IN THE
MISSOURI SUPREME COURT

LEON TAYLOR,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. SC 85119
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
SIXTEENTH JUDICIAL CIRCUIT, DIVISION 10
THE HONORABLE CHARLES ATWELL, JUDGE

APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Appellant, Leon Taylor, was tried and convicted of first degree murder, first degree assault, first degree robbery, and three counts of armed criminal action for a shooting in Jackson County. Sections 565.020, 565.050, 569.020 and 571.015.[1] Although the racially-diverse jury could not agree upon punishment for the murder conviction, the trial judge found aggravators, weighed them against the mitigators, and sentenced Mr. Taylor to death. The court also imposed consecutive life, fifteen years and three-100 year sentences. Mr. Taylor filed a postconviction action, and in a consolidated appeal, this Court affirmed the convictions and all the non-death sentences, but remanded for a new sentencing phase on the murder conviction, based on the prosecutor's improper closing argument to decide the case on emotion. *State v. Taylor*, 944 S.W.2d 925 (Mo. banc 1997).

Given this Court's recent decision in *State v. Whitfield*, 107 S.W.3d 253 (Mo. banc 2003), when the jury hung, the trial judge had no authority to give death. *See*, appellant's motion to recall the mandates (A-44-A-53). Thus, Mr. Taylor should have been sentenced to life imprisonment without probation or parole. The subsequent proceedings should be considered a nullity since the trial court did not have jurisdiction. If this Court grants the motion to recall the mandates, it should dismiss this appeal as moot.

[1] All statutory references are to RSMo 2000, unless otherwise indicated.

However, a new sentencing proceeding was held and an all-white jury assessed punishment at death. This Court affirmed in *State v. Taylor*, 18 S.W.3d 366 (Mo. banc 2000). Mr. Taylor filed his *pro se* motion for post-conviction relief under Rule 29.15,[2] which appointed counsel amended. The motion court heard evidence on counsel's ineffectiveness in failing to investigate and rebut an aggravator and failing to present mitigating evidence. The court denied relief and Mr. Taylor now appeals. Should this Court deny Mr. Taylor's Motion to Recall the Mandates and find that the second trial court had authority to proceed, then this Court has exclusive appellate jurisdiction because a death sentence was imposed. Art. V, §3, Mo. Const. (as amended 1982); Standing Order, June 16, 1988.

[2] All references to rules are to VAMR, unless specified otherwise.

STATEMENT OF FACTS

Appellant, Leon Taylor, was convicted for shooting a gas station attendant, while his step-daughter watched. *See*, *State v. Taylor*, 944 S.W.2d 925 (Mo. banc 1997) and *State v. Taylor*, 18 S.W.3d 366 (Mo. banc 2000)[3] for a summary of the facts of the charged offense.

At the first trial, a racially-diverse jury, including four African-Americans[4] deliberated for hours over two days, but could not agree upon punishment (1Tr. 1547-54; 1L.F. 726).[5] The jury made no written findings (1L.F. 700-03; 1Tr. 1466). The court refused a proffered verdict-director that tracked Section 565.030.04 to determine what findings, if any, the jury made in the four-step process (1L.F. 700-03; 1Tr. 1466). The court also refused the defense request to poll the jury to determine what findings, if any, it had made (1Tr. 1563). The

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[3] Appellant requests this Court take judicial notice of its files in Mr. Taylor's first appeal, *State v. Taylor*, S.Ct. No. 78086, and his second appeal, *State v. Taylor*, S.Ct. No. 81748. The motion court judicially-noticed the underlying criminal files (H.Tr. 26-28).

[4] *See*, Judge Maurer's Trial Judge Report, at 7.

[5] Citations to the record on appeal are as follows: S.Ct. Appeal No. 78086 – trial transcript (1Tr.) and legal file (1L.F.); S.Ct. Appeal No. 81748 – penalty phase retrial (2Tr.) and (2L.F.); and the postconviction record in the current appeal – legal file (L.F.), hearing transcript (H.Tr.), and exhibits (Ex.).

court found that Mr. Taylor had been convicted of three serious assaultive convictions (1Tr. 1596). He did not find the remaining two statutory aggravators (1Tr.1596-97).

The court found, as mitigation, Mr. Taylor's family background, the childhood abuse he suffered, and his seeing the murder of his stepfather when he was ten (1Tr. 1597). He found the aggravators outweighed the mitigators and sentenced Mr. Taylor to death (1Tr. 1597).

This Court affirmed the convictions and all the non-death sentences, but remanded for a new sentencing phase on the murder conviction, based on the prosecutor's improper closing argument, encouraging the jury to decide the case on emotion. *State v. Taylor*, 944 S.W.2d 925, 937-38 (Mo. banc 1997).

At the new sentencing hearing, the parties read the jury a stipulation: that Mr. Taylor had been convicted of first degree murder, first degree assault, first degree robbery, and three counts of armed criminal action, and that he had received consecutive sentences of life, fifteen years and three-100 years (2Tr. 1691-94). The trial court admitted exhibits showing Mr. Taylor's prior convictions for second degree murder, attempted robbery, and robbery and correction records showing the dates of Mr. Taylor's incarceration (2Exs. 49-53, 2Tr. 1688-89, 1921). The State emphasized the prior murder conviction throughout the trial, in its opening, when admitting exhibits, during the cross-examination of Dr. Smith, and during closing argument (2Tr. 1664, 1927-28, 2039-40, 2046-47, 2047, 2048, 2163, 2164, 2172, 2173, 2174, 2176, 2195, 2196).

The State told the jury that Mr. Taylor had stabbed the victim to death (2Tr. 1664, 1927-28, 2173, 2195).

The State adduced guilt-phase evidence consistent with the first trial. On April 14, 1994, Tina and Willie Owens were riding in Tina's car with their stepbrother, Leon Taylor (2Tr. 1697-98). Tina kept a loaded gun in her car (2Tr. 1698). They went to a gas station in Independence, Missouri, where they robbed Robert Newton, the white attendant, while Sarah Yates, his nine year old stepdaughter was present (2Tr. 1702-04, 1744). Mr. Taylor shot the attendant and tried to shoot the girl, but the gun jammed (2Tr. 1704-05, 1744, 1917). Willie Owens detailed all the statements Mr. Taylor allegedly made about the crime (2Tr. 1705-07). Mr. Newton died from a gunshot wound to his head. (2Tr. 1749, 1773, 1778-79).

Willie and Tina went to St. Louis where they spent the money from the robbery (2Tr. 1722-23). They returned, were arrested, and gave statements to the police blaming their brother (2Tr. 1723, 1884-87). After initially denying any involvement, Mr. Taylor admitted shooting the gas station attendant, but said it was an accident (2Tr. 1872-79, 1893-94).

Willie, a convicted felon with a prior assault, received eight years in exchange for his testimony (2Tr. 1695, 1716-17). The State dismissed all of Tina's charges (2Tr. 1716).

In support of the death sentence, the State called Mr. Newton's wife, Astrid (Tr. 1898-1902), and Mr. Newton's stepdaughter, Sarah Yates (Tr. 1903-19), who testified about Mr. Newton and the impact of his death on them.

The defense called nine witnesses and read the previous trial testimony of a close family friend who was hospitalized at the time of trial (2Tr. 1936-2086). The witnesses described Mr. Taylor's abusive and traumatic childhood. *Id*. Mr. Taylor's mother, Mary, was a chronic alcoholic who gave her children alcohol to drink (2Tr. 1709-11, 1972, 2021). The drunken household was filled with violence. Mary stabbed and shot boyfriends, Joe Pugh, Harold Morgan and Wayman Johnson (2Tr. 1712, 1962, 1971, 1983, 1992-93, 1998, 2001). Mary's husband, Sammie Owens, was shot and killed in front of Mr. Taylor (2Tr. 1715, 1983, 1996-97, 2024-25).

Mr. Taylor was physically and sexually abused. Mary beat all of the children, the severity depending on how drunk she was at the time (2Tr. 1712, 1960-61). However, Mary focused most of her anger and abuse on Leon, the oldest (2Tr. 1713-14). If any of the children got in trouble, she blamed Leon and beat him (2Tr. 1713). The children were unsupervised, strange men had access to them (2Tr. 2022). A twenty year old male neighbor sexually abused Leon when he was five (2Tr. 2022).

Judge Robert G. Russell met Mr. Taylor when he was a youngster (2Tr. 1938). He recognized Mr. Taylor's mother was violent, volatile, with

different men coming and going in and out of the house, and recommended he not be returned to the home (2Tr. 1938, 1942-44).

Dr. Smith testified about this abuse and its effect on Mr. Taylor (2Tr. 2007-2052). Mr. Taylor was depressed at an early age (2Tr. 2019). He could not connect with people or develop trusting relationships (2Tr. 2019-20, 2031-33). He became addicted to alcohol and drugs (2Tr. 2020-21). He needed treatment and counseling, but never got it. (2Tr. 2036-37).

The State submitted statutory aggravators in Instruction No. 6:

- 1-3) listing each prior conviction as a statutory aggravator;
- 4) pecuniary gain (the aggravator Judge Mauer had found inapplicable at the first trial); and
- 5) to avoid lawful arrest (the aggravator Judge Mauer had found was not proven beyond a reasonable doubt)

(2L.F. 963). The jury deliberated from 10:58 a.m. until 1:11 p.m., found Mr. Taylor had three prior convictions, and the pecuniary gain aggravator, and sentenced him to death (2Tr. 2200-2204).

This Court affirmed the death sentence on appeal, and rejected the challenge that the judge, not the jury, had found the serious assaultive criminal conviction aggravator. *State v. Taylor*, 18 S.W.3d 366, 377-78 (Mo. banc 2000).

Mr. Taylor filed a *pro se* motion for postconviction relief (L.F. 4-10). Appointed counsel amended the motion and included the following claims:

- Counsel's ineffectiveness for failing to investigate Mr. Taylor's prior murder conviction and prosecutorial misconduct for arguing that Mr. Taylor had stabbed the victim to death, while the State prosecuted the co-defendant, Hardin, for stabbing the victim to death;
- Counsel's ineffectiveness for failing to provide the defense expert, Dr. Smith, with adequate background materials and failure to obtain an adequate mental health evaluation that would have shown Mr. Taylor's mental deficits and established statutory mitigation;
- Counsel's ineffectiveness in failing to have Mr. Taylor evaluated by a psychiatrist, who could have diagnosed Mr. Taylor's mental defects and established statutory mitigation; and
- Counsel's ineffectiveness for failing to present Mr. Taylor's good conduct in jail and prison and the positive impact he had on others.

(L.F. 14-407).

Mr. Taylor presented the following evidence to support his claims:

Prior Conviction

The State prosecuted Mr. Taylor's co-defendant, Carl Hardin, and claimed that Hardin, not Mr. Taylor, had stabbed to death the victim, Jessie Howater (Ex. 2 at 230-31). Mr. Taylor assisted the State in its prosecution (Ex. 2, at 356-98). Taylor was a teen at the time, three years younger than his cousin, Hardin (Ex. 2, at 200-01; H.Tr. 357-60). They broke into a laundromat, but Mr. Howater, its caretaker, found them (Ex. 2, at 360-363). After an initial altercation, in which

Mr. Taylor stabbed at Mr. Howater's side, Mr. Taylor fled. (Ex. 2, at 366-68, Ex. 3, at 437-440, 457; H.Tr. 357-60). Hardin stabbed the victim sixteen times, inflicting fatal blows to his chest (Ex. 2, at 366-68, Ex. 3, at 437-440, 457; H.Tr. 357-60). The jury convicted Hardin of second degree murder and sentenced him to 20 years (Ex. 4, at 748).

Trial counsel read the police reports provided about the incident, but did no other investigation into this aggravator (H.Tr. 353-54; Ex.31-32 at 194, 508, 1776; Ex. 8 at 194, 1681, 1776). Counsel could not recall reading the co-defendant's published opinion, *State v. Hardin*, 558 S.W.2d 804 (Mo. App. 1977) and never obtained the transcript from that case (H.Tr. 354-59). Counsel did not object to the State's argument that Mr. Taylor had stabbed the man to death, and therefore should receive the death penalty (2Tr. 1664, 2173, 2195).

Dr. Smith

Dr. Smith, a psychologist specializing in drug and alcohol addiction, first saw Mr. Taylor on June 29, 1996 (H.Tr. 29-31). He gave Mr. Taylor a Michigan Alcohol screening test and the Drug Abuse Screening Test and reviewed background records (Exs.31-33, H.Tr. 30-31). Dr. Smith provided a draft report summarizing his impressions and provided this Court with an affidavit in support of a motion to remand (Exs. 26 and 27, H.Tr. 33-34). In September, 1998, 17 months after this Court reversed and remanded for a new penalty phase, counsel contacted Dr. Smith and asked him to testify to the information in his affidavit

(H.Tr. 34). This initial contact came two months before the new penalty phase (H.Tr. 34).

Dr. Smith told counsel that he could not make a diagnosis or give his professional opinion without additional information (H.Tr. 34). He needed to interview other witnesses, review records, and do additional testing (H.Tr. 34-35). Counsel did not want Dr. Smith to fly to Missouri to see Mr. Taylor again; he had a paralegal administer the Trauma System Inventory that Dr. Smith wanted (H.Tr. 35-36). Five scales were elevated, revealing intrusive thoughts, depression and disassociation (H.Tr. 36). Mr. Taylor displayed classic symptoms of Post-Traumatic Stress Disorder (H.Tr. 36-37).

Dr. Smith met with counsel once before trial and then testified (H.Tr. 39). His trial testimony did not address Mr. Taylor's mental state or behavior at the time of the crime (H.Tr. 40). Dr. Smith knew that Mr. Taylor had prior convictions, but counsel provided no records regarding them (H.Tr. 47-48). The records would have been helpful in testifying, since the prosecutor specifically asked Dr. Smith about the prior offense (H.Tr. 48, 2Tr. 2039-40, 2046-47, 2048, 2049).

After trial, Dr. Smith reviewed additional materials (H.Tr. 41, Ex. 10). Family members' medical records showed multiple injuries, suicide attempts, and mental illness (H.Tr. 50, Ex. 5, at 802, 808, 968). Loutina had scars on her scalp burned, a gunshot wound, and blisters on her legs from scalding water (Ex. 5, at 1056, 1060, and 1075). Dr. Smith tested Mr. Taylor's siblings, obtaining objective

data regarding the impact of their environment (H.Tr. 43-44). The testing showed symptoms of Post-Traumatic Stress Disorder and Depression (H.Tr. 44-45). Interviews of family members also corroborated the data Dr. Smith received (H.Tr. 42). James Dempsey, a licensed social worker, prepared a social history consistent with the witnesses' accounts (H.Tr. 43). All of this corroboration would have been helpful at trial, since the State discredited Dr. Smith for relying exclusively on Mr. Taylor (2Tr. 2038). This information was important, because it verified Mr. Taylor's account about his dysfunctional family (H.Tr. 42, 49).

Based on these materials, interviews and testing, Dr. Smith found that Mr. Taylor had severe psychological disorders, Depression, Post-Traumatic Stress Disorder, and alcohol and drug dependence (H.Tr. 87). Mr. Taylor's mental health problems were well-documented (H.Tr. 69).[6] When Mr. Taylor was 15, Dr. Shu found he suffered from depression, avoided showing emotion, had difficulty discussing his emotions, and had trouble with relationships (H.Tr. 69). Although the doctor had recommended family counseling, his mother refused (H.Tr. 69).

Eight years later, he was admitted to Western Missouri Mental Health Center where Dr. Ajans found a severe passive, aggressive personality disorder and prescribed Mellaril, a psychotropic drug (H.Tr. 73). Depressed, with auditory

[6] Exs. 11-16 outline Mr. Taylor's social history. His mental health problems appear in green, significant environmental factors in blue, and significant events in red (H. Tr. 79-80)

hallucinations, Mr. Taylor again attempted suicide (H.Tr. 73). Doctors prescribed more psychotropic medication (H.Tr. 73). His problems continued; he suffered shaking spells and anxiety attacks (H.Tr. 76). During his later incarceration, mental health treatment and counseling was sporadic and rare (H. Tr. 72-77, Ex. 31).

Mr. Taylor's mental illness progressed (H.Tr. 81-90, Exs. 17-18). At the time of the charged offense, he suffered from:

- Depression,
- Post-Traumatic Stress Disorder, and
- Alcohol and Drug Dependence

(H.Tr. 87). The severe psychological disorders combined and impaired Mr. Taylor's ability to appreciate the criminality of his acts, the consequences and to consider what he was doing (H.Tr. 89- 90). He had auditory hallucinations, voices told him he was no good, and told him to go ahead and commit the robbery (H.Tr. 103). Dr. Smith did not find Mr. Taylor incompetent, but found his mental health mitigated the offense (H.Tr. 98-100).

Counsel said he did not want Smith to do an evaluation regarding Mr. Taylor's mental state at the time of crime, as he thought it would open Smith up to cross-examination, including harmful hearsay statements Mr. Taylor made regarding the offense (H.Tr. 393, 397-400, 405).

Dr. Logan

Dr. Logan, a forensic psychiatrist, evaluated Mr. Taylor during the post-conviction proceedings (H.Tr. 117, Ex. 9). In addition to a five-hour interview of Mr. Taylor, he interviewed two siblings, Veronica and Willie, and Mr. Taylor's stepfather, Wayman Johnson (H.Tr. 118). He reviewed numerous documents and reports of a tremendous number of interviews (H.Tr. 118-19, Ex. 9). Dr. Logan concluded that Mr. Taylor suffered from:

- Dysthymia, Chronic Depression,
- Post-Traumatic Stress Disorder,
- Substance Abuse Problems, and
- Personality Disorder.

(H.Tr. 157-58).

Dr. Logan explained the genetic and environmental influences on Mr. Taylor (H.Tr. 120-28, Ex. 9, at 7-10). However, Dr. Logan emphasized that Mr. Taylor's problems were not solely environmental, but became physical, because alcohol, drugs and trauma actually changed his brain function (H.Tr. 174-75).

Constant exposure to drugs and alcohol damaged Mr. Taylor's brain (H.Tr. 134-35). His mother ingested alcohol while she was pregnant (H.Tr. 134). Once he was born, Mr. Taylor's mother gave him alcohol to sedate him (H.Tr. 134-35). He later used inhalants, further decreasing his intelligence, dropping him to the borderline retarded range (H.Tr. 135-36).

Trauma also caused damage. One area of the brain, the hippocampus, shrank in size when exposed to trauma (H.Tr. 130). The trauma caused constant high arousal, and the body produced high levels of steroids (H.Tr. 130, 157). Mr. Taylor's brain was in a constant state of hyper-alert or hyper-vigilance (H.Tr. 130, 157). The nervous system became reactive to deal with his environment (H.Tr. 130, 156).

Of the trauma Mr. Taylor suffered, the most significant was witnessing violence in the home (H.Tr. 126, 128). Research shows that Post-Traumatic Syndrome Disorder is most likely to occur when the patient is exposed to domestic violence (H.Tr. 126-27, 138-39). This factor has a higher correlation to PTSD than any other potential trauma; 25-30% of children exposed to any one of the traumas that Mr. Taylor was exposed to would develop PTSD (H.Tr. 126-27, 138). This type of trauma was well-documented in Mr. Taylor's case (H.Tr. 128-29).

Dr. Logan found that head trauma impacted Mr. Taylor's mental functioning. Neurological insults included childhood beatings, a 1979 skull fracture, a 1983 shot in the back of the head, and a 1991 fall from a ladder (H.Tr. 137). These traumas were significant, but in Mr. Taylor's case, minor, compared to the alcohol and drug ingestion, especially during his infancy and early childhood (H.Tr. 137). From a neurological perspective, the alcohol damaged the temporal lobe, which regulated emotions (H.Tr. 137-38). The damage caused irritability, explosiveness and overreaction (H.Tr. 138). At the time of his offense,

Mr. Taylor did not even have the equipment that he was born with and his brain could not work the same (H.Tr. 175).

Mr. Taylor's environment also fostered paranoid suspiciousness (H.Tr. 142, 144). His family told them that he was cursed (H.Tr. 144). They practiced voo-doo and black magic (H.Tr. 146). He heard demonic voices during the homicide (H.Tr. 144). These symptoms can suggest schizotypical and paranoid personality disorders (H.Tr. 146).

Mr. Taylor's emotional problems included depression, suicide attempts and suicidal thinking, panic attacks, shaking spells, substance abuse, marijuana abuse, irritability, fighting, hyper-arousal, startled response, hyper-vigilance, and sleeping difficulties (H.Tr. 147-49, 150). Children suffering trauma often abuse substances, to escape to a different place (H.Tr. 148). Drugs such as marijuana calmed him and helped him to disassociate, to numb himself emotionally (H.Tr. 148).

Dr. Logan offered no mental defense for the murder, but found substantial mental problems that brought Mr. Taylor to the situation (H.Tr. 178, 181).

Counsel did not offer statutory mitigators such as extreme mental or emotional disturbance or substantial impairment of capacity to appreciate the criminality of his conduct,[7] because they had elicited no evidence to support them (H.Tr. 382-83).

[7] Section 565.032.3 (2) and (6).

Mr. Taylor's Good Conduct in Jail and Positive Impact On Others

While incarcerated, Mr. Taylor has written religious poetry and sent it to his family and friends (L.F. 408-792; H.Tr. 49-50, 161-62, 274-76, 316-22, 324, 326-27, 328, 329-30, Arizola Depo,[8] at 11-13, Chaney Depo, at 7-12, Rhodes Depo, at 6-9, 13-17, Skillicorn Depo, at 18, Owens Depo, at 43-48). The poetry showed Mr. Taylor's sensitive and emotional side (H.Tr. 49) and his caring about others (H.Tr. 162). He reached out to others, was thoughtful and was remorseful for past misdeeds (H.Tr. 49-50, 161-62, 197-215, 275-76, 316-328, Arizola Depo, at 11-14, Chaney Depo, at 8-12, Rhodes Depo 6-17, Skillicorn Depo, at 6, 18-19, 22, 24-26, 29-30, Owens Depo, at 42-47). Others appreciated Mr. Taylor's thoughtfulness, which helped them through difficult times (H.Tr. 201, 203-04, 205, 275-76, 326-28, Arizola Depo, at 12-13, Chaney Depo, at 8-12, Rhodes Depo, at 9-17, Skillicorn Depo, at 12, 17, 23-26, 29-30, Owens Depo, at 42, 44, 45).

Counsel knew about the poetry, since family and friends mentioned it and its impact on them, but chose not to present this or any other *Skipper*[9] evidence to the jury (H.Tr. 378-79). He thought it would be easy for the prosecutor to mock

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[8] The motion court considered five witnesses' deposition testimony in lieu of requiring their appearance at the evidentiary hearing (H.Tr. 411).

[9] *Skipper v. South Carolina*, 476 U.S. 1 (1986) (defendant's good behavior in jail, while awaiting trial, is relevant mitigating evidence).

this evidence (H.Tr. 394). Counsel was wary of inmate witnesses and did not want the jury to know that Mr. Taylor had been on death row (H.Tr. 394-95).

The motion court entered findings and conclusions, denying relief (L.F. 921-963).[10]

Mr. Taylor has filed a motion to recall the mandates from his two appeals, S.Ct. Nos. 78086 and 81748, because the trial judge, not the jury, made the factual findings necessary to sentence him death. *See*, *State v. Whitfield*, 107 S.W.3d 253 (Mo. banc 2003). Further, the trial judge, not the jury, made the factual finding that his prior convictions were, "serious" and "assaultive," violating his right to have the jury make any factual finding that increases the range of punishment. *See*, *Ring v. Arizona*, 536 U.S. 584 (2002). The motion is included in the appendix for the Court's convenience (A-44 to A- 53). Should this Court grant the motion and sentence Mr. Taylor to life without probation or parole, the Court should dismiss this appeal as moot.

[10] The findings are set forth in detail in the argument portion of the brief, and are included in the appendix.

POINTS RELIED ON

I. Failure to Investigate Aggravating Circumstance

The motion court clearly erred in denying Mr. Taylor's claim that counsel was ineffective for failing to investigate, rebut and object to the prosecutor's suggestion that Mr. Taylor had stabbed a man to death, when he had not, because counsel's failure and the prosecutor's misstatements violated Mr. Taylor's rights to effective assistance of counsel, to due process, and to present mitigation, under the 6th, 8th, and 14th Amendments of the United States Constitution, in that counsel did not investigate Mr. Taylor's prior conviction and discover that the State had maintained that a co-defendant, Carl Hardin, had stabbed the victim to death. Mr. Taylor was prejudiced, since the State argued that the jury should give death because Mr. Taylor had stabbed another man to death. Had this inaccuracy been corrected, a reasonable probability of a life sentence exists, especially since the first jury, hearing similar information, could not agree upon punishment.

Wiggins v. Smith, 123 S.Ct. 2527 (2003);

Ervin v. State, 80 S.W.3d 817 (Mo. banc 2002);

Parker v. Bowersox, 188 F.3d 923 (8th Cir. 1999);

Smith v. Groose, 205 F.3d 1045 (8th Cir. 2000);

U.S. Const., Amends. V, VI, VIII and XIV;

Section 565.032.2(1); and

Rule 29.15.

II. Failure to Present Psychiatric Testimony of Mr. Taylor's Mental State at the Time of the Crime

The motion court clearly erred in denying the Rule 29.15 motion because Mr. Taylor was denied his rights to effective assistance of counsel and due process and he was arbitrarily and capriciously sentenced to death, in violation of the 6th, 8th and 14th Amendments, U.S. Constitution, and Section 565.032.3 (2) and (6), in that trial counsel failed to investigate and present evidence of Mr. Taylor's mental state through a psychiatrist, such as Dr. Logan, who found that Mr. Taylor's brain did not function normally due to the alcohol and drugs he received while *in utero,* as an infant, and during childhood, and the trauma he suffered as a child, and the results were mental diseases and defects, including Dysthymia, Chronic Depression, Post-Traumatic Stress Disorder, Substance Abuse problems, and a Personality Disorder, which established the statutory mitigators of extreme mental or emotional disturbance and substantial impairment of capacity to appreciate the criminality of his conduct, thus reducing Mr. Taylor's culpability and providing a basis for a life sentence.

Wiggins v. Smith, 123 S.Ct. 2527 (2003);

State v. Johnson, 968 S.W.2d 686 (Mo. banc 1998);

Simmons v. Luebbers, 929 F.3d 529 (8th Cir. 2002);

Hildwin v. Dugger, 654 So.2d 107 (Fla. 1995);

U.S. Const., Amends. VI, VIII and XIV;

Sections 552 and 565.032.3 (2) and (6);

Section 921.141(6) (b) and (f), Fla.Stat. (1985);

Rule 29.15; and

MAI CR3d 313.44A.

III. Mental Retardation

The motion court clearly erred in denying Mr. Taylor's postconviction motion, because counsel was ineffective in failing to present evidence of Mr. Taylor's mental retardation and this evidence prohibits his execution under his rights to due process, effective assistance of counsel, and freedom from cruel and unusual punishment, as guaranteed by the 6th, 8th, and 14th Amendments of the United States Constitution and Sections 565.030.4 and 565.030.6, RSMo Cum. Supp. 2001, in that the jury never heard available evidence of mental retardation through Dr. Logan who revealed that Mr. Taylor use of inhalants decreased his IQ 10 points and placed him in the borderline mentally retarded range.

Alternatively, this Court should find, pursuant to Section 565.035.3 (3), that the death penalty is excessive given the evidence of Mr. Taylor's mental retardation.

Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242 (2002);

Johnson v. State, 102 S.W.3d 535 (Mo. banc 2003);

Williams v. Taylor, 529 U.S. 362, 120 S.Ct.1495 (2000);

Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934 (1989);

U.S. Const., Amends. VI, VIII and XIV;

Sections 565.030.4, 565.030.6, 565.032.3 and 565.035.3(3);

Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed.1992).

IV. Inadequate Mental Evaluation

The motion court clearly erred in denying the Rule 29.15 motion because Mr. Taylor was denied his rights to effective assistance of counsel and due process and was arbitrarily and capriciously sentenced to death, 6th, 8th and 14th Amendments, U.S. Constitution, and Section 565.032.3 (2) and (6), in that trial counsel failed to investigate and present evidence through their expert Dr. Smith that Mr. Taylor suffered from Depression, Post-Traumatic Stress Disorder, and Alcohol and Drug Dependence, which established the statutory mitigators, extreme mental or emotional disturbance and substantial impairment of capacity to appreciate the criminality of his conduct. This mitigation would have reduced Mr. Taylor's culpability and likely resulted in a life sentence.

Wiggins v. Smith, 123 S.Ct. 2527 (2003);

Wallace v. Stewart, 184 F.3d 1112 (9th Cir. 1999);

State v. Johnson, 968 S.W.2d 686 (Mo. banc 1998);

Simmons v. Luebbers, 929 F.3d 529 (8th Cir. 2002);

U.S. Const., Amends. VI, VIII and XIV;

Sections 552 and 565.032.3 (2) and (6);

Rule 29.15; and

MAI-CR 3d 313.44, Notes on Use 5.

V. Skipper Evidence:

Mr. Taylor's Good Conduct In Prison and Positive Influence on Others

The motion court clearly erred in denying Mr. Taylor's claim that counsel was ineffective in failing to present evidence of Mr. Taylor's good conduct in prison and positive influence on others because Mr. Taylor was denied his rights to effective assistance of counsel and to present mitigation under the 6th, 8th, and 14th Amendments of the United States Constitution, in that counsel failed to show that Mr. Taylor had reached out to others while in prison, writing them words of encouragement, and expressing remorse for his past misdeeds. Mr. Taylor had a positive impact on others and made a difference in their lives. Mr. Taylor was prejudiced as this evidence of good behavior in prison was mitigating and established that Mr. Taylor's life had meaning and if given life, he could have a positive influence on others.

Skipper v. South Carolina, 476 U.S. 1 (1986);

Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495 (2000);

Wiggins v. Smith, 123 S.Ct. 2527 (2003);

Lockett v. Ohio, 438 U.S. 586 (1978); and

U.S. Const., Amends. VI, VIII and XIV.

ARGUMENT

I. Failure to Investigate Aggravating Circumstance

The motion court clearly erred in denying Mr. Taylor's claim that counsel was ineffective for failing to investigate, rebut and object to the prosecutor's suggestion that Mr. Taylor had stabbed a man to death, when he had not, because counsel's failure and the prosecutor's misstatements violated Mr. Taylor's rights to effective assistance of counsel, to due process, and to present mitigation, under the 6th, 8th, and 14th Amendments of the United States Constitution, in that counsel did not investigate Mr. Taylor's prior conviction and discover that the State had maintained that a co-defendant, Carl Hardin, had stabbed the victim to death. Mr. Taylor was prejudiced, since the State argued that the jury should give death because Mr. Taylor had stabbed another man to death. Had this inaccuracy been corrected, a reasonable probability of a life sentence exists, especially since the first jury, hearing similar information, could not agree upon punishment.

Counsel knew that Mr. Taylor had prior convictions and that the State intended to introduce them at his penalty hearing (H.Tr. 353, 386). Counsel admitted that he thought the prior murder conviction was important and would be very damaging (H.Tr. 381). Yet counsel did no investigation into the priors; he simply read the police reports in his file (H.Tr. 353-54; Ex.31-32 at 194, 508, 1776; Ex. 8 at 194, 1681, 1776). Counsel could not recall reading the co-

defendant's published opinion, *State v. Hardin*, 558 S.W.2d 804 (Mo. App. 1977) and never obtained the transcript from that case (H.Tr. 354-59).

Had counsel conducted the most basic investigation, he would have discovered that the State had prosecuted Mr. Taylor's co-defendant, Carl Hardin, and claimed that Hardin, not Mr. Taylor, had stabbed the victim, Jessie Howater, to death (Ex. 2 at 230-31). Mr. Taylor actually assisted the State in that prosecution (Ex. 2, at 356-98). Since counsel never investigated, he never knew Mr. Taylor's role in the crime (H.Tr. 359-60). Counsel did not know that Hardin was three years older than Mr. Taylor, who was only 17 at the time (Ex. 2, at 200-01; H.Tr. 357-60). Counsel did not know that, after the initial altercation, Mr. Taylor fled, and Hardin repeatedly stabbed the victim, inflicting the fatal blows (Ex. 2, at 366-68, Ex. 3, at 437-440, 457; H.Tr. 357-60).

Without this most basic information, counsel could not decide how to proceed, and could not object to the State's misleading argument that Mr. Taylor had stabbed the man to death, and therefore should receive the death penalty (2Tr. 1664, 2173, 2195).

In its opening, the State immediately emphasized the prior murder, claiming that Mr. Taylor had "stabbed a man by the name of Jesse Howater, H-o-w-a-t-e-r to death" (2Tr. 1664). Later, the State read the jurors the prior charge, again misleading them by stating that Mr. Taylor had inflicted the mortal wound

(2Tr. 1927-28). During its cross-examination of Dr. Smith,[11] the State again emphasized the prior murder conviction (2Tr. 2039-40, 2046-47, 2047, 2048). Then, in closing, it hammered away, repeatedly emphasizing the prior murder (2Tr. 2163, 2164, 2172, 2173, 2174, 2176, 2195, 2196). It misled the jury, telling them that Mr. Taylor had stabbed the victim to death, and as a result should receive the death penalty:

> I can see some of this mitigation evidence maybe, being seriously considered in 1975 *when he stabbed a man to death . . .*

(2Tr. 2173) (emphasis added), and later:

> He has shown his character when he was 17 years old, when he stabbed a man.

(2Tr. 2195).

Counsel admitted that he failed to object and, without having read the transcript of the prior offense or otherwise investigating, counsel could not say whether he would have objected to the prosecutor's misleading argument (H.Tr. 362-65, 368-69). Since he had not investigated, counsel could not present evidence to show that Mr. Taylor was not the sole actor, was not the most culpable, and had not stabbed the victim to death (H.Tr. 370). Counsel could not show that Mr. Taylor had cooperated with the

[11] Counsel admitted that he did not provide background material about the prior conviction to his expert, since he did not have it (H.Tr. 371, 406).

state (H.Tr. 370-71). Counsel admitted that he did not know how the jury would consider the evidence or its effect (H.Tr. 370-71). He could not weigh the pros and cons since he had not read the transcript and did not know Mr. Taylor's role in the prior offense or his level of culpability.

Mr. Taylor alleged counsel was ineffective for not investigating the aggravating circumstance, and not objecting when the prosecutor misled the jury about Mr. Taylor's role in the prior offense (L.F. 18-42). The prosecutor's presentation of false and misleading evidence and argument as a basis for a death sentence violated due process and the right to reliable determination of the punishment, as guaranteed by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution (L.F. 23-35). Counsel's failure to investigate and then object denied effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution (L.F. 18-42).

The motion court found that the State had emphasized this prior conviction and relied heavily on it as a basis for imposing death (L.F. 939). Counsel knew the State planned to rely on it and thought it would be damaging, yet counsel did not investigate to discover what had actually happened and been testified to at the prior proceeding (L.F. 939, 946). Nevertheless, the motion court found that counsel was not ineffective, because counsel chose not to object to the prosecutor's characterization of the offense as a matter of trial strategy and had requested individual void dire on the prior murder (L.F. 939, 940, 947). Finally, since five statutory aggravators were submitted, the motion court found that Mr.

Taylor was not prejudiced by counsel's failure to present evidence regarding Mr. Taylor's actual level of involvement in the prior case (L.F. 947). Finally, the motion court found that the prosecutor had not misused or unfairly characterized the conviction (L.F. 948).

These findings are clearly erroneous and do not withstand scrutiny.

Standard of Review

This Court must review the motion court's findings and conclusions for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); *Hall v. State*, 16 S.W.3d 582, 585 (Mo. banc 2000); Rule 29.15. Findings and conclusions are clearly erroneous if, after reviewing the entire record, the court is left with the definite and firm impression that a mistake has been made. *State v. Taylor*, 929 S.W.2d 209 (Mo. banc 1996).

Ineffective Assistance of Counsel

To establish ineffective assistance, Mr. Taylor must show that his counsel's performance was deficient and that the performance prejudiced his case. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 1511-12 (2000); and *Wiggins v. Smith*, 123 S.Ct. 2527, 2535 (2003). To prove prejudice, Mr. Taylor must show a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Id*., at 2542, and *State v. Butler*, 951 S.W.2d 600, 608 (Mo. banc 1997). "A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Wiggins, supra* at 2542.

Wiggins v. Smith: **Counsel's Duty to Rebut Aggravator**

The Sixth Amendment guarantee of effective assistance requires counsel to "discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor". *Wiggins*, 123 S.Ct. at 2537 (emphasis in original). Included in such a basic investigation is a thorough review of a client's prior adult and juvenile correctional experience. *Id*.

This Court, too, has recognized that "[o]ne of the primary duties of counsel at a capital sentencing proceeding is to neutralize the aggravating circumstances advanced by the state and present mitigating evidence." *Ervin v. State,* 80 S.W.3d 817, 827 (Mo. banc 2002), citing *Bell v. Cone*, 535, U.S. 685, 122 S.Ct. 1843 (2002). Defense counsel's failure to investigate and rebut aggravating evidence constitutes ineffective assistance of counsel. *Ervin, supra, citing Parker v. Bowersox*, 188 F.3d 923, 929 (8th Cir. 1999).

In *Ervin*, counsel failed to investigate a jail assault and refute the State's contention that Ervin had threatened to kill his cellmate. *Ervin*., at 826. The potential for prejudice was strong because the State argued this nonstatutory aggravating evidence as a reason to give death. *Id*., at 827. The State maintained this evidence showed that Ervin would pose a danger to others while incarcerated. *Id*.

Similarly, in *Parker*, counsel failed to rebut the State's aggravating evidence. The State suggested that Parker murdered the victim because she was a potential witness in other pending cases. *Id*. A prosecutor testified that other cases involving the murder victim had been pending against Parker before the murder. *Id*. But Parker's former attorney would have testified that those cases had been resolved before the murder, and that Parker knew this before the murder. *Id*. at 930. The attorney had notified trial counsel about this information, but counsel failed to call her to rebut the State's aggravating evidence. *Id*. The Court held that counsel was ineffective, and ordered that Parker receive a new penalty phase. *Id*. at 931.

Similarly, here, counsel failed to investigate all reasonably available evidence that would have rebutted the State's claim that Mr. Taylor had stabbed a man to death. Counsel admitted that he never read the co-defendant's reported decision, *State v. Hardin*, 558 S.W.2d 804 (Mo. App. W.D. 1977) (H.Tr. 354-59). Counsel never obtained the transcripts from Hardin's trial (H.Tr. 354-59). Yet, like *Ervin* and *Parker*, this evidence was at counsel's fingertips. He was on notice that Mr. Taylor did not commit his prior offense alone, and that the co-defendant was convicted of the stabbing and received 20 years (Ex. 4, at 748, 783).[12] Counsel knew or should have known that Mr. Taylor had testified in that

[12] Mr. Taylor received a sentence of 11 years, after a finding of ineffective assistance of counsel (H.Tr. 385).

case, as the records so indicated. Counsel knew that at Mr. Taylor's first trial, the State had emphasized the prior offense, and knew it was damaging evidence, likely to be a centerpiece of the State's case for death. Like Ervin's counsel, Mr. Taylor's attorneys simply read the police reports they received and did not investigate further, hardly complying with the *Wiggins* Court's directive that counsel must "discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Wiggins*, *supra* 123 S.Ct. at 2537.

Without an adequate investigation, counsel could not make a reasonable strategic decision about how to proceed. *See, e.g., Wiggins*, *supra* at 2541-42 (counsel could not make a reasonable strategic choice on whether to focus on Wiggins' direct responsibility, the sordid details of his life history, or both, because the investigation supporting their choice was unreasonable). Thus, the motion court's finding that counsel *chose* not to object to the State's characterization, as a matter of trial strategy, is clearly erroneous. This decision was made without an investigation into Mr. Taylor's conduct, role, and level of participation in the prior offense.

Similarly, counsel's decision to have the trial judge voir dire on the prior murder did not alleviate counsel of their duty to investigate and rebut the misleading characterization about Mr. Taylor and his role in the prior case. In voir dire, each juror was told that Mr. Taylor had a prior murder and asked if they

could consider both sentences of death and life without parole (2Tr. 808). The following is demonstrative:

> I anticipate that the people that serve on the jury in this case will hear evidence that the defendant, Mr. Taylor, has prior convictions including a prior conviction for a murder other than the murder that is charged or involved in this case.
>
> That is a circumstance that you can rightfully consider as a juror in this case. On the other hand, a juror who sits in this case must fairly consider all the evidence and both options, that of life without parole and that of voting to impose the death penalty.
>
> Based on this circumstance that I have told you if you were selected as a juror could you carefully consider all the evidence and consider both such options based on this additional information?

(2Tr. 807-808).[13] This question did nothing to inform the jurors that Mr. Taylor was not the more culpable actor in the prior crime and actually fled after the initial altercation. It did not tell the jury that the State prosecuted Hardin, maintaining that he was the actual killer who stabbed the victim to death, contrary to the position it took in Mr. Taylor's case. It did not explain Mr. Taylor's role in the prior crime and his level of responsibility.

[13] Other examples of the Court's questioning can be found at (2Tr. 757, 820-821, 878, 907, 1021-22).

The motion court ruled that Mr. Taylor was not prejudiced, since the State submitted five statutory aggravators (L.F. 948). However, the jury did not find that the victim was a witness to a crime (2Tr. 2203-04; 2L.F. 198). Further, the first trier did not find the pecuniary gain aggravator (1Tr. 1596-97). Finally, although the State listed Mr. Taylor's prior convictions separately, they did not each constitute a statutory aggravator. *See*, § 565.032.2(1) providing that "the offense was committed by a person who has one or more serious assaultive criminal convictions". Moreover, the jury never found whether the priors were "serious" or "assaultive," precisely the determination that should have taken into account Mr. Taylor's level of participation in the prior offense and his relevant culpability. The State's case for death was not overwhelming; the first jury deliberated for hours over two days and could not agree on punishment (1Tr. 1547-54; L.F. 726).

Even with statutory aggravators, the potential for prejudice is strong, since as the motion court found: "the State emphasized and relied heavily on Mr. Taylor's prior conviction" (L.F. 939). The State hammered home the prior at every opportunity, suggesting that Mr. Taylor had acted alone, stabbing the victim to death (2Tr. 1664, 1927-28, 2039-40, 2046-47, 2047, 2048, 2163, 2164, 2172, 2173, 2174, 2176, 2195, 2196). The State misled the jury, telling them that they could tell Mr. Taylor was "just evil" because of the prior killing (2Tr. 2173). He ended his argument, focusing on the false suggestion that Mr. Taylor had stabbed Mr. Howater to death (2Tr. 2195).

As in *Ervin*, here, since the State relied on the prior conviction as a basis for death, and more importantly, inaccurately portrayed Mr. Taylor's role in that crime, counsel had a duty to object. His failure to do so was ineffective. Mr. Taylor was prejudiced and a new sentencing hearing should result.

Due Process and Reliability

The State of Missouri has taken inconsistent positions about the 1975 murder of Mr. Howater. When prosecuting Hardin, the State maintained that Hardin stabbed the victim to death, inflicting 16 knife wounds (Ex.2, at 366-68, Ex.3, at 437-38, 440, 457). Yet, in seeking death against Mr. Taylor, the State told the jury that Mr. Taylor stabbed the victim to death, that Mr. Taylor inflicted the fatal wound (2Tr. 1664, 2173, 2195). It is fundamentally unfair to rest a death sentence on a factual basis that the State has formally disavowed. It violates due process. The motion court's finding that the State did not misuse or unfairly characterize the conviction (L.F. 948) does not square with the record and is clearly erroneous.

A prosecutor's knowing presentation of false testimony is "inconsistent with the rudimentary demands of justice." *Mooney v. Holohan,* 294 U.S. 103, 112 (1935). When a prosecutor fails to correct false testimony, he violates due process. *Alcorta v. Texas*, 355 U.S. 28 (1957); *Napue v. Illinois*, 360 U.S. 264 (1959). The heightened need for reliability in capital cases, *Caldwell v. Mississippi*, 472 U.S. 320, 323 (1985), requires that the State not present false testimony or take inconsistent factual positions to obtain a death sentence.

In *Smith v. Groose*, 205 F.3d 1045, 1051-52 (8th Cir. 2000), the State's use of factually contradictory theories to convict multiple defendants of the same crime violated due process. When trying Smith, the State relied on evidence, a December 2, 1983 videotaped statement from co-defendant Lytle, that Smith entered the victims' house with a group of people, including Bowman, who then killed the victims, making Smith guilty as an accomplice. *Id.,* at 1051. The State said that this December statement was true and that Lytle had made up his in-court testimony to try to avoid a conviction. *Id*. However, when trying Cunningham, the State shifted gears, and contended that Lytle's November 30, 1983 statement, implicating Cunningham and asserting that he had killed the victims before Smith and the others arrived, was true. *Id.* The State did not introduce the December 2, 1983 videotaped statement and objected when defense counsel suggested that Lytle was lying to protect his friends. *Id*. The State took inconsistent factual positions to gain a conviction. *Id.*

The State's manipulation of the evidence deprived Smith due process and rendered the trial fundamentally unfair. *Id*. "The State's duty to its citizens does not allow it to pursue as many convictions as possible without regard to fairness and the search for truth." *Id*. Thus, the use of inherently factually contradictory theories violates the principles of due process. *Id*., at 1052. The court found that "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Id*., quoting *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

Here, too, the State of Missouri presented inherently contradictory theories. First, it maintained that Hardin stabbed the victim to death (Ex. 2, at 366-68, Ex. 3, at 437-38, 440, 457). Later, it argued that *Mr. Taylor* stabbed him to death, and therefore should be sentenced to death (2Tr. 1664, 1927-28, 2039-40, 2046-47, 2047, 2048, 2163, 2164, 2172, 2173, 2174, 2176, 2195, 2196). The State had a duty to do justice and not win at all costs. *Berger v. United States*, 295 U.S. 78, 88 (1935). Further, since this is a capital case, the Constitution required heightened reliability. *Caldwell*, *supra*. Yet, Mr. Taylor's jury was asked to sentence Mr. Taylor to death based on facts, the State had formally disavowed in Hardin's case. Its argument violated Mr. Taylor's right to due process and reliable sentencing. A new penalty phase should result.

II. Failure to Present Psychiatric Testimony of Mr. Taylor's Mental State at the Time of the Crime

The motion court clearly erred in denying the Rule 29.15 motion because Mr. Taylor was denied his rights to effective assistance of counsel and due process and he was arbitrarily and capriciously sentenced to death, in violation of the 6th, 8th and 14th Amendments, U.S. Constitution, and Section 565.032.3 (2) and (6), in that trial counsel failed to investigate and present evidence of Mr. Taylor's mental state through a psychiatrist, such as Dr. Logan, who found that Mr. Taylor's brain did not function normally due to the alcohol and drugs he received while *in utero,* as an infant, and during childhood, and the trauma he suffered as a child, and the results were mental diseases and defects, including Dysthymia, Chronic Depression, Post-Traumatic Stress Disorder, Substance Abuse problems, and a Personality Disorder, which established the statutory mitigators of extreme mental or emotional disturbance and substantial impairment of capacity to appreciate the criminality of his conduct, thus reducing Mr. Taylor's culpability and providing a basis for a life sentence.

Counsel failed to adequately investigate and present evidence of Mr. Taylor's mental problems. Dr. Logan, a psychiatrist, could have testified that Mr. Taylor's brain functioning had been altered due to the alcohol and drugs he received while *in utero*, as an infant, and during childhood. Dr. Logan could have

told the jurors about the neurological effects of the trauma Mr. Taylor suffered as a child. He could have identified Mr. Taylor's mental diseases and defects, including Dysthymia, Post-Traumatic Stress Disorder, substance abuse problems, and a personality disorder. This evidence would have established the statutory mitigators of extreme mental or emotional disturbance and substantial impairment of capacity to appreciate the criminality of his conduct, thus reducing Mr. Taylor's culpability and providing the jurors a reason to sentence Mr. Taylor to life, not death.

Dr. Logan's Evaluation

Dr. Logan evaluated Mr. Taylor during the post-conviction proceedings (H.Tr. 117, Ex. 9). He interview Mr. Taylor for five hours and interviewed two siblings and Mr. Taylor's stepfather (H.Tr. 118). He reviewed numerous documents, including Department of Corrections records, Probation and Parole records, jail records, police records, social service records, juvenile records, medical records, mental health and treatment records from Fulton State Hospital, and Kansas City Community Center, school records, employment records, Mr. Taylor's mother's medical and police records, Mr. Taylor's sister's mental health and medical records, a social history report by a licensed social worker, trial transcripts from Mr. Taylor's prior conviction and the penalty phase of the charged offense, and poetry (H.Tr. 118-19, Ex. 9, at 2-4, 6-8). He also reviewed numerous reports of interviews (H.Tr. 118-19, Ex. 9, at 4-5).

Dr. Logan found multiple stressors that produced an adverse effect on Mr. Taylor's mental health (Ex. 9, at 7). They included "adverse genetic and environmental factors, traumatic events, and physical insults to his neurological development and brain functioning." (Ex. 9, at 7).

Genetic Influences

Mr. Taylor had a prominent family history of alcohol abuse, affective disorder, anxiety disorder, bipolar disorder, and depression (H.Tr. 120, Ex. 9, at 7). Several siblings suffered from depression and Mr. Taylor's mother had documented panic attacks (H.Tr. 120). Alcohol and substance abuse problems are often found in families with a genetic susceptibility to mood disorders (Ex. 9, at 7). Psychiatric literature has established a genetic susceptibility to alcohol abuse. *Id*.

Environmental Factors

1. Multiple Transitions

During his childhood, Mr. Taylor experienced twelve transitions, including being shifted to various relatives, being sent to a training school for boys, and being placed in youth centers (Ex. 9, at 8). These transitions created an adverse impact on Mr. Taylor's socialization, his bonding with others, and his ability to establish an internal sense of security. *Id*.

2. Death and Loss of Important Figures

Mr. Taylor suddenly lost many important figures (Ex. 9, at 8-9). As a result, he felt abandoned and depressed. *Id.* Included among these losses, were

the deaths of his father, his nine-month old brother, Andrew, his maternal grandmother, his stepfather, Sammy Owens, and his mother (Ex. 9, at 8-9). Seeing his stepfather shot and killed was the most traumatic (H.Tr. 122-23).

3. Poverty, Neglect and Lack of Nurturance

A stable home during one's childhood creates an important foundation for adult emotional stability and satisfactory functioning (Ex. 9, at 9). Mr. Taylor's home was anything but stable. It was filled with poverty, neglect, lack of supervision or nurturance. (Ex. 9, at 9). During his early childhood, no father was in the home. *Id*. When Mr. Taylor was only three, he was left unattended and pulled a pot of hot coffee on his head, which required medical treatment. *Id.* While only a child himself, he supervised and cared for his brothers and sisters. *Id.* The home was filthy, bugs crawled everywhere, food rotted, and urine reeked from the furniture (Ex. 9, at 9, Ex. 32). His mother spent money on alcohol, not for food or to pay bills (Ex. 9, at 9).

4. Negative Role Models

Children learn how to cope and meet life challenges from those in their environment (Ex. 9, at 9). Unfortunately for Mr. Taylor, he had only negative role models (H.Tr. 126, Ex. 9, at 9-10). Those around him exposed him to alcoholism, fights and domestic violence (H.Tr.126). His entire family, immediate and extended, were alcoholics (Ex. 9, at 9). Mr. Taylor's mother fostered his substance abuse, giving him alcohol as an infant and child (H.Tr. 126, Ex. 9, at 10). He had to deal with his mother's promiscuity, violence and shoplifting. *Id.*

She not only condoned, but taught him to shop lift and steal (H.Tr. 126). *Id.* His stepfather, mother's boyfriends, and his cousins, also drank and were violent (Ex. 9, at 10).

Family members had odd, bizarre behaviors and beliefs (Ex. 9, at 10). Mr. Taylor's environment fostered paranoid suspiciousness (H.Tr. 142, 144). His family told them that he was cursed (H.Tr. 144). They practiced voo-doo and black magic (H.Tr. 146). He heard demonic voices during the homicide (H.Tr. 144). These symptoms are suggestive of schizotypical and paranoid personality disorders (H.Tr. 146).

Trauma

Mr. Taylor's mother got into drunken brawls with her husbands and lovers in front of him (H.Tr. 129). He saw his mother stab her husband, Sammy Owens, and saw her choke his brother during an argument (H.Tr. 129). He saw his mother and grandmother shoot, stab, and pound each other (H.Tr. 129). Once, when Sammy shot Mr. Taylor's mother, Mr. Taylor watched her bleed (H.Tr. 129). He watched as his stepfather, Sammy, was shot and killed (H.Tr. 122, 129). Scared and terrified, he ran home crying (Ex. 9, at 11). He was never the same thereafter (Ex. 9, at 11).

Witnessing violence in the home had devastating consequences (H.Tr. 126, 128). His exposure to domestic violence resulted in Post-Traumatic Stress Disorder (H.Tr. 126-27, 138-39).

Mr. Taylor not only witnessed this violence, he received it as well. His mother punched, choked and stomped on him during her violent rages (H.Tr. 131). Sammy Owens beat him (H.Tr. 131). His grandmother, Hattie, flew into rages and beat him (H.Tr. 131). Mr. Taylor was sexually abused and constantly exposed to sexual promiscuity and incestuous relationships (H.Tr. 132-33, Ex. 9, at 12).

Physical Changes in Brain

Dr. Logan explained that the trauma Mr. Taylor sustained actually changed his brain functioning (H.Tr. 174-75). Drugs and alcohol altered his brain. Before Mr. Taylor was even born, his mother drank alcohol daily while she was pregnant with him (H.Tr. 134). This drinking damaged his frontal lobes and prefrontal cortex, the areas of brain that regulate emotion (H.Tr. 134). Exposure to these toxins increased hyperactivity (H.Tr. 134). Once he was born, Mr. Taylor's mother gave him alcohol to sedate him (H.Tr. 134-35). Therefore, instead of being alert and inquisitive, he was sedated, stunting his intelligence and ability to cope (H.Tr. 135). He later used inhalants, further decreasing his intelligence, dropping him into the borderline retarded range (H.Tr. 135-36).

Trauma caused constant high arousal, which caused Mr. Taylor's body to produce high levels of steroids (H.Tr. 130, 157). Mr. Taylor's brain was in a constant state of hyper-alert or hyper-vigilance (H.Tr. 130, 157). His nervous system became reactive to deal with his environment (H.Tr. 130, 156). As a result of exposure to so much trauma, one area of his brain, the hippocampus, would have shrank in size (H.Tr. 130).

Neurological insults were not limited to his childhood beatings, but also included a 1979 skull fracture, a 1983 shot in the back of the head, and a 1991 fall from a ladder (H.Tr. 137). These traumas were significant, but in Mr. Taylor's case, minor, compared to the alcohol and drug ingestion, especially during his infancy and early childhood (H.Tr. 137). From a neurological perspective, the alcohol caused the most damage, especially to the temporal lobe, which regulated his emotions (H.Tr. 137-38).

Effects of Traumatic Background

Mr. Taylor's background had a devastating impact on his behavior and his emotions (Ex. 9, at 14-16). He believed that his mother hated him and nothing mattered. *Id*., at 14. He became depressed and tried to run away (Ex. 9, at 14, H.Tr. 130-31). He stole things for his mother, like alcohol, so she would love him. *Id*., at 14-15. He stole food to try to feed his brothers and sisters. *Id.*, at 15.

Mr. Taylor's emotional problems included depression, suicide attempts and suicidal thinking, panic attacks, shaking spells, substance abuse, marijuana abuse, irritability, fighting, hyper-arousal, startled response, hyper-vigilance, and sleeping difficulties (H.Tr. 147-49, 150). Children suffering from trauma often abuse substances to escape to a different place (H.Tr. 148). Drugs like marijuana calmed him and helped him to disassociate, and emotionally numb himself (H.Tr. 148).

Alcohol served as a disinhibitor. Thus, if Mr. Taylor was impulsive, the alcohol made him more likely to act-out in emotional distress (H.Tr. 136). If he was depressed, the alcohol gave him excitement or a boost (H.Tr. 136). Alcohol

played a role in all of Mr. Taylor's criminal offenses, including the one for which this jury had to decide punishment (H.Tr. 136-37).

Diagnosis

Dr. Logan found that Mr. Taylor suffered from major psychiatric disorders:

- Dysthymia, chronic depression,
- Post-Traumatic Stress Disorder,
- Substance Abuse Problems, and
- Personality Disorder.

(H.Tr. 157-58, Ex. 9 at 18).

Mental State at the Time of the Crime

Shortly before the offense, Mr. Taylor was in a relationship with Debra Hardin, his first relationship in 20 years (H.Tr. 153). He was working and hoping for a normal life (H.Tr. 153). When Debra left him to move to California, he was devastated and became despondent (H.Tr. 153-54). He felt totally abandoned and lost hope for the future (H.Tr. 154, 158-60, 176). He sought solace in alcohol and marijuana (H.Tr. 154, 159-61, 176). His drinking increased his paranoia and impaired his judgment (H.Tr. 161). He heard voices (H.Tr. 177). He shot and killed the victim in the spur-of-the moment decision, an over-reaction in a stressful situation (H.Tr. 160). He acted out of despair, while suffering from long-term depression, accentuated by alcohol intoxication (H.Tr. 177).

Dr. Logan found that Mr. Taylor's mental problems that had brought him to the situation were mitigating factors that lessened his responsibility (H.Tr. 178,

181). Mr. Taylor's emotional disturbance ultimately led to him to committing an irrational act during a significant emotional crisis (Ex. 9, at 19).

Counsel's Failure to Investigate and Present Evidence of Mr. Taylor's Mental State

Trial counsel knew of Mr. Taylor's mental problems. Red flags abounded everywhere:

- Traumatic childhood
- Exposure to drugs and alcohol at early age
- Exposure to violence, including physical and sexual abuse
- Head Trauma
- Records of suicide attempts
- Admissions to mental health facilities
- Prescribed psychotropic drugs
- Previous diagnosis of mental illness
- Psychologist's diagnostic impressions and concerns of mental illness
- Hearing voices at time of crime

(Exs. 31-33).

Despite these warning signs, counsel did not investigate Mr. Taylor's mental state at the time of the crime. Without evaluations or discovering Mr. Taylor's mental diseases or defects, counsel decided to forgo all this mitigation, saying they were concerned about hearsay statements that might be elicited on

cross-examination (H.Tr. 393). Without a mental evaluation, counsel had no evidence of Mr. Taylor's mental state and thus could not offer statutory mitigators such as extreme mental or emotional disturbance or substantial impairment of his capacity to appreciate the criminality of his conduct (H.Tr. 382-83). Instead, counsel offered non-statutory mitigating circumstances that the trial court rejected (2Tr. 2123; 2L.F. 195). The jury thus had no statutory mitigators to weigh against the aggravators (2L.F. 190).

Court's Findings

The motion court found that Dr. Logan was a qualified forensic psychiatrist with a substantial amount of experience (L.F. 936, 954). His testimony would have supported the statutory mitigators of Sections 565.032.3 (2) and (6), and would have supported a jury instruction to that effect, MAI CR3d 313.44A, paragraphs 2 and 6 (L.F. 936, 951-52). The court found, however, that the bulk of information presented by Dr. Logan was presented at trial (L.F. 954). The jury heard about Mr. Taylor's tragic life, in which he was physically and sexually abused, exposed to much violence, drugs and alcohol (L.F. 954). While the experts' opinions were not presented, the bases for their opinions were thoroughly addressed (L.F. 954-55). Thus, the motion court found that the testimony was not substantially different than the trial testimony, "*other than, it would have likely allowed additional statutory mitigators to be submitted to the jury*" (L.F. 955) (emphasis added). The court found that counsel made a reasonable decision not to

pursue a Chapter 552 or a mental health defense, based on the other evidence counsel possessed (L.F. 941, 956-57).

Standard of Review

As outlined in Point I, *supra*, this Court must review the motion court's findings and conclusions for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); Rule 29.15. This Court will find clear error if, after reviewing the entire record, the court is left with the definite and firm impression that a mistake has been made. *Id*.

Ineffective Assistance of Counsel

To establish ineffective assistance, Mr. Taylor must show that his counsel's performance was deficient and that the performance prejudiced his case. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 1511-12 (2000); *Wiggins v. Smith*, 123 S.Ct. 2527, 2535 (2003). To prove prejudice, Mr. Taylor must show a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Id*., at 2542.

Duty to Investigate

The Sixth Amendment guarantee of effective assistance requires counsel to "discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Wiggins, supra*, at 2537 (emphasis in the original). Wiggins' counsel hired a psychologist who tested Wiggins and concluded he had an IQ of 79, had difficulty coping with

demanding situations, and exhibited features of a personality disorder. *Id.*, at 2536. Counsel reviewed a written PSI that referenced Wiggins' "misery as youth" and indicated that he spent most of his life in foster care. *Id.* Counsel also obtained social service records documenting Wiggins' foster care placement. *Id.* The Supreme Court concluded that this investigation was insufficient. *Id.*, at 2536-38. Counsel had a duty to pursue leads in order to make informed choices about how to proceed and what evidence to present. *Id.* When assessing the reasonableness of an attorney's investigation, a court must not only consider the quantum of evidence known to counsel, but whether the known evidence would lead a reasonable attorney to investigate further. *Id.* at 2538. Wiggins' counsel failed to follow-up on leads and discover readily available evidence of severe physical and sexual abuse. *Id.*

Like *Wiggins*, Mr. Taylor's counsel failed to conduct a reasonable investigation. They did not pursue leads that would have established that Mr. Taylor suffered from depression and had major psychiatric disorders. Counsel knew about Mr. Taylor's traumatic childhood, and that he was given drugs and alcohol at an early age. They knew he had been beaten and sexually abused, and suffered multiple blows to the head. Counsel had records of his suicide attempts, his admissions to mental health facilities, his prescriptions for psychotropic drugs, and the previous diagnosis of mental illness. Their own psychologist gave them diagnostic impressions and concerns that he suffered from several psychiatric disorders. They knew that he heard voices at the time of the crime. (Exs. 31-33).

Despite all of these leads, counsel did not investigate Mr. Taylor's mental state at the time of the crime and discover his major psychiatric disorders. The motion court improperly focused on what evidence counsel knew. But the real issue was whether this known evidence would have led a reasonable attorney to investigate further. *Wiggins, supra* at 8.

Mr. Taylor suffered one of the most violent, traumatic childhoods imaginable. He was given alcohol as an infant and toddler. He was beaten and sexually abused. Terrified, he watched as those around him, who should have nurtured him, beat and stabbed each other. Not surprisingly, he tried to run away. When he could not escape, he tried to end his life. He landed in a mental hospital when he was only 15. Any reasonable attorney would have followed these leads and investigated his mental problems.

Psychiatric testimony is important, so much so that due process requires that, if a defendant demonstrates his mental condition is a significant factor at trial, he is entitled, at a minimum, to access to a "*competent* psychiatrist who will conduct an *appropriate* examination and assist in evaluation, preparation, and presentation of the defense." *Ake v. Oklahoma*, 470 U.S. 68 (1985). "Psychiatrists gather facts, through professional examination, interviews, and elsewhere." *Id*. They analyze the information and draw plausible conclusions about the defendant's mental condition and the effects of the disorder on behavior. *Id*. Through investigation, interpretation, and testimony, psychiatrists assist lay jurors

to make a sensible, educated determination about the defendant's mental condition. *Id*. at 80-81.

Without Dr. Logan's testimony, the jury could not make a sensible, educated determination about Mr. Taylor's mental condition and the effects of his disorders on his behavior. They did not know that Mr. Taylor suffered from PTSD, or that drugs and alcohol had altered his brain and its functioning. Contrary to the motion court's finding, the jury never heard this information regarding Mr. Taylor's mental state at the time of the crime. Dr. Logan's testimony contained critical mitigation, providing for a basis to submit as statutory mitigators, extreme emotional disturbance or substantial impairment of capacity to appreciate the criminality of his conduct. Section 565.032.3 (2) and (6). *See*, *State v. Richardson*, 923 S.W.2d 301, 325-26 (Mo. banc 1996), *citing* MAI-CR 3d 313.44, Notes on Use 5 (evidence of a mental disease or defect at the time of the murder supports giving the mitigating circumstance instruction).

Like *Ake*, this Court has also recognized the importance of psychiatric testimony in the penalty phase. *State v. Johnson*, 968 S.W.2d 686, 697 (Mo. banc 1998). In *Johnson,* counsel was ineffective for not presenting a psychiatrist's testimony that Johnson suffered from cocaine intoxication delirium. This Court refused to countenance insufficient pre-trial preparation with an expert witness who had helpful opinions for penalty phase. *Id*.

Here, too, had counsel adequately prepared, they would have discovered Mr. Taylor's mental disorders and the impact they had on his behavior.

Strategy Must Be Reasonable

The motion court found that counsel decided not to pursue a weak Chapter 552 or mental health defense based on the evidence they possessed and that this was an appropriate tactical decision (L.F. 956-57). These findings are clearly erroneous.

As in *Wiggins*, counsel failed to investigate Mr. Taylor's mental state. Thus, counsel could not know how strong such a defense would be.

The court also confused a Chapter 552 defense with statutory mitigators under Section 565.032.3(2) and (6). *Johnson* illustrates, that mental factors like cocaine intoxication are mitigating even though they would not provide a defense to the murder. *Johnson*, *supra* at 697. *See*, *State v. McGreevey*, 832 S.W.2d 929, 931 (Mo. App. W.D. 1992); *State v. Mouse*, 989 S.W.2d 185 (Mo. App. S.D. 1999) (drug-induced psychosis is not a mental disease or defect under Section 552.010). *See also*, *Caudill v. Com.*, 2003 WL 21355427 (Ky. 2003) (statutory mitigator of extreme emotional disturbance is broader than a mental disease or defect that can be presented as a defense in guilt phase).

"The mere incantation of the word 'strategy' does not insulate attorney behavior from review. The attorney's choice of tactics must be reasonable under the circumstances." *Cave v. Singletary*, 971 F.2d 1513, 1518 (11th Cir. 1992). Whether a tactic is reasonable is a question of law on which the motion court's findings are not entitled to deference. *Id*.

In *Simmons v. Luebbers*, 929 F.3d 529 (8th Cir. 2002), counsel[14] were ineffective because they failed to introduce available mental health information in penalty phase. *Id*., at 935. Counsel knew of Simmons' mental health problems through reports from four mental health experts. *Id*., at 933. Counsel said they were afraid that this mental health evidence would open the door to damaging information, such as Simmons' violence and anger toward women. *Id*., at 936. So instead, counsel called only one witness during penalty phase, Simmons' mother. *Id*. Instead of testifying about her son's traumatic childhood, Mrs. Simmons merely stated that she loved her son and would draw value from their continued relationship. *Id*., at 936-37.

The Eighth Circuit concluded that counsel's actions were not reasonable trial strategy. *Id*., at 938. The jury was entitled to hear evidence of Simmons' terrible childhood. *Id*. Relying on a plea from Simmons' mother to spare her son's life was insufficient. *Id*. Considering the aggravating evidence, mitigating evidence was essential to provide some sort of explanation for Simmons' behavior. *Id*., at 938-39. The purported strategy reason did not withstand scrutiny and was unreasonable. *Id*.

Likewise, here, counsel's actions were unreasonable. They claimed that evidence of Mr. Taylor's mental disorders and their impact would not be persuasive without knowing what disorders were present. Counsel said they

[14] Simmons trial counsel also represented Mr. Taylor.

worried that an expert could have been cross-examined with hearsay statements regarding the crime. But those statements were already before the jury. The State elicited from its first witness, Willie Owens, every statement that Mr. Taylor had allegedly made (2Tr. 1705-07). This could have hardly been surprising to counsel, as the State had done the same thing at the first trial (1Tr. 1188, 1189, 1190, 1191, 1192). Counsel did not to avoid these statements by not calling a psychiatrist to testify about Mr. Taylor's mental state at the time of the crime, they simply failed to explain them.

Prejudice

In *Hildwin v. Dugger*, 654 So.2d 107, 110 (Fla. 1995), the Florida Supreme Court found counsel ineffective and resulting prejudice under similar facts. In *Hildwin*, trial counsel presented some evidence in mitigation at sentencing. *Id*. The defense called five lay witnesses--including Hildwin's father, a couple who periodically cared for Hildwin when he was abandoned by his father, a friend of Hildwin, and Hildwin himself. *Id*. The testimony of these witnesses revealed that Hildwin's mother died before he was three, that his father abandoned him on several occasions, that Hildwin had a substance abuse problem, and that Hildwin was a pleasant child and is a nice person. *Id*.

However, in the postconviction proceeding, two mental health experts testified that they found the existence of two statutory mitigators: (1) that Hildwin murdered Cox while under the influence of extreme mental or emotional disturbance; and (2) Hildwin's capacity to appreciate the criminality of his

conduct or to conform his conduct to the requirements of law was substantially impaired. Section 921.141(6) (b) and (f), Fla.Stat. (1985). *Hildwin, supra* at 110. The experts also recognized a number of nonstatutory mitigators: (1) Hildwin was abused and neglected as a child; (2) Hildwin had a history of substance abuse; (3) Hildwin showed signs of organic brain damage; and (4) Hildwin performed well in a structured environment such as prison. *Id*. In view of this substantial mitigation, including the testimony of the two mental health experts that supported statutory mitigators, the Court found counsel' errors deprived Hildwin of a reliable penalty phase. *Id*. Counsel was ineffective and Hildwin was prejudiced. *Id*.

As with *Hildwin*, Mr. Taylor was also prejudiced by counsel's failure to act. The jury never heard compelling psychiatric testimony that Mr. Taylor suffered from major psychiatric disorders: Dysthymia, Chronic Depression, Post-Traumatic Stress Disorder, Substance Abuse Problems, and Personality Disorder (H.Tr. 157-58, Ex. 9, at 18). Without this testimony, the jury never learned that alcohol and drugs had altered Mr. Taylor's brain, damaged his frontal lobes and prefrontal cortex. They never knew that inhalants had reduced his intelligence, making him borderline retarded. They knew nothing about the trauma's impact on his hippocampus and the physiological changes in his nervous system. They knew nothing of his psychiatric problems and their effects on his behavior.

Contrary to the court's findings that this testimony was not substantially different from the trial testimony (L.F. 955), it was very different. Even the motion court concedes that this evidence would have provided a basis for statutory

mitigators (L.F. 936, 951-52, 955). Without that testimony, the jury had no statutory mitigators to weigh against the aggravators. *See, Hildwin, supra*.

The State's case for death was not overwhelming. The first racially-diverse jury could not agree upon punishment, deliberating over two days (1Tr. 1547-54, 1L.F. 726). The first trial judge had rejected two of three of the submitted aggravators (1Tr. 1596-97). The second jury also rejected a submitted aggravator (2Tr. 2200-2204).

If the motion court had applied the appropriate standard for prejudice, combining the evidence at trial and adding the evidence presented at the postconviction proceeding, *William v. Taylor, supra*, the court would have found a reasonable probability that the outcome would have been different. The motion court found that a jury may well have found statutory mitigation based on this evidence. This Court's confidence in the outcome must be undermined. A new penalty phase should result.

III. Mental Retardation

The motion court clearly erred in denying Mr. Taylor's postconviction motion, because counsel was ineffective in failing to present evidence of Mr. Taylor's mental retardation and this evidence prohibits his execution under his rights to due process, effective assistance of counsel, and freedom from cruel and unusual punishment, as guaranteed by the 6th, 8th, and 14th Amendments of the United States Constitution and Sections 565.030.4 and 565.030.6, RSMo Cum. Supp. 2001, in that the jury never heard available evidence of mental retardation through Dr. Logan who revealed that Mr. Taylor use of inhalants decreased his IQ 10 points and placed him in the borderline mentally retarded range.

Alternatively, this Court should find, pursuant to Section 565.035.3 (3), that the death penalty is excessive given the evidence of Mr. Taylor's mental retardation.

Counsel failed to present any evidence regarding Mr. Taylor's mental state at the time of the crime. Had counsel investigated and consulted a psychiatrist, like Dr. Logan, they would have discovered that Mr. Taylor has many mental problems. *See* Points, II, *supra*, and IV, *infra*. Dr. Logan's testimony revealed a most troubling finding - that the use of inhalants decreased Mr. Taylor's IQ, placing him in the Borderline Mental Retardation range (H.Tr. 135-36). Dr. Logan's testimony was as follows:

> By adolescence, Mr. Taylor had gone on to abusing a number of different substances, but one of the things that was fairly prominent was his abuse of inhalants. And inhalants that in my experience, if they're used chronically, usually drop an IQ by at least 10 points. I have seen a number of inhalant abusers, people who regularly sniff various substances, and they usually end up with a IQ in the borderline retarded range, which is where Mr. Taylor's IQ had been measured at times in the past.

(H.Tr. 135-36).

The motion court denied Mr. Taylor's claim that counsel was ineffective in failing to investigate and present evidence regarding Mr. Taylor's mental state at the time of the crime (L.F. 936-38, 940-41, 954). According to the court, although Dr. Logan's testimony would have supported statutory mitigators, §§ 565.032.3(2) and (6), much of the background information Dr. Logan considered was presented to the jury (L.F. 936, 937-38, 940, 954). The court held that counsel's decision not to present mental health evidence was a matter of trial strategy and did not prejudice Mr. Taylor since much of the information was before the jury (L.F. 941, 954-5).

Standard of Review

This Court must review the motion court's findings and conclusions for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000). *See*, Point I, *supra*. Given Dr. Logan's testimony, the motion court's findings are clearly

erroneous.

Sixth Amendment Right to Effective Assistance of Counsel

To establish ineffective assistance of counsel, Mr. Taylor must show that his counsel's performance was deficient and that the performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct.1495, 1511-12 (2000). To prove prejudice, he must show a "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Id.*

In *Williams v. Taylor, supra*, counsel was ineffective for failing to investigate and present substantial mitigating evidence, including evidence of Williams' borderline mental retardation. *Id*., at 1514. Williams did not advance beyond the sixth grade. *Id*. Yet, Williams did well in prison and seemed to thrive in that regimented, structured environment. *Id*. Trial counsel had an "obligation to conduct a *thorough* investigation of the defendant's background," including his mental retardation. *Id*. at 1515 (emphasis added).

Here, counsel investigated Mr. Taylor's troubled background, but did not investigate his mental state at the time of the crime, either through a psychologist or psychiatrist. Had counsel conducted such an evaluation, they would have discovered that Mr. Taylor is borderline mentally retarded, due to his extensive use of inhalants (H.Tr. 135-36). Like *Williams*, counsel's failure to present evidence of Mr. Taylor's borderline mental retardation was constitutionally ineffective. Contrary to the motion court's findings, no evidence of Mr. Taylor's

mental retardation was before the jury. Not only would this evidence have been mitigating, *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 2952 (1989), it would have completely barred the imposition of death. *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 2249 (2002). Thus, counsel's failure to investigate and present this evidence was unreasonable.

Eighth Amendment Prohibits Execution of Mentally Retarded

In addition to counsel's ineffectiveness, this Court should review Mr. Taylor's sentence to determine whether it is excessive considering the evidence of Mr. Taylor's mental retardation. Section 565.035.3.

The Eighth Amendment precludes executing the mentally retarded. *Atkins supra*, at 2249. "Our society views mentally retarded offenders as categorically less culpable than the average criminal." *Id.* Thus, "death is not a suitable punishment for a mentally retarded criminal" and would violate the cruel and unusual punishment clause of the Eighth Amendment. *Id*., at 2252.

The American Association of Mental Retardation (AAMR) defines mental retardation as follows:

> Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional

> academics, leisure, and work. Mental retardation manifests before age 18.

Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed.1992); *Atkins*, *supra* at 2245, fn.3.

Like the AAMR's definition of mental retardation, Missouri's death penalty statute does not set a cut-off for IQ. §565.030.6, RSMo Cum. Supp. 2001. Its definition provides:

> The terms "mental retardation" or "mentally retarded" refer to a condition involving substantial limitations in general functioning characterized by significantly subaverage intellectual functioning with continual extensive related deficits and limitations in two or more adaptive behaviors such as communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work, which conditions are manifested and documented before eighteen years of age.

§565.030.6, RSMo Cum. Supp. 2001. §565.030.4(1), RSMo Cum. Supp. 2001 provides that the trier *must* assess a sentence of life imprisonment without parole if it finds, by a preponderance of the evidence, that the defendant is mentally retarded. Thus, under *Atkins*, the Eighth Amendment, and § 565.030.6, someone mentally retarded cannot be executed. *Id.*

In *Johnson v. State*, 102 S.W.3d 535 (Mo. banc 2003), this Court reversed the denial of post-conviction relief and remanded for a new penalty phase.

Johnson was evaluated by three mental health experts and one expert, Dr. Bernard provided evidence of mental retardation. *Id.*, at 538. Johnson's IQ was within the borderline mentally retarded range. *Id.* He had poor intelligence indicators and other defective adaptive skills. *Id.* Reasonable minds could differ as to Johnson's mental abilities. *Id.*, citing *Murphy v. Oklahoma*, 54 P.3d 556, 557, n.17 (Okla. Crim. App. 2002) (evidence of borderline mental retardation downplayed by defendant's own expert warranted remand) and *State v. Lott*, 779 N.E.2d 1011, 1013-15 (Ohio 2002) (contradictory evidence of mental retardation necessitated a remand); *People v. Pulliam*, 2002 WL 31341298 (Ill. 2002) (contradictory evidence of mental retardation necessitated a remand); and *State v. Dunn*, 831 So.2d 862, 880-83 (La. 2002) (contradictory evidence of mental retardation necessitated a remand). Despite contradictory evidence of Johnson's mental abilities, this Court remanded for a new penalty phase. *Id.* at 539.

Here, the undisputed evidence provided by Dr. Logan showed retardation (H.Tr. 135-36). He found Mr. Taylor's use of inhalants as a youngster reduced his IQ, placing him in the borderline retarded range. *Id*. Since the evidence of Mr. Taylor's mental retardation went undisputed, this Court should find that he is mentally retarded and resentence him to life without probation or parole. Section 565.030.4 (1), RSMo Cum. Supp. 2001.

Alternatively, evidence of Mr. Taylor's borderline mental retardation warrants a reversal and remand for a new penalty phase. *Johnson*, *supra*. No jury has considered this evidence.

If this Court finds the motion court's findings inadequate on the issue, it should remand for findings on the mental retardation issue, with additional evidence adduced as necessary. *Ervin v. State*, 80 S.W.3d 817, 827 (Mo. banc 2002).

IV. Inadequate Mental Evaluation

The motion court clearly erred in denying the Rule 29.15 motion because Mr. Taylor was denied his rights to effective assistance of counsel and due process and was arbitrarily and capriciously sentenced to death, 6th, 8th and 14th Amendments, U.S. Constitution, and Section 565.032.3 (2) and (6), in that trial counsel failed to investigate and present evidence through their expert Dr. Smith that Mr. Taylor suffered from Depression, Post-Traumatic Stress Disorder, and Alcohol and Drug Dependence, which established the statutory mitigators, extreme mental or emotional disturbance and substantial impairment of capacity to appreciate the criminality of his conduct. This mitigation would have reduced Mr. Taylor's culpability and likely resulted in a life sentence.

Dr. Smith, a psychologist who specialized in drug and alcohol addiction, first saw Mr. Taylor on June 29, 1996, while his case was pending on direct appeal (H.Tr. 29-31). He gave Mr. Taylor a Michigan Alcohol screening test and the Drug Abuse Screening Test, and reviewed background records (Exs.31-33, H.Tr. 30-31). Dr. Smith drafted a summary of his impressions for appellate counsel and provided this Court with an affidavit in support of a motion to remand to rebut an inaccurate PSI (Exs. 26 and 27, H.Tr. 33-34). In September, 1998, 17 months after this Court reversed and remanded for a new penalty phase, trial counsel contacted Dr. Smith and asked him to testify to the information in his affidavit

(H.Tr. 34). This initial contact came a bare two months before the new sentencing proceeding (H.Tr. 34).

Dr. Smith told counsel that he could not make a diagnosis or give his professional opinion without additional information (H.Tr. 34). He told counsel he needed to interview other witnesses, family friends, review records, and do additional testing (H.Tr. 34-35). Since counsel did not want Dr. Smith to fly to Missouri to see Mr. Taylor again, he had a paralegal administer the Trauma System Inventory (H.Tr. 35-36).

The results of this test were alarming. Mr. Taylor displayed classic symptoms of Post-Traumatic Stress Disorder (H.Tr. 36-37). Five scales were elevated, revealing intrusive thoughts, depression and disassociation (H.Tr. 36). Yet, counsel said they did not want Dr. Smith to do an evaluation regarding Mr. Taylor's mental state at the time of crime, believing it would open Dr. Smith up to cross-examination, including harmful hearsay statements made regarding the offense. (H.Tr. 393, 397-400, 405).

Dr. Smith met with Mr. Taylor's counsel once before trial and then testified (H.Tr. 39). His trial testimony did not address Mr. Taylor's mental state and behavior at the time of the crime (H.Tr. 40). He knew that Mr. Taylor had prior convictions, but counsel provided no records about them (H.Tr. 47-48). The records would have been helpful for his testimony, since the prosecutor specifically asked him about the prior offense (H.Tr. 48, 2Tr. 2039-40, 2046-47, 2048, 2049).

After trial, Dr. Smith reviewed additional materials which contained important information that verified Mr. Taylor's account of his family's dysfunction (H.Tr. 41-42, Ex. 10). Mr. Taylor's poems revealed Mr. Taylor's thoughts, feelings and approach to life (H.Tr. 49). They spanned a number of years and covered different topics (H.Tr. 49). They revealed his sensitive, emotional side (H.Tr. 49). He could connect to others' feelings and emotions; he was thoughtful and remorseful for his past misdeeds (H.Tr. 49-50).

Dr. Smith tested Mr. Taylor's siblings, obtaining objective data regarding the impact of their environment (H.Tr. 43-44). His testing revealed that like Mr. Taylor, they had symptoms of PTSD and Depression (H.Tr. 44-45). Family members' medical records documented childhood injuries, suicide attempts, and mental illness (H.Tr. 50, Ex. 5, at 802, 808, 968). Loutina's records verified their horrific childhood. She had scars on her scalp from where she was burned as a child (Ex. 5, at 1075). She had a gunshot wound (Ex. 5, at 1060). A doctor saw blisters on her legs, the result of burns from scalding water (Ex. 5, at 1056).

Interviews with family members and close friends also corroborated the data Dr. Smith had received (H.Tr. 42, Ex. 10, at 1-2). James Dempsey, a licensed social worker, provided a social history and his report further corroborated the witnesses' accounts of alcohol, drugs, and abuse (H.Tr. 43, Ex. 10, at 2, Ex. 6, at 1179-1244).

A thorough investigation and evaluation, including corroboration of the information provided by Mr. Taylor to Dr. Smith was critical. The State pounced

on counsel's failure to provide Dr Smith with additional information, and discredited Dr. Smith for relying exclusively on Mr. Taylor (2Tr. 2038). Counsel could have easily avoided this cross-examination had they heeded Dr. Smith's warning that his evaluation was incomplete and that he needed to interview other witnesses, review records, and do additional testing (H.Tr. 34-35).

Once Dr. Smith had the relevant materials, interviews and testing, Dr. Smith could diagnose Mr. Taylor's mental illness. He suffered from Depression, Post-Traumatic Stress Disorder, and Alcohol and Drug dependence (H.Tr. 87). Unfortunately, he could not provide this diagnosis to jurors, since he did not adequate information to evaluate Mr. Taylor (H.Tr. 87).

Dr. Smith's conclusions were supported by other materials. Mr. Taylor's mental health problems were well-documented (H.Tr. 69). Dr. Shu, who treated Mr. Taylor when he was 15, found he suffered from depression, avoided showing emotion, had difficulty discussing his emotions, and had trouble with relationships (H.Tr. 69). The doctor recommended family counseling, but his mother refused (H.Tr. 69).

Eight years later, Dr. Ajans from Western Missouri Mental Health Center found that Mr. Taylor had a severe passive, aggressive personality disorder and prescribed Mellaril, a psychotropic drug (H.Tr. 73). Depressed, with auditory hallucinations, Mr. Taylor attempted suicide (H.Tr. 73). A doctor prescribed more psychotropic medication (H.Tr. 73). His problems continued; he suffered shaking spells and anxiety attacks (H.Tr. 76).

During his incarceration, Mr. Taylor received little mental health treatment and counseling, even though counselors recommended treatment (H. Tr. 72-77). One counselor reported that Mr. Taylor was mentally unstable (H.Tr. 74). The staff continually recommended mental health treatment and Mr. Taylor asked for help, but it did not come (H.Tr. 74, 75, 76, 77). On June 7, 1992, Mr. Taylor was released without the mental health treatment recommended by all the counselors and psychologists that had seen him (H.Tr. 77).

The cause of Mr. Taylor's mental problems included living in an environment filled with violence, alcohol and drug abuse, sex, including incest, and criminal activity (H.Tr. 51-54, 65-66). This behavior occurred from generation to generation (H.Tr. 53). A generational substance abuse chart showed the family history of substance abuse (H.Tr. 55-56, Ex. 19-20). Thirty members of Mr. Taylor's immediate family had alcohol or drug addictions (H.Tr. 56, 57). Their genetic predisposition for alcohol addiction was significant (H.Tr. 55-56).

Mr. Taylor's environment reeked of alcohol (H.Tr. 58). His mother drank throughout her pregnancy and she fed him alcohol in a baby bottle, using a gin nipple (H.Tr. 58). She initially gave him alcohol to sedate him and make him compliant, but later, when he was a toddler, she gave him beer and whiskey for her own amusement, to watch him perform (H.Tr. 58-59).

Alcohol mixed with violence in Mr. Taylor's home (H.Tr. 59). He regularly witnessed stabbings and shootings (H.Tr. 59). His mother was out of control, beating and stomping the children (H.Tr. 60-61, 62). She struck them

with belts, switches, or extension cords, threw whiskey bottles at them and pounded them with broom stick handles (H.Tr. 61, 62). Police often were called; they arrested Mary 20 times (H.Tr. 61). She stabbed each of her partners and shot at many of them (H.Tr. 61).

When he was only six or seven, Mr. Taylor saw his mother and stepfather stab each other with a butcher knife and an ice pick (H.Tr. 61). His stepfather beat his mother so severely, that they thought she was dead (H.Tr. 61-62, Ex. 12). Finally, one day he punched her and chased her down the street with a knife (H.Tr. 63). A cousin shot and killed Mr. Taylor's stepfather as he watched (H.Tr. 63).

Mr. Taylor's grandmother joined in the violence (H.Tr. 58, 62, 64). His grandmother and mother shot and stabbed each other (H.Tr. 64). Once the grandmother knocked his mother unconscious (H.Tr. 64).

Even though his mother abused him, Mr. Taylor still tried to protect her (H.Tr. 65). Once she stabbed him when he tried to intervene on her behalf (H.Tr. 65).

The family believed in witchcraft, curses and spells (H.Tr. 51). They convinced Mr. Taylor that he was cursed and was under a spell because he was born out of wedlock (H.Tr. 51-52, 66). Mr. Taylor lived in an isolated community that was oppressed and segregated (H.Tr. 52).

Mr. Taylor's mother often left the children alone for three to four days on end (H.Tr. 64). Mr. Taylor, a child himself, cared for his siblings, sometimes

stealing food to feed them (H.Tr. 64). His mother trained Mr. Taylor to steal and beat him if the police caught him (H.Tr. 64).

Finally, Mr. Taylor started running away, but his mother beat him when she caught him (H.Tr. 67). Incarcerations were the most stable times in his life (H.Tr. 67-69). Yet, even there he did not escape violence as he was raped and beaten (H.Tr. 69-70). He attempted suicide (H.Tr. 69).

Mr. Taylor's mental illness progressed (H.Tr. 81-90, Exs. 17-18). At the time of the charged offense, he suffered from Depression, PTSD, and alcohol and drug dependence (H.Tr. 87). His severe psychological disorders combined and impaired his ability to appreciate the criminality of his acts, and their consequences (H.Tr. 89- 90). He had auditory hallucinations -- voices told him he was no good -- and told him to commit the robbery (H.Tr. 103). Dr. Smith did not find Mr. Taylor incompetent, but found his mental defects mitigated the offense (H.Tr. 98-100).

Motion Court's Findings

The motion court found that much of Dr. Smith's testimony had been presented at trial, since he testified about Mr. Taylor's upbringing, his traumatic childhood, the psychological effect of growing up in an abusive family and the resulting difficulty in making appropriate choices (L.F. 932, 937, 953). However, the court acknowledged that counsel had failed to give Dr. Smith information about Mr. Taylor's prior conviction and failed to interview people who knew mitigating information (L.F. 932-33). As with Dr. Logan, the court recognized

that Dr. Smith's testimony supported statutory mitigating circumstances, Section 565.032.3 (2) and (6), and would have supported giving a jury instruction, MAI CR3d 313.44A, paragraphs 2 and 6 (L.F. 936, 951-52, 955). The court found that counsel made a reasonable decision not to pursue Chapter 552 or a mental health defense, based on the other evidence counsel possessed (L.F. 941, 956-57).

Standard of Review

This Court must review the motion court's findings and conclusions for clear error, as outlined in Point I, supra. *See, e.g. Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); Rule 29.15. Once this Court reviews the entire record, the Court will be left with the definite and firm impression that a mistake has been made. *Id*.

Ineffective Assistance of Counsel

To establish ineffective assistance, Mr. Taylor must show that his counsel's performance was deficient and that the performance prejudiced his case. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 1511-12 (2000); *Wiggins v. Smith*, 123 S.Ct. 2527, 2535 (2003).

Duty to Investigate

The Sixth Amendment requires counsel to "discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Wiggins, supra*, at 2537 (emphasis in original). Simply hiring an expert is not enough. Counsel must do an adequate investigation and provide the expert with all relevant background information.

Wiggins' counsel hired a psychologist who tested Wiggins and concluded he had an IQ of 79, had difficulty coping with demanding situations, and exhibited features of a personality disorder. *Id.*, at 2536. They also reviewed a written PSI and obtained social service records that documented Wiggins' foster care placement. *Id.* The Supreme Court concluded that this investigation was insufficient. *Id.*, at 2536-38. Counsel had a duty to pursue leads to make informed choices about how to proceed and what evidence to present. *Id.*

In *Wallace v. Stewart*, 184 F.3d 1112, 1117 (9th Cir. 1999), counsel also failed to prepare and communicate with an expert in penalty phase. Counsel hired mental health experts, but did not investigate Wallace's background and provide the experts with the materials so that they would have the facts necessary to do a competent mental evaluation. Counsel retained a psychiatrist to testify on Wallace's behalf at the sentencing hearing. *Id*. Counsel did not provide the expert with Wallace's MMPI results or any information about Wallace's background. *Id*. From a brief interview with Wallace and the pre-sentence report, the doctor ascertained that Wallace's mother had been mentally ill, but could not diagnose Wallace with any type of mental infirmity, and testified that Wallace had been aware of his actions. *Id*. His only explanation for his conduct was that "there must've been something that went wrong in [his] mind." *Id*. The court sentenced Wallace to death on all three counts. *Id*.

After a reversal on one count, counsel presented the testimony of a new psychiatrist at the resentencing. *Id*. at 1115. Counsel also provided this expert

with no information about Wallace's background or family history. *Id*. The court again sentenced Wallace to death. *Id*.

Had counsel investigated, he would have discovered that Wallace had a psychotic, alcoholic and anorexic mother. *Id*. at 1116. Psychosis and alcoholism have a genetic component, passing from parents to children. *Id*. Wallace had a chaotic home life, started sniffing glue and gasoline between ages 10 and 12, and suffered head trauma. *Id*. Children raised in profoundly dysfunctional environments are prone to develop severe psychiatric disturbances. *Id*. Counsel presented the testimony of a psychiatrist, but gave him no information about Wallace's background or family history. *Id*. at 1115.

The appellate court went to the heart of the issue: "Does an attorney have a professional responsibility to investigate and bring to the attention of mental health experts who are examining his client, facts that the experts do not request? The answer, at least at the sentencing phase of a capital case, is yes." *Id*. at 1117.

Here, Dr. Smith told counsel he had inadequate information to evaluate Mr. Taylor and diagnose his psychiatric disturbances. He needed to interview other witnesses, review records, and do additional testing (H.Tr. 34-35). Dr. Smith suspected psychiatric disturbances (Ex. 26). Like Wallace, Mr. Taylor was raised by a violent, mentally disturbed, alcoholic mother. He had a chaotic home life. He was given alcohol as an infant and young child. He sniffed inhalants. He witnessed much violence and suffered head trauma. Surely, if counsel must bring

additional information to the attention of an expert that does not request it, he must provide his expert with additional information when the expert does request it.

Contrary to the motion court's findings, counsel did not fully investigate. They looked at Mr. Taylor's environment and background, but when that information turned up numerous leads pointing to psychiatric disorders, counsel did not act or investigate his mental state. They failed in their basic duty to discover all reasonably available mitigating evidence. *Wiggins, supra* at 2537.

The motion court found that counsel made a decision not to pursue a weak Chapter 552 or mental health defense based on the evidence they possessed and that this was an appropriate tactical decision (L.F. 956-57).

These findings are clearly erroneous. As in *Wiggins*, counsel failed to investigate Mr. Taylor's mental state. Counsel could not know how strong such a defense would be. Further, the motion court confused a Chapter 552 defense with statutory mitigators under Section 565.032.3(2) and (6). *State v. Johnson*, 968 S.W.2d 686, 697 (Mo. banc 1998) illustrates, that defects like cocaine intoxication are mitigating even though they would not provide a defense to the murder. *See*, *State v. McGreevey*, 832 S.W.2d 929, 931 (Mo. App. W.D. 1992); *State v. Mouse*, 989 S.W.2d 185 (Mo. App. S.D. 1999) (drug-induced psychosis is not a mental disease or defect within the purview of Section 552.010). *See also*, *Caudill v. Com.*, 2003 WL 21355427 (Ky. 2003) (statutory mitigator of extreme emotional disturbance is broader than a mental disease or defect that can be presented as a defense in guilt phase).

Finally, merely stating that a failure to investigate was "strategic" does not insulate attorney behavior from review. *Cave v. Singletary*, 971 F.2d 1513, 1518 (11th Cir. 1992). "The attorney's choice of tactics must be reasonable under the circumstances." *Id*. Whether a tactic is reasonable is a question of law on which the motion court's findings are not entitled to deference. *Id*.

As they were in *Simmons v. Luebbers*, 929 F.3d 529 (8th Cir. 2002), counsel again were effective because they failed to introduce available mental health information in penalty phase. *Id*., at 935. Counsel's claimed strategy, that Mr. Taylor's mental disorders and their impact would not be persuasive to a jury, was made without knowing what disorders were present. Counsel said they worried that an expert could have been cross-examined with hearsay statements regarding the crime. But those statements were already before the jury (2Tr. 1705-07). Counsel could not have been surprised that these statements would be admitted, as the prosecutor elicited them from the same witness during the first trial (1Tr. 1188, 1189, 1190, 1191, 1192). Counsel's purported strategy reasons do not withstand scrutiny.

Prejudice

Mr. Taylor was prejudiced. The jury never heard that Mr. Taylor suffered from major psychiatric disorders, including Dysthymia, Chronic Depression, PTSD, and Substance Abuse Problems, (H.Tr. 157-58, Ex. 9, at 18). Since they never heard these findings, the court did not instruct them on the statutory mitigators of extreme emotional disturbance or substantial impairment of capacity

to appreciate the criminality of his conduct. Section 565.032.3 (2) and (6); *See, State v. Richardson*, 923 S.W.2d 301, 325-26 (Mo. banc 1996), *citing* MAI-CR 3d 313.44, Notes on Use 5 (evidence of a mental disease or defect at the time of the murder supports giving the mitigating circumstance instruction).

As discussed in Point II, *supra*, the Florida Supreme Court found prejudice under similar facts. *Hildwin v. Dugger*, 654 So.2d 107, 110 (Fla. 1995) (counsel ineffective in failing to present mental health expert testimony that would have established two statutory mitigators: (1) that Hildwin murdered Cox while under the influence of extreme mental or emotional disturbance; and (2) Hildwin's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired).

As with *Hildwin*, Mr. Taylor was also prejudiced by counsel's failure to act. The jury never heard compelling expert testimony that Mr. Taylor suffered from major psychiatric disorders: Dysthymia, Chronic Depression, Post-Traumatic Stress Disorder, and Substance Abuse Problems (H.Tr. 87). They knew nothing of his psychiatric problems and their effects on his behavior.

Contrary to the court's findings that this testimony was not substantially different from the trial testimony (L.F. 955), it was very different. Even the motion court concedes that this evidence would have provided a basis for statutory mitigators (L.F. 936, 951-52, 955). Without that testimony, the jury had no statutory mitigators to weigh against the aggravators. *See, Hildwin, supra*.

Additionally, the failure to provide Dr. Smith with adequate background material opened him up to a cross-examination that damaged his credibility. The State criticized him for relying on Mr. Taylor for his conclusions, rather than other sources (2Tr. 2038). A thorough investigation and evaluation, including corroborating information, was critical. Counsel could have easily avoided this cross-examination had they heeded Dr. Smith's warning that his evaluation was incomplete and that he needed to interview other witnesses, review records, and do additional testing (H.Tr. 34-35).

The State questioned Dr. Smith about Mr. Taylor's prior murder (2Tr. 2039-40, 2046-47, 2047, 2048). Unfortunately, Dr. Smith did not have any background information to analyze Mr. Taylor's behavior and the mitigating factors involved. Had Dr. Smith been adequately prepared, he could have discussed several factors that reduced Mr. Taylor's culpability (H.Tr. 47-48). Mr. Taylor was only 17, Hardin was 20, three years older than his cousin (H.Tr. 47). They were using drugs and alcohol (H.Tr. 48). Mr. Taylor's role in the crime was minor, compared to Hardin's; he never intended the murder and Hardin actually killed the victim (H.Tr. 47-48).

Counsel's failure to do a complete investigation and to provide their expert with all relevant background materials was inexcusable. The result, was a discredited expert and no statutory mitigators to weigh against the aggravators submitted by the State. Thus, this Court's confidence in the outcome has to be undermined. A new penalty phase should result.

V. Skipper Evidence:

Mr. Taylor's Good Conduct In Prison and Positive Influence on Others

The motion court clearly erred in denying Mr. Taylor's claim that counsel was ineffective in failing to present evidence of Mr. Taylor's good conduct in prison and positive influence on others because Mr. Taylor was denied his rights to effective assistance of counsel and to present mitigation under the 6th, 8th, and 14th Amendments of the United States Constitution, in that counsel failed to show that Mr. Taylor had reached out to others while in prison, writing them words of encouragement, and expressing remorse for his past misdeeds. Mr. Taylor had a positive impact on others and made a difference in their lives. Mr. Taylor was prejudiced as this evidence of good behavior in prison was mitigating and established that Mr. Taylor's life had meaning and if given life, he could have a positive influence on others.

At trial, Mr. Taylor was portrayed as damaged goods, someone who had a terrible, horrific childhood, filled with abuse. However, the jury never heard how that abuse affected his mental state, *see* Points II-IV, *supra*. The jury never heard that despite his difficulties, he was not simply a hardened, cold criminal who cared about no one. The jury never heard that Mr. Taylor had a sensitive, religious side, and cared about others. He reached out to his family and friends and tried to help them with their struggles, with their difficult times. This evidence would have

established that Mr. Taylor could be productive if given a life sentence, that he could positively influence others.

While incarcerated, Mr. Taylor has written religious poetry and sent it to family and friends (L.F. 408-792; H.Tr. 49-50, 161-62, 274-76, 316-22, 324, 326-27, 328, 329-30, Arizola Depo, at 11-13, Chaney Depo, at 7-12, Rhodes Depo, at 6-9, 13-17, Skillicorn Depo, at 18, Owens Depo, at 43-48). The poetry showed Mr. Taylor's sensitive and emotional side (H.Tr. 49) and that he cared about others (H.Tr. 162). He reached out to others, was thoughtful and was remorseful for his past misdeeds (H.Tr. 49-50, 161-62, 197-215, 275-76, 316-328, Arizola Depo, at 11-14, Chaney Depo, at 8-12, Rhodes Depo 6-17, Skillicorn Depo, at 6, 18-19, 22, 24-26, 29-30, Owens Depo, at 42-47). Others appreciated Mr. Taylor's thoughtfulness and it helped them through difficult times (H.Tr. 201, 203-04, 205, 275-76, 326-28, Arizola Depo, at 12-13, Chaney Depo, at 8-12, Rhodes Depo, at 9-17, Skillicorn Depo, at 12, 17, 23-26, 29-30, Owens Depo, at 42, 44, 45).

Mr. Taylor encouraged his cousin, Leroy Booker, through good times and bad (H.Tr. 197-205). He remembered Mr. Booker on his birthdays (H.Tr. 197-99). But more importantly, he helped him during difficult times, like Mr. Booker's custody battle (H.Tr. 201-04). Mr. Taylor reassured his cousin when he lost faith and kept him from giving up (H.Tr. 203-05). Mr. Taylor showed concern for his family, including his sisters (H.Tr. 205, 208-11).

Mr. Taylor reached out to his siblings (H.Tr. 274-76, Owens Depo, at 43-45). He told them how much he loved them, encouraged them to avoid his

mistakes and to lead productive lives (H.Tr. 274-76, Owens Depo, at 42-45). He tried to help Willie, encouraging him to stay in school and to stop using drugs. *Id*., at 42.

Mr. Taylor was kind to others and encouraged them to have faith in God (H.Tr. 316-22, 326-27, 332-34, Arizola Depo, at 6-7, 14, Chaney Depo, at 5, 7, Rhodes Depo, at 5, 10-12, and Skillicorn Depo, at 6, 12, 18, 24). He helped Ronald Arizola, who was mentally ill and housed in a mental unit (Arizola Depo, at 4, 9-10). When Arizola burned his own arms, Mr. Taylor got angry, warned him not to hurt himself, and showed Arizola that he cared. *Id*., at 9-11. Mr. Taylor listened to Arizola's worries about his daughter and Mr. Taylor encouraged him through his difficult times. *Id*., at 12-13. Arizola loved Mr. Taylor like a brother. *Id*., at 15.

Similarly, Mr. Taylor helped Mr. Chaney, who had lost touch with his daughter (Chaney Depo, at 6-7). Because of Mr. Taylor, Chaney reached out to his daughter, shared his love, and became a more caring and compassionate father. *Id*., at 7-10. Mr. Taylor listened to others' problems, but did not ask for anything in return. *Id*., at 11. He was caring and compassionate. *Id*., at 12. His kindness was unique in prison. *Id*.

Mr. Taylor helped another inmate write a poem to thank Sister Berta, a nun who had provided support for him and his family (Rhodes Depo, at 5-9). He encouraged other inmates to pray and to attend services at church. *Id*., at 11-12. He helped them reach out to their family and show them how much they cared.

Id., at 13-16. This opened up lines of communication, and helped them to build positive relationships. *Id*.

Mr. Taylor was remorseful for this crime and other misdeeds in his life (H.Tr. 49-50, Skillicorn Depo, at 26). He tried to atone for his crimes by helping others and adapted well in prison. *Id*., at 28. While incarcerated, Mr. Taylor's behavior gradually improved and his adjustment was excellent (H.Tr. 80). In this controlled environment, he had less access to alcohol and drugs, and events were much more predictable (H.Tr. 81). He had the opportunity for long-term development of relationships and could learn to trust (H.Tr. 81).

Counsel knew about the poetry, since family and friends mentioned it and its impact on them (H.Tr. 378-79). However, they chose not to present it or any other *Skipper* evidence to the jury (H.Tr. 379). Counsel thought it would be easy for the prosecutor to mock this evidence, was wary of inmate witnesses, and did not want the jury to know that Mr. Taylor had been on death row (H.Tr. 394-95).

The motion court found that Mr. Taylor's poetry had affected numerous people and showed a side inconsistent with someone who committed a deliberate murder (L.F. 942, 948). The court found that counsel was aware of this evidence and chose not to present it to the jury, although counsel did present it at sentencing (L.F. 948-49). The court further found that counsel's decision not to overly-utilize this evidence was not ineffective (L.F. 949). Since inmate witnesses would have been subject to cross-examination, the motion court concluded that it was reasonable to avoid calling them (L.F. 949).

Standard of Review

As outlined in Point I, review is for clear error. *Morrow v. State*, 21 S.W.3d 819, 822 (Mo. banc 2000); 29.15. A review of entire record should leave this Court with the definite and firm impression that a mistake has been made. *Id*.

Ineffective Assistance of Counsel

Mr. Taylor must show that his counsel's performance was deficient and that it prejudiced his case. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 1511-12 (2000); *Wiggins v. Smith*, 123 S.Ct. 2527, 2535 (2003). Counsel has a duty to "thoroughly" investigate mitigating evidence. *Williams v. Taylor*, *supra* at 1515. In *Williams*, counsel was constitutionally ineffective for not investigating and introducing mitigating evidence, including Williams' good jail behavior. *Id*.

Good prison behavior is relevant mitigation that serves "as a basis for a sentence less than death." *Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986), quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). This kind of evidence is critical to the jury's decision in deciding whether to sentence someone to death or life imprisonment. Good prison behavior is the flip side of past conduct, and helps the jury decide whether one should be sentenced to life in prison. *Skipper*, *supra* at

5.[15] Evidence suggesting a defendant has adjusted well to life in prison "unquestionably goes to a feature of defendant's character that is highly relevant to a jury's sentencing determination." *Id*., at 7, n. 2.

Counsel admitted that he presented no *Skipper* evidence (H.Tr. 379). Rather, he allowed the State to inaccurately portray Mr. Taylor is someone who had stabbed a man to death and then, again, committed a horrible, brutal murder. *See* Point I, *supra*. He did nothing to counter Mr. Taylor's past criminal conduct by showing his good prison behavior, although this evidence would have shown that Mr. Taylor could adjust well to life in prison and be a positive influence on others.

The motion court found that the decisions not to "overly utilize" this evidence and not to call inmate witnesses were reasonable. However, counsel presented *none* of Mr. Taylor's good prison behavior, except in sentencing, so the jury never had a chance to consider it. Further, this evidence could have been presented with non-inmate witnesses, such as Mr. Listrom, who was called at sentencing (1Tr. 2239-2244). The evidence could have been presented through witnesses who testified at trial, like Mr. Taylor's cousin, Leroy Booker (2Tr.

[15] The Court found that to exclude evidence of good jail conduct would violate due process, especially when the State presents evidence of prior criminal behavior and argues future dangerousness. *Id*.

1970-79; H.Tr. 187, 197-215; Exs. 34, 35 and 37) or his brother, Willie Owens, who counsel cross-examined about other mitigating factors (2Tr. 1708-24).

Counsel said he did not want to call inmate witnesses so the jury would not know that Mr. Taylor had been on death row (H.Tr. 394-95). Many other witnesses were available to testify about Mr. Taylor's good behavior. *See*, Dr. Smith (H.Tr. 49-50), Dr. Logan (H.Tr. 161-62), Cousin-Booker (H.Tr. 197-215), Sister-Veronica Owens (274-76), Brother-Willie Owens (Depo at 42-47), Friend-Arizola (Depo, at 11-14), and Friend-Chaney (Depo at 8-12). The jury knew that Mr. Taylor was serving sentences of life and 315 years for the related offenses in this case (2Tr. 1691-94). Jurors would hardly have been surprised that inmate witnesses knew Mr. Taylor.

Given that Mr. Taylor was going to spend the rest of his life in prison, regardless of what sentence the jury chose, counsel had a duty to give the jury a compelling reason to give Mr. Taylor life, to show them that he would be a good prisoner and could have a positive influence on others. He cared about others. He was sorry for his misdeeds. His life had purpose and meaning. He made a difference and could continue to do so if given a life sentence.

This Court should reverse and remand for a new penalty phase.

CONCLUSION

Based on the arguments in Point I - V, Mr. Taylor requests a new penalty phase; and additionally, requests under Point III, that this sentence impose a life sentence, a new penalty phase or alternatively, for an evidentiary hearing and findings on the mental retardation issue.

Respectfully submitted,

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Certificate of Compliance and Service

I, Melinda K. Pendergraph, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 19,462 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in August, 2003. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were hand-delivered this 6th day of August, 2003, to John M. Morris, Assistant Attorney General, 1530 Rax Court, 2nd Floor, Jefferson City, Missouri 65109.

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Melinda K. Pendergraph