IN THE SUPREME COURT OF FLORIDA
CASE NO. SC09-2417

WILLIAM K. TAYLOR,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

Mark S. Gruber
Florida Bar No. 0330541
Maria Perinetti
Florida Bar No. 0013837
CAPITAL COLLATERAL REGIONAL COUNSEL-MIDDLE REGION
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619
813-740-3544
Counsel for Appellant

PRELIMINARY STATEMENT

This is an appeal of the circuit court's denial of William K. Taylor's motion for postconviction relief brought pursuant to Florida Rule of Criminal Procedure 3.851.

The following format will be used when citing to the record. References to the record of the direct appeal of the trial, judgment, and sentence in this case shall be referred to as "R." followed by the appropriate volume and page numbers. References to the postconviction record on appeal shall be referred to as "PC-R." followed by the appropriate volume and page numbers. All other references will be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

William K. Taylor has been sentenced to death. Given the gravity of the case and the complexity of the issues raised herein, Mr. Taylor, through counsel, respectfully requests this Court grant oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other

STATEMENT OF THE CASE

The episode from which this case arose occurred on the night of Friday, May 25, 2001. *Taylor v. State*, 937 So. 2d 590, 593 (Fla. 2006). The incident was reported the next day, and a subsequent investigation led to the arrest of William K. Taylor at a motel in Tennessee on May 29, 2001. *Id*.

On August 25, 2001, a grand jury returned an indictment for Mr. 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 her brother, 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. R. Vol. I, 23-27. A sixth count of possession of a firearm by a convicted felon was nolle prossed. R. Vol. XXX, 3201.

This case was tried before the Honorable Barbara Fleisher. The first attempt to pick a jury ended in a mistrial. R. Vol. VI, 968. The actual guilt phase trial took place from June 2, 2004 through June 9, 2004. The evidence presented at trial was summarized in *Taylor v. State*, 937 So. 2d 590. The jury returned a verdict of guilty as charged on June 9, 2004. R. Vol. VIII, 1212; R. Vol. XXV, 2477. The penalty phase was conducted on June 11 and 14, 2004, ending with a 12-0 death

recommendation. R. Vol. VIII, 1285. The *Spencer*[1] hearing took place on August 16, 2004. R. Vol. XXX, 3159-83. The trial court imposed a death sentence on September 29, 2004. R. Vol. XXX, 3222. The written sentencing order and judgment and sentence are located at R. Vol. VII, 1314-26 and 1330-46.

The judgment and sentence were affirmed at *Taylor v. State*, 937 So. 2d 590, in an opinion dated June 29, 2006.

Mr. Taylor filed a Motion to Vacate Judgment and Sentence on October 8, 2007. PC-R. Vol. II, 346-81. The circuit court subsequently granted counsel's Motion for Leave to Amend, which was filed on October 10, 2007. PC-R. Vol. II, 383-85; PC-R. Vol. XXVIII, 4077. Mr. Taylor filed an Amended Motion to Vacate Judgment and Sentence on February 15, 2008, wherein he raised twelve claims. PC-R. Vol. III, 424-580. The State filed its Answer to Amended Motion to Vacate Judgment and Sentence on March 17, 2008. PC-R. Vol. IV, 583-602. A case management conference was held on June 2, 2008. PC-R. Vol. XXX, 4095-4115. The circuit court entered an order on June 10, 2008 granting an evidentiary hearing on Claims I, II, III, IV, V, VI, and VIII. PC-R. Vol. IV, 622-44. Claims VII, IX, and X were summarily denied. *Id*. Claim XI (incompetency to be executed) was stipulated to be premature and Claim XII (cumulative error claim)

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

was deferred. *Id*.

An evidentiary hearing was held on January 5-6, 2009. PC-R. Vol. XXXV, 4151-4277; PC-R. Vol. XXXV, 4278-4409; PC-R. Vol. XXXVIII, 4410-94. The hearing was continued on April 29, 2009. PC-R. Vol. XXXVIII, 4495-4683. Written closing arguments were filed by both parties. PC-R. Vol. V, 764-874. On November 19, 2009, the circuit court entered an order denying relief. PC-R. Vol. VI, 897-1097; PC-R. Vol. VII, 1098-1137. A notice of appeal was timely filed on December 17, 2009.

STATEMENT OF THE FACTS

The following witnesses testified at the evidentiary hearing that was held on January 5-6, 2009 and April 29, 2009. The details of their testimony will be discussed in more detail under the individual claims.

Joseph John Sesta, Ph.D.

Joseph John Sesta, Ph.D. is a forensic neuropsychologist and medical psychologist who is board certified in the specialty of neuropsychology and subspecialty certified in forensic neuropsychology. PC-R. Vol. XXXV, 4156. Dr. Sesta examines doctors who are seeking board certification, and he has published several articles. *Id.* at 4159. He has testified as an expert for the Court, Defense, and State 137 times in fourteen judicial circuits. *Id.* at 4159-60. Dr. Sesta was

accepted as an expert in the area of forensic neuropsychology. *Id.* at 4161.

John J. Skye and Debra Goins

Mr. Taylor was represented at trial by Assistant Public Defenders John J. Skye and Debra Goins. PC-R. Vol. XXXVI, 4282. Mr. Skye and Ms. Goins worked together as "coequals." PC-R. Vol. XXXVIII, 4298. According to Mr. Skye, he and Ms. Goins had a collegial relationship. *Id.* at 4297. Ms. Goins was lead counsel for Mr. Taylor's penalty phase, and she was primarily responsible for dealing with mental health experts in this case. *Id.* at 4429. Mr. Skye was lead counsel for the guilt phase. *Id.* at 4429. They conferred with regard to trial strategy, in order to ensure that the defense in the first phase was consistent with whatever defense they might need in the second phase. *Id.* at 4298.

Mr. Skye reviewed the appendix to Mr. Taylor's amended 3.851 Motion, and he recognized some letters and memoranda that he wrote and letters that he received. *Id*. at 4285. His practice was to dictate a detailed memorandum each time he met with a client, and he was especially careful to annotate files in death penalty cases. *Id.* at 4397-98.

James R. Merikangas, M.D.

James R. Merikangas, M.D. is a medical doctor, who is board certified in neurology and psychiatry. PC-R. Vol. XXXVIII, 4502-03. Dr. Merikangas was

on the committee that made up the written examination given to neurologists and psychiatrists, and he is an examiner for the oral boards in psychiatry and neurology. *Id.* at 4504. He has published numerous articles, book chapters, and book reviews in his field. *Id.* at 4506. He has testified as an expert in over 200 civil and criminal cases in federal court and over twenty states. *Id.* at 4505; *Id.* at 4507. Dr. Merikangas was accepted as an expert in the area of forensic psychiatry. *Id.* at 4508.

Dr. Merikangas was retained by CCRC-Middle to render an opinion regarding Mr. Taylor's medical, neurological, and psychiatric diagnosis. PC-R. Vol. XXXVIII, 4511. He reviewed the documents contained in Defense Exhibit Three, and he relied on these documents to render an opinion in this case. *Id.* at 4509. He also read the evidentiary hearing testimony of Mr. Skye and Ms. Goins. *Id.* at 4509.

Dr. Merikangas met with Mr. Taylor at Union Correctional Institution in December 2007. PC-R. Vol. XXXVIII, 4511. He previously attempted to meet with Mr. Taylor in November 2007, but Mr. Taylor refused to see him. *Id.* at 4512. Dr. Merikangas conducted a psychiatric examination and a physical neurological examination of Mr. Taylor. *Id.* at 4512. When he saw Mr. Taylor, Mr. Taylor had been off medications for two years. *Id.* at 4512. There was motor

impersistence of the tongue, which is a sign of brain dysfunction. *Id.* at 4512. He had orthostatic hypertension, which means that his blood pressure dropped dramatically when he stood up. *Id.* at 4512. He had difficulty distinguishing between the smell of cloves and vanilla, which is significant because people with head injuries frequently lose their sense of smell. *Id.* at 4513. Mr. Taylor also provided a history of unilateral headaches three times per week. *Id.* at 4512. Headaches on one side of the head are generally a form of migraines, which is a neurological condition, associated with extreme irritability and impulse control disorders. *Id.* at 4513. He also obtained a family history from Mr. Taylor. *Id.* at 4514. Mr. Taylor was straightforward and open with Dr. Merikangas, and Dr. Merikangas did not get the impression that he was malingering. *Id.* at 4514.

Donald R. Taylor, Jr., M.D.

Donald R. Taylor, Jr. is a medical doctor, who is board certified in psychiatry and forensic psychiatry. PC-R. Vol. XXXVIII, 4630. He has testified as an expert in the area of forensic psychiatry between 150 and 200 times, including approximately ten death penalty cases. *Id.* at 4631. He testified in Mr. Taylor's penalty phase trial in 2004. *Id.* at 4631.

Dr. Taylor sometimes consults with other experts in his field. PC-R. Vol. XXXVIII, 4671. He did not, however, consult with Dr. Krop or Dr. McCraney

prior to trial. *Id.* at 4671. Likewise, he did not consult with Dr. Sesta or Dr. Merikangas prior to the evidentiary hearing. *Id.* at 4671.

JURISDICTION

This Court has jurisdiction. Art. V, § 3(b)(1) Fla. Const.

STANDARD OF REVIEW

The standard of review is *de novo*. *Stephens v. State*, 748 So. 2d 1028, 1032 (Fla. 2000). Under *Strickland v. Washington*, 466 U.S. 668, 688 (1984), ineffective assistance of counsel claims are a mixed question of law and fact; with the lower court's legal rulings reviewed *de novo* and deference given to factual findings supported by competent and substantial evidence. *Sochor v. State*, 883 So. 2d 766, 772 (Fla. 2004).

SUMMARY OF ARGUMENT

1. The circuit court erred in denying Mr. Taylor's claim that counsel provided ineffective assistance by misadvising him about moving to discharge counsel. Mr. Taylor relied on this advice and did not move to discharge his counsel, which precluded any possibility of the judge discharging counsel and appointing outside counsel who would have provided effective representation.

2. The circuit court erred in denying Mr. Taylor's claim that counsel provided prejudicial ineffective assistance for failing to investigate the effects of Mr.

Taylor's overmedication. Given the medications that Mr. Taylor was taking leading up to and during trial, there is a reasonable probability that Mr. Taylor was denied his constitutional right not to be tried while incompetent. Furthermore, if counsel adequately investigated the effects of their client's overmedication, they would not have terminated plea negotiations when they did.

3. The circuit court erred in denying Mr. Taylor's claim that counsel provided prejudicial ineffective assistance by cutting off plea negotiations. There is a reasonable probability that if defense counsel did not terminate plea negotiations when they did the State would have offered and Mr. Taylor would have accepted a plea to life in avoidance.

4. The circuit court erred in denying Mr. Taylor's claim that counsel provided ineffective assistance by failing to employ the aid of a mental health expert in plea discussions with the defendant. Such an expert could have helped counsel understand why he was reacting as he was and the effects of the medications he was taking, assisted counsel in speaking with him about plea negotiations, and determined whether he was competent to enter a plea or stand trial. There is a reasonable probability that if counsel had employed a mental health expert in this way, the State would have offered a plea to life in avoidance, and Mr. Taylor would have accepted such an offer.

5. The circuit court erred in denying Mr. Taylor's claim that counsel provided prejudicial ineffective assistance by failing to investigate and present evidence regarding the link between his low levels of serotonin and his violent behavior. This evidence would have helped establish the two statutory mental health mitigating circumstances. There is a reasonable probability that if this evidence had been presented at trial, Mr. Taylor would have received a life sentence.

6. The circuit court erred in denying Mr. Taylor's claim that counsel provided ineffective assistance by failing to advise the court about his recent history of seizures and medications. As a result of counsel's deficient performance, the trial court was under the mistaken impression that Mr. Taylor was no longer experiencing the effects of or being treated for a seizure disorder. Furthermore, Mr. Taylor's history of seizures could have served as additional credible evidence of brain damage.

7. The circuit court erred in denying Mr. Taylor's claim that counsel provided prejudicial ineffective assistance when they failed to call Dr. Sesta as a witness during penalty phase. Dr. Sesta's testimony, including the results of neuropsychological testing, would have provided credible scientific evidence that Mr. Taylor suffers from brain impairment, and it would have established the two statutory mitigating circumstances. A strategic decision not to call Dr. Sesta would

have been unreasonable.

8. The circuit court erred when it denied Mr. Taylor's claim that cumulative error deprived him of the fundamentally fair trial guaranteed under the Sixth, Eighth, and Fourteenth Amendments and rendered his convictions and sentence of death unreliable.

ARGUMENT I

THE CIRCUIT COURT ERRED WHEN IT DENIED MR. TAYLOR'S CLAIM THAT COUNSEL PROVIDED PREJUDICIAL INEFFECTIVE ASSISTANCE BY MISADVISING HIM ABOUT MOVING TO DISCHARGE HIS COURT APPOINTED COUNSEL.

Mr. Taylor alleged in Claim I of the motion for postconviction relief that trial counsel provided prejudicial ineffective assistance by misadvising him about moving to discharge his court appointed counsel. PC-R. Vol. III, 442-45. The circuit court conducted an evidentiary hearing on this claim, and found that Mr. Taylor failed to meet either prong of the *Strickland* test. PC-R. Vol. VI, 901. Mr. Taylor seeks review of this finding.

The right of an indigent defendant to counsel is guaranteed under the Sixth Amendment to the United States Constitution. This includes the right to effective representation by such counsel. *Nelson v. State*, 274 So. 2d 256 (Fla. 4th D.C.A. 1973). When, before the commencement of trial, a defendant expresses his desire to the trial judge to discharge his court appointed counsel, the trial judge is

required to make an inquiry of the defendant concerning the reason he seeks to have his attorney discharged. *Id*. If the defendant alleges that counsel has provided incompetent assistance, "the trial judge should make a sufficient inquiry of the defendant and his appointed counsel to determine whether or not there is reasonable cause to believe that the court appointed counsel is not rendering effective assistance to the defendant." *Id*. At 259. If the judge finds reasonable cause to believe that appointed counsel has rendered ineffective assistance, the court should make such a finding on the record and appoint substitute counsel. *Id*.

Mr. Skye testified that Mr. Taylor wrote a number of angry letters to Mr. Skye, Ms. Goins, and Ms. Holt in which he seemed unhappy and expressed discontent with his situation. PC-R. Vol. XXXVI, 4301-02; *Id.* at 4308. Mr. Taylor claimed that there was a "conflict of interest" between himself and his attorneys, but he did not explain what the conflict was. *Id.* at 4301; *Id.* at 4388. Mr. Taylor also filed a complaint with the Florida Bar, which he later withdrew, and he threatened to file complaints with the Judicial Qualifications Committee or the Florida Committee on Human Relations. *Id.* at 4304; *Id*. at 4315.

In response to the several attempts by Mr. Taylor to prompt trial counsel to withdraw from his case, Mr. Skye provided misleading advice to Mr. Taylor regarding motions to withdraw. The legal standard the attorneys followed in

deciding whether or not to file a motion to withdraw was articulated by Mr. Skye in a letter to Mr. Taylor dated December 5, 2002, in which he stated, "[A] client's unhappiness or dissatisfaction with the performance of the Public Defender's Office (and the individual Assistant Public Defender assigned) is also not a basis for disqualifying the Public Defender's Office and appointing private (conflict) counsel unless the client/defendant is able to allege and prove that the Assistant Public Defender assigned to his case has rendered incompetent or ineffective assistance of counsel." PC-R. Vol. VII, 1196. This standard placed the burden of going forward on the defendant, and articulated the standard that the attorneys would never move to withdraw in a personal conflict situation.

Mr. Skye went on in his December 5, 2002 letter to Mr. Taylor to say, "If a client/defendant does not allege and prove ineffective or incompetent representation on the part of the Public Defender's Office, the Court is under no obligation to discharge the Public Defender's Office and appoint private counsel, and a client/defendant's only option is self-representation." PC-R. Vol. VII, 1196. The circuit court found that "Mr. Skye's failure to state in his letter to Defendant 'Or, you could choose to keep your original counsel,' does not rise to the level of deficient performance." PC-R. Vol. VI, 901. However, Mr. Skye did provide deficient performance in that the advice he provided to Mr. Taylor in his December

5, 2002 letter is misleading. If the trial court refuses to discharge court appointed counsel, the defendant could choose to keep his court appointed counsel. Under *Nelson*, the court may, in its discretion, discharge court appointed counsel and require the defendant to proceed to trial without representation by court appointed counsel only if the defendant continues to demand that his counsel be dismissed. *Nelson*, 274 So. 2d at 259. Furthermore, Mr. Skye assured Mr. Taylor that any such claim would not prevail. PC-R. Vol. VII, 1196. The only logical conclusion that a defendant could draw from such advice was that if he asked to have counsel discharged, the Court would deny such a request and he would be forced to represent himself. There was never a *Nelson* hearing in this case, and the Public Defender's Office did not file a motion to withdraw. PC-R. Vol. XXXVI, 4303-04. Relying exclusively on Mr. Skye's assertions, Mr. Taylor did not bring his claims to the attention of the trial court, despite his strong initial desire to do so, thereby prejudicing Mr. Taylor and precluding any possibility of the judge discharging counsel and appointing outside counsel who would have provided effective representation.

The courts have held that counsel can provide ineffective assistance by misadvising a defendant. See *Rodriguez v. State*, 932 So. 2d 1287 (Fla. 2d D.C.A. 2006); *Williams v. State*, 2007 W.L. 486397 (Fla. 2d D.C.A. 2007). In the case at

hand, trial counsel provided ineffective assistance when they misadvised Mr. Taylor about the procedure for asking the court to discharge his attorneys. Mr. Skye actively discouraged Mr. Taylor from bringing his concerns about trial counsel to the attention of the court. In doing so, trial counsel invaded the province of the trial court and prevented judicial oversight.

ARGUMENT II

THE CIRCUIT COURT ERRED WHEN IT DENIED MR. TAYLOR'S CLAIM THAT COUNSEL PROVIDED PREJUDICIAL INEFFECTIVE ASSISTANCE BY FAILING TO INVESTIGATE THE EFFECTS OF OVERMEDICATION.

Mr. Taylor alleged in Claim II of his motion for postconviction relief that trial counsel provided prejudicial ineffective assistance by failing to investigate the effects of overmedication. PC-R. Vol. III, 445-52. The circuit court conducted an evidentiary hearing on this claim. The circuit court found that it was possible that during the time Mr. Taylor was incarcerated in the Hillsborough County Jail awaiting trial, "he may have been over- or under-medicated." PC-R. Vol. VI, 904. However, the circuit court noted that despite the testimony of Dr. Merikangas regarding Mr. Taylor's demeanor and medications, neither Mr. Taylor's attorneys nor Dr. Sesta, nor the jail doctors who treated Mr. Taylor expressed concerns that Mr. Taylor was overmedicated. *Id.* at 905. Further, the circuit court found that Mr. Taylor failed to demonstrate prejudice. *Id.* Mr. Taylor seeks review of these

findings.

Overmedication of prisoners is an ongoing problem. Comprehensive Textbook of Psychiatry 1995 (Harold I. Kaplan & Benjamin J. Sadock eds., 4th ed. 1985) ("Observers of the prison system in the United States have been particularly critical of the haphazard ways in which psychopharmacological agents are dispensed."). The ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, in recognizing this problem, states that "actions by prison authorities (e.g., solitary confinement, administration of psychotropic medications) may impede the ability to present the client as a witness at a hearing or have legal implications, and changes in the client's mental state . . . may bear upon his capacity to assist his counsel." Guidelines at Guideline 10.5 Commentary. Mr. Taylor was overmedicated at precisely the times he was confronted with key decisions concerning his case, such as whether to accept a plea to life in avoidance, whether or not to testify in his own defense, and whether to waive a jury in one or both phases of trial.

Referring to Defense Exhibit Eight, entitled "William Taylor Medications Timeline," Dr. Merikangas discussed the medications Mr. Taylor was taking leading up to and during trial, including Dilantin, Paxil, Sinequan, Vistaril, Prozac, Lithium, Depakote, and Tegretol. PC-R. Vol. XXI, 3975-82. While he was

awaiting trial, approximately a half dozen different doctors prescribed medications for Mr. Taylor. PC-R. Vol. XXXVIII, 4581. The standard of care was not being met with regard to the medications Mr. Taylor was prescribed. *Id.* at 4588. Mr. Taylor was given medications without appropriate medical evaluation and documentation. *Id.* at 4577. It does not appear that he was being closely monitored on his medications. *Id.* at 4584. There was no indication in the records about why Mr. Taylor was prescribed certain medications. *Id.* at 4584. The doctors prescribed combinations of medications that were unsafe, such as Sinequan and Prozac, without any apparent rationale for doing so. *Id.* at 4565. At times, he was on large doses of some of these medications. *Id.* at 4566; *Id.* at 4570-73; *Id.* at 4575-79; *Id.* at 4583. It amounted to what Dr. Merikangas called a "chemical straight jacket." *Id.* at 4579.

Many of the medications Mr. Taylor was taking have side effects. Too much Lithium can cause permanent brain damage or death, and it generally requires blood tests and careful monitoring. PC-R. Vol. XXXVIII, 4566-67. A notation from Mr. Taylor's jail medicals records states that Mr. Taylor was "shaking bad" in April 2003, which could have been a side effect of too much Lithium. *Id.* at 4569. However, there is no evidence in the record that Mr. Taylor's Lithium levels were ever checked. *Id.* at 4566-67. Tegretol can lower a

person's white blood cell count and cause an allergic reaction with a rash, which may result in death. *Id.* at 4572. Depakote can lower platelet count and affect liver functions. *Id.* at 4572. Depakote and Tegretol should be given under medical supervision with appropriate blood tests and documentation as to why they are given and what their effect is, but that was not done in this case. *Id.* at 4572. One of the SSRIs that Mr. Taylor was taking while he was awaiting trial is Paxil, which the federal government now requires be labeled with a warning that it can cause suicidal behavior and other mental changes. *Id.* at 4558. The possible side effects of Prozac, another SSRI, include irritability, agitation, sedation, and an increase in suicidal behavior. *Id.* at 4564. Other medications, such as Sinequan, Vistaril, Dilantin, Tegretol, and Depakote have a sedating effect. *Id.* at 4560-61; *Id.* at 4571. Dr. Taylor acknowledged that when a person takes two or more medications together that have a sedating effect, the sedating effect can be increased. *Id.* at 4670. Taking Sinequen, Vistaril, and Dilantin together, as was the case in August 2002, for example, may have made Mr. Taylor even more sedated and confused. *Id.* at 4562. Given the dosages of Vistaril and Sinequan Mr. Taylor was taking in June 2003, Dr. Merikangas would be surprised if he could stay awake during the day. *Id.* at 4571.

Dr. Merikangas expressed concerns that the medications Mr. Taylor was

taking during the entire time leading up to and during trial affected his cognition and decision making. PC-R. Vol. XXXVIII, 4583. At times, Mr. Taylor was overmedicated. PC-R. Vol. XXXVIII, 4569. He was intoxicated during the trial. *Id.* at 4583. Some of the drugs Mr. Taylor was taking together also would have exacerbated the symptoms of his borderline personality disorder, including irritability, impulsivity, and his mental process. *Id.* at 4578. On the other hand, there are medications that Mr. Taylor was not prescribed that could have helped treat his depression and borderline personality disorder, such as a conventional tricyclic antidepressant or a small dose of antipsychotic medication. *Id.* at 4584. In August 2001, Mr. Taylor refused Dilantin, which was an indication that something was wrong with his mental state. *Id.* at 4556. Additionally, going on and off Dilantin would have changed his mental state dramatically. *Id.* at 4556.

The circuit court was critical of the fact that Dr. Merikangas did not meet with Mr. Taylor and review his medical records until five years after the trial. PC-R. Vol. VI, 905. The circuit court relied on testimony by trial counsel that "they never saw anything that indicated to them that he was over-medicated because he was always in control of his faculties, and he was never confused or incoherent." *Id.* at 905. However, there were indications in the pretrial record of how the medications Mr. Taylor was being prescribed were effecting his mental state,

which should have served as red flags to trial counsel that there was a problem with Mr. Taylor's medications. Mr. Taylor wrote a letter to his attorneys, in which he expressed a concern that he was under the influence of medications and may be intoxicated. *Id.* at 4568. In another letter Mr. Taylor wrote to Colonel Parrish, he stated that he was jittery about the upcoming trial and wanted more Depakote. *Id.* at 4578. Dr. Merikangas opined that the Prozac and Sinequan may have been making him jittery. *Id.* at 4578. There are also a number of entries of "Signal 67" in Mr. Taylor's jail logs, which indicated that he was having a mental problem while he was in jail awaiting trial. *Id.* at 4593.

Dr. Taylor reviewed Mr. Taylor's medical records, as well as Defense Exhibit Eight, which is entitled "William Taylor Medications Timeline." PC-R. Vol. XXXVIII, 4640. Dr. Taylor pointed out several omissions in the timeline. *Id.* at 4639-53. Generally, the time line omitted some of the medications Mr. Taylor was on. *Id.* at 4668. There was only one instance, in June 2004, where Mr. Taylor was actually on fewer medications than the timeline indicated, as the timeline indicated that he was taking Depakote and Sinequan when those medications had actually had been discontinued. *Id.* at 4652; *Id.* at 4669. Dr. Taylor explained why some medications may have been left off the chart:

> [M]y best idea is that somebody looked month by month for when orders were written. But usually in this case, and this is common at

> the jail, order are written for 60 or 90 days so if, say, Prozac had been ordered in February 2003 for the next 90 days and somebody doesn't see that there's another order for it in March of April, they might think that the Prozac had been discontinued at that time because it's not ordered again until May of 2003 when point in fact, it's being ordered for 60 or 90 days at a time.

Id. at 4642-43.

Dr. Merikangas testified in rebuttal in response to the omissions Dr. Taylor found in the timeline. Assuming that Dr. Taylor's testimony was accurate, Mr. Taylor was on a lot more medication that Dr. Merikangas assumed. PC-R. Vol. XXXVIII, 4678. For example, one of the medications that was left out of the chart was Benadryl, which is very sedating, and can cause dry mouth and blurred vision. *Id.* at 4679. Benadryl would have contributed to the sedating effects of the other medications, such as Sinequan and Vistaril. *Id.* at 4679. He further testified:

> It strengthens my opinion that he was overmedicated with polypharmacy without adequate documentation because there was no way to look at the chart and find what the patient was taking at any given time. Instead, you had to figure out this was prescribed for 90, this was prescribed for 60 days, this was prescribed today. So someone looking at any given page of the chart could not tell what medicine this patient was taking, and in my opinion that does not comport with the standard of care.

Id. at 4679.

During the trial, Judge Fleischer asked Mr. Taylor if he was on medications. R. Vol. XXIII, 2217. Mr. Taylor responded that he was taking Prozac and Tegretol, but neither of these medications confused him in any way. *Id.* at 2217.

Dr. Merikangas testified that because Mr. Taylor was being affected by his medications and illnesses, he was not in a position to judge whether or not he was confused. PC-R. Vol. XXXVIII, 4589. Therefore, his response when Judge Fleischer asked him whether his medications confused him in any way is intrinsically unreliable. *Id.* at 4590.

Mr. Skye testified at the evidentiary hearing that he never saw evidence that Mr. Taylor was under the influence of drugs. PC-R. Vol. XXXVI, 4347-48; PC-R. Vol. XXXVII, 4425. Dr. Merikangas disagrees with Mr. Skye, as in his opinion Mr. Taylor was impaired leading up to and during the trial because of the drugs he was on. PC-R. Vol. XXXVIII, 4592. Dr. Merikangas explained that it is not always evident to a layperson when an individual is under the influence of medication:

> [P]eople can behave in ways that are to an exterior observer apparently normal while they're having very, very bizarre thinking and unless you test the thinking or have some evidence of what they are experiencing you wouldn't know how affected they were.

Id. at 4592.

Many of Mr. Taylor's behaviors leading up to and during trial that are characteristic of individuals with borderline personality disorder may also have been an effect of the medications he was taking. For example, he exhibited suicidal behaviors when he overdosed on Dilantin, tried to plead guilty with the

death penalty in-tact, and insisted on wearing his jail uniform at trial. PC-R. Vol. XXXVIII, 4555-56; *Id.* at 4564; *Id.* at 4596. He went from liking his attorneys to not liking his attorneys without any rational basis. *Id.* at 4576. He wrote angry letters to his attorneys, and when they went to see him he was non confrontational. *Id.* at 4594. During the roughly two years leading up to trial, Mr. Taylor went back and forth between wanting to enter a plea and wanting to go to trial. PC-R. Vol. 37, 4456. Ms. Goins further testified about Mr. Taylor's "flip-flopping behavior":

> Unfortunately, this was so much a part of Mr. Taylor's psyche that it was difficult for him to make decisions in his best interest; and that was very difficult as a lawyer from dealing with him as a lawyer and hoping that he would be able to make rational decisions for himself not based upon his psychological makeup but maybe upon what might be good for him.

Id. at 4457.

Dr. Merikangas testified regarding an order dated June 8, 2001 from a U.S. Magistrate Judge, which orders that Mr. Taylor shall receive Dilantin, "as the generic equivalent is inadequate to prevent seizures associated with Defendant's epilepsy." PC-R. Vol. XXXVIII, 4523. Dilantin is the brand name for Phenytoin, which is an anticonvulsant drug for seizures. *Id.* at 4523. The fact that the Order specified that Mr. Taylor be given Dilantin and not some other anticonvulsant drug is significant:

> The brand name Dilantin is more reliable in its composition and its dosage than generics. And epileptics frequently have seizures when

> they are switched from brand name Dilantin to generics. This is well documented in the medical literatures.
>
> . . .
>
> [Other anticonvulsant drugs, such as Depakote or Tegretol,] may be ineffective. They may have toxic effects or allergic effects. They may be causing changes in mental status.

Id. at 4524.

Dr. Merikangas testified about the anticonvulsant medications Mr. Taylor was taking while he was awaiting trial at the jail. Mr. Taylor received Dilantin for some time. PC-R. Vol. XXXVIII, 4524. Dr. Merikangas testified about the standard of care with regard to monitoring Dilantin levels:

> [Y]ou should get Dilantin levels and probably follow them at least in the beginning on a monthly basis and when there are any changes in adding other medications that may interact with it or changes in the mental state or the seizure frequency of the patients you would get other levels.

Id. at 4587.

In a memorandum dated August 13, 2002 and introduced as Defense Exhibit Nine, Carolyn Fulgueira noted that both Dr. McCraney and Mr. Taylor were concerned that Mr. Taylor's Dilantin level was too low. PC-R. Vol. XXII, 3983-86; PC-R. Vol. XXXVIII, 4585-86. Dr. Merikangas agreed that Mr. Taylor's Dilantin level may have been too low because Mr. Taylor had a seizure when he was taking two hundred milligrams a day of Dilantin, and was somewhat better when he was taking three hundred milligrams of Dilantin. *Id.* at 4587. Other than the indication

in the memorandum, Dr. Merikangas is not aware of any other documentation with regard to Mr. Taylor's Dilantin levels being measured at the jail. *Id.* at 4587. In February 2003, Dilantin was discontinued and it was replaced by Depakote. *Id.* at 4567. At times, Mr. Taylor was taking two anticonvulsive medications, Depakote and Tegretol. *Id.* at 4525. It is not clear from Mr. Taylor's records why these two medications were given together. *Id.* at 4571. Depakote and Tegretol are very seldom given together, as taking multiple drugs increases the chances of toxicity and an adverse reaction. *Id.* at 4525. Generally, multiple anticonvulsant drugs are only given to epileptics whose seizures cannot be controlled by a single drug. *Id.* at 4525. At other times while Mr. Taylor was awaiting trial, he was not taking any anticonvulsant medications at all. *Id.* at 4526.

When Dr. Taylor saw Mr. Taylor in June 2004, he reviewed Mr. Taylor's jail medical records and medications up to late 2003. PC-R. Vol. XXXVII, 4664. Mr. Taylor told him that he was taking Tegretol, Prozac, and Vistaril. *Id.* at 4664-65. Dr. Taylor was aware that Dilantin was discontinued in January 2003. *Id.* at 4666. After Dilantin was discontinued, Mr. Taylor was on either Depakote, Tegretol, or both together. *Id.* at 4667. He was also aware of the June 8, 2001 order from a federal judge directing that Mr. Taylor receive Dilantin, as opposed to its generic equivalent. *Id.* at 4666. He acknowledged that Dilantin can affect a

person differently than other anticonvulsant medications, and that they all work differently. *Id.* at 4666. As a physician, if he prescribed a patient Dilantin and that patient received some other medication, it would be unacceptable. *Id.* at 4667. Nevertheless, when he saw that Mr. Taylor was not on Dilantin he did not inform anyone at the jail. *Id.* at 4667.

Mr. Skye and Ms. Goins were aware of Mr. Taylor's history of mental illness and the fact that he was on medications during most of the time he was in jail awaiting trial. PC-R. Vol. XXXVI, 4347; PC-R. Vol. XXXVII, 4460. Although Ms. Goins did not recall ever having the Order from Judge Scriven directing that Mr. Taylor receive Dilantin, Mr. Skye recognized the Order as part of trial counsel's file. *Id.* at 4462; PC-R. Vol. XXXVI, 4291. Mr. Skye and Ms. Goins were aware that Mr. Taylor attempted to commit suicide on two occasions. PC-R. Vol. XXXVI, 4352;PC-R. Vol. XXXVII, 4459. When Mr. Taylor abruptly changed his mind about wanting to enter a plea to life in avoidance, they should have known that something was amiss. However, they did not consult with any experts with regard to the effects of the medications Mr. Taylor was taking on the plea process. PC-R. Vol. XXXVI, 4348;PC-R. Vol. XXXVII, 4455. They did not speak with Dr. Gushwa at the Hillsborough County Jail about Mr. Taylor's medications. PC-R. Vol. XXXVI, 4292-93;PC-R. Vol. XXXVII, 4456.

Additionally, they did nothing to ensure that Mr. Taylor was given Dilantin as ordered by the federal court.

This case is analogous to *United States v. May*, 475 Supp. 2d (D. Kan. 2007). In that case, the defendant agreed to enter into a plea agreement with the State, but on the eve of the plea hearing, he changed his mind and decided not to enter into a plea agreement. *Id.* at 103. Trial counsel subsequently filed a motion to determine competency, which the trial court granted. *Id.* at 1003. The first doctor who evaluated the defendant found him incompetent and recommended a thorough medical examination to determine whether he was overmedicated. *Id.* at 1104. The Court appointed a second doctor, who found that, while the defendant's physical problems were the main cause of his inability to properly assist in his own defense, medications were also causing problems with alertness and the defendant's cognitive abilities. *Id.* at 1104. Although the Tenth Circuit upheld the trial court's finding that the defendant was competent to proceed, in recognizing the defendant's deficits, it allowed for special accommodations, including "ongoing monitoring of defendant's sedation-causing medications." *Id.* at 1107.

As to the question of competence, this Court is required to follow the standard set forth in *Rees v. Peyton*, 384 U.S. 312 (1966) and determine:

> **in the present posture of things** . . . whether he has the capacity to appreciate his position and make a rational choice with respect to

> continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises.

Id. at 314 (emphasis added); *Mata v. Johnson*, 210 F.3d 324, 327 (5th Cir. 2000)

As the *Rees* standard implies, the evaluation of a petitioner's competency must take into account the specific nature of the decision the defendant must make. Federal courts have repeatedly emphasized the specificity of the inquiry required. In *Chavez v. United States*, the Ninth Circuit held that competency assessments must be made "with specific reference to the **gravity** of the decisions the defendant faces." *Chavez v. United States*, 656 F.2d 512, 518 (9th Cir. 1981) (emphasis added). There, the Court explained:

> The test for competence is thus traditionally stated in different terms depending upon the decisions and **consequences** presented to the defendant by the particular proceeding. It might be fair to require a marginally competent defendant to make certain kinds of decisions, but not others.

Id. at 518 (citation omitted); *Miller v. Stewart*, 231 F.2d 1248, 1250 (9th Cir. 2000) (holding that the competency of the decision to represent oneself poses a different question than competency of decision to waive capital appeals); *see also, Westbrook v. Arizona*, 384 U.S. 150 (1965) (*per curium*) (competency to stand trial poses a different competency question than competency of decision to waive right to counsel and represent oneself).

This line of jurisprudence has two lessons. First, the Court must assess the defendant's competency with reference to his capacity to rationally decide the specific decision posed. Second, the Court must employ a heightened standard for evaluating competence if the potential consequences of the decision are grave.

One can imagine no decision more grave than the decision to reject a potential offer of a life sentence in a capital case. The United States Supreme Court has repeatedly acknowledged that death penalty cases are unique from any other type of criminal case "in their finality." *E.g.*, *Eddings v. Oklahoma*, 455 U.S. 104, 117-18 (1982) (O'Conner, J., concurring). For this reason, the standard for evaluating the competence of the defendant's decision whether to accept an offer of life in avoidance or proceed to trial should be uniquely high.

At a minimum, the Court should employ the standard used to evaluate the waiver of a constitutional right. Many courts have articulated that standard as follows:

> To waive a constitutional right, a defendant must have that degree of competence required to make decisions of very serious import. A defendant is not competent to waive constitutional rights if mental illness has substantially impaired his or her ability to make a **reasoned choice among the alternatives presented** and to understand the nature and consequences of the waiver.

Chavez, 656 F.2d at 518 (emphasis added); *Mata*, F.3d at 327.

The conviction of an incompetent defendant denies him the due process of law guaranteed in the Fourteenth Amendment. *Pate v. Robinson*, 383 U.S. 375 (1966). "A defendant's allegation that he or she was tried while incompetent therefore claims that the state, by trying him or her for and convicting him or her of a criminal offense, has engaged in certain conduct covered by the Fourteenth

Amendment, namely without due process of law." *James v. Singletary*, 957 F.2d 1562, 1573 (11th Cir. 1992).

Trial counsel's failure to investigate and address their client's medications fell below the standard for reasonably competent counsel and prejudiced Mr. Taylor. At times, Mr. Taylor was overmedicated. At other times, he was not receiving medication he needed, either as ordered by the federal judge or for the treatment of his borderline personality disorder. Among the many side effects Mr. Taylor may have been experiencing were sedation, confusion, suicidal tendencies, irritability, impulsivity, agitation, and problems with cognition and decision making. Given the medications that Mr. Taylor was taking leading up to and during trial, there is a reasonable probability that Mr. Taylor was denied his constitutional right not to be tried while incompetent. Trial counsel could have filed a motion to have Mr. Taylor evaluated for competency, or they could have had a confidential expert look into Mr. Taylor's medications. If trial counsel had adequately investigated the effects of overmedication of their client, they would not have pulled the plug on plea negotiations when they did. Even if Mr. Taylor was found competent to proceed, the trial court could have, as the appellate court directed in *May*, allowed for special accommodations. Furthermore, if investigation by trial counsel revealed that he was overmedicated, they could have

arranged for his medications to he adjusted so that his decisions were all knowingly, intelligently, and voluntarily made.

ARGUMENT III

THE CIRCUIT COURT ERRED WHEN IT DENIED MR. TAYLOR'S CLAIM THAT COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY CUTTING OFF PLEA NEGOTIATIONS.

Mr. Taylor argued in Claim III of the motion for postconviction relief that trial counsel provided ineffective assistance by cutting off plea negotiations. PC-R. Vol. III, 452-59. The circuit court conducted an evidentiary hearing on this claim. In denying this claim, the circuit court found that Mr. Taylor had not met either prong of the *Strickland* test. PC-R. Vol. VI, 909. Mr. Taylor seeks review of this finding.

The ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases require that "[c]ounsel at every stage of the case should explore with the client the possibility and desirability of reaching an agreed upon disposition." Guidelines at Guideline 10.9.1(B). The Guidelines further state that:

> If a negotiated disposition would be in the best interest of the client, initial refusals by the prosecutor to negotiate should not prevent counsel from making further attempts to negotiate. Similarly, a client's initial opposition should not prevent counsel from engaging in an ongoing effort to persuade the client to accept an offer of resolution that is in the client's best interest.

Id.

When Mr. Skye was first assigned Mr. Taylor's case, Mr. Taylor wanted to plead guilty. PC-R. Vol. XXXVI, 4296. At a status conference on November 4, 2002 before Judge Holloway, Mr. Taylor said that he wanted to plead guilty, and he complained about his attorneys interfering with his right to plead guilty. *Id.* at 4301. When Judge Holloway told Mr. Taylor that he needs to consider what he is pleading to, Mr. Taylor responded, "I know what I'm pleading to." R. Vol. IX, 54. Mr. Skye felt that Mr. Taylor was frustrated and angry about his situation and that he was not thinking about the ramifications of pleading guilty to first-degree murder. PC-R. Vol. XXXVI, 4352. On November 13, 2002, Mr. Taylor wrote a letter to Mr. Skye in which he stated that he wanted to plead guilty as charged with the death penalty in-tact. *Id.* at 4388. On January 6, 2003, Mr. Taylor told Mr. Skye in court that he wanted to plead guilty. *Id.* at 4296; *Id.* at 4361. Approximately one day later, Mr. Skye had a conversation with Mr. Taylor about pleading guilty if the State would waive the death penalty. *Id.* at 4296. Mr. Taylor hoped to resolve the case by pleading guilty in exchange for a life sentence. *Id.* at 4320.

Mr. Skye and Ms. Goins discussed Mr. Taylor's desire to plead guilty, and they concluded that, given the nature and magnitude of the evidence against him, it would be in Mr. Taylor's best interest to plead guilty if the State waived the death

penalty. PC-R. Vol. XXXVI, 4319; *Id.* at 4339. They agreed that the defense would have great difficulty in the guilt phase. PC-R. Vol. XXXVII, 4438; *Id.* at 300. Mr. Skye thought that there was only "a very outside chance" of obtaining a verdict of second-degree murder as opposed to first-degree murder. PC-R. Vol. XXXVI, 4339. Ms. Goins felt that there was virtually no possibility of obtaining a verdict of anything less than first-degree murder. PC-R. Vol. XXXVII, 4451. She also felt that there was a potential for the jury to recommend death both because of the nature of the offense itself and because she was concerned that the mitigation would not be strong enough to overcome the aggravation. *Id.* at 4451. According to Mr. Skye, he and Ms. Goins both participated in most of the discussions with Mr. Taylor regarding a potential plea, but Mr. Skye was the primary person who spoke with the State Attorney's Office. PC-R. Vol. XXXVI, 4321-22. Ms. Goins testified that both she and Mr. Skye took a leading role as far as discussing the possibility of a plea with the State because in their opinion it was Mr. Taylor's best option. PC-R. Vol. XXXVII, 4454. Ms. Goins believed that a plea to a life sentence was at one time a very serious possibility. *Id.* at 4450.

Mr. Skye described his understanding of how the State Attorney's Office decides whether to make an offer of life in prison to a person who is facing the death penalty:

> [W]hen a decision of this magnitude in a death penalty case needs to be made, the matter has to be presented for discussion and a vote at what the State Attorney's Office calls a homicide committee meeting. The homicide committee is made up of the State Attorney and chief assistant and various division chiefs and other perhaps administrators. They listen to it and they decide whether or not they are agreeable to making any particular plea offer.

PC-R. Vol. XXXVI, 4322-23.

Ms. Bondi was Mr. Skye's contact person regarding the homicide committee because she was one of the prosecutors assigned to Mr. Taylor's case. *Id.* at 4323.

In January or early February 2003, Mr. Skye conveyed Mr. Taylor's offer to plead guilty in exchange for life in prison to the State Attorney's Office:

> Ms. Bondi seemed a little bit cool to the idea but she said that she would run it by the homicide committee. And I thought that she would also have to discuss it with the homicide committee in the State Attorney's Office and she would have to talk with the family about the concept, not that she would necessarily have to be bound by their decision or their feelings in it but she would at least consult with them.

PC-R. Vol. XXXVI, 4319-20.

There were delays in the State Attorney's Office having a homicide committee meeting, and they postponed a status hearing for a week or two because they thought Mr. Taylor might be able to enter a plea. *Id.* at 4320. In the meantime, Mr. Taylor changed his mind and informed his attorneys that he did not wish to plead guilty. *Id.* at 4325. On February 13, 2003, Ms. Goins received a call from someone at the State Attorney's Office informing her that the homicide committee

had unanimously rejected Mr. Taylor's offer to plead guilty to avoid the death penalty. *Id.* at 4320.

Mr. Taylor started mentioning the possibility of a plea bargain again in February or early March of 2004. PC-R. Vol. XXXVI, 4324. Mr. Skye thought that the State might have gotten so busy that they would be receptive to working this case out with a plea bargain. *Id.* at 4326. On March 3, 2004 Mr. Skye and Ms. Goins discussed the strengths and weaknesses of the case with Mr. Taylor. *Id.* at 4325. The conversation was very calm and rational. *Id.* at 4365. At the end of the meeting Mr. Taylor agreed that it was in his best interest to plead guilty for life in avoidance and he agreed to do so if the State made such an offer. *Id.* at 4325; *Id.* at 4365. He wanted his attorneys to ask the State about such an offer. *Id.* at 4329. Mr. Skye left the jail at 3:00 p.m., and when he returned to his office at 3:15 he received a telephone message from Mr. Taylor stating that he had changed his mind and wanted a trial. *Id.* at 4327. Mr. Taylor did not tell the State about the telephone message because he wanted to keep the process open. *Id.* at 4327-28.

Ms. Goins regarded the weeks leading up to the March 15, 2004 trial as the last and best chance for resolving Mr. Taylor's case with a plea to life in avoidance. PC-R. Vol. XXXVII, 4455. According to Ms. Goins, it appeared that the State was considering such an offer and that they would be willing to speak

with the victim's family about whether they would agree to a life in avoidance plea. *Id.* at 4452. Ms. Goins felt that there may have been concerns about the stress that a trial would cause the victim's family. *Id.* at 4452. This belief is supported by three emails from the Manuel Gonzalez to Ms. Bondi regarding the victim's family. In an email dated April 15, 2003, Mr. Gonzalez wrote:

> I got a call from Renate today. She is very concerned about her son's health problems and his ability to be in trial. She was explaining that with the death of her husband, her daughter, and the up-coming trial and her son's condition she is overwhelmed. She indicated that she would prefer to leave the issue of her son showing up for trial directly between you and her son; because she does not want to feel bad if his appearance in court would cause his health to deteriorate.

PC-R. Vol. V, 872.

In an email dated February 9, 2004, Mr. Gonzalez expressed that the victim's mother, Renata Sykes, was getting more nervous as the trial approached, and she wanted to put the trial behind her. *Id.* at 874. Ms. Sykes was also anxious about seeing Mr. Taylor in the courtroom. *Id.* at 874. In another email dated February 10, 2004, Mr. Gonzalez stated that Ms. Sykes is "getting anxious to see the trial over." *Id.* at 874.

On March 5, 2004, Ms. Bondi mentioned something to Mr. Skye about the possibility of resolving the case with a plea. PC-R. Vol. XXXVI, 4329. Mr. Skye got the impression that Ms. Bondi was not enthusiastic about a plea offer and that she was not going to try very hard to sell such an offer. *Id.* at 4383. She told him

to let her know if Mr. Taylor wanted to plead guilty in exchange for the State waiving the death penalty. *Id.* at 4328. If so, Ms. Bondi said that she would run it by the homicide committee and speak with the family about it. *Id.* at 4328. She expressed to Mr. Skye that she did not want to put herself and the family through this "angst" on a case that was a "slam dunk" for the State unless Mr. Skye could tell her that Mr. Taylor was willing to accept such a plea. *Id.* at 4328. Mr. Skye further described his conversation with Ms. Bondi on March 5:

> Ms. Bondi also told me at that time don't be wasting my time asking me to go talk with the family and Mr. Ober talk with the family, so on and so forth if Mr. Taylor didn't want to do this; so, you go talk to Taylor and you tell me this is what he wants to do and I will talk to the family about it or Mr. Ober will talk to the family about it.

Id. at 4529.

Mr. Skye's discussion with Ms. Bondi on March 5, 2004, as well as the events that followed, were memorialized in a memorandum, written by Mr. Skye on March 7, 2004, regarding which Mr. Skye testified at the evidentiary hearing:

> "On Friday, March 5th, 2004, I met with Ms. Bondi about various matters relating to the trial and she told me they were seriously considering the plea in avoidance situation. She asked me again for whatever assurance I could give her that the defendant would be willing to accept it if offered, and I again told her that I believed that he would."
>
> Now, I didn't tell her that two days earlier he had told me the opposite for perhaps obvious reasons.
>
> "Later that same night at approximately 6:00 p.m. Ms. Bondi called

> me and told me that they would not be able to finalize talking with the family about the plea in avoidance until Monday. Because of various scheduling matters she went on to tell me that Mr. Ober would be meeting with one or more of the family members on Monday morning."
>
> What she meant by that or what I meant by that was she was telling me if I were to call her over the weekend and tell her that he would be willing to do this, then Mr. Ober would meet with the family on Monday to get their feelings on it.
>
> The memo goes on: "Because of this situation I contacted Ms. Goins and we agreed we should go to the jail to assure ourselves that the defendant would or would not accept such a plea.

Id. at 4330-31.

Mr. Skye noted a discrepancy between what he wrote in the March 7, 2004 memorandum and his present recollection of events:

> The memo goes on: "During the last week of February and the first week of March 2004 the State Attorney's Office said they were considering the matter but were facing resistance from the victim's family. They wanted all the assurances they could" – it should be "I could give them that if, in fact, they went through the effort to convince the family that this was a good disposition of the case, that the defendant would, in fact, be willing to accept such an offer."

PC-R. Vol. XXXVI, 4334.

Apparently, Mr. Skye understood that the State would not meet with the family about a plea to life in avoidance without assurances from Mr. Taylor that he would accept such a plea. *Id.* at 4386. At this point in the case, Mr. Skye did not believe there was a strong likelihood of resolving this case with a plea. *Id.* at 4356-57.

A meeting between the elected State Attorney, Mark Ober, and the victim's

family was originally set for some time between Friday and Monday. PC-R. Vol. XXVI, 4338. Mr. Skye's understanding was that if he called Ms. Bondi before Monday morning and told her that Mr. Taylor wished to accept a plea, she would do whatever she needed to do to arrange a meeting between herself and Mr. Ober and the victim's family. *Id.* at 4338. According to Mr. Skye, he assured Ms. Bondi that he would see Mr. Taylor as soon as possible and let her know what he decided so that the State could either meet with the victim's family or not, depending on his decision. *Id.* at 4336.

Ms. Goins and Mr. Skye agreed that it was necessary to speak with Mr. Taylor because the State was looking for assurances that Mr. Taylor would accept a plea in avoidance offer before they spoke with the victim's family. PC-R. Vol. XXXVII, 4454. It was Ms. Goins' understanding that a meeting between the State and members of the victim's family had already been scheduled for Monday or early in the week. *Id.* at 4454.

On March 7, 2004, Mr. Skye and Ms. Goins went to the jail to speak with Mr. Taylor about whether he would accept an offer of life in prison. PC-R. Vol. XXVI, 4335. Mr. Skye testified that because approximately one year earlier Mr. Taylor changed his mind about wanting to plead guilty, he was not sure whether Mr. Taylor would ultimately agree to a plea. *Id.* at 4334. He was, however,

hopeful that Mr. Taylor would say yes. *Id.* at 4376. The meeting was cordial and friendly. *Id.* at 4368. Mr. Skye testified that he told Mr. Taylor that depending on what he decided, he needed to call the State Attorney's Office and let them know his decision. *Id.* at 4336. Mr. Taylor agreed that Mr. Skye should do that. *Id.* at 4336. Mr. Skye explained why he told Mr. Taylor that he needed to call the State Attorney's Office:

> I think I told him that for perhaps two reasons. Number one, I think it was the truth. Knowing the personalities involved like I did, I thought that it probably would or perhaps maybe had come to a point when the plea bargaining process, if it can be dignified as that, needed to come to an end and both sides needed to get ready for trial.
>
> And the other thing, as I say, is I may have said that to him in an effort to convince him that now is the time to fish or cut bait and he needed to make a decision on this before any more days went by.

Id. at 4374.

Mr. Taylor informed his attorneys that he did not wish to accept such an offer. PC-R. Vol. XXXVI, 4341. Mr. Skye tried to understand why Mr. Taylor was making this decision. *Id.* at 4343. Mr. Skye memorialized counsel's conversation with Mr. Taylor in the March 7, 2004 memorandum:

> [A]fter he said he did not want to take that offer, he wanted to go to trial, I then say quote, "The defendant then went [on to] say quote, 'they had two chances' end quote, to make such an offer to him and mentioned that on one occasion I had related to him that Ms. Bondi said that the homicide committee had rejected his offer unanimously. I told him that before the State made the statement, he also told me that he had changed his mind and did not want to plead guilty anyway.

> The defendant acknowledged this incident and the chain of events and chuckled as he did so."

Id. at 4341.

Mr. Skye did not attempt to convince or pressure Mr. Taylor to agree to accept such an offer because he believed that such an attempt could be counterproductive and "poison" Mr. Taylor's relationship with his attorneys. *Id.* at 4372.

After Mr. Taylor decided that he did not want to plead guilty in exchange for the State waiving the death penalty, Mr. Skye called Ms. Bondi on Sunday night and told her that Mr. Taylor did not wish to accept such an offer. PC-R. Vol. XXXVI, 4372. Mr. Skye explained why he called Ms. Bondi on Sunday night:

> And I did that because I didn't want to burn my bridges with the State Attorney's Office for hanging them out to dry, not letting them know what was going on; because I felt that if I did that, any future attempts would be met with less than coolness shall we say.

Id. at 4336-37.

On March 14, 2004, with the trial set to begin the following morning, Mr. Skye again visited Mr. Taylor in jail. PC-R. Vol. XXVI, 4351. After discussing some evidentiary matters with Mr. Taylor, the topic of pleading guilty to avoid the death penalty arose. *Id.* at 4351. Mr. Taylor told him calmly and without hesitation to get ready for trial. *Id.* at 4351. Just as at the March 7, 2004 meeting, Mr. Skye made no attempt to persuade Mr. Taylor that he should accept a plea to life in avoidance, despite the fact that he and Ms. Goins agreed that accepting such

an offer would be in Mr. Taylor's best interest.

In order to establish a claim of ineffective assistance of counsel, "a defendant need not show that counsel's deficient conduct more likely than not affected the outcome of the case." *Strickland*, 466 U.S. at 693. Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "[A] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

In the case at hand, there is a reasonable probability that, but for trial counsel cutting off plea negotiations, the State would have offered a plea in avoidance. A discussion about attempted plea negotiations at the pretrial conference on March 9, 2004 demonstrates that an offer of a plea to life in avoidance was a reasonable probability, and not mere speculation:

> Scott Harmon: There were discussions about the life in avoidance plea. Our understanding is that the defense was ready to take that. We discussed it at a homicide meeting. We had some follow-up work we were going to do involving the State Attorneys and the victim's mother. And Mr. Skye was gracious enough to call us from the jail and advise his client is no longer interested. So I don't believe it's any longer a table discussion.
>
> John Skye: I didn't call from the jail judge, but –
>
> Scott Harmon: I'm sorry, counsel –

> John Skye: But everything else Mr. Harmon says is true, judge. Mr. Taylor's not interested in anything but a trial at this point.

R. Vol. XI, 392.

The Court offered to set a status date on the Friday before trial so that Mr. Taylor could have additional time to think about the offer. R. Vol. XI, 392. Mr. Harmon offered to continue to work with the victim's family if the defense was still interested in an offer, which according to Mr. Harmon was "the only thing left undone." *Id.* at 393. Nevertheless, Mr. Skye declined the offer of additional time to work out a plea for Mr. Taylor.

Mr. Skye found Mr. Harmon's comments strange, as it seemed like he had not been communicating with Ms. Bondi. PC-R. Vol. XXXVI, 4350. According to Mr. Skye, "what he said at the hearing didn't jive with where I had left the situation with Ms. Bondi." *Id.* at 4350. Contrary to what Mr. Harmon informed the Court, Mr. Skye's understanding was that whatever was going to happen at the State Attorney's Office was contingent on Mr. Skye telling Ms. Bondi that Mr. Taylor would plead guilty to avoid the death penalty. *Id.* at 4379. At the same hearing, Mr. Skye indicated to Judge Fleischer that Mr. Taylor told him two days earlier that he wanted to go to trial. *Id.* at 4351. Mr. Taylor was sitting by Mr. Skye at the time, and he did not indicate anything differently. *Id.* at 4351. Although Mr. Skye was no longer engaging in plea discussions with the State on

March 9, 2009, he thought that there was an outside possibility that they may be able to resolve the case at the last minute if Mr. Taylor agreed to plead guilty to avoid the death penalty. *Id.* at 4380.

Mr. Skye did not recall any plea discussions taking place from the time the first trial in March ended in a mistrial to the trial in June 2004. PC-R. Vol. XXXVI. 4292. In spite of the rather lengthy history of discussions with the State and Mr. Taylor regarding a plea in avoidance, according to Mr. Skye, "there was really never anything that you could dignify as a plea bargaining or plea negotiation process" in this case. *Id.* at 4319.

Unless the representations made by Mr. Harmon and Ms. Bondi were false, the State cannot in good faith argue that a life in avoidance plea was not under serious consideration. The fact that Mr. Ober, the elected State Attorney, planned to meet with members of the victim's family demonstrates that there would have been some point to meeting with them in the first place. This was not a tentative initial approach, as the homicide committee had already met to discuss a potential plea offer and, according to Mr. Harmon, the only thing left to do was meet with the victim's family. Rather, it was a formal meeting to finalize the outcome. The emails from Mr. Gonzalez to Ms. Bondi show that the victim's family was experiencing a great deal of anxiety about the upcoming trial, and there is a

reasonable probability that they would have agreed to a plea offer in order to avoid the stress of trial. An argument that the family members may have been opposed to such an offer could only be based on speculation. Additionally, as Ms. Bondi indicated to Mr. Skye in early 2003, the State Attorney's Office is not bound by the feelings or decision of the victim's family regarding a plea. *Id.* at 169-70.

Furthermore, there is a reasonable probability that if the State offered Mr. Taylor a plea to life in avoidance, Mr. Taylor would have accepted such an offer. Mr. Taylor attempted more than once to enter an open plea, without the benefit of a plea offer. On numerous other occasions during the pendency of the case, he expressed, both in letters and in person, a desire to plead guilty, either with the death penalty in-tact or in exchange for a life sentence. PC-R. Vol. XXXVI, 4388; *Id.* at 4296; *Id.* at 4261; *Id.* at 4296; *Id.* at 4320. He agreed with his attorneys that it would be in his best interest to plea to life in avoidance. *Id.* at 4325; *Id.* at 4365.

The fact that Mr. Taylor expressed a desire on numerous occasions to plead guilty, and later expressed a desire to go to trial instead of pleading guilty for a life sentence when the facts of the case had not become any more favorable for the defense should have indicated to trial counsel that Mr. Taylor was not thinking clearly. Trial counsel's assessment of the situation and subsequent acts may have been appropriate in a situation where a clearly competent client wrestles with a

tough decision over a long period of time and finally, when matters have come to a head, makes a decision. That, however, was not the situation in this case. Mr. Taylor had come to positions of absolute certainty only to change his mind without reason on several occasions. The lengthy history of Mr. Taylor's flip-flopping behavior should have told counsel on March 7, 2004 that Mr. Taylor might well flip-flop again, especially if a deal were on the table.

Trial counsel should have continued to seek a negotiated plea. In that vein, they were ineffective in viewing Mr. Taylor's statement on March 7, 2004 that he did not wish to accept a plea to life as his final decision. Mr. Skye wrote in the March 7, 2004 memoranda that and Ms. Goins did not make "any further attempts to 'convince' the defendant or put 'any pressure' on him whatsoever concerning his decision" to proceed to trial. PC-R. Vol. XXI, 3945. The commentary to the ABA Guidelines for the Appointment and Performance of Defense Counsel addresses the issue of persuasion in plea negotiations:

> In addition to persuading the prosecution to negotiate a resolution to the case, counsel must often persuade the client as well . . . A relationship of trust with the client is essential to accomplishing this. The entire defense team must work from the outset of the case with the client and others close to him to lay the groundwork for acceptance of a reasonable resolution.
>
> If the possibility of a negotiated disposition is rejected by either the prosecution or the client when the settlement appears to counsel to be in the client's best interest, counsel should continue efforts at

> persuasion while also continuing to litigate the case vigorously.

Guidelines at Guideline 10.9.1 Commentary.

Given that trial counsel agrees that a plea to life would have been in Mr. Taylor's best interest, they were obligated to do whatever they could to persuade their client to accept an agreed upon disposition. Instead of attempting to persuade Mr. Taylor to accept a potential offer that would have spared his life, however, trial counsel pressured him to make a decision on the spot so they could put all of their "efforts and energies into getting ready for a trial." PC-R. Vol. XXI, 3945. Furthermore, trial counsel could have enlisted the help of a mental health professional to assist in plea negotiations and to help trial counsel understand what may have been causing Mr. Taylor to change his mind in irrational and unpredictable ways. Additionally, if the relationship of trust between attorney and client had eroded to the point that it was interfering in plea negotiations, trial counsel could have considered a motion to withdraw or they could have informally obtained the assistance of another attorney to help with plea negotiations. There was no reason for Mr. Taylor to make a final decision on March 7, 2004, and there was no reason why trial counsel could not have actively pursued a negotiated disposition while at the same time continuing to prepare for trial, as they were required to do under the Guidelines. Although Mr. Skye essentially gave up on trying to resolve the case with a plea on March 7, 2004, others apparently felt that it was still a possibility. Mr. Harmon,

for example, indicated at the pretrial conference on March 9, 2004 that the State could continue to work with the victim's family if Mr. Taylor was interested in an offer, and Judge Fleischer offered to set a status date for the Friday before trial so that Mr. Taylor could have additional time to think about the offer.

Counsel is charged with acting in the best interest of his client. Mr. Skye and Ms. Goins agreed that it was in Mr. Taylor's best interest to accept a plea to life in avoidance. In the case at hand, trial counsel should have done everything in their power to negotiate such a plea. Even if the State would not have spoken with the victim's family about a plea to life in avoidance without assurances that Mr. Taylor would accept such an offer, Mr. Skye should not have accepted Mr. Taylor's decision on March 7, 2004 to proceed to trial as his final decision, and he should have continued to seek a negotiated plea up until the beginning of trial. Instead, Mr. Skye terminated plea negotiations when he called Ms. Bondi on March 7, 2004 to inform her that Mr. Taylor did not wish to accept a plea. He felt that, at this point, it was time to get ready for trial, and the plea bargaining process needed to come to an end. PC-R. Vol. XXVI, 4374. Trial counsel did not attempt to persuade Mr. Taylor to do what was clearly in his best interest, and what Mr. Taylor had previously indicated he wished to do, despite offers from the State and the judge for more time. As the only thing left for the State to do regarding to plea

offer was meet with the victim's family, it is clear that the homicide committee and Mr. Ober were amenable to such an offer. The prejudice is clear, as there is a reasonable probability that, had Mr. Skye continued to seek a negotiated plea the State would have made such an offer and Mr. Taylor would have accepted a plea for life in avoidance.

ARGUMENT IV

THE CIRCUIT COURT ERRED WHEN IT DENIED MR. TAYLOR'S CLAIM THAT COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO EMPLOY THE AID OF A MENTAL HEALTH EXPERT IN PLEA DISCUSSIONS WITH THE DEFENDANT.

Mr. Taylor argued in Claim IV of the motion for postconviction relief that trial counsel provided ineffective assistance by failing to employ the aid of a mental health expert in plea negotiation discussions with the defendant. PC-R. Vol. III, 459-61. The circuit court conducted an evidentiary hearing on this claim. In denying this claim, the circuit court found "that the plea discussions were never firm enough to merit the involvement of a third-party expert" and that trial counsel's performance in this regard was not deficient. PC-R. Vol. VI, 912. Mr. Taylor seeks review of these findings.

Dr. Merikangas offered testimony about Mr. Taylor's mental condition and its effect on his relationship with his attorneys, as well as his behavior leading up to and during trial. He agrees with the diagnosis of borderline personality disorder

that was made by Dr. Krop and Dr. Taylor. PC-R. Vol. XXVIII, 4527-28. Borderline personality disorder affects between one and three percent of the population. *Id.* at 4528. It is not clear how people develop borderline personality disorder, but a person does not choose to have this disorder. *Id.* at 4528-29. It is a lifelong condition, which has its origins in childhood. *Id.* at 4529. Mr. Taylor suffered from borderline personality disorder prior to 2001. *Id.* at 4529-30.

Dr. Merikangas testified about the features of borderline personality disorder. Individuals with borderline personality disorder are affected by their disorder every day of their life and in every area of their life. PC-R. Vol. XXVIII, 4531. The most striking feature is the labile effect, which is the switching between moods and the difficulty that this causes with interpersonal relationships. *Id.* at 4530. A person with borderline personality disorder will have a very strong like and then suddenly a very strong dislike toward another individual. *Id.* at 4530. They are sensitive to the idea that another individual might leave them, "and they frequently test people by acting out in ways to see whether they can cause that person to leave as a test of the person's loyalty." *Id.* at 4533. They are impulsive, and they tend to make snap decisions or act on whims. *Id.* at 4531. They can also have miniature psychotic episodes, paranoia, poor judgment, and difficulty in situations that require forethought and judgment. *Id.* at 4530. They have difficulty

controlling their anger. *Id.* at 4532. They cause disputes among people who know them. *Id.* at 4532. When they are threatened, people with borderline personality disorder react in a variety of ways, sometimes striking out, sometimes acting passive aggressive, and sometimes trying to manipulate the situation. *Id.* at 4533. "[T]heir lives are generally a series of maladapted episodes and creating misery for themselves and the people around." *Id.* at 4531.

Individuals with borderline personality disorder are also prone to self-damaging behavior. PC-R. Vol. XXVIII, 4530. Cutting oneself is characteristic of borderline personality disorder. *Id.* at 4530. In Mr. Taylor's case, when Dr. Merikangas met with him in November 2007 he noticed a number of scars on his arm that were self-inflicted. *Id.* at 4530.

Dr. Merikangas testified about a number of Mr. Taylor's behaviors leading up to and during trial that are characteristic of individuals with borderline personality disorder, many of which may also have been an effect of the medications he was taking. For example, in July 2001 Mr. Taylor attempted suicide by overdosing on Dilantin. PC-R. Vol. XXVIII, 4555-56. He exhibited additional suicidal behavior when he tried to plead guilty with the death penalty in-tact, and when he insisted on wearing his jail uniform during trial. *Id.* at 4564; *Id.* at 4596. He went from liking his attorneys to not liking his attorneys without any

rational basis. *Id.* at 4576. He wrote angry letters to his attorneys, and when they went to see him he was non confrontational. *Id.* at 4594. He changed his mind back and forth between wanting to plead guilty and wanting to take his case to trial, which is indicative of the labile effect, his shifting moods, irritability, and the unstable nature of his emotional life. *Id.* at 4595.

Dr. Merikangas has experience working with patients who suffer from borderline personality disorder. PC-R. Vol. XXVIII, 4538. It is very difficult for mental health professionals to work with patients who are suffering from borderline personality disorder, and as a result, Dr. Merikangas tries not to have more than one at a time:

> [T]hey're very demanding. They're very threatening. They're frequently suicidal. They're sometimes assaultive. They have difficulty abusing drugs and they have difficulty taking the prescribed drugs in the prescribed manner. They're generally a lot of trouble.

Id. at 4539.

Some individuals with borderline personality disorder are able to function in society through intensive therapy and the proper medications. *Id.* at 4539. Even then, however, they still exhibit symptoms of their disorder. *Id.* at 4539. Without the correct medications, these individuals will continue to be "volatile, impulsive, periodically depressed, suicidal and sometimes psychotic." *Id.* at 4547.

Likewise, it is challenging for lay people to deal with individuals who have

borderline personality disorder:

> [O]ne of the challenges is generally it's hard to like them and it's hard to gain their confidence and it's hard to maintain a stable relationship with someone whose internal controls and internal state is constantly changing so it takes a great deal of patience and takes a great deal of understanding and realization that these people are sick and have a disease and that what they are doing is not necessarily product of [free will] but is a result of a brain condition.

Id. at 4540.

The more difficult or important a relationship is, the more difficult it is to have a relationship with an individual with borderline personality disorder. *Id.* at 4540.

Dr. Merikangas would advise an attorney who is representing a client with borderline personality disorder to have a mental health professional assist with that relationship. PC-R. Vol. XXVIII, 4542. In fact, Dr. Merikangas has been hired before to assist in this manner. *Id.* at 4543. Individuals with borderline personality disorder are guaranteed to have difficult relationships with their attorneys. *Id.* at 4540. It would be normal for an attorney to have mixed feelings about a client who has borderline personality disorder, and as a result the attorney might try to have less contact with his client. *Id.* at 4541. An attorney's response to the behavior of a client with borderline personality disorder is very important to the attorney-client relationship. *Id.* at 4541. The attorney needs to insure that the client is receiving appropriate psychiatric treatment, which could include psychotherapy and medication. *Id.* at 4541. It is important for the attorney to realize that the

statements his client makes may not be definitive and are subject to change. *Id.* at 4541-42. An attorney should never challenge a client with borderline personality disorder because the client's response would be angry, aggravated, and manipulative. *Id.* at 4542-43. Dr. Merikangas testified about how he would advise an attorney to react to a client who has borderline personality disorder who is angry or enraged:

> I'd advise him to wait until that anger and rage passes because it frequently does. [T]hen they will on the next visit perhaps really love the relationship and express that they're the greatest attorney in the world. And the next time they see them, they'll be the worst attorney in the world and to realize that their relationship is very unstable because the patient's brain is unstable.

Id. at 4542.

The ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases contemplate and encourage third-party assistance in attorney-client discussions regarding the disposition of the case with a plea. As suggested in the commentary to Guideline 10.5, "members of the client's family, friends, or clergy might also be enlisted to talk to the client about the reasons for living; inmates who have accepted pleas or been on death row and later received a life sentence (or now wish they had) may also be a valuable source of information about the possibility of making a constructive life in prison." Guidelines at Guideline 10.5 Commentary.

Dr. Sesta testified that he could have helped facilitate the relationship between Mr. Taylor and his trial attorneys. PC-R. Vol. XXXV, 4167. Any communications that Dr. Sesta had with Mr. Taylor and trial counsel were confidential. *Id.* at 4167. In the past, Dr. Sesta has assisted counsel in dealing with difficult and mentally ill clients. *Id.* at 4167. Dr. Sesta explained how he is sometimes able to assist in this manner:

> There is often times difficulties in criminal defendants interacting with their lawyers. They may not feel that they are visited enough or the lawyers pay enough attention, and we often act as go-betweens or liaisons between the attorneys and criminal defendants, or also helping the attorneys to understand how their mental illness is impacting upon the quality of the communication between the attorney and the client, and helping them, again, interact with them in a meaningful way.

Id. at 4168.

Furthermore, mental health experts can evaluate whether the defendant understands what is going on during plea negotiations. *Id.* at 4168.

Trial counsel acknowledged the importance and difficulty in speaking to a defendant about accepting a life in avoidance plea. Ms. Goins did not know if Mr. Taylor would accept a plea to life in avoidance. PC-R. Vol. XXXVII, 4451. In her experience handling death penalty cases since 1989, she has learned that it is not easy to speak with someone about the possibility of agreeing to life in prison. *Id.* at 4451. She was concerned about whether Mr. Taylor would feel that accepting

such an offer was in his best interest, or whether he would make the best decision if given the chance to do so. *Id.* at 4451. If the State had offered a plea to life in avoidance, Mr. Skye claims that he would have done everything he could to convince Mr. Taylor to accept the offer. PC-R. Vol. XXXVI, 4386. Under the circumstances, Mr. Skye felt that such an offer would not be unreasonable. *Id.* at 4321.

Trial counsel did not use a third party to assist in plea discussions with Mr. Taylor. PC-R. Vol. XXXVI, 4348. Since the State did not make an offer, Mr. Skye did not feel it was warranted, and he was concerned that putting pressure on Mr. Taylor regarding a plea may have been counterproductive with regard to the relationship between Mr. Taylor and his attorneys. *Id.* at 4349. Mr. Skye agreed, however, that Mr. Taylor is manipulative. *Id.* at 4341. He described Mr. Taylor as "ornery" and "cantankerous." PC-R. Vol. XXXVII, 4431. Mr. Taylor also does not like it when people tell him what to do, especially people in authority. PC-R. Vol. XXXVI, 4342. Mr. Taylor viewed Mr. Skye as a person in authority. *Id.* at 4342. When Mr. Taylor informed his attorneys on March 7, 2004 that he did not wish to plead guilty, in Mr. Skye's opinion he was resisting his attorneys telling him what he should do. *Id.* at 4342.

Ms. Goins also did not feel that third party assistance in the plea process was

necessary in this case. PC-R. Vol. XXXVII, 4455. However, prior to March 2004 Dr. Krop informed Mr. Skye and Ms. Goins that Mr. Taylor mentioned to him that he was interested in entering a life in avoidance plea. *Id.* at 4456. In her experience dealing with Dr. Krop, he often asks the attorneys if a plea to life in avoidance is a possibility, and she assumes that Dr. Krop was speaking with Mr. Taylor about that prospect. *Id.* at 4457.

Given Mr. Taylor's history of mental illness, especially his borderline personality disorder, it would have been appropriate to employ the services of a mental health expert in plea discussions Mr. Taylor. In not doing so, trial counsel's performance was deficient. A mental health expert could have helped trial counsel understand why Mr. Taylor was reacting as he was and the effect of the medications he was taking. The expert also could have assisted trial counsel in speaking with Mr. Taylor about plea negotiations. Additionally, a mental health expert could have determined whether Mr. Taylor was even competent to enter a plea or stand trial at that time. Such conversations would be triply confidential. First, "[e]vidence of statements made in connection with . . . pleas or offers is inadmissible" under Florida Statute 90.140. Additionally, such conversations would be confidential under the lawyer-client privilege, as codified in Florida Statute 90.502, and the psychotherapist-patient privilege in Florida Statute 90.503.

As Mr. Taylor demonstrated in Argument III, *supra*, had a mental health expert been employed to assist in plea discussions with Mr. Taylor and had Mr. Taylor agreed to a plea in avoidance, there is a reasonable probability that the State would have made such an offer and he would not have been sentenced to death. By accepting Mr. Taylor's decision on March 7, 2004 to proceed to trial as his final decision and not enlisting the help of a mental health expert, trial counsel provided prejudicial ineffective assistance.

ARGUMENT V

THE CIRCUIT COURT ERRED WHEN IT DENIED MR. TAYLOR'S CLAIM THAT COUNSEL PROVIDED PREJUDICIAL INEFFECTIVE ASSISTANCE BY FAILING TO INVESTIGATE AND PRESENT EVIDENCE REGARDING THE LINK BETWEEN HIS LOW LEVELS OF SEROTONIN AND HIS VIOLENT BEHAVIOR.

Mr. Taylor argued in Claim V of the motion for postconviction relief that trial counsel provided prejudicial ineffective assistance by failing to investigate and present evidence regarding the link between his low levels of serotonin and his violent behavior. PC-R. Vol. III, 461-66. The circuit court conducted an evidentiary hearing on this claim. The circuit court found that "given the strength of the aggravators compared to the mitigators, low serotonin levels presented in mitigation would not have changed the outcome of the trial." PC-R. Vol. VI, 915. The circuit court further found that "counsel's strategic decision in not making this argument was not deficient performance." PC-R. Vol. VI, 915. Mr. Taylor seeks

review of these findings.

Aside from Mr. Taylor's brain impairment, seizure disorder, and borderline personality disorder, he also suffers from a number of co-occurring disorders, including alcoholism. PC-R. Vol. XXXVIII, 4533. As Dr. Merikangas explained, substance abuse is common among people with borderline personality disorder:

> People with borderline personality frequently abuse drugs or alcohol or both because their internal behavior and feelings are so unpleasant to them they seek relief through medications, both prescribed and drugs like alcohol, marijuana, cocaine, and heroin. Every drug known to man has been abused by borderlines.

Id. at 4534.

Substance abuse exacerbates the symptoms of borderline personality disorder. *Id.* at 4534. He would expect an increase in impulsive behavior in a person with borderline personality disorder who is abusing alcohol or drugs. *Id.* at 4534-35. "[T]heir internal controls are reduced by drugs and they're more likely to have violent outbursts." *Id.* at 4548.

Dr. Merikangas discussed several other co-occurring disorders. Mr. Taylor has attention deficit disorder and suffered from educational cognitive deficits prior to age fourteen. PC-R. Vol. XXXVIII, 4536. Although Dr. Merikangas agreed that Mr. Taylor "meets the cookbook menu of symptoms" of antisocial personality disorder, in his opinion it is secondary to his diseased brain. *Id.* at 4536. He agrees with the diagnosis in September 2002 of major depression. *Id.* at 4536. Mr.

Taylor's many disorders "add up to cause him more difficulty with his thinking, with his mood and with his behavior." *Id.* at 4537.

Dr. Merikangas described how serotonin affects functioning in the brain. There are approximately eighty neurotransmitters in the brain, one of which is serotonin. PC-R. Vol. XXXVIII, 4545. When the neurotransmitters get out of balance, things go wrong. *Id.* at 4545. The most common effect of low serotonin levels is depression. *Id.* at 4545. It has been shown that arsonists and people who are violent and impulsive have low levels of serotonin. *Id.* at 4545. Individuals with borderline personality disorder and alcoholics also have low levels of serotonin. *Id.* at 4545-46. High levels of serotonin, on the other hand, can cause fever, agitation, delirium, and even death. *Id.* at 4545-46.

Some of the medications that are commonly prescribed for the treatment of borderline personality disorder are antidepressants. PC-R. Vol. XXXVIII, 4543. Most antidepressants raise serotonin levels. *Id.* at 4543-44. Selective serotonin reuptake inhibitors (SSRIs) are a class of antidepressants that act by inhibiting the reuptake of neurotransmitters. *Id.* at 4544. By blocking the reuptake of serotonin in people with low serotonin levels, "it acts as if there's more of it and their behavior tends to be normalized." *Id.* at 4544. If a person has normal levels of serotonin, he usually would not need to take an SSRI. *Id.* at 4544. It has been

shown that people who have impulsivity and violent behavior generally have low levels of serotonin in their brains. *Id.* at 4543.

Dr. Merikangas testified that it is quite possible that Mr. Taylor has low levels of serotonin. PC-R. Vol. XXXVIII, 4547. Mr. Taylor was treated with SSRIs by doctors employed by the State while he was awaiting trial. *Id.* at 4545. Aside from having borderline personality disorder, Mr. Taylor is also an alcoholic and has suffered from depression. *Id.* at 4536; *Id.* at 4546. Additionally, he has a history of impulsive aggression. *Id.* at 4546.

Dr. Merikangas considered the statutory mitigating circumstance under Florida Statue 921.141(6)(b), which reads "The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance." PC-R. Vol. XXXVIII, 4596. In Dr. Merikangas' opinion, this statutory mitigating circumstance applies in Mr. Taylor's case. *Id.* at 4597. At the time of the offense, Mr. Taylor "was severely impaired under [extreme] emotional disturbance and suffering from a major mental illness and neurological condition that leads to seizures." *Id.* at 4604. Dr. Merikangas described what he relied on in forming his opinion:

> [F]rom my review of the records and the opinions of the other doctors and the courtroom testimony and the information provided by the Court which described his life and his abuse and his losses and his depression and his epilepsy and his drug and alcohol abuse and the

> situation with his family and his job all of which was going on at the time of these events.

Id. at 4597.

Dr. Merikangas is also aware that the trial court found that Mr. Taylor was under the influence of alcohol on the night of the offense. *Id.* at 4597. Alcohol would have contributed to the loosening of Mr. Taylor's inhibitions and the worsening of his impulse control. *Id.* at 4597. It also would have prevented him from forming intent by causing Mr. Taylor to act "in the reflexatory way drunk people do." *Id.* at 4597.

Dr. Merikangas also considered the statutory mitigating circumstance under Florida Statute 921.141(6)(f), which reads "The capacity of the defendant to appreciate the criminality of her or his conduct or to conform her or his conduct to the requirements of law were substantially impaired." PC-R. Vol. XXXVIII, 4599. Dr. Merikangas testified that, in his opinion, this statutory mitigating circumstance applies to Mr. Taylor. *Id.* at 4599. Dr. Merikangas explained that one of the bases for Mr. Taylor's mental illness is his serotonin disorder:

> [H]e intrinsically, because of his borderline personality disorder, has impulse controls and irritability. And because of the drug and alcohol abuse, that is worsened. And people who are alcoholic are likely to have low serotonin levels. And people with borderline and impulsivity and irritable, likewise have low serotonin levels. And the drugs he was given by the State of Florida, the serotonin reuptake inhibitors are there to raise his serotonin. So there's an admission by the doctors treating him that he has a problem with serotonin.

Id. at 4600.

At Mr. Taylor's penalty phase trial, Dr. Taylor discussed two reasons why he did not believe that Mr. Taylor's ability to conform his conduct to the requirements of the law was impaired. R. Vol. XXIX, 3032-33. First, Mr. Taylor committed the crime at a time when no other witnesses were around. *Id*. Dr. Merikangas testified that whether there were people around or not has little to do with what occurred. PC-R. Vol. XXXVIII, 4601. Second, Dr. Taylor pointed out that after the fact, Mr. Taylor left the scene and he subsequently left the state. R. Vol. XXIX, 3032-33. Dr. Merikangas did not agree with Dr. Taylor in this regard:

> [W]hat happened subsequent to [this] impulsive, thoughtless, irrational act has no relation to what one was thinking or not thinking prior to that happening. Many people who have had impulsive acts or people who, for instance, run over somebody with their car without intending to do it then flee the scene out of fright or stupidity so it has no probative value whatsoever about what the man's mental state was at the time that these actions [took place].

PC-R. Vol. XXXVIII, 4602.

Dr. Merikangas explained why he relied of the findings of fact in the direct appeal opinion from the Florida Supreme Court in Mr. Taylor's case. PC-R. Vol. XVIII, 4509-10. In general, Dr. Merikangas is highly suspicious of the reliability of statements made by defendants regarding the facts of an offense. *Id.* at 4510. According to Dr. Merikangas, Mr. Taylor's mental condition affects his ability to accurately recall events. *Id.* at 4510. He is aware that Mr. Taylor provided several

versions of the facts of the offense in this case. *Id.* at 4510. This indicates that Mr. Taylor has a problem with his memory or his ability to recollect and tell the truth, and reinforces Dr. Merikangas' opinion that there is something wrong with Mr. Taylor's brain and his thinking. *Id.* at 4510-11.

On cross examination, Mr. Harmon presented Dr. Merikangas with additional facts regarding the offense. PC-R. Vol. XXXVIII, 4609-4615. Dr. Merikangas testified that, given these additional facts, he still feels that the offense was an irrational and disturbed act on the part of Mr. Taylor:

> [This] dramatic hypothetical certainly shows irrational behavior because if he simply wanted to rob these people it would be a lot easier than the way it occurred. And all this narrative that you've given indicates the actions of a very disturbed individual.
>
> . . .
>
> I believe that to overpower a 98-pound woman with blood alcohol of 1.7 did not require hitting her at all. And whether Mr. Maddox was unprovoked in his attack or not is totally unknowable. I don't think any of this is rational behavior. And if you want to rob someone, why not rob some strangers[?] If you have a shotgun, it's not necessary that you do this elaborate scenario which makes very little sense to me.

Id. at 4615-16.

Trial counsel provided deficient performance under the first prong of *Strickland* by failing to investigate and present evidence regarding the link between low levels of serotonin in Mr. Taylor and his violent behavior. *Strickland*, 466

U.S. at 687. Trial counsel is required to make reasonable investigations into potential mitigating evidence or reasonable decisions that make particular investigations unnecessary. *Wiggins v. Smith*, 539 U.S. at 521. Failure to investigate or present mitigation evidence can be a basis for an ineffective assistance of counsel claim. *Id.* In the case at hand, there is no indication that counsel conducted any investigation regarding the link between low levels of serotonin in Mr. Taylor and his violent behavior, in spite of the fact that such evidence was being presented in other cases. *State v. Odom*, 137 S.W. 3d 572 (Tenn. 2004); *State v. Sanders*, 2000 WL 1006574 (Ohio App. 2 Dist. 2000); *Hines v. State*, 2004 WL 1567120 (Tenn. Crim. App. 2004).

The prejudice prong of *Strickland* is also met. The trial court found that the statutory mitigating circumstance that "[t]he capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance" had not been proven. R. Vol. XXX, 3208-14. Likewise, the trial court did not find the statutory mitigating circumstance that "[t]he capacity of the defendant to appreciate the criminality of her or his conduct or to conform her or his conduct to the requirements of law was substantially impaired." *Id.* at 3214-16. There is a reasonable probability that if the jury heard evidence that low levels of serotonin in Mr. Taylor's brain impaired his ability to control his impulses, they would have

recommended a life sentence for Mr. Taylor, which the trial court would have followed. Additionally, there is a reasonable probability that if this evidence was presented the trial court would have found that the defense had proven one or both of the statutory mitigating circumstances and sentenced Mr. Taylor to life. This undermines the confidence in the final outcome of the case and satisfies the second prong of *Strickland. Strickland*, 466 U.S. at 687.

ARGUMENT VI

THE CIRCUIT COURT ERRED WHEN IT DENIED MR. TAYLOR'S CLAIM THAT COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO ADVISE THE COURT ABOUT HIS RECENT HISTORY OF SEIZURES AND MEDICATIONS.

Mr. Taylor argued in Claim VI of his postconviction motion that trial counsel provided ineffective assistance by failing to advise the court about his history of seizures and medications. PC-R. Vol. III, 466-67. The circuit court conducted an evidentiary hearing on this claim. The circuit court denied relief and found that neither the deficient performance prong nor the prejudice prong of the *Strickland* test had been met. PC-R. Vol. VI, 919. Mr. Taylor seeks review of these findings.

Much of the expert testimony that was presented during the penalty phase of Mr. Taylor's trial concerned his history of epilepsy. The trial court found that Mr. Taylor had not reported or received treatment for any seizures since 1991. R. Vol.

VIII, 1318. Trial counsel did not present sufficient evidence to the trial court to contradict these findings, nor did trial counsel adequately educate the trial court about Mr. Taylor's seizure disorder.

Ms. Goins gathered what medical records she could find on Mr. Taylor. PC-R. Vol. XXXVII, 4472. There is no question that Mr. Taylor had been diagnosed with epilepsy and a seizure disorder for essentially the entire time he was institutionalized since the mid-1980s. *Id.* at 4472-73. Dr. Greer stopped Mr. Taylor's treatment at one point, but it resumed when Ms. Goins was representing him. *Id.* at 4473. Ms. Goins was not able to find primary medical records regarding Mr. Taylor's fall from a roof, probably because they were destroyed after a certain amount of time. *Id.* at 4473.

Dr. Merikangas testified about Mr. Taylor's history of seizures. A seizure is "an abnormal electrical discharge in the brain." PC-R. Vol. XXXVIII, 4516. Seizures are frequently caused by brain damage. *Id.* at 4519. Seizures themselves can also cause brain damage. *Id.* at 4519-20. As Dr. Merikangas explained, there are a number of different types of seizures:

> [A] grand mal seizure is total body convulsion where patient falls to the ground, shakes all over, may bite his tongue, foam at the mouth and lose consciousness. There are also petit mal seizures, which are simply staring spells or spells of losing consciousness and blinking without the convulsion. There are also psychomotor seizures which primarily changes in the thinking and cognition, sometimes

> accompanied by that hallucinations or strange behaviors. And there are myoclonic seizures, which are simply body jerking.

Id. at 4517.

Dr. Merikangas and Dr. Taylor agreed that one cannot always tell by looking at a person who is having a seizure that he is having a seizure. *Id.* at 4518; *Id.* at 4671. Sometimes the individual who is having a seizure is not even aware that he is having a seizure. *Id.* at 4519. Seizures can also occur during sleep. *Id.* at 4519. People with documented seizure disorders can go for long periods of time without experiencing seizures. *Id.* at 4520. Therefore, even where there is a lack of documentation of seizure activity, it does not mean that Mr. Taylor does not have a seizure disorder, or that he was not experiencing seizures.

Epilepsy is accompanied by changes in mental state and personality. PC-R. Vol. XXXVIII, 4526-27. People with epilepsy frequently develop a psychosis, which is a paranoid way of thinking, after about fourteen years. *Id.* at 4526. They are also reported to have peculiar personality disorders, such as hyper-religiosity, the tendency to read a lot, and hypergraphia, which is a tendency to write a lot of irrational things. *Id.* at 4526. In Mr. Taylor's case, he wrote a lot of letters, which are variable in tone and range from polite to abusive within short periods of time. *Id.* at 4527.

Seizures are diagnosed from history and observations. PC-R. Vol.

XXXVIII, 4518. Mr. Taylor has been diagnosed with and treated for seizures and seizures have been witnessed by medical personnel. *Id.* at 4526. There is a note in Mr. Taylor's jail records from a nurse who describes seizures. *Id.* at 4518. There is also a notation in Mr. Taylor's jail records that he banged his head on the wall, right side swelling was noted, and felt dizzy in his cell. *Id.* at 4557. It is possible that this was the result of a seizure. *Id.* at 4557. Another notation from April 2003 reports that Mr. Taylor was "shaking bad," which may have been the result of a seizure. *Id.* at 4569. It is the opinion of Dr. Merikangas that Mr. Taylor suffers from a seizure disorder. *Id.* at 4518.

The trial court stated in its sentencing order that an EEG of Mr. Taylor in 1991 indicated no abnormality. R. Vol. III, 1318. Dr. Greer, a neurologist who specializes in seizure disorders, did a consult with Mr. Taylor in 1991, in which an EEG did not show any abnormalities in Mr. Taylor's brain. PC-R. Vol. XXXVIII, 4520. An EEG, or electroencephalogram, is a brain wave recording. *Id.* at 4520. However, Dr. Merikangas and Dr. Sesta both testified that an EEG is only probative if the patient is having a seizure while the EEG is being conducted. PC-R. Vol. XXXVIII, 4520-21; PC-R. Vol. XXXV, 4249. Patients with documented histories of epilepsy have normal EEGs sixty percent of the time. PC-R. Vol. XXXVIII, 4520-21. Therefore, the fact that Mr. Taylor had a normal EEG in 1991

is of little significance and does not prove anything. *Id.* at 4523.

Furthermore, the trial court's finding that Mr. Taylor had not received treatment for seizures since Dr. Greer discontinued Dilantin in 1991 was directly contradicted by the evidence presented at trial, as well as additional evidence presented at the evidentiary hearing. Dr. Krop testified at trial that when he saw Mr. Taylor in January 2004, he was on two anticonvulsant medications, Depakote and Tegretol. R. Vol. XXVII, 2823. When the trial court inquired of Mr. Taylor on June 8, 2004 about the medications he was taking, Mr. Taylor stated that he was taking Tegretol for his seizures. R. Vol. XXIII, 2217. Furthermore, Ms. Goins was aware that Mr. Taylor was being treated for his seizure disorder while she was representing him. PC-R. Vol. XXXVII, 4473. Nevertheless, trial counsel failed to correct the trial court's misstatement.

In an Order dated June 8, 2001, United States Magistrate Judge Mary S. Scriven ordered that Mr. Taylor receive Dilantin, as "the generic equivalent is inadequate to prevent seizures associated with the Defendant's epilepsy." PC-R Vol. XVIII, 3353. She further ordered that "[t]he Defendant shall receive immediate medical attention and shall have his condition monitored daily or as otherwise ordered by a physician." *Id.* Dr. Merikangas testified that the fact that the Order specified that Mr. Taylor be given Dilantin and not some other

anticonvulsant medication is significant because brand name Dilantin is more reliable in its composition and dosage than generic anticonvulsant medications, which may be ineffective. PC-R. Vol. XXXVIII, 4524. Mr. Taylor received Dilantin for some time while he was awaiting trial at the jail. *Id.* at 4524. In February 2003, Dilantin was replaced by the anticonvulsant medication Depakote, in violation of the Order. *Id.* at 4567. At other times, Mr. Taylor was taking two anticonvulsant medications, Depakote and Tegretol. *Id.* at 4525. Mr. Skye testified at the evidentiary hearing that he recognized this Order as part of trial counsel's file. PC-R. Vol. XXXVI, 4291. Ms. Goins testified that she did not recall having seen the Order prior to the postconviction deposition. PC-R. Vol. XXXVII, 4462. She stated that if she had known about the Order at the time of trial, she would have introduced it into evidence, presented it to the judge, or had one of her experts testify about the Order. *Id.* at 4463. However, at no time was the trial court made aware of the Order.

The trial court also found in its sentencing order that there was a "paucity of credible evidence" to support the finding that Mr. Taylor has brain damage. R. Vol. VIII, 1323. Dr. Merikangas testified that seizures are frequently caused by brain damage, and they can also be the cause of brain damage. PC-R. Vol. XXXVIII, 4519-20. Evidence that Mr. Taylor experienced recent seizures and that

that he was receiving ongoing treatment for his seizures would have provided additional evidence regarding Mr. Taylor's brain damage.

Trial counsel's performance in failing to present readily available information to the trial court concerning Mr. Taylor's recent history of seizures and anticonvulsant medications was deficient under the first prong of *Strickland*. *Strickland*, 466 U.S. at 687. During the penalty phase, the defense focused on Mr. Taylor's seizure disorder and brain damage. Trial counsel's failure to present this additional evidence that would have added substantial credibility to trial counsel's arguments during penalty phase "fell below an objective standard of reasonableness." *Id.* at 688. Trial counsel offered no strategic explanation for their failure to present this evidence, or their failure to correct the misstatements in the sentencing order regarding Mr. Taylor's treatment.

Trial counsel's deficient performance in this area prejudiced Mr. Taylor. It left the trial court with the mistaken impression that Mr. Taylor was no longer experiencing the effects of or being treated for a seizure disorder. Furthermore, Mr. Taylor's history of seizures could have served as additional credible evidence to support trial counsel's argument that Mr. Taylor suffered from brain damage. If the trial court had received a complete picture concerning Mr. Taylor's recent history of seizures and anticonvulsant medications, and if the trial court had been

properly educated about Mr. Taylor's seizure disorder, there is a reasonable probability that Mr. Taylor would have received a life sentence.

ARGUMENT VII

THE CIRCUIT COURT ERRED WHEN IT DENIED MR. TAYLOR'S CLAIM THAT COUNSEL PROVIDED PREJUDICIAL INEFFECTIVE ASSISTANCE WHEN THEY FAILED TO CALL DR. SESTA AS A WITNESS DURING PENALTY PHASE.

Mr. Taylor argued in Claim VIII of his motion for postconviction relief that trial counsel provided prejudicial ineffective assistance when they failed to call Dr. Sesta as a witness during the penalty phase. PC-R. Vol. III, 470-74. The circuit court conducted an evidentiary hearing on this claim. In denying this claim, the circuit court found that, "[w]hen counsel makes reasonable strategic decisions, counsel cannot be deemed to have been ineffective." PC-R. Vol. VI, 922. Mr. Taylor seeks review of this finding.

Ms. Goins assisted Ms. Holt and Ms. Ward by retaining and consulting with Dr. Sesta in February or March 2002, before she and Mr. Skye were assigned to the case. PC-R. Vol. XXXVI, 4298-99; PC-R. Vol. XXXV, 4161. Ms. Goins had worked with Dr. Sesta before this case, but she had not used Dr. Sesta in any death penalty cases. PC-R. Vol. XXXVII, 4464. Mr. Skye does not recall speaking with Dr. Sesta about this case, as Ms. Goins was primarily responsible for dealing with the mental health experts. PC-R. Vol. XXXVI, 4298. Ms. Goins requested that

Dr. Sesta conduct a neuropsychological examination of Mr. Taylor to "assess his functional brain integrity to determine if there were any neurological illnesses, diseases, or injuries that could possibly aid in the Defense in preparing his case." PC-R. Vol. XXXV, 4162. He was not asked to evaluate Mr. Taylor for the statutory mitigating factors contained in Florida Statute 921.141, and Ms. Goins requested that he not speak with Mr. Taylor about the offense. *Id.* at 4162-63. Ms. Goins testified that she made this request because she did not want there to be multiple versions of the facts. PC-R. Vol. XXXVI, 4402. The Public Defender's Office provided him with some newspaper clippings and criminal records regarding Mr. Taylor. PC-R. Vol. XXXV, 4162.

Dr. Sesta performed neuropsychological testing on Mr. Taylor in March 2002, and he found evidence of impairment in functional brain integrity. PC-R. Vol. XXXV, 4163. He believed that he would have been able to help the defense. *Id.* at 4165. Dr. Sesta prepared a report for the Public Defender's Office, which was introduced at the evidentiary hearing as Defense Exhibit Two. *Id.* at 4163. Following his evaluation of Mr. Taylor in 2002, Dr. Sesta recommended that the Public Defender's Office hire Dr. David McCraney as a consulting neurologist on Mr. Taylor's case to substantiate or refute Dr. Sesta's findings. *Id.* at 4164. He recalls speaking with Dr. McCraney in 2002 about his findings. *Id.* at 4164.

CCRC-Middle hired Dr. Sesta in 2007. Vol. XXXV, 4169. Dr. Sesta reviewed a packet of background materials that he received from CCRC, which was introduced as Defense Exhibit Three. *Id.* at 4172. Dr. Sesta prepared a report for CCRC, which was introduced as Defense Exhibit Four. *Id.* at 4173. After completing his written report, Dr. Sesta consulted with Dr. Merikangas. *Id.* at 4173.

Dr. Sesta explained the distinction between brain damage and brain impairment:

> Brain impairment generally refers to a functional condition; essentially, the brain isn't working right because it suffered some structural damage, either from an external force, like blunt force trauma or from a disease, like having a stroke or hemorrhage associated with that. The damage speaks to etiology. Brain impairment speaks more to the functional condition of the brain.

PC-R. Vol. XXXV, 4174.

In terms of an individual's level of functioning, impairment is what matters. *Id.* at 4174.

Brain imaging is not essential for a neuropsychologist to render a diagnosis. PC-R. Vol. XXXV, 4174. In fact, brain damage does not always show up in brain imaging. *Id.* at 4174. In some cases, a person can even be brain dead and have a normal MRI. *Id.* at 4175. A person with a documented history of epilepsy may have a normal EEG if the EEG is not conducted when the person is actually

seizing. *Id.* at 4249. In 1991, Dr. Greer performed an EEG on Mr. Taylor, and he did not find evidence of any injury to his head or skull. *Id.* at 4248. However, the EEG provided only a temporal snapshot of the electropsychological activity in Mr. Taylor's brain at the time the EEG was taken, and it does not provide any information about what was going on in Mr. Taylor's brain before or after the EEG. *Id.* at 4248-49.

At the evidentiary hearing, Dr. Sesta testified in detail about the full day of neuropsychological testing he performed on Mr. Taylor on March 7, 2002. PC-R. Vol. XXXV, 4176. A person must have certain qualifications to read and interpret the raw data from neuropsychological testing. *Id.* at 4275. A psychiatrist such as Dr. Taylor typically would not administer neuropsychological testing, and he would not be qualified to read and interpret the raw data from such testing. *Id.* at 4275. Although he has since disposed of the hundred or so pages of raw data that he would have had at the time of Mr. Taylor's trial, Dr. Sesta kept a copy of his data summary and original report. *Id.* at 4177. Dr. Sesta's data summary report was introduced at the evidentiary hearing as Defense Exhibit Five. *Id.* at 4178.

Mr. Taylor's score of 87 on the GAMA IQ Test falls in the low average range and is consistent with the scores Mr. Taylor received on full scale IQ testing by other doctors. PC-R. Vol. XXXV, 4181. This is significant because he would

not expect Mr. Taylor to have a lot of neuropsychological deficits while having an IQ that fell within the normal range. *Id.* at 4182.

Several of the neurological tests Dr. Sesta administered to Mr. Taylor revealed neurological impairment. PC-R. Vol. XXI, 3941. He showed mild impairment in his verbal memory. PC-R. Vol. XXXV, 4183. There was also mild impairment in the area of attentional control. *Id.* at 4189.

Dr. Sesta administered three tests of processing speed, which measure how fast a person can think. PC-R. Vol. XXXV, 4190-91. "One of the most ubiquitous symptoms of neurological impairment is slowing down of the mental processing speed." *Id.* at 4190. Mr. Taylor was severely, moderately, and borderline impaired on the three tests in this category. *Id.* at 4190. One of the areas where Mr. Taylor consistently shows impairment is in his information processing speed, which is known as bradyphrenia, or having slow thought. *Id.* at 4191.

The Halstead Impairment Index is an aggregate score that looks at seven measures. PC-R. Vol. XXXV, 4180. It is the single most sensitive measure of brain impairment from the Halstead-Reitan Neuropsychological Test Battery. *Id.* at 4184. This index revealed that Mr. Taylor has a severe level of impairment, as he was impaired in all seven of the measures. *Id.* at 4180-81.

Dr. Sesta also conducted several tests of Mr. Taylor's executive functions.

PC-R. Vol. XXI, 3941. Executive functions are the highest levels of cognitive function, including reasoning, judgment, hypothesis testing, and the ability to use feedback to modify one's behavior. PC-R. Vol. XXXV, 4185. Mr. Taylor showed mild impairment in the Halstead Category Test, which is a complex nonverbal reasoning test where the subject has to "figure out what's going on, and then [the doctor gives him] feedback of being right or wrong, and he has to use [the doctor's] feedback to figure out what the theme is for the different aspects of the test." *Id.* at 4185. Mr. Taylor was severely impaired on the Wisconsin Card Sorting Test, which Dr. Sesta described:

> They are simply told they have to sort cards according to different attributes of the card and all we tell them is if they are right or wrong. After they get . . . the series of the cards correct without telling them we change the rules. Then, all of a sudden something they have been doing correctly is now wrong. They have to one, have error recognition and realize something is wrong, and two, a realization, they have to use that to figure out [a] different way to sort the cards.

Id. at 4185.

He was moderately impaired on the Design Fluency Test, which calls for perseveration, or repeating oneself, which is often a problem for people who have brain injuries. *Id.* at 4185-86.

The GO-NOGO test is a clinical test that measures a person's ability to resist urges, such as the urge to imitate the examiner or go on green, and use rules to govern their behavior. PC-R. Vol. XXXV, 4186. Like the Halstead Category Test,

the Design Fluency Test, and the Wisconsin Card Sorting Test, it is also a test of executive functions. *Id.* at 4186. Mr. Taylor's score on the GO-NOGO test was within normal limits. *Id.* at 4186. However, when Dr. McCraney tested Mr. Taylor on August 13, 2002, Mr. Taylor received abnormal results on the GO-NOGO test. *Id.* at 4187. Dr. Sesta explained how he might account for these differences:

> In individuals who are brain injured various clinical neurological tests can vary. Even something like the Babinski Response, when you stroke the bottom of someone's feet, they have done research and results can vary either because it's between the examiners, how they are doing the test, or the neurological state of the patient is changing, or one of the hallmarks of a dysfunctional brain is it doesn't function reliably.

Id. at 4188.

Some of the changes in Mr. Taylor's neurological status that may have caused the different results on the GO-NOGO test could have also been due to medication changes. *Id.* at 4188.

There were no indications that Mr. Taylor was malingering. PC-R. Vol. XXXV, 4194. First, the malingering test was normal. *Id.* at 4192. Furthermore, people who are malingering often overdo it and perform poorly on every test. *Id.* at 4193. However, Mr. Taylor scored well on several of the tests. *Id.* at 4193. For example, Mr. Taylor scored in the high average range on the Aphasia Screening Test, which looks at reasoning, writing, arithmetic, and verbal functions. *Id.* at

4188. These scores are consistent with the fact that Mr. Taylor is an avid letter-writer. *Id.* at 4188-89. Additionally, there was no indication from the testing Dr. Sesta performed that Mr. Taylor's visual-spatial abilities are impaired in any way. *Id.* at 4189. Testing further revealed that all of Mr. Taylor's sensory-motor functions were within normal limits for a man of his age. *Id.* at 4191-92.

In addition to malingering, which Dr. Sesta ruled out, one of the explanations for a person doing very poorly on a neuropsychological test is acute psychosis. PC-R. Vol. XXXV, 4194. Based on Mr. Taylor's performance on the SCL-90, Dr. Sesta concluded that his results on the neuropsychological tests were not caused by mental illness or psychotic disturbance. *Id.* at 4194-95.

Dr. Sesta reached a number of conclusions regarding Mr. Taylor's brain functioning when he examined him in 2002. He concluded that there was strong evidence of mild to moderate impairment in the functional integrity of the brain. PC-R. Vol. XXXV, 4197. He did not feel that Mr. Taylor's neurological condition was getting worse. *Id.* at 4197.

Regarding the cause of Mr. Taylor's brain impairment, Dr. Sesta could not say for certain. PC-R. Vol. XXXV, 4246. There was a frontal locus of impairment in Mr. Taylor's brain function, which was consistent with closed head cerebral trauma, such as a fall from a roof. *Id.* at 4198. It is common for doctors to

destroy medical records after a certain amount of time. *Id.* at 4270-71. Because Mr. Taylor's 20-25 foot fall from a roof occurred around twenty years ago, it is not surprising that no medical records currently exist regarding that injury. *Id.* at 4271. Mr. Taylor also reported that he fell off a bike and sustained a frontal head injury when he was seven years old. *Id.* at 4274. It is possible that this injury could have contributed to Mr. Taylor's early pattern of criminal behavior, before he reported falling from a roof. *Id.* at 4274. Furthermore, having one head injury significantly increases one's chances of having a second head injury with reasoning and judgment problems. *Id.* at 4274.

One area of Mr. Taylor's brain where Dr. Sesta found impairment was the frontal lobe. PC-R. Vol. XXXV, 4199. Executive functions are primarily mediated by the frontal lobe. *Id.* at 4199. Someone with impairment in the frontal lobe would have impairment in reasoning, judgment, organization, hypothesis testing, and the ability to use what they know to control what they do. *Id.* at 4200. A person with frontal lobe impairment would have trouble inhibiting himself from doing what he wants to do and governing his behavior to follow laws or rules that he is familiar with. *Id.* at 4201.

Dr. Taylor testified at trial that "[t]he fact that Mr. Taylor has not gotten beyond the lower levels of using his frontal lobe is connected to his personality

disorder, not a result of frontal lobe damage." R. Vol. XXIX, 3040. Dr. Sesta did not agree with Dr. Taylor's opinion that Mr. Taylor's personality disorder caused his frontal lobe impairments. PC-R. Vol. XXXV, 4201. In fact, Dr. Sesta has examined many individuals with personality disorders, and there is not a pattern of them being impaired on frontal lobe tests. *Id.* at 4201. A person can suffer from both antisocial personality disorder and brain impairment, but it is not possible to pinpoint how much each is affecting an individual's behavior. *Id.* at 4271.

A large part of the mitigation that was presented at trial related to Mr. Taylor's frontal lobe damage, and the fact that it is difficult for people with frontal lobe damage to control their impulses. PC-R. Vol. XXXVII, 4433. Mr. Skye testified that given the facts of this case he does not personally believe it was an impulsive act. *Id.* at 4432-33. However, he argued during guilt phase closing arguments that there is no evidence that Mr. Taylor had a conscious intent to kill the victim. R. Vol. XXIV, 2260. He also argued during the defense motion for judgment of acquittal that the State had not proven a prima facie case of premeditation. R. Vol. XXIII, 2172-81.

Ms. Goins, on the other hand, felt that the issue of premeditation "hooked very well into the issue about impulsivity and the frontal lobe damage" Mr. Taylor suffered from. PC-R. Vol. XXXVII, 4450. She strongly disagreed with some of

the findings in Judge Fleishcher's sentencing order:

> [T]his was a penalty phase that provided the opportunity to explain a person's behavior. And I felt that we had the frontal lobe impairment, the epilepsy issue which effects the temporal lobe, doesn't necessarily effect behavior, although it could, again, just be another indication of some kind of a brain deficit, and we had not only the neurological and neuropsychological findings in that regard that showed that he was subject to impulsive behavior due to his frontal lobe damage but also from a psychosocial standpoint we presented information that showed from a very young age, long before he could have before made volitional decisions about how he was going to be and how his personality was going to develop that supported the findings that he either had this brain damage at a young age or at least he had severe personality disorder issues that were a result of the environment that affected his ability to properly adjust and to live in this world in a more normal fashion. And I think Judge Fleischer's not giving weight to these things I think was – I guess I don't agree with it because I think it was all there.

Id. at 4463-64.

Dr. Sesta testified that Mr. Taylor also suffers from temporal lobe impairment. PC-R. Vol. XXXV, 4199. Many of the key memory structures are in the temporal lobe. *Id.* at 4199. Memory impairment is common in people with temporal lobe impairment. *Id.* at 4202. Based on Mr. Taylor's temporal lobe impairment, Dr. Sesta is not surprised that Mr. Taylor has difficulty remembering what year he fell off a roof. *Id.* at 4203. Additionally, the amygdala, which is a nuclei involved in rage, is located in the temporal lobe. *Id.* at 4202. Individuals with temporal lobe impairments may have intermittent explosive disorder or episodes of rage. *Id.* at 4202.

In March 2008, Dr. Sesta traveled to death row to speak with Mr. Taylor about the offense. PC-R. Vol. XXXV, 4205. He met with Mr. Taylor for approximately two and a half hours. *Id.* at 4206. Dr. Sesta used the Criminal Responsibility Assessment Scale, which is a structured interview about issues that are relevant in cases where the McNaughton standard for insanity is being used. *Id.* at 4206.

Mr. Taylor's life in the weeks leading up to the instant offense was in a downward spiral. PC-R. Vol. XXXV, 4206-07. It started a few weeks before the offense when he left his job at the shipyards in Tampa because of a disagreement with management over dangerous conditions. *Id.* at 4207-08. Mr. Taylor described to Dr. Sesta how he was a different person after he lost his job than he was when he was working. *Id.* at 4208. He went through all of his savings, and he had no money. *Id.* at 4206. He alienated his wife and his friends. *Id.* at 4206. He was drinking heavily and using marijuana on a daily basis. *Id.* at 4208. He was not taking his prescription medications, such as Dilantin. *Id.* at 4208. He violated his parole by leaving the State of Florida, and he was nervous because he knew that the police were looking for him. *Id.* at 4208. He also had a seizure approximately one month before the offense. *Id.* at 4209.

Mr. Taylor spoke with Dr. Sesta about what happened on the night of the

offense:

> [I]t was a Friday night. He ran into Sandy and her brother and they began drinking and smoking marijuana. He said they were all intoxicated.
>
> He indicates that they went out shooting some darts with Sandy. They got into an argument because Mr. Taylor wanted to leave and Sandy didn't, but they ended up going back to Sandy's mom's house.
>
> He got into an argument with Sandy and they drank some more, they smoked some more pot. Sandy hit Mr. Taylor and Mr. Taylor was going to leave. Then, however, Mr. Taylor hits Sandy and he says things escalated and he hit her with a crowbar.
>
> Then, when she woke up, he left the house and he . . . got the shotgun from in the house. He got the shotgun, and at that point he indicates that he shoots Sandy with the shotgun.
>
> He put her body back inside the house. He mentioned not wanting to leave her body exposed to the elements. And then he left and went back to Lisa's house, and he was arrested about five days later in Memphis.

Id. at 4209-10.

Based on Mr. Taylor's account, Dr. Sesta did not feel as though this was something that Mr. Taylor planned. *Id.* at 4210. According to Mr. Taylor, he "snapped." *Id.* at 4211.

Dr. Sesta considered the statutory mitigating circumstance under Florida Statute 921.141(6)(b), which reads "The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance." PC-R. Vol. XXXV, 4211. Dr. Sesta expressed the opinion that this statutory

mitigating circumstance applies in Mr. Taylor's case. *Id.* at 4212. Mr. Taylor was suffering from brain impairment, which involved impulse control, among other issues. *Id.* at 4225. His life was in a downward spiral, and he was depressed, nervous, and in significant psychological distress in the weeks preceding the offense. *Id.* at 4211-12. On top of all of the other stressors that Mr. Taylor was experiencing, he also may have been experiencing anxiety or distress about having a seizure. *Id.* at 4213. Individuals such as Mr. Taylor, who have brain impairment, do worse when they are placed under psychosocial stress. *Id.* at 4212. Furthermore, drugs such as alcohol and marijuana, which are suppressants of the central nervous system, can exacerbate brain impairment. *Id.* at 4212.

Dr. Sesta relied to a degree on Mr. Taylor's account of the offense in forming his opinion regarding the statutory mitigating circumstance under Florida Statutes 921.141(6)(b). PC-R. Vol. XXXV, 4221. He is aware that Mr. Taylor gave several different accounts of the offense. *Id.* at 4222. On cross examination, Dr. Sesta was confronted with additional facts, which Mr. Harmon suggested showed "that the defendant had a strong financial motive and this was a robbery." *Id.* at 4230. Dr. Sesta testified that the additional facts do not "negate what his mental state was at the time of the offense." *Id.* at 4231. A person with brain impairment is not necessarily unable to make plans. *Id.* at 4236. Although the

additional facts that Mr. Harmon provided involved Mr. Taylor's alleged plans to commit a robbery, there is no evidence that Mr. Taylor planned to murder anyone. PC-R. Vol. XXXVI, 4338. Therefore, even if Mr. Taylor planned to commit a robbery, it does not affect Dr. Sesta's opinion that the murder was an impulsive act. PC-R. Vol. XXXV, 4269. Regardless of the different facts, the data shows that Mr. Taylor has brain impairment in the area of the brain that affects his ability to control his behavior. *Id.* at 4231.

Dr. Sesta also considered the statutory mitigating circumstance under Florida Statute 921.141(6)(f), which reads "The capacity of the defendant to appreciate the criminality of her or his conduct or to conform her or his conduct to the requirements of the law were substantially impaired." PC-R. Vol. XXXV, 4213. Dr. Sesta felt that this statutory mitigating circumstance applies in Mr. Taylor's case:

> Mr. Taylor has brain impairment on objective measures of neuropsychological functioning. The nature of that brain impairment is in his executive functions, which includes his ability to reason, to use logic, to use judgment and to use what he knows to control what he does.
>
> That level of impairment, while I don't believe it reaches the level of insanity, I believe it certainly makes him less able or significantly impairs his capacity to conform his behavior to the standard of law to the extent that normal individuals do who don't have brain impairment.

Id. at 4214.

Research has shown that individuals such as Mr. Taylor who suffer from antisocial personality disorder have low lower levels of serotonin. *Id.* at 4256. Additionally, chronic alcohol abuse can lower serotonin levels and lead to impulse control problems. *Id.* at 4214. In Mr. Taylor's case, alcohol abuse "is impacting upon an individual who has brain impairment that involves impulse control or reasoning and judgment." *Id.* at 4214. The severe stress that Mr. Taylor was under leading up to and during the offense also contributed to problems with impulse control. *Id.* at 4214-15.

At Mr. Taylor's penalty phase trial, Dr. Taylor discussed two reasons why he did not believe that Mr. Taylor's ability to conform his conduct to the requirements of the law was impaired. R. Vol. XXIX, 3032-33. First, Mr. Taylor committed the crime at a time when no other witnesses were around. *Id.* Dr. Sesta testified that the fact that there were no witnesses was serendipity and a result of three people who were out late drinking at a bar and returned home when other people were asleep, as opposed to some organization or planning. PC-R. Vol. XXXV, 4216. Second, Dr. Taylor pointed out that after the fact, Mr. Taylor left the scene and he subsequently left the state. R. Vol. XXIX, 2032-33. Dr. Sesta commented on Dr. Taylor's testimony:

> What Dr. Taylor speaks to is, can he recognize it's wrong after the fact?
>
> Well, children can do that; and the fact that Mr. Taylor recognized he did something wrong and ran away after the fact to me doesn't impact upon the statutory mitigator.
>
> The issue was, was his capacity to control his behavior substantially impaired? Yes, it was. After he did something wrong, and we saw that . . . could he recognize it? Sure, he did. Could he run away? Sure, he could. That [to] me doesn't impact upon the statutory mitigator.

PC-R. Vol. XXXV, 4216-17.

Dr. Sesta was not called as a witness at trial, and he was not subpoenaed or kept on standby for trial. PC-R. Vol. XXXVII, 4466; *Id.* at 4468. During the penalty phase, trial counsel attempted to prove the existence of two statutory mitigating circumstances under Florida Statute 921.141(6). In support of the statutory and non-statutory mitigating factors that trial counsel sought to establish, they presented Dr. Krop, a psychologist, and Dr. McCraney, a neurologist. Both doctors, as well as Dr. Taylor, who testified for the State, considered Dr. Sesta's testing. The Court noted in its sentencing order that Dr. McCraney testified that all of the information regarding a head injury was based on Mr. Taylor's self-reporting. R. Vol. VIII, 1318. Dr. Krop testified that Mr. Taylor has brain damage, but he added, "When I use the term brain damage, I'm using it fairly loosely. I'm talking about there is something in the brain that's not working the

way it's supposed to." *Id.* at 1318-19.

The trial court found that the defendant had not proven either of the statutory mitigating circumstances. R. Vol. VIII, 1317-22. The trial court found that the defense did not present any credible evidence that Mr. Taylor has brain damage. *Id.* at 1320. The trial court further stated in its Sentencing Order that "[a]lthough both Drs. McCraney and Krop testified that Defendant has brain damage, there was a paucity of credible evidence to support that finding." *Id.* at 1323.

At the evidentiary hearing, Dr. Sesta testified about what he would have been able to offer at trial that was not brought up through Dr. Krop or Dr. McCraney. PC-R. Vol. XXXV, 4165-66. Dr. Krop is not a neuropsychologist. *Id.* at 4165. Dr. Sesta, who is a neuropsychologist, may have been able to testify about certain things that Dr. Krop did not feel comfortable testifying about. *Id.* at 4166. Dr. Sesta also would have testified about Mr. Taylor's temporal lobe impairment, including its affect on memory and intermittent explosive disorder or episodes of rage. *Id.* at 4199-4203. Furthermore, Dr. Sesta had over one hundred pages of data, and he would have discussed the neuropsychological data in much greater detail than did Dr. Krop. *Id.* at 4166. Dr. Sesta's testimony would have provided the kind of credible scientific evidence that court was seeking to support the finding of brain damage.

An ineffective assistance of counsel claim can be based upon trial counsel's failure to investigate or present mitigation evidence. *Jackson v. Herring*, 42 F.3d 1350 (11th Cir. 1995); *Blanco v. Singletary*, 943 F.2d 1477 (11th Cir. 1991). In *Blanco v. Singletary*, the Eleventh Circuit granted habeas relief on Blanco's claim that his trial counsel rendered ineffective assistance, in part, by not presenting available mitigating evidence during penalty phase. 943 F.2d 1477. Additionally, failure to investigate potential and known mitigation witnesses can be a basis for ineffective assistance of counsel. *Id.* at 1500-01.

In *Duncan v. Crosby*, the Supreme Court of Florida found that trial counsel was ineffective for failing to present available evidence in support of two mental health mitigating circumstances during penalty phase. *Duncan v. Crosby*, 894 So. 2d 817 (Fla. 2005). Duncan's trial counsel originally hired a mental health expert who evaluated their client, but they never called the expert to testify at trial. *Id.* at 825. Based on the evidence presented at trial, the trial court found that the defense did not prove any statutory mitigating factors. *Id.* at 825. During the postconviction evidentiary hearing, the expert testified that he had conducted psychological testing on the defendant and, in his opinion, the defendant suffered from a mental illness. *Id.* at 825. The trial court found, as did the Florida Supreme Court, that defense "counsel knew or should have known of the existence of

various mitigating factors that could have been presented during the penalty phase." *Id.* at 822. As such, the burden shifted to the State to prove that the failure to present this mitigating evidence had a valid and strategic basis. *Id.* at 822.

In order to justify a strategic decision not to call a mitigation witness, that decision must be reasonable. *Wiggins*, 539 U.S. 510; *Duncan*, 894 So. 2d at 822. The circuit court found that trial counsel's failure to call Dr. Sesta as a witness during penalty phase was based on a reasonable strategic decision. PC-R. Vol. VI, 922. In the case at hand, trial counsel knew about the information that Dr. Sesta could have provided, which would have helped them establish the two statutory mitigating circumstances that they were attempting to establish. Although Mr. Skye and Ms. Goins each provided different strategic reasons for failing to call Dr. Sesta as a witness during penalty phase, any downside to having Dr. Sesta testify would have been far outweighed by the benefits of having him testify, not the least of which was the credible scientific evidence of Mr. Taylor's brain damage that he would have offered. Therefore, the decision not to call Dr. Sesta as a witness was unreasonable.

Ms. Goins testified about the decision not to call Dr. Sesta as a witness. Dr. Sesta did some personality testing that Ms. Goins did not request, and she did not want that information to be brought out. PC-R. Vol. XXXV, 4467. Specifically,

Dr. Sesta administered the OMNI-IV, and it indicated antisocial personality disorder. *Id.* at 4469-70. She did not feel that this diagnosis would be helpful to Mr. Taylor, and she did not want to list a witness who would "just hand that to the State." *Id.* at 4470. She feels that she would have discussed this with Dr. Sesta, and she thinks that his position was that the testing was part of the neuropsychological battery. *Id.* at 4467. Ms. Goins testified that she and Mr. Skye would have discussed whether or not to call Dr. Sesta, but she made the final decision to have Dr. Krop testify and use Dr. Sesta's neuropsychological findings as further substantiation for Dr. Krop's findings. *Id.* at 4468. Dr. Sesta's raw data was also provided to Dr. Taylor during the interim between the guilt phase and the penalty phase. *Id.* at 4468-69. As she expected, Dr. Taylor testified that Mr. Taylor had antisocial personality disorder. *Id.* at 4470. Dr. Krop also indicated that Mr. Taylor had some features of antisocial personality disorder. *Id.* at 4470-71. Additionally, Mr. Taylor has been diagnosed with antisocial personality disorder a number of times in the past. *Id.* at 4472.

The strategic decision not to call Dr. Sesta because he found that Mr. Taylor suffered from antisocial personality disorder is not reasonable. As Ms. Goins acknowledged, both Dr. Krop and Dr. Taylor testified that Mr. Taylor suffers from antisocial personality disorder, and he has been diagnosed with antisocial disorder

in the past. If Dr. Sesta testified that Mr. Taylor had antisocial personality disorder, it would not have added anything new, and it would not have harmed Mr. Taylor because it was already established. If Ms. Goins was truly concerned about presenting an expert who would testify about Mr. Taylor's antisocial personality disorder, she would not have had Dr. Krop testify. Furthermore, Dr. Sesta's raw data was provided to Dr. Taylor in the interim between the guilt phase and the penalty phase, so the State's own expert was aware that Dr. Sesta administered the OMNI-IV. Regardless of whether Dr. Sesta testified, Dr. Taylor could have relied on Dr. Sesta's findings regarding antisocial personality disorder in his own testimony.

Mr. Skye recalled different reasons for deciding not to use Dr. Sesta as a witness. PC-R. Vol. XXXVI, 4299. Mr. Skye recalls more than one discussion with Ms. Goins about whether it made sense to call Dr. Sesta as well as Dr. McCraney and/or Dr. Krop. *Id.* at 4299-4300. He also recalls Ms. Goins explaining to him that, although Dr. Sesta could be helpful, some of the things Dr. Sesta was saying were in conflict with what Dr. McCraney and Dr. Krop were saying, perhaps concerning the level of brain impairment or the etiology of his brain damage. *Id.* at 4401-02; PC-R. Vol. XXXVII, 4443-4444. They ultimately came to the mutual conclusion that it would probably be better to have just Dr.

McCraney and Dr. Krop testify. PC-R. Vol. XXXVI, 4300.

Contrary to what Mr. Skye testified to, Ms. Goins did not recall any substantive discrepancies in the findings of Dr. Sesta, Dr. Krop, and Dr. McCraney. PC-R. Vol. XXXVII, 4471. Dr. Krop saw Mr. Taylor on April 16, 2003, and Ms. Goins had a discussion with Dr. Krop on April 24, 2003 about his findings. *Id.* at 4460. Dr. Krop administered some neuropsychological testing of Mr. Taylor. *Id.* at 4461. Dr. Sesta and Dr. Krop discussed their neuropsychological findings during a phone conference on April 25, 2003. *Id.* at 4469. Their findings correlated, and both of the doctors found that there were no indications that Mr. Taylor was malingering. *Id.* at 4466. Because there was no discrepancy between Dr. Sesta and Dr. Krop or Dr. McCraney, Mr. Skye's explanation for not calling Dr. Sesta was not reasonable.

Furthermore, Mr. Skye and Ms. Goins both testified that Ms. Goins ultimately made the decision not to call Dr. Sesta. Mr. Skye expressed his opinion at the evidentiary hearing that although Dr. Sesta has good credentials, Mr. Skye believes that he becomes too much of an advocate and often loses his appearance as a disinterested expert. PC-R. Vol. XXXVI, 4299. Ms. Goins, who made the decision not to call Dr. Sesta, did not express the same negative opinion about Dr. Sesta. Therefore, because it has not been established that Mr. Skye's opinion

about Dr. Sesta was a factor in Ms. Goins' decision not to call him, it should not be considered when taking into account whether the strategic decision not to call Dr. Sesta was reasonable.

In considering the statutory mitigating circumstance under Florida Statute 921.141(6)(f), the trial court cited the testimony of Dr. Krop and Dr. Taylor, which confused the statutory mitigating circumstance with the insanity statute. Dr. Taylor testified that Mr. Taylor was not impaired to the extent that he was unable to conform his conduct to the requirements of the law. R. Vol. VIII, 1321. The Court also cited Dr. Krop's testimony, in which he stated that "we are not talking about an individual who is so severely impaired that they cannot direct their action or think about what they want to do at a given time." *Id.*

Had Dr. Sesta testified, he could have cleared up this confusion and explained how, although Mr. Taylor does not meet the standard for insanity, he does meet the standard for the statutory mitigating circumstance that the capacity of the defendant to appreciate the criminality of her or his conduct or to conform her or his conduct to the requirements of the law were substantially impaired. Dr. Sesta explained how the statutory mitigating circumstance under Florida Statute 921.141(6)(f) differs from the insanity statute. PC-R. Vol. XXXV, 4218-19. Florida Statute 775.027 reads, in relevant part:

> (1) Affirmative Defense- All persons are presumed to be sane. It is an affirmative defense to a criminal prosecution that, at the time of the commission of the acts constituting the offense, the defendant was insane. Insanity is established when:
> (a) The defendant has a mental infirmity, disease, or defect; and
> (b) Because of this condition, the defendant:
> 1. Did not know what he or she was doing or its consequences; or
> 2. Although the defendant knew what he or she was doing and its consequences, the defendant did not know that what he or she was doing was wrong.

Dr. Sesta explained that in order to meet the McNaughton standard for insanity, the individual has to either not know what they are doing, or not know that what they are doing is wrong. *Id.* at 4218. This is very different from an individual, such as Taylor, whose ability to conform his conduct to the requirements of the law was substantially impaired, but who was not insane:

> The problem with individuals who are neurologically impaired is they often do know what they are doing and often do know what is wrong but it's the brakes. Can they actually [put] the brakes on and can they use what they know to control what they do?
> . . .
>
> Even given that Mr. Taylor knew what he was doing and given that Mr. Taylor knew what he was doing was wrong, could Mr. Taylor exact the same degree of behavioral control to stop that as someone who wasn't neurologically impaired, and is he significantly impaired in his capacity to control his behavior due to neurological impairment, which I believe he is.

Id. at 4219.

The statutory mitigating circumstance requires that the capacity of the Defendant to conform his conduct to the law was **substantially impaired**, not, as Dr. Taylor's

testimony suggested, that he was altogether unable to conform his conduct to the law, which would be a significantly higher standard.

This case is analogous to *Duncan* in that trial counsel in both cases failed to present available evidence in support of two statutory mitigating circumstances during penalty phase. Trial counsel in the case at hand provided prejudicial ineffective assistance by failing to call Dr. Sesta as a witness during penalty phase. Neither Ms. Goins nor Mr. Skye offered a reasonable strategic reason for failing to call Dr. Sesta. Dr. Sesta's testimony would have provided credible scientific evidence that Mr. Taylor suffers from brain impairment, and it would have established the two statutory mitigating circumstances. If Dr. Sesta testified during penalty phase, there is a reasonable probability that Mr. Taylor would have received a life sentence.

ARGUMENT VIII

THE CIRCUIT COURT ERRED WHEN IT DENIED MR. TAYLOR'S CLAIM THAT CUMULATIVE ERROR DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Mr. Taylor argued in Claim XII of his motion for postconviction relief that cumulative error deprived him of the fundamentally fair trial guaranteed under the Sixth, Eighth, and Fourteenth Amendments. PC-R. Vol. III, 479. The circuit court denied this claim on the basis that it did not find deficient performance or prejudice

in any of the other claims. PC-R. Vol. VI, 923. Mr. Taylor seeks review of these findings.

Mr. Taylor did not receive the fundamentally fair trial to which he was entitled under the Sixth, Eighth, and Fourteenth Amendments. See *Heath v. Jones*, 941 F.2d 1126 (11th Cir. 1991); *Derden v. McNeal*, 938 F.3d 605 (5th Cir. 1991). The sheer number and types of errors in Mr. Taylor's guilt and penalty phases, when considered as a whole, virtually dictated the sentence of death. While there are means for addressing each individual error, addressing these errors on an individual basis will not afford adequate safeguards required by the Constitution against an improperly imposed death sentence. Repeated instances of ineffective assistance of counsel significantly tainted Mr. Taylor's guilt and penalty phases.

These errors cannot be harmless. Under Florida case law, the cumulative effect of those errors denied Mr. Taylor his fundamental rights under the Constitution of the United States and the Florida Constitution. *State v. Diguilio*, 491 So. 2d 1129 (Fla. 1986); *Ray v. State*, 403 So. 2d 956 (Fla. 1981); *Taylor v. State*, 640 So. 2d 1127 (Fla. 1st DCA 1994); *Stewart v. State*, 622 So. 2d 51 (Fla. 5th DCA 1993); *Landry v. State*, 620 So. 2d 1099 (Fla. 4th DCA 1993).

ARGUMENT IX

MR. TAYLOR'S EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS HE MAY BE INCOMPETENT AT THE TIME OF EXECUTION.

This claim was raised below and stipulated as being premature. However, it is necessary to raise it here to preserve the claim for federal review. *In Re. Provenzano*, 215 F.3d 1233 (11th Cir. June 21, 2000). Mr. Taylor suffers from brain impairment. His already fragile mental condition could only deteriorate under the circumstances of death row, causing his mental condition to decline to the point that he is incompetent to be executed.

CONCLUSION AND RELIEF SOUGHT

Based on the foregoing, the circuit court improperly denied Mr. Taylor relief on his 3.851 motion. Relief is warranted in the form of a new trial, a new sentencing proceeding, a remand to the trial court with directions that Mr. Taylor's sentences be reduced to life, or any other relief that this Court deems proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to all counsel of record and the Defendant on this ___ day of November, 2010.

_____
MARK S. GRUBER
Florida Bar No. 0330541
Maria Perinetti
Florida Bar No. 0013837
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE REGION
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619
(813) 740-3544

Copies furnished to:

Carol M. Dittmar
Assistant Attorney General
Office of the Attorney General
Concourse Center 4
3507 E. Frontage Road, Suite 200
Tampa, FL 33607-7013

William K. Taylor
DOC #111640
Union Correctional Institution
7819 NW 228th Street
Raiford, FL 32026

Scott Harmon
Assistant State Attorney
Office of the State Attorney
800 E. Kennedy Boulevard
Tampa, FL 33602

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Initial Brief of Appellant, was generated in Times New Roman, 14 point font, pursuant to Fla. R. App. 9.210 (a) (2).

MARK S.GRUBER
Florida Bar No. 0330541
Maria Perinetti
Florida Bar No. 0013837
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE REGION
3801 Corporex Park Drive, Suite 210
Tampa, Florida 33619
(813) 740-3544

Counsel for Appellant