation (V36/4299-4300, 4398-4407; V37/4416-19, 4431, 4443-44, 4455, 4465-72, 4475-78). Dr. Krop testified at the penalty phase that the statutory mental mitigating factors of extreme disturbance and substantial impairment should both be applied in this case (DA. V27/2829-

30), but ultimately the court chose to weigh the mental health evidence as nonstatutory mitigation (DA. V8/1315-20).

John Skye and Deb Goins are experienced capital defense attorneys who work together at the public defender's office (V36/4280-83, 4297-98, 4353-54; V37/4446-49). They worked on Taylor's case as a team, with Skye primarily responsible for the guilt phase, and Goins responsible for the penalty phase, as that was where they were most experienced (V36/4297; V37/4449). They conferred on all aspects of trial strategy and wanted the penalty phase defense to be consistent with the guilt phase evidence (V36/4298). As lead penalty phase counsel, Goins was the one responsible for handling the mental health experts (V36/4298, 4321-22, 4401-02; V37/4449).

Both Skye and Goins testified to the reasoning behind the defense strategy. Skye recalled that Sesta had been retained and rendered a report before Skye had been assigned to the case (V36/4298-99). Skye was familiar with Dr. Sesta, and felt that Sesta had good credentials and was well-intentioned, but did not always make a good witness (V36/4299). Skye believed that Sesta becomes too much of an advocate, losing his appearance as a disinterested witness (V36/4299). Skye would have used Sesta if he had no other options, but in this case they had other helpful experts, including Dr. McCraney, who Skye considered to be a

good witness in ways which Dr. Sesta was not (V36/4401). Skye had worked with Dr. Krop and Dr. McCraney, knew that he would be satisfied with their credentials and preparation, and preferred to use them in this case (V36/4299, 4400-01). Skye and Goins discussed it several times; as Skye recalled, Goins was reluctant to use Sesta because his testimony would be somewhat at odds with the other experts and the inconsistency would not be helpful (V36/4401-02). Ultimately, there was a mutual decision to use Krop and McCraney, and to keep Sesta in abeyance (V36/4299-4300).

Deb Goins also related her concerns about presenting Dr. Sesta as a witness. She recalled that she had retained Sesta to conduct neurological testing, but Sesta also administered personality testing she had not requested and his primary diagnosis was that Taylor suffered from antisocial personality disorder (V37/4466-67). That diagnosis was not helpful to the defense and she did not want it brought out (V37/4468-72). She knew Dr. Krop would acknowledge that Taylor had features of the disorder, but Sesta was more concrete about the diagnosis and she did not want this to be the primary diagnosis provided to the jury (V37/4470-72). While she did not recall Skye's concern of some inconsistency between the experts, she testified that she used the experts that were best for the whole overall

picture, which was not Sesta (V37/4475). She had been using Dr. Krop for many years, knew him to be very experienced, and just as qualified as Dr. Sesta to conduct neuropsychological testing (V37/4478).

Taylor does not dispute that there was strategy involved, but he characterizes the strategy as unreasonable and therefore deficient. Taylor claims that, had Sesta been offered as a witness, Sesta would have testified that both statutory mental mitigating factors applied, leading the jury to recommend and the judge to impose a life sentence. This argument is without merit because Dr. Krop testified at the penalty phase that both statutory mental mitigators applied, but that testimony was rejected and the trial court found only nonstatutory mental mitigation. Although Dr. Sesta believed that he could have been a better witness, his personal opinion as to his own superiority provides no basis for a finding of deficient performance.

Taylor takes issue with the reasons that were provided by counsel below and also asserts that this Court should only consider Ms. Goins's comments, claiming that she did not express the same concerns Skye offered and that the decision had been Goins's to make, so Skye's opinion is not relevant. However, the testimony below established that Skye and Goins worked as a team, and although Goins focused more on the penalty and Skye on

the guilt, they conferred extensively on many aspects of trial strategy (V36/4297-98). The issue of whether or not to present Dr. Sesta as part of the mitigation case was discussed several times, and it was a mutual decision to go with McCraney and Krop and hold Sesta in abeyance (V36/4299-4300, 4400-02). Both attorneys were familiar with the mental health experts and had prior experience with using the experts as witnesses (V36/4299, 4398-4403; V37/4464-65, 4476).

The fact that Taylor's attorneys were able to articulate specific reasons for not presenting Dr. Sesta is one of the major distinctions between this case and Taylor's primary case, State v. Duncan, 894 So. 2d 817 (Fla. 2005). Although Taylor relies heavily on Duncan, it does not demonstrate any error in the court's ruling below. Although Duncan's trial counsel testified that he had a reason for not presenting Dr. Berland as an expert, he could not provide the reason and no one else involved could suggest a reason. Significantly, there was no testimony presented at Duncan's penalty phase to establish the existence of the two statutory mental mitigating factors, although counsel knew Dr. Berland could have testified to this mitigation based on Berland's pretrial evaluation. It does not appear from this Court's opinion that any mental health testimony was offered at Duncan's penalty phase, quite the

opposite of Taylor's penalty phase, where two defense mental health experts were presented and testimony that both statutory mental mitigating factors applied was offered.

The law is well settled that, when reasonable strategic decisions are made as in this case, counsel cannot be deemed to have been ineffective. Sexton v. State, 997 So. 2d 1073, 1085 (Fla. 1985) (denying ineffective assistance claim based on presentation of mental mitigation); Darling v. State, 966 So. 2d 366, 377-78 (Fla. 2007) (noting attorneys are entitled to rely on trial experts); Burns v. State, 944 So. 2d 234, 243-44 (Fla. 2006) (upholding reasonableness of decision against presenting mental mitigation); Looney v. State, 941 So. 2d 1017, 1029 (Fla. 2006) (same). Counsel in this case investigated potential mitigation through three mental health experts, and made a strategic decision as to the best witnesses to present. Such an informed, reasonable decision refutes any allegation of deficient performance with regard to the failure to present Dr. Sesta as a mitigation witness.

Moreover, the record in this case demonstrates that no reasonable probability of a different result would have occurred had Dr. Sesta testified. Defense counsel presented mental mitigation through the testimony of two expert witnesses, Dr. Krop and Dr. McCraney, and Dr. Sesta offers no persuasive

mitigation above and beyond that presented by Krop and McCraney. Dr. Sesta testified at the evidentiary hearing that he reviewed the penalty phase testimony and felt he had better credentials than Dr. Krop, but Krop is a very experienced psychologist, having testified over a thousand times at the time of Taylor's trial, and is also well qualified to perform neuropsychological testing (DA. V27/2773-79). Sesta also felt that he could have added more to the penalty phase presentation by discussing the neurological data more in-depth, and explaining the different methods of inference in neuropsychology (V35/4165-66). However, the problem in this case wasn't that the fact-finder did not know enough about neurology, but that Taylor's medical condition had little to do with why this crime occurred, and Taylor's neurological deficits do not reduce his moral culpability for the acts committed on Sandra Kushmer and Bill Maddox.

In addition, for the reasons noted by John Skye, Dr. Sesta is not a credible witness. Dr. Sesta and Dr. Merikangas both damaged their credibility at the evidentiary hearing by repeatedly characterizing this crime as an impulsive act (V35/4209-11, 4220-25, 4268-70; V38/4601, 4604-09, 4628-29). Sesta spoke to Taylor about the facts of the case in February, 2008, and Taylor indicated that he "snapped" after he was drinking at the victims' house and Sandra hit him spontaneously

(V35/4209-11). Based on this scenario, Sesta concluded that both statutory mental mitigating factors applied to this crime (V35/4211-12). Although Sesta testified that the facts were very important to his opinion and that he relied on Taylor's account of the crime, Sesta's opinion did not change when he was confronted with the extensive trial evidence demonstrating that the facts were much more egregious; this was a well planned robbery and Sandra was murdered after reflection and deliberation, being shot in the face at close range by a shotgun while on the ground, leaning up against the house. The surviving victim, Bill Maddox, was brutally attacked and beaten while he slept. Sesta's refusal to change his opinion when the facts were substantially different than Taylor's version of events, in Skye's opinion, reduced his credibility and turned him more into an advocate than a disinterested witness (V36/4403-07). As Skye noted, this would not work well in front of the jury, and Sesta's penalty phase testimony would have contributed little, if anything at all, to the defense case for mitigation.

Dr. Sesta's testimony at the evidentiary hearing demonstrated the reasonableness of counsels' strategic decision against using him as a witness. Because Sesta's potential testimony did not provide any additional mitigation, any

deficient performance that could be ascribed to the decision not to use Sesta as a witness could not result in any prejudice. Taylor has again failed to establish any deficient performance or prejudice in his trial attorneys' decision with regard to Dr. Sesta, and this Court must affirm the denial of relief on this claim.

ISSUE VIII

CUMULATIVE ERROR

Taylor next claims cumulative error rendered his trial and sentencing fundamentally unfair. This is a purely legal claim, based on the written record and pleadings, so review is *de novo*. Walton v. State, 3 So. 3d 1000, 1005 (Fla. 2009); State v. Coney, 845 So. 2d 120, 137 (Fla. 2003).

It should be noted that Taylor's reliance on an unspecified "number and type of errors" is overbroad (Appellant's Initial Brief, p. 98). This Court has held that claims which are procedurally barred or were rejected on direct appeal cannot be considered in a postconviction claim of cumulative error. Rogers v. State, 957 So. 2d 538, 553-54 (Fla. 2007); see also Hannon v. State, 941 So. 2d 1109, 1148 (Fla. 2006) (cumulative error analysis does not encompass claims which are procedurally barred or without substantive merit); Philmore v. State, 937 So. 2d 578, 590 (Fla. 2006); Evans v. State, 946 So. 2d 1 (Fla. 2006).

Taylor's allegations of ineffective assistance of counsel were refuted at the evidentiary hearing. As Taylor has not demonstrated any error in his trial or sentencing proceedings, he is not entitled to any relief based on cumulative error.

ISSUE IX

INCOMPETENCE AT TIME OF EXECUTION

Taylor's last issue speculates that he may be incompetent at the time of his execution. This is a purely legal claim to be reviewed *de novo*. Walton, 3 So. 3d at 1005; Coney, 845 So. 2d at 137.

Taylor has acknowledged that his claim is premature. As this Court has repeatedly recognized, this claim is not ripe for judicial consideration until a death warrant has been issued. At that time, the claim must be pursued in accordance with Section 922.07, Florida Statutes. As this is not the appropriate time or vehicle for presentation of this claim, case law mandates the summary denial of this claim at this time. Sexton, 997 So. 2d at 1089; Barnhill v. State, 971 So. 2d 106, 118 (Fla. 2007); Philmore, 937 So. 2d at 590; Kimbrough v. State, 886 So. 2d 965, 984 (Fla. 2004); Griffin v. State, 866 So. 2d 1, 21-22 (Fla. 2003).

CONCLUSION

WHEREFORE, the State respectfully requests that this Honorable Court affirm the Order entered below denying postconviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Mark S. Gruber and Maria Perinetti, Assistant Capital Collateral Regional Counsel, Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida, 33619, this 28th day of January, 2011.

/s/ Carol M. Dittmar
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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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