

2004

# Von Lester Taylor v. The State of Utah : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

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VON LESTER TAYLOR,

Petitioner/Appellant

v.

STATE OF UTAH,

Respondent/Appellant/Cross-Appellee.

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Case No. 20040262-SC

OPENING BRIEF OF APPELLANT

This is the opening brief of Appellant in a capital post-conviction case presided over by the Honorable Frank G. Noel, Judge of the Third District Court, Summit County, State of Utah.

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IN THE UTAH SUPREME COURT

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IN THE UTAH SUPREME COURT

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VON LESTER TAYLOR :  
Petitioner/ Appellant, :  
v. :  
STATE OF UTAH, : Case No. 20040262  
Respondent Appellee, :

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JURISDICTION

Utah Code Ann. § 78-2-2 (i) provides this Court's jurisdiction over appeals from district court cases involving a conviction of a capital felony

ISSUES, PRESERVATION, AND STANDARD OF REVIEW

Mr. Taylor is an inmate housed on Utah's death row. He pled guilty to two counts of capital homicide and was sentenced to death by a jury. His trial counsel was discharged. Substitute counsel was appointed and the case was remanded to the district court for consideration of ineffective assistance of counsel. The trial court found that trial counsel was not ineffective, and the case was appealed to this Court. This Court upheld Mr. Taylor's conviction. *State v. Taylor*, 947 P.2d 681 (Utah 1997).

Mr. Taylor filed a First Amended Petition pursuant to the Utah Post-Conviction Remedies Act, Utah Code Ann. §§ 78-35a-101 to -202 raising twenty-five claims. The issues raised include:

1. The plea and conviction were not made voluntarily, and that Mr. Taylor was not aware that dismissed counts would be used at the penalty phase. Claims I & II

2. Mr. Taylor suffers from neuropsychiatric injury the was neither discovered nor presented at the penalty phase hearing. Additionally, prior counsel failed to present and discover additional important mitigation and exculpatory evidence. Claims III, IV, XVII.

3. There was legal and constitutional error in certain instructions that were given and in the court's failure to give certain proposed instructions. Claims IV, V, VI, VII, VIII, IX, X, XI, XII, & XIII

4. The voir dire was unconstitutionally limited and did not result in a fair and impartial jury. Claims XIV & XV.

5. Several of jurors did not meet the constitutional standards of impartiality. Claim XVI.

6. Trial and appellate counsel were ineffective. Claims XVIII & XIX.

7. Utah's death penalty statute is unconstitutional. Claim XX.

8. The trial court failed to take appropriate steps to ensure that Mr. Taylor was competent to proceed at both the penalty phase and during the rule 23B hearing. Claim XXI.

9. The trial court erred in admitting the hearsay statement of a suspected co-defendant at the penalty phase. Claim XXII.

10. The prosecution committed misconduct by introducing prejudicial evidence at the penalty phase, by objecting to proper voir dire questions, and by making prejudicial arguments during the penalty phase. Claim XXIII.

11. Trial counsel had a conflict of interest making the penalty phase fundamentally unfair. Claim XXIV.

12. Utah's death penalty statute is unconstitutional. Claim XXV.

When reviewing an appeal from an order regarding post-conviction relief, the appellate court reviews the habeas court's conclusion of law for correctness and its findings of fact for clear error. *Julian v. State*, 52 P.3d 1168 (Utah 2002). "Generally, an



appeal from a judgment on a petition for post-conviction relief raises questions of law reviewed for correctness, giving no deference to the post-conviction court's conclusion.”

*Wickham v. Galetka*, 61 P.3d 978, 979 (Utah 2002)

All the issues were raised in writing in pleadings including the First Petition, the First Amended Petition, the Response to the Motion for Summary Judgment and in other pleadings. Post-Conviction Record, 1-20, 521-808, 1072-1167 (hereinafter “Post-Conviction R”). Although the court granted summary judgment without a hearing, the court nonetheless heard oral argument on the issues raised in the petitions. Post-Conviction Transcript, 1986 (p.p. 1-37), 1987 (p.p. 1- 66), 1988 (p.p. 1- 25) (hereinafter “Post-Conviction TR”).

#### CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The pertinent constitutional provisions, statutes and rules are in the addendum to this brief.

#### STATEMENT OF THE CASE/FACTS RELEVANT TO THE ISSUES ON APPEAL

##### A. Nature of Charges, Pretrial Motions

Von Lester Taylor was originally charged along with co-defendant, Edward Deli, in a ten count information with two counts of capital homicide, attempted criminal homicide, aggravated arson, two counts of aggravated kidnaping, aggravated robbery, theft, failure to respond to an officer's signal to stop, and aggravated assault. Trial Record, 002 (hereinafter “Trial R”). The incident giving rise to the charges occurred on

December 22, 1990. The facts underlying the case are more fully set forth by this court's decision in *State v. Taylor*, 947 P.2d 681 (Utah 1997).

Mr. Taylor appeared before a state magistrate on December 24, 1990; Elliott Levine (hereinafter "Mr. Levine" or "trial counsel"), the Summit County Public Defender, was assigned to represent Mr. Taylor. Trial R, 11. The preliminary hearing was held for both defendants on January 8, 1991. Both Mr. Taylor and Mr. Deli were bound over for trial on all charges. Preliminary Hearing Transcript, 130-35 (hereinafter "PHTR"). On January 21, 1991, trial counsel filed a one page pleading styled Notice of Intent to Claim Defense of Insanity or Diminished Mental Capacity. Trial R, 29. Two alienists were appointed "to examine the Defendant and prepare a written report of findings on the condition of the defendant and address the issues of insanity and diminished mental capacity and release a copy of said findings to the Court, the Prosecutor, and Defendant's counsel within thirty days. . . ." Trial R, 32.

Approximately two weeks later, trial counsel filed a one page motion to sever and a one page motion for change of venue. Trial R., 34 & 36. Trial counsel submitted no memoranda with any of the motions. Both motions were denied. Trial R, 64-67. On March 18, 2001, co-defendant Deli's attorney made application to the court for appointment of co-counsel and for leave to make ex parte application for expert and investigative services. Trial R, 68. Trial counsel for Mr. Taylor neither made application for co-counsel nor had he in any other case throughout his legal career. Rule 23B

Transcript, 1931 (hereinafter “Rule 23B TR”).

On March 5, 1991, trial counsel moved for a continuance of the trial set for March 19, 1991 indicating that he had not received the reports from the psychiatric evaluators. Trial R, 61. The trial was continued until May 7, 1991. Trial R, 75. Deli filed a discovery request seeking information and evidence that would be introduced at both the guilt and penalty phases. The state responded to Deli’s discovery request. Trial R, 80. Mr. Levine filed no discovery request, but instead relied on “an open policy file (sic in original) with the County Attorney’s Office.” Rule 23B TR, 1871.

Trial counsel’s strategy, in lieu of filing pretrial motions, was to simply object if “he thought [the evidence] was too inflammatory or prejudicial. . . .” Rule 23BTR, 1869. In fact, trial counsel had only filed pretrial motions in limine “maybe two times . . .” in his twenty year career as a defense lawyer. Rule 23BTR, 2094. His general philosophy regarding admissibility of evidence in capital cases was a strategy described as the “broad brush approach” meaning he assumed “everything was going to come in. . . .” Rule 23B TR, 1969. After hearing the evidence at trial, he might object if he thought “it was too inflammatory or prejudicial, [or] too graphic. . . .” *Id.* 1869.

#### B. Change of Plea, Pretrial Investigation

On May 1, 1991, Mr. Taylor pled guilty to two counts of capital murder. Trial R, 105. The facts supporting this claim are found in the transcript of the plea colloquy conducted on May 1, 1991 and the Statement of Defendant plea form. The court

questioned whether the dismissed counts would be used as aggravating circumstances. Trial TR, 266-67. The state responded that the evidence of the other (dismissed) counts would be limited to their relationship to the murder. *Id.* The court then asked about whether the state intended to introduce the “crimes of arson, kidnaping and so forth.” The prosecutor did not state that those crimes would be introduced as aggravating circumstances, but simply said “[t]here will be evidence of that(the other crimes).” *Id.* Mr. Levine was aware that some evidence would be introduced and would reserve any objections for the sentencing phase. *Id.*

On May 8, 1991, one week after the change of plea, trial counsel made application to the court to hire “an investigative paralegal.” Trial R., 120. She was not hired as an investigator, however, as her primary role was that of paralegal. Rule 23BTR, Vol. VII, 1553. Her primary duties were to read and organize the file and to attend the trial of the co-defendant. Vol. VII, 1560-61. She also spoke with one witness, Joe Offret, a Summit County Police Officer, but prepared no reports regarding that interview. *Id.* 1554-55. The investigator had no training in either “capital cases,” or application of “mitigation theories” in capital cases. *Id.* 1557.

During the time period between January 1991 and May 1991, trial counsel testified that she spent between five to twenty-four hours per week working on Mr. Taylor’s case. Rule 23BTR, 1816-20. He spent approximately twelve hours per week consulting with Mr. Taylor. *Id.* In his trial preparation, trial counsel neither consulted with nor talked to

ballistics experts, Rule 23BTR, 1924, experts who examine or assist in the examination of evidence, *id.*, at 1925, or a penalty or mitigation phase expert. *Id.* at 1926. When pressed to explain his efforts to counter the state’s forensic investigation, trial counsel thinks he may have consulted some named “Chuck” or Charles, but could neither recall “Chuck’s” last name nor the subject matter discussed. *Id.* at 1925.

As explanation for his failure to consult experts, trial counsel expressed a philosophical aversion to expert witnesses proclaiming that “we can hire an expert to say just about anything.” Rule 23BTR, 1926. Moreover, Levine doesn’t “go around talking to and hiring experts merely because they are going to align with [his] position.” Rule 23BTR, 1927. He expressed a general misunderstanding about the necessity of consulting experts, instead believing that all experts are “guns for hire,” who will say anything to support the party paying them. Rule 23BTR, 1927. Mr. Levine explained his view that it is oftentimes “unethical” to pay an expert to back a defense theory. *Id.* 1927. As an example, he referred to something called the “his grandmother didn’t bake him chocolate cookies” defense as a basis for not consulting experts in this case. Rule 23BTR, 1927.

“Back in 1990, [trial counsel] was not aware that there was any such thing as a mitigation expert.” Rule 23B TR, 1929. By 1995, he was aware of such people, but expressed reservations about use of such experts because “they have other agendas . . . .” *Id.* 1929.

Trial counsel obtained all his information relative to Von's background through Von and his father, Tom Taylor. Thomas Taylor testified that trial counsel never asked about other potential family witnesses. Rule 23BTR, 2449. Thomas Taylor also "traveled a lot," during Von's childhood and was unaware of several things that occurred during that time. Trial TR, 759.

In the course of his investigation, trial counsel did not acquire school records, Rule 23BTR, 1955, independent medical records other than those disclosed in prior presentence reports, and prior psychological reports, *id*, 1955, made no attempt to obtain social services records, *id*, 1957, made no independent attempts to obtain records from organizations that Von belonged to, *id*, 1958, made no attempt to obtain records of boy scouts, juvenile records, or other independent records, *id*, 1960, obtained no independent records from Summit County jail, *id*, 1960, made no attempt to find independent employment records, and interviewed no friends prior to the hearing. *Id*. 1962.

Trial counsel never wrote out the questions he intended to ask Tom Taylor at the penalty, although he spoke with him on several occasions in preparation for his testimony. Rule 23bTR, 2057-58. Thomas Taylor testified that trial counsel spent approximately two minutes in witness preparation prior to the penalty phase. Rule 23BTR, 2449.

When asked to explained who he had interviewed and when, trial counsel responded that most potential trial witness were interviewed, but he simply could not recall the dates or substance of any interviews. *Id*. 2052-55. When pressed to identify

witnesses interviewed before trial, he finally responded that “[he] talked to so many people at so many various points in time . . . , [that] [i]t is all basically a blur . . . , [and he doesn’t] have any independent recollections.” *Id.* 2055-56.

At the time of Mr. Taylor’s trial, Elliot Levine was the Summit County public defender. Rule 23BTR, 1780. The contract obligated Mr. Levine to represent all indigent persons charged with crimes except certain child sex or rape cases for he could not provide unbiased representation. Rule 23BTR, 1780-81. Prior to the representation of Mr. Taylor, trial counsel handled one prior capital case, that of James Holland. *Id.* 1791.<sup>1</sup>

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<sup>1</sup> Mr. Holland’s death sentence was eventually reversed by this Court, and Mr. Levine was removed from the case prior to the appeal. *See State v. Holland*, 876 P.2d 357 (Utah 1994) Two members of this court sharply rebuked Mr. Levine for his representation of both Mr. Holland and Mr. Taylor:

[We] believe that Levine’s conduct as defense counsel requires further action by the court. Levine has demonstrated such a fundamental and underlying misconception of the defense attorney’s role that the death penalty should be set aside and the matter remanded for a new penalty hearing.  
*Holland*, 876 P.2d at 361.

In expressing concern about Mr. Levine’s performance in Mr. Taylor’s case Justices Stewart and Durham commented that:

Levine’s view of his role as a defense attorney is inconsistent with the duties the law imposes on defense counsel. It is not the role of defense counsel to persuade a defendant to plead guilty because *counsel* concludes that the defendant committed a crime. Defense counsel’s obligation is to explain the evidence against the defendant, the nature of all defenses that might be provable, all the various options the defendant has in pleading guilty or not guilty and going to trial, and the possible or likely consequences of those options. It is not defense counsel’s responsibility or proper role to decide that a defendant deserves the death penalty. Should a defendant choose to contest the charges against him or her, it is counsel’s

When asked about the number of cases Mr. Levine had taken to trial, he responded:

I don't keep scorecards. I do a job. I do what needed (sic) to be done. I did it that time. And I don't keep scorecards of wins, losses, trials, settlements. I do a job.

Rule 23BTR, 1792.

In preparation for handling death cases, trial counsel testified that he "consulted a death penalty manual that [he] thought was published by the American Bar Association," Rule 23BTR, 2279, and "always scan[ned] the [legal] resources available about possible new issues coming up." *Id.* 2280.

### C. Psychological Investigation Suicide Attempts/Competency Issues

Mr. Levine's only arguable documented investigation consisted of filing a Notice of Intent to Assert an Insanity Defense. Trial counsel explained that he typically filed such motions in capital cases to obtain a "psychological profile" – "to find out if there's

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obligation to require the State to prove its case beyond a reasonable doubt.

Certainly attorneys are bound to have private feelings about the clients they represent and their guilt or innocence, but it is their professional responsibility to set aside private feelings and judgments and vigorously argue the law and the facts in a light as favorable to the defendant as the law and facts permit. That, however, is not the role Levine assumes when he acts pursuant to his stated philosophy. Under that philosophy, defense counsel acts as an agent for the prosecution in ensuring that defendants take responsibility for their crimes (as Levine would adjudge the matter) and that punishment, as deemed appropriate by counsel, is meted out. As Levine stated it, it is his duty "to get that person [i.e., the defendant] to come forth [and] admit their wrong doing." The practical effect of that philosophy is to nullify our adversarial system and to deny the defendant the effective assistance of counsel.

*Holland*, 876 P.2d at 362-63.



something going on psychologically that you can pursue . . . .” Rule 23BTR, 2248.

Dr. Rindflesh “evaluated” Mr. Taylor in one day, on February 22, 1991. Post-Conviction R. 693. He “evaluated Mr. Taylor for one and one-half hours, reviewed records for forty-five minutes prior to the interview and spent forty-five minutes writing a report. *Id.* at 696. Dr. Rindflesh does not specify the documents reviewed prior to the evaluation, but states that he “reviewed various documents relating to the alleged crime, including police reports, interviews and autopsy reports,” which were given to him by the county attorney. *Id.* at 693. He conducted something called “an informal mental status examination,” although he failed to identify what this informal test measured or how it was administered. *Id.* Dr. Rindflesh apparently neither reviewed nor attempted to determine if any other mental health records existed. Instead, he simply concluded that “[Mr. Taylor] has no history of involvement with counseling or therapy from mental health professionals for drug or alcohol abuse, or any other psychiatric problem.” He reiterated that Mr. Taylor does not suffer from a mental illness “because he has no history of mental illness. . . .”

Dr. Rindflesh neither spoke to nor attempted to contact Mr. Levine or anyone in Mr. Taylor’s family. He based at least part of his conclusion on Mr. Taylor’s word that he “himself, reported no symptoms of any psychiatric illness.” *Id.* at 694. Although he knew that Mr. Taylor “was sent to the Utah State Prison in late 1989 . . . ,” and was housed in Orange Street, a state half-way house facility which treats mentally ill

offenders, he neither requested nor reviewed any records from those facilities. He not only failed to review the ninety day evaluative reports, presentence reports, and other data generated by the department of corrections, he apparently was unaware such reports existed since there is no reference to that information in Rindflesh's evaluation.

On February 11, 1991, Dr. Moench examined Mr. Taylor for three hours at the Summit County Jail "for the purpose of determining his state of mind at the time of the alleged commission of crimes with which he is charged as it relates to the defense of insanity." It appears that Dr. Moench reviewed police reports, other investigative reports, and transcripts of interviews with victims. Moreover, Dr. Moench reviewed the 1989 St. George presentence burglary report, and a ninety day diagnostic evaluation prepared by diagnostic investigator Robyn Williams, which included a psychological evaluation by L. Donald Long, Ph.D.

Dr. Moench noted a past psychiatric history, past psychological testing, and past medical problems, and apparently conducted some memory and cognitive testing, although neither the tests nor methodology are identified. Dr. Moench was apparently aware of at least some of Mr. Taylor's prior mental health history citing prior suicide ideation, serious mood swings, and referral for mental health treatment at the Iron County Jail. Dr. Moench noted that "psychological testing . . . revealed [Taylor] to be extremely paranoid and borderline schizophrenic or depressed and suicidal."

Dr. Moench concluded that "[t]he random property destruction in the cabins

around Oakley, and the destruction of human life itself, is a level of violence sometimes seen with head injured or otherwise brain damaged people.” Post-Conviction R. 708. Dr. Moench dismissed this conclusion, however, noting that Mr. Taylor “presents no history of head injury and no evidence for brain impairment other than some degree of learning disability in math and English.” *Id.* Dr. Moench conducted no neuropsychiatric testing to determine the presence of brain damage.

Dr. Moench observed that in 1989, Dr. Kliarsky of Southwest Mental Health found Taylor “to be extremely paranoid and borderline schizophrenic or depressed and suicidal.” Neither Dr. Moench nor attorneys Levine and Savage requested nor reviewed records from Dr. Kliarsky or Southwest Mental Health. He also noted that, Dr. Long, as part of the ninety day evaluation, diagnosed Mr. Taylor with “Adjustment Disorder with Mixed Emotional Features and elements of Passive Aggressive Personality Disorder.” None of the test data was reviewed or requested by Dr. Moench, Levine or Savage. Dr. Moench diagnosed Mr. Taylor with “Antisocial Personality Disorder with Schizoid Personality Disorder,”<sup>2</sup> but notes both a learning disability and social withdrawal in school. Post-Conviction R. at 707.

Levine relied upon the representation in the Rindflesh report indicating that Mr.

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<sup>2</sup> “The essential feature of Schizoid Personality Disorder is a pervasive pattern of detachment from social relationships and a restricted range of expression of emotions in interpersonal settings.” Diagnostic and Statistical Manual of Mental Disorders IV, 638. Persons who meet this diagnostic criteria lack a desire for intimacy, avoid close relationships, and are generally detached from family and other social groups. *Id.*

Taylor had no prior history of mental health, psychiatric or alcohol/ substance abuse problems, as a basis to conduct no further investigation. Trial R.2251. He also felt that Moench report was very damning and gave him no options to investigate further psychological claims. Vol. III, 92, R.2265. Although he claims to have reviewed the information in the prior presentence report, and items he identified as “prior psychological reports . . . [with] medical histories. . . [he] didn’t see anything in that that glared out at [him] requiring any further delving into [Mr. Taylor’s] medical records.” Rule 23B TR, 1955.

*1. Mental Health Issues at Penalty Phase and Rule 23B Hearing*

On the opening morning of the penalty phase, Mr. Taylor attempted suicide by slitting his wrists. These injuries required medical treatment and stitches. Trial TR, 30. The trial was delayed as the parties expressed concerned about Mr. Taylor’s competency to proceed. The court contacted Dr. Mark Rindflesh, the Salt Lake City psychiatrist, who earlier filed a report stating that Mr. Taylor had no history of counseling or therapy from mental health professionals, “no history of mental illness,” and no “psychiatric problems.”

The parties questioned “whether or not Mr. Taylor [was] competent to proceed with the penalty phase of this trial.” Trial R. 28-35 Dr. Rindflesh spoke briefly with Mr. Taylor, concluding he was competent to proceed. *Id.* There is no indication that he conducted any psychological or psychiatric tests and he prepared no reports. Dr. Rindflesh felt that Mr. Taylor suffered from depression, that could possibly be treated

with medication. Trial TR. 31. Despite finding Mr. Taylor competent, the doctor nonetheless expressed concern about giving Mr. Taylor anti-depressant medication because of a fear that he might save it for a future suicide attempt. Trial TR, 31-32.

At the Rule 23B hearing, appellate counsel again expressed concern about Mr. Taylor's competency. He described Von as "either in some sort of depression or remorse or something. His eyes are teary, he's crying and he is – although he's responsive to my questions in the sense of being oriented as to time and space, he is answering questions by telling me about personal feelings instead of being responsive to the questions that I'm asking." Rule 23B, 2178. These observations were confirmed by appellate counsel's assistant. *Id.* Mr. Taylor responded to questions: "I'm too depressed. I'm too depressed. I can't do this anymore." *Id.* Appellate counsel further indicated that Mr. Taylor's conduct is "totally and completely . . . [a] surprise." Rule 23B TR, 2182. Appellate counsel expressed grave concerns about his competency to proceed further in the hearing:

If Mr. Taylor is emotionally of the state that it is certainly that I'm observing – again, I am not holding myself out as any kind of an expert here – but if his emotional depression is such that he, after all of this, is willing to risk the motion of the state to pull this entire thing back, I want him examined by somebody.

Rule 23B, 2186.

During the same conversation, Mr. Taylor seems confused about his options regarding the Rule 23B hearing and the appeal:

Q: [Mr. Voros]: Does he understand that he has an appeal even if he doesn't have his 23(b)?

A: [Mr. Savage]: I don't know what he understands. That's why I said: "Do I ask him" - is what you are telling me, you want to back out, not do this and just have me do things at the Supreme Court, "yes" or "no?" The answer I got, however was not "yes" or "no"; and so as I've indicated, I didn't feel like I could proceed in any direction. Rule 23B TR,2190

At one point during the colloquy, Mr. Taylor did not respond to the Judge's question and instead turned toward appellate counsel. Rule 23B TR, 2203-04. Appellate counsel unequivocally moved to have Mr. Taylor evaluated for competency. Rule 23B, Vol.III, 2218-20. The court denied the motion finding that a Rule 23B hearing was not a proceeding contemplated by §77-15-5 and that defendant did not have a right to raise a competency claim under that provision:

[T]he Court's of the opinion that the applicable law does not require the Court to stay the proceedings and interrupt the proceedings for inquiry into his competency and therefore will deny the motion.

Rule 23BTR, 2223-25.

#### D. Penalty Phase Case

##### *1. Voir Dire, Jury Selection*

After the plea on May 1, 1991, the case proceeded to a penalty phase hearing beginning on May 8, 1991. Trial counsel submitted no proposed voir dire questions and no pre-penalty phase motions.

Ninety seven jurors were summoned for the jury pool. Trial R. 125-30. The court conducted voir dire with the large group. Trial Tr. 33-133. The court began by asking the jurors if they knew any of the parties or witnesses. *Id.* at 41-74. The court then asked the

pool if they met the legal requirements for jury service. *Id.* at 74. The court next had each juror stand, state their name, occupation, name and occupation of spouse, level of education, and membership in social or service clubs. *Id.* at 77-97. The court asked about prior jury service, *id.* at 97, relatives or close friends who work in law enforcement, *id.* at 105, whether they would give more or less weight to law enforcement officers, *id.* at 110-11, friends or family members involved in the criminal justice system, *id.* at 111-12, whether the jurors could follow the law, *id.* at 115, whether any of the jurors have been the victims of a serious crime, 115, whether anyone felt resentment toward the legal system, *id.* at 123, whether anyone had physical problems or mental disabilities preventing them from sitting as a juror, *id.* 124, and whether anyone would suffer any hardship by sitting on the jury. *Id.* 126.

The in-chambers voir dire generally consisted of leading questions. Few jurors were asked about what they heard about the case. Rather most jurors were asked if they could set aside anything they might know about the case and judge the case on the facts presented in court.

During the voir dire of potential jurors, trial counsel attempted to ask the following question: “Do you have any opinions as to – or any feelings that you would like to share with us as to whether or not you feel at this point, anyway, that a death penalty is more severe than life in prison or whether life in prison is more of a severe penalty.” Trial TR. 153. The state’s attorney objected on relevance grounds. The court modified the

question to: “Do you think that the (sic) life imprisonment is a severe penalty?” Later, in voir dire, when Levine asked the same question, the court this time sustained the objection and disallowed questions comparing a life sentence to the death penalty. Trial TR. 179.

During the in-chambers voir dire, the court singled out members of the Church of Jesus Christ of Latter Day Saints concerning their knowledge of the doctrine of blood atonement. Those of LDS faith were asked if they heard or knew about the term, “blood atonement.” Regardless of their answers, the court uniformly told them that “the [LDS] church does not accept the doctrine of blood atonement,”<sup>3</sup> even when they expressed

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<sup>3</sup> (Juror Oldham) Vol. II, TR. 150; (Juror Jerry Lewis, “Are you aware that the LDS Church does not accept the doctrine of blood atonement.” Vol. II, TR, 157); (Juror Robert Lewis, “Are you aware that the LDS Church does not accept the doctrine of blood atonement.” Vol. II, TR. 170); (Juror Joseph Jenkins, “You’re not aware that [the doctrine of blood atonement] is an accepted doctrine of the [LDS] Church.” Vol. II, TR. 178); Juror Rowser, “So you’re aware then that [the doctrine of blood atonement] is not an accepted doctrine of the [LDS] Church.”); (Juror Schumann, “Are you aware that the LDS Church does not accept the doctrine of blood atonement?” Vol. II, TR. 206-07); (Juror Blaine Moore, “Are you aware that the [LDS] Church does not accept the doctrine of blood atonement.” Vol. II, TR. 250); (Juror Ronald Wilde, “[The LDS Church] do[es] not teach [the doctrine of blood atonement], do you understand that; they do not teach that doctrine. . . .” Vol. II, TR, 270); (Juror Lesa Bird, “Are you aware that the [LDS] Church does not teach or accept the doctrine of blood atonement?” Vol. II, TR. 282); (Juror Gloria Mitchell, “Are you aware that the [LDS] Church does not teach the doctrine of blood atonement?” Vol. II, TR. 293); (Juror Lorene McNeil, Are you aware that the LDS Church does not accept the doctrine of blood atonement?” Vol. II, TR. 303, 304) (Juror J.L. Turner “Are you aware that the LDS Church does not accept the doctrine of blood atonement.” Vol. II, TR, 314); (Juror Arnold Bosworth, “Are you aware that the LDS Church does not accept [the] doctrine [of blood atonement].” Vol. II, TR. 360); (Juror Jay Hendrickson, “Are you aware that the LDS Church does not accept [the] doctrine [of blood atonement].” Vol. II, TR. 369); (Juror David Richards, “Are you aware then that



belief in the doctrine.

The court told every LDS jurors that the “Church” rejects the doctrine. There were no similar proclamations made to Catholics, Methodists or other religious groups explaining their official church position. Rather, the court simply asked non-LDS jurors their church’s position regarding the death penalty, without telling them their church’s position.

## *2. Witherspoon Excludables, Challenges for Cause, Biased Jurors*

Juror Blaine Moore, who sat on the jury returning a verdict of death, stated his belief in the doctrine of blood atonement, agreeing that “anyone who kills must also be killed.” Trial TR, 250. He expressed this view despite two admonitions from the court telling him that the “[LDS] Church does not accept the doctrine of blood atonement,” *id.* 250, and later asking if he “understand[s] that the [LDS] Church does not teach [the doctrine of blood atonement].” *Id.* Moreover, he expressed frustration at housing “guilty” people in jail at taxpayer expense, *id.* 251, and doesn’t “think that’s right.”

When asked if he was more inclined to impose the death penalty because Mr. Taylor “admitted to killing two individuals with a gun in an unprovoked manner,” he responded:

Well. I’ve been considering that. Like I told the judge. I don’t like to see anybody die. But nevertheless where he’s committed a crime and by death, and did it

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the LDS Church dose not accept that doctrine.” Vol. II, TR, 374); (Cheryl Chamberlain, “Are you aware that’s not an accepted doctrine of the church.” Vol. II, TR. 416); (Juror Reich, “And are you aware that the LDS Church does not teach that doctrine?” Vol. II, TR, 421).

through thinking about it, then I've got a question about it.

Trial TR. 253. Juror Moore also worked with prosecutor Adkins' mother at the LDS Temple. *Id.* at 253-54.

Trial counsel moved to challenge Moore for cause "based upon his answers." *Id.* 254. Levine noted that Moore believed in the doctrine of blood atonement and that based upon the general tenor and demeanor of his answers could not be a "fair and impartial juror." *Id.* The court denied the challenge. *Id.* 254. Interestingly, the prosecutor noted that Mr. Moore probably misunderstood the doctrine of blood atonement noting that "it was clear that he was thinking of something other than what those of us in the room now understand the doctrine of blood atonement to be." *Id.* 255. Mr. Moore sat on the jury that returned a verdict of death.

During the course of voir dire, juror David Richards, who ultimately sat on the jury, indicated that he had an attorney client relationship with County Attorney, Bob Adkins. Vol. II, TR, 59.<sup>4</sup> Juror Richards indicated that "Mr. Adkins office did a land contract for us about-,," before he was interrupted by the court. *Id.* There were no follow up questions regarding the extent of the attorney/client relationship, the duration of that relationship, or whether that relationship still existed at the time of trial. The court simply asked whether juror Richards could still be "fair and impartial" despite that relationship.

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<sup>4</sup> The prosecution struck potential juror Philip Ovard who was a party opponent of Mr. Adkins in an earlier property transaction. Vol. II, TR. 290, R. 126.

Trial counsel neither asked follow-up questions nor moved to challenge juror Richards for cause. Mr. Richards sat on the jury that returned a verdict of death.

In May, 1991, Juror Joseph Jenkins was the director of the Summit County Health Department. He was a “lifelong friend” of prosecutor Bob Adkins, and worked with prosecutors Adkins and Christiansen in the county office building. Trial TR. 44. The county attorney’s office was the legal representative for the health department, as acknowledged by Mr. Jenkins who said he regularly consulted both Mr. Adkins and Mr. Christiansen “on ordinances.” *Id.* at 44. Despite this apparent attorney/client relationship, neither the court nor Levine asked any follow up questions or sought to probe the extent of that relationship. Mr. Jenkins sat on the jury that returned a death sentence in this case.

During voir dire, juror Cheryl Chamberlain disclosed that she was a cousin to Judge Edward Watson, who heard the preliminary hearing, and that her son was married to prosecutor Bob Adkins’ sister. Vol. II, TR. 113. Despite her disclosure of these relationships, no one asked her to further elaborate, especially the relationship between her and Mr. Adkins. No challenge for cause was made to remove Ms. Chamberlain. Ms. Chamberlain sat on the jury that returned a verdict of death.

Juror Wilde expressed a belief that “anyone who kills must also be killed,” Vol. II, TR, 250, and “if somebody kills somebody should pay for their life . . . ,” Vol. II, TR, 270, despite the court’s repeated admonition that the LDS Church does not teach that

doctrine. Mr. Wilde asserted his belief that the death penalty was appropriate in this case. *Id.* 272. Trial counsel did not challenge juror Wilde for cause, but used a peremptory challenge to strike him.

Potential juror McNeil witnessed the police chase in this case, Trial TR, 305, which was ultimately presented and argued as an aggravating circumstance. She expressed concern about her ability to be impartial based upon her observations. *Id.* The court, incorrectly, told her that because Mr. Taylor pled guilty she would “not be asked to judge whether or not it happened.”<sup>5</sup> *Id.* Moreover, because she observed the car chase and lived close to the Tiede cabin, Ms. McNeil told the court she was “fairly biased,” against Mr. Taylor, *id.* 306, and did not think “that life in prison would be as severe a sentence as the death penalty.” *Id.* 308. Trial counsel moved to strike Ms. McNeil for cause. *Id.* 310. The judge denied the challenge *id.* 311; trial counsel struck Ms. McNeil with the use of a peremptory challenge. R. 126.

During voir dire, potential juror Dearl Shill stated that he didn’t think that life in prison was a severe sentence. Vol. II, TR. 354. When trial counsel attempted a follow up question—whether Mr. Shill feels that life in prison is an appropriate penalty based on Mr. Taylor’s admission of guilt-- the court interceded stating, “I won’t let you ask that that way.” *Id.* Later, trial counsel moved to strike Shill for cause, a challenge which was denied. Vol. II, TR. 356-57. Trial counsel later used a peremptory challenge to strike

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<sup>5</sup> The fleeing charge was submitted as an aggravating circumstance. Trial R, 227.

juror Shill. R. 126.

Juror Blum told the court that a lack of mental health or psychiatric evidence would have “substantial bearing on [her] decision . . .” to impose death. Vol. II, TR. 321-22. In fact, she acknowledge that the lack of mental health evidence would “sway” her more toward the death penalty. *Id.* Despite these answers, trial counsel did not move to strike her for cause. Ms. Blum was removed from the jury by the prosecutor’s use of a peremptory challenge. R.127.

Alternate juror Dennis Gunn knew prosecutor Adkins from “being a lifelong resident” of the county. Vol.. II, TR. 64. Moreover, Gunn acknowledged that he had a previous attorney/client relationship with Mr. Adkins, occurring two years before this case. *Id.* No one asked Mr. Gunn about the basis of that representation.

### *3. Manley Evidence*

During the penalty phase, the prosecution called a witness named Scott Manley. Trial TR. 640-58. In December 1990, Manley lived at Freemont Community Correctional Facility, a Department of Corrections halfway house located in Salt Lake City. *Id.* 641. Manley was a friend of Von Taylor. Manley was contacted by police on December 26, 1990 about information he may have had regarding the homicides at the Tiede cabin. When police went to his room, Manley “was observed with his pants down looking at pornographic material spread out in his room and masturbating.” Post-Conviction R,

1646.<sup>6</sup> Although he agreed to speak to police, he nonetheless “wonder[ed] if he would be in trouble for what his friend, Von Taylor, had done over the weekend.” *Id.* When Manley spoke with police, he was unclear about the date he received the phone call, and thought the call might have been in the afternoon of December 22, 1990. Mr. Taylor purportedly told Manley about escaping from Orange Street Correctional Facility, with a friend, and how the two were going to New York.

The telephone call was made from the Tiede cabin. Manley told the police that he believed the Tiede’s were home when Mr. Taylor made the call, Post-Conviction R. at 776, then he said that the call was made “after” the people were killed. *Id.* at 783. He at times said that Mr. Taylor “was going to waste the people,” *id.* 776, but later said that the people might already be dead. *Id.* 783. Manley conceded that before the interview that he followed the case closely on the news as he knew about facts involving the case and condition of victims. *Id.*

When Manley was called as a witness, he first refused to testify, claiming a fifth amendment privilege. Trial TR. 641. The court dismissed the jury, while the prosecutor gave Manley a grant of immunity. *Id.* 642. The jury apparently was not informed of this grant of immunity. In the meantime, while the jury was absent, Levine objected to the

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<sup>6</sup> The state moved to strike the records pertaining to inmate Manley; the court granted the motion to strike. As addressed below, petitioner contends that the trial court erred in striking that part of the record.

introduction of the tape-recorded interview<sup>7</sup> and the transcript. *Id.* Levine first asked the court to review the tape in chambers, then objected on the ground that the witness was unavailable, argued that the capital sentencing statute, section 76-3-207, prohibited the introduction of such evidence, and that the prejudicial effect of the evidence outweighed its probative value. *Id.* 647-48.

The jury was brought back and Manley was again questioned:

By Mr. Adkins:

Q. Mr. Manley, on December 22<sup>nd</sup>, 1990 you did receive a telephone call from the defendant, Von Lester Taylor, at the Freemont Center; did you not?

A. Yeah.

Q. And during that telephone conversation did the defendant tell you where he was?

A. No, plead the fifth.

Q. *During that telephone conversation did the defendant, Von Lester Taylor, tell you what he intended to do?*

A. *No.*

Q: And during that telephone conversation did the defendant—

*THE COURT: Your answer is no, Mr. Manley?*

*THE WITNESS: Yeah.*

Q. *(By Mr. Adkins) He didn't tell you what he intended to do later that day?*

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<sup>7</sup> Mr. Levine had not listened to the tape-recorded interview prior to the penalty phase hearing.

A: No.

Trial TR. 656-57(emphasis added).

Manley refused to answer any other questions. The court nonetheless admitted the tape into evidence.

Trial counsel objected to the introduction of the tape citing the Sixth Amendment to the United States Constitution, art I, § 12 of the Utah Constitution and Rule 804 of the Utah Rules of Evidence and Utah Code Ann. § 76-3-207. Trial Tr, 653. Rule 23B counsel neither raised nor addressed the issue on appeal and the supreme court did not consider the matter under a plain error analysis.

#### *4. Ballistics, Less Culpable Defendant*

Linae Tiede, who entered the cabin with her mother and grandmother, was interviewed by police on December 22, 1990, the day of the incident, at 5:20 p.m.. She told Detective Rob Berry of the Summit County Sheriff's Office that Edward Deli appeared to be in charge:

Det. Berry: Okay, did Von seem to be in control of everything, was he bossing Dave around most or were they both(sic)

Linae Tiede: No, Dave was the bossiest one, but Von was like the one that did everything. Like, he shot(sic).

Von's brother confirmed the leadership role played by co-defendant, Deli. Post-Conviction R. 1405. Two days before the homicides, Steven recalled that "Deli was running the whole thing," that he was making plans for where the two would go, and how



they would get there. Mr. Taylor merely listened and went along. *Id.*

Linae Tiede, observed the shooting from five feet away. She said that Mr. Taylor carried the .38 caliber, Edward Deli carried the .44. Post-Conviction R. 759. She believes that Edward Deli fired shots from the .44 while Von Taylor fired shots from the .38. *Id.* The projectiles recovered from the scene and analyzed by the Utah State Crime Laboratory show that the more serious injuries, and likely the fatal injuries, were caused by the .44 caliber weapon carried by Mr. Deli. *See* Trial Exhibits Numbers 28 to 38 (showing that six .44 mag. bullets were recovered either from the bodies Kaye Tiede and Beth Potts or floor area under bodies, while only two .38 caliber bullets recovered with only one appearing to have hit Ms. Potts or Ms. Tiede). It appears from the crime lab report that Mr. Deli inflicted all three gunshot injuries on Mrs. Potts. *See* Autopsy Report and Bullet Analysis Summary compiled by Detective Joseph Offret on 2/28/91. (In his report, Offret concludes that the three projectile injuries or gunshot wounds to Mrs. Potts were inflicted by the .44 caliber weapon, the gun carried and discharged by Mr. Deli. A copy of that report is attached as Exhibit 19 to the First Amended Petition). *See also* Testimony of James Bell Trial TR.552-73. Although the crime lab and Detective Offret conclude that one of the bullets fired from .38 caliber struck Mrs. Tiede, it appears that neither trial counsel nor Rule 23B counsel conducted any independent investigation to determine the accuracy of this conclusion or to investigate whether the wound was fatal.

*5. James Holland Testimony, Comparing Mr. Taylor to Serial Killers, Possibility of Escape, Jury Instructions, Improper Argument*

Trial counsel called James Holland, another one of his death row clients as a witness at the penalty phase. Mr. Levine had hoped to have Holland state that he was a prime candidate for the death penalty, while someone like Mr. Taylor was not. The court did not permit Holland to make the comparative analysis. Instead, Holland testified about his two convictions for murder, TR. 751, spending 40 of his 51 years in prison, TR. 750, and offered no expression of remorse for his murderous actions. TR. 754. Levine never explained how this was helpful to Mr. Taylor. Holland told the jury that prison was a place that bred violence and that prisoners must “react with violence.” TR. 754. If Levine had any thought of arguing for rehabilitation or mercy for Mr. Taylor, Holland extinguished it:

[M]ost prisons all they do is just breed hate with hate and resentment. That’s just pounded into you. There’s no form of rehabilitation.

TR, 755.

Holland also seriously hampered the argument for life by telling the jury that there was little hope in prison, that he was “never getting out so [he] might as well die,” and “[i]f they sentence [him] to die all [he] say[s] is, ‘come on, I’m not fighting you.’” This testimony was effectively used by the state to argue for death.<sup>8</sup> Holland knew nothing of

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<sup>8</sup> Indeed, the prosecution seized upon this theme during closing:

So you’re going to put him in that prison and he’s going to be part of it. I would submit he doesn’t need to be part of it.

TR. 855.

this case and said nothing positive about Mr. Taylor. Instead, Holland created the impression that prison would only make Mr. Taylor more violent, fill him with “hate and resentment,” and offer “no form of rehabilitation,” all of which made the jury’s vote for death easier.

During the penalty phase, the prosecution called Medical Examiner Investigator James Bell. Trial TR. 550. Bell conducted a portion of the investigation and gathered some of the evidence. *Id.* 552-73. In May, 1991, Bell had accepted a job with the FBI “investigating multiple murders and deaths.” *Id.* 552. Near the end of the direct examination the prosecution asked Bell to rate this homicide using a one to ten “grossness” scale:

Q. [by the prosecutor]: You’ve indicated that you’ve basically done hundreds of these crime scene investigations involving shootings. Mr. Levine has indicated that all shootings are gross. On a scale of one to 10, could you characterize how gross this shooting was?

A. Probably a nine.

Q. Why do you say that?

A. Because it’s a stranger-to-stranger murder, face-to-face shooting, and the victim sees it coming all the time.

Vol. III, TR, 574.

The prosecutor used this evidence forcefully and repeatedly during closing. In asking the jury to impose the death penalty, he repeated Jim Bell’s assessment that this murder is a nine on a scale of ten, Trial TR, 835, promoted Bell’s credentials as serial

killer investigator in asking the jury to evaluate or compare the “grossness” of Mr. Taylor’s conduct, *id.*, 834, and emphasized that Mr. Taylor should receive the death penalty because of Bells’ belief that this was a “coldblooded (sic) execution murder.” *Id.*

During closing argument, the state also argued that a death sentence was the only appropriate option because Mr. Taylor might escape from prison. *Id.* 855. There was no evidence presented at the penalty phase hearing that Mr. Taylor had escaped from prison, that he attempted escape from prison, or that he be would housed in a section of the prison where escape was likely. The prosecution also suggested that because Mr. Taylor left a half-way house, he might therefore escape from prison, leaving the jury only one alternative: the death penalty.

Both during the initial portion of closing argument and again during rebuttal, the prosecution told the jury that they did not have to find him guilty of the other offenses to consider those offenses as aggravating circumstances. In the first part of closing, although the prosecutor told the jury that they must find aggravating circumstances beyond a reasonable doubt, he nonetheless told the jury: “it’s not your job to say he’s guilty or not guilty of those crimes, it’s only your job to consider whether or not they should be used as aggravating circumstances.” Trial Tr. 839-40. This had the effect of misrepresenting or reducing the burden of proof to establish those aggravating circumstances. Again on rebuttal, the prosecution confused the burden of proof regarding aggravating circumstances:

I would simply remind you that the state has argued that there are a number of aggravating circumstances. Some of those are additional crimes that the defendant has not been convicted of. That's the crime of attempted murder of Rolf Tiede, the kidnappings, the robberies, the thefts, the flight afterwards, the possession of a weapon by a person on parole. *Now you don't have to find that each and everyone of these have been proven to your satisfaction beyond a reasonable doubt to impose the penalty of death.* There are a number of them, some eight or nine. And I think when you look at it you'll come to the conclusion that the state has proven each and every one of those crimes and their aggravating factors. But you don't have to find them in order to come to the determination that the appropriate penalty is death. You can find that simply from the aggravated circumstances of the killing itself.

Trial TR, 872-73 (emphasis added).

In the First Amended Petition and in the Petitioner's Response to the State's Motion for Summary Judgment Mr. Taylor raised several claims regarding error in jury instructions that were given and in the failure to give certain proposed jury instructions. Post-Conviction R.746-57. In the post-conviction pleadings, Mr. Taylor argued that the instructions were erroneous and prejudicial because they were unreasonably weighted in favor of death, there was no provision for a life sentence but only consideration for death or non-unanimous death, and there is no explanation in the record for why proposed instructions explaining the meaning of a life sentence and presumption of a life sentence were withdrawn.

#### D. Rule 23B Hearing

After Mr. Levine was discharged from further representation of both Mr. Holland and Mr. Taylor, Bruce Savage was appointed to represent Mr. Taylor. Mr. Savage raised three issues at the Rule 23B remand hearing:

- a) by misinforming Mr. Taylor about the effect of a guilty plea to capital murder charges, and what evidence would be presented at the penalty phase;
- (b) by asserting a philosophy about the role of a criminal defense attorney that conflicted with his duty to represent Mr. Taylor thus causing Mr. Taylor to plead guilty involuntarily; and
- (c) by not receiving adequate funds to represent Mr. Taylor thus creating a conflict of interest.

Mr. Savage conducted no independent investigation and raised no claims or objections regarding jury selection, jury instructions or voir dire, prejudicial evidence presented at the penalty phase, or improper arguments made by the state lawyers. *See* Rule 23B proceedings; *State v. Taylor*, at 687 (appellate counsel “fail[ed] to identify any mitigating information that might have been uncovered by additional investigation of another psychological exam”). He argued that Mr. Levine had a conflict of interest, but spend considerable time presenting evidence addressing the first prong of ineffective assistance of counsel test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). He questioned Mr. Levine about the investigation, the consultation or hiring of experts, and scope of Levine’s overall investigation and trial preparation. *See* (Statement of Facts outlined above describing Levine’s pretrial investigation). In fact, he called at least two witnesses, John Hill and Joan Watt, to testify about so-called *Strickland* standards that were in place in 1991, during Mr. Taylor’s penalty phase. Rule 23BTR, 1286-98.<sup>9</sup> He was not prepared, however, to demonstrate the prejudice prong of *Strickland*. Rule 23B

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<sup>9</sup> In fact, the court recessed to read the *Strickland* case before listening to Mr. Hill’s testimony. Rule 23BTR, 1298 & 1300.

TR, 1701-02, 1734, 1737.

F. John Hill, the director of the Salt Lake Legal Defender Association testified about lawyer competency standards in capital cases. Rule 23BTR, 1281-1386. Mr. Hill discussed minimal standards for appointment of counsel, duties of trial counsel in defending capital cases, and enactment of national performance standards in 1989. Rule 23B TR, 1319, 1345, 1353. Mr. Hill was specifically asked how an attorney should respond to harmful information in a psychological report. He responded that, at a minimum, the attorney should file a motion in limine before making any strategic decisions about use of psychological information. Moreover, Mr. Hill discussed the absolute duty to fully investigate psychological information:

Certainly negative information would have to be, you'd have to investigate to see if it could be countered. And it would be required, I think, to initiate further psychiatric examination, *physical examinations regarding organic damage*, or anything that you could to explain away the negative information contained in an alienist's report. (emphasis added)

Rule 23B TR, 1346-47(emphasis added).

Joan Watt, the chief appellate attorney from the Salt Lake Legal Defender Association reiterated the importance of conducting a thorough investigation, and like Mr. Hill, discussed the minimum or baseline standards articulated by the American Bar Association Standards for the Appointment and Performance of Counsel in Death Penalty Cases. *Id.* 1452-53.

#### E. Appellate Decision

The trial court rejected the claims of ineffective assistance. The matter was appealed to the Utah Supreme Court. The Court affirmed, but again noted the lack of evidence in addressing the prejudice prong of *Strickland*:

Taylor, on the other hand, has failed to provide any evidence that if Levine had performed any of the suggested investigations, the outcome of the trial would have differed. He does not even suggest what such investigation would have revealed and how the revelations would have improved his position with the jury.

*State v. Taylor*, 947 P.2d 681, 685 (Utah 1997).

Despite Rule 23B counsel’s failure to address the prejudice prong of *Strickland*, the Supreme Court nonetheless identified the “failure to pursue mitigation evidence” as an area raising “a significant question.” *Taylor*, 947 P.2d at 686. This Court noted that “the failure to perform an adequate mitigation workup represents ineffective assistance of counsel.” *Id.* at 687. The Court repeatedly recognized Rule 23B counsel’s failure to identify, develop, or present any information addressing the prejudice prong of *Strickland* as a major area of concern.<sup>10</sup>

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<sup>10</sup> The Court emphasized its frustration with Rule 23B counsel’s failure to present any helpful evidence to support Mr. Taylor’s claims:

Moreover, Taylor fails to identify any mitigating information that might have been uncovered by additional investigation or another psychological exam. . . . *Taylor*, 947 P.2d at 687

A defendant must show not only that counsel failed to seek mitigating evidence, but also that some actually existed to be found. . . . *Id.*

Taylor has not suggested a helpful strategy that would have been supported by evidence not known to Levine. Failure to investigate mitigating factors can



This Court held that “although very limited, [Levine’s mitigation investigation] appears to have been adequate.” *Taylor*, 947 P.2d at 687. Throughout the opinion, the Court expresses concern with trial counsel’s representation. *Taylor*, 947 P.2d at 689 (“Levine’s [closing] argument [was] so minimal as to represent the lower threshold of reasonableness. . . .” Although it affirmed the imposition of the death penalty the Court notes that “Levine’s representation of Taylor does not illustrate ideal defense attorney behavior.”) Justice Stewart would reverse the case noting that the mitigation investigation here was inadequate. *Id.* at 90 (Stewart, J., dissenting). Moreover, Justice Stewart held that “[Levine] clearly should have been disqualified from representing [Taylor] and any other capital defendant because of his failure to adhere to fundamental professional standards of competence and conduct.” *Id.* (Stewart, J., dissenting).

#### F. Post-Conviction Proceedings

Mr. Taylor filed a petition raising twenty-five claims. *See* Post-Conviction Record, 521. Petitioner reviewed the issues raised at the penalty phase and Rule 23B

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constitute ineffective assistance of counsel only where such factors actually exist and may be productively used in the penalty phase. . . . *Id.*

To demonstrate that counsel made an unreasonable judgment in not pursuing an investigation further, a defendant must identify potentially mitigating circumstances that the investigation would have uncovered. . . . *Id.*

[Taylor] has, quite simply, failed to identify deficiencies in Levine’s performance that had any apparent affect on the outcome of his penalty trial. . . . *Taylor*, 947 P.2d at 688

hearing, conducted a partial mitigation investigation, and identified important errors in the earlier proceedings that were neither identified nor addressed before this Court.

*1. Mitigation*

Dr. Linda Gummow, a licensed psychologist with a speciality in clinical psychology, examined Mr. Taylor to determine if he suffered from neuropsychiatric injury. Post-Conviction R. 1380. Dr. Gummow found that Mr. Taylor suffers from moderate to severe brain damage which affected his ability to “fully appreciate the wrongfulness of his conduct or conform his conduct to the requirements of law.” *Id.* 1388. She concluded that the information contained in the prior presentence reports, prison and jail medical files, prior psychological information existing in 1989, and information observed and noted by family members, “were sufficient issues in 1991 to raise the issue of brain damage as a possible explanation for Mr. Taylor’s criminal acts.” *Id.* at 1383.

Moreover, Dr. Gummow noted that Dr. Moench was unaware that Mr. Taylor had suffered from several head injuries and repeated exposure to farm pesticides.<sup>11</sup> *Id.* at 1383-84. Like Dr. Moench, Dr. Gummow also recognized how “[f]rontal lobe brain injury can be associated with violent behavior over which the individual has little control.” *Id.* at 1384.

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<sup>11</sup> Exposure to farm pesticides was a known cause of brain damage in 1991. *See Caro v. Woodford*, 280 F.3d 1247, 1249-50 (9<sup>th</sup> Cir. 2002)

Mr. Hill likewise concluded that there was sufficient evidence prior to trial so that “[t]rial counsel should have consulted a neurologist and other medical experts in this case to determine if Mr. Taylor had brain injury or brain damage.” Post-Conviction R. 1394. “It was widely known in this community and throughout the country in 1990, that a capital attorney could persuasively present evidence of brain injury to address at least two of the seven [statutory] mitigating circumstances . . . .” *Id.*

Petitioner conducted a partial mitigation investigation with the assistance of a mitigation specialist, Post-Conviction R. 729-31, an investigator with expertise in capital investigations, *id.*, 1400-08,<sup>12</sup> and a licensed psychologist with a specialty in clinical neuropsychology.<sup>13</sup> *Id.* 1380-89.

In the course of that investigation, petitioner identified a minimum of thirty-one separate sources of information relating to Mr. Taylor’s background that neither trial counsel nor appellate counsel discovered or interviewed. Post-Conviction R. 730.

In addition to brain damage, it was evident in 1991 that Mr. Taylor suffered from severe mental health problems that were known as early as 1989. In 1989, his sister Kay Auble, sent a letter to the Washington County Judge expressing grave concerns about her

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<sup>12</sup> The trial court granted the state’s motion to strike Mr. Cilwick’s affidavit on the ground that the information is not admissible in a post-conviction death penalty case. As argued below, petitioner contends that the information is admissible in a penalty phase proceeding and therefore the court erred in striking the affidavit.

<sup>13</sup> See also Ex Parte Affidavit of Richard P. Mauro Regarding Post-Conviction Duties, Post-Conviction R. 605-618 (discussing other aspects of investigation that will be necessary prior to trial or a penalty phase).

brother's mental health. She first observed these traits at an early age describing her brother as either depressed or paranoid, a loner, a person who did not fit in, and suggested the need for psychiatric intervention. *Id.* at 1328. She also described a history of alcohol abuse beginning in junior high school. *Id.*

Mr. Taylor's father also sent a letter to the Washington County judge explaining that Von never graduated from high school, had difficulty holding a job and experienced "psychological problems" as a result of a prior accident leaving a facial scar. *Id.* at 1328-29. Likewise, in 1989, his brother Robert Taylor told Diagnostic Investigator, Robyn Williams that Von "has some pretty serious mood swings," and described a prior suicide attempt. *Id.* at 1329.

Mr. Taylor also presented evidence of head injuries and exposure to farm chemicals. Mr. Taylor suffered the first head injury when he was two years old in 1967 after falling down a flight of stairs and being hospitalized. *Id.* at 1329. In 1977, he suffered a severe facial injury when an aerosol can exploded in a campfire imbedding shrapnel into his face and arm. In 1979, he was hospitalized after being thrown from a pick up truck in a roll-over accident. On April 8, 1983 he crashed his motorcycle and was again hospitalized. In elementary school, Mr. Taylor was standing upright in a plastic saucer while being pulled along the sidewalk. He fell face first landing on his forehead, causing a "doorknob-sized" bump on his forehead. In 1989, while at the Utah State Prison in Draper, Mr. Taylor hit his head on a metal stairwell. After that incident, up to

today, he suffers from severe migraine headaches and has occasionally taken medication for that malady. Post-Conviction R. 1400-05

During the 1970's and 1980's, Mr. Taylor spent summers working on the family farm in Idaho. He was repeatedly exposed to pesticides and other farm chemicals. Family members recall use of chemicals in controlling insects, various poisons used to control rodents and gophers, and use of fertilizers. These various chemicals were applied by hand, spray, and crop duster. At times, Mr. Taylor was standing under the crop duster as it sprayed chemicals on the field; at other times Mr. Taylor had direct contact with chemicals when they were sprayed by hand or while changing the sprinkler heads immediately after spraying. Mr. Taylor's sisters recall suffering from headaches and nausea after pesticides were sprayed onto the field. *Id.* at 1329, 1384, 1403-04.

Additionally, there is a significant history of substance abuse and alcoholism in Mr. Taylor's maternal and paternal families. Thomas Taylor's father was an alcoholic who died of cirrhosis of the liver. Mrs. Taylor also had a family history of alcoholism and what appears to be depression.<sup>14</sup> Four of Mr. Taylor's brothers have been treated for alcoholism, drug abuse, and mental health problems. Steven Taylor, a brother with whom Von was close to in the late 1980's, is completely disabled because of alcohol, drugs and

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<sup>14</sup> Mrs. Taylor describes conduct of parents and grandparents that today would be recognized as clinical depression, although because family members would be over one hundred years old, there was no formal diagnosis. Moreover, as Mrs. Taylor, who is nearly eighty explained, people didn't go to doctors for those things back in those days.

mental health problems. He receives social security benefits and cannot work. Steven's alcohol, drug use, and mental health problems were widely known in 1989, and are mentioned in report prepared by Dr. Moench. John Taylor, who is two years older than Von, was placed in an inpatient psychiatric unit for mental health problems and alcoholism. He has been prescribed various anti-depression medication including Zoloft and Wellbutrin. Thomas, who is a few years older than Von, has also undergone inpatient alcohol and mental health treatment at the LDS Dayspring Program. He is an admitted alcoholic who also suffers from clinical depression. Von's sister, Cheryl Nix, has been treated for clinical depression and panic disorder and takes Zoloft, Trazadone, and Paxil, and may be obsessive compulsive. Von's other sister, Sana Johnson, has been treated for clinical depression and takes various anti-depressant medication. Robert Taylor, Mr. Taylor's older brother, has also been treated for clinical depression. Post-Conviction R. 1330, 1387, 1404-05.

Von Taylor was drinking alcohol frequently during the late 1980's. In 1989, David G. Christensen, an investigator for the Utah Office of Adult Probation and Parole believed that Mr. Taylor had "a possible health reaction to alcohol." Christensen based this on three factors: (1) "a history of diabetes in the [Taylor] family and [Von's] inability to gain weight . . . indicat[ing] . . . diabetes or hypoglycemia . . . ;" (2) Von became "crazy" when he drank alcohol; and (3) Von had been drinking heavily on the night of the burglary at the Leavitt's home. *See* Presentence Investigation Report, Case No. 1991, p.

10. Christensen recommended that Mr. Taylor undergo a ninety day diagnostic evaluation “[b]ecause of [Mr. Taylor’s] exceptional family relationships and extended arrest-free history and perceived psychological problems . . .” Mr. Taylor’s consumption of alcohol was consistent with the maternal and paternal history of alcoholism in the family.

The 1989 Presentence Report contained a section styled “Substance Abuse.” A subsection of that category contained an explanation of Mr. Taylor’s alcohol use history:

Mr. Taylor reports he began drinking alcoholic beverages at approximately age fourteen. He reports this drinking was to become accepted by peers. He was drinking three to four beers on weekends, but reported when he drank he became “crazy.” He quit drinking as a teenager, but began drinking again after he became depressed in St. George, because he could not find employment and was having problems with bills. He was under the influence of drugs and alcohol at the time he committed the present offense. It is felt, because of the defendant’s actions regarding the present offense and his past alcohol abuse problems he would benefit from alcohol abuse treatment and counseling.

Von’s brother Robert, who was the Summit County Building Inspector in December 1990, recalls showing police several empty whiskey bottles and pills strewn about on tables in the Taylor family cabin which was located in close proximity to the Tiede cabin where the homicides occurred. Post-Conviction R. 1405.

Mr. Taylor’s siblings were never interviewed in preparation for the penalty phase or the Rule 23B hearing. Post-Conviction R. 1401. His siblings are much older than Von, and because of this age difference, helped raise him. If interviewed before the penalty phase, they would have described Von as a “follower,” a person who was easily lead and

manipulated. *Id.* At 1402-03. Although they loved their brother, each sibling can describe stories where Von was manipulated and nearly always lead by others. *Id.*

Mr. Taylor's siblings would all have offered powerful mitigating evidence. *Id.* 1400-06. Each would testify that Von was gentle and peaceful as a child. *Id.* at 1401. He was known for compassion and had no prior history of violence or fighting. *Id.* Each would also testify about personal, loving interactions with their brother in circumstances at the farm in Idaho, on family vacations to Flaming Gorge, Yellowstone and other places, and while the family lived in Utah. *Id.* Because Mr. Taylor had few friends, his siblings provide the most important and complete picture of Von. When the siblings were interviewed, Mr. and Mrs. Taylor, Von's parents, proclaimed that they were unaware of many the stories and antidotes that the siblings observed, because his parents were not present during the incidents.

To complement the testimony of family members, Dr. Gummow could have testified that Mr. Taylor "was not and is not a leader in social situations, and he is readily influenced by others," that he has "a positive family history with no history of juvenile infractions or diagnoses of conduct disorders," and that his "social characteristics are inconsistent with the violent acts for which he was convicted." Post-Conviction R. 1387.

Mr. Taylor raised a total of twenty-five claims most of which evolve around ineffective assistance of both trial and appellate counsel. Those claims which are largely described above consist of legal errors that made the underlying proceedings unfair, the



failure to investigate and present mitigating evidence, and general ineffective assistance of counsel claims in jury selection process, jury instructions, and prejudicial evidence presented at the penalty phase.

In response to the First Amended Petition, the state filed a motion for summary judgment. Mr. Taylor responded by asking the trial court to stay the response to the summary judgment motion and instead asked the court to allow the parties to complete discovery.<sup>15</sup> Post-Conviction R. 1062-69. The trial court denied permission to engage in discovery and instead ordered petitioner to respond to the state's motion for summary judgment. *Id.* at 1176. Mr. Taylor responded to the motion for summary judgment. *Id.* at 1304. In response to the motion for summary judgment, Mr. Taylor submitted four affidavits. The state moved to strike three of the four affidavits on the grounds that the evidence presented in one of the affidavits would not be admissible in a capital penalty

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<sup>15</sup> Utah Rule of Civil Procedure 65C(1) requires a party to seek permission from the court to conduct discovery. That provision states as follows:

Discovery under Rule 16 through 37 shall be allowed by the court upon motion of a party and a determination that there is good cause to believe that discovery is necessary to provide a party with evidence that is likely to be admissible in an evidentiary hearing. The court may require either the petitioner or the respondent to obtain any relevant transcript or court records.

Utah Rule of Civil Procedure 65C(1).

If a party does not seek permission to conduct discovery, and instead responds to a motion for summary judgment, then the pleadings are closed and no discovery is allowed. Utah R. Civ. P. 65C(i) (once a petitioner submits a response to motion for summary judgment then “[n]o further pleadings or amendments will be permitted unless ordered by the court.”)

phase, that John Hill was not a qualified expert to opine regarding a capital attorney's performance, and that hearsay relating witness statements would not be admissible at a penalty phase hearing. The trial court struck the affidavits. *Id.* at 1935.

The trial court thereafter granted the state's motion for summary judgment without an evidentiary hearing. *Id.* at 1928.

### SUMMARY OF ARGUMENT

The trial court erred in granting the state's motion for summary judgment because a material issue of fact exists regarding the claims raised in this post-conviction proceeding. The court failed to apply clearly established federal law in evaluating the ineffective assistance of counsel claims and erred in its legal conclusions. The proper application of the Post-Conviction Remedies Act should, at a minimum result in a reversal of Mr. Taylor's death sentence and a remand for a new penalty phase.

### POST-CONVICTION REMEDIES ACT, RULE 65, CASE LAW

This action was initiated pursuant to the Utah Post-Conviction Remedies Act. In 1996, the Utah Legislature enacted the Utah Post-Conviction Remedies Act, Utah Code Ann. §§ 78-35a-101 to -202, which "establishes a substantive legal remedy for any person who challenges a conviction or sentence for a criminal offense and who has exhausted all other legal remedies . . . ." Utah Code Ann. § 78-35a-102(1). The Act establishes five grounds for relief:

(a) the conviction was obtained or the sentence was imposed in violation of the United States Constitution or Utah Constitution;

(b) the conviction was obtained under a statute that is in violation of the United States Constitution or Utah Constitution;

(c) the sentence was imposed in an unlawful manner, or probation was imposed or revoked in an unlawful manner;

(d) the petitioner had ineffective assistance of counsel in violation of the United States Constitution or Utah Constitution;

(e) newly discovered material evidence exists that requires the court to vacate the conviction or sentence, because:

(i) neither petitioner nor petitioner's counsel knew of the evidence at the time of trial or sentencing or in time to include the evidence in any previously filed post-trial motion or post-conviction proceeding, and that the evidence could not have been discovered through the exercise of reasonable diligence;

(ii) the material evidence was not merely cumulative of evidence that was known;

(iii) the material evidence is not merely impeachment evidence; and

(iv) viewed with all the other evidence, the newly discovered material evidence demonstrates that no reasonable trier of fact could have found the petitioner guilty of the offense or subject to the sentence received.

Utah Code Ann. § 78-35a-104 (1).

A petitioner has the burden of proving, by a preponderance of evidence, facts necessary to grant relief. Utah Code Ann. § 78-35a-105. Once a petitioner has plead facts entitling a petitioner to relief, the respondent then has the burden of pleading grounds of preclusion as outlined in section 78-35a-106. *Id.* Once a ground has been pled, "the petitioner has the burden to disprove its existence by a preponderance of the evidence." *Id.* Section 78-35a-106 sets out the factors that preclude relief:

(1) A person is not eligible for relief under this chapter upon any ground that:

- (a) may still be raised on direct appeal or by a post-trial motion;
- (b) was raised or addressed at trial or on appeal;
- (c) could have been but was not raised at trial or on appeal;
- (d) was raised or addressed in any previous request for post-conviction relief or could have been, but was not, raised in a previous request for post-conviction relief; or
- (e) is barred by the limitation period established in Section 78-35a-107.

A person is still eligible for post-conviction relief, however, if the failure to raise the claim at trial or on appeal was due to ineffective assistance of counsel. Utah Code Ann. 78-35a-106(2).

A petition for post-conviction review is a collateral attack of a conviction and is generally not a substitute for a direct appeal. *Carter v. Galetka*, 44 P.3d 626, 633 (Utah 2001)(hereinafter “Carter III”); *Gardner v. Holden*, 888, P.2d 608 (Utah 1994). The noted exception to the above-stated rule is when unusual circumstances exist—situations where there is “an obvious injustice or a substantial and prejudicial denial of a constitutional right.” *Carter III*, at 633. *quoting Hurst v. Cook*, 777 P.2d 1029, 1035 (Utah 1989). This Court, in *Carter III*, cited to Justice Stewart’s concurrence in *Codianna v. Morris*, 660 P.2d 1101, 1114-15 (Utah 1983)(Stewart, J. concurring) in discussing unusual circumstances:

we have repeatedly declared that any claims of error or impropriety should be asserted in the regular procedure provided for on appeals and that, if that is not done, a writ of habeas corpus may not be used as a belated appeal. Nevertheless, howsoever desirable it may be to adhere to the rules, the law should not be so blind and unreasoning that where an injustice has resulted the victim should be without remedy. For that reason, as indicated in the cited cases, the writ should be available

in rare cases, where it appears that there is a strong likelihood that there has been such unfairness, or failure to accord due process of law, that it would be wholly unconscionable not to reexamine the conviction.

“When a habeas petitioner alleges that his counsel was ineffective for failing to raise an issue on appeal, we examine the merits of the omitted issue.” *Carter III*, at 639-40.

## **ARGUMENT**

### **I. THE TRIAL COURT ERRED IN STRIKING THE AFFIDAVITS OF JOHN HILL AND TED CILWICK**

Before addressing the substantive issues regarding the court’s granting of the summary judgment motion it is first important to address the trial court’s ruling on the submitted affidavits.

#### *A. John Hill Affidavit.*

The trial court ordered paragraph 11<sup>16</sup> of Mr. Hill’s affidavit struck ruling he is

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<sup>16</sup> Paragraph 11 reads as follows:

It was well known in the third district in 1990 and 1991, brain damage affects human behavior in significant and dramatic ways. There is a high correlation between brain injury and violent conduct over which the person has little control. Brain injury is often the cause of conduct associated with criminal behavior. Brain damage is associated with gross disturbances in judgment and reasoning, disinhibitions of impulses, and in personality changes. This is especially relevant to the penalty phase hearing as brain damage impairs those cognitive functions associated with an individual’s self-regulation of behavior, resulting in irrational decision making, the inability to inhibit behavioral impulses, or the inability to accurately evaluate the consequences of one’s behavior through reasoning. Evidence of brain injury is obviously a critical and important component of a

“[in]competent to offer testimony about the effects of brain damage.” Mr. Hill, however, was earlier qualified as an expert in this matter,<sup>17</sup> and testified about mitigation investigations, mental health investigations, and strategic decisions to consider in the presentation of mental health evidence in capital cases. *See* Rule 23B TR, 1281-1386. Even if Mr. Hill had not been previously qualified, his affidavit nonetheless sets forth sufficient qualifications to support his conclusions. *See Gaw State Dep’t of Transp*, 798 P.2d 1130, 1137 (Utah App. 1990) Mr. Hill is the director of the Salt Lake County Legal Defender Association. Post-Conviction R. 1392. He has represented accused persons charged with capital offenses, but more importantly, oversees and ensures that attorneys from his office are competent and qualified to represent indigent persons charged with capital offenses. *Id.* He is accordingly familiar with the standards for representation of capital defendants, how investigations of such cases should be conducted, and what types of mental health evidence are important to present in mitigation.

Mr. Hill’s opinions in paragraph 11 are legitimate expert opinions designed to address the central question in this litigation: whether prior counsel was ineffective for failing to present important evidence of brain damage to the trier of fact. Mr. Hill met the standard for expert qualification in 1995 when he testified at the Rule 23B hearing and

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penalty phase hearing because it addresses the two statutory mitigating circumstances addressed above.

<sup>17</sup> The state conceded that Mr. Hill is “an expert witness with regard to conduct of a penalty phase . . . .” Rule 23BTR, 1335.

meets the standard in his affidavit submitted with the response to the motion for summary judgment. *See* Utah Rule of Evid. 702 (“If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.”); *Gaw v. State*, 798 P.2d 1130 (Utah App. 1990)

Moreover, because of his expertise as both a capital trial attorney and director of a large public defender office, he has “consistently remained familiar with [capital] representation standards and practices. . . .” Paragraph 11 simply describes the importance of brain injury as persuasive mitigation in a capital case, how “brain injury is often the cause of conduct associated with criminal behavior,” and how that evidence is important to address two of the statutory mitigating factors under Utah’s capital sentencing statute. *See Smith v. Mullin*, 379 F.3d 919 (10<sup>th</sup> Cir. 2004) (explaining how failure to present evidence of brain injury constitutes ineffective assistance); *Caro v. Woodford*, 280 F.3d 1247, 1258 (9<sup>th</sup> Cir. 2002)(“Because it has been established that Caro suffers from brain damage, the delicate balance between his moral capability and the value of his life would certainly teeter toward life.”) *Gaw*, 798 P.2d at 1137 (articulating rule for admission of expert affidavits).

He states both the basis of his conclusion and the facts relied upon in reaching his conclusions regarding the importance of brain injury as mitigation in a capital case. *See*

*Gaw*, at 1137. The trial court accordingly erred in striking paragraph 11 from Mr. Hill's affidavit.

*B. Cilwick Affidavit*

The trial court struck Mr. Cilwick's affidavit finding that it "contains primarily hearsay that would not be inadmissible in this post-conviction case." Post-Conviction R. 1938. Pursuant to Utah Rule of Civil Procedure 56(e), an affidavit in opposition to summary judgment "shall be made on personal knowledge, *shall set forth such facts as would be admissible in evidence*, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." (emphasis added).

Mr. Cilwick is "a certified paralegal and licensed private investigator (Utah License Number 100268)." Post-Conviction R. 1400. He has received special training in the investigation of capital cases and has been court-appointed or retained in thirteen Utah capital cases – eleven at the trial level and two in post-conviction. *Id.* Mr. Cilwick has personal knowledge of the information contained in his affidavit and performed duties consistent with his role as an investigator in a capital case. Mr. Cilwick's duties were to interview family members and compile information for use in a capital penalty phase hearing.

That information is relevant and admissible in a penalty phase hearing through Mr. Cilwick. See Utah Code Ann. § 76-3-207 (1990); *State v. Kell*, 61 P.3d 1019, 1033 (hearsay in disciplinary reports "was highly probative of defendant's character and



relevant for capital sentencing purposes”); *see Wiggins v. Smith*, 123 S.Ct. 2527, 2543 (2003)(acknowledging a relaxed standard at penalty phase, Supreme Court accepts hearsay evidence of mitigation in post-conviction proceedings relayed exclusively through investigator who interviewed family members).<sup>18</sup> In light of the capital sentencing statute, this Court’s prior rulings regarding admission of hearsay at penalty phase proceedings, and the United States Supreme Court’s acceptance of hearsay under strikingly similar circumstances, petitioner contends that the trial court erred in excluding Mr. Cilwick’s affidavit.

**II. MR. TAYLOR’S GUILTY PLEA AND CONVICTION WERE UNLAWFULLY INDUCED OR NOT MADE VOLUNTARILY WITH THE UNDERSTANDING OF THE NATURE OF THE CHARGE AND THE CONSEQUENCES OF THE PLEA AND THE PLEA WAS ACCEPTED WITHOUT AN ADEQUATE FACTUAL BASIS TO SUPPORT THE CAPITAL MURDER CHARGE**

The petition raises a claim that the trial court failed to advise Mr. Taylor of certain constitutional rights he gave up when pleading guilty. This claim was never raised by any prior counsel nor did any court rule on this issue. This is a claim that should have been raised by both trial counsel and appellate counsel, but was not. Both prior counsel were ineffective for failing to raise this claim, and therefore this court may accordingly

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<sup>18</sup> Judge Noel, at the time of the penalty phase, thought hearsay evidence was admissible at the penalty phase:

“I think the court is at liberty to introduce evidence that is probative of the issues in a penalty hearing, and therefore will allow it [the hearsay statement of witness Manley] to come in.” Trial TR, at 652.

consider this claim. Utah Code Ann. § 78-35a-106 (2)(“a person may be eligible for relief on the basis that the ground could have been but was not raised at trial or on appeal, if the failure to raise that ground is due to ineffective assistance of counsel.”).

A trial judge has the responsibility of ensuring that constitutional and Rule 11 requirements are complied with when a guilty plea is entered. *State v. Gibbons*, 740 P.2d 1309, 1312 (Utah 1987). When considering motions to withdraw guilty pleas, appellate courts review the record compiled at the change of plea hearing, the change of plea affidavits and other related documents, and sometimes, the surrounding facts and circumstances underlying the plea. *State v. Dean*, 95 P.3d 276, 279 (Utah 2004); *Gibbons*, 740 P.2d at 1313; *Salazar v. Warden*, 852 P.2d 988, 992 (Utah 1993). A person is entitled to relief on a motion to withdraw a plea “only if the alleged violation of rule 11 is also a violation of his constitutional rights.” *Salazar*, 852 P.2d at 991.

To preserve this claim for review, an accused must file a motion to withdraw a plea within thirty days after entry of judgment or sentencing. *State v. Ostler*, 31 P.3d 528, 530 (Utah 2001).<sup>19</sup> When the motion lacks specific grounds for withdrawing the plea, the court can only reach the issue by applying a plain error analysis. *Dean*, 95 P.3d at 280; see *State v. Reyes*, 40 P.3d 630 (Utah 2002). The error analysis involves a two-part test:

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<sup>19</sup> When Mr. Taylor entered a guilty plea in 1991, the statute allowed an accused to file a motion to withdraw a plea within thirty days of entry of the plea. That statute was enacted in 1989. *State v. Ostler*, 31 P.3d at 530. The Utah Supreme Court has interpreted entry of plea to mean thirty days after final disposition or sentence has been imposed. *Ostler*, 31 P.3d at 530.

1. error; 2. that is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for appellant.

In this case, Mr. Taylor entered pleas of guilty to two counts of capital murder on May 1, 1991. Trial R, 105, 113-14. The court entered the Judgment and Sentence of Death on May 24, 1991. Trial R, 243-46. On June 1, 1991, eight days after entry of judgment, Mr. Taylor filed a motion to withdraw his guilty plea, citing two grounds:

1. That co-defendant Edward Deli was convicted of only second degree murder under the same facts which Defendant pleaded guilty to Capital Homicide;
2. That the Statement of Defendant signed by Defendant, VON LESTER TAYLOR, to wit: Paragraph 10 thereof, failed to appropriately and correctly advise the Defendant that a Motion to Withdraw the entry of his guilty plea could only be based upon good cause and in the discretion of the court.

The court denied the motion on June 18, 1991, addressing only the two grounds outlined above. Trial Record, 281.

To succeed on a plain error claim,<sup>20</sup> Mr. Taylor must show that an error existed, the error should have been obvious to the court and the error is harmful.

Here, the trial court neglected to inform Mr. Taylor “of the right to the presumption of innocence.” Utah R. Crim P. 11. Moreover, as more fully discussed in the petition, there was confusion regarding the use of the dismissed counts as aggravating

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<sup>20</sup> Application of the plain error analysis is the same as the ““obvious injustice or substantial and prejudicial denial of a constitutional right,”” standard which a petitioner must demonstrate to prevail in post-conviction. *Carter*, 44 F.3d at 633 (quoting *Hurst v. Cook*, 777 P.2d 1029, 1035 (Utah 1989)).

circumstances at the penalty phase.<sup>21</sup> See First Amended Petition. The court failed to clearly state that those charges could be used as aggravating circumstances at the penalty phase. Moreover, there is no explanation of the difference between his testimony at trial and testimony at the penalty phase. The court further does not explain the differences between testimony at the penalty phase which subjects Mr. Taylor to cross-examination and allocution, which does not subject him to cross-examination. Cumulatively, this error is harmful. Even though this Court partially reviewed this claim on direct appeal, Mr. Taylor nonetheless asks the Court to reconsider the claim in light of the additional evidence presented to the trial court which is discussed below.

### **III. THE TRIAL COURT ERRED IN FINDING THAT NEITHER TRIAL NOR APPELLATE COUNSEL WERE INEFFECTIVE FOR FAILING TO INVESTIGATE DISCOVER OR DETECT BRAIN INJURY AND OTHER MITIGATION EVIDENCE.**

#### *A. Trial Court Ruling*

In a novel ruling, the trial court found that appellate counsel's failure to pursue an ineffective assistance of counsel claim at the Rule 23B hearing was strategic. The court held that failure to pursue such a claim falls within the "broad range of professional judgment . . . ," of competent capital counsel. Post-Conviction R. 1950. Consistent with that ruling, the court found that "a more thorough mitigation investigation would not necessarily have been helpful . . . ," since appellate counsel was relying upon a theory of

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<sup>21</sup> This was obvious during voir dire when the trial judge told potential juror McNeil that she would not be judged to ask whether the car chase happened.

conflict of interest. *Id.*<sup>22</sup> Nonetheless, the trial court pursuant to the “unusual circumstances” test, “consider[ed] petitioner’s argument with respect to the evidence that would have been discovered had trial counsel done a more thorough mitigation workup.” *Id.* at 1951.

The trial court acknowledged that Mr. Taylor suffers from moderate to severe brain damage, but rejected that evidence because Mr. Taylor failed to “allege or demonstrate . . . that his moderate brain damage is somehow related to his criminal conduct involved in this case.” *Id.* at 1952.<sup>23</sup> The court concluded that evidence of brain injury is only relevant if an accused can establish a connection between the brain injury and the homicide. *Id.*

#### *B. Effective Assistance of Counsel*

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<sup>22</sup> Petitioner contends that appellate counsel was at best confused about what theory to pursue since he referred to both the *Strickland* standard and the conflict standard interchangeably and seemed to not understand the difference between the two arguments. See First Amended Petition, (citing to portions of Rule 23B record where appellate counsel addresses both *Strickland* claims and conflict claims). Moreover, appellate counsel spent considerable time developing a *Strickland* argument at the Rule 23B hearing as evidenced by questions asked about the investigation and performance standards that were in place for capital attorneys in 1991.

<sup>23</sup> After the court issued its findings and conclusions, petitioner filed a pleading styled Objections to Findings and Conclusions. Post-Conviction R. 1898-1905. In that pleading petitioner referred the trial court to *Tenard v. Dretke*, 124 S.Ct. 2562 (2004) which found that evidence of impaired functioning is inherently mitigating, regardless of whether an accused can establish a nexus between the mental state and the crime. *Tenard*, at 2569-70 (rejecting nexus standard as having “no foundation in the decisions of this Court”). The trial court rejected the Supreme Court’s holding in *Tenard* ruling that Mr. Taylor’s objections were “inappropriate Objections to the proposed Order . . . .”

Petitioner contends that trial counsel and appellate counsel were both ineffective for failing to investigate and discover important mitigation evidence outlined above. The court should review this matter under the unusual circumstances test. *Carter III*, 44 P.3d at 639-40. To succeed in on an ineffective assistance of counsel claim, an accused must show that counsel's performance was deficient meaning that counsel's representation fell below an objective standard of reasonableness. *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000).<sup>24</sup> Once that threshold is met, an accused must then demonstrate that the deficient performance prejudiced the defense. The prejudice prong applies a "but for" test to determine prejudice: "but for counsel's unprofessional errors, [would] the result of the proceeding have been different[?]" *Id.* at 391 "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* This two part test, which originated with *Strickland v. Washington*, 466 U.S. 668 (1984), is now part of "clearly established federal law" meaning that if a petitioner can establish the two elements of ineffectiveness, he is entitled to post-conviction relief. *Tenard*, 124 S.Ct. at 2570;

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<sup>24</sup> The United States Supreme Court has found that the standards articulated by the American Bar Association Standards for the Appointment and Performance of Counsel in Death Penalty Cases serve as an appropriate guide in determining the reasonableness of trial counsel's investigation. *Wiggins*, 2536-37 ("we long have referred [to The ABA Guidelines] as 'guides to determining what is reasonable.'" ) *quoting Strickland v. Washington*, 466 U.S. 668, 688 (1984); *see also Williams v. Taylor*, 529 U.S. 362, 396 (2000); *see also Florida v. Nixon*, 125 S.Ct. 551, 562-63 (2004) (citing to ABA Guidelines in evaluating counsel's performance at trial); *Smith v. Mullin*, 379 F.3d 919, 939 (10<sup>th</sup> Cir. 2004)(referring to ABA Guidelines in describing duties of capital defense counsel).

*Wiggins*, at 2541-42; *Williams*, 529 U.S. at 391

### *C. Mitigation Investigation*

An attorney representing a capital defendant has a duty to conduct a complete and thorough investigation in preparation for a penalty phase. *Wiggins*, at 2532 (the failure to expand the mitigation investigation beyond information in an earlier presentence report and division of social service records is ineffective assistance of counsel when post-conviction counsel showed there was additional mitigation found beyond initial reports); *Williams*, at 399 (the failure to discover and present evidence of disadvantaged background, low IQ, abuse at hands of father and failure to interview family members is ineffective assistance); see *Taylor*, at 687 (“the failure to perform an adequate mitigation workup represents ineffective assistance of counsel”).

In *Wiggins v. Smith*, the United States Supreme Court reversed Kevin Wiggins death sentence after it determined that trial counsel failed to conduct an adequate mitigation investigation. *Wiggins*, at 2141-42. Trial counsels’ investigation consisted in part of review of a presentence investigation detailing some of Wiggins’ personal history. They also reviewed “records kept by the Baltimore City Department of Social Services (DSS) documenting petitioner’s various placements in the State’s foster care system.” *Wiggins*, at 2536. The attorneys, however, conducted no further investigation, even though some of the information in the initial reports suggested the existence of helpful mitigation evidence. *Id.* (The attorneys did not expand their investigation beyond the PSI

and social services records)

In the post-conviction investigation, new counsel conducted a mitigation investigation using the information in the PSI and DSS as a starting point. Post-conviction counsel learned through family members of physical and sexual abuse, and additional mitigation evidence. *Wiggins*, at 2532-33. The investigator reviewed school records, social service records, medical records, and foster care records. In reversing Wiggins' conviction, the Court found counsel ineffective for failing to pursue further investigation:

Counsel's investigation into Wiggins' background did not reflect reasonable professional judgment. Their decision to end their investigation when they did was neither consistent with the professional standards that prevailed in 1989, nor reasonable in light of the evidence counsel uncovered in the social services records—evidence that would have led a reasonably competent attorney to investigate further. Counsel's pursuit of bifurcation until the eve of sentencing and their partial presentation of a mitigation case suggest that their incomplete investigation was the result of inattention, not reasoned strategic judgment. In deferring to counsel's decision not to pursue a mitigation case despite their unreasonable investigation, the Maryland Court of Appeals unreasonably applied *Strickland*.

*Wiggins*, at 2541-42.

In *Williams v. Taylor*, 529 U.S. 362 (2000), as in this case, trial counsel sought to present Williams as a “nice boy” during the penalty phase. The trial attorney called Williams' mother and two neighbors who both testified that he was a “nice boy” and non-violent. Williams' attorney also presented testimony from a psychiatrist who said that Williams removed bullets from a gun used in a prior robbery so as not to hurt anyone.



In the *Williams* case, as here, the penalty phase evidence was cursory and designed merely to show that some friends and his mother thought he was a nice boy. As here, there was little evidence presented in mitigation. Williams, like Mr. Taylor had a prior felony conviction where a gun was used, and like trial counsel in this case, Williams' attorney told the jury it was difficult to find a reason to spare William's life, but they should do it anyway. *Williams*, 529 U.S. at 369; *Compare Taylor*, 947 P.2d at 688 (trial counsel never asked the jury to spare his client's life, although he told them the killing must stop somewhere, stated that balancing aggravating and mitigating circumstances was extremely difficult if not impossible, but they had to do it anyway, and said to the jury that criminals like Mr. Taylor "don't think like you and I"). Like Mr. Taylor, Mr. Williams was sentenced to death. On post-conviction review, the Supreme Court reversed finding trial counsel ineffective for failing to discover and present mitigating evidence which consisted of:

1. Evidence of Williams' background;
2. Abuse at the hands of his father;
3. Testimony from correctional officers who were willing to testify that Williams did not pose a danger while incarcerated;
4. Evidence of commendation given to Williams by prison for breaking up drug ring;
5. Failing to interview or call as witnesses other people who could testify about Williams' character; and
6. Failing to discover and present evidence that Williams was borderline mentally retarded.

*Williams*, at 399 ("[T]he entire post-conviction record viewed as a whole and cumulative of mitigation evidence presented originally, raised a reasonable probability that the result

of the sentencing hearing would have been different if competent counsel had presented and explained the significance of all the available evidence.”).

The Tenth Circuit has followed the Supreme Court’s lead in mitigation cases. *See Smith*, 379 F.3d at 939(trial counsel’s failure to understand the importance of borderline intellectual functioning, mental illness and brain injury as mitigating circumstances constitutes ineffective assistance); *Battenfield v. Gibson* 236 F.3d 1215 (10<sup>th</sup> Cir. 2001)(“[Trial counsel’s] failure to investigate Battenfield’s background, and his failure to explore other readily apparent mitigation possibilities, rendered unreasonable his alleged penalty-phase strategy of focusing on sympathy and mercy”); *Cargle v. Mullin*, 317 F.3d 1196 (10<sup>th</sup> Cir. 2003). (failure to investigate and present evidence of premature birth, physical and learning problems, history of abuse at hands of father, and evidence of mother who loved him and wanted life spared, constitutes ineffective assistance of counsel); *Osborn v. Shillinger*, 861 F.2d 612, 627 (10<sup>th</sup> Cir. 1988)( Counsel’s failure to uncover mitigating family background witnesses and medical history when both were available constitutes ineffective assistance).

#### *D. Importance of Brain Injury As Mitigation*

Brain injury is an important mitigating factor in death penalty cases. *Caro*, at 1254 (evidence of brain damage “evidence would have provided powerful mitigating evidence at the penalty phase of Caro’s trial.”); *Smith*, at 942 (“The mitigating evidence omitted in Mr. Smith’s trial is exactly the sort of evidence that garners the most sympathy from

jurors.”); *See* Post-Conviction R, 1389 (Affidavit of Dr. Linda Gummow stating that brain damage can affect judgment, cause aggressiveness, and be a persuasive mitigating explanation for the person’s participation in a violent crime). A person with frontal lobe or brain injury will oftentimes participate in “violent behavior over which the person has little control.” . *Caro*, at 1253. (“Because it has been established that Caro suffers from brain damage, the delicate balance between his moral capability and the value of his life would certainly teeter toward life. Therefore, we find that counsel’s errors prejudiced Caro by rendering the results of his penalty phase trial unreliable”); *Smith*, at 941.<sup>25</sup>

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<sup>25</sup> The Tenth Circuit explained the importance of brain injury as mitigating evidence:

Brain damage generally affects three different components. One is the component we call intellectual thinking or cognitive. Another component of our development is our motor behavior, motor control.... And the third area is ... emotional control and emotional regulation. The other two areas also affect that.

The brain injury, in general, will cause damage to the centers of the brain and an injury like an hypoxic injury is known to cause damage to the particular and specific centers of the brain that are involved in emotional regulation. These are generally called the limbic areas of the brain and that's what helps to regulate and modulate our emotions.

Injury of those areas can cause all sorts of problems. Primarily, ... when a person is stressed or put in a stressful situation, their control over their emotions may break down even further. In addition to that would be intellectual and cognitive problems of brain injury.... For example, intellectually they don't understand what's going on because of the intellectual component of the brain injury, then their emotional regulation is also disrupted, and so their behavior becomes erratic or out of control or aggressive, and any number of emotional problems can result that are usually not consistent with whatever is going on in the environment around them, and that represents the direct cause of the brain injury, as well as an

“[F]rontal brain damage may hinder judgement and cause aggressiveness without necessarily diminishing one’s intelligence.” *Caro*, 280 F.3d at 1253. That is because “damage to one’s frontal lobes may not affect other brain functions controlled by the lack of the brain, such as motor skills, sensory perception, memory, and speech.” *Caro*, 280 F.3d at 1253. Indeed, person’s who have normal intelligence, perform well in jobs, and do well in school may still have brain damage that affects their conduct and behavior. *Id.* (Court granted post-conviction relief finding that defendant had brain injury despite fact that he obtained high marks in high school, performed well in Marines, had negative blood results for pesticides, reasonably high IQ, rationality of actions in covering up murders, and normal psychiatric and neurological evaluations taken both before and after his trial).

Brain injury, however, is a significantly different kind of mental impairment from competency or inquiry into insanity. *See Caro*, 280 F. 3d 1247; *Smith*, at 943. Indeed, an investigation for brain injury is unlike an investigation for insanity. Post-Conviction R. 1384 (“[t]he tests administered by Dr. Long, Dr. Moench, and Dr. Rindflesh are not generally accepted as instruments to diagnose brain damage.”); *See Caro*, 280 F.3d at 1257 (psychologist’s general investigation testimony about state of mind is not sufficient to uncover brain damage); *Smith*, 379 F.3d at 941.

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inability to cope or interact with stress or what's going on in the environment in a way that most of us would see to be reasonable or prudent or understandable.

### *E. Incomplete Investigation*

The information in the prior presentence reports, department of corrections documents, Dr. Long's evaluation suggesting significant mental disturbance, and the information in Dr. Moench's report should have put a minimally competent capital attorney on notice that additional investigation was necessary. *Wiggins*, at 2141-42 ("Their decision to end their investigation when they did was neither consistent with the professional standards that prevailed in 1989, nor reasonable in light of the evidence counsel uncovered in the social services records—evidence that would have led a reasonably competent attorney to investigate further"); *Williams*, 529 U.S. at 399;(failure to discover and present evidence of prior abuse, family character witnesses, and borderline mental retardation, constitutes ineffective assistance of counsel); *Caro*, 280 F.3d at 1249-50 (failure "to investigate and present evidence of the impact that exposure to neurotoxicants and child abuse had on his brain; the penalty phase jury was deprived of this critical explanation in determining Caro's culpability for his crime."); *Coleman v. Mitchell*, 268 F.3d 417 (6<sup>th</sup> Cir. 2001) (Failure to independently investigate mitigating evidence of defendant's personal background, psychological history and potential organic brain dysfunction and present such evidence during penalty phase, resulted in prejudice entitling defendant to post-conviction relief); *State v. Duncan*, 894 So. 2d 817 (Fla. 2004) (the failure to discover and present evidence of chronic, long lasting psychotic disturbance, evidence of delusional paranoid thinking, and possibility of brain injury is

ineffective assistance).

Here, neither trial nor appellate counsel conducted any independent investigation into Mr. Taylor's background. Levine collected no school records, independent medical records or any other records. He consulted no experts except someone named "Chuck" of Charles whose last name and topic discussed are unknown. His "investigator" possibly interviewed one police officer but prepared no reports. Her role in the case, however, was as a paralegal assigned to help organize the file. Appellate counsel likewise conducted no investigation. He readily admitted that he was unprepared to demonstrate how the result could have been different if a proper investigation had been done. Although he asked questions about gathering records, interviewing witnesses, and preparing for the penalty phase, he similarly did no investigation in any of those areas. *See Taylor*, (this Court expressed concern with the lack of investigation on the part of appellate counsel).

In addition to the evidence of brain injury, a minimal investigation would have revealed important information from family members about Mr. Taylor's lack of violence, peacefulness, and how repeated taunting by other children at school affected him. *Tenard*, 124 S.Ct. at 270 ("Virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances."); *Cargle*, 317 F.3d at 1216 (failure to call family members who would talk about love for defendant contributed to court's finding of ineffectiveness); *Battenfield*, 236 F.3d at 1226(failure

to present evidence from family and friends that defendant was known for compassion, gentleness, and lack of violence, even when provoked contributed to ineffectiveness finding); *see Carter III*, at 639-40 (no ineffective assistance when counsel presented significant mitigation including evidence of troubled childhood, brain injury causing increased likelihood of violence, history of alcohol use, and evidence of love that family shared with defendant). This is important mitigation evidence that is always admissible and critical at a penalty phase. *Smith*, 379 F.3d at 942 ( “The mitigating evidence omitted in Mr. Smith’s trial is exactly the sort of evidence that garners the most sympathy from jurors.”)

Simply talking to Mr. Taylor’s family members would have revealed this important mitigation evidence.

This investigation here does not meet the minimal standards expected of a competent capital attorney. *Wiggins*, at 2537 (The baseline for reasonable performance in 1990 was set by ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases); *Smith*, 379 F.3d at 942 (“The Supreme Court has, time and again, cited "the standards for capital defense work articulated by the American Bar Association (ABA) ... as 'guides to determining what is reasonable' " performance”); ABA Guidelines, 11.8.6, p. 133. Levine’s explanation that he stopped investigating because some of the information was harmful is likewise an insufficient reason to cease the investigation. *Hutchison v. State*, 150 S.W.3d 292 (Mo. 2004)(trial court erred in ruling that further

investigation into mental health claims was unnecessary because some of the information might have been harmful); *Wiggins*, at 2537 (counsel must conduct a reasonable investigation and pursue known leads regarding mitigation in order to make informed choices about possible defenses).

*D. Failure to Present the Mitigation Evidence was Prejudicial*

The failure to discover and present evidence of brain injury and other mitigation is prejudicial. *Tenard*, at 2569-70. The trial court's finding that Mr. Taylor must first establish a nexus between brain injury before that can be used in mitigation is erroneous and has no basis in law. *Tenard*, at 2569-70 (the Court rejects nexus test as having "no foundation in the decisions of this Court.");<sup>26</sup> *Payne v. Tennessee*, 501 U.S. 808, 822 (1991) ("we have held that a state cannot preclude the sentencer from considering any relevant mitigating evidence that the defendant proffers in support of a sentence less than death. Virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances."); *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986) (The trial court's exclusion from the sentencing hearing of the testimony of the jailers and the visitor denied petitioner his right to place before the sentencing jury all relevant evidence in mitigation of punishment); *Eddings v. Oklahoma* 455 U.S. 104 (1982) (death sentence vacated when state court refused to consider as

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<sup>26</sup> The trial court was informed of the ruling in *Tenard v. Dretke* before signing the order granting summary judgment. The trial court, however, ignored that precedent instead finding petitioner's objections "to be inappropriate." Post-Conviction R. 1970.



mitigating circumstance the petitioner's unhappy childhood and emotional disturbance, including evidence of turbulent family history and beatings by a harsh father); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)

In this case, petitioner has shown that there is “a ‘reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.” *Battenfield*, 236 F.3d at 1226 (quoting *Strickland v. Washington*, 466 U.S. at 695). There is a plethora of compelling mitigation evidence that was available in 1991, but was neither discovered nor presented. The evidence here is more compelling than any of the evidence discovered in the post-conviction cases outlined above. *Compare Williams*, 529 U.S. at 399 (failure to investigate or present evidence of Williams' background, abuse at hands of father, borderline mental retardation, or to interview witnesses about Williams' background and history “raised a reasonable probability that the result of the sentencing hearing would have been different if competent counsel had presented and explained the significance of all the available evidence.”); *Caro*, 280 F.3d at 1249-50 (failure “to investigate and present evidence of the impact that exposure to neurotoxicants and child abuse had on his brain” constitutes ineffective assistance of counsel); *Battenfield*, 236 F.3d at 1234 (“[Trial counsel] failed to conduct a constitutionally adequate pretrial investigation into potential mitigation evidence which, in turn, hampered his ability to make strategic choices regarding the second-stage proceedings and competently advise his client regarding those

proceedings.”); *Brownlee v. Haley*, 306 F.3d 1043,1068 (11<sup>th</sup> Cir. 2002) (trial counsel “failed to conduct any kind of substantive investigation into [defendant’s] background or character for purposes of presenting potentially mitigating evidence at sentencing until after the jury rendered it’s advisory verdict, and that such constituted deficient performance within the meaning of *Strickland*).

The trial court’s finding that failure to present the compelling mitigation was strategic has been squarely rejected by the United States Appellate Courts. *Smith*, at 943 (The Tenth Circuit noted that trial court erroneously concluded that the mitigation evidence of brain damage evidenced by lack of impulse control was aggravating. This conclusion “reveals a fundamental misunderstanding of the purpose for which such mitigation evidence would have been presented.”); *Williams*, 529 U.S. at 369 (nice boy image argument is not a substitute for mitigation evidence of abuse at hands of father, borderline mental retardation, and failure to interview witnesses about Williams good character); *Battenfield*, 236 F.3d at 1229 (“[Trial counsel’s] failure to investigate Battenfield’s background, and his failure to explore other readily apparent mitigation possibilities, rendered unreasonable his alleged penalty-phase strategy of focusing on sympathy and mercy.”)

The chief problem with the trial court’s analysis is the failure to address the incomplete nature of the mitigation investigation and the importance of a complete investigation in making strategic choices. *See.g., Battenfield*, 236 F.3d at 1226 (ignoring

prior evidence of head injury, substance abuse problem, history of substance abuse in family, and evidence from family and friends that defendant was known for compassion, gentleness, and lack of violence is ineffective even though counsel argued for mercy and compassion).

If the known mitigation evidence were presented in this case, the result would have been different. Prior to 1989, Mr. Taylor had no prior criminal history and was generally known as a non-violent and compassionate person. His siblings would have testified about his lack of prior violence, gentleness, and how he avoided conflict as a child. Post-Conviction R. 1400-08; *See Battenfield*, 236 F.3d at (trial counsel ineffective for failing to present evidence from family and friends that defendant was known for compassion, gentleness, and lack of violence, even when provoked). The known evidence of brain injury, however, is perhaps the most compelling mitigation evidence. Here, Levine never even argued that any of the two powerful statutory mitigating circumstances existed.<sup>27</sup> The two that did exist here—the defendant was under the influence of extreme mental or emotional disturbance and the defendant failed to conform his conduct to the requirement of law or appreciate the wrongfulness of his actions as a result of a mental disease or defect—are alone sufficient to tip any balance in favor of life over death. *Caro*, at 1258 (“Because it has been established that Caro suffers from brain damage, the delicate

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<sup>27</sup> On the contrary, trial counsel wrongly and continually emphasized to the jury that Mr. Taylor had no mental health problems.

balance between his moral capability and the value of his life would certainly teeter toward life.”); *Brownlee*, 306 F.3d at 1073-74 (“our confidence in the jury’s balancing of the aggravating and mitigating circumstances, and it’s resulting recommendation of death has been substantially undermined as a result of counsel’s failure to present to the jury of any of the powerful [mental health] mitigating evidence that was available.”).

Other evidence shows that Mr. Taylor was the minor participant both in terms of playing a lesser role in the offense and because the co-defendant was the leader. *See* Utah Code Ann. § 76-3-207(section addressing minor participant); *Osborn v. Shillinger*, 861 F.2d 612 (10<sup>th</sup> Cir. 1988) (Trial counsel’s failure to adequately investigate his client’s potential lesser role compared to the co-defendant’s is one of the bases for reversing death sentence); Post-Conviction R. 1400-06. His family members would provide potent evidence that Von was easily lead and manipulated from an early age up until the time of the homicide. Indeed, in the days before the homicide, Steven Taylor, Von’s brother observed both Von and co-defendant Deli. Steven would have testified that Edward Deli was the person making all the plans for where the two would go, how they would obtain money, and what they would do. *See* Cilwick Affidavit. Steven observed Von listening and merely going along with the things said by Deli.

Steven’s observations were confirmed by Linae Tiede who told police that Deli, was in charge or the “bossy one,” and that Von did everything. This is consistent with his life history of being easily manipulated and following behind a more dominant person—the

very type of evidence that would have been presented had trial counsel interviewed Mr. Taylor's siblings. This is the type of statutory mitigating evidence that should have been presented at the penalty phase. *See* Utah Code Ann. § 76-3-207 (2)(c)(1990)(the defendant acted under extreme duress or under the substantial domination of another person). Presentation of this evidence would tip the scales in favor of life.

**IV. THE JURY INSTRUCTIONS WERE ERRONEOUS IN THAT THEY WERE UNFAIRLY WEIGHTED TOWARD DEATH, THE REASONABLE DOUBT INSTRUCTION VIOLATES DUE PROCESS, AND THE FAILURE TO GIVE SEVERAL INSTRUCTIONS PROPOSED BY MR. TAYLOR WAS PREJUDICIAL**

A. Jury Instructions

The jury instructions are found in the court record at pages 196 to 230. The reasonable doubt instruction is instruction No. 10, pages 206-07 . The instructions that are unconstitutionally and unfairly weighted toward death are found in instructions Nos. 10 to 27, pages 205-224 . The special verdict instruction, asking the jury to count and score the aggravating circumstances, is attached to the numbered jury instructions contained in the record at pages 226 and 227. The mitigation instruction is instruction No. 12 at page 208. Taylor's proposed mitigation instruction appears on page 149, the proposed life sentence instruction appears at page 155.

The proposed jury instructions submitted by trial counsel appear in the record at pages 143 to 155. The proposed instruction regarding the mitigating circumstances (R.

149) sets out circumstances that the jury may consider. The court’s instruction (R. 208), however, suggests that the jury must make a specific finding regarding the existence of the mitigating factor, before it can count it as a mitigating factor. The proposed instruction instructs the jury “that it may consider as mitigating circumstances the following: . . .” (R. 149), and then it lists the statutory mitigating factors. The given instruction, however, is styled in form of “whether” the particular mitigating factor exists. For example the proposed instruction reads:

The jury is instructed that it may consider as mitigating circumstances the following:

1. The defendant has no significant history of prior criminal activity:

. . . .

The given instruction reads:

In considering mitigating circumstances, you may consider the following factors which may or may not be present:

1. Whether the defendant’s history of prior criminal history is insignificant:

. . . .

The proposed instruction is simpler, more easily understood, and more accurately states the purpose of mitigating circumstances.

B. Improper Burden Shifting– Unfairly Weighted Toward Aggravation–

### Failure to Narrow.

Instruction number 10 addresses the standard for the jury to follow in weighing aggravating and mitigating circumstances. (Instruction No. 10 is attached to the First Amended Petition as Exhibit 15). That instruction states that factors in aggravation and mitigation should be considered “in terms of their respective substantiality and persuasiveness,” suggesting that mere numbers of aggravating factors tip the balance in favor of death. The instruction further instructs the jury “to consider the totality of evidence . . . produced by the defendant throughout the penalty phase . . . ,” suggesting that the Taylor had a burden to produce evidence that outweighed the evidence produced by the state. This instruction is inconsistent with Utah penalty phase standards. *State v. Wood*, 648 P.2d 71, 83 (Utah 1982)(setting forth two-part test: 1. aggravating circumstances must outweigh mitigating circumstances beyond a reasonable doubt, and 2. imposition of the death penalty is justified and appropriate under the circumstances beyond a reasonable doubt)

The error in that instruction is compounded by the failure of the trial court to give the presumption of life instruction proposed by Taylor, Trial R. 154, the overwhelming number of jury instructions addressing aggravating factors, and jury instruction number 27 which contains no provision for consideration of a life sentence. R. 224. Moreover, the ineffectiveness of trial counsel in failing to conduct adequate investigation of mitigating factors, or to present or argue mitigating factors lead to imposition of the death

penalty here.<sup>28</sup> Finally, the prosecutor told the jury during closing that the state did not to prove the listed aggravating circumstances to return a verdict of death. See Claim Twenty-Three In First Amended Petition and Argument Below.

Indeed, the vast number of instructions addressing aggravating circumstances, along with the special verdict aggravator checklist, unfairly weighted the aggravating factors against Taylor and in favor of a death verdict.

### C. Reasonable Doubt.

The reasonable doubt instruction is part of Instruction No. 10. That instruction neither adequately explains nor legally describes the reasonable doubt standard. *See Cage v. Louisiana*, 498 U.S. 39 (1990); *State v. Reyes*, — P.3d — WL 1330791 (Utah 2005)

### D. Presumption of Life.

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<sup>28</sup> As the Supreme Court noted, Levine’s closing argument was “not a model of persuasive rhetoric:”

Levine began by telling a Native American story about how death came into the world but then failed to connect the story to his argument. Levine never asked the jury directly to spare his client’s life although he did say that ‘the killing has to stop somewhere.’ He told the jurors that balancing mitigating and aggravating factors meaningfully was extremely difficult if not impossible but that they had to do it anyway. He emphasized that Taylor himself thought his own crimes were ‘gross’ and ‘vile.’ He repeatedly reminded the jury that Taylor, like criminals generally, did not think like ‘you and I.’ He mentioned, but did not elaborate on, the only mitigating factors he had, i.e., Taylor’s relative youth and clean record. Overall, Levine did not give a virtuoso performance.

*Taylor*, 947 P.2d at 688.



Trial counsel proposed an instruction that read:

All presumptions of law, independent of evidence, are in favor of life imprisonment until and unless you as jurors, after considering the totality of the aggravating and mitigating circumstances, are persuaded beyond a reasonable doubt that the total aggravation outweighs total mitigation and, you are further persuaded, beyond a reasonable doubt, that the imposition of the death penalty is justified and appropriate under the circumstances.

R. 154 (A copy of that instruction is attached as Exhibit 16 to the First Amended Petition).

A note appears at the bottom of the instruction reading “not given–fGN–5-21-91.”

This is a proper statement of Utah law and a jury instruction approved by the Utah Supreme Court. *State v. Holland*, 876 P.2d 357 (Utah 1994). There is no explanation for excluding that instruction and no record of trial counsel’s exception or objection to the failure to give that instruction.

#### E. Life Sentence Instruction.

Trial counsel proposed an instruction which read:

Life imprisonment means that the defendant will be incarcerated in the Utah State Prison for the remainder of his natural life, unless and if ever, he is paroled by the Board of Pardons.

R. 155 (A copy of that Instruction is attached as Exhibit 17 to the First Amended Petition).

A note at the bottom of that instruction reads “given fGN” which is crossed out.

Below the crossed out section it reads, “withdrawn fGN 5-21-91.” This was a proper statement of law in 1991. It was particularly important given the prosecutor’s argument that Mr. Taylor might escape from prison and constitutes a continuing danger while in prison. *See generally Simmons v. South Carolina*, 512 U.S. 154 (1994) (defendant was denied due process when trial court refused to instruct sentencing jury that life sentence meant no possibility of parole). This instruction would have mitigated the prosecution’s argument regarding possibility of escape and accurately explained to the jury the meaning of a life sentence.

F. No Option for Consideration of Life.

Instruction No. 27 (attached as Exhibit 18 to the First Amended Petition) fails to instruct the jury that life is an option. Rather the instruction gives the jury two options: 1. A unanimous finding for death; or 2. A non-unanimous finding of death. This instruction tells the jury that the only deliberation or debate in this case is for death. It fails to instruct that life is an appropriate option or an appropriate topic for debate during deliberation. The sole option given to the jury was for death or for non-unanimous death if the jury was “reasonably satisfied that [they] will not reach a unanimous verdict of death.” The life option is erroneously absent from the instruction.

Trial counsel was ineffective for failing to object to the jury instructions at the penalty phase. Trial TR, 826. Although trial counsel submitted proposed instructions addressing mitigation, presumption of life, and the meaning of life in prison, there is no

explanation for why he failed to take exceptions or object to the failure to give his proposed instructions. The court states that the parties “had an opportunity to discuss jury instructions and verdict forms, etc., in chambers. . . ,” and then asked both trial counsel and the state if either had “exceptions or objections to the jury instructions, the special interrogatories or the verdict form.” Trial Transcript, 826. Inexplicably, trial counsel stated, “No, your honor. I’m satisfied with the jury instructions the court is going to give.” *Id.* 826. Trial counsel’s only objection related to the court’s restrictions to the testimony of death row inmate Holland.<sup>29</sup> Trial TR. 826

This error was critical given the paucity of trial counsel’s argument and failure to ask the jury to spare Taylor’s life. Moreover the error was compounded by Levine’s failure to conduct any meaningful mitigation investigation or to object to any of the highly prejudicial evidence admitted by the prosecution at the penalty phase. *See* Argument Below Regarding Admission of Manley Tape, Prosecution Misconduct and “Grossness Measurement” evidence presented by Jim Bell. The combination of trial counsel’s lack of investigation, failure to present mitigation, and the erroneous instructions weighted in favor of death was prejudicial to Mr. Taylor.

As the record shows, trial counsel did not object to either the instructions given or argued for inclusion of the instructions he submitted to the court. Trial counsel did,

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<sup>29</sup> The Utah Supreme Court condemned Levine’s attempt to call Holland as a witness at Mr. Taylor’s trial.

however, in his opening brief, raise the claim that the penalty phase jury instructions “were unconstitutional in that they either relieved the state of its burden of proof or, in the alternative, lessened the state’s burden of proof.” He argued that the instructions as written created an unlawful rebuttable presumption. He offers no explanation for failing to object at trial and instead asks the Supreme Court to “still consider these issues and make appropriate rulings on these issues, especially since this a capital homicide case.” Unfortunately, this opening brief was withdrawn upon motion of the state.

There is no indication anywhere in the several hundred pages of the Rule 23B hearing or in the Rule 23B pleadings that appellate counsel even looked at the jury instructions for error. There are no questions asked of trial counsel regarding proposed instructions, why no objections were posed to the court’s failure to give the presumption of life or explanation of life sentence instructions. There is no inquiry or discovery conducted regarding why the life sentence explanation instruction was withdrawn. Moreover, there is no mention in the voluminous record as to why the jury could only consider death and non-unanimous death in its deliberations. *See* Instruction No. 27. In short, there has been no prior judicial review of this issue. A minimally competent capital attorney should have discovered these errors, addressed these errors, and raised these matters before the trial court and Utah Supreme Court.

Rule 23B counsel was equally ineffective in failing to review the instructions for error or for reviewing the instructions and concluding there was no error. The failure to

properly instruct the jury had a substantial and injurious effect on the verdict as to render the sentence in this case unfair and unconstitutional. But for these errors with the jury instructions, Mr. Taylor would have received a sentence less than death. This error was not harmless.

## **V. THE VOIR DIRE WAS INADEQUATE TO ENSURE A FAIR & IMPARTIAL JURY – CLAIMS 14 & 15**

### A. Purpose of the Voir Dire Process

Voir dire process serves two purposes: (1) to detect bias in jurors; and (2) “the collection of data to permit informed exercise of peremptory challenges.” *State v. Taylor*, 664 P.2d 439, 447 (Utah 1983); *State v. Worthen*, 765 P.2d 839 (Utah 1988); *State v. Saunders*, 992 P.2d 951, 961 (Utah 1999). “Voir dire questioning is essential to choosing an impartial jury, and an impartial jury is as essential to a fair trial as is an impartial judge.” *Saunders*, 992 P.2d at 961. Although a trial judge has discretion in limiting voir dire, “that discretion must be ‘liberally exercised’ *in favor* of allowing counsel to elicit necessary information for ferreting out bias, whether for a for-cause challenge or a peremptory challenge.” *Id.* (quoting *Worthen*, 765 P.2d at 845)(emphasis in original).

In a death penalty case, the jurors must be asked questions about their views of the death penalty. *Lockhart v. McCree*, 476 U.S. 162 (1986); *Witherspoon v. Illinois*, 391 U.S. 510 (1968); *State v. Kell*, 61 P.3d 1019, 1027 (Utah 2002). Jurors, who state in voir

dire, that they would automatically impose the death penalty and those who would never impose death are both subject to removal for cause. *See Witherspoon*, 391 U.S. 510. Accordingly, the court’s voir dire examination should be broadly exercised in favor of exploring the juror’s viewpoints on the death penalty.

#### B. Lack of Voir Dire in This Case

In this case, trial counsel neither prepared nor submitted for consideration proposed voir dire questions either addressing guilt/innocence issues or penalty phase issues. He apparently either relied upon the state attorneys’ or the court’s questioning as sufficient. Neither he nor appellate counsel raised any objections to the voir dire process, and those matters were never addressed by the Utah Supreme Court. Both trial counsel and appellate counsel were ineffective for failing to raise the issues identified in claims 14 and 15 in the First Amended Petition. Utah Code Ann. § 78-35a-106(2)(this issue could have been was not raised on appeal).

The court unconstitutionally limited the scope of voir dire by preventing trial counsel from asking whether the jurors felt that it was their job to seek revenge for what Mr. Taylor had done. This was a particularly appropriate voir dire question given that a jury earlier that week acquitted co-defendant Deli of the capital murder charge and convicted him of a lesser-included offense.<sup>30</sup> *See Saunders*, 992 P.2d at 962 (Trial counsel

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<sup>30</sup> Trial counsel felt it important to ask this questions because he heard “[r]umblings [around the courthouse] that Mr. Deli got off, and [people] couldn’t

should be given considerable latitude in asking voir dire questions, chiefly because trial counsel is more likely to know the case better than the court).

The court also erred in preventing trial counsel from asking the jurors if they felt that life in prison was more severe than death or whether death is more severe than life in prison.

A comparison between a life sentence and death is a particularly relevant and important consideration in a death penalty case, since the only two juror options were life and death. The court stated no basis for refusing to allow trial counsel to ask these questions, and for sustaining the state's objections to these questions. The failure to allow those questions in this case was prejudicial, as none of the jurors were allowed to state their views of life versus death, preventing counsel from intelligently exercising his peremptory challenges. All trial counsel had in this case, was death-qualified jurors, without any knowledge of those jurors who might generally favor life over death. *See Saunders*, 992 P.2d at 965 (limitations on voir-dire combined with the refusal to remove for cause challenged juror were sufficiently cumulative to constitute reversible error); *Witherspoon*, 391 U.S. 510 (those who express general objections to the death penalty cannot be excluded for cause).

## **VI. SEVERAL JURORS DID NOT MEET CONSTITUTIONAL STANDARDS OF IMPARTIALITY**

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understand why he got off.” Rule 23B TR.2392.

### A. Standards For Failing to Remove Juror for Cause

A “petitioner must rebut the strong presumption that under the circumstances, the challenged action might be considered sound trial strategy.” *Carter III*, 44 P.3d at 638.

A petitioner must overcome two presumptions: 1. that counsel’s decision not to challenge a particular juror is presumed to be a conscious choice; and 2. counsel’s strategic choice to refrain from objecting to a juror is presumed to constitute effective assistance.

*Carter III*, at 638. Additionally, the court will find error if a petitioner can demonstrate one of the following three elements:

- (1) Defense counsel was so inattentive or indifferent during the jury selection that the failure to remove a prospective juror was not the product of a conscious choice or preference;
- (2) A prospective juror express bias so strong or unequivocal that no plausible countervailing subjective preference could justify failure to remove that juror; or
- (3) There is some other specific evidence clearly demonstrating that counsel’s choice was not plausibly justified.

*Carter III*, at 638-39.

At least four jurors who sat on the jury in this case expressed bias so strong or unequivocal that no plausible countervailing subjective preference could justify failure to remove that juror or trial counsel’s choice in not asking that those jurors be removed was not plausible. Moreover, the failure to remove those jurors demonstrates that trial counsel was so inattentive or indifferent that it was not the product of conscious choice or preference.

Those jurors were David Richards, Blaine Moore, Joseph Jenkins, and Cheryl



Chamberlain. Juror David Richards had an attorney client relationship with County Attorney, Bob Adkins. Trial TR, 59.<sup>31</sup> The extent of that relationship was unknown since no one asked follow up questions or probed the extent or depth of the relationship.<sup>32</sup> The court simply asked whether juror Richards could still be “fair and impartial” despite that relationship. *See Saunders*, at 962 (Juror’s statement he or she can be fair insufficient to qualify juror once answers suggesting bias are raised. Court must ask questions to explore possible bias).

Juror Blaine Moore worked with prosecutor Bob Adkins’ mother at the LDS Temple. Vol. II, TR. 53-54. Moore should have been excluded pursuant to *Witherspoon v. Illinois*, as he expressed his belief in the doctrine of blood atonement acknowledging that “anyone who kills must also be killed.” Vol. II, TR, 250. The court attempted rehabilitation by telling him that the “[LDS] Church does not accept the doctrine of blood atonement,” *id.* 250, and whether he “understand[s] that the [LDS] Church does not teach [the doctrine of blood atonement].” *Id.* 250. Moore additionally expressed frustration at housing “guilty” people in jail at taxpayer expense, *id.* 251, and doesn’t “think that’s right.” When asked if he was more inclined to impose the death penalty because Mr. Taylor “admitted to killing two individuals with a gun in an unprovoked manner,” Moore

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<sup>31</sup> The prosecution struck potential juror Philip Ovard who was a party opponent of Mr. Adkins in an earlier property transaction. Trial TR. 290, R. 126.

<sup>32</sup> The prosecutor certainly knew the extent, scope, and nature of the relationship, but disclosed none of that information to the court.

suggested that death was appropriate. Trial TR. 253.

Trial counsel appropriately moved to challenge Moore for cause “based upon his answers.” Trial TR. 254. Levine appropriately noted that Moore believed in the doctrine of blood atonement and that based upon the general tenor and demeanor of his answers could not be a “fair and impartial juror.” *Id.* The court denied the challenge. *Id.* 254. Mr. Moore should have been removed for cause. Trial counsel’s failure to remove Moore is inexplicable given Moore’s preference for imposing the death penalty in facts similar to this case. Moore is the type of juror who expresses “bias so strong or unequivocal that no plausible counterveiling subjective preference could justify failure to remove that juror.” *Carter*, at 638-39.

Joseph Jenkins, who was then director of the Summit County Health Department, told the court he was a “lifelong friend” of prosecutor Bob Adkins and worked with prosecutors Adkins and Christiansen in the county office building. Vol. II, TR. 44. He had an existing attorney/client relationship with both Mr. Adkins and Mr. Christiansen. Trial Tr. 44. Despite this apparent attorney/client relationship, neither the court nor Levine asked any follow up questions or sought to probe the extent of that relationship.<sup>33</sup> Mr. Jenkins should have been removed for cause. It is again inexplicable why trial counsel choose to retain both prosecutors’ client.

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<sup>33</sup> The prosecutors again failed to volunteer any information about the nature of existing attorney/client relationship.

Juror Cheryl Chamberlain was Judge Edward Watson's cousin,<sup>34</sup> and her son was married to prosecutor Bob Adkins' sister. Trial TR. 113. Despite her disclosure of these relationships, no one asked her to further elaborate, especially the relationship between her and Mr. Adkins. No challenge for cause was made to remove Ms. Chamberlain. Ms. Chamberlain sat on the jury that returned a verdict of death.

It is hard to imagine a jury more prone to accepting the prosecutor's argument for death. Two of the prosecutor's clients sat on the jury. Another juror, who strongly believed in the doctrine of blood atonement and worked with prosecutor's mother, also sat. The fourth juror was directly related to the prosecutor's sister. One-quarter of the jury in this case was biased and should have been removed for cause. This error is not harmless. Absent this error Mr. Taylor would have received a more favorable result.

There was also prejudice in failing to challenge for cause potential juror Wilde who explained he was a member of the LDS Church and believed in the doctrine of blood atonement acknowledging "that if somebody kills somebody, they should pay with their own life." Trial TR. 270. The court emphasized to Mr. Wilde that the LDS Church neither "teach[es]" nor "accept[s]" that doctrine. *Id.* Despite that admonition, Mr. Wilde told the court that he had formed an opinion based upon what he heard and that was for death. *Id.* 272. Trial counsel did not challenge juror Wilde for cause, but used a peremptory challenge to strike him.

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<sup>34</sup> Judge Watson heard the preliminary hearing in this case.

Potential juror McNeil witnessed the police chase in this case, Vol. II, TR, 305, which was ultimately presented and argued as an aggravating circumstance. She expressed concern about her ability to be impartial based upon her observations. *Id.* The court, incorrectly, told her that because Mr. Taylor pled guilty she would “not be asked to judge whether or not it happened.” *Id.* This was incorrect because Ms. McNeil, if chosen as a juror, would have to decide if Mr. Taylor committed the offense of fleeing, the very offense to which Ms. McNeil was a witness. Moreover, because she observed the car chase and lived close to the Tiede cabin, Ms. McNeil told the court she was “fairly biased,” against Mr. Taylor, *id.* 306, and did not think “that life in prison would be as severe a sentence as the death penalty.” *Id.* 308. Trial counsel moved to strike Ms. McNeil for cause. *Id.* 310. The judge denied the challenge *id.* 311; trial counsel struck Ms. McNeil with the use of a peremptory challenge. R. 126.

During voir dire, potential juror Dearl Shill stated that he didn’t think that life in prison was a severe sentence. Vol. II, TR. 354. When trial counsel attempted a follow up question—whether Mr. Shill feels that life in prison is an appropriate penalty based on Mr. Taylor’s admission of guilt-- the court interceded stating, “I won’t let you ask that that way.” *Id.* Later, trial counsel moved to strike Shill for cause, a challenge which was denied. Vol. II, TR. 356-57. Trial counsel later used a peremptory challenge to strike juror Shill. R. 126.

Juror Blum told the court that a lack of mental health or psychiatric evidence

would have “substantial bearing on [her] decision . . .” to impose death. Vol. II, TR. 321-22. In fact, she acknowledge that the lack of mental health evidence would “sway” her more toward the death penalty. *Id.* Despite these answers, trial counsel did not move to strike her for cause. Ms. Blum was removed from the jury by the prosecutor’s use of a peremptory challenge. R.127.

Alternate juror Dennis Gunn knew prosecutor Adkins from “being a lifelong resident” of the county. Vol.. II, TR. 64. Moreover, Gunn acknowledged that he had a previous attorney/client relationship with Mr. Adkins, occurring two years before this case. *Id.* No one asked Mr. Gunn about the basis of that representation.

Failure to strike these additional jurors was prejudicial to Mr. Taylor. Rule 23B counsel neither addressed jury issues nor raised any of those issues in the course of the Rule 23B hearing. His failure to raise these important issues is ineffective assistance of counsel.

## **VII. THE TRIAL ERRED IN FAILING TO STAY BOTH THE TRIAL AND RULE 23B HEARING TO DETERMINE MR. TAYLOR’S COMPETENCY TO PROCEED. CLAIM 21.**

### **A. The Competency Statute**

When there is a bonafide doubt as to defendant’s competency, a court is required to initiate competency proceedings and hold a competency hearing. *State v. Lafferty*, 20 P.3d 342, 361 (Utah 2001); Utah Code Ann. §77-15-5(1)(1990) *see Smith*, 370 F.3d at 930 . Those proceedings include appointment of two or more alienists, preparation of

reports, and the setting of a hearing. Utah Code Ann. § 77-15-5. After the receipt of reports, the court is not authorized to set a hearing until at least five days after the parties receive copies of the reports. *Id.* “All other proceedings pending against the defendant shall be stayed until the proceedings to determine his mental condition are terminated.” Utah Code Ann. § 77-15-5(7) (1990).

There are two types of competency claims: 1. Procedural claims that arise when trial court either fails to hold a competency hearing or fails to hold an adequate competency hearing. *Smith*, 379 F.3d at 930; and 2. Substantive claims that arise when “an individual was tried and convicted while, in fact, incompetent.” *Id.* “[T]o prevail on a procedural competency claim after a trial in which a petitioner was found competent under an unconstitutional burden of proof, the petitioner must establish that a reasonable judge should have had a bona fide doubt as to his competence at the time of trial.” *Id.* A petitioner establishes a bona fide doubt if he shows that a reasonable judge should have doubted whether petitioner had “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding’ and whether petitioner had ‘a rational as well as factual understanding of the proceedings against him.” *Id.*, quoting *Dusky v. United States*, 362 U.S. 402, 402, (1960). A defendant must be competent throughout the entire trial. See *Drope v. Missouri*, 420 U.S. 162, 171-72 (1975), *McGregor v. Gibson*, 248 F.3d 946, 954 (10<sup>th</sup> Cir. 2001).

A person making a procedural incompetence claim "need not establish facts

sufficient to show he was actually incompetent or to show he was incompetent by a preponderance of the evidence." *Id.* Rather, courts look at "evidence of ... irrational behavior, ... demeanor at trial, and any prior medical opinion" to determine whether further inquiry on the part of the trial judge was required. *Smith*, at 930 (*quoting Drope*, 420 U.S. at 180, 95 S.Ct. 896). "[E]vidence of mental illness and any representations of defense counsel about the defendant's incompetence" would also be significant. *Id.* (*quoting Walker v. Gibson*, 228 F.3d 1217, 1227 (10th Cir.2000)). "We examine the totality of the circumstances.... The question is ... whether the trial court 'fail[ed] to give proper weight to the information suggesting incompetence which came to light during trial.'" *Id.* at 955 (*quoting Drope*, 420 U.S. at 179, 95 S.Ct. 896).

#### B. Competency Issues at the Penalty Phase.

On the opening morning of the penalty phase, Mr. Taylor attempted suicide by slitting his wrists. These injuries required medical treatment and stitches. Trial TR, 30. The trial was delayed as the parties were appropriately concerned about Mr. Taylor's competency to proceed. The court meanwhile contacted Dr. Mark Rindflesh, a Salt Lake City psychiatrist, to examine Mr. Taylor. Dr. Rindflesh was the same doctor who filed a report stating that Mr. Taylor had no history of counseling or therapy from mental health professionals, "no history of mental illness," and no "psychiatric problems," all conclusions plainly contrary to known evidence existing in early 1991.

The court was properly concerned "as to whether or not Mr. Taylor [was]

competent to proceed with the penalty phase of this trial.” Trial TR. 27. Dr. Rindflesh spoke briefly with Mr. Taylor, concluding he was competent to proceed. *Id.* 28. There is no indication that he conducted any psychological or psychiatric tests and he prepared no reports. Dr. Rindflesh felt that Mr. Taylor suffered from depression, that could possibly be treated with medication. Trial TR, 31. This procedure did not comport with the statutory requirements for competency determination.

Here the court failed to give proper weight to the information suggesting incompetence. Even Dr. Rindflesh expressed reservations about Mr. Taylor’s mental health by suggesting that anti-depressant medication may allow him to save up a supply for a future suicide attempt. The court should have ordered a competency evaluation in light of Mr. Taylor’s prior mental health history, prior suicide attempts and serious suicide attempt on the morning of the penalty phase. Here, the trial court ‘fail[ed] to give proper weight to the information suggesting incompetence. *Smith*, at 955.

#### C. Rule 23B Competency Issues.

At the Rule 23B hearing, appellate counsel again raised the issue of Mr. Taylor’s competency. He described Von as “either in some sort of depression or remorse or something. His eyes are teary, he’s crying and he is – although he’s responsive to my questions in the sense of being oriented as to time and space, he is answering questions by telling me about personal feelings instead of being responsive to the questions that I’m asking.” Rule 23B, 5, 2178. These observations were confirmed by appellate counsel’s



assistant. Rule 23B, Vol. III, 5, 6, 2178. Mr. Taylor responded to questions: “I’m too depressed. I’m too depressed. I can’t do this anymore.” Rule 23B, Vol. III, 6. Appellate counsel further indicated that Mr. Taylor’s conduct is “totally and completely . . . [a] surprise.” (Vol. III, 9, 2182). Appellate counsel expressed grave concerns about his competency to proceed further in the hearing:

If Mr. Taylor is emotionally of the state that it is certainly that I’m observing – again, I am not holding myself out as any kind of an expert here – but if his emotional depression is such that he, after all of this, is willing to risk the motion of the state to pull this entire thing back, I want him examined by somebody.

Rule 23B, 2186.

During same conversation, Mr. Taylor seems confused about his options regarding the Rule 23(b) hearing and the appeal (Rule 23B, Vol. III, 17, 2190):

Q: [Mr. Voros]: Does he understand that he has an appeal even if he doesn’t have his 23(b)?

A: [Mr. Savage]: I don’t know what he understands. That’s why I said: “Do I ask him” - is what you are telling me, you want to back out, not do this and just have me do things at the Supreme Court, “yes” or “no?” The answer I got, however was not “yes” or “no”; and so as I’ve indicated, I didn’t feel like I could proceed in any direction. Vol. III, 17, R.2190

At one point during the colloquy, Mr. Taylor did not respond to the Judge’s question and instead turned toward appellate counsel. Vol. III, 30-31, R.2203-04.

Appellate counsel unequivocally moved to have Mr. Taylor evaluated for competency.

Rule 23B, 45-47. The court denied the motion finding ruling that a Rule 23B hearing was

not a proceeding contemplated by §77-15-5 and that defendant did not have a right to raise a competency claim under that provision. Rule 23B, 50-52. The trial court not only failed to give proper weight to the evidence, it simply ignored the evidence by claiming that a capital defendant never has the right to raise competency claims at a Rule 23B remand to determine ineffective assistance. This is clear error.

Although both trial counsel and Rule 23B counsel raised the issue at the trial court level, neither raised that issue on appeal and this court should review the error applying the unusual circumstance test. A minimally competent capital attorney would have requested a continuance and requested more comprehensive mental health examination aimed at determining competency. Indeed, the state statute in effect at the time called for examinations by two or more alienists to determine competency. It also called for a stay in all pending court proceedings. Utah Code Ann. § 77-15-4 (1990). The informal discussion with Mr. Taylor was simply insufficient to determine, with any degree of accuracy, Mr. Taylor's competency. Had this been done is reasonably probable that Mr. Taylor would have received a sentence other than death, especially in light of the mental health issues known today. Trial counsel's failure to move for a continuance substantially and injuriously affected the process to such an extent as to render Mr. Taylor's death sentence fundamentally unfair and unconstitutional. This error was not harmless.

Likewise, appellate counsel's failure to raise the penalty phase and Rule 23B competency claims was error. In this instance, appellate counsel described a situation

wherein Mr. Taylor could not “assist his counsel in his defense.” Utah Code Ann. § 77-15-2(2). To proceed forward under these circumstances, especially when the trial court wrongly declared that competency is never an issue at a Rule 23B hearing, is plain error.

### **VIII. THE COURT ERRED IN ADMITTING THE HEARSAY STATEMENT OF SCOTT MANLEY**

#### **A. The Manley Tape**

After Von Taylor’s arrest, police contacted parole officer Cathy Truelson who supervised Mr. Taylor at the Orange Street half-way house. *See* Detective Offret Police Report, Post-Conviction R. 763 She immediately told police that Mr. Manley might somehow be involved in the incident that occurred at the Tiede cabin either because he was with Mr. Taylor or might have provided the firearm to Mr. Taylor. The police later interviewed Mr. Manley. *Id.* When interviewed by police on December 26, 1990, Manley was also suspected of a parole violation for possessing a .357 Magnum pistol. Post-Conviction R. 1641-46.<sup>35</sup> The incident involving possession of the gun occurred on November 18, 1990, approximately five weeks before the incident at the Tiede cabin.

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<sup>35</sup> The government objected to the supplementation of the record with the Manley probation and police reports. The state does not object to the accuracy of the records; rather they make a procedural objection claiming prejudice in their ability to respond to the motion for summary judgment. The records were offered simply as background information relating to witness Scott Manley. As explained in the pleading, although the records were received by the mitigation specialist in 1998, those records were not delivered to counsel until 2003. The state was not prejudiced by supplementation of the records. Mr. Taylor contends it was error for the trial court to strike the reports from the record.

The supplemental records simply relate to Manley's criminal background, the bias he showed in offering testimony against Mr. Taylor, and his actions which cast doubt on his statements.

B. The Statement was Inadmissible

To be admissible at a penalty phase, evidence must be reliable. *State v. Brown*, 607 P.2d 261, 271 (Utah 1980). The court must act as a vigilant gatekeeper to insure that prejudicial or otherwise unreliable evidence is not presented to the trier of fact in a capital case:

Scrupulous care must be exercised by the state in capital cases in both the guilt determination and penalty phases in presentation of evidence and argument because of the acknowledged uniqueness of the death penalty.

*Brown*, 607 P.2d at 271.

The sentencing hearing in a death penalty case must further satisfy the requirements of due process. *Gardner v. Florida*, 430 U.S. 349 (1977). Courts must ensure that evidence presented in the penalty phase of death case is reliable. *See Gregg v. Georgia*, 428 U.S. 153, 192 (1976); *State v. Brown*, 607 P.2d at 271 (court found prejudicial error in admission of hearsay at penalty phase); *United States v. Gilbert*, 120 F. Supp. 3d 147 (D. Mass. 2000)(some information, admissible at normal sentencing hearings, will be unreliable and inadmissible during penalty phase of capital trial).

Hearsay statements from an unavailable third party that inculcate an accused are

presumed unreliable. *Crawford v. Washington*, 541 U.S. 36 (2004); *Lily v. Virginia*, 527 U.S. 116, 119 S.Ct. 1887 (1999); *Ohio v. Roberts*, 448 U.S. 56 (1980) *overruled by Crawford v. Washington*, 541 U.S. at 66-69; *State v. Villarreal*, 889 P.2d 419 (Utah 1995). In the guilt phase of a criminal case, those statements are never admissible because an accused cannot confront or cross-examine the witness. *Crawford*, 541 U.S. at 66 (hearsay inadmissible unless defendant was given prior opportunity to cross-examine); *Lily*, 119 S. Ct. at 1898 (when one person accuses another of a crime under circumstances where the declarant stands to benefit then the statement is suspect); *Lee v. Illinois*, 476 U.S. 530, 541 (1986) (“because the co-defendant/declarant may gain by inculcating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination.”); *Villarreal*, 889 P.2d at 424 (“It is fundamental that to ensure accuracy and reliability, testimony should be given under oath in open court with the opportunity for cross-examination.”).

Because the heightened standard of reliability attached to penalty phase evidence, hearsay statements like Manley’s should never be admissible in a penalty phase hearing. That statement was inherently unreliable, first, because when given, Manley was suspected as an accomplice. *See Lily*, 119 S.Ct. at 1898 (accomplice confessions ordinarily are untrustworthy precisely because they are not unambiguously adverse to the penal interest of the declarant but instead are likely to be attempts to minimize the declarant's culpability). Parole agent Cathy Truelson reported that Manley was involved

with Mr. Taylor and may have provided the gun used in the homicide. Moreover, even if Manley wasn't a formal suspect he still had a powerful motive to curry favor with authorities in the hope of favorable treatment on his pending parole violation. *Davis v. Alaska*, 415 U.S. 308 (1974)(partiality of a witness is subject to exploration at trial and is always relevant as discrediting witness and affecting weight of his testimony).

Both trial counsel and appellate counsel were ineffective for failing to raise this issue on appeal. If the issue had been raised on appeal, Mr. Taylor would have prevailed on that claim since it was clear error to admit Manley's hearsay statement and the statement was prejudicial. This statement was effectively and repeatedly used by the prosecutor to argue for death.<sup>36</sup> The statement was admitted despite its unreliability. Moreover, trial counsel was never given the opportunity to cross-examine Manley or introduce impeachment and bias evidence. The admission of this evidence alone is

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<sup>36</sup> The prejudice of this statement is evident from the prosecution's closing argument. The prosecution, in arguing for death, called the Manley tape "the most significant thing [they] heard . . ." on May 21, 1991, the day in which several police officers and Rolf Tiede testified. TrialTr. 831-32. He quoted extensively from the Manley transcript calling it a "premeditated murder," and that Mr. Taylor "was waiting to kill the Tiede Family." Vol. V, TR. 831-32. In arguing that there were no physical or mental problems with Mr. Taylor he again cited the Manley tape:

It isn't a situation where he made a decision instantaneously. This is a situation, ladies and gentlemen, where he knew he was going to kill these people for at least three hours based upon the telephone call to Mr. Manley and probably a lot longer than that. So I would submit there's nothing wrong with his mental or physical condition.

sufficient to undermine confidence in the jury's verdict for death. It is also unfairly prejudicial when considered with the other errors identified in the petition and discussed in this memorandum.

**IX. THE PROSECUTORS COMMITTED MISCONDUCT BY INTRODUCING PREJUDICIAL EVIDENCE, MAKING IMPROPER ARGUMENT AND MISREPRESENTING THE BURDEN OF PROOF FOR AGGRAVATING CIRCUMSTANCES**

A prosecutor is prohibited from discussing inadmissible evidence and may not “call to the attention of the jury a matter it would not be justified in considering in determining its verdict.” *State v. Lafferty*, 20 P.3d 342, 368 (Utah 2001); *State v. Kell*, 61 P.3d 1019, 1033 (Utah 2002); *State v. Saunders*, 992 P.2d 951 (Utah 1999). The Utah Supreme Court has quoted the oft-repeated standard defining prosecution conduct in a criminal trial:

A prosecuting attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilty shall not escape nor the innocent suffer. He may prosecute with earnest and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

*Saunders*, at 961 (citations omitted).

In this case, trial counsel was ineffective for failing to object to any of the

prejudicial evidence introduced in this case. Appellate counsel also failed to raise any of the issues identified below. To prevail on this claim, Mr. Taylor must show that the failure to raise these claims was due to ineffective assistance of counsel. Moreover, a petitioner must show that “absent the error, there is a reasonable likelihood of a more favorable outcome for the defendant. *Lafferty*, at 368; see *Gardner v. Holden*, 888, P.2d 608, 613 (Utah 1994). (to prevail on a claim in post-conviction, a petitioner must show the existence of fundamental unfairness).

The prosecution misconduct and overreaching began in voir dire. Every time trial counsel asked jurors in voir dire to compare a life sentence with the death penalty, the prosecution objected. Trial TR.153. No jurors were asked about the comparative seriousness of a life sentence versus the death penalty, because the prosecution objected. Trial TR. 153. The prosecution also objected to questions about the verdict in the Deli case, which received extensive press coverage after jurors convicted him of non-capital offenses. Trial TR. 210. This conduct had a chilling effect on trial counsel’s voir dire questions, as he asked very few voir dire questions after the initial objection.

During the penalty phase, the prosecution called Medical Examiner Investigator James Bell. Trial TR. 550. Bell conducted a portion of the investigation and gathered some of the evidence. *Id.* 552-73. In May, 1991, just before the penalty phase, Bell accepted a job with the FBI Serial Killer Task Force. Trial TR. 552. Near the end of the direct examination, the prosecution improperly asked Bell to rate this homicide using a



one to ten “grossness” scale:

Q. [by the prosecutor]: You’ve indicated that you’ve basically done hundreds of these crime scene investigations involving shootings. Mr. Levine has indicated that all shootings are gross. On a scale of one to 10, could you characterize how gross this shooting was?

A. Probably a nine.

Q. Why do you say that?

A. Because it’s a stranger-to-stranger murder, face-to-face shooting, and the victim sees it coming all the time.

Vol. III, TR, 574.

The prosecutor used this improper evidence forcefully and repeatedly during closing. In asking the jury to impose the death penalty, he repeated Jim Bell’s assessment that this murder is a nine on a scale of ten, Trial TR, 835, improperly promoted Bell’s credentials as serial killer investigator in asking the jury to evaluate or compare the “grossness” of Mr. Taylor’s conduct, *id.* 834, and emphasized that Mr. Taylor should receive the death penalty because of Bells’ belief that this was a “coldblooded (sic) execution murder.” *Id.* See *State v. Troy*, 688 P.2d 483 (Utah 1984)(comparing defendant to other criminals is improper and constitutes prosecutor misconduct).

The prosecution committed additional misconduct by improperly referring to the Manley tape to argue that the killings were “premeditated,” that Taylor and Deli “were stocking their prey, the Tiede Family,” and that Taylor planed “to waste them all.” Trial Tr. 830-31. See Argument Regarding Manley Tape Above; *Cargle*, 317 F.3d 1196 (prosecutor misconduct, combined with failure to present mitigation results in reversal of death sentence). This was equally egregious and improper, but was effectively used to

argue for death. Both the admissibility of the tape and the argument based on the tape were improper and prejudicial.

The prosecutor committed additional misconduct in closing argument by suggesting that a death sentence was the only appropriate option because Mr. Taylor might escape from prison. TR. 855. There was no evidence presented at the penalty phase hearing that Mr. Taylor had escaped from prison, that he attempted escape from prison, or that he would be housed in a section of the prison where escape was likely. The prejudice of that argument was exacerbated by the court's refusal to allow trial counsel to voir dire jurors about a comparative analysis between life in prison and the death penalty and by the failure to give the life imprison jury instruction. The prosecution improperly suggested that because Mr. Taylor left a half-way house, he might therefore escape from prison, leaving the jury only one alternative: the death penalty.

Both during the initial portion of closing argument and again during rebuttal, the prosecution improperly told the jury that they did not have to find him guilty of the other offenses to consider those offenses as aggravating circumstances. In the first part of closing, although the prosecutor told the jury that they must find aggravating circumstances beyond a doubt, he nonetheless tells the jury: "it's not your job to say he's guilty or not guilty of those crimes, it's only your job to consider whether or not they should be used as aggravating circumstances." Trial Tr. 839-40. This had the effect of misrepresenting or reducing the burden of proof to establish those aggravating

circumstances. Again on rebuttal, the prosecution confused the burden of proof regarding aggravating circumstances:

*Now you don't have to find that each and everyone of these [other crimes] have been proven to your satisfaction beyond a reasonable doubt to impose the penalty of death. There are a number of them, some eight or nine. And I think when you look at it you'll come to the conclusion that the state has proven each and every one of those crimes and their aggravating factors. But you don't have to find them in order to come to the determination that the appropriate penalty is death. You can find that simply from the aggravated circumstances of the killing itself.*

Vol. V, TR, 872-73(emphasis added).

The repeated misconduct identified above lead directly to imposition of the death penalty. The prosecution misrepresented standards for aggravating circumstances, improperly suggested that death was appropriate because Mr. Taylor might escape, wrongly used the Manley statement to argue premeditation, and unfairly appealed to passions of the jury by suggesting that Mr. Taylor was worse than a serial killer and scored a nine out of a possible ten on a “grossness” meter. It is hard to imagine more inflammatory rhetoric, designed to sway the passions of jurors to vote for death. The prosecution not only misrepresented the standard for finding aggravating circumstances, but then vigorously and forcefully used inadmissible evidence to argue for death.

In the absence of this misconduct, Mr. Taylor would have received a sentence less than death. The failure to object to this repeated misconduct substantially and injuriously affected the process to such an extent as to render Mr. Taylor's death sentence fundamentally unfair and unconstitutional. Absent these errors, “there is a reasonable

likelihood of a more favorable outcome for the [Mr. Taylor].” This court should accordingly review these claims under the unusual circumstances test.

#### **X. BOTH TRIAL AND APPELLATE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL**

The Post-Conviction Remedies Act and unusual circumstance test outlined in *Carter III*, recognize claims of ineffective assistance as a means of defeating the procedural bar that the arguments could have been raised on appeal, but were not. *See Carter III*, 44 P.3d at 634. To the extent that claims of ineffective assistance of counsel were not adequately expressed in the arguments above, petitioner reasserts that both trial and appellate counsel were ineffective in their representation of Mr. Taylor for the reasons stated above.

#### **XI. MR. TAYLOR’S DEATH SENTENCE IS INVALID BECAUSE THE CAPITAL MURDER AND SENTENCING STATUTE ARE UNCONSTITUTIONAL IN VIOLATION OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE UNITED STATES AND UTAH CONSTITUTIONS**

In 1990, the Utah death penalty statute had sixteen aggravating circumstances. Utah Code Ann. § 76-5-202 (1990). That statute along with the sentencing statute found in Utah Code Ann. § 76-3-207 (1990), fails to narrow the category of persons eligible for the death penalty. This argument was first considered and addressed in *State v. Young*, 853 P.2d 327, 396-410 (Durham, J, dissenting). Justice Durham explained that in order to pass constitutional muster, a death penalty statute must narrow the pool of death eligible

murders numerically, and also distinguish the death eligible murders from non-capital murders by articulating a good reason to characterize certain murders as death eligible. *Id.* at 398-99. The Utah scheme fails by having so many broad categories that virtually all intentional murders can be death penalty cases. *Id.*

The Utah capital sentencing process permits the imposition of the death penalty for any first degree murder that is accompanied by an aggravating circumstance. Moreover, the sentencing statute sets no rational boundaries or limits on the introduction of aggravating factors. Nor does the statute limit the extent or scope of aggravating factors. Mr. Taylor asks this court to consider anew the argument that the Utah capital statute is unconstitutional.

The problems associated with the imposition of death here are magnified in that there has been no meaningful appellate review of most issues raised in this petition. No one has reviewed the legality of jury instructions, the voir dire errors, jury impartiality problems, introduction of prejudicial error and prosecutor misconduct, and Rule 11 claims. Moreover, the failure to investigate mental health issues and their impact on both the plea and sentencing demonstrates a fundamental unfairness and failure to adequately narrow the category of persons eligible for death. Mr. Taylor has had no meaningful review of any claims up to this point in the process.

Neither Levine nor Savage raised this claim. In fact, Levine filed no pretrial motions, instead hoping to make any objections that might arise at trial. The court should

accordingly declare the statute unconstitutional on its face and as applied to this case.

**XII. MR. TAYLOR'S DEATH SENTENCE IS INVALID UNDER THE STATE AND FEDERAL GUARANTEES OF DUE PROCESS AND EQUAL PROTECTION, THE RIGHT TO COUNSEL, AND A RELIABLE SENTENCE BECAUSE OF LEVINE'S CONFLICT OF INTEREST.**

In 1996, Levine was suspending from practicing law for three years, as a result of his simultaneous representation of James Holland and Von Lester Taylor. Post-Conviction R. 790. Levine's conduct with regard to James Holland in this case is described above. Levine called Holland as a witness. As a result of the conduct, the Utah Supreme Court disqualified Levine from both the Holland and Taylor cases, suspended him from the practice of law, and reversed Holland's death sentence. *State v. Holland*, 876 P.2d 357 (Utah 1994). In light of the additional evidence discovered in the post-conviction record and the issues that were neither raised nor addressed by the this Court, Mr. Taylor asks this Court to reconsider the conflict of interest claims pursuant to the unusual circumstance test.

**XIII. MR. TAYLOR'S DEATH SENTENCE IS INVALID UNDER THE FEDERAL AND STATE CONSTITUTIONAL GUARANTEES OF DUE PROCESS, EQUAL PROTECTION. AND A RELIABLE SENTENCE BECAUSE IMPOSITION OF THE DEATH PENALTY IS CRUEL AND UNUSUAL PUNISHMENT.**

The Eighth Amendment prohibits punishment which is inconsistent with the evolving standards of decency that mark the progress of an ordered society. *See Roper v.*

*Simmons*, 125 S.Ct. 1183 (2005)(Eighth and Fourteenth Amendments prohibit the execution of persons under the age of eighteen); *Adkins v. Virginia*, 536 U.S. 304 (2002)(execution of mentally retarded persons constitutes cruel and unusual punishment). The state constitutional provision against cruel and unusual punishment and treatment with unnecessary rigor has been interpreted similarly and perhaps provides greater protection than its federal counterpart.

The trend currently in the world is toward abolition of the death penalty. Virtually every Western European country has abolished the death penalty. Indeed, most of those countries will not extradite United States prisoners if the death penalty is possible. In 1990, the United Nations called on all member nations to abolish the death penalty. Our neighbors to north and south, Canada and Mexico, have both abolished the death penalty. Germany and South Africa, two nations with a history of violent insurrection and questionable human rights policies, have both eliminated capital punishment by adoption of constitutional provisions. Many other third world nations have outlawed the death penalty on moral, legal, and ethical grounds. The Utah government's state-sanctioned killing is inconsistent with this modern trend and evolving standards of decency that mark an ordered and maturing society.

The death penalty is unnecessary to achieve any or the legitimate societal or penological interests in Mr. Taylor's case. The gross errors committed in this case, the failure to perform or conduct investigation, the existence of mental health issues that


should have been discovered, the legal errors in the instructions, the improper plea colloquy, and other legal errors, the misconduct committed by the prosecution, and all the other facts and claims identified above, make the imposition of the death penalty cruel and unusual punishment and treatment with unnecessary rigor.

The death penalty constitutes cruel and unusual punishment and treatment with unnecessary rigor under any and all circumstances, and constitutes cruel and unusual punishment and treatment with unnecessary rigor in this case.

#### CONCLUSION

Mr. Taylor asks this Court to reverse Mr. Taylor's conviction and remand the matter to the trial court for a new trial. Alternatively, Mr. Taylor asks this Court to reverse Mr. Taylor's death sentence and remand the matter for a new sentencing phase hearing.

DATED this 28 day of June, 2005

A handwritten signature in cursive script, reading "Richard P. Mauro", written over a horizontal line.

RICHARD P. MAURO

Attorney For Von Lester Taylor



Certificate of Mailing

I hereby certify that I mailed two true and correct copies of the foregoing to Assistant Attorney General Thomas Brunker and Assistant Attorney General Erin Riley, 160 East 300 South, 6<sup>th</sup> Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, 28 day of June, 2005.

Richard P. MacLeod