

2004

Von Lester Taylor v. The State of Utah : Reply Brief

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

VON LESTER TAYLOR, :

Petitioner/Appellant, :

v. : Case No.20040262-SC

STATE OF UTAH, :

Appellee/Respondent. :

REPLY BRIEF OF APPELLANT

This is the reply 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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SUMMARY OF ARGUMENT

In his opening brief, Mr. Taylor raised thirteen arguments addressing the twenty-five claims raised in his first amended petition. The issues raised and briefed include the following:

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.

This reply brief explains the procedural history of post-conviction proceedings, the nature of the case investigation, and concerns expressed to the trial court about the funding mechanism in post-conviction cases. It then addresses the admissibility of affidavits stricken by the trial court along with an argument in support of admissibility. Finally, this brief addresses the ineffective assistance of counsel claim in the context of failing to investigate, discover and present important mitigation evidence. The issues outlined and argued in the opening brief and post-conviction pleadings address the remaining issues raised in this post-conviction proceeding.

POST-CONVICTION PROCEEDINGS

In its description of the history of post-conviction proceedings, the state suggests several years pass by before petitions and amended petitions are filed with the trial court. Absent from that discussion is a description of the litigation surrounding the lack of adequate funding in post-conviction cases. The post-conviction record in this case consists of 1983 pages of pleadings, plus several in-court hearings. At the first in-court hearing held on April 9, 1998, post-conviction counsel raised the issue of inadequate funding to complete investigation. Trial R. 2607, Motion Hearing (4/9/98), 2733.¹ There

¹ At that time the administrative cap on expenses was \$10,000 to complete all investigation in post-conviction proceedings. Utah R. Admin. P. 25-14-5.

was an extensive discussion with the judge about the inadequacy of funding to properly complete a post-conviction investigation.² Counsel argued that the sum allocated for investigation was inadequate to complete a proper mitigation investigation including investigation into mental health claims. In the intervening period, counsel filed several ex parte pleadings seeking approval of expenses for a mitigation specialist and an investigator. Throughout 1999 and 2000, the pleadings and litigation in this case evolve around the adequacy of the post-conviction funding scheme, the appropriate procedure for seeking funds,³ and what remedy applied once funds were expended.

As part of the post-conviction proceeding, Judge Noel approved expenses for a mitigation investigator in an amount up to \$25,000, \$10,000 for an investigator, and \$4,800 for a neuropsychiatric examination. Indeed, the docket entries throughout 1999 and 2000 show that the litigation involved funding issues. In November of 2000, Mr. Taylor moved to hold the Utah Division of Finance in contempt for failing to pay

² In 1998, the duties of post-conviction counsel were defined by ABA Guidelines 1989:

Counsel should consider conducting a full investigation of the case, relating to both the guilt/innocence and sentencing phases. Post-conviction counsel should obtain and review a complete record of all court proceedings relevant to the case . .

³ Mr. Taylor filed ex parte pleadings seeking funding. The state objected to that procedure. Both parties briefed the issue, and the court held several hearings regarding that matter.

“reasonable litigation expenses.” Mr. Taylor also petitioned the Division of Finance to disburse reasonable litigation expenses. The court ultimately denied all motions relating to funding.

In 2003, counsel filed an affidavit in connection with a request to conduct discovery in lieu of responding to the state’s motion for summary judgment. Post-Conviction R. 1052-61. (A copy of that affidavit is attached as Addendum “A”). That affidavit detailed the work performed on Mr. Taylor’s behalf, the amount of time spent working on the case, and additional expenses expended on Mr. Taylor’s behalf for which reimbursement was not provided. The affidavit also explains that the trial exhibits including guns and ballistic evidence are missing from the Summit County Courthouse, how the transcripts and files in the co-defendant’s case disappeared, and details the reasons for which discovery was necessary. The state objected to the motion to conduct discovery; the court agreed with the state and denied the request to conduct discovery.

ARGUMENT

I. THE CILWICK AND HILL AFFIDAVITS ARE ADMISSIBLE IN EVIDENCE

In its brief, the state argues that an affidavit prepared by an investigator with expertise in death penalty mitigation preparation is inadmissible because “it contained primarily inadmissible hearsay.” Post-conviction death penalty litigation is not traditional civil litigation in the sense that the underlying conviction stems from a criminal conviction. Moreover, the process by which death penalty cases reach the court is

governed by hybrid proceedings delineated by the rules of civil procedure, the Utah Post-Conviction Remedies Act, and Utah Rule of Civil Procedure 65C.⁴ The duties of post-conviction counsel are similarly governed by a series of rules promulgated by the American Bar Association and Utah court rules. See American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 1989 & 2003 (hereinafter “ABA Guidelines 1989” and “ABA Guidelines 2003”); Utah R. Crim P. 8.

In this case, Mr. Cilwick was retained to investigate issues relative to the mitigation investigation. See ABA Guideline 2003, 10.15.1.⁵ Mr. Cilwick has special expertise in the investigation of capital cases and performed his role in conformance with both case law requirements and ABA standards. See *Rompilla v. Beard*, 125 S.Ct. 2456 (2005) (post-conviction investigation which uncovered previously unknown mitigation

⁴ The Utah Post-Conviction Remedies Act, Utah Code Ann. §§ 78-35a-100 to-202, “establishes a substantive remedy for any person who challenges a conviction or sentence for a criminal offense and who has exhausted all other legal remedies”

⁵ “As described in the Commentary to Guideline 1.1, providing high quality legal representation in collateral review proceedings in capital cases requires enormous amounts of time energy and knowledge. The field is increasingly complex and ever changing.

. . .

[C]ollateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation in accordance with Guideline 10.7 (Subsection E(4)). As demonstrated by the high percentage of reversals and disturbingly large number of innocent persons sentenced to death, the trial record is unlikely to provide either a complete or accurate picture of the facts and issues in the case.”

ABA Guidelines 2003, 10.15.1 Commentary, p.p. 127-28.

results in setting aside death sentence); *Wiggins v. Smith*, 539 U.S. 510 (2003)(investigator with expertise in mitigation investigations discovered important mitigation evidence and relayed that information at the post-conviction evidentiary hearing); *Williams v. Taylor*, 529 U.S. 362 (2000) (post-conviction investigation revealed evidence of accused's nightmarish childhood, borderline mental retardation, and good conduct in prison and resulted in reversal of death sentence); ABA Guidelines 2003 10.7 & 10.15.1 ("Because the sentencer in a capital case must consider in mitigation, anything in the life of the defendant which might militate against the appropriateness of the death penalty for the defendant, penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history.").

The trial court found and the state argues that information uncovered by Mr. Cilwick would likely be admissible in a capital sentencing hearing, but the same evidence would be inadmissible in a post-conviction proceeding. See State's Brief 29. They argue that Rule 56(e) prohibits introduction of hearsay in post-conviction proceedings. Rule 56(e), however, does not prohibit introduction of hearsay; rather, it limits affidavits to "personal knowledge . . . [which] *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. Taylor contends that Mr. Cilwick's affidavit meets the criteria for admissibility pursuant to Rule 56(e). The information in the affidavit was compiled

pursuant to his duties as a capital mitigation investigator.⁶ See ABA Guidelines 2003, 10.7. He learned the information and compiled it as part of the mitigation case. Contrary to the state's position, that information is admissible as persuasive mitigation evidence. See *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (“[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”) (emphasis in original); *State v. Wood*, 648 P.2d 71, 88 (Utah 1982)(mental health and character evidence are admissible as mitigation in a penalty phase).

As noted in the opening brief, this same procedure was followed in *Wiggins v. Smith*, 539 U.S. 510 (2003) when an investigator like Mr. Cilwick testified in federal court about what family members told him relating to the defendant's background.⁷

⁶ “The assistance of an investigator who has received specialized training is indispensable to discovering and developing the facts that must be unearthed at trial or in post-conviction proceedings.” ABA Guidelines 2003, 4.1, Commentary, p.32.

⁷ The witness in *Wiggins* was a licensed social worker who “testified concerning an elaborate social history report he had prepared containing evidence of the severe physical and sexual abuse petitioner suffered at the hands of his mother and while in the care of a series of foster parents. Relying on state social services, medical, and school records, as well as interviews with petitioner and numerous family members, [the social worker] chronicled petitioner's bleak life history.” *Wiggins*, at 516. In its brief, the state indicates that *Wiggins* was a Maryland state post-conviction case. It was not a state post-conviction case, rather, it was a federal post-conviction case initiated in the United States District Court for the District of Maryland.

There is no state rule in a capital case that limits mitigation evidence in post-conviction proceedings in the manner the state argues. The information compiled by Mr. Cilwick is admissible in evidence. Mr. Taylor asks this court to overturn the trial court's finding striking Mr. Cilwick's affidavit.

He likewise asks this court to overturn the trial court ruling striking paragraph 11 of John Hill's affidavit. As outlined in his opening brief, Mr. Taylor contends that paragraph 11 states appropriate conclusions based on Mr. Hill's competence and expertise as an expert in a capital murder penalty phase.

II. THE PRETRIAL MENTAL HEALTH EXAMINATIONS FOR INSANITY WERE INSUFFICIENT TO UNCOVER EVIDENCE OF BRAIN INJURY.

In its brief, the state summarized the portions of the two reports prepared by Drs. Rindflesh and Moench. Those reports were prepared as part of an evaluation to determine whether Mr. Taylor met the standard of diminished mental capacity or insanity during the trial phase and were not compiled as part of the mitigation investigation. The state erroneously suggests that these general mental health evaluations prepared for the guilt phase are sufficient to bar any claims of ineffective assistance counsel relating to failure to present mitigation in the penalty phase.⁸ An examination for diminished

⁸ The Supreme Court has repeatedly held that failure to conduct a thorough investigation and present mitigating evidence constitutes ineffective assistance of counsel. *Rompilla v. Beard*, 125 S.Ct. 2456; *Wiggins v. Smith*, 123 S.Ct. 2527, 2532 (2003) (the failure to expand the mitigation investigation beyond information in an earlier

capacity, however, is materially different than an investigation for brain injury.⁹ See *Jacobs v. Horn*, 395 F.3d 92, 103 (3rd Cir. 2005) (general psychological assessments for diminished capacity are often insufficient to detect brain damage); *Daniels v. Woodford*, ___ F.3d ___ 2005 WL 2861623 (9th Cir. 2005)(reliance solely on preliminary psychological assessment constitutes ineffective assistance when a subsequent investigation employing more extensive psychological tests for penalty phase revealed brain damage); *Summerlin v. Schriro*, 427 F.3d 623, 642 (9th Cir. 2005) (“considerations of [competency and diminished capacity] are far different from those involved in a penalty phase mitigation defense.”); *Bean v. Calderon*, 163 F.3d 1073, 1078 (9th Cir. 1998)(it was unreasonable for trial counsel to base mitigation decisions solely on mental health evaluation performed to assess competency at guilt phase)

In contrast to the preliminary exams performed in 1991, Dr. Gummow performed the full neuropsychiatric test battery designed to discover and measure the existence of

presentence report and division of social services records is ineffective assistance of counsel when post-conviction counsel showed there was additional mitigation beyond the initial reports); *Williams v. Taylor*, 529 U.S. 362, 399 (2000) (The failure to discover and present evidence of disadvantaged background, low IQ, abuse at hands of father constitutes ineffective assistance); see also *State v. Taylor*, 947 P. 2d 681, 687 (Utah 1997) (“the failure to perform an adequate mitigation workup represents ineffective assistance of counsel.”).

⁹ Dr. Gummow explained in her affidavit that the examinations performed by Drs. Rindflesh and Moench as part of the diminished capacity inquiry “are not generally accepted as instruments to diagnose brain damage.” R. 1384.

brain damage.¹⁰ In this case, both trial and appellate counsel had sufficient notice to expand their investigation beyond the rudimentary reports prepared by Drs. Rindflesh and Moench. *See e.g., Wiggins*, at 2532 (the failure to expand the mitigation beyond information in an earlier presentence report and division of social services records is ineffective assistance of counsel when post-conviction counsel discovered important mitigation evidence beyond that contained in the reports). Dr. Moench specifically states in his report that the conduct observed here is consistent with someone that has brain damage, but the doctor neither had a sufficient history of head injuries to make additional recommendations nor performed the neuropsychiatric battery himself to test for brain damage. Moreover, the observations of Dr. Moench combined with the mental health and substance abuse history should have put a minimally competent lawyer on notice that more investigation was necessary. *See e.g., Wiggins*, at 2537, 2542.

¹⁰ The full neuropsychiatric battery consists of the following tests: California Computerized Assessment Package, California Verbal Learning Test-II, Complex Figure Test (Myers and Myers), Fifteen Items Test, Hare Psychopathy Checklist Revised, Halstead-Reitan Battery entire, Million Clinical Multiaxial Inventory-III, Ruff Figural Fluency, Stroop Neuropsychological Screening Test, Structured Interview of Reported Symptoms, Thurston Word Fluency, Validity Indicator Profile, Test of Malingered Memory, Wechsler Adult Intelligence Scale-III, Wechsler Memory Scale-III, Wisconsin Card Sorting Test, Wide Range Achievement Test-3 (Arithmetic), and the Woodcock Reading Mastery-Revised. Post-Conviction Record, 1385. In contrast, neither Dr. Moench nor Dr. Rindflesh conducted any formal psychological testing. It appears that Dr. Moench limited his testing to informal memory questions asking about current events, names of school teachers, and basic math questions. Post-Conviction Record, 992. Dr. Rindflesh limited his psychological assessment to something he described as an “informal mental status examination.” Post-Conviction R. 104. There is no explanation or description of what is measured by an “informal mental status examination.”

The state next contends that the discovery of the additional mitigation evidence from family members and evidence of moderate to severe brain damage would not have changed the outcome, that the issue regarding mitigation was already decided in earlier proceedings, that the new evidence does not meet the standard for unusual circumstances, and that trial and appellate counsel's "mitigation decisions met constitutional standards." State Brief, 41.

The procedural bars outlined in the Post-Conviction Remedies Act and corresponding case law are intended to prohibit petitioners from re-raising issues previously decided on direct appeal. *See Carter v. Galetka*, 44 P.3d 626, 629 (Utah 2001). This Court explained how the unusual circumstances test is applied in post-conviction proceedings:

A petition for habeas corpus is a collateral attack of a conviction and/or sentence and is not a substitute for direct appellate review. As a result, issues raised and disposed of on direct appeal of a conviction or sentence cannot be raised again in a petition for habeas corpus. Such issues are dismissed as an abuse of the writ, without ruling on the merits. Additionally, issues that could and should have been raised on direct appeal, but were not, may not be raised for the first time in a habeas corpus proceeding *absent unusual circumstances*.

Carter, at 629 (emphasis added).

Contrary to the state's position, this Court will still review claims whenever unusual circumstances exist even if the claim was or could have been raised before. *Garner v. Holden*, 888, P.2d 608, 613 (Utah 1994) ("unusual circumstances" may overcome procedural bar); *Carter v. Galetka*, 44 P.3d at 633 ("To determine unusual

circumstances, a petitioner must show that there was ‘an obvious injustice or a substantial and prejudicial denial of a constitutional right.’” *quoting Hurst v. Cook*, 777 P.2d 1029, 1035 (Utah 1989)). This Court will still review seemingly defaulted claims “to ensure that substantial justice is done.” *Carter*, 44 P.3d at 634.

Where, as here, “a habeas petitioner alleges that his counsel was ineffective for failing to raise an issue on appeal, [this Court] examine[s] the merits of the omitted issue.” *Carter*, 44 P.3d at 639.¹¹ There is no procedural default because the courts seek to ensure fundamental fairness and substantial justice is done. *Codianna v. Morris*, 660 P.2d 1101, 1114-16 (Utah 1983)(Stewart, J., concurring in result)(cited favorably in *Carter*).

The “unusual circumstance” in this case is the ineffective performance of both trial and appellate counsel. The state court decision here “was contrary to, or involved an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States. . . ,” and thus meets the standard for unusual circumstances. *Rompilla v. Beard*, 125 S. Ct. at 2462; *Wiggins*, at 520; *Williams*, 529 U.S. at 413.

As outlined more extensively in the opening brief, the second amended petition, and memorandum in opposition to summary judgment, both prior attorneys were

¹¹ The state suggests that petitioner failed to raise and preserve the claim of ineffective assistance of trial counsel and contend that the only issue before this court is whether appellate counsel was ineffective. Throughout the litigation, petitioner has always alleged that both trial and appellate counsel were ineffective. Post-Conviction R. 582-86, 1319, 1366.

ineffective for failing to conduct an appropriate mitigation investigation and for failing to present the persuasive mitigation evidence to the jury.¹² It was unreasonable for trial counsel to end the investigation when he did as the history of prior mental health problems and reference to behavior consistent with brain damage should have “led a reasonably competent attorney to investigate further.” *Wiggins*, at 2541-42.¹³ The discovery and presentation of the evidence would have changed the outcome of the proceedings below. *See e.g. Williams*, 529 U.S. at 399 (“[T]he entire post-conviction

¹² The state characterizes Mr. Taylor’s argument as one of “investigating to exhaustion” all possible mitigation evidence. Mr. Taylor has never argued that as a standard and that is not the standard recognized by either this Court or the United States Supreme Court. Rather he simply argues that the standards for investigation are set by the ABA standards and Supreme Court case law. *See Wiggins*, at 2541-42 (Counsel’s “decision to end their investigation when they did was neither consistent the professional standards that prevailed in 1989, nor reasonable in light of the evidence uncovered in the social services records – evidence that would have led a reasonably competent attorney to investigate further.”) ABA Guidelines 1989 11.4.1; ABA Guidelines 2003 10.7. The state neither cites to nor acknowledges the existence of the ABA Guidelines which the Supreme Court has long referred to as “guides to determining what is reasonable.” *Wiggins*, at 2537.

¹³ The state also suggests that petitioner argued that a so-called “boy next door” mitigation theme is “constitutionally unacceptable as a matter of law.” Petitioner made no such argument. Petitioner merely compared the case of *Williams v. Taylor* to the present case pointing out the similarities in both counsels’ deficient performances. In *Williams*, as in this case, both trial counsel did little investigation in preparation for the penalty phase. Like here, *Williams*’ attorney called witnesses including family members to talk about *Williams*’ good character and argued that he was a “nice boy.” Both trial attorneys told the jury that it was difficult to find a reason to spare his client’s life, and in both cases, the post-conviction investigation revealed significant and important mitigation evidence that would have made a difference in the sentence. In *Williams*, the Supreme Court reversed petitioner’s death sentence finding trial counsel ineffective for failing to investigate and present mitigation evidence similar to evidence in this case.

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 state further contends that if Mr. Taylor tried to present “mental health issues” it would “open the door to damaging evidence from the Moench and Rindflesh reports.” Contrary to the representation in the state’s brief, petitioner argued that the information in the Moench and Rindflesh reports was inadmissible because it failed to meet the standards of reliability for admission in a capital sentencing phase. *See* Memorandum in Support of Motion in Opposition to Summary Judgment, p.p. 30-33.¹⁴ Moreover, counsel was never in a position to make a reasoned choice about the risk of admission of the damaging evidence because he failed to pursue an appropriate mitigation investigation. *See Rompilla*, 125 S.Ct. at 2460 (attorney has a duty to conduct mitigation investigation which includes possible challenges to aggravation evidence); *Wiggins*, at 2538-39 *quoting*

¹⁴ There is a question about whether anything in the reports could be used at a penalty phase since there are procedural safeguards in place that limit the use of section 77-14-4 examinations. *See State v. Herrera*, 895 P.2d 359, 370 (Utah 1995)(admission of statements made in relation to an examination to determine diminished capacity “should be limited to rebutting an insanity defense and may not be used to show that the defendant engaged in the conduct charged. . . .”) *Herrera* also points out that a defendant is entitled to have the court review defendant statements *in camera* before the information is presented to the jury. In this case, there was no effort to limit admission of the information as trial counsel stated he never moved to exclude possibly prejudicial evidence but simply waited to hear the evidence before objecting at trial.

Strickland v. Washington, 466 U.S. 688, 690-91 (1984) (“strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.”); *Soffar v. Dretke*, 368 F.3d 441 (5th Cir. 2004)(“an actual failure to investigate cannot be excused by a hypothetical decision not to use its unknown results”). In short, he was never in a position to weigh the risk of admission of some bad evidence in exchange for the compelling nature of the mitigation evidence that did exist. *See Smith v. Mullin*, 379 F.3d 919, 942-44 (10th Cir. 2004) (rejecting district court’s finding that mental health evidence could be harmful to defendant).

The state next suggests that the evidence of brain damage here is somehow less compelling or important than the brain damage evidence discovered in the federal cases cited in Mr. Taylor’s opening brief.¹⁵ Contrary to the state’s argument, Dr. Gummow explains how the brain injury evidence “constitutes powerful and persuasive mitigation evidence.” Post-Conviction R. 1388; *Coleman v. Mitchell*, 268 F.3d 417, 452 (6th Cir. 2001)(“We find, given Petitioner’s personal background, psychological history, and

¹⁵ As noted in *Smith v. Mullin*, 379 F.3d 919, 942 (10th Cir. 2004), the state’s characterization of brain damage as unimportant mitigation evidence “reveal[s] a fundamental misunderstanding of the purpose for which such mitigation evidence would have been presented.” Moreover, the state presented no evidence challenging the finding of moderate brain damage. Dr. Gummow explained the importance of brain injury as mitigation in this case: “Although economic limitations make it currently impossible to complete the mental health investigation, the information presently known still constitutes powerful and persuasive mitigation evidence.” Post-Conviction R. 1388.

potential organic brain dysfunction, that it is reasonably probable that the presentation of even a substantial subset of the mitigating evidence detailed above, would be such that at least one juror could have found he did not deserve the death penalty.”)

They also try to cast the trial court’s finding in a manner different than stated in Findings and Conclusions. The trial court specifically found that

after incurring substantial expense in expert witness fees and undergoing fourteen hours of psychological examination, *petitioner still cannot demonstrate to the Court that his moderate brain damage is somehow related to the criminal conduct involved in this case.* It may be true, as Dr. Gummow opines, that brain damage is relevant in explaining violent or out-of-control behavior, and “that a brain-injured person often cannot fully appreciate the wrongfulness of his conduct or conform his conduct to requirements of law.” However, *Dr. Gummow has not opined that petitioner was unable to do so at the time of the homicides, or that he acted under the influence of extreme emotional disturbance.* The Court also notes that, had trial counsel raised mental health issues, the door likely would have been opened to Dr. Moench’s and Dr. Rindflesh’s reports, which contain substantial information that is prejudicial to petitioner.¹⁶

Post-Conviction R. 1952 (emphasis added).

The court’s finding requires a defendant to first “demonstrate . . . that . . . brain damage is somehow related to the criminal conduct . . . ,” before it becomes admissible at a penalty phase. The trial court here thus created a “nexus” test for admission of mitigation evidence which is simply inconsistent with and contrary to clearly established

¹⁶ Neither the trial court nor the state articulate how the so-called “prejudicial” information contained in the reports would become admissible at a penalty phase in light of this Court’s ruling in *State v. Lafferty*, 749 P.2d 1239 (Utah 1988) and other cases limiting admissibility of prejudicial evidence at a penalty phase.

federal law. *Tenard v. Dretke*, 124 S.Ct. 2562 (2004).¹⁷ The *Tenard* Court specifically rejected such a nexus test. *Tenard*, 124 S.Ct. at 2570 *quoting Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982) (“Virtually no limits are placed on relevant mitigating evidence a capital defendant may introduce concerning his own circumstances.”); *see Skipper v. South Carolina*, 476 U.S. 1, 5 (1986)(A sentencing body may not be precluded from considering, as a mitigating factor, “any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (even though the petitioner's evidence of good conduct in jail did "not relate specifically to petitioner's culpability for the crime he committed, there is no question but that such [evidence] ... would be 'mitigating' in the sense that [it] might serve 'as a basis for a sentence less than death.'”).

The state next contends that any evidence of Mr. Taylor’s lesser role in the homicides was overcome by forensic evidence and eyewitness testimony. Consistent with the arguments above, neither trial counsel nor appellate counsel were in a position to

¹⁷ Before the summary judgment order became final, the United States Supreme Court issued *Tenard v. Dretke*, 124 S.Ct. 2562, 2570 (2004) which rejected the Fifth Circuit’s nexus test as a prerequisite to admission of mitigation evidence. On August 2, 2004, petitioner submitted a pleading styled objections to findings and conclusions, Post-Conviction R. 1898, informing the court of the Supreme Court’s decision in *Tenard*. Post-Conviction R. 1903-04. The trial court reviewed the objections “in some detail” and apparently ignored the *Tenard* holding finding the *Tenard* objections “to be inappropriate. . . .” Post-Conviction R. 1970.

evaluate the viability of a lesser role mitigation claim, because neither attorney investigated or discovered evidence consistent with a lesser role. *Soffar v. Dretke*, 368 F.3d 441 *amended* 391 F.3d 703 (5th Cir. 2004)(counsel was ineffective for failing to retain a ballistics expert, who could have established that the crime scene was consistent with the surviving victim’s statement and inconsistent with defendant’s confession).

As outlined in greater detail in his opening brief, the post-conviction investigation reveals that the co-defendant, Edward Deli played a leadership role in the homicides. The state insists that if Mr. Taylor presented the co-defendant as the leader through family members and statements of eyewitnesses, then admissions about the shooting made in the psychological statements would be admissible.¹⁸ Neither trial counsel nor appellate counsel, however, were ever prepared to address this issue simply because neither investigated the viability of this mitigation evidence.

The failure to conduct a thorough mitigation investigation, given the mitigation evidence known in 1990 and 1991, is neither reasonable nor strategic. *Wiggins*, at 2537, 2542 (“any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses . . .”). When

¹⁸ An attorney nonetheless has the duty to conduct a thorough investigation of the facts underlying those admissions. See ABA Guidelines 1989 ; ABA Guidelines 2003 10.7. A recent study conducted as part of the innocence project found that in twenty-three percent of the cases, the client confessed guilt, notwithstanding his actual innocence. See ABA Guidelines 2003 10.7 note 201. Even if Mr. Taylor was the shooter, it would not preclude an argument that he was acting at the direction of the co-defendant.

viewing the record as whole, here, it is clear that counsel “put on a halfhearted mitigation case.” *Wiggins*, at 2538. Counsel called Mr. Taylor’s father who was ambivalent about the death penalty, Mr. Taylor who was concerned about giving evidence against the co-defendant which made him appear uncooperative and evasive, and James Holland, a fellow death row inmate whose testimony suggested that Mr. Taylor would be transformed into a more violent and angry person if placed in prison for life.¹⁹ He presented no evidence addressing any of the statutory mitigating circumstances, even though substantial evidence of brain injury and mental health evidence existed. See Addendum “B” (outlining the known clues and mitigation evidence that existed in 1990). He did nothing to combat or challenge the aggravating circumstances, *see Rompilla*, 125 S. Ct. at 2462, and conducted no investigation to show that the co-defendant, who received a 5 to life sentence, was more culpable and most likely delivered the fatal gunshots to both victims. Prior counsels’ failures in the penalty phase “resulted from inattention, not reasoned strategic judgment.” *Wiggins*, at 2537.

“In order for counsel’s inadequate performance to constitute a Sixth Amendment violation, petitioner must show that counsel’s failures prejudiced his defense.” *Wiggins*, at 2542 *quoting Strickland*, 466 U.S. at 692. Both in *Wiggins* and in this case, counsel

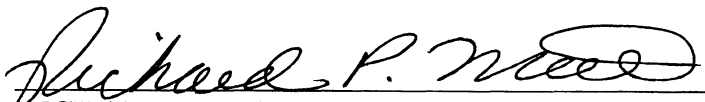
¹⁹ Neither party in this case was prepared prior to the penalty phase to present evidence of future dangerousness. After Holland testified, however, the prosecution used that evidence repeatedly and effectively in closing argument to argue for the death penalty. Holland’s testimony was actually harmful to Mr. Taylor’s case.

failed to discover and present “powerful” mitigation evidence. See Addendum “B.” The Supreme Court found that presentation of Wiggins’ severe privation at an early age, physical and sexual abuse, homelessness, and diminished mental capacities “‘might well have influenced the jury’s appraisal’ of Wiggins’ moral culpability.” *Wiggins*, at 2544 quoting *Williams v. Taylor*, 529 U.S. at 398. Similarly, discovery of the compelling mitigating evidence, here, which includes evidence of brain injury that directly impacts moral culpability, see *Caro v. Woodford*, 280 F.3d 1247, 1251 (9th Cir. 2002), substance abuse issues previously outlined and argued, the fact that Mr. Taylor is a less culpable participant, and family witnesses who describe Mr. Taylor as a generally peaceful and compassionate person are all factors that tip the balance in favor of life. See *Wiggins*, at 2543. At a minimum, Mr. Taylor is entitled to a new penalty phase.

CONCLUSION

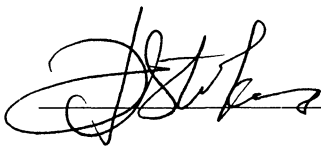
Mr. Taylor asks this Court to reverse Mr. Taylor’s conviction and remand the matter to the trial court for a new trial. Alternatively, Mr. Taylor asks this Court to reverse Mr. Taylor’s death sentence and remand the matter for a new sentencing hearing.

DATED this 5th day of December, 2005


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 Reply Brief to Thomas Brunker, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 5th day of December 2005.




ADDENDUM A

FILED DISTRICT COURT
Third Judicial District

JAN 13 2003

RICHARD P. MAURO (5402)
Attorney for Petitioner
43 East 400 South
Salt Lake City, Utah 84111
Telephone: (801) 363-9500

By  SALT LAKE COUNTY
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SUMMIT COUNTY, STATE OF UTAH

VON LESTER TAYLOR,	:	
	:	
Petitioner,	:	AFFIDAVIT OF RICHARD P. MAURO
	:	
vs.	:	
	:	
HANK GALETKA,	:	
Warden of the Utah State Prison,	:	
State of Utah	:	Case No. 990902315
	:	
Respondent.	:	Judge Frank G. Noel

Richard P. Mauro, being first duly sworn, upon oath deposes and states as follows:

1. I am an attorney in good standing licensed to practice law in the State of Utah. I have been duly licensed to practice law since May 1989.

2. I was appointed by Judge Ronald Nehring to represent Von Lester Taylor in state post-conviction proceedings pursuant to Utah Code Ann. §78-35a-109. At the time I was appointed to represent Mr. Taylor I was qualified, pursuant to Utah Rule of Criminal Procedure 8, to represent indigent defendants in capital trial proceedings. Since my appointment in this case, Rule 8 has been amended to include provisions for appointment of post-conviction counsel. Although I meet

many of the criteria for appointment of post-conviction counsel, I have not, prior to this case, represented anyone in habeas or post-conviction proceedings.

3. Since my appointment in this case, I have spent over 450 hours on this case. That time has been spent obtaining and reviewing the file, reading and reviewing penalty phase transcripts, reading and reviewing the Rule 23B pleadings and transcripts, drafting the original petition and first amended petition; drafting and compiling several ex parte motions, ex parte affidavits, and ex parte orders; drafting and filing discovery requests and subpoenas; meeting with investigators, mitigation specialists, and mental health experts; reading pertinent information and learned treatises pertaining to mitigation and mental health issues; meeting with Mr. Taylor at the Utah State Prison; traveling to and conversing with court personnel in Summit County; and attending court hearings in the District Court.

4. The funding mechanisms for payment of counsel and investigation are wholly inadequate. At this point, I have been paid a total of \$10,000 in attorney fees. I have paid \$692.00 of that amount toward investigation and 709.50 to a law clerk for legal research. That results in a rate of hourly compensation of \$19.10 which is inadequate for me to meet basic office overhead. My customary billing rate per hour has been \$150 per hour and is presently \$175 per hour. The hourly billing rate for death penalty habeas work in federal court is \$125 per hour. It is a sufficient burden for me to allot sufficient time to work on this complex matter given that I am a sole practitioner and must meet office overhead and salaries from sources other than this case.

5. Moreover, the amount allocated for investigation and experts is woefully inadequate to conduct anything but the most perfunctory of investigations. The present case is very complex from a scientific and mental health standpoint. No prior attorney has conducted any mitigation investigation prior to this point. A mitigation work up is a very difficult and complex undertaking. It initially requires the identification and compilation of a detailed document and witness list. The list includes vital records including birth records, medical records, school records, work records, driver license records, department of corrections records, and court records. The retained mitigation specialist, Mary Goody, has identified thirty-eight such sources of information. Ms. Goody has either contacted or attempted to conduct all thirty-eight sources. She has received records from some agencies, a few agencies have indicated that no records exist, while a number of agencies, particularly school administrations, medical and corrections agencies require follow-up contact and investigation.

6. It is absolutely necessary to obtain the school, medical, and department of corrections records in this case. I know that additional clues of brain injury can be found in school, medical and correction records. Indeed, here, we know of anecdotal evidence consistent with brain injury as a result of several reported events at school, plus information gleaned from interviews with family members.

7. I know that clearly established state and federal law requires me, as part of my post-conviction duties, to investigate and present the mitigating evidence of brain injury that exists in

this case. *Williams v. Taylor*, 529 U.S. 362 (2000) (counsel ineffective in penalty phase when he limited testimony to defendant's mother and some psychiatric evidence, but failed to investigate or discover other important mental health evidence); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (the eighth and fourteenth amendments require that a sentencing jury not be precluded from considering, as a mitigating factor, any aspect of a defendant's life and any of the circumstances of the offense that the accused proffers as a basis for a sentence less than death); *Battenfiled v. Gibson*, 236 F.3d 1215 (10th Cir. 2001) (trial counsel's preparation for penalty phase was constitutionally defective when he was unaware of various mitigation strategies, and was unprepared to rebut aggravating factors argued by the state); *Caro v. Woodford*, 280 F. 3d 1247 (9th Cir. 2002)(even though trial counsel consulted with two psychologists and a licensed clinical social worker before trial, his failure to consult with a neuropsychologist constitutes ineffective assistance of counsel); *Brownlee v. Haley*, 306 F.3d 1043 (11th Cir. 2002) (failure to present evidence of possible mitigating evidence consisting of brain injury and/or mental retardation constitutes ineffective assistance of counsel); *State v. Taylor*, 947 P.2d 681, 687 (Utah 1997) (the failure to investigate potential mitigation leading to discovery of mental health or mental disturbance evidence is ineffective assistance of counsel). I am presently conducting follow-up investigation regarding this issue.

8. In this case, I am seeking permission from the court to obtain Mr. Taylor's Utah Department of Corrections file. In 1998, Mary Goody, the mitigation specialist retained in this

case, requested these records from the Department of Corrections. The Department informed her that the requested records were protected under the Government Records Access Management Act, and would not be disclosed without a court order. Additionally, I have contacted the Department requesting these records and was informed that such records would not be released without a court order.

9. The specific reports and observations regarding prior diagnosed mental illnesses and other unusual behavior is material to the claims outlined in the petition. It is relevant in establishing at least two statutory mitigating circumstances: 1. that the offense was committed while accused was under the influence of extreme mental or emotional disturbance; and 2. the accused's capacity "to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirement of law was substantially impaired as a result of mental disease" Utah Code Ann. § 76-3-207(2)(b) & (d) (1990); *see Brownlee Haley*, 306 F.3d 1043, 1073-74 (11th Cir. 2002)(failure to investigate evidence of possible brain injury constitutes ineffective assistance as such evidence addresses two statutory mitigators: 1. acting under the influence of extreme emotional disturbance; and 2. inability to appreciate wrongfulness of conduct or conform conduct to requirements of law). I know from my training and experience that documents in these files will include mental health testing documents; test records; notes of observations, diagnoses, and behavior compiled by mental health personnel and other people at the Department of Corrections; medical records; observations and records of behavior in jail and prison; and

other important documents and information. This information is likely to lead to the discovery of additional important mitigating evidence. Experts who specialize in neuropsychiatric testing depend upon this information in assessing and evaluating brain injured people. *See Caro*, 280 F.3d at 1254.

10. I have personally traveled to the Summit County Courthouse four times seeking to review the trial exhibits in the Taylor and Deli cases. The court has some of the exhibits in the Taylor case; other penalty phase exhibits are missing. The most critical missing exhibits include the guns and ballistic evidence. Court personnel believe that these items are located at the Summit County Sheriff's office. I personally contacted the evidence custodian at the Summit County Sheriff's Office who informed me that the Sheriff's Office does not have the guns or ballistics evidence. I believe, based upon reading the police reports and state discovery, that physical evidence (e.g., guns, ballistics, pictures and physical evidence) are important in developing the statutory mitigating circumstance of minor participant. Utah Code Ann. § 76-3-207(2)(f)(1990). I base this upon my review of the ballistic and autopsy evidence showing that the lethal injuries were caused by the .44 caliber pistol, that all the prosecution witnesses testified that co-defendant Edward Deli carried that gun, that no one saw Deli give the gun to Mr. Taylor, and Linæ Tiede watched Mr. Deli reload the .44 caliber after her mother and grandmother were shot. Moreover, although the Deli file is missing (see below), newspaper articles written during the Deli trial described the prosecutor's argument that Edward Deli was the only person observed

with the .44 caliber weapon.

11. Although I am presently without funds to hire a ballistics person, I have nonetheless contacted a ballistics expert. Obviously, a ballistics expert would assist greatly in the development and explanation of this mitigating evidence. Even without the expert, however, I still believe that production and review of this evidence will support the statutory mitigating circumstance identified above.

12. I have attempted to obtain the Edward Deli file and transcripts. According to Summit County Court personnel, that file is missing. I have written to and made phone contact with Martin Gravis, Edward Deli's attorney. Mr. Gravis informed me that he sent his entire file, including pleadings and transcripts, to Edward Deli at the Utah State Prison. I believed that information contained in this file is important in supporting the claims outlined in the petition. I know from reading the newspaper reports, written during Deli's trial, that all of the eyewitnesses testified that Deli was the only one seen with .44 caliber, that he was observed reloading that gun after the shootings of Ms. Tiede and her mother, and that he told Linae Tiede that he was as good with a knife as he was with a gun. That information is important to the development of the claims identified in the petition.

13. I know from training and experience that information contained within the prosecutor's file might reveal mitigating or exculpatory evidence. I know from review of the file that this case generated a high degree of emotion and anger directed toward Mr. Taylor and Mr.

Deli. I also know that Mr. Levine made no requests for discovery. Although I know of no specific evidence of wrongdoing, I also know that the emotion generated by this case might lead to the withholding of exculpatory and/or mitigating evidence. I know of at least one capital case in Utah where the prosecutor failed to disclose *Brady* material regarding an important witness. *See State of Utah v. Elroy Tillman*, Case No. 010908894. This information was first disclosed just a few weeks before Mr. Tillman's scheduled execution. Accordingly, I am seeking permission from the court to seek discovery of the prosecutor's file in this case.

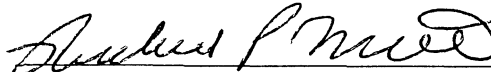
14. While reviewing the file in this case, I learned that trial counsel was suspended by the Utah State Bar for violations of the Utah Rules of Profession Conduct as a result of deficiencies in the representation of Mr. Taylor and a second capital client named James Holland. I have both spoken to Bar counsel and issued a subpoena requesting copies of Mr. Levine's Utah State Bar disciplinary file. I know from training and experience that information contained in this file will undoubtedly contain important evidence to support the claims of ineffective assistance of counsel. Accordingly, I am seeking permission from the court to seek discovery of the Utah State Bar's disciplinary file regarding Elliot Levine.

15. I know from training and experience that criminals like Scott Manley will do and say anything to stay out of prison. At the time Scott Manley gave his statement to police regarding this case, he was on parole, undoubtedly hoping to remain free. I also know that experienced criminals like Manley will often seek favorable treatment from governmental agencies in exchange

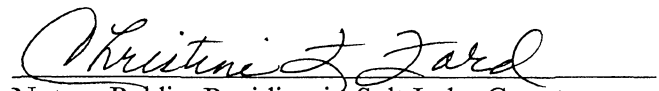
for information provided against other defendants. Evidence of requests for consideration or favorable treatment can often be found in files compiled by the probation officers or others in the Department of Corrections. While I believe that the court erred in allowing the admission of Manley's statement at the penalty phase, *see Lilly v. Virginia*, 527 U.S. 116 (1999), I nonetheless know a minimally competent capital attorney should have been prepared to attack Manley's credibility. I have sought Manley's Utah Department of Corrections file, but was informed that the Department would not disclose the file without an order from the court. Accordingly, I am seeking permission from the court to seek discovery of Scott Manley's Department of Corrections file.

16. There is considerable additional investigation to complete in this case, although I do not have the necessary funds to complete that investigation. There is approximately three thousand dollars left to complete the investigation in this case. I have communicated with experts and investigators in this case to complete additional investigation and testing. I anticipate that the \$20,000 allocated for investigation will soon be depleted. There is still considerable investigation to be completed which I cannot complete without additional funds from the court. Nonetheless, I am seeking permission from the court to conduct discovery in areas identified above and in the accompanying motion and memorandum.

Dated this 13 day of January, 2003.


Richard P. Mauro

SWORN AND SUBSCRIBED before me this 13 day of January, 2003.


Notary Public, Residing in Salt Lake County

My Commission Expires:



CERTIFICATE OF SERVICE

I certify that I mailed a copy of the foregoing **AFFIDAVIT OF RICHARD P. MAURO**
was mailed, via U.S. mail, postage prepaid, on the 13 day of January, 2003 to:

Thomas B. Brunker
Assistant United States Attorney
160 East 300 South, 6th Floor
Salt Lake City, Utah 84111



ADDENDUM B

have diminished capacities to understand and process information, to communicate, to abstract from mistakes, and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.¹²

Adkins, 122 S.Ct. at 2241.

Although the Supreme Court has not yet found it to be cruel and unusual to execute brain injured people, presentation of brain injury constitutes equally critical mitigating evidence.

Compare Adkins, 122 S.Ct. at 2252, *with Caro*, 280 F.3d at 1251 (explaining how brain damage may hinder judgment and cause aggressiveness).

D. Mitigation Here.

In this case, there were sufficient clues to alert a minimally competent capital attorney to conduct further investigation for the presence of brain injury. Those known factors were as follows:

1. Letter sent to Washington County Judge by Sister. In 1989, Kay Auble, Mr. Taylor's older sister, wrote a compelling letter to the Washington County Judge in relation to Mr. Taylor's case in that county. That letter was attached to the presentence report. In that letter, Ms. Auble expressed grave concerns about her brother's mental health problems which were evident at an early age. She explained that when young, Von "had a lot of problems." When she suggested to her mother that Von "wasn't stable," and needed professional help, her pleas were ignored. She described Von as either depressed or paranoid since an early age, and felt that he needed psychiatric intervention. She described Von as a loner, even in group situations, that he "did not fit in," and did not conform to norms. She explained that as he got older, he withdrew even more. She observed him to be "depressed and disturbed" in 1988, approximately eighteen months before this incident. She explained that Von began drinking alcohol in junior high school, and since then things have gotten progressively worse. Finally, she described her brother as a follower, who spent considerable time in his room. Contrary to information in one of the reports Ms. Auble reported that Von never participated in devil worshipping.

2. Letter sent to Washington County Judge by parents. Mr. Taylor's father also sent a letter to the Washington County judge explaining that Von never graduated from high

¹² A brain injured person also lacks the ability to logically reason, control impulses and understand the reactions of others.

school, had difficulty holding a job and experienced “psychological problems” as a result of a prior accident leaving a facial scar.

3. Information provided by Robert Taylor, Von Taylor’s Brother. In 1989, a little more than a year prior to this case, Robert Taylor told Diagnostic Investigator, Robyn Williams that his brother, Von Taylor, “has some pretty serious mood swings.” He also described a prior suicide attempt.

4. History of head injuries. (a) In 1967, when Mr. Taylor was two years old, he fell down a flight of stairs in his home while trying to retrieve a toy. He was hospitalized as a result of that fall. This injury may have caused brain injury as it is known that Mr. Taylor has moderate brain damage. (b) In 1977, Mr. Taylor suffered a severe facial injury when an aerosol can exploded in campfire imbedding shrapnel into his face and arm. Doctors performed plastic surgery to repair the injuries to his face. This injury may have caused or contributed to the brain damage. (c) In 1979, Mr. Taylor was hospitalized when the pick up truck in which he was a passenger rolled over. He was thrown from the pick up truck in this accident. He began skipping school after suffering the injuries in this accident. This accident may have caused or contributed to the brain damage. Mr. Taylor underwent surgery to repair the injuries. (d) On April 8, 1983 in Weber County, Utah. Mr. Taylor crashed his motorcycle and was transported by ambulance to McKay Dee Hospital. (e) When Mr. Taylor was in elementary school, his brother John was pulling him along in a plastic saucer sled. Mr. Taylor was standing in the saucer while being pulled along the sidewalk. He fell face first landing on his forehead, causing a “doorknob-sized” bump on his forehead. (f) 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 migraine headaches and has occasionally taken medication for that malady. (g) 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. Mr. Taylor was repeatedly exposed to these chemicals. 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 when he changed the sprinkler heads immediately after the fields were sprayed. Mr. Taylor’s sisters recall suffering from headaches and nausea when the pesticides were sprayed onto the field. See Cilwick Affidavit.

5. History of migraine headaches. Mr. Taylor suffers from recurrent migraine headaches which began in 1989. Members of the Taylor family reported that Mr. Taylor began experiencing migraine headaches after hitting his head on a steel post while incarcerated after being arrested for the 1989 burglary. There is also a maternal history of migraine headaches in his family, plus three siblings suffer from migraine headaches.

6. History of Substance Abuse. There is both a maternal and paternal history of alcoholism in the Taylor family. *See* Affidavit of Ted Cilwick. 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.¹³ 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 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 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. *See* Cilwick Affidavit.

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

¹³ 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.

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.

Presentence Report, Case 1991, p. 7.

7. History of Suicide attempts. (a) The earliest known suicide attempt occurred in approximately 1989, before his arrest for burglary, as observed by his brother, Robert Taylor. (b) Von Taylor was placed on suicide watch at the Washington County Jail in 1989, as jail personnel noted that he was "very depressed and contemplating suicide." He was twice placed in isolation because of suicidal tendencies. He was visited by Dr. Kliarsky for suicide and mental assessment while in the Washington County Jail. There was a note placed in his file at the ninety day diagnostic unit that unit staff should be aware of a possible suicide risk. (c) At the Utah State Prison Captain Clark referred Mr. Taylor for suicidal reassessment and he was placed on modified watch for suicide. (d) Mr. Taylor attempted suicide on the opening morning of the penalty phase hearing by slitting his wrists. The proceedings were stopped, and Dr. Mark Rindflesh was called to examine Mr. Taylor. Although Dr. Rindflesh found Mr. Taylor competent to proceed, he nonetheless cautioned against prescribing medication because "it would offer [Mr. Taylor] an opportunity to save up a supply . . .," for another suicide attempt. Mr. Taylor's sisters remember Von's arms being heavily bandaged during the penalty phase hearing; (e) At the Rule 23B hearing counsel asked for a stay of proceedings noting that Mr. Taylor was "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, Vol. III, 5, 2178. Mr. Taylor responded to questions by stating: "I'm too depressed. I'm too depressed. I can't do this anymore." Rule 23B, Vol. III, 6.¹⁴

8. Learning Disabilities in School. Mr. Taylor had difficulty in school "doing math and English." See Dr. Moench Report, 8. He was placed in special education classes for those two subjects. *Id.* Dr. Moench explained his difficulty in school: "A learning disorder despite normal intelligence is the probable explanation for his poor school performance and need for special education." *Id.* at 10.

9. Prior Diagnoses of Mental health problems. While in the Washington County Jail on burglary charges, Mr. Taylor wrote a letter stating, "I (sic) totally going fucking crazy I

¹⁴ When Rule 23B counsel requested permission to file a motion for competency, the court denied that motion finding that a defendant's competency is not relevant during a Rule 23B hearing. Rule 23B, VOL. III, 50-52. The court accordingly ruled that a defendant did not have a right to raise a competency claim during a Rule 23B hearing and refused to consider the issue.

want to kill myself to put this out of my life I will confess to anything they want me to including last night or any other night for that matter but death sounds good. They say I have someone else working with me who knows but my mind, it tells me to die die die!!!!?? He was prescribed Clonidine, which is a medication used primarily to treat hypertension. *See Physician's Desk Reference*, 56 Edition 2002, p. 1038-40.

Dr. Moench noted that Dr. Kliarsky of Southwest Mental Health found Mr. Taylor to be "extremely paranoid and borderline schizophrenic or depressed and suicidal," all of which are evidence of major mental disorders. No one apparently sought the medical records from Dr. Kliarsky in the early 1990's, and counsel was informed in 1998 that the records pertaining to Mr. Taylor no longer exist.¹⁵ The best evidence available at the time was that Mr. Taylor suffered from a major mental illness, although no one sought to follow-up or investigate those significant diagnoses.

In 1989, Dr. Long diagnosed Mr. Taylor with Adjustment Disorder with Mixed Emotional Features which is "an impairment in occupational functioning, social activities or relationships, or may be other reactions in excess of what is normal and expectable for the given stressor." *See Psychological Evaluation*, 8/11/89. Dr. Long noted elevated results on the Minnesota Multiphasic Personality Inventory (MMPI), Psychological Evaluation, at 1, indicating the presence of a "number of mental illnesses and neurological conditions." *See Affidavit of Dr. Linda Gummow*. Dr. Long further described Mr. Taylor as "irritable, depressed, and shy . . .," non-confrontational, "anxious and nervous," and "basically passive." Psychological Evaluation at 1. The ninety day diagnostic evaluation recommended that Mr. Taylor be placed in the Weber County Drug and Alcohol/Mental Health Program as that program was best suited to address Mr. Taylor's drug and alcohol and mental health issues.

In a report written in February, 1991, Dr. Moench concludes 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." Moench Report, at 11. He rejected that conclusion instead mistakenly believing that Mr. Taylor "presents no history of head injury and no evidence for brain impairment . . .," although the doctor concedes that the known learning disabilities present an additional clue for brain injury. Despite the clues presented by random property destruction and learning disabilities, plus that additional clues of alcohol abuse, head injuries, other mental health problems, evidence from family members describing unusual conduct, and prior suicide attempts, no one thought to conduct neuropsychiatric testing. Dr. Moench nonetheless noted that Mr. Taylor has a History of Adjustment Disorder with Depressed Mood, and diagnosed him at that time with a mildly depressed mood, and with Antisocial Personality Disorder with Schizoid Personality Features.

10. Always a Follower. Mr. Taylor's siblings were never interviewed in preparation for this case. His siblings are much older than Von, and because of this age difference, helped

¹⁵ Mitigation expert Mary Goody requested those records in 1998. On September 28, 1999, she was informed in writing that those records no longer exist.

raise him. If interviewed before the penalty phase, they would have described Von as a “follower,” a person who was easily lead and manipulated. Although they loved their brother, each sibling can describe stories where Von was manipulated and nearly always lead by others. *See* Cilwick Affidavit. Testimony of this nature would have been powerful mitigation, consistent with the evidence that Edward Deli was the leader and person in charge at the time of the homicide.

11. Mitigation. Mr. Taylor’s siblings, if interviewed before the penalty phase, would all have offered powerful mitigating evidence. Each would testify that Von was gentle and peaceful as a child. He was known for compassion and had no prior history of violence or fighting. Each would also testify about personal, loving interactions with their brother in circumstances at the farm in Idaho and while the family lived in Utah. *See* Cilwick Affidavit. 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. No one interviewed the siblings prior to the penalty phase. *See* Cilwick Affidavit. Interestingly, the 1989 Presentence Report indicates that “Mr. Taylor has a very supportive family and friends,” yet none of his extended family or friends were ever interviewed.

Respondent argues that it was proper for trial counsel to reject these clues in not pursuing evidence of brain injury because Mr. Taylor mentioned an interest in devil worshipping during the Moench interview. Respondent accordingly reasons that devil worship is somehow admissible as an aggravating factor which then converts trial counsel’s failure to investigate evidence of brain injury into reasonable trial strategy. Admission of evidence in a penalty phase hearing, however, is governed by the due process clauses of the United States and Utah Constitutions. *State v. Howell*, 707 P.2d 115, 117 (Utah 1985) (the due process clause applies to sentencing proceedings and requires that the sentencer rely on reliable information in fixing a sentence); *Gardner v. Florida*, 430 U.S. 349 (1977). It is unclear how or why an interest in satanic worship would be relevant and admissible at penalty phase other than to inflame the passions of jury. *See Gregg v. Georgia*, 428 U.S. 153, 192 (1976) (aggravating factors in a death penalty case must be “particularly relevant to the sentencing decision, not merely relevant in some generalized sense to