IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
IN THE MIDDLE DIVISION AT NASHVILLE

STATE OF TENNESSEE	)	**Circuit Court for Williamson County**
	)	**Case No. S83428**
Appellee,	)	
v.	)	
	)	
RICHARD C. TAYLOR	)	**C.C.A. No. M2005-01941-CCA-R3-DD**
	)	
Appellant.	)	**CAPITAL CASE**
	)	

BRIEF OF APPELLANT RICHARD C. TAYLOR

ORAL ARGUMENT REQUESTED

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CITATIONS TO THE RECORD

All citations to the record are in parentheticals with the volume number followed by the page number. The last volume of the record as currently certified is Volume 25. Unless otherwise specified, for the eleven tapes of video record hearings the brief cites the hearings as "volumes" in chronological order as follows:

Vol. No.	Date	Video Hearing
26	10/15/1999	Appointment of Counsel
27	12/6/1999	Status Conference
28	2/11/2000	Status Conference
29	5/8/2000	Status Conference
30	1/26/2001	Competency Hearing
31	8/20/2001	Medication Hearing
32	7/8/2002	Status Conference
33	9/9/2002	Status Conference
34	4/2/2003	Competency Hearing, Day 1
35	4/3/2003	Competency hearing, Day 2
36	6/10/2003	Hearing To Terminate Counsel & Medications

On August 18, 2006, undersigned counsel filed in the trial court an uncontested motion to supplement the record with certified transcripts of the video record and proposed the above volume numbers. The video record is already part of the record. (Vol. 15, 2082). As of the time of the filing of this brief, the motion to supplement has not been decided. For the purpose of this brief, all citations to the video record include pages of the transcript using the above assigned volume numbers. In the event that the motion to supplement the record is denied, the transcript references should be considered references to the video record itself.

STATEMENT OF THE CASE

The procedural history of this case is both unusual and complex. In 1981, Richard Taylor was charged with first-degree murder in connection with the death of Ronald Moore, a Tennessee corrections officer at the Turney Center, on August 29, 1981. In May 1984, Taylor was convicted as charged and sentenced to death (Vol. 2, 19), and the conviction and sentence were upheld on direct appeal. See State v. Taylor, 771 S.W.2d 387 (Tenn. 1989).

In 1994 and 1995, the Honorable William S. Russell, sitting by special designation, held multiple days of hearing on Taylor's state post-conviction petition and, in 1997, granted relief. (Vol. 2, 133). Judge Russell concluded that Taylor's counsel had been ineffective for failing to fully explore and present evidence of Taylor's extensive mental health history at the guilt-innocence and penalty phases of the trial. (Vol. 2, 113-114). Judge Russell also determined that Taylor was not competent to stand trial and was not competent to be executed under Ford v. Wainwright, 477 U.S. 3999 (1986). (Vol. 2, 115). Accordingly, he ordered that Taylor be held without bond pending restoration of his competency to stand trial. Id. Judge Russell's grant of post-conviction relief was upheld by this Court in 1999. Taylor v. State, No. 01C101-9709-CC-00384, 99 1999 WL 512149 (Tenn. Crim. App. July 21, 1999).

Judge Donald Harris again found Taylor incompetent on January 26, 2001, and ordered his transfer from the custody of the Tennessee Department of Corrections to the Department of Mental Health. (Vol. 5, 542). While in the state hospital, Taylor was forcibly medicated against his will. (Vol. 31, 23-24). On April 2 and 3, 2003, a new trial judge, Judge Russ Heldman, held a third competency hearing and determined that Taylor was competent to stand trial. (Vol. 7, 854). On June 10, 2003, Taylor represented himself at a hearing on his *pro se* motions to terminate his forcible medication and to waive counsel. (Vol. 36, 5). Judge Heldman found that

Taylor knowingly and voluntarily waived counsel and permitted him to represent himself, but denied Taylor's motion to terminate his medication. (Vol. 9, 1206; 1208).

On October 14, 2003, Judge Heldman held another hearing to determine Taylor's competency as well as whether his forced medication was consistent with the requirements of Sell v. United States, 539 U.S. 166 (2003). Taylor was unrepresented at this hearing and only state witnesses testified. (Vol. 9, 1268; Vol. 17, 2, 35). After hearing their testimony, which was not subjected to cross-examination, Judge Heldman determined that Taylor was competent to stand trial and ordered that he be forcibly medicated during the trial. (Vol. 17, 57-58).

On the same day, Judge Heldman immediately began voir dire in Taylor's capital trial. Taylor, heavily sedated, wore his sunglasses and prison uniform at the trial. He asked no questions during voir dire, cross-examined only a handful of witnesses with bizarre and irrelevant questions, and gave no closing argument. (Vol. 18, 56, 78; Vol. 19, 117, 136, 147; Vol. 20, 338). At the sentencing phase, Taylor presented no defense or argument at all. The entire trial lasted only two days and the jury sentenced Taylor to death in less than forty minutes. (Vol. 11, 1499-1500).

Following the conviction and death sentence, Judge Heldman appointed appellate counsel (Vol. 21, 20) and, through counsel, Appellant filed a motion for a new trial and motion to dismiss indictment. (Vol. 12, 1704). Counsel filed three motions to continue the hearing on the motion for new trial. (Vol. 14, 1927, 1933-38). Judge Heldman denied the continuance motions and counsel was not able to present evidence in support of the motion for new trial. (Vol.14, 1949). Counsel subsequently filed two amended motions for new trial, limited to claims raised in transcripts that were not previously available. On July 19, 2005, Judge Heldman denied

Appellant's motion, and supplemental motions, for a new trial. (Vol. 15, 2061). On August 17, 2005, Appellant filed a Notice of Appeal. (Vol. 15, 2071).

STATEMENT OF FACTS

In 1981, at the age of 21, Richard Taylor -- schizophrenic, psychotic and delusional -- was charged with the first-degree murder of prison guard Ronald Moore in a Tennessee prison, the Turney Center. State v. Taylor, 771 S.W.2d 387, 390-92 (Tenn. 1989). Twenty-two years later, following a two-day trial at which Taylor, forcibly medicated and heavily sedated, "represented" himself while wearing sunglasses and prison garb, he was convicted of first-degree murder and sentenced to death. Taylor put on no defense at either phase of the trial, nor did he make any verbal objections to any of the state's evidence.[1]

Richard Taylor had consistently maintained that it did not matter whether he received a death sentence because he had already died and come back to life on numerous occasions. (Vol. 35, 49, 110-111, 147, 201; Vol. 36, 78). He also had consistently expressed a paranoid distrust of lawyers, believing them to be "evil agents" and members of "a corporation" that seeks to ensure defendants receive death sentences. (Vol. 35, 53-54, 72, 184). Nonetheless, Judge Russ Heldman found Taylor competent to stand trial and waive counsel at his capital trial.

There were signs of trouble with Taylor from the outset of the trial. Taylor asked no voir dire questions and declined paper and a pen. At the beginning of the guilt-innocence phase, Taylor gave a two-paragraph opening statement, telling the jury that they would hear from him in closing argument, and then asked a handful of bizarre cross-examination questions of the first few state witnesses. After that, he lapsed into utter and complete silence. He called no witnesses at either phase and waived closing argument at both phases. The jurors who sentenced Taylor to

[1] Taylor did not have standby counsel or even his court-appointed medical conservator to help him.

death never heard that he was schizophrenic or about his "family history of mental problems, [his] difficult upbringing, and [his] long history of diagnosed mental problems." (Vol. 3, 167) (July 21, 1999, Opinion of this Court, affirming trial court's vacatur of conviction and sentence). Judge Heldman somehow concluded, nonetheless, that Richard Taylor "seemed to the Court to be very in control of his trial strategy." (Vol. 25, 3.)

* * *

By 1981, the time of the offense, Taylor's mental health issues were already well documented within the Tennessee prison system. A state hospital psychiatrist diagnosed Taylor two years earlier in 1979, at age 19, with psychosis and prescribed antipsychotic medication to control his hallucinations and paranoia. (Vol. 2, 112). At his initial evaluation with the Tennessee Department of Corrections (TDOC), TDOC determined that Taylor might suffer significant psychiatric problems and recommended that he be sent to DeBerry Correctional Institution (DCI) for psychiatric services. (Vol. 2, 106). The state physicians at DCI also prescribed antipsychotic medication to Taylor, but then transferred him from DCI to the Turney Youth Correction Center. (Vol. 2, 106).

In December of 1980, less than one year before the offense, Taylor attempted suicide by swallowing glass while at the Turney Center (Vol. 2, 106).[2] Following the suicide attempt, Taylor was again sent to DCI where state physicians concluded that he might suffer from significant mental disturbance and ordered antipsychotic medication. (Vol. 2, 106). Taylor was diagnosed with paranoid schizophrenia at the Multi-County Comprehensive Mental Health Center on two occasions in 1980. (Vol. 2, 153).

[2] Taylor first attempted suicide at age sixteen. (Vol. 2, 106).

In May of 1981, shortly before the offense, Taylor was transferred to the Tennessee State Penitentiary (TSP)'s "West 100".[3] (Vol. 2, 106). A coordinator of psychological services for TSP described Taylor's condition that summer as "reclusive, agitated, disoriented, and shaky" and felt that Taylor should have been transferred back to DeBerry. (Vol. 1, 54). On July 2, 1981, Taylor was transferred from TSP's West 100 back to the Turney Center. (Vol. 2, 106). Once at Turney, Taylor no longer received his antipsychotic medication. (Id.)

The state's evidence showed that on August 28, 1981, Taylor fatally stabbed Ronald Moore, a Turney Center prison guard, with a prison-made knife. (Vol. 1, 50-51). Witnesses described Taylor at the time as "raving," trembling and shaking, with "wild" eyes, and an "expression on his face like a wild horse." (Vol. 1, 52; Vol. 19, 161, 65-66, 202). Taylor was immediately taken into custody and kept in solitary confinement on death row at TSP. (Vol. 2, 106-07).

While waiting for trial, Taylor was evaluated by Dr. William Tragle. (Vol. 6, 822). Dr. Tragle diagnosed Taylor as psychotic in an atypical way and concluded that he should be transferred to DeBerry Special Needs Facility. (Vol.6, 822). Despite this recommendation, Taylor remained in solitary confinement on death row. (Vol. 2, 106). Dr. Tragle prescribed Taylor antipsychotic medications, but Taylor's medications were once again terminated in 1984. (Vol. 2, 112, 166).

In 1984, Taylor was convicted of the first-degree murder of the prison guard and sentenced to death. Despite his documented history of mental illness, Taylor did not undergo an

[3] TSP, including TSP's West 100 unit, was the subject of federal litigation, Grubbs v. Bradley, 552 F. Supp. 1053 (M.D. Tenn. 1982), that ultimately resulted in a 1982 finding that the prison conditions were unconstitutional. (Vol. 2, 140-41). As part of the litigation, prison staff members testified that the unit bordered on "inhumane" and was "dangerous and unfit for housing mentally disturbed inmates." (Vol. 2, 140).

adequate competency evaluation before standing trial. (Vol. 2, 166, 167). Taylor's trial lawyers later testified that Taylor exhibited bizarre behavior, including wearing underwear on his head and dark sunglasses inside, while asserting that he was competent to represent himself. (Vol. 2, 107-08).

In 1997 state post-conviction proceedings, Judge William Russell set aside Taylor's conviction and sentence because of the ineffectiveness of trial counsel. (Vol. 2, 115). Judge Russell found that Taylor's counsel failed to adequately explore his competency for trial as well as his mental health and social history. (Vol. 2, 113- 115). Judge Russell also held that Taylor was incompetent to stand trial at the time of the post-conviction proceedings, in 1997, and incompetent to be executed under Ford v. Wainwright, 477 U.S. 399 (1986). (Vol. 2, 115).

Between 1984 and 2000, Taylor was in solitary confinement on death row and received no psychiatric services.[4] A TDOC guard signed an affidavit describing years of physical and psychological torture inflicted upon Taylor by prison guards while he was on death row, including beatings, starvation, and deliberate exposure to high pressure water and fire. (Vol. 3,

[4] See, e.g., testimony of Brad MacLean ("Taylor's received no treatment of any kind, either counseling or medication since January of 1985.") (Vol. 30, 74) and ("Taylor has been in a form of solitary confinement since August 29, 1981 . . . what this means is that Taylor is in his cell by himself 23 hours a day) (Vol. 30, 65); testimony of Dr. Rokeya Farooque (agreeing that Taylor was incarcerated for 20 years and did not receive psychotherapy after 1984) (Vol. 31, 10); testimony of Dr. Lenny Lococo (agreeing that the TDOC psychiatrist had not seen Taylor in the previous year) (Vol. 30, 58-59); testimony of Dr. Sam Craddock (as of January, 2001 Richard Taylor was in the custody of TDOC at Riverbend and had never been to DeBerrey Special Needs Facility) (Vol. 30, 22, 25) and (Taylor was found incompetent in 1997 and no evidence that Taylor received treatment, therapy or counseling administered after this finding) (Vol. 30, 31); Taylor v. State, No. 01CO1-9709-CC00384, Slip. Op. at 14 (Tenn. Crim.Ct. App. July 21, 1999) (Vol. 2, 145) (regarding solitary confinement on death row since 1981).

350- 377). Although the trial court found Taylor incompetent in 1997, he remained until 2001 on death row in the custody of TDOC rather than the mental health department.[5]

On January 26, 2001 Judge Donald Harris held a hearing on Taylor's competency and confinement location. Physicians from the Middle Tennessee Mental Health Institute (MTMHI) testified that Taylor was not competent to stand trial. (Vol. 30, 9). The physicians also testified that Taylor "is psychotic," that "he has a thought disorder," that he "cannot communicate in a rational or coherent fashion at times," that he "wants to represent himself at trial," and that "he expresses beliefs that have no basis in reality." (Vol. 30, 20-21, 29, 38). At the conclusion of the hearing, Judge Harris found Taylor incompetent, and, over the objections of MTMHI staff (Vol. 4, 510-11; Vol. 30, 10), ordered that Taylor be transferred to the custody of the commissioner of mental health pursuant to Tennessee law. (Vol. 5, 542). On July 10, 2001, Taylor was finally transferred from death row to MTHMI. (Vol. 5, 555).

Within the first two weeks of his transfer to MTHMI, Dr. Farooque ordered the forcible medication of Taylor with antipsychotic medications. (Vol. 31, 8, 13). When Taylor refused to take the medication, Dr. Farooque directed that Taylor be restrained with his hands and feet strapped in "four points" and forcibly medicated. (Vol. 31, 8); (Vol. 31, 23-24). Taylor immediately protested this medication (Vol. 5, 557; Vol. 5, 560) and Taylor's guardian ad litem, Virginia Story, quickly sought judicial review of Taylor's forcible medication. (Vol. 5, 561).

[5] In 1999, the state informed the court that it would serve notice of its intent to seek the death penalty again against Taylor after he was appointed counsel. (Vol. 3, 172). The case was assigned to Judge Donald Harris, who held a hearing in response to the state's filing. (Vol.4, 388) Judge Harris determined that Taylor needed a guardian ad litem, ordered a psychiatric evaluation, and appointed counsel. (Vol.4, 388) Judge Harris ordered Middle Tennessee Mental Health Institute (MTMHI) to examine Taylor and evaluate his competency on May 10, 2000 (Vol.4, 426) and appointed Virginia Lee Story as Taylor's guardian at litem on November 17, 2000. (Vol.4, 514); see also, Order filed 12/13/00 (Vol.4, 518).

Judge Harris held a hearing on Ms. Story's motion on August 20, 2001, and concluded that the medication was appropriate based on the testimony of Dr. Farooque. (Vol. 31, 36).

At the hearing on his medications, Taylor informed the judge that he wanted to testify. (Vol. 31, 33). He complained to the court that the drugs were making him "mentally retarded," and unable to "[t]est the prosecution's case." (Vol. 31, 33). Judge Harris responded that he thought he knew the concerns that Taylor wanted to express and that those concerns would be more relevant if Taylor were later found competent to stand trial. (Vol. 31, 36). Judge Harris noted that the calculus regarding the forcible medication might differ if the state sought to forcibly medicate Taylor at trial. (Vol. 31, 36) ("Well, I will say this, I think that the standard that the Court is using now is perhaps different from the standard making a similar decision if were talking about medicating during a trial.")

On November 5, 2001, the Davidson County Circuit Court appointed a limited conservator "empowered to consent to medical and mental examinations and treatment on Taylor's behalf." (Vol. 12, 1688). At a hearing on the issue, the presiding judge, Judge Walter C. Kurtz, denied Richard Taylor's request to proceed *pro se* in the conservatorship case. Judge Kurtz found that "the proof adduced at the hearing clearly showed the respondent as being unable to represent himself." Carobene v. Taylor, No. 01P-1613, slip op. at 2 (Tenn. 7th Cir. Nov. 5, 2001). Judge Kurtz appointed the Guardianship and Trust Corporation (GTC) as Taylor's medical conservator. (Vol. 11, 1506).

On May 6, 2002, Dr. Larry Southard, the medical director of MTHMI, wrote to Judge Harris regarding the opinion of MTMHI that "Taylor's condition has improved sufficiently that he is currently competent to stand trial and to assist in his own defense." (Vol. 5, 576). Approximately two weeks later, on May 23, 2002, Dr. Southard wrote again to court and

explained that MTMHI had reversed its opinion and again believed that Taylor was incompetent. (Vol. 5, 604-05). Dr. Southard reported that the Forensic Services Program (FSP) psychiatrist had "made a minor adjustment of the dosage level of some of the medication" and described the change in Taylor's condition:

> On May 20 the FSP clinical team met with Taylor. It was immediately apparent that his psychiatric condition had rapidly and significantly deteriorated over the weekend. It was the opinion of the entire team that it would be a mistake to proceed with returning Taylor to TDOC at the present time.

(Vol 5, 604-05). Five weeks later, MTHMI again changed its opinion of Taylor's competency. (Vol. 5, 606). On this date, Dr. Southard opined that Taylor "is now considered to be competent to stand trial and to assist in his own defense."

On September 3, 2002, Dr. Keith Caruso, a psychiatrist appointed by the court to assist the defense, filed a formal report with the court stating his opinion that Taylor was incompetent and explaining the bases for his opinion, including Taylor's delusions that he has died in the past and therefore won't die if executed, that all attorneys are evil agents of the state, and that he must wear sunglasses because the police use radio waves to control his mind. (Vol. 6, 819, 824, 828, 832). Dr. Caruso examined Taylor again on March 25, 2003 and wrote a second report on March 26, 2003. This report confirmed his opinion that Taylor was incompetent based on his continued delusions and hallucinations. (Vol. 6, 837, 839, 841-843).

A new judge, Judge Russ Heldman, was assigned to the case in 2003. Judge Heldman held a competency hearing on April 2, 2003 and April 3, 2003.[6] Dr. Farooque, the psychiatrist

[6] Shortly before the new hearing, on March 10, 2003, Dr. Southard sent a letter to Judge Heldman reiterating MTHMI's wish that Taylor be transferred to TDOC custody, a transfer that would only be possible if Taylor were deemed competent. Although Dr. Southard conceded that Taylor would not choose voluntarily to continue his medication, he noted that a conservator

from MTMHI and Dr. Stout, a psychologist from MTMHI, testified on behalf of the state. Dr. Caruso and five of Taylor's former attorneys -- Brad MacLean, Sue Palmer, Henry Martin, William Redick, and Michael Williamson – testified on behalf of the defense.

None of the witnesses at the competency hearing, including the state physicians, disputed that Taylor suffers from schizophrenia, a "devastating brain disorder . . . [which] interferes with a person's ability to think clearly, to distinguish reality from fantasy, to manage emotions, make decisions, and relate to others."[7] See, e.g., (Vol. 34, 14, 92). Schizophrenia is characterized by such symptoms as delusions, hallucinations, "gross impairment in reality testing," "structural brain abnormalities," and affective flattening. BENJAMIN SADOCK AND VIRGINIA SADOCK, KAPLAN & SADOCK'S SYNOPSIS OF PSYCHIATRY, 491 (9th ed. 2003); AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL, 297, 300, 304-05 (4th ed. Text Rev. 2000).

The witnesses testified that, as a result of his mental illness, Taylor likely suffered from the delusion that he was under the control of "unseen forces" at the time of the offense. (Vol. 34, 38; Vol. 35, 49, 120, 144-45). The witnesses further agreed that Taylor presently suffered from both visual and audio hallucinations, although they disagreed about the severity of the hallucinations. Compare, e.g., report of Dr. Caruso (Vol. 6, 27) ("[H]e endorsed hearing musical hallucinations and wanted to check the room for a source."); testimony of Dr. Stout (Vol. 34, 37) (explaining that Taylor might have visual hallucinations "sometimes at night, for example, in

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could be appointed and Taylor could be forcibly medicated at the TDOC DeBerry Special Needs Facility. (Vol.5, 670-671).

[7] National Alliance on Mental Illness, About Mental Illness: Schizophrenia, http://www.nami.org/Template.cfm?Section=By_Illness&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=54&ContentID=23036 (last visited Aug. 23, 2006). See also World Health Organization, The Executive Summary of The Global Burden of Disease and Injury Series, http://www.hsph.harvard.edu/organizations/bdu/GBDseries_files/gbdsum4.pdf)* 26 (listing schizophrenia as one of the ten most disabling diseases) (last visited Aug. 23, 2006).

when he's alone in his room in the time before he falls asleep" but noting that the hallucinations are "much, much reduced in frequency and severity").

Multiple witnesses testified about Taylor's delusional belief that he had died in the past and had come back to life and, if executed, would come back to life once again. See, e.g., Mr. MacLean (Vol. 35, 49) (describing Taylor's recent statement that "he had been killed over at the old prison once before and had awakened . . . and he said that if he were executed the same thing's going to happen to him again. That he's not going to die."); Mr. Redick (Vol. 35, 110-111) ("Well he doesn't think that he can be executed. Or rather, I think to be more precise, he doesn't think that, he thinks if he's executed that he will rise from the dead. And, and Richard is of the opinion that he's died, well, when I saw him in September, he told me that he had died three times before and he recounted the instances when he died in some detail. When I saw him a couple of weeks ago, he said he had died four, four times previously."); Mr. Williamson (Vol. 35, 147) (same); Dr. Caruso (Vol.35, 201) (explaining that time served and the death penalty "are equivalent to" Taylor because "if he dies, he's not going to be dead"); but see, Dr. Stout ("On March 11, when asked, he denied believing anymore that he had died and come back to life.")

Dr. Farooque and Dr. Stout both testified that they chose not to question Appellant about his strange dress or practice of wearing dark sunglasses inside. (Vol. 34, 42, 63-64, 119). In contrast, Dr. Caruso testified that he questioned Taylor and learned that he wears sunglasses and layered clothing in order to keep the police from controlling his mind. (Vol. 35, 195-96). ("I asked him about why are you wearing these glasses. . . . [H]e told me . . . that it cut the police from being able to bombard him with radio rays and control him. And that the police did this [to] everybody.")

Witnesses also testified extensively about Taylor's fundamental distrust of attorneys, which arises out of his delusion that all attorneys are evil. See, e.g., Dr. Caruso, (Vol. 35, 183-184) ("I believe he has delusions about his attorneys . . . He [told me that] he couldn't trust any attorney with his case. . . He believes that [trial counsel] Mr. Appman is working for a corporation that is tasked with, or tasks him with making sure that Taylor will be convicted and get the death penalty."); Mr. MacLean (Vol. 35, 67) (Taylor is "incapable . . . of forming a [] trust, any kind of a, of a working relationship with counsel.") Dr. Farooque acknowledged that Taylor "needs to understand that the lawyers is the means for him to talk in the courtroom." (Vol. 34, 97).

Dr. Stout, the MTMHI psychologist, explained that Taylor's memory of the events surrounding the allegations was distorted. (Vol. 34, 57) ("I think that his memory for the, the offense is distorted. I think it's distorted in ways that might be seen in a mentally ill individual.") Because delusions become incorporated into a mentally ill person's reality, he recommended that Taylor's counsel check everything Taylor said. (Vol. 34, 71).

The state witnesses Dr. Farooque and Dr. Stout testified that they believed Taylor was competent. (Vol. 34, 26, 96). Dr. Stout added, however, that "competence can wax and wane" (Vol. 34, 66) and warned that Taylor might decompensate under the stress of the capital trial if he represented himself. (Vol. 34, 80) ("I do not think he's equipped to represent himself . . . because he's, he's not a lawyer . . . [a]nd you know, if he had to do it all by himself, if he had to do it all by himself from beginning to end, I don't know if he could hold up to the stress.").

Dr. Caruso testified that in his expert opinion Taylor was not competent to stand trial and was not competent to waive his right to counsel or to represent himself at trial. (Vol. 35, 218). The lay witnesses testified that, based on their recent interactions with Taylor, they did not

believe him capable of working with counsel or competent to stand trial. (Vol. 35, 23-24, 35,49-50, 53-54, 67, 113-15, 135, 153, 184).

After the hearing, in a conclusory one-paragraph order, Judge Heldman determined that Taylor was competent to stand trial. (Vol. 7, 854). Judge Heldman credited the testimony of Taylor's former attorney, Brad MacLean, but gave "little weight" to the testimony of Taylor's other former attorneys "as a result of their prior attorney-client relationships with [Taylor]." (Vol. 7, 862). He also dismissed the testimony of Dr. Caruso as "an advocate." (Vol. 7, 862). Judge Heldman concluded that the evidence "preponderated in favor of finding defendant competent to stand trial." (Vol. 7, 862).

A short time later, Taylor filed a motion requesting to proceed *pro se* and requesting that his "psycho meds be terminated." (865-66) Judge Heldman held a hearing on the motion on June 10, 2003. At the outset, Judge Heldman denied defense counsel's uncontested motion for a continuance and indicated his belief that defense counsel lacked standing to participate. (Vol. 9, 1202; Vol. 36, 5).

Taylor was the only witness at the hearing. There was no expert testimony at all on the question of the forcible administration of medication. The court and the state questioned Taylor about his desire to terminate his counsel and medications. Defense counsel attempted to ask cross-examination questions; however, the trial court ruled that Taylor did not need to respond to the questions by defense counsel if he did not wish to. (Vol. 36, 76-77).

Taylor testified that he believed he alone was capable of representing himself (Vol. 36, 24, 31), that he couldn't be wrong about the law, (Vol. 36, 41), that there might not be pitfalls in his self-representation given that he has been "in a lot of pits," (Vol. 36, 55), and that he previously "was killed and came back to life." (Vol. 36, 78). Taylor also testified about his

desire to terminate his medication so that the jury would not see him medicated. (Vol. 36, 36). Under questioning, he admitted that he did not believe he needed the medications. (Id).

Hershell Koger, Taylor's defense counsel, stated at the hearing that Taylor did not, in "any sense of the word, knowingly or understandingly understands what he is doing when he starts talking about representing himself," and described in detail Taylor's delusions that prevented him from forming a relationship with counsel, such as his delusional belief that he personally had cross-examined the witnesses in post-conviction and was responsible for winning his case on appeal. (Vol. 36, 65-67) .

On June 16, 2003, Judge Heldman ruled that Taylor knowingly and voluntarily waived his right to counsel and that he could represent himself, but that the forcible medication would continue. (Vol. 9, 1206; 1208). Judge Heldman also ruled that all motions filed by his attorneys after the filing of the Taylor's motion would be stricken and set the case for trial. Id.

Taylor's appointed counsel sought to appeal the ruling and asked for a rehearing on the issues of in light of Sell v. United States, 539 U.S. 166 (2003). (Vol. 9, 1215, 1236-1245). Judge Heldman denied the request for a rehearing, finding that Taylor's counsel "lacked standing to contest or assert the issues raised by his motions" and ruling that "it would be unconstitutional for this Court in any way to force appointed counsel back on this case or to appoint 'elbow' counsel in light of Defendant's expressed, competent wishes." (Vol. 9, 1267-1268). Nonetheless, Judge Heldman ordered a new hearing, to be held on October 14, 2003, the first day of trial, "to address (1) whether Defendant is still competent to stand trial… and (2) whether the criteria set forth in the Sell case are still met." (Vol. 9, 1268). The court ordered only the state physicians to attend the October hearing. Id.

On September 11, 2003 the Davidson County Probate Court determined that "Mr. Taylor [was] still in need of a conservator" and appointed attorney Ed Ryan to succeed the Guardianship and Trust Corporation as Taylor's limited conservator, empowered to make medical decisions in Taylor's best interests. (Vol. 11, 1506; Vol.12,1689). One month later, Judge Heldman commenced the hearing on Taylor's competency and medications and, immediately thereafter, Taylor's capital murder trial.

In conformance with the court order, Taylor was unrepresented at the October 14, 2003 competency and medication hearing, without even standby counsel to assist him. (Vol. 9, 1268). Dr. Farooque and Dr. Stout were the only two witnesses. Both physicians had met with Taylor on two occasions before the hearing, including a visit the day before. (Vol. 17, 15, 42). Because Taylor had been transferred out of the MTMHI facility to DOC, they were no longer treating him. Dr. Farooque testified that she was not aware of Taylor's exact medications, although she believed them to be the same as she had previously prescribed. (Vol. 17, 10, 15).

Taylor's court appointed medical conservator, Attorney Edward Ryan, attempted to participate in the Sell/competency hearing. (Vol. 17, 34). He informed the court that he had instructed that Taylor's medications be terminated the day before the hearing. Id. Judge Heldman responded that Mr. Ryan had no standing to participate. (Vol. 9, 1215; Vol.17, 35).[8] In response to a suggestion by the prosecutor, Dr. Farooque attempted to call Taylor's treating physician in the Department of Corrections. Although she was unable to reach the physician, she

[8] Judge Heldman also issued a written order prohibiting Virginia Story, Taylor's former guardian ad litem, and Mr. Ryan, Taylor's current medical conservator, from participating in this case. (Vol. 11,1512-13). He described their efforts to supplement the record with information about Taylor's medications as "regrettable" and as "interfering with the constitutional rights of Taylor in this matter." (Vol. 11, 1513).

did speak with the medical director who confirmed that the physician had begun tapering off Taylor's medications the day before the hearing. (Vol. 17, 53).

Dr. Stout testified that when he recently questioned Taylor about "any notions that he has died before[, Taylor's] response was vague as he said this was an [']experience he had['] in the past, but he was unsure if he believes this now." (Vol. 17, 50). Dr. Farooque and Dr. Stout both concluded that Taylor was competent to stand trial. Taylor did not testify or call any witnesses. Judge Heldman ruled that Taylor was competent to stand trial and that the criteria from Sell were satisfied. (Vol. 17, 57-58).

The competency hearing was concluded at 11:15 a.m. (Vol. 17, 65) and the Court proceeded directly to voir dire. (Vol. 11, 1499) Taylor was heavily sedated, wore his sunglasses and prison uniform, asked no questions during voir dire, and declined paper and pencil. (Vol. 18, 51, 56, 78).

Taylor was forcibly medicated from July, 2001 through his post-trial proceedings with high doses of Clozaril and Zyprexa, both antipsychotic medications associated with drowsiness and sedation. The forcible administration of antipsychotic medication had a profound effect on him. Before the forcible administration of antipsychotic medications, even though he was incompetent, Taylor was highly engaged in his legal defense, frequently filing motions and continuously interjecting himself at hearings, including by raising legal arguments and attempting to cross-examine witnesses. (See, e.g., Vol. 3, 242; Vol. 4, 400-02, 409, 414, 522). After the forcible medication began, Taylor filed almost no motions and became quiet, withdrawn, and slow to respond in court.[9] (Vol. 5, 557, 560), Video Tape of June 10, 2003 h'rg. at 12:58 p.m., 1:05 p.m., 1:08 p.m., 1:11 p.m. See also Vol. 35, 60-61 (testimony of Brad

[9] For a more complete discussion of the change in Taylor's demeanor and involvement, see the Due Process Sell section, infra.

MacLean explaining that post-medication Taylor appeared very docile, placid, pale and underweight); (Vol. 35, 108) (testimony of Bill Redick that Taylor was "obviously sedated.").

Taylor's lack of engagement, confusion, and slow thought was abundantly apparent at the trial. Judge Heldman impaneled the jury at 2:30 p.m. on October 14, 2003, instructed the jury, and then ordered the parties to give opening statements. (Vol. 18, 93). Taylor's opening statement was two paragraphs long. (Vol. 18, 98). He told the jury that he would "talk to [them] later here in closing arguments and try to go over point by point where [the prosecutor] is incorrect." Id. That was the last time the jury heard from him. See (Vol. 19, 295) (Taylor declining to testify); (Vol. 20, 338) (waiving closing argument at the guilt phase); (Vol. 20, 398) (waiving argument at the penalty phase).

The presentation of evidence and deliberations for both phases of the trial lasted less than two days. (Vol. 11, 1499-1500; Vol. 19, 113 – Vol. 20, 413). On October 15, 2006, the jury was brought in at 9:45 a.m. The State called twelve witnesses and rested before 5:00 p.m. that day. (Vol. 11, 1501). Taylor cross-examined only five of the state's twelve witnesses, asking a total of only 13 questions in the morning and no questions at all in the afternoon.[10] He made no objections during any of the testimony.[11]

Taylor's few cross-examination questions were short and bizarre. For example, he asked the state's first witness, the deceased's sister, Eureka Wilsdorf, a single question: "Are you aware – are your family members aware that Ronnie was a member of the Klu (sic) Klux Klan?" (Vol.

[10] For Taylor's limited cross-examination, see Vol. 19, 117, 136, 147, 155, 182. No cross-examination, see Vol. 19,174, 194, 206, 220, 269, 272, 285.

[11] Taylor's only objection to the evidence was a pretrial motion he filed objecting to the introduction of letters he purportedly wrote, addressed by the trial court out of the presence of the jury. (Vol. 19, 230).

19, 117).[12] He cross-examined the third and the fourth witnesses, Mr. Gardner and Mr. Compton, by asking each the single question whether a black inmate walked through the hall. (Vol. 19, 147, 155).

Before trial, Taylor had filed a written objection to the admission of letters he wrote, contending that the letters were a product of torture. The Court addressed the issue outside of the presence of the jury (Vol. 19, 223), and Taylor appeared utterly confused:

> The Court: Mr. Taylor, this is a jury-out hearing; you objected to the letters based upon your filing. You can now question [witness Jim Rose, whom the state called to testify about the letters] anything about this issue; in support of your objection, you can question the witness at this time.
> Mr. Taylor: What's my objection?
> The Court: Your objection? You made an objection –
> Mr. Taylor: Are you telling me to object?
> The Court: No, I – you objected in writing to these letters originally; you sent an objection in. You recall that, don't you?
> Mr. Taylor: Right.
> The Court: Okay. Now you can – I've noted your objection; the State wants this introduced. You have an opportunity now in the writing to cross-examine the witness about these.
> Mr. Taylor: I have no questions.

(Vol. 19, 230). The court admitted the letters. (Vol. 19, 252-53).

On the morning of October 16, Taylor rested without presenting any defense or calling any witnesses on his behalf. (Vol. 20, 323). The prosecutor gave a closing statement, Taylor waived his statement, and the court instructed the jury before noon. (Vol. 20, 338; Vol. 11, 1501). The jury deliberated from 11:59 a.m. until 1:34 p.m. and then found Taylor guilty of first-degree murder. (Vol. 11, 1501).

Judge Heldman immediately proceeded to the penalty phase. (Vol. 11, 1501-02; Vol. 20, 370). Judge Heldman did not ask Taylor if he was ready to proceed or if he wanted standby

[12] The State objected to the question and when the Court asked Taylor for his response to the objection, Taylor stated "I have no other questions." (Vol. 19, 117, line 13).

counsel before starting the penalty phase. Id. Indeed, without giving either the jury or Taylor even a lunch or restroom break, Judge Heldman offered a brief instruction to the jury (Vol. 20, 371), and then the state proceeded to give its opening statement. Id. Taylor waived opening statements, and the state called its first witness. (Vol. 20, 374-375).

The state called three witnesses at the penalty phase, none of whom were cross-examined by Taylor (Vol. 20, 377, 379, 378). The state's first witness introduced a copy of Taylor's indictment for armed robbery, although Taylor was only convicted of simple robbery. (Vol. 20, 376; Exh. 22). The state's second witness, Dr. John Filley, a psychiatrist formerly employed at the Middle Tennessee Mental Health Institute who had interviewed Taylor in 1983 and 1984, testified, without objection or cross-examination, that Taylor was not insane at the time of the offense. (Vol. 20, 377-79). The state's third and final witness, Jerry Simmons, was a former DOC correctional officer. (Vol. 20, 380). Less than thirty minutes after the jury's finding of guilt, at 1:58 p.m., the state rested its case at the penalty phase. (Vol. 11, 1502).

After the state rested, Judge Heldman dismissed the jury and asked Taylor if intended to call any witnesses or testify. (Vol. 20, 388-90). Taylor responded that he did not intend to do either. (Id.) Judge Heldman asked if Taylor desired the appointment of elbow counsel, which Taylor declined. (Vol. 20, 390). At no point during either phase of the trial – including after Taylor stated that he would not introduce penalty-phase evidence – did Judge Heldman question Taylor about his understanding of the significance of presenting mitigation evidence.

Taylor presented no mitigation evidence or defense at the penalty phase and gave no closing argument. (Vol. 20, 388, 380). As a result, the jury did not learn, for example, any of the evidence of Taylor's long history of mental health problems, including his schizophrenia. Nor did the jury learn anything regarding Taylor's family life: they did not know that Taylor was

adopted at a young age, that he spent most of his early years in state institutions, and that his biological family members suffered from significant drug, alcohol, and psychiatric problems. (Vol. 2, 106, 107). The jurors knew nothing of his biological sister's long history of mental health problems, including schizophrenia. (Vol. 2, 145).

The court called the jury back to the court room and asked the state to give closing argument, although Taylor had not rested on the record. (Vol. 20, 391). In closing the prosecutor told the jury that it was his "duty" to ask the jurors to sentence Taylor to die and that "there are few or none" mitigating factors in the case. (Vol. 20, 391-92). Taylor waived his closing argument. (Vol. 20, 398). Judge Heldman instructed the jury and within forty minutes, at 3:46 p.m., the jury returned with a sentence of death. (Vol. 11, 1502).[13]

Shortly after the trial, Judge Heldman appointed appellate counsel (Vol. 11, 1569), who raised Taylor's competency at the first opportunity. (Vol. 21, 20) ("[It is counsel's] position that [Taylor] is not competent today and that he was not competent during the trial, and that the testimony you just heard was not the testimony of a competent man even though he was medicated."). At an October 27, 2003, hearing addressing whether Taylor should continue to be forcibly medicated, Taylor testified that his new lawyer, Kelly Gleason, had come to see him four times in the past week, when in fact she had come twice, (Vol. 21, 17, 19), and that he could not remember many of the topics they had discussed (Vol. 21, 18, 19).

[13] The jury found four aggravating factors: (1) the murder was committed against a corrections employee who was engaged in the performance of his duties and the defendant knew or reasonably should have known that such victim was a corrections officer or corrections employee engaged in the performance of his duties; (2) the murder was especially heinous, atrocious or cruel in that it involved torture or depravity; (3) the murder was committed by the defendant while he was in lawful custody or in a place of lawful confinement; (4) the defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or the threat of violence to the person. (Vol. 11, 1563-1564).

Through counsel, Taylor timely filed a motion for new trial on April 30, 2004. (Vol. 12, 1704, 1706-1752). The State filed its answer on July 6, 2004. (Vol. 12, 1753-1762). A hearing on the motion was set for August 24, 2004. Defense counsel filed three motions to continue or reschedule the hearing. (Vol. 14,1927-1929, 1933-1938).[14]

Judge Heldman did not rule in advance on the motions for a continuance and instead addressed the motions at the hearing on August 24, 2004. (Vol. 23, 9). Defense counsel explained that a continuance was necessary to produce unavailable witnesses and to produce subpoenaed documents. (Vol. 23, 10-18). Defense counsel argued that witnesses Brad MacLean, Bill Redick, and Virginia Story were necessary to testify about new evidence that Taylor had been incompetent at the time of trial, and that the side effects of the forcible medication had seriously interfered with his trial rights. (Vol. 23, 10, 12). In their offer of proof, for example, counsel explained that Virginia Story would testify that Taylor was "unaware that after the return of a guilty verdict that he would be proceeding into a sentencing phase," that he "wasn't able to converse intelligently with [Ms. Story]," and that he "appeared to be in a drugged, highly medicated state and that he did not understand the procedure." (Vol. 23, 12, 37). Counsel also based their motion for continuance on their need for Taylor's medical records: although they had issued a subpoena to the custodian of records for the records, the custodian did not appear at the August 24, 2003 hearing. (Vol. 23, 16-18).

Judge Heldman took the defense's motion to continue under advisement but then asked the parties to proceed on the motion, (Vol. 23, 29), noting that he "had observed Taylor

[14] Defense counsel learned of the hearing date on August 10, 2004. They filed a motion to continue the hearing in order to call critical witnesses and have time to prepare for the hearing. (Vol. 14, 1934-1935).

throughout the trial" and that he "was never of the opinion that Taylor was all of those things that Mr. Johnston respectfully has said that Ms. Story would say, if she testified." (Vol. 23, 39).

On August 27, 2004, Judge Heldman denied the Taylor's motions to continue and reschedule the hearing, ruling that lay testimony would "have no bearing on the Court's ruling on the new trial motion" and that new evidence could not be used to show that Taylor was incompetent at the time of trial, since the court had previously ruled that Taylor was competent. (Vol. 14, 1949).[15]

On July 19, 2005, Judge Heldman issued an order denying Taylor's motion for new trial, motion to dismiss indictment, and the supplemental motions for new trial. (Vol. 15, 2061). This appeal followed.

[15] Thereafter, Judge Heldman granted Appellant permission to file limited supplemental motions for new trial based on trial transcripts that had not previously been provided to defense counsel. (Vol. 14, 1952, 1957). At a subsequent argument on the supplemental motions for a new trial, defense counsel pointed to Taylor's bizarre statements at trial and his lack of memory after the trial as evidence of his then and current incompetency. (Vol. 25, 1, 2). Judge Heldman responded by asserting that Taylor "seemed to the Court to be very in control of his trial strategy," (Vol. 25, 3).

STATEMENT OF THE ISSUES PRESENTED

1.

Whether a non-adversarial competency hearing without counsel violates the Constitutions of Tennessee and the United States;

2.

Whether Judge Heldman erred by failing to hold a competency hearing during the trial when it was abundantly clear that appellant's mental state had deteriorated;

3.

Whether Judge Heldman erred by failing to question appellant regarding his purported waiver of mitigation, as required by the Tennessee Supreme Court's decision in Zagoriski v. State, 983 S.W.2d 654 (Tenn. 1999), and by failing to determine whether appellant's waiver of mitigation was knowing, voluntary, and intelligent;

4.

Whether the state's forcible administration of antipsychotic medication, including at trial, and the resulting heavy sedation of appellant, violated appellant's constitutional rights, including his rights to a fair trial and due process;

5.

Whether Judge Heldman erred by failing to conduct a constitutionally adequate examination of Taylor's purported waiver of counsel and by determining that his purported wavier was knowing, voluntary, and intelligent?

6.

Whether Judge Heldman abused his discretion by failing to exercise discretion when deciding whether to appoint standby counsel and by failing to appoint standby counsel;

7.

Whether Judge Heldman's April 2003 competency determination was error because it was based on the wrong standard of proof and numerous errors of law and because it was contrary to the evidence;

8.

Whether Judge Heldman erred by failing to determine whether appellant was competent to proceed with his post-trial motions;

9.

Whether Judge Heldman erroneously denied appellant's motions to continue the hearing on the motion for new trial and refused to permit appellant to present compelling evidence in support of his motion for a new trial;

10.

Whether Judge Heldman erred by failing to follow the Tennessee Legislature's mandate to instruct the jury on all statutory mitigating circumstances raised by the evidence;

11.

Whether Judge Heldman erred by permitting a state witness, Dr. Filley, to testify at the penalty phase that appellant was sane at the time of the offense;

12.

Whether Judge Heldman committed numerous errors with respect to the prior violent felony aggravating circumstance, including permitting the introduction of appellant's indictment for armed robbery, when he was only convicted of simple robbery;

13.

Whether Judge Heldman erred by denying appellant's motion for a new trial;

14.

Whether Judge Heldman erred by denying appellant's motion to suppress letters based on a misapplication of the Tennessee Rules of Evidence;

15.

Whether appellant's execution is consistent with the intent of the Framers and modern civilized standards, given that he has spent over twenty-five years awaiting his execution;

16.

Whether the "especially heinous, atrocious or cruel" aggravating circumstance is constitutionally vague and overbroad, even with Judge Heldman's purported limiting instruction;

17.

Whether the jury charge at the penalty phase violated appellant's constitutional and statutory rights by telling the jurors that they were the judges of the law;

18.

Whether Judge Heldman violated appellant's constitutional rights when he failed to rule on appellant's motions to subpoena witnesses with material and relevant information;

19.

Whether Judge Heldman denied appellant's right to due process and self representation by failing to rule on the vast majority of his *pro se* motions;

20.

Whether the execution of defendants who are severely mentally ill at the time of their offenses, such as Richard Taylor, violates Article I, Sections 8 and 16 of the Tennessee Constitution and the Eighth and Fourteenth Amendments to the U.S. Constitution ;

21.

Whether T.C.A. § 39-2-203 violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 8, 9, 10, 13, 16, and 32 of the Tennessee Constitution by giving the prosecutors unfettered and standardless discretion to seek or decline to seek a sentence of death;

22.

Whether the proportionality review under T.C.A. § 39-13-204 violates the Eighth and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 8 and 16 of the Tennessee Constitution and whether the appellant's death sentence is disproportionate even under the limited statutory review;

23.

Whether the death penalty violates the Tennessee and U.S. Constitutions.

JURISDICTION AND STANDARD OF REVIEW

Richard Taylor timely appeals his conviction for first degree murder and sentence of death as of right, pursuant to T.C.A. § 39-13-206(a)(1). As described below, this Court has jurisdiction to review all assigned errors. T.C.A. § 39-13-206(b); See also, Tenn. R. App. Proc. 3; Tenn. Sup. Ct. R. 12. [16]

As described infra in the Argument section, many of Appellant's claims were raised in the pre-trial and trial proceedings and in the motions for new trial. These claims are preserved for appellate review. Severely mentally ill, medicated to the point of complete sedation, and incompetent as an advocate in the capital prosecution against him, Richard Taylor did not object to some of the errors assigned in this brief. However, all of the errors raised in this brief, including those not preserved by objection, must be reviewed for the following three reasons.

First and foremost, this is a capital appeal. "Where the defendant is under sentence of death," Tennessee appellate courts must "consider any alleged error, whether called to the trial court's attention or not." State v. Martin, 702 S.W.2d 560, 564 (Tenn. 1985) (citing T.C.A. § 39-2-205(a) (repealed and replaced by T.C.A. § 39-13-206)), overruled on other grounds, State v. Brown, 836 S.W.2d 530 (Tenn. 1992). See also State v. Rice, 184 S.W.3d 646, 667 (Tenn. 2006) (holding it mandatory under T.C.A. § 39-13-206 to conduct review of legal sufficiency of (i) (2) aggravating circumstance); State v. Duncan, 698 S.W.2d 63, 67-68 (Tenn. 1985) (same as Martin).

[16] In addition, this Court is statutorily required to review whether: (1) Appellant's death sentence was imposed in any arbitrary fashion; (2) the evidence supports the jury's finding of aggravating circumstances; (3) the evidence supports the jury's finding that he aggravating circumstances outweigh the mitigating circumstances; and (4) whether the death sentences is excessive or disproportionate to the penalty imposed in other similar cases. T.C.A. § 39-13-206(c)(1).

Second, the "plain error" rule requires review of the errors. See Tenn. R. Crim. P. 52 (b). This rule provides:

> (b) Plain Error. An error which has affected the substantial rights of an accused may be noticed at any time, even though not raised in the motion for a new trial or assigned as error on appeal, in the discretion of the appellate court where necessary to do substantial justice.

Id. "The plain error rule has been previously applied by [the Tennessee Supreme Court] to allow review of patently incomplete instructions at a capital sentencing hearing despite defense counsel's failure to call such error to the trial court's attention." State v. Stephenson, 878 S.W.2d 530, 554 (Tenn. 1994) (citing State v. Hines, 758 S.W.2d 515, 523-24 & n.4 (Tenn. 1988)).

Third, the common-law "fundamental error rule" requires review of each of the instructional errors discussed in this brief. This rule

> generally refers to the proposition that a trial court judge's failure to give a jury charge on matters characterized as 'fundamental' may be found to be error requiring reversal despite the fact that the defendant did not request the omitted instructions. The fundamental error rule has been applied to a variety of instructional omissions, including prior inconsistent statements offered for impeachment, circumstantial evidence, weight of a dying declaration, and guilt beyond a reasonable doubt.

Stephenson, 878 at 554 (citing State v. Reece, 637 S.W.2d 858, 861 (Tenn. 1982); Bunch v. State, 499 S.W.2d 1, 3 (Tenn. 1973); Pearson v. State, 143 Tenn. 385, 226 S.W. 538 (Tenn. 1920); and Frazier v. State, 117 Tenn. 430, 100 S.W. 94 (Tenn. 1907)).

Accordingly, this Court should review all assigned errors, under the special, mandatory statutory review imposed for all capital cases as well as under the "plain error" and "fundamental error" rules.

ARGUMENT

1. JUDGE HELDMAN VIOLATED TAYLOR'S RIGHTS UNDER THE UNITED STATES AND TENNESSEE CONSTITUTIONS BY HOLDING A NON-ADVERSARIAL COMPETENCY HEARING WITHOUT COUNSEL

A. INTRODUCTION

"Competency to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so." Cooper v. Oklahoma, 517 U.S. 348, 354 (1996) (citations omitted). Even though Richard Taylor had been adjudicated incompetent to stand trial for years before more recently being found competent and even though the state's own physician described his competency as waxing and waning (Vol. 34, 66), Judge Heldman held a pre-trial competency hearing where Taylor was unrepresented by counsel and where both he and the state both took the same position – that Taylor was competent to stand trial. This non-adversarial hearing, lacking in the basic constitutional protections required by the Sixth, Eighth, Fourteenth Amendments of the United States Constitution and Article I, Sections 8,9, and 16 of the Tennessee Constitution, was a gross abuse of justice. Judge Heldman's failure to hold a constitutionally adequate hearing on Taylor's competency was raised in the motion for new trial. (Vol. 12, 1718, 1723-1730).

B. RELEVANT FACTS

In the years from 1997 to 2003, the trial court held four hearings on Taylor's competency. At the first hearing in 1997, in the state post-conviction case, the state and its court-appointed expert contended that Taylor was competent despite his serious mental illness. (Vol. 2, 152). After eleven days of testimony, the trial court, Judge William S. Russell, found otherwise. (Vol.

2, 115). Judge Russell concluded that Taylor was then incompetent to stand trial, was likely insane at the time of the trial, and was incompetent to be executed under the standard enunciated in Ford v. Wainwright, 477 U.S. 399 (1986).

The next competency hearing was held in 2000 in front of a new judge, Judge Donald Harris. Physicians from MTMHI testified that Taylor was psychotic, schizophrenic, and incompetent to stand trial, and Judge Harris found him incompetent to stand trial. (Vol. 5, 542; Vol. 30, 9, 21, 29, 38). In the spring of 2003, a third trial judge, Judge Russ Heldman, held another competency hearing. (Vol. 34-35). At this hearing, a psychiatrist and psychologist from MTMHI testified to their belief that Taylor, although schizophrenic, was competent at that time. (Vol. 34, 14, 26, 92). The psychologist testified that Taylor's competency might vary over time and warned that Taylor could decompensate at trial if he represented himself. (Vol. 34, 66, 80). Six lay witnesses and an independent psychiatrist appointed by the Court to assist the defense testified that Taylor remained incompetent. (Vol. 35, 42,115, 135, 151, 218). Judge Heldman determined that Taylor was competent to stand trial and scheduled a trial date. (Vol. 7, 854). Shortly after concluding that Taylor was competent to stand trial, Judge Heldman found that Taylor was competent to represent himself. (Vol. 9, 1206).

In 2003, Taylor's previously appointed counsel filed a pleading raising his competency and the constitutionality of his forced medication. (Vol. 9, 1215). On October 14, 2003, the first day of trial, Judge Heldman held a hearing on this motion, addressing "whether Defendant is still competent to stand trial… and (2) whether the criteria set forth in the Sell case are still met." (Vol. 9, 1268) (referring to Sell v. United States, 539 U.S. 166, 177 (2003)). Unlike the first three competency hearings, however, Taylor was not represented by counsel because Judge Heldman ruled that the counsel did not have standing to raise any issues related to Taylor's

mental health (Vol. 9, 1268) and that any participation by counsel – even "elbow counsel" – would be unconstitutional and could not be permitted. (Vol. 9, 1268).

In the order setting the hearing, Judge Heldman directed that the "State shall have its expert witnesses, Drs. Ron Stout and Rokeya Farooque, present affirmatively" to address Taylor's competency and the forcible medication issue. (Vol. 9, 1268). Judge Heldman did not order or even suggest that it would be permissible to have present Dr. Caruso, or any of the lay witnesses who testified at the earlier 2003 hearing. (Vol. 9, 1268). Furthermore, Judge Heldman prohibited Taylor's conservator and former guardian from participating. (Vol. 17, 35; Vol. 11, 1512-1513). He issued an order striking written reports the conservator and former guardian had filed with the court in relation to the hearing.

At this full-blown (albeit non-adversarial) competency hearing, Dr. Stout and Dr. Farooque testified that Taylor was competent to stand trial. Neither one of them was cross-examined and no contrary evidence was presented. (Vol. 17, 20-21, 52, 56, 57). Dr. Stout testified Taylor had given recently an evasive answer in response to a question whether he believed that he had previously died. See Vol. 17, 50 (stating that when questioned whether he had "any notions that he has died before, Taylor's response was vague … he said this was an [] experience he had [] in the past but was unsure if he believes this now.") Six months earlier, at the April, 2003 competency hearing, Dr. Stout had testified that "when asked, [Taylor] denied believing anymore that he had died and come back to life" and that this was a "marker of improvement" of Taylor's mental condition. (Vol. 34, 23).

Dr. Farooque testified at the October competency hearing that she was no longer prescribing medication to Taylor because he had been discharged to the Department of Corrections and was now under the treatment of another physician. (Vol. 17, 10, 15). Edward

Ryan, Taylor's conservator, attempted to inform the court at the hearing that Taylor's current medications at TDOC had been recently reduced by Dr. Casey Arney, Taylor's treating physician at TDOC. (Vol. 17, 34).

Judge Heldman refused to permit Mr. Ryan to testify or participate. (Vol. 17, 35). Dr. Arney, whom Judge Heldman had not ordered to be present, was not at the hearing and did not testify about Taylor's medications at trial. Instead, Dr. Farooque left the hearing, called someone from Dr. Arney's department, and testified that Taylor's medications had been tapered off the day before the hearing. (Vol. 17, 37, 53-54). Dr. Farooque further testified that she was not able to learn the doses or medications Taylor was currently taking. (Vol. 17, 53-54).

After the unchallenged testimony of Drs. Stout and Farooque – and in the absence of testimony by any defense witnesses -- Judge Heldman ruled that Taylor was competent to stand trial, issued an order that the "instruction concerning a tapering off (of Taylor's medications) is now countermanded," and then proceeded immediately to voir dire in Taylor's capital murder trial. (Vol. 17, 61, 65; Vol. 11, 1499).

C. JUDGE HELDMAN ERRED BY FAILING TO PERMIT COUNSEL TO REPRESENT TAYLOR AT THE COMPETENCY HEARING

"It is well established that the Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial." Medina v. California, 505 U.S. 437, 439 (1992) (citations omitted). This fundamental tenet demands that a trial court hold a competency hearing whenever the evidence raises a "sufficient doubt" about a defendant's competency. Drope v. Missouri, 420 U.S. 162, 180 (1975).

A defendant has a right to counsel at a competency hearing. Appel v. Horn, 250 F.3d 203, 215 (3d Cir. 2001); United States v. Klat, 156 F.3d 1258, 1262 (D.C. Cir. 1998); United States v. Barfield, 969 F.2d 1554, 1556 (4th Cir. 1992); Sturgis v. Goldsmith, 796 F.2d 1103, 1109 (9th

Cir. 1986); United States v. Collins II, 430 F.3d 1260, 1264 (10th Cir. 2005) (agreeing with other federal circuits and holding that a competency hearing is a critical stage). A defendant must be competent to waive counsel and the waiver must be knowing, voluntary, and intelligent. See Godinez v. Moran, 509 U.S. 389, 400-401, n.12 (1993).

A defendant whose competency is in sufficient doubt to require a competency hearing cannot competently, knowingly, voluntarily, and intelligently waive his right to counsel at the hearing. As the Second Circuit has explained, "[l]ogically, the trial court cannot simultaneously question a defendant's mental competence to stand trial and at one and the same time be convinced that the defendant has knowingly and intelligently waived his right to counsel." United States v. Purnett, 910 F.2d 51, 55 (2d Cir. 1990). Other courts have reached the same conclusion. See United States v. Klat, 156 F.3d 1258, 1263 (D.C. Cir. 1998) ("[W]e find it contradictory to conclude that a defendant whose competency is reasonably in question could nevertheless knowingly and intelligently waive her Sixth Amendment right to counsel."); United States v. Boigegrain, 155 F.3d 1181, 1186 (10th Cir. 1998) ("it was impossible for the district court to allow the defendant to waive counsel before determining whether he was competent to stand trial [because] [b]efore resolving the first question the court had to resolve the second." (citing Godinez, 509 U.S. at 399-400)); United States ex rel. Konigsberg v. Vincent, 388 F. Supp. 221, 225 (S.D.N.Y. 1975) ("Where a defendant's competency has been put in issue, the trial judge must first determine that the defendant is capable of making an intelligent and understanding waiver before deciding whether such a waiver has been made."). Cf. Pate v. Robinson, 383 U.S. 375, 384 (1966) ("it is contradictory to argue that a defendant may be incompetent and yet knowingly or intelligently 'waive' his right[s]").

In this case, Judge Heldman had a substantial basis for concern about Taylor's competency: Taylor was severely mentally ill and schizophrenic (Vol. 34, 14, 92, Vol. 35, 181-182, 268); he had been adjudicated incompetent in two of the last three competency hearings (Vol. 2, 115, Vol. 5, 542); all of his former counsel had unanimously testified that he could not form a meaningful relationship with counsel (Vol. 35, 23-24, 115, 132, 153); his former appointed counsel had filed a motion raising the issue of his competency (Vol. 9, 1215); and one of the only two witnesses who testified at the previous hearing that Taylor was competent had warned that Taylor's competency was variable and that he might decompose under the stress of a capital trial. (Vol. 34, 66, 80).

Given this substantial basis, the Sixth and Fourteenth Amendments and Article I, Sections 8 and 9 of the Tennessee Constitution required Judge Heldman to appoint counsel to represent Taylor at the full-blown competency hearing that occurred in October 2003. Like the defendant in United States v. Klat, Taylor "was erroneously denied [his] Sixth Amendment right to counsel because the [trial] court found reasonable cause to doubt appellant's competency to stand trial and yet failed to appoint counsel to represent [him] through the resolution of the competency issue." Klat, 156 F.3d at 1263.

In United States v. Zedner, 193 F.3d 562 (2d Cir. 1999) (*per curiam*), the trial court had found that the defendant knowingly and intelligently waived counsel thirteen months before trial. Id. at 566. The trial court later held a *sua sponte* competency hearing on the eve of trial where the defendant represented himself. Id. The Second Circuit reversed, concluding that it was error for the court "to have allowed defendant to appear *pro se* at his own competency hearing." Id.[17]

[17] This full-blown evidentiary hearing on Richard Taylor's competency – in which the court *sua sponte* ordered the attendance of state expert witnesses -- was most definitely not a "precautionary hearing" in which the court "did not harbor serious doubts about [the defendant's]

Similarly, in Wise v. Bowersox, 136 F.3d 1197 (8th Cir. 1998), the Eighth Circuit upheld a second competency hearing where the defendant was without appointed counsel *only because* the defendant was represented by standby counsel at the hearing and "the contrary point of view was well represented." 136 F.3d at 1203. But see, Burks v. State, 748 P.2d 1178, 1181 (Alaska Ct. App. 1998) ("appointment of standby counsel is not a substitute for appointed counsel where a person is incapable of making a constitutional waiver of counsel"). In sharp contrast to Wise, here no standby counsel was present or permitted to participate and there was no adversarial presentation of a contrary point of view. Indeed, undersigned counsel have located no case in the country that has upheld a pre-trial competency hearing held where the defendant's competency was seriously at issue and where the defendant was not represented by counsel or assisted by standby counsel who actively challenged his competency.[18]

"[T]he Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceedings." United States v Cronic, 466 U.S. 648, 659, n. 25 (1984) (citations omitted). Accordingly, the appropriate remedy for denial of counsel at a competency hearing is

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competency." United States v. Nichols, 56 F.3d 403, 414 (2nd Cir. 1995); See also, United States v. Morrison, 153 F.3d 34, 47 (2d Cir. 1998) (distinguishing rule that a trial court "must appoint counsel to serve until the issue with respect to competency is resolved" from cases where court holds subsequent "precautionary measure" hearings). Therefore, the fact that Judge Heldman had found Taylor competent seven months before is entirely irrelevant to whether Taylor's right to self-representation had to yield to his right to counsel and his right to be competent to stand trial at the October competency hearing.

[18] Like the Wise court, other courts have analyzed the role played by standby counsel when evaluating whether standby counsel provided sufficient representation at a competency hearing. See United States v. Leggett, 1994 WL 171441, at *2 (6th Cir. May 5, 1994) (upholding competency hearing where standby counsel was appointed and participated in competency hearing); United States v. Zedner, 193 F.3d 562 (2d. Cir. 1999) (*per curiam*)(finding that "the presence of advisory counsel at defendant's competency hearing did not provide defendant with representation sufficient to satisfy his Sixth Amendment right to counsel" where standby counsel did not take an active role).

reversal when "evidence could have been introduced and arguments made that likely could have affected the outcome of the [defendant']s competency hearings" because "it is impossible to say that the violation of [defendant's] Sixth Amendment rights did not pervade his entire trial." Collins, 430 F.3d at 1268; cf, United States v. Klat, 156 F.3d 1258, 1264 (D.C. Cir.1998) (remanding for hearing to determine whether "the competency hearing could have come out differently if appellant had been represented by counsel").

Had counsel been permitted to participate, the competency hearing would have been radically different. Indeed, the only two witnesses – both state experts -- were not cross-examined *at all* at the hearing. "Without some questioning of the experts concerning their technical conclusions, a factfinder simply cannot be expected to evaluate the various opinions, particularly when they are themselves inconsistent." Ford, 477 U.S. at 415 (citing Barefoot v. Estelle, 463 U.S. 880, 899 (1983)). For example, counsel could have questioned Dr. Stout about the significance of his testimony that Taylor, who previously renounced his former belief that he had died and come back to life, had recently given only equivocal answers on this issue, suggesting that he continued to believe that he had died in the past. Counsel could have cross-examined Dr. Farooque, the psychiatrist, about the effects that "tapering off" Taylor's antipsychotic medication could have on his competency, particularly in light of her testimony at the previous competency hearing that Taylor's mental condition rapidly deteriorated in 2002 (leading to incompetency) when she decreased his Zyprexa prescription. (Vol. 5, 604-605; Vol. 34, 142).

In addition, counsel could have called witnesses, including the treating physician, Dr. Arney, the court-appointed psychiatrist, Dr. Caruso, and lay witnesses to testify about Taylor's recent bizarre statements – such as his assertion that he wore sunglasses to protect himself from

the police's controlling radio waves. Through expert testimony counsel would have been able to introduce evidence about the side effects of Taylor's medications, including heavy sedation, and about the possible consequences of the recent change in Taylor's medications. This evidence – wholly missing from the inadequate hearing held by Judge Heldman – "likely could have affected the outcome" of the competency hearing. Collins, 430 F.3d at 1268. Accordingly, "it is impossible to say" that the violation of Taylor's right to counsel at the competency hearing "did not pervade his entire trial." Id.

D. JUDGE HELDMAN ERRED BY FAILING TO FOLLOW CONSTITUTIONALLY ADEQUATE PROCEDURES TO ENSURE THAT THE COMPETENCY HEARING WAS SUBJECT TO ADVERSARIAL TESTING

Because "[a] defendant has a constitutional right not to be tried while legally incompetent[,] a State's failure to observe procedures adequate to protect a defendant's right not be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." Medina v. California, 505 U.S. 437, 449 (1992) (internal quotations omitted). In this case, the non-adversarial competency hearing – at which the Court held that counsel, including potential defense witnesses Virginia Story and Edward Ryan, had no standing to participate and which utterly failed to submit the state's claim of competency to "the crucible of meaningful adversarial testing" – was inadequate to protect Taylor's right to not stand trial while incompetent and violated the Tennessee and Federal Constitutional due process protections. Alabama v. Shelton, 535 U.S. 654, 667 (2004) (citation omitted). "We have elected to employ an adversarial system of justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and

comprehensive." Taylor v. Illinois, 484 U.S. 400, 408-09 (1988) (citing United States v. Nixon, 418 U.S. 683, 709 (1974)).

The Supreme Court has emphasized the importance of subjecting the state's claims to the crucible of meaningful adversarial testing. Cronic, 466 U.S. at 655 ("Truth … is best discovered by powerful statements on both sides of the question.") (internal citations and quotations omitted); Gardner v. Florida, 430 U.S. 349, 360 (1977) (citing "[o]ur belief that debate between adversaries is often essential to the truth-seeking function of trials…"); Polk County v. Dodson, 454 U.S. 312, 318 (1981) ("The [American criminal justice] system assumes that adversarial testing will ultimately advance the public interest in truth and fairness.").

Thus, in evaluating whether a competency hearing passes constitutional muster, "the question is whether the government's case for competency was subject to meaningful adversarial testing." Collins, 430 F.3d at 1265. In O'Rourke v. Endell, 153 F.3d 560 (8th Cir. 1998), the Eighth Circuit considered a competency hearing where the defendant's appointed counsel advocated the position that the defendant was competent. 153 F.3d at 565. The Eighth Circuit determined that the defendant "should have been represented by an attorney, either a counsel of record or a 'next friend,' to argue [the contrary position]," and concluded that the "court's failure to appoint such a representative resulted in an evidentiary hearing on [the defendant's] competence that failed to develop adequately all material facts, that was neither full nor fair, and that did not afford [the defendant] the process he was due." Id. at 569. The Tenth Circuit reached a similar conclusion in Collins, reversing where counsel, although present at competency hearing, did not "subject the prosecution's competency case to 'meaningful adversarial testing.'" Collins, 430 F.3d at 1265-66 (citation omitted).

Many courts, including this Court, have held that requirement of adversarial testing mandates that defense counsel test the government's case regarding competency, even over the objection of the defendant. "The desire of a defendant whose mental faculties are in doubt to be found competent does not absolve counsel of his or her independent professional responsibility to put the government to its proof at a competency hearing when the case for competency is in serious question." Wilcoxson v. State, 22 S.W.3d 289, 305-06 (Tenn. Crim. App. 1999) (citing Hull v. Freeman, 932 F.2d 159, 168 (3d Cir. 1991) (overruled on unrelated grounds by Coleman v. Thompson, 501 U.S. 722 (U.S. 1991)); Appel, 250 F.3d 203 (counsel must advocate for defendant during competency hearing regardless of defendant's wishes); Shepard v. Superior Court of Los Angeles County, 180 Cal.App.3d 23 (1986) (holding trial court erred by removing counsel who would assert defendant's incompetence over defendant's objection); ABA STANDARDS FOR CRIMINAL JUSTICE STANDARD 7-4.2(c) (recommending that defense counsel move for evaluation of defendant's competence to stand trial whenever defense counsel has a good faith doubt and alert the court and prosecutor to facts which form the basis of the concern, even over the client's objection). The Tennessee Courts have recognized the right to adversarial testing when defining the minimum procedural requirements for a competency hearing on the question whether a defendant is competent to be executed. See Van Tran v. State, 6 S.W.3d 257, 271 (Tenn. 1999) (holding that such "hearing[s] shall be adversarial in nature".)

The protections of adversarial testing extend beyond merely the active participation of counsel to challenge the state's theory and include the affirmative presentation of evidence. In Ford v. Wainwright, the Supreme Court held that a basic component of the adversarial process demanded by due process concerns is the ability to present relevant mental health evidence.

Ford, 477 U.S. at 414 (plurality opinion). The Court explained the importance in the context of capital cases:

> [A]ny procedure that precludes the prisoner or his counsel from presenting material relevant to his sanity or bars consideration of that material by the factfinder is necessarily inadequate. 'The minimum assurance that the life-and-death guess will be a truly informed guess requires respect for the basic ingredient of due process, namely, an opportunity to be allowed to substantiate a claim before it is rejected.' … [W]ithout any adversarial assistance from the prisoner's representative… the factfinder loses the substantial benefit of potentially probative information. The result is a much greater likelihood of an erroneous decision.

Ford, 477 U.S. at 414 (citation omitted).

In this case, the trial court actively limited the introduction of material, compelling evidence, in contravention of the clear mandate of Ford. Id. Judge Heldman refused to grant Edward Ryan, Taylor's conservator, standing to participate or testify about his recent change in medication, and compounded this error by refusing to permit Taylor's previously appointed counsel or former guardian from participating. Judge Heldman also personally selected the witness list by s*ua sponte* directing only the state witnesses to attend – rather than including psychiatric experts with differing testimony, such as Dr. Caruso or appointing an independent expert. "[E]xpert psychiatric evidence that may differ from the state's own psychiatric examination" is a "basic" due process requirement. Ford, 477 U.S. at 427 (Powell, J., concurring). The preclusion of defense evidence, the selection of only State witnesses, combined with the denial of counsel, meant that the "fact-finding procedures" at Taylor's October competency hearing fell far short of the "heightened standard of reliability" necessary in capital cases. Ford, 477 U.S. at 411.

The failure to submit the state's case to adversarial testing was structural error and requires reversal. See, e.g., Henderson v. Frank, 155 F.3d 159, 169-71 (3d Cir. 1998). "[A]n

erroneous determination of competence threatens a fundamental component of our criminal justice system – the basic fairness of the trial itself." Cooper, 517 U.S. at 364 (citations omitted). The non-adversarial hearing on Taylor's competency failed to provide any reasonable protection against an erroneous determination and demands reversal. In the alternative, this Court should remand this case for a determination of whether a *nunc pro tunc* adversarial hearing can be convened on the defendant's competency to stand trial. See Appel, 250 F.3d at 218; State v. Snyder, 750 So.2d 832, 855 (La 1999).

2. JUDGE HELDMAN ERRED BY FAILING TO HOLD A COMPETENCY HEARING DURING THE TRIAL WHEN IT WAS ABUNDANTLY CLEAR THAT TAYLOR'S MENTAL STATE HAD VISIBLY DECOMPENSATED.

A. INTRODUCTION

As predicted by the testimony of the state's experts at the competency hearing held months earlier, Richard Taylor's mental condition visibly deteriorated at trial. Despite clear signs that Taylor was confused and disoriented at the trial and despite Taylor's bizarre questioning followed by his uncharacteristic silence, Judge Heldman failed to convene a *sua sponte* competency hearing. This failure was an abdication of his constitutionally-imposed duty to ensure due process and requires reversal under the Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 8, 9 and 16 of the Tennessee Constitution.

The trial court's failure to protect Taylor from trial while incompetent was raised in the motion for a new trial and at the hearing on the motion for new trial. (Vol. 12, 1723-1730).[19] The standard of review of a trial court's failure to hold a *sua sponte* competency hearing is "whether a reasonable judge, situated as was the trial court judge whose failure to conduct an

[19] For example, defense counsel proffered that Virginia Story, Taylor's former court-appointed guardian, would testify at the hearing on the motion for new trial about evidence that related to whether Taylor was in fact competent at the time of trial, including his inability to have conversations and his confusion at the trial. (Vol. 23, 12, 37).

evidentiary hearing is being reviewed, should have experienced doubt with respect to [a defendant's] competency to stand trial." State v. Vick, No. W2005-00467-CCA-R3-CD, 2006 WL 722173, at *4 (Tenn. Crim. App. March 22, 2006) (quoting Berndt v. State, 733 S.W.2d 119, 122 (Tenn. Crim. App. 1987)). As demonstrated below, that standard was clearly satisfied in this case.

B. RELEVANT FACTS

Taylor, a schizophrenic, has a long history of mental illness and has been found incompetent on multiple occasions. See Competency Section infra. Taylor's competency was sharply contested at a hearing held on April 2 and 3, 2003. Two state witnesses, Dr. Stout and Dr. Farooque, testified that Taylor had regained sufficient competency to stand trial.

Dr. Caruso, a psychiatrist appointed by the court to assist the defense, and five of Taylor's former attorneys all testified that they vehemently disagreed that Taylor was competent given, *inter alia*, his utter inability to form any meaningful relationship with counsel and his on-going delusions that he had previously died and come back to life and therefore that he will not die if executed.

Both Dr. Stout and Dr. Caruso warned that Taylor's fragile mental state was unlikely to hold up under the stress of self-representation at a capital trial. See Report of Dr. Caruso (Vol. 6, 845) ("This tendency to lose his train of thought was also apparent throughout each of my interviews with Taylor and is no better now . . . *this is likely to get worse under the stress of a Capital trial*.") (emphasis added); Testimony of Dr. Stout (Vol. 34, 80) ("I do not think he's equipped to represent himself . . . because he's, he's not a lawyer . . . [a]nd you know, if he had to do it all by himself, if he had to do it all by himself from beginning to end, *I don't know if he could hold up to the stress*.") (emphasis added).

On October 13, 2006, the morning of trial, Judge Heldman questioned Dr. Stout and Dr. Farooque about Taylor's mental condition.[20] Dr. Farooque testified that she believed that Taylor was still competent, but also testified that Taylor's medications had been tapered off the day before. See (Vol. 17, 53) ("Dr. Arney is gradually tapering off the medication.") Dr. Farooque speculated that "maybe Dr. Arney decreased the Clozaril, took him off of Zyprexa, I don't know, but I'm just assuming and maybe he got less medicine that [sic] he was on yesterday. I don't think you will see that much change today. But within a week maybe it will be apparent, but I cannot say anything." (Vol.17, 54).

Dr. Stout also testified that he believed Taylor remained competent but acknowledged that Taylor had recently given an evasive answer in response to the question whether he believed that he had previously died. See Vol. 17, 50 (stating that when questioned whether he had "any notions that he has died before, Taylor's response was vague … he said this was an [] experience he had [] in the past but was unsure if he believes this now.") This testimony was in sharp contrast to Dr. Stout's testimony at the April, 2003 competency hearing, where he pointed to the fact that "when asked, [Taylor] denied believing anymore that he had died and come back to life" as a "marker of improvement" of Taylor's mental condition and a sign of competency. (Vol. 34, 23). Dr. Stout's testimony on the day of trial that Taylor might still believe that he had died before was consistent with the testimony of other witnesses at the April, 2003 hearing and the testimony of Taylor himself at the waiver and medication hearing held on June 10, 2003 that Taylor continued to believe that he had died in the past and would return to life after execution. (Vol. 35, 49, 110-111; Vol. 36, 78).

[20] Although referred to as a "hearing" by Judge Heldman, Taylor was not represented by counsel, there was no adversarial view point presented, and the testimony of the state witnesses was not subjected to cross-examination. See Point 1, arguing that this constituted reversible error.

After this non-adversarial competency hearing where Taylor was unrepresented, Judge Hellman began jury selection. (Vol. 11, 1499). Taylor, heavily sedated and wearing his dark sunglasses and prison uniform,[21] asked no questions during voir dire[22] and turned down paper and pencil. (Vol. 18, 51, 56, 78). In a brief opening statement, Taylor told the jury that he would "talk to [them] later here in closing arguments and try to go over point by point where [the prosecutor] is incorrect," a promise that Taylor failed to keep since he declined to testify, waived closing argument at the guilt-innocence phase, and waived all argument at the penalty phase. (Vol. 18, 98; Vol. 19, 295; Vol. 20, 338, 398).

The state began presentation of its evidence on Wednesday morning, October 15, 2003. (Vol. 11, 1500). Taylor cross-examined five of the state's first six witnesses, but by the afternoon of October 15, 2003, fell completely silent.[23] (Vol. 11, 1500; Vol. 19, 221). Taylor asked no questions of any witness on the afternoon of October 16, 2003 or at any point on October 17, 2003. Id. He did not cross-examine a single witness at the penalty phase. At the entire capital trial, Taylor asked a total of only thirteen questions. (Vol. 19, 117, 136, 147, 155, 181-82). He made no verbal objections during any of the testimony at the guilt-innocence or penalty phases.

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[21] After the jury had already been selected and after opening statements, the court asked Taylor if he wanted to wear civilian clothing. (Vol. 19, 108). Taylor declined. (Vol. 19, 108).

[22] When Judge Helman told Taylor that it was his turn for voir dire he stated "I don't have no questions, your Honor." (Vol. 18, 56).

[23] See cross-examination of Lenjoy Wildsdorf (Vol. 19, 117); cross-examination of Ricky Bell (Vol. 19, 136); cross-examination of Jeffrey Garner (Vol. 19, 147); cross-examination of James Compton (Vol. 19, 155); no questions of Howard Patternson (Vol. 19, 174); cross-examination of Dr. George Mayfield (182); no questions of Robert Hodson (Vol. 19, 194); no questions of Franklin Atkinson (Vol. 19, 206); no question of Special Agent Jerry R. Tenry (Vol. 19, 220); no questions of Jim Rose, retired TDOC warden (Vol. 19, 269); no questions of Linda Kincaid (Vol. 19, 272); no questions of Charlotte Ware (Vol. 19, 285).

Taylor's few cross-examination questions were bizarre and irrational. The questions involved topics which could only have been relevant in his irrational mind. For example, he asked whether the victim was a member of the Ku Klux Klan, whether a black inmate walked through the hall, and about Warden Bell's supposed (and non-existent) demotion. (Vol. 19, 117, 136, 147).

Before trial, Taylor had filed a written objection to the admission of letters he allegedly wrote, contending that the letters were a product of torture. The court addressed the issue outside of the presence of the jury (Vol. 19, 222), and Taylor appeared thoroughly confused:

The Court:	Mr. Taylor, this is a jury-out hearing; you objected to the letters based upon your filing. You can now question [witness Jim Rose whom the state had called to testify about the letters] anything about this issue; in support of your objection, you can question the witness at this time.
Mr. Taylor:	What's my objection?
The Court:	Your objection? You made an objection –
Mr. Taylor:	Are you telling me to object?
The Court:	No, I – you objected in writing to these letters originally; you sent an objection in. You recall that, don't you?
Mr. Taylor:	Right.
The Court:	Okay. Now you can – I've noted your objection; the State wants this introduced. You have an opportunity now in the writing to cross-examine the witness about these.
Mr. Taylor:	I have no questions.

(Vol. 19, 230).

On October 16, Taylor rested at the guilt-innocence phase without presenting any defense. (Vol. 20, 323). Despite his promise in opening, he waived closing argument. He then presented no evidence or argument whatsoever at the penalty phase. (Vol. 20, 374, 398). The jury returned a death sentence in 38 minutes. (Vol. 11, 1502).

C. JUDGE HELDMAN'S FAILURE TO HOLD A COMPETENCY HEARING DURING THE CAPITAL TRIAL AT WHICH TAYLOR OFFERED ABSOLUTELY NO DEFENSE CONSTITUTED REVERSIBLE ERROR

The United States Supreme Court has emphasized a trial court's weighty obligation to monitor a criminal defendant at trial for signs suggesting a change in his competency. See Drope v. Missouri, 420 U.S. 162, 181 (1975) ("Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial."); see also State v. Haun, 695 S.W.2d 546, 549 (Tenn. Crim. App. 1985) (holding that "'if at any time while criminal proceedings are pending, the trial court, before or during the trial, either from observation or upon suggestion of counsel, has facts brought to its attention which raise a doubt of the then sanity of the accused, it should, before putting him upon trial or continuing his trial initiate an investigation'" because "[it is] the duty of the trial judge to ensure that an accused has sufficient mental competence at trial to understand the proceedings against him" (quoting Cogburn v. State, 281 S.W.2d 38, 39-40 (Tenn. 1955))).

This obligation demands that the trial court hold a *sua sponte* competency hearing whether or not there is a defense motion. See Pate v. Robinson, 383 U.S. 375 (1966) (holding that the court must hold a hearing on its own motion where the evidence raises a bona fide doubt as to a defendant's competence); Berndt v. State, 733 S.W.2d 119, 122 (Tenn. Crim. App. 1987) ("[I]t is the duty of the court to conduct a hearing for the purpose of inquiring into the competence of the accused, and, where warranted, ordering a psychiatric examination and evaluation of the accused . . . even in the absence of a motion seeking such a hearing) (citing T.C.A. § 33-7-301(a)); Howard v. Mississippi, 697 So.2d 415 (Miss. 1997) ("Even where the issue of competency to stand trial has not been raised by defense counsel, the trial judge has an ongoing responsibility to prevent the trial of an accused unable to assist in his own defense.") (quoting Conner v. Mississippi, 632 So.2d 1239 (Miss. 1993)); Reynolds v. Norris, 86 F.3d 796,

800 (8th Cir. 1996) ("Due Process requires the trial court to hold a competency hearing, either on motion or *sua sponte*, whenever evidence raises a 'sufficient doubt' about the accused's mental competency to stand trial"); Haun, 695 S.W.2d at 549 (duty to hold hearing triggered by court's own observations).

During the trial in this case there was overwhelming evidence raising far more than a bona fide doubt about Taylor's continued competence: (1) the testimony of Dr. Farooque that Taylor's medications had been changed on the eve of trial; (2) Taylor's bizarre and irrational questioning; (3) Taylor's profound confusion; (4) Taylor's eventual lapse into complete silence; (4) Taylor's documented history of extreme mental illness and the testimony of Dr. Stout and Dr. Caruso that predicted Taylor's mental decline at trial; (5) the testimony of Dr. Stout that Taylor was no longer sure whether he had been killed before; and (6) the testimony of the Taylor's counsel at the competency hearing that he could not form a relationship with defense counsel.

Taylor's limited cross-examination of the first witnesses consisted of bizarre questions that failed to "touch directly on the testimony that had just been delivered." Rob Johnson, Prosecution Rests Its Case, Defendant Has Little To Say: Taylor asks few questions in representing himself at murder trial, The Tennessean, Oct. 16, 2003, at 4B. He questioned the victim's sister only about whether her brother had been a Klansman, a fact not at issue in the trial and for which he had no evidence. He later questioned three witnesses *only* about whether a black man walked through the hallway, again questions that failed to relate to the direct testimony or any material issue at trial. By the middle of the state's case, Taylor fell entirely silent and asked no questions at all. Despite his promise in opening statement, he waived closing argument at the guilt-innocence phase, and then offered not a shred of evidence or argument during the penalty phase.

A defendant's irrational behavior and demeanor at trial are critical to determining whether a trial court violated a defendant's due process rights by failing to hold a competency hearing at trial. See, e.g., White v. Georgia, 414 S.E.2d 328, 330 (Ga. Ct. App. 1992); Reynolds v. Norris, 86 F.3d 796 (8th Cir. 1996). Taylor's bizarre questioning was compelling proof of his deteriorated mental condition and should have raised serious doubt in the mind of the trial court as to his competency. See id. at 801 (holding that trial court should "have had sufficient doubt as to Reynolds' competency at the time of trial" because "Reynolds' meandering and irrational testimony at trial [was] evidence that his condition had deteriorated," particularly in light of defendant's diagnosis as schizophrenic); Michigan v. Harris, 460 N.W.2d 239 (Mich. Ct. App. 1990) (reversing for trial court's failure to have competency reevaluated where defendant had a history of schizophrenia and "the record . . . is replete with instances of bizarre statements and behavior of the defendant"); see also United States v. Zedner, 193 F.3d 562, 566 (2d Cir. 1999) (describing defendant's "strange behavior," including his "decision to subpoena numerous high level government officials with no apparent connection to this case" as basis for concern about ability to waive counsel).

Taylor's falling silent during trial was another critical sign which should have alerted the trial court to his deteriorating mental status. Howard v. Mississippi, 697 So. 2d 415 (Miss. 1997) is instructive. There, the Mississippi Supreme Court reversed a capital defendant's conviction because the trial court failed to hold a *sua sponte* competency hearing during a trial in which "[the defendant] rarely asked rational questions, if he asked questions at all." Id. at 423. Similarly in White, the Georgia Court of Appeals remanded for a determination of competency after the trial court failed to hold a competency hearing despite a change in demeanor by the defendant from "quite active during the first part of the trial" to "totally silent" later in the trial.

414 S.E.2d at 329. Just as in Howard and in White, at the beginning of the trial, Taylor "rarely asked rational questions, if he asked questions at all" and became "totally silent" by the end of the trial. 697 So. 2d at 423; 414 S.E.2d at 329.

The evidence that Taylor did not believe death was permanent, including the testimony of five lay witnesses in April and Dr. Stout's testimony on the day of trial that Taylor "was not sure" if he believed he had died previously, also should have alerted the trial court to the need for a full competency hearing. See, e.g., Nowitzke v. Florida, 572 So. 2d 1346, 1349 (Fla. 1990) (holding that trial court erred in failing to hold competency hearing after receiving evidence that the defendant believed that he could not be executed and that a death sentence is only a "step" he must go through).

In light of the evidence leading up to the trial and Taylor's visible deterioration at trial, "a reasonable judge, situated as was the trial court judge . . . , [w]ould have experienced doubt with respect to [the defendant's] competency to stand trial." Vick, 2006 WL 722173, at *4. Accordingly, Judge Heldman's failure to order a *sua sponte* competency hearing was error and requires reversal under the Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 8, 9 and 16 of the Tennessee Constitution.

3. JUDGE HELDMAN ERRED BY FAILING TO QUESTION TAYLOR REGARDING HIS PURPORTED DECISION TO WAIVE THE PRESENTATION OF MITIGATION EVIDENCE AS REQUIRED BY THE TENNESSEE SUPREME COURT'S DECISION IN ZAGORSKI V. STATE, 983 S.W.2D 654 (TENN. 1999), AND BY FAILING TO DETERMINE WHETHER TAYLOR'S WAIVER WAS KNOWING, VOLUNTARY AND INTELLIGENT.

Despite the clear mandate of the Tennessee Supreme Court that trial courts engage in a searching inquiry before finding that a capital defendant has knowingly, voluntarily and intelligently waived his right to present mitigation, Judge Heldman failed to ask Taylor a single

question about his purported decision to waive the presentation of mitigation evidence. Judge Heldman's decision to permit Taylor to waive mitigation without engaging in the required colloquy violated Taylor's rights under the Tennessee Supreme Court's decision in Zagorski v. State, 983 S.W.2d 654, 660 (Tenn. 1998), as well as under the Eighth and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 8 and 16 of the Tennessee Constitution. Accordingly, Taylor's sentence must be vacated and his case remanded for another penalty trial.

A. RELEVANT FACTS

Immediately after Judge Heldman read and imposed the jury's verdict of first-degree murder, he proceeded to the sentencing phase of the trial. (Vol. 20, 370). Without asking Taylor if he wanted a short break, Judge Heldman offered a brief instruction to the jury. (Vol. 20, 371). Judge Heldman then asked the state to give an opening statement. (Vol. 20, 371). After the state's opening statement, Judge Heldman asked Taylor if he wanted to give an opening statement:

> The Court: Thank you, General. All right, Mr. Taylor, would you like to make an opening statement at this phase?
> Mr. Taylor: No, I waive my statement, Your Honor.
> The Court: Are you sure about that, Mr. Taylor?
> Mr. Taylor: Yes, sir, Your Honor.
> The Court: All right, you may be seated. General?

(Vol. 20, 374-375). With no further discussion, the state proceeded to call three witnesses, none of whom were cross-examined by Taylor (Vol. 20, 377, 379, 378). The state rested, at which point the court dismissed the jury. (Vol. 20, 388). Out of the presence of the jury, Judge Heldman asked Taylor if he intended to call any witnesses or testify:

> The Court: All right, Mr. Taylor, do you intend to call any witnesses at this time?
> Mr. Taylor: No, Your Honor.

The Court: Mr. Taylor, do you wish to testify at this time?
Mr. Taylor: No, sir.
The Court: Let me advise you of this, Mr. Taylor. You do have the right not to testify. And if you do not testify, the jury may not draw any inferences from your failure to testify. But you also have the right to testify and if you wish to exercise that right no one can prevent you from testifying. Did you hear everything I said?
Mr. Taylor: Yes, Sir.
The Court: Did you understand everything I said?
Mr. Taylor: I have the right to testify.
The Court: You have the right to testify if you want to but—
Mr. Taylor: I don't desire to, Your Honor.
The Court: I didn't hear you.
Mr. Taylor: I don't desire to.
The Court: Did you understand what I said?
Mr. Taylor: Yes, sir, Your Honor.
The Court: All right. Are you electing not to testify, is that correct?
Mr. Taylor: Yes sir, Your Honor.
The Court: All right, now let me ask you this, Mr. Taylor. I've asked you several times and I just want to make sure I'm absolutely crystal clear from where you're coming from at this point in time. If you would like, I could ask a member of the Williamson County Bar to sit with you as advisory or elbow counsel at this time –
Mr. Taylor: No, Your Honor.
The Court: You do not wish that?
Mr. Taylor: No, sir, Your Honor.
The Court: All right. Thank you, Mr. Taylor.

(Vol. 20, 388-90). Judge Heldman then took a short recess to get the draft jury instructions. (Vol. 20, 390). After the state and Taylor declined to propose changes to the instructions, the prosecutor gave closing argument. (Vol. 20, 391-398). The court asked Taylor if he wished to give a closing argument and Taylor waived his closing argument. (Vol. 20, 398).

At no point did Judge Heldman question Taylor about whether he understood the purpose of the penalty phase or whether he was aware of his right to present mitigating evidence and its importance. Judge Heldman instructed the jury and, in less than forty minutes, the jury returned with a sentence of death. (Vol. 11, 1502).

B. JUDGE HELDMAN COMMITTED REVERSIBLE ERROR BY FAILING TO ENSURE THAT TAYLOR KNOWINGLY, VOLUNTARILY AND

INTELLIGENTLY WAIVED HIS RIGHT TO PRESENT MITIGATING EVIDENCE AS REQUIRED BY ZAGORSKI V. STATE, 983 S.W.2D 654, 660 (TENN. 1999)

A defendant in a capital case has a constitutional right to present mitigating evidence. See,e.g., Skipper v. South Carolina, 476 U.S. 1, 4 (1986); Lockett v. Ohio, 438 U.S. 586, 604 (1978). A defendant's decision to waive mitigation must be knowing, voluntary and intelligent. See State v. Ashworth , 706 N.E.2d 1231,1237 (Ohio 1999); Wilkins v. Bowersox, 145 F.3d 1006, 1015-1016 (8th Cir. 1998). In Zagorski v. State, 983 S.W.2d 654 (Tenn. 1998), the Tennessee Supreme Court adopted mandatory procedures for capital trials where the defendant seeks to waive mitigation to ensure that the waiver is knowing, voluntary and intelligent. Id. at 660.[24] Under Zagorski, before a defendant may waive his right to present mitigating evidence, the trial court must take the following steps "to protect the defendant's interests":

> (1) Inform the defendant of his right to present mitigating evidence and make a determination on the record whether the defendant understands this right and the importance of presenting mitigating evidence in both the guilt phase and sentencing phase of trial; (2) Inquire of both the defendant and counsel whether they have discussed the importance of mitigating evidence, the risks of forgoing the use of such evidence, and the possibility that such evidence could be used to offset aggravating circumstances; and (3) After being assured the defendant understand the importance of mitigation, inquire of the defendant whether he or she desires to forgo the presentation of mitigating evidence.

[24] Numerous other state courts are in accord. See, e.g., Koon v. Dugger, 619 So.2d 246, 249-250 (Fla. 1993); Wallace v. Oklahoma, 893 P.2d 504, 512 (Ct. Crim. App. Okla. 1995); Tilley v. State, 963 P.2d 607, 617 (Ct. Crim. App. Okla.1998) (reversing death sentence because of failure to comply with Wallace guidelines); Commonwealth v. Wilson, 861 A.2d 919, 935 n.20 (Pa. 2004).

Id. at 660. The Tennessee Supreme Court noted that following this "procedure will insure that the accused has intelligently and voluntarily made a decision to forgo mitigating evidence." Id. at 660.[25]

In the seven years since Zagorski was decided, Tennessee appellate courts have consistently enforced its holdings. In State v. Rimmer, No. W1999-00637-CCA-R3-DD, 2001 WL 567960 (Tenn. Crim. App. May 25, 2001), this Court considered the appellant's claim that the trial court's procedure was inadequate to ensure that he knowingly and intelligently waived his right to present mitigating evidence. Id. at *7. This Court noted that Zagorski *requires* the court to engage in the three-part inquiry about the defendant's knowledge of the right to mitigation and the importance of mitigation, the defendant's understanding of the risks of waiving mitigation, and whether the defendant continues to desire to waive mitigation in light of this knowledge. Id. After citing the factors, this Court found that the defendant was placed under oath and thoroughly questioned about his decision to waive mitigation as required by Zagorski. Id. The defendant affirmed that he understood the risks of waiving mitigation and still

[25] In Zagorski the defendant alleged that his trial counsel was ineffective for permitting him to waive mitigation. 983 S.W.2d at 659. Although the Tennessee Supreme Court adopted the required inquiry for waiver of mitigation in that context, courts which have adopted similar precautionary inquiry measures have applied the inquiry to cases of *pro se* representation. See, e.g., State v. Jordan, 804 N.E.2d 1, 13-14 (Ohio 2004) (*pro se* "[a]ppellant was advised of the possible consequences of his decision to waive mitigation" as required by State v. Ashworth, 706 N.E.2d 1231, 1237 (Ohio 1999)); Lamarca v. State, 931 So.2d 838 (Fla. 2006) (upholding the *pro se* defendant's waiver of mitigation as knowing and intelligent where the court followed the procedures adopted in Koon v. Dugger, 619 So.2d 246, 249-250 (Fla. 1993)); Fitzgerald v. State, 972 P.2d 1157, 1172-73 (Ct. Crim. App. Okla. 1998) (applying Wallace v. Oklahoma, 893 P.2d 504, 512 (Ct. Crim. App. Okla. 1995), guidelines to *pro se* defendant and holding that "[w]e need not decide whether this murky record [regarding waiver of mitigation] would, standing alone, require reversal since in combination with other errors, it necessitates reversal and remand for resentencing on the capital murder charge"); Commonwealth v. Randolph, 873 A.2d 1277, 1282 (Pa. 2005) (applying Commonwealth v. Wilson, 861 A.2d 919, 935 n.20 (Pa. 2004), to *pro se* defendant).

wished to waive mitigation. Id. at *7. In light of this compliance with Zagorski, this Court affirmed the sentence. Id. at *8.

Similarly, in State v. Smith, 993 S.W.2d 6 (Tenn. 1999), the defendant challenged the sufficiency of his waiver of mitigation. Id. at 13. The Tennessee Supreme Court found that Zagorski requirements were satisfied because the defendant was informed of the risks of waiving mitigation, including a warning by the trial court that if the defendant waived mitigation, he would almost certainly be sentenced to death by the jury, and because the trial court inquired into the defendant's competency. Id at *15; see also State v. Holton, No. M2000-00766-CCA-R3-DD, 2002 WL 1574995, * 26 (Tenn. Crim. App. July 12, 2002) (holding that the trial court appropriately questioned the defendant to ensure that his wavier of mitigation evidence was knowing and voluntary in compliance with Zagorski), affirmed State v. Holton, 126 S.W.3d 845, 862 (Tenn. 2004).[26]

In this case, Taylor presented no mitigating evidence. Nevertheless, in clear contravention of Zagorski, and in stark contrast to the detailed inquiries approved in Smith and Rimmer, Judge Heldman failed to make any inquiry whatsoever regarding whether Taylor knew of his right to present mitigation, whether he understood the benefit of presenting mitigating evidence, whether he understood the risk of waiving mitigation, and, indeed, whether Taylor even intended to waive mitigation. In other words, Judge Heldman did not (1) "[i]nform the [Taylor] of his right to present mitigating evidence and make a determination on the record

[26] Smith also held that a defendant may knowingly, voluntarily and intelligently waive mitigation consistently with the constitution. Notwithstanding the decision in Smith, however, a trial court's failure to require the presentation of mitigation evidence at the penalty phase violates the Eighth Amendment to the United States Constitution and Article I, Section 16 of the Tennessee Constitution because the heightened reliability constitutionally demanded in capital cases requires that a jury consider mitigation evidence even over a defendant's objection. See, e.g., State v. Koedatich, 548 A.2d 939, 997 (N.J. 1988).

whether the defendant underst[ood] this right and the importance of presenting mitigating evidence in both the guilt phase and sentencing phase of trial; (2) [i]nquire of ... [Taylor] ...whether [he understood] the importance of mitigating evidence, the risks of forgoing the use of such evidence, and the possibility that such evidence could be used to offset aggravating circumstances; and (3) [a]fter being assured [Taylor] underst[ood] the importance of mitigation, inquire of [Taylor] whether he . . . desire[d] to forgo the presentation of mitigating evidence." Zagorski, 983 S.W. 2d at 660.

Judge Heldman knew that this case contained a wealth of compelling mitigation evidence. He knew, for example, that even the state physicians diagnosed Taylor as schizophrenic, a profoundly mitigating fact that the jurors never learned before deciding to impose a death sentence. The jurors also did not learn anything about Taylor's "family history of mental problems, a difficult upbringing, and a long history of diagnosed mental problems." (Vol. 3, 167) (July 21, 1999, Opinion of this Court, affirming trial court's vacatur of conviction and sentence).

This Court is statutorily required to determine whether the sentence of death was imposed "in any arbitrary fashion." T.C.A. § 39-13-206. Judge Heldman's complete abdication of his duty to ensure that Taylor competently, knowingly, intelligently and voluntarily waived his right to mitigation requires reversal under this statutory provision, under the Tennessee Supreme Court's decision in Zagorski v. State, 983 S.W.2d 654, 660 (Tenn. 1998), and under the Eighth and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 8 and 16 of the Tennessee Constitution.

4. THE STATE'S FORCIBLE ADMINISTRATION OF ANTIPSYCHOTIC MEDICATION TO RICHARD TAYLOR AND HIS RESULTING HEAVY

SEDATION VIOLATED HIS CONSTITUTIONAL RIGHTS UNDER THE STATE AND FEDERAL CONSTITUTIONS

A. INTRODUCTION

Richard Taylor, a *pro se* litigant in a capital trial, sought to have the forcible administration of the antipsychotic medications Clozaril and Zyprexa terminated before trial, complaining vehemently about the sedating side effects and asking that his jury be allowed to see him in his natural, unmedicated state. See, e.g., Taylor testimony (Vol. 36,36) ("I don't like it. I don't like being medicated. I'm afraid it will have an effect on me that I don't desire for juries to see.") Judge Heldman denied this motion, without developing the requisite factual record, in violation of the clear requirements imposed by Sell v. United States, 539 U.S. 166, 177 (2003). As a result, Taylor was forcibly medicated at trial, with disastrous results. Sedated and confused, Taylor was denied his fundamental trial rights, including his right to represent himself, as guaranteed by Riggins v. Nevada, 504 U.S. 127 (1992).[27]

The issue of Taylor's unconstitutional forced medication was raised by Richard Taylor, (Vol. 5, 557-559, 560; Vol. 7, 865), as well as counsel both before trial (Vol. 5, 561; Vol. 9, 1215) and after trial. (Vol. 12, 1709).

B. RELEVANT FACTS

[27] Taylor raises this claim pursuant to his rights under the Tennessee Constitution, Article 1 § 1 ("'all power is inherent in the people"), § 2 ("doctrine on nonresistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind), § 3 ("no human authority can, in any case whatever, control or interfere with the rights of conscience"), § 8 (no man shall be taken or imprisoned or disseized of his freehold, liberties or privileges or outlawed or exiled or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers, or the law of the land,) § 16 ("excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted) § 19 ("[t]he free communication of thoughts and opinions, is one of the invaluable rights of man"), and the First, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Despite Richard Taylor's long history of mental illness, for sixteen years, between 1984 and 2000, he was held in state custody without receiving any antipsychotic medication or any psychological treatment of any kind. In 1997, Judge William Russell determined that Taylor was incompetent to stand trial. On January 26, 2001, four years later, Judge Donald Harris held a hearing on Taylor's competency at which MTMHI physicians testified that Taylor was incompetent and, for the first time since 1983, raised the prospect of prescribing antipsychotic medication to Taylor. Specifically, Dr. Farooque testified that with medication Taylor might regain competency. (Vol. 31, 38-39).

The hearing was unusual. Medical staff from MTMHI testified that Taylor should not be transferred to MTMHI but should remain in the custody of Tennessee Department of Corrections (TDOC), even though MTMHI could not treat inmates at TDOC. (Vol. 30, 47). To support its argument that Taylor should not be transferred to the mental hospital – despite his mental incompetency and need for treatment – the state called Leonard Lococo, the Director of Mental Health Services for TDOC. (Vol. 30, 51). Mr. Lococo explained that TDOC has a system for the involuntary medication of inmates which involved the appointment of guardians. (Vol. 30, 52). He also clarified that TDOC will not medicate for the purpose of competency, but only for the patient's medical benefit or if he is presenting a danger to himself or others. (Vol. 30, 53-54).[28]

On January 26, 2001, Judge Harris found Taylor incompetent and ordered his transfer to MTHMI, ruling that the Tennessee mental health statue required that Taylor be transferred to the custody of the commissioner of mental health. (Vol. 5, 542). Taylor, however, was not transferred to the MTHMI until July 10, 2001. (Vol. 5, 542). There is no evidence that, during

[28] Mr. Lococo further testified that TDOC provides a range of psychological and psychiatric services to inmates. Id.

the period between January 26, 2001 and July 10, 2001, Taylor was prescribed any antipsychotic medications by TDOC physicians or that the physicians sought to have him forcibly medicated based on a "set of clinical needs." See Vol. 31, 8 (testimony of Dr. Farooque that Taylor's condition was poor when he was transferred to MTMHI and medication was required); See also, Vol. 30, 53-54 (testimony of Dr. Lococo that TDOC will treat individuals with medication based on their clinical needs).

Within the first two weeks of Taylor's transfer to MTHMI, Dr. Farooque -- the attending psychiatrist who later testified that she is "very fond" of Clozaril and "treat[s] almost all [of her] patients with Clozaril" -- ordered that he be forcibly medicated with the antipsychotic medication Clozaril. (Vol. 31, 8) (ordering medication); (Vol. 31, 13) (statements about Clozaril).[29] Because Taylor refused to take the medication, Dr. Farooque ordered intramuscular forcible medication. (Vol. 31, 8). On July 30, 2001, Taylor was strapped to a bed with his hands and feet restrained in "four points" for over two hours while he was medicated against his will. (Vol. 31, 23-24).

Taylor immediately protested this medication. On July 31, 2001, he wrote a letter to Judge Harris requesting that the court enjoin the forcible medication as a violation of his constitutional rights. (Vol. 5, 557). Three days later, on August 3, 2001, Taylor again wrote the court to protest his forced medication. (Vol. 5, 560). On August 7, 2001, Taylor's guardian ad

[29] "[Clozaril's] use is severely limited by its side effects and potential for serious toxicity. Common side effects include sedation, extreme weight gain, constipation, and rare instances of agranulocytosis [a potentially fatal loss of white cells in the blood.]" ROBERT JULIEN, A PRIMER OF DRUG ACTION 361 (10th ed. 2005). Clozaril is part of a class of antipsychotics sometimes referred to as "major tranquilizers." Id. at 349. Despite the term "tranquilizer," the "psychological effects produced by the major tranquillizers are neither pleasant nor euphoric." Id.

litem, Virginia Story, sought judicial review of Taylor's forcible medication. (Vol. 5, 561) Judge Harris held a hearing on Ms. Story's motion on August 20, 2001.

At the hearing, Dr. Farooque testified that a Tennessee regulation permits her to forcibly treat Taylor, an incompetent patient, without his consent for ninety days before seeking the appointment of a guardian. She stated that she "loves Clozaril" and that "if Taylor continues to take the medication, he *might* improve in his mental condition and become not psychotic." (Vol. 31, 31) (emphasis added). Dr. Farooque also testified that, without the medication, Taylor was "loud, hostile, and irritable" (Vol. 31, 10) and that in her opinion the medication was necessary to Taylor's safety and to the safety of others. (Vol. 31, 15-16).

When asked about the side effects of Clozaril, Dr. Farooque responded that Clozaril causes weight gain and agranulocytosis, a reduction of white blood cells. (Vol. 31, 13).[30] She explained that she did not know the statistics for the risk, for example, of diabetes but that only a few of her patients had developed diabetes (Vol. 31, 18). She also testified that Clozaril makes patients "sedate – they are groggy, sedated." (Vol. 31, 23).

At the hearing, Taylor told the judge that he wanted to testify, and stated that "he's [sic] made a case that's making me mentally retarded, Your Honor, and I'm unable to engage witnesses and the Court himself, cross examine witnesses. Test the prosecution's case, in other words." (Vol. 31, 33). Judge Harris responded that he thought he knew the concerns that Taylor wanted to express and that those concerns would be more relevant if Taylor were later found competent to stand trial. (Vol. 31, 36).

[30] In Re Mark W., 811 N.E. 2d 767, 770 (Ill. Ct. App. 2004) (describing the evidence of "numerous side effects of Clozaril," including agranulocytosis, "a blood disease that can lead to death that is characterized by a reduction in a certain type of white blood cells").

Based on the testimony at the hearing, Judge Harris ruled that the medication was medically appropriate in MTMHI, a therapeutic facility, "as opposed to a Correctional Facility," and that the medication was necessary to avoid danger and to help restore competency (Vol. 31, 36). Judge Harris cautioned that his decision might differ if the state sought to forcibly medicate Taylor at trial. "Well, I will say this, I think that the standard that the Court is using now is perhaps different from the standard making a similar decision if we're talking about medicating during a trial." (Vol. 31, 35-36).

Taylor was forcibly medicated from July, 2001 throughout his post-trial proceedings. The effect was profound on both his thought processes and his level of participation in his defense. Off his antipsychotic medication, and even though incompetent, Taylor was at least actively engaged in his defense. His extremely active engagement in his case and legal defense dropped off precipitously with the antipsychotic medication. Between September 30, 1999 and July, 2001, the two year period before MTMHI began forcibly medication, Taylor filed seventy-five (75) *pro se* motions.[31] These motions included a wide range of substantive motions related to his trial, such as requests for subpoenas and compulsory process (Vol. 4, 402, 409, 414, 522), notice of affirmative defenses, (Vol. 3, 242), proposed jury instructions (Vol. 3, 242), motions for appointment of psychiatrist, psychologist, and investigator (Vol. 3, 247; Vol. 4, 400), motion

[31](Vol. 3, 242-243 244-245, 246, 247, 248, 249, 250, 251, 252, 253, 254,255, 256-257, 265, 266, 267, 268-269, 273-274, 275, 276-278, 279, 281, 282, 284-285; Vol. 4, 380, 381-382, 385, 386-387, 390-392, 393, 394, 395, 396-397, 398, 399, 400, 401, 402-403, 404-406, 409-416, 417-418, 419, 420, 421, 424, 429-431, 433, 435-439, 440, 441-442, 443-444, 445-458, 464-466, 467, 470, 471, 476, 477-478, 480-481, 485, 486, 495-502, 503-506, 508-509, 519, 520-521, 522, 523-525; Vol. 5, 531, 532, 533, 534, 535, 536-537, 545, 548, 549, 552-554, 558-559).

for transfer to MTMHI (Vol. 3, 255), notice of expert testimony (Vol. 4, 401), and a request for a copy of the local rules (Vol. 4, 424).[32]

In the following two-year period, while forcibly medicated and before his capital trial, Taylor filed only five motions: three in 2001, none in 2002, and two in 2003.[33] Three of the five motions are requests to terminate his forced medication. See Vol. 5, 557 (Letter to Judge Harris dated July 31, 2001, demanding that the court stop the forced medication); Vol. 5, 560 (Letter to Court dated August 3, 2001, requesting that the court enjoin the involuntary medication); Vol. 7, 865 (Motion to Terminate Appointed Counsel and Motion to Terminate Forced Medication dated May 12, 2003).[34]

The video record dramatically illustrates the extreme contrast between Taylor when forcibly medicated and when free of forcible medication. Unmedicated, Taylor actively questioned the court about his case at every opportunity. For example, in a three-minute hearing held on October 15, 1999, Taylor spoke thirteen times. (Vol. 26, 3-5). He stated his preference to represent himself and asked the court to hear his previously filed motions. (Vol. 26, 3, 5). Similarly, on February 11, 2000, Taylor spoke on thirty-three occasions in a six-minute hearing. He again discussed his negative view of his appointed counsel and stated his desire to dismiss counsel as soon as he is found competent. At the May 18, 2000 hearing, Taylor objected to letting MTHMI make findings as to his sanity at the time of the crime as part of its competency assessment, an objection Judge Harris incorporated into his order. (Vol. 29, 12). Taylor also

[32] These motions were never heard. See Point 9, contending it was error not to hold hearings on Appellant's motions.
[33] (Vol. 5, 557, 560, 571; Vol. 7, 865-866; Vol. 11, 1457).
[34] Taylor filed only two motions post-trial, *one describing his lack of memory of the trial, (Vol. 14, 2002), and the second demanding that he be executed immediately (Vol. 15, 2065).*

told the court that the Warden limited his ability to investigate his case by denying him access to visitors. (Vol. 29, 9). He requested copies of the court's competency order. (Vol. 29, 11).

In marked contrast, after forcible medication commenced, Taylor spoke only once, briefly, at the two-day hearing to determine his competency. (Vol. 34, 49). Taylor's demeanor, appearance and behavior at the hearing on his motion to represent himself and terminate his medication is striking. When Taylor spoke, his voice was much weaker than it was at the pre-medication hearings. (Vol. 36).[35] Although Taylor actively jumped into conversation with the court before his medication, at this hearing Taylor was very slow to respond, even when asked a direct question. At points in the hearing, Taylor made odd chewing motions, looked strangely up into the air, and rocked back and forth.[36] He also had trouble putting sentences together, stumbled over his words and, on occasion, stuttered.[37]

This difference in Taylor's appearance, demeanor and behavior was noted by his former attorneys and his appointed guardian ad litem. Brad MacLean, Taylor's former defense counsel whose testimony was explicitly credited by Judge Heldman, testified at the April 2003 competency hearing that there was a marked difference in Taylor after the medication commenced. He explained that with the forcible medication Taylor appeared very docile, placid, pale and underweight. (Vol.35, 45). Bill Redick, another former attorney of Taylor, stated at the same hearing that, as a result of the medication, Taylor was "obviously sedated." (Vol. 35, 108)

Virginia Story, Taylor's guardian ad litem, submitted a written report to the court on March 3, 2003, in which she described the effect of the medication on Taylor:

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[35] The video record, even more than the transcript of the videos, is compelling evidence of the change in Taylor's demeanor and participation. Compare, e.g., Video of May 18, 2000 with Video of June 10, 2003.

[36] Video of June 10, 2003 hearing at 1:08 p.m. (looking up into the air); 1:11 p.m. (strange chewing motions); 1:30 p.m. (rocking back and forth).

[37] See, e.g., Video of June 10, 2003, 12:58 p.m., 1:05 p.m., 1:26 p.m..

> Mr. Taylor has been forced [sic] medicated with the Clozaril and Zyprexa since July 11, 2002 when he was placed at forensic services MTMHI. On my last visit with Mr. Taylor, March 18, 2003, I found him to be *sedated, lethargic and passive*. *He is a completely different individual than I met two (2) year ago*. . . . Mr. Taylor's thought process is much slower.

Vol. 6, 795 (emphasis added).

Although Dr. Farooque testified at the August, 2001 hearing that Taylor was administered 200 mg of Clozaril per day (Vol. 31, 19), his medication dosage was subsequently increased significantly. By April of 2003, Taylor was receiving 600 mg of Clozaril and 10 mg of Zyprexa daily. (Vol. 6, 795; Vol. 34, 91).

Shortly after the trial court declared that Taylor was competent to stand trial, Taylor filed a *pro se* motion to terminate his "psycho" medications and dismiss counsel. (Vol. 7, 865-866). Judge Heldman scheduled a hearing on Taylor's "motion to 'proceed *pro se*' and to 'terminate' medications" for June 10, 2003. (Vol. 7, 867).

Defense counsel requested a continuance of the hearing in order to adequately research and introduce proof at the hearing. (Vol. 9, 1202). Despite the fact that the state did not contest the continuance, Judge Heldman denied the request. (Vol. 36, page 5-6). Although Judge Heldman had not yet determined whether Taylor could knowingly, intelligently, and voluntarily waive counsel, he stated at the outset that he was not sure that defense counsel had standing to proceed. (Vol. 36, 5). Later in the hearing – but still before he found that Taylor knowingly waived counsel -- Judge Heldman permitted the state to question Taylor, while ruling that Taylor did not need to answer questions by defense counsel.

Taylor testified at the hearing about the reason for his objection to the medication:

> I don't like it. I don't like being medicated. I'm afraid it will have an effect on me that I don't desire for juries to see and I need to be off of it for a period of time just to get used to not being on it.

(Vol. 36, 36).

Taylor testified that he did not think the medications were necessary to make him competent. Id. He stated that he did not agree with what the doctors said about his competency. (Vol. 36, 38). Taylor additionally testified that because he wanted to go to trial quickly, and he wanted to represent himself, he was being "cornered" into taking medications. (Vol. 36, 51). He testified that he was not willing to wait until after the trial to stop his medications and that he was willing to run the risk of having the trial postponed in order to get off of the drugs. (Vol. 36, 52). After repeated questioning by the prosecutor, he testified that he was not willing to agree to the forcible medication because he was not willing to be "in front of the jury in that state." (Vol. 36, 54). Judge Heldman issued a one page order finding that Taylor should continue to be medicated. (Vol. 9, 1208).

The issue of Taylor's forcible medication was next raised as a result of a filing by Mr. Koger, previously Taylor's defense counsel. (Vol. 9, 1215). On July 15, 2003, Mr. Koger filed a motion asking for a rehearing on the issues of Taylor's *pro se* motion to represent himself and his forcible medication, in light of Sell v. United States, 539 U.S. 166 (2003). (Vol. 9, 1215). Judge Heldman issued an order denying counsel's request for a rehearing, concluding that Taylor's counsel "lacked standing to contest or assert the issues raised by his motions;" (Vol. 9, 1267); however, Judge Heldman ordered a new hearing, to be held on October 14, 2003, the first day of trial, "to address (1) whether Defendant is still competent to stand trial… and (2) whether the criteria set forth in the Sell case are still met." (Vol. 9, 1268).[38]

[38] In the same order, Judge Heldman applied the standards of Sell "in light of the evidence adduced at the two prior hearings" and "reaffirm[ed]" the June 16, 2003 order denying Defendant's motion to terminate medications. (Vol. 9, 1268.)

Taylor was unrepresented by counsel at the competency and medication hearing held on October 14, 2003.[39] The only witnesses, Dr. Stout and Dr. Farooque, were subpoenaed by the court. Although the testimony was clear that until recently Taylor had been prescribed large dosages of two antipsychotic medications, Clozaril and Zyprexa, the testimony was unclear about what dosages, if any, Taylor was receiving on the day of the hearing. (Vol. 17, 8, 34-36).

Dr. Farooque testified that she was no longer the treating physician because Taylor had been transferred from the hospital to DeBerry Special Needs Facility (Vol. 17, 10,14-15),[40] but that she had seen Taylor on two occasions since he was transferred. (Vol. 17, 15). She testified that Taylor told her that he was still receiving his medications, but that she was not sure exactly what medications Taylor was receiving. (Vol. 17, 15).

Later in the hearing, Edward Ryan, Taylor's court appointed medical conservator,[41] informed the court that "as of yesterday, [Taylor] was instructed to be taken off his medication." (Vol. 17, 34). Judge Heldman orally ruled that Mr. Ryan lacked standing and then later issued an order prohibiting Mr. Ryan from participating in the case or further trying to interfere with Taylor's constitutional right to represent himself. (Vol. 11, 1513; Vol. 17, 35;).

After Mr. Ryan's statement, Dr. Farooque testified that she had met with Taylor's psychiatrist, Dr. Arney, the day before and that he told her that he had not changed Taylor's medications. (Vol. 17, 35-36). She also testified that Taylor had not shown signs that he had been taken off his medication when she met with him the previous day. (Vol. 17, 36). At the prosecutor's request, Dr. Farooque attempted to call Dr. Arney to investigate whether Taylor remained on the medication. (Vol. 17, 37, 53). Although she was not able to reach Dr. Arney,

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[39] This was a denial of Appellant's right to counsel. See Point 1.
[40] Taylor was transferred to TDOC on or around August 26, 2006. (Vol. 17, 41).
[41] Mr. Ryan was appointed as Taylor's conservator on September 11, 2003. (Vol. 11, 1506).

Dr. Farooque spoke with "Ms. Jeweltine" who told her that "Dr. Arney is gradually tapering off the medication." (Vol. 17, 53). Dr. Farooque speculated that "maybe Dr. Arney decreased the Clozaril, took him off of Zyprexa, I don't know, but I'm just assuming and maybe he got less medicine that [sic] he was on yesterday. I don't think you will see that much change today. But within a week maybe it will be apparent, but I cannot say anything." (Vol.17, 54).

Dr. Farooque also testified that as a result of the forcible medication, Taylor suffered from numerous side effects, including "drowsiness, sedation, feeling nauseated" and "sexual side effects." (Vol. 17, 11); See also, (Vol. 17, 26-27) ("[Taylor] complains about sedation"). Dr. Stout testified that Taylor had told him that the medications were affecting his "hormone" and "enzymes." (Vol. 17, 49).

At the conclusion of the testimony of the two state witnesses, which was not subjected to cross-examination, Judge Heldman found that Taylor was competent to stand trial and that the "criteria set forth in the Sell case are met by the proof today." (Vol. 17, 59). In his oral ruling, Judge Heldman stated that "important governmental interests are at stake," without identifying those interests, and that the "involuntary medications significantly further those state interests." (Vol. 17, 60). He ruled that "[a]dministration of medication to Mr. Taylor is medically appropriate," without identifying what medications and what dosages were medically appropriate, and that the "administration of medications prescribed is substantially likely to render Mr. Taylor competent to stand trial." Id. The court also determined that the "administration of the drugs is unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense" or "interfere significantly

with the defendant's ability to represent himself in conducting a trial defense." (Vol. 17, 60.)[42] Again without specifying what medications or what dosages Taylor was receiving, Judge Heldman ordered that "Mr. Taylor shall remain on his prescribed medications" and that the "instruction concerning a tapering off is now countermanded." (Vol. 17, 61). [43]

At the trial, the side effects of Taylor's forcible medication, including heavy sedation and greatly impaired thinking, continued to radically alter his behavior. In contrast to his previous active participation in his case, Taylor was slow to respond to questions from the judge and continually appeared confused and virtually catatonic. See, e.g., (Vol. 19, 30). On the few occasions when he attempted to cross-examine state witnesses, his questions were unrelated to their direct testimony, bizarre and apparently rooted in his delusional belief system. See (Vol. 19, 117, 147 and 155).[44] He presented no closing argument at the either phase of the trial and no defense at all at the penalty phase.

C. THE FORCED MEDICATION OF TAYLOR DEPRIVED HIM OF A FAIR TRIAL AND VIOLATED HIS CONSTITUTIONAL RIGHTS

In Riggins v. Nevada, 504 U.S. 127 (1992), the United States Supreme Court recognized that the forcible administration of antipsychotic medication implicates important trial rights.[45]

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[42] As shown below, Judge Heldman's prediction turned out to be tragically wrong. The record clearly establishes that, in fact, the side effects of the forcible medication significantly interfered with the defendant's ability to represent himself.

[43] On October 16, 2003, the last day of trial, Judge Heldman entered a written order reiterating these findings and adding the conclusory finding that "no alternative, less intrusive treatment exist to achieve substantially the same result." (Vol. 11, 1515, 1519.)

[44] Although there was no testimony or evidence at the trial about a racial dimension to the case, many of Taylor's questions focused exclusively on racial issues. (See, e.g., Vol. 19, 147, 155.)

[45] Sell v. United States, 539 U.S. 166, 177 (2003), discussed at length in Section D., infra, is the leading case addressing the standard required before a court may order medication over a defendant's objection. In Sell itself, the Supreme Court clarified the distinction between a challenge to forced medication as a violation of a defendant's right to avoid the medication, stemming only in part because the medication might render a trial unfair, and the claim that forced medication at trial *resulted* in an unfair trial, the claim discussed here. See Sell, 539 U.S.

The appellant in Riggins sought review of his capital conviction following his forced medication at trial. The Supreme Court reversed the conviction on the ground that the trial court's findings authorizing his forced medication were inadequate, holding that the medication "may well have impaired the constitutionally protected trial rights [appellant] invokes," including altering his "outward appearance" and affecting his testimony on direct and cross examination, his ability to follow the proceedings, and the substance of his communication with counsel. Id. at 135-7. The majority rejected the suggestion of the dissent that the defendant must demonstrate prejudice from the record, comparing the forced medication of defendant to the binding and gagging of the defendant at trial or to requiring a defendant to appear at trial in prison garb, violations where the effect cannot be seen in the trial transcript. Id.

The forcible administration of antipsychotic medications at trial implicates, and may violate, a wide range of constitutional protections, including a defendant's right to a fair trial; right to be present during the trial; right to effective assistance of counsel; right to present witnesses and evidence; right to testify and right to self-representation.[46] In his concurrence in Riggins, Justice Kennedy explained his fear that the side effects associated with antipsychotic medications will seriously compromise a defendant's right to a fair trial "in two principal ways: (1) by altering his demeanor in a manner that will prejudice his reactions and presentation in the

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at 177 ("We add that the question presented here, whether Sell has a legal right to avoid forced medication, perhaps in part because medication may make a trial unfair, differs from the question whether forced medication did make a trial unfair. The first question focuses upon the right to avoid administration of drugs. What may happen at trial is relevant, but only as a prediction. The second question focuses upon the right to a fair trial. It asks *what did happen* as a result of having administered the medication.") (emphasis added); see also Riggins, 504 U.S. at 139 (Kennedy, J., concurring) ("I express full agreement with the Court's conclusion that one who was medicated against his will in order to stand trial may challenge his conviction.").

[46] See, e.g., Dora W. Klein, Note, "Trial Rights and Psychotropic Drugs: The Case Against Administering Involuntary Medications To a Defendant During Trial," 55 VAND. L. REV. 165, 191 (2002).

courtroom, and (2) by rendering him unable or unwilling to assist counsel." Riggins, 504 U.S. at 142 (Kennedy, J., concurring). Justice Kennedy elaborated:

> As any trial attorney will attest, serious prejudice could result if medication inhibits the defendant's capacity to react and respond to the proceedings and to demonstrate remorse or compassion. The prejudice can be acute during the sentencing phase of the proceedings, when the sentencer must attempt to know the heart and mind of the offender and judge his character, his contrition or its absence, and his future dangerousness. . . .
>
> Concerns about medication extend also to the issue of cooperation with counsel. We have held that a defendant's right to the effective assistance of counsel is impaired when he cannot cooperate in an active manner with his lawyer. . . . The side effects of antipsychotic drugs can hamper the attorney-client relation, preventing effective communication and rendering the defendant less able or willing to take part in his defense. . . .
>
> It is well established that the defendant has the right to testify on his own behalf, a right we have found essential to our adversary system. . . . In my view medication of the type here prescribed may be for the very purpose of imposing constraints on the defendant's own will, and for that reason its legitimacy is put in grave doubt.

Id. at 142-145.

Numerous state and lower federal courts have recognized that the side effects associated with antipsychotic medication can fundamentally compromise a defendant's ability to present a defense, including by sedating him to the extent that he is unable or unwilling to assist counsel and by altering his demeanor. See State v. Maryott, 492 P.2d 239, 240-241 (Wash. Ct. App. 1971); State v. Murphy, 355 P.2d 323, 326 (Wash. 1960); Commonwealth v. Louraine, 453 N.E.2d 437 (Mass. 1983); Willis v. Cockrell, No. P-1-CA-20, 2004 U.S. Dist. LEXIS 15950, (W.D. Tex. Aug. 9, 2004); State v. Hayes, 389 A.2d 1379,1382 (N.H. 1978).[47]

[47] A defendant's right to meaningfully present his defense at trial is deeply ingrained within the American jurisprudential system and tightly guarded by constitutional protections. See, e.g.,

In State v. Maryott, 492 P.2d 239 (Wash. Ct. App. 1971), the Washington Court of Appeals reversed the defendant's conviction based on his forcible medication at trial, noting that by forcibly medicating the defendant the state was "able to affect the judgment and capacity of its own adversary," an outcome contrary to "[o]ur total legal tradition." Id. at 241. The court explained that a fundamental component of due process demands that a defendant have control over his mental process at trial and determined that the unwanted medication impermissibly compromised this right. Id. at 241-242. Ten years earlier, in a capital case, the Washington Supreme Court had reversed a defendant's conviction because his forced medication violated his trial right to the "use of . . . his mental . . . faculties unfettered." State v. Murphy, 355 P.2d 323, 326 (Wash. 1960) (citing State v. Williams, 50 P. 580 (Wash. 1897).) See also United States v. Brandon, 158 F.3d 947, 953 (6th Cir. 1998) (recognizing that the defendant has a "First Amendment interest in avoiding forced medication which may interfere with his ability to communicate ideas.")

More recently, a Texas state post-conviction trial court granted relief to the petitioner because forced medication violated his right to present a defense. See Willis v. Cockrell, No. P-1-CA-20, 2004 U.S. Dist. LEXIS 15950 (W.D. Tex. Aug. 9, 2004) (describing the state post-conviction decision and reversing the conviction on other grounds).[48] The trial court found that

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Crane v. Kentucky, 476 U.S. 683, 690 (1986) (Trombetta v. California, 467 U.S. 479, 485 (1984) ("Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'") (internal citations omitted)); Webb v. Texas, 409 U.S. 95, 98 (1972), (citation omitted) (holding that the right to present a defense is a "fundamental element of due process of law.")

[48] The procedural history of Willis is complex. The state post-conviction trial court granted habeas relief of the issue of the forced medication, including the resulting denial of his right to a fair trial. This ruling was reversed on appeal by the Texas Court of Criminal Appeals for the appellant's failure to object to the forcible medication. Willis, *52-53 (citing Ex Parte Willis, No. 27,787-01 (Tex. Crim. App. 2000). The federal district court granted habeas relief on the ground

administration of two antipsychotic medications violated the defendant's due process trial rights, including his right to counsel, the right to assist in his defense, and "the right to confront witnesses because a defendant's physical presence and demeanor in the courtroom are essential to the exercise of his confrontation rights." Id. * 49.

Like the defendants in the Washington and Texas cases, the forcible medication of Taylor denied him the ability to use his mental faculties unfettered and to present a defense. As Taylor described to the court, the medication made him feel "mentally retarded" (Vol. 31, 33) and made it difficult for him to assist in his case. (Vol. 21, 14). The record shows that Taylor, even though legally incompetent, was at least an active and engaged questioner while not under the influence of medication. When forcibly medicated, even assuming that he was technically "competent" (which appellant disputes elsewhere in this brief), Taylor was so heavily sedated that he was deprived of his ability to engage in his legal defense.

Medicated, Taylor had trouble forming sentences at hearings and responded slowly to questions. His trial performance was even worse: Taylor asked only a few bizarre cross-examination questions, made no argument at closing in either phase, and presented no evidence at the penalty phase. Under the influence of the forcible medication, Taylor became invisible at his capital trial – a violation of his fundamental rights to self-representation, to present a defense, to a fair trial, to due process of law, and, indeed, *to be present*. See Maryott, 492 P.2d at 244 ("Courts have held that an accused may not be tried when he is so drugged or intoxicated he is,

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that Willis was forcibly medicated without a showing of medical necessity, without reaching the claim the forcible medication deprived him of his fair trial rights. *71. The federal court cited, but did not review on the merits, the state trial court's analysis cited in this section. See Willis *71, n. 128.

in effect, not there at all."); cf. Drope v. Missouri, 420 U.S. 162, 171 (1975) ("trying incompetents invokes the law's disfavor of trials *in absentia*").

The risk that forcible medication will violate a defendant's right to present his defense, including the right to present exculpatory evidence of demeanor and appearance, is heightened in cases where the defendant's mental condition at the time of the offense is at issue. In Commonwealth v. Louraine, 453 N.E.2d 437 (Mass. 1983), the Massachusetts Supreme Court reversed the defendant's conviction due to his forced medication. Id. at 442. The Court noted that "it is an established and universally accepted rule that, when the defendant's sanity is at issue, the trier of fact is entitled to consider the defendant's demeanor in court," and found that the medication deprived the defendant of the ability to place before the jury probative evidence of his mental condition. Id. at 442. See also, 4 WIGMORE ON EVIDENCE § 1160 (1972) ("it seems to be universally accepted that in whatever form the issue of insanity may be presented, the jury may take into consideration the behavior of the person as observed by them"); Hayes, 389 A.2d at 1382 (holding that defendant was entitled to show jury non-medicated state, similar to state at time of the crime).

The Court in Louraine explained medication can present a false picture of the defendant because "if the defendant appears calm and controlled at trial, the jury may well discount any testimony that the defendant lacked, at the time of the crime, substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law." 453 N.E.2d at 442.

Taylor's state of mind was clearly at issue in both phases of his trial. Indeed, Judge Heldman instructed the jurors to consider the "mental state of the accused at the time . . . in order to determine whether the accused was sufficiently free form excitement and passion as to

be capable of premeditation." (Vol. 20, 344).[49] Accordingly, Judge Heldman erred by refusing Taylor's request to appear in front of the jury while not on medication. As Taylor stated repeatedly, he did not want the jury to see him in that state. Unmedicated, Taylor was described by the state doctors as openly delusional. See, e.g., Testimony of Dr. Farooque (Vol. 17, 7). The state's intentional medication of Taylor in order to make him sane at trial violated Taylor's right to exculpatory evidence in the form of his demeanor. See, e.g., Riggins, 504 U.S. at 139 (Kennedy, J., concurring) ("When the State commands medication during the pretrial and trial phases of the case for the avowed purpose of changing the defendant's behavior, the concerns are much the same as if it were alleged that the prosecution had manipulated material evidence."). The jury may well have found that Taylor, if presented in his natural state, had a diminished capacity and was not capable of premeditation. Moreover, the jurors might well have concluded that death was an inappropriate punishment. By denying him the ability to show evidence of his true mental condition, Judge Heldman withheld relevant information from the jury in violation of Taylor's rights under the Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 8, 9 and 16 of the Tennessee Constitution.

By forcibly medicating Taylor the state also violated his due process and Sixth Amendment right to self-representation. Faretta v. California, 422 U.S. 806, 834-34 n. 46 (1976). It is clear that if, as courts have recognized, the side effects of forcible medication can render a trial unfair by interfering with the defendant's ability to consult and assist counsel, those side effects also can have a devastating effect on a *pro se* defendant's ability to engage in self-representation. See Riggins, 504 U.S. at 142 (Kennedy, J., concurring). This Court need look no further than this case to see stark and deeply unsettling evidence of this proposition.

[49] Judge Heldman also instructed the jurors to consider the "appearance and demeanor" of witnesses. (Vol. 3, 355).

The forced medication of Taylor also violated his Fifth Amendment right not to present evidence against himself. The medication required him to present false evidence of himself as lacking in remorse, apathetic and sane. This violation is particularly egregious in light of the state's introduction at the penalty phase of the testimony of Dr. Filley that Taylor was *not* insane at the time of the offense. (Vol. 20, 378-78).

The forced medication of Taylor at trial violated his right to a fair trial by compromising his ability to participate in his own defense, control his thoughts, and present exculpatory evidence. It also violated his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 8, 9 and 16 of the Tennessee Constitution.

D. THE FORCED MEDICATION VIOLATED TAYLOR'S DUE PROCESS AND LIBERTY RIGHTS TO BE FREE OF UNWANTED MEDICATION IN VIOLATION OF SELL V. UNITED STATES, 599 U.S. 166 (2003)

For over one hundred years the Supreme Court has recognized that "[n]o right is more sacred, or is more carefully guarded . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others." Curzan v. Missouri Dept. of Health, 497 U.S. 261, 269 (1990) (quoting Union Pac. R. Co. v. Bostford, 141 U.S. 250, 251 (1981)). Recognizing that forcible medication treads heavily on this sacred right to liberty, the Supreme Court clarified the standard for when the government may forcibly administer antipsychotic medications for the purpose of rendering the defendant competent to stand trial in Sell v. United States, 539 U.S. 166, 177-179 (2003); See also Washington v. Harper, 494 U.S. 210, 229 (1990) ("The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty.") The Court held that forcible medication should be limited to those "rare" circumstances where "treatment is medically

appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests." Sell, 539 U.S. at 179. The state failed to satisfy any of the elements of this test in this case and, accordingly, Taylor's due process right to be free from bodily intrusion was violated.

1. There Were Inadequate Procedural Protections and Inadequate Development of the Evidentiary Record To Demonstrate that Forcible Medication Was Medically Appropriate or that the Side Effects Were Unlikely to Adversely Affect Richard Taylor's Trial Rights

Judge Heldman failed to ensure that Richard Taylor received adequate procedural protections before ordering his forcible medication. Furthermore, there was an insufficient evidentiary basis for forcible medication. On both grounds, he committed reversible error.

a. Inadequate procedural protections.

Judge Heldman first approved the forced medication of Taylor at a hearing held on June 10, 2003 to determine whether Taylor could knowingly and voluntarily waive counsel and whether it was appropriate to terminate his forced medication. (Vol. 9, 1206; Vol. 36, 92). Judge Heldman denied defense counsel's motion to continue the hearing in order to assemble proof on the issues at the hearing, despite the fact that the state agreed to the continuance. Judge Heldman's refusal to grant the continuance meant that the defense was denied the opportunity to put on expert proof regarding the lack of necessity for and side effects of the prescribed medications.

As the Ninth Circuit explained in a recent case, United States v. Rivera-Guerrero, 426 F.3d 1130, 1136 (9th Cir. 2005), the court's failure to grant a continuance denied the court the "complete factual and medical record" necessary for its decision. In Rivera-Guerrero, the court reversed the trial court's denial of the request by the defense for a continuance in order to retain a

medical expert to rebut the government's proof. Id. at 1138. The Rivera-Guerrero court explained the importance of a fully developed record to the important liberty interest at stake in a Sell determination:

> [t]he importance of the defendant's liberty interest, the powerful and permanent effects of antipsychotic medications, and the strong possibility that a defendant's trial will be adversely affected by the drug's side effects all counsel in favor of ensuring that [an] involuntary medication order is issued only after both sides have had a fair opportunity to present their case and develop a complete and reliable record.

Rivera-Guerrero, 426 F.3d at 1138.

Judge Heldman's refusal to grant the continuance denied the defense a "fair opportunity" to present the case against forced medication. Id. See also United States v. Brandon, 158 F.3d 947, 955 (6th Cir. 1998) (holding that the due process clause requires the right to present rebuttal testimony before involuntary administration of antipsychotic medication for the purpose of achieving competency to stand trial). Because of this denial, the defense had no meaningful opportunity to present its case that forcible medication was inappropriate.

The hearing on October 14, 2006, the first day of trial, was also patently deficient. Judge Heldman ruled that Edward Ryan, Taylor's court appointed conservator, did not have standing to participate.[50] This was clear error. Mr. Ryan was appointed by the Probate Court on September 11, 2003, approximately one month before the Sell competency hearing and trial. (Vol. 11, 1506). Under Tennessee law, a conservator in an action before the probate court is appointed to provide partial or full supervision, protection, and assistance to a disabled person. See T.C.A. § 34-1-101 (4); § 34-3-101(a). Mr. Ryan was "empowered to consent to medical and mental

[50] The October 14, 2003 hearing was held to determine Taylor's competency as well as the ability of the state to continue his forcible medication. Judge Heldman also ruled that Taylor's counsel did not have standing to participate. See Point 1, explaining that this hearing was a denial of Appellant's right to counsel.

examinations and treatment on [Taylor's] behalf." (Vol. 12, 1688). Judge Heldman clearly erred by excluding Mr. Ryan from the proceedings: first, because under the probate court's order, Mr. Ryan had authority to make treatment decisions for Taylor; and second, as Taylor's medical conservator, Mr. Ryan had knowledge about Taylor's medications, including knowledge of his own conversations with the treating physician, Dr. Arney. (Vol. 17, 34). By failing to permit Mr. Ryan to testify and participate at the hearing, and by excluding defense counsel, Judge Heldman prevented the defense from developing "a complete and reliable record." 426 F.3d at 1138.[51]

b. Inadequate evidentiary basis for forcible medication.

Furthermore, the record developed at the June 10, 2003 and October 14, 2003 hearings fell far short of a "complete and reliable record" justifying forcible medication. 426 F.3d at 1136. At the June 10, 2003 hearing, Taylor was the only witness. (Vol. 36, 3). The state presented *no* evidence regarding the medications which it proposed to administer to Taylor, no evidence of the proposed dosages, no evidence of the side effects, and no evidence about the availability (or lack) of alternatives. See Riggins, 504 U.S. at 136 (reversing where the trial court did not make "*any* determination of the need for this course [of forcible medication] or *any* findings about reasonable alternatives.") (emphasis in the original). Rather, Judge Heldman relied upon earlier testimony by state physicians offered at Taylor's *competency* hearing. (Vol. 9, 1206; Vol. 36, 92).

[51] This error was compounded by the fact that the court ordered that two state witnesses testify at the hearing, but did not order the attendance of defense witnesses or even instruct Appellant of his right to call witnesses at the hearing. (Vol. 9, 1268). This fact is particularly striking given the fact that the court never ruled on Taylor's motion for appointment of an independent psychiatrist and psychologist. (Vol. 3, 247).

Furthermore, the record from the Sell hearing on October 13, 2003 is woefully inadequate about the government's proposed course of medication for the trial. Dr. Farooque was the only witness to testify about Taylor's medications. She testified about the medications that she had prescribed earlier in the summer but stated that she was no longer prescribing medications for Taylor. She also testified that she did not know all of the medications that he was taking. Even more dramatically, she testified – based on a phone conversation during the hearing itself – that Taylor's treating physician had begun tapering off Taylor's medications. (Vol. 17, 37, 53). She admitted that she did not know what his current medications were or whether Taylor's prescriptions for Clozaril and Zyprexa had been reduced or entirely stopped. (Vol. 17, 8, 34-36).

By failing to introduce evidence of the antipsychotic medications and the dosages that the state was administering, and intended to continue administering throughout the trial, the state necessarily failed to meet its burden under Sell. In a similar case, United States v. Evans, 404 F.3d 227, (4th Cir. 2005), the Fourth Circuit reversed the trial court's ruling permitting the forcible medication of the defendant because the government failed to detail the proposed course of treatment of antipsychotic medications. Id. at 233-234. The Court explained that Sell "requires an evaluation of possible side effects" and "[w]ithout at least describing the course of treatment, it is tautological that the Government cannot satisfy its burden of showing anything with regards to that treatment." Id. at 240. The court required on remand that the government produce a specific showing of the proposed medications and dose ranges, noting that "[t]o approve of a treatment plan without knowing the proposed medication and dose range would give prison medical staff carte balance to experiment with what might even be dangerous drugs

or dangerously high dosages of otherwise safe drugs and would not give defense counsel and experts a meaningful ability to challenge the propriety of the proposed treatment." Id. at 241.

In this case, the trial court necessarily could not have made informed decisions about the side effects and necessity of the medications because the record was woefully inadequate about Taylor's medications. Accordingly, it was error for Judge Heldman to conclude that the medication, without specification, was appropriate under Sell.

2. Judge Heldman Applied the Wrong Legal Standard and Neglected To Determine Whether the Medication Was Unlikely to Have Side Effects that May Undermine the Fairness of the Trial

Judge Heldman also erred by applying the wrong legal standards when attempting to enforce Sell. Recognizing that antipsychotic medications may "sedate a defendant, interfere with communication with counsel, prevent rapid reaction to trial developments, or diminish the ability to express emotions," Sell demands that the trial court ask whether the proposed medications are "substantially unlikely to have side effects that may undermine the fairness of the trial." Sell, 539 U.S. at 185, 179. Here, the trial court determined only that the "administration of the drugs is unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense" or "interfere significantly with the defendant's ability to represent himself in conducting a trial defense." (Vol. 17, 60.)

Judge Heldman's reformulation significantly reduced the state's burden of proof in two important respects. First, Judge Heldman erroneously required the state to demonstrate only that the medication would not "significantly" interfere with defendant's trial rights (Sell required the state to meet the much heavier burden of showing that it was substantially unlikely that the side effects "may undermine the fairness of the trial"). Second, Judge Heldman erroneously required the state to prove only that it was "unlikely" that the side effects might undermine the fairness of

the trial (Sell required the state to meet the much heavier burden of showing it was "substantially unlikely").

The court might have reached a different conclusion applying the correct standard of proof given the ample evidence that Taylor was heavily sedated as a result of the medication. (Vol. 6, 795; Vol. 31, 23; Vol. 35, 45, 108; Vol. 36). See In Re Mark W., 811 N.E.2d 767, 770 (Ill. App. Ct. 2004) (reversing order of forcible medication of psychotropic medication because the side effects of Clozaril "could impact trial-related issues, such as making it more difficult for [the defendant] to focus on the testimony of witnesses at his criminal trial and making it more difficult for [him] to communicate with his counsel and assist his counsel with his defense.").

The question of the scope of the inquiry is also significant because the court failed to consider the impact that some of the side effects, such as sedation, would have on Taylor's ability to present mitigating evidence of his mental health, an important component of his right to conduct a trial defense, as described, supra.

3. There is insufficient evidence in the record to support findings that the medication was medically appropriate or that medicating Taylor was significantly necessary to further important governmental trial related interests

Sell also required Judge Heldman to determine that "the administration of the drugs is medically appropriate, i.e., in the patient's best medical interest in light of his medical condition." Sell, 539 U.S. at 181. Judge Heldman failed to weigh the negative side effects of Clozaril and Zyprexa and failed to consider the statements of Edward Ryan, the individual appointed to act in Taylor's best medical interests.

The Supreme Court has repeatedly noted that "[w]hile therapeutic benefits of antipsychotic drugs are well documented, it is also true that the drugs can have serious, even fatal, side effects." Riggins, 504 US. at 134 (citing Harper, 494 U.S. at 229). Clozaril and

Zyprexa, the antipsychotic medications that Taylor was prescribed at least during the period leading up to trial, are no exception. See, e.g., Jones v. Bick, 891 So.2d 737, 740 (La. Ct. App. 2004) ("The expert testimony indicates that Clozaril is a powerful drug, with dangerous side effects, and can be considered a drug of last resort."); In Re Mark W. 811 N.E.2d 767, 770 (Ill. App. Ct. 2004) (citing expert report describing the "numerous side effects of Clozaril, such as agranulocytosis [a blood disease that can lead to death that is characterized by a reduction in a certain type of white blood cells], seizures, adverse cardiovascular and respiratory effects, neuroleptic malignant syndrome, tardive dyskinesia, *drowsiness, sedation, fatigue, dizziness*, vertigo, headache, tremor, syncope, restlessness, agitation, rigidity, akathasia, *confusion*, fatigue, hyperkinesia, amnesia/ memory loss, *loss of speech, stuttering*, and many others") (emphasis added).

Dr. Farooque testified to some of the side effects of Clozaril, such as agranulocytosis and sedation. (Vol. 31, 13, 18). Judge Heldman was required to weigh these side effects, along with the opinion of Mr. Ryan that the medications were not in Taylor's best interest, against the state's interest in rendering Taylor competent to stand trial. His conclusory opinion that Taylor's medication was medically appropriate does not reflect the kind of serious balancing demanded by Taylor's liberty interest.

Nor did Judge Heldman adequately consider the government's trial related interests. To be sure, the state has an interest in pursuing the prosecution for Ronald Moore's death. See Sell, 539 U.S. at 180 (describing the state's interest in bringing to trial individuals accused of serious crimes as important). But as Sell instructs, "[s]pecial circumstances may lessen the importance of that interest." Id. at 180. In this case, Taylor had been confined on the charge for over twenty years. (see, e.g., Vol. 2, 145; Vol. 30, 22, 25, 58-59, 65, 74; Vol. 31, 10). He had been tortured

by the state while in custody, a fact which possibly contributed to his continued mental illness and certainly did not help him regain competency at an earlier date. See Dale Hunt Affidavit, Vol. 3, 350-377. For almost twenty years, the state neglected to provide Taylor with mental health services that might have restored him to competency without the use of antipsychotic medications. In Taylor's case, a conclusion that he did not require medication might well have meant "lengthy confinement in an institution for the mentally ill—and that would [have] diminish[ed] the risks that ordinarily attach to freeing without punishment one who has committed a serious crime." Sell, 539 U.S. at 180. See also T.C.A. § 33-6-403 (providing for involuntary commitment). Again, Judge Heldman's conclusory statements failed to acknowledge that he considered any of the relevant evidence, let alone that he weighed it as required by the Supreme Court in Sell.

E. TAYLOR'S FORCED MEDICATION AT TRIAL VIOLATED HIS CONSTIUTIONAL RIGHT TO RELIABLE SENTENCING

In capital cases, the constitution requires that a defendant be permitted to present as mitigating evidence "any aspect of a defendant's character or record." Lockett v. Ohio, 438 U.S. 586, 604 (1978). See also, Skipper v. South Carolina, 476 U.S. 1, 8 (1986) (reversing where trial court excluded testimony at penalty phase regarding defendant's adjustment to prison because jury did not consider "all relevant facts of the character and record" of the defendant). By forcing Taylor to appear in front of the jury in a medicated and false state at the sentencing phase, the trial court denied Taylor the opportunity to present the jury with evidence of his mental condition, an important aspect of his character, thereby impermissibly reducing the reliability of the sentencing determination.[52]

[52] In Riggins v. Nevada, the petitioner sought to challenge his sentence on the ground that the forcible medication violated the Eighth Amendment because he was denied the opportunity to

The Washington Supreme Court in Murphy recognized the importance of the ability of the capital defendant to introduce evidence of his true mental condition and demeanor at the penalty phase. See Murphy, 355 P.2d at 327 ("We believe this right is of particular significance in a case such as that now before us, where the matter of life or death of the accused may well depend upon the attitude, demeanor and appearance he presents to the members of the jury, who are the ultimate determiners of his fate."). Like the defendant in Murphy, Taylor was denied the ability to show the members of the jury his attitude, demeanor and appearance without the altering medications. The prejudice to Taylor was particularly significant given that the state introduced testimony at sentencing that Taylor was sane at the time of the offense. The jury was denied important evidence of Taylor's mental condition. Taylor's forcibly masked and artificial state before the jury violated his rights under the Eighth Amendment of the United States Constitution and Article I, Section 16 of the Tennessee Constitution.

5. JUDGE HELDMAN ERRED BY ALLOWING RICHARD TAYLOR TO WAIVE COUNSEL BECAUSE HIS WAIVER OF COUNSEL WAS NOT COMPETENT, VOLUNTARY, KNOWING, OR INTELLIGENT.

A. INTRODUCTION

On June 10, 2003, Judge Heldman held a perfunctory hearing on Taylor's motion to represent himself. Judge Heldman failed to follow up in any way when Taylor made deeply troubling, delusional statements during the hearing, including expressing his belief that he had died in the past. Furthermore, Judge Heldman ignored Taylor's testimony that he sought to waive counsel because he believed that it would expedite his trial and finally free him of forcible medication. Judge Heldman also chose to turn a deaf ear to clear indications that Taylor's

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present evidence at sentencing of his mental condition. 504 U.S. at 133. The Supreme Court did not reach the merits of this issue because it was not presented to the state supreme court or raised in the petition for certiorari. Id.

decision to waive counsel was rooted in his paranoid distrust of attorneys (a clear symptom of his mental illness). In short, Judge Heldman fell woefully short of conducting a constitutionally adequate examination of Richard Taylor's waiver of counsel, and this Court should reverse.

Reversal also is required because the evidence from the June 10, 2003 hearing, combined with the testimony from the April 2 and April 3, 2003 competency hearing, greatly preponderates against Judge Heldman's determination that Taylor's waiver of counsel was knowing, voluntary, and intelligent.[53]

This issue was raised by defense counsel at the hearings held on April 2 and 3, 2003 and June 10, 2003 and was also raised in the motion for new trial. (Vol. 12, 1730-31).

B. RELEVANT FACTUAL BACKGROUND

On May 8, 2003, Taylor submitted a motion requesting to proceed *pro se* and that his "psycho meds be terminated." (Vol. 7, 865-866). On June 10, 2003, after denying defense counsel's uncontested request for a continuance, Judge Heldman held a hearing on Taylor's motion.[54] The court questioned Taylor under oath about his motion to proceed *pro se* (Vol. 36, 7), and Taylor testified that he had decided "way back in 1986" that he wanted to represent

[53] See State v. Blackstock, 19 S.W.3d 200, 209 (Tenn. 2000) (reviewing whether Miranda waiver was knowing, voluntary, and intelligent and reversing under the preponderance of the evidence standard); Smith v. State, 987 S.W.2d 871, 877 (Tenn. Crim. App. 1998) (reviewing waiver of counsel and reversing under the preponderance of the evidence standard).

[54] On June 6, 2003, appointed defense counsel Hershell Koger filed a motion requesting a continuance of the *pro se* hearing. (Vol. 9, 1202). He explained that he had been in a capital trial during the entire period between the date he received service of the motion and June 4, 2003, and requested additional time to prepare for the hearing. Id. At the beginning of the hearing on June 10, 2003, Judge Heldman stated that he believed defense counsel lacked standing to participate in the hearing on Taylor's *pro se* motion. (Vol. 36, 5). The prosecutor stated on the record he would not object to a brief continuance. Id. The court denied the request for a continuance and refused to allow Mr. Koger to be heard on the motion for the continuance. (Vol. 36, 6).

himself and that they "could start the trial today." (Vol. 36, 9-11). Judge Heldman asked Taylor if he wanted to handle his own defense:

The Court: And you have to handle your defense yourself?
Mr. Taylor: Right.
The Court: You understand that?
Mr. Taylor: Yes, sir.
The Court: And that's something you want to do?
Mr. Taylor: Yes, sir. *I have to.*
The Court: Well, why do you say you have to?
Mr. Taylor: *Well, nobody will get it correct, except me.*

(Vol. 36, 24) (emphasis added). Judge Heldman immediately changed the subject, asking if Taylor understood that the court would not give him advice.

In response to questioning by Judge Heldman about cross-examination, Taylor expressed his concern about whether the podium was nailed to the floor:

The Court: Alright [sic]. And do you understand that you would also be given the right to cross-examine witnesses? You understand that, don't you? And you would be the one doing the examination and be standing at the podium. Do you understand that?
Mr. Taylor: Yeah.
The Court: Because –
Mr. Taylor: Is it nailed down?
The Court: Is it nailed down now? I don't know the answer that question. No its not. Not right now.
Mr. Taylor: Used to sit on it and rock it back and forth.
The Court: Okay. Well –
Mr. Taylor: About twenty years ago.
The Court: It's best not to rock back and forth. It conveys a sort of slovenly appearance to the jury. But anyway, do you realize that if you were . . .

(Vol. 36, 29). Judge Heldman did not question Taylor about his belief that he had sat on and rocked the lawyer's podium twenty years ago.

A few minutes later, Taylor told Judge Heldman that lawyers could represent him in post-conviction "after I'm found guilty." (Vol. 36, 30). When Judge Heldman asked Taylor why he wanted to represent himself, he testified that "the Supreme Court says I can" and because "my

past experiences say I better." (Vol. 36, 31). Judge Heldman did not ask Taylor about those past experiences or why he believed he had "better," but again changed the subject. Id.

After Judge Heldman finished his own questioning he permitted the prosecutor to question Taylor. (Vol. 36, 38). The prosecutor asked Taylor about aggravating circumstances:

Q: Do you know what the aggravating circumstances are?
A: For what? Premeditation?
Q: No. I'm talking about, in terms of it –
A: Talking about –
Q: The jury decides –
A: (inaudible) death?
Q: Yes. Do you know what the aggravating –
A: No. I couldn't state them verbatim. *I'll allow them*.

(Vol. 36, 44) (emphasis added). Judge Heldman made no inquiry as to why Taylor would "allow" aggravating circumstances.

The State also questioned Taylor about his request to stop his medications:

Q: Mr. Taylor, don't you, don't you think that in terms of trying to get, I mean you want to try this case as soon as possible?
A: Yeah. Yeah.
Q: Are you willing, given the fact this case is set in October, and I know you have some reservations about the, the drugs. But are you willing, since the case is set in October to go head and to remain, at least on the drug until October just to make certain, 100% certain that your remain competent?
A: *That's what I'm being cornered into doing*, I think.
Q: Well, no. I want to know what, what you want it that –
A: *That's what I'm being cornered into doing.*
Q: You, you realize that there is at least some risk, some risk –
A: Oh, yeah.
Q: That if, if, if they stop giving you the drugs that you might become incompetent in their minds.
A: *Yeah. That's in their minds.…*
Q: Now, my question of you, Mr. Taylor, is are you willing to wait about the issue of, of the drugs to go ahead and, let me finish please. Go ahead and say on the drugs at least until October, then after that you can get off them. Are you willing to do that?
A: No.
Q: Why is that?
A: Why? *I, I want to be free of these drugs as soon as I can*.

Q: But if, if you're free of them, and then they, the, the experts, Middle Tennessee Mental Health –
A: Those are experts –
Q: Well, Dr. Farooque, Dr. Farooque says well, he's no longer competent. Then you won't even be able to be tried in October. It will be after that.
A: *Yea, but, but I won't be forced medicated if it came about the way you describe, hypothetically.*
Q: So you're willing to risk, run the risk of having his trial postponed to get off the drugs?
A: Yeah.
Q: Cause that's why, you understand, you should a little hesitant, a little bit. Are you?
A: *I have to.*
Q: You have to what?
A: *Get off these drugs.*

(Vol. 36, 52-53) (emphasis added).

Judge Heldman later resumed questioning of Taylor. Taylor continued to give strange, profoundly troubling responses, for example:

Court: You understand that there's clear pit falls in representing yourself?
Mr. Taylor: Maybe there is, maybe there isn't. I've been in a lot of pits.

(Vol. 36, 55).

Taylor testified a few minutes later, "There won't be too much to examine, there won't be, I won't be cross-examining." (Vol. 36, 57). Judge Heldman did not ask Taylor if he believed he was capable of cross-examining witnesses, if he had considered what witnesses might testify, or how not cross-examining them might affect his defenses. He did not even ask why Taylor did not intend to cross examine witnesses.

After Judge Heldman and the prosecutor finished their examinations, Judge Heldman asked defense counsel if he wanted to examine Taylor. (Vol. 36, 62). When counsel answered affirmatively, the court questioned whether defense counsel had standing to participate and asked counsel to make an argument about why Taylor could not waive counsel. (Vol. 36, 62-64).

Mr. Koger, one of Taylor's appointed counsel, explained that Taylor was not competent to waive counsel because, *inter alia*, of his delusional beliefs, including his belief that he had died before and come back to life. (Vol. 36, 65-66). Mr. Koger pointed to the testimony by Taylor's previous attorneys at an earlier competency hearing that Taylor had a fundamental distrust of all attorneys. (Vol. 36, 66). He pointed to Taylor's testimony that he had to represent himself because only Taylor could get it right, and reminded the court of the testimony at the April competency hearing that Taylor delusionally believed that he had represented himself at the post-conviction hearing and cross-examined witnesses. (Vol. 36, 66). In reality, Taylor did not cross-examine any witnesses, and despite Taylor's belief that no attorneys did anything well, he was represented by outstanding counsel in post-conviction. Id.

Mr. Koger also pointed to Taylor's testimony earlier at the hearing that he did not need to take medication as further evidence that Taylor does not believe, indeed has never believed, that he was mentally ill despite his profound mental illness. (Vol. 36, 65-67, 70). He summarized that based on his experience, "I don't believe that Mr., that Mr. Taylor in any, in any sense of the word knowingly or understandingly understands what he is doing when he starts talking about representing himself." (Vol. 36, 63).

At the conclusion of his argument, Mr. Koger asked permission to call co-counsel, Mr. Appman, to testify about his conversation the day before with Taylor. (Vol. 36, 75). Judge Heldman denied the request on the ground that Taylor did not want Mr. Appman to testify. Id. Mr. Kroger then sought to examine Taylor and Judge Heldman instructed Mr. Koger to "tell me what the questions are (of Taylor) and then we'll decide whether I'm going to let you ask him." (Vol. 36, 76). Mr. Koger attempted to question Taylor:

Mr. Koger: Question number one, Judge, would be one, haven't you maintained all along that you are competent, Richard? That would be question number one.
The Court: Alright [sic]. Now, Mr. Taylor, I'm going to let you decide. Do you want to answer that question or do you not want to? It's up to you.
Mr. Taylor: I don't want to answer.
The Court: Alright [sic]. He don't [sic] want to answer. I'm not going to make him. What's the next question?

(Vol. 36, 76).

This pattern continued, and Taylor declined to answer, with court approval, why he wanted to represent himself and whether he had participated in the cross-examination or direct examination of witnesses at the post-conviction hearing. (Vol.36, 76-77). Mr. Koger then sought to ask Taylor about his belief that he had died in the past:

Mr. Koger: Yes, sir. My next question, Judge would be what, Richard is your, my next question would be, Judge, Richard, have you died in the past and come back to life?
The Court: Alright. Taylor did you hear that question?
Mr. Taylor: I think he's talking about *when I was killed and came back to life*. Is that –
The Court: I'm just asking did you hear the question he wants to ask you?
Mr. Taylor: No.
The Court: You didn't hear it? Alright. State it again.
Mr. Koger: Let me restate –
The Court: I just want to hear what the question is. I'm not going to make you answer them. We're going to get to that. I just want to make sure you heard it. State what [the] question is, Mr. Koger.
Mr. Koger: The question would be whether Richard has died or been killed in the past?
Mr. Taylor: Yes.

(Vol. 36, 78) (emphasis added). Judge Heldman took absolutely no notice of Taylor's delusional responses to counsel's question.

The court continued to instruct Taylor that he did not have to answer questions from defense counsel, including whether he believed that if he were convicted and sentenced to death he would be killed and come back to life, whether he believed that if he were executed his sentence would be "discharged" so that he could come back to life without a death sentence,

whether one of his goals if convicted was to get answers regarding the unseen force, and whether Taylor believed that the unseen force still exists. (Vol. 36, 79-81).

At the conclusion of the hearing, Judge Heldman ruled that Taylor had knowingly waived his right to counsel and that he could represent himself. (Vol. 36, 83). On June 16, 2003, Judge Heldman issued a short, one page written order confirming his ruling that Taylor knowingly and voluntarily waived his right to counsel and that he could represent himself. (Vol. 9, 1206).[55]

C. TAYLOR DID NOT KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY WAIVE HIS RIGHT TO COUNSEL

Assistance of counsel is "one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty." Johnston v. Zerbst, 304 U.S. 458, 462 (1938). For over seventy years, the Supreme Court has recognized that "when a right so fundamental as that to counsel at trial is involved, the question of waiver must be determined on the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." North Carolina v. Butler, 441 U.S. 369, 374-375 (1979) (quoting Zerbst, 304 U.S. at 464). The inquiry whether a defendant knowingly, voluntarily and intelligently waives counsel focuses on the defendant's actual circumstances and understanding. See Godinez v. Moran, 509 U.S. 389, 400-401 n.12 (1993) ("The focus of a competency inquiry is the defendant's mental capacity: the question is whether he has the *ability* to understand the proceedings. The purpose of the 'knowing and voluntary inquiry' by contrast, is to determine whether the defendant actually *does* understand the significance and

[55] The order, tilted "*Pro se* Order" stated, "[a]fter hearing extensive proof, specifically from the testimony of the Defendant, arguments of counsel, and considering the entire record, the Court ruled that the Defendant had knowingly and voluntarily waived his right to counsel, that he had asserted his right to represent himself in a timely fashion, and that the Defendant could in fact represent himself." (Vol.9, 1206).

consequences of a particular decision and whether the decision is uncoerced.") (citations omitted) (emphasis in original).

1. Judge Heldman Erred By Failing to Conduct a Constitutionally Adequate Examination of Taylor's Purported Decision to Waive Counsel.

The importance of the right to counsel places a heavy responsibility on the trial court when evaluating a waiver of counsel. State v. Northington, 667 S.W.2d 57, 60 (Tenn. 1984)) ("[T]he constitutional right of an accused to be represented by counsel 'imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused.'") (quoting Johnson v. Zerbst, 304 U.S. 458, 465 (1938)). In Von Moltke v. Gillies, 332 U.S. 708, 723-724 (1948), the Supreme Court described the constitutional requirements of an adequate judicial evaluation of a waiver of counsel:

> To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a *judge must investigate as long and as thoroughly as the circumstances of the case before him demand*. . . . To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a *penetrating and comprehensive examination of all the circumstances* under which such a plea is tendered.

Id. at 723-724 (emphasis added). The Court warned that the "mere routine inquiry—the asking of several standard questions followed by the signing of a standard written waiver of counsel—may leave a judge entirely unaware of the facts essential to an informed decision that an accused has executed a valid waiver of his right to counsel." Id. at 724.

In Northington, 667 S.W.2d 57, the Tennessee Supreme Court considered whether the trial court had adequately examined the circumstances of the defendant's purported waiver of

counsel in light of Von Moltke. The court agreed with the Criminal Court of Appeals that the "trial court 'wholly failed' to properly investigate the matter," as required under the constitution. Id. at 61. See also Smith v. State, 987 S.W.2d 871, 876 (Tenn. Crim. App. 1998) (finding trial court's inquiry inadequate because, *inter alia*, the trial court "accepted the petitioner's waiver of counsel without asking about defendant's background, education, or experience with the court system"); State v. Herrod, 754 S.W.2d 627 (Tenn.Crim.App. 1988).

Judge Heldman's inquiry into the circumstances of Taylor's waiver fell far short of the penetrating and comprehensive examination required by the constitution. Von Moltke, 332 U.S. at 724. Despite numerous red flags, Judge Heldman failed to investigate adequately – and indeed, prevented defense counsel from investigating – Taylor's mental illness, his fatalism, and his delusional beliefs that he died before, that he had outperformed his counsel in the post-conviction proceedings, and that he is not mentally ill. These areas of needed exploration were extraordinarily relevant to whether Richard Taylor's waiver was knowing, voluntary and intelligent.

Judge Heldman's failure to investigate whether Taylor understood the consequences of a death sentence was a startling omission. Taylor testified at the waiver hearing that he had previously returned to life after being killed. (Vol. 36, 78) ("I was killed and came back to life"). At the competency hearing just two months earlier, multiple witnesses had testified about Taylor's recent statements that he was unconcerned about his execution because of his delusional belief that he would soon return to life if executed. See Points 1 and 2, supra. Given this testimony and Taylor's own statement at the waiver hearing, Judge Heldman's failure to question Taylor about his belief that he had previously died constituted, at best, willful blindness.

More than merely failing to question Taylor himself, Judge Heldman *prevented* defense counsel from questioning Taylor about this critical topic. (Vol. 36, 78-79).[56] There is no adequate explanation for Judge Heldman's decision to prevent counsel from further questioning Taylor after Taylor's initial response indicating that he believed that he had died before and had returned to life. This unsettling decision simply cannot be reconciled with Judge Heldman's "serious and weighty responsibility" to ensure that Taylor's waiver of counsel was knowing, voluntary and intelligent. Zerbst, 304 U.S. at 465.

Judge Heldman also erroneously refused to inquire into whether Taylor believed that he had participated in the cross-examination of witnesses at the post-conviction hearing. (Vol. 36, 77). This proposed line of questioning by defense counsel built on the testimony from the competency hearing that Taylor had delusions about his legal capabilities and past performances, including his belief that he was responsible for winning the post-conviction proceedings. See Points 1 and 2, supra. The questioning was particularly important given Taylor's testimony at the waiver hearing (1) that he *had* to represent himself because "nobody will get it correct," (2) that his past experiences say that he had better represent himself, and (3) that he "couldn't be wrong" on a legal issue once he had conducted legal research. (Vol. 36, 24, 31, 41). The fact that Taylor delusionally believed that his lawyers had not provided assistance in the past, could not provide assistance in the future, and that he had outperformed them in the past was central to whether Taylor actually understood the consequences of his waiver of counsel. Judge Heldman's perplexing and unconstitutional failure to investigate this testimony, including his

[56] Judge Heldman's decision to minimize the role of defense counsel at the competency hearing – including prohibiting the testimony of the proffered defense attorney witness and not permitting questioning of Taylor by defense counsel – while permitting the prosecution to fully participate and question defendant, was itself error. "[T]he defendant's court-appointed counsel is in the best position to know whether or not the defendant is mentally capable of executing a knowledgeable waiver of counsel." Howard v. Mississippi, 701 So. 2d 274, 281 (Miss. 1997).

decision to prevent defense counsel from questioning Taylor about it, precluded an informed determination about the validity of Taylor's waiver.

Judge Heldman also erred by failing to explore the role that Taylor's mental illness, including his paranoid distrust of attorneys, played in his decision to waive counsel. Mental illness is a "significant factor in the 'voluntariness' calculus." Colorado v. Connelly, 479 U.S. 157, 164 (1986). In finding that Taylor waived his right to counsel, Judge Heldman did not acknowledge Taylor's schizophrenia and long history of mental and social problems, and failed to explore in any way whether Taylor's mental illness, including his paranoid distrust of attorneys, played a significant role in his decision to waive counsel (as testimony at the competency hearing suggested it did). "Nearly every court to consider the issue has held that mental impairments or mental retardation are factors that must be considered along with the totality of the circumstances." State v. Blackstock, 19 S.W.3d 200, 208 (Tenn. 2000) (in the context of evaluating a Fifth Amendment waiver). See also United States v. Herrera-Martinez, 985 F.2d 298, 302 (6th Cir. 1993) ("We noted in McDowell that a 'psychological impairment would go to the question of whether the waiver of counsel was knowing and intelligent.") (citing United States v. McDowell, 814 F.2d 245, 251 (6th Cir. 1987); Wilkins v. Bowersox, 145 F.3d 1006, 1012 (8th Cir. 1998) (holding that a defendant's mental health is relevant consideration to the question whether a defendant voluntarily waived counsel, independent of whether there is state coercion).

Similarly, Judge Heldman erroneously instructed Taylor that he did not need to answer defense counsel's question about whether he believed that he has always been competent. (Vol. 36, 76). Again, Taylor's own testimony at the hearing highlighted the need for such questioning. Taylor testified that he had wanted to represent himself since 1986, that the idea that he might

become incompetent without medication was merely in the "minds" of his physicians, and that he thought he would be competent without taking medication. (Vol. 36, 10, 51, 38). Taylor's failure to recognize his mental illness was itself a sign of mental illness. (Vol. 35, 191-92). See also BENJAMIN SADDOCK AND VIRGINIA SADDOCK, KAPLAN & SADDOCK'S SYNOPSIS OF PSYCHIATRY, (9th ed. 2003) ("Classically, patients with schizophrenia are described as having poor insight into the nature and the severity of their disorder."); Celso Arango *et al.*, Relationship of Awareness of Dyskinesia in Schizophrenia to Insight into Mental Illness, 156 AM. J. PSYCHIATRY 1097 (1999) ("Poor awareness of one's own mental illness is an established feature in schizophrenia."). Judge Heldman should have investigated Taylor's belief that he is and always has been competent.

Furthermore, Judge Heldman failed to adequately investigate fatalistic statements by Taylor indicating that he believed the outcome of the trial was predetermined. Taylor testified that he was not planning on doing any cross-examination, that he expected to be found guilty, and that they could start the trial could start that day. (Vol. 36, 57, 11). This testimony should have prompted Judge Heldman to question Taylor about why he believed he would be found guilty and did not need to do any trial preparation before representing himself. Compare State v. Reddish, 859 A.2d 1173, 1197-98 (N.J. 2004):

> [The trial court] must determine whether a defendant's 'understanding' is real or feigned. Courts must be sensitive . . . to attempts by the defendant to claim 'knowingness' merely to assuage the court's concerns about the consequences of *pro se* representation . . . . The court must ask appropriate open-ended questions that will require defendant to describe in his own words his understanding of the challenges that he will face when he represents himself at trial.

Because Judge Heldman failed to "properly investigate the matter to be assured [that Taylor] understood the consequences of self-representation," he could not say with any degree of

confidence whatsoever that Taylor's waiver of counsel was voluntary, knowing, and intelligent. Northington, 667 S.W.2d at 61. Neither can this Court. Therefore, it must reverse.

2. The Evidence Regarding the Totality of the Circumstances Preponderated Against A Finding That Taylor's Waiver of Counsel Was Voluntary, Knowing, and Intelligent

The government bears a "heavy burden" before a waiver of counsel can be found because of the importance of this right to our adversarial system of justice. Schneckloth v. Bustamonte, 412 U.S. 218, 236 (1973). See also Zerbst, 304 U.S. at 465 ("[C]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights and we do not presume acquiescence in the loss of fundamental rights."). In this case, the evidence pertaining to Taylor's purported waiver of counsel fell far short of the government's heavy burden and requires reversal.

The evidence demonstrated that Taylor's waiver was coerced by his forcible medication and, therefore, was involuntary. A defendant's waiver of counsel is involuntary "if his will has been overborne and his capacity for self-determination critically impaired." Bustamonte, 412 U.S. at 225. In other words, the evidence must show that the defendant's waiver was the product of "a free and deliberate choice rather than intimidation, coercion and deception." Moran v. Burbine, 475 U.S. 412, 421 (1986). Taylor testified at the waiver hearing that he wanted to be free of his forcible medication as soon as he could and that he *had* to get off the drugs. (Vol. 36, 52-53). Dr. Caruso had notified the court as early as the fall of 2002 that Taylor wanted to expedite his case in order to stop his medication. (Vol. 6, 830) (quoting Taylor stating that "[t]he faster that I get this case off me, the faster I can get this medication off," and noting that in Taylor's mind "it would be better to be found guilty than to be on medication."). Taylor was singularly committed to the goal of stopping his forcible medication. His decision to waive

counsel, thus expediting his case and leading – at least in his mind – to the cessation of his forcible medication, was clearly a coerced one, rather than the product of a "free and deliberate choice."[57] Cf., Moran, 475 U.S. at 421.

In addition, the evidence established that Taylor's waiver was neither knowing nor intelligent. Taylor's bizarre statements at the waiver hearing were a clear indication that his waiver was not knowing and intelligent. See Herrera-Martinez, 985 F.2d at 299 (reversing for inadequate waiver where "[the defendant] made numerous bizarre and obscene statements."). Taylor asserted that he had previously died and come back to life. He asserted that he had previously rocked back and forth on the podium. When Judge Heldman asked him whether he understood the pitfalls of self-representation, Taylor asserted: "maybe there is, maybe there isn't. I've been in a lot of pits." (Vol. 36, 55).

Moreover, Taylor's serious mental illness and the judicial conclusion that Taylor was incompetent to manage his own healthcare were other factors strongly suggesting that his waiver was not knowing, voluntary or intelligent. In his ruling, Judge Heldman failed to acknowledge Taylor's history of schizophrenia or its well-documented impact on Taylor's thought process and ability to form relationships with counsel. Taylor's mental health should have been a significant factor in the calculus regarding the determination of whether his waiver was knowing, voluntary and intelligent. Connelly, 479 U.S. at 164; Blackstock, 19 S.W.3d at 208; Wilkins, 145 F.3d at 1012. Similarly, Judge Heldman failed to adequately factor in the judicial conclusion that he was incompetent to manage his own healthcare. (Vol. 12, 1688-89). See Blackstock, 19 S.W.3d

[57] Judge Heldman did not question Taylor about his statements that he had to get off medication or ask, for example, if Taylor would still seek to represent himself if not forcibly medicated. This is another example of his inadequate investigation of the circumstances of Taylor's waiver.

at 208 (reversing finding of waiver and noting in its analysis that a conservator had been appointed because of the defendant's inability to manage his affairs).

In short, the evidence of the totality of the circumstances surrounding Richard Taylor's waiver preponderated against a finding that the waiver was knowing, voluntary and intelligent.

3. There Was No Clear Evidence That Taylor Waived Counsel at the Penalty Phase

In this case, Judge Heldman failed to instruct Taylor about the difference between the guilt-innocence and penalty phases of the capital trial and failed to ask whether he wished to waive counsel at both stages.[58] Because Taylor never stated that he sought to represent himself at the penalty phase of the trial, Judge Heldman could not have concluded that Taylor clearly and unequivocally waived his right to counsel at the penalty phase. Accordingly, this Court must reverse Taylor's sentence.

At the waiver hearing itself, Judge Heldman informed Taylor of some of his rights, including his right to the assistance of counsel at "every stage of the proceeding." (Vol. 36, 56). He explained that if Taylor represented himself he would have the right to sit at the counsel table and cross-examine witnesses. (Vol. 36, 57). Judge Heldman informed Taylor that "after the trial if [he were] convicted of any crime, [he] certainly could appeal [his] conviction to the Tennessee Court of Criminal Appeals." (Vol. 36, 58). Judge Heldman did *not* inform Taylor that if he were convicted of capital murder at the guilt-innocence phase, he would have the right to assistance of counsel at the penalty phase that would follow.

On the first day of trial, Dr. Farooque, whom Judge Heldman found credible, testified that Taylor wanted the assistance of counsel at the penalty phase of his trial. Dr. Farooque testified that Taylor wanted "the lawyer, Mr. Brad McLean [sic] to help him during the

[58] Tennessee Rule of Criminal Procedure 44(a) requires that the trial court "advise the accused in open court of the right to the aid of counsel in every stage of the proceedings."

sentencing hearing so that he can bring out all the mitigating factors." (Vol. 17, 16). Despite this evidence that Taylor intended to have representation at the penalty phase, Judge Heldman neglected to ask whether Taylor sought to waive his right to counsel at the penalty phase of the trial. He failed to ask Taylor, either at the beginning of the guilt-innocence phase or at the beginning of the penalty phase, whether he waived his right to counsel at sentencing.[59]

A defendant's request for wavier of counsel "must be clear and unequivocal." State v. Herrod, 754 S.W.2d 627, 630 (Tenn. Crim. App. 1988). Both Taylor's written and oral requests to waive counsel were general requests to proceed *pro se*. (Vol. 7, 865 ("I demand my right to proceed *pro se*."); Vol. 36, 61 (Taylor affirming that he sought to "waive his right to counsel.")). Here, there is no evidence that Taylor clearly and unequivocally requested a waiver of counsel at the penalty phase of his trial, or indeed that Taylor intended to waive counsel at the penalty phase. Id. Certainly, no court could reasonably assume that this general request to "proceed *pro se*" meant that Taylor intended for his waiver of counsel to apply to post-trial proceedings. Similarly, it was error for Judge Heldman to conclude that this general wavier applied to the post-guilt-innocence phase of the trial, particularly in light of the credible testimony at the beginning of the trial that Taylor *did not* want his waiver of counsel to extend to the penalty phase.

In Reddish, the New Jersey Supreme Court explained that the need for separate waiver determinations at the guilt-innocence and penalty phases of a capital trial:

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[59] Judge Heldman asked Taylor periodically during the guilt-innocence phase if he wished to have counsel appointed. He did not inquire at the beginning of the penalty phase. After the state had put on its penalty case and Taylor had indicated that he did not intend to call any witnesses or testify, Judge Heldman asked Taylor if he wished to have standby counsel appointed. (Vol. 20, 389). Even if Judge Heldman had asked Taylor this question at the appropriate time – the beginning of the penalty phase – the appointment of standby counsel is not a substitute for the assistance of counsel.

> [T]he trial court must conduct separate inquiries concerning waiver of counsel before both the guilt and penalty phases in the event defendant seeks to appear *pro se* in both phases. The court should adjust its questions and analyses to meet the circumstances and exigencies in each instance. Its inquiry before the penalty phase may warrant questions beyond those posed before the guilt-innocence phase.

859 A.2d at 1198. Judge Heldman's failure to even ask Taylor if he wanted counsel at the penalty phase of the trial fell far short of a separate inquiry with questions beyond those necessary for the guilt-innocence phase. Id. Because the record does not support a finding that Taylor clearly waived his right to counsel at the sentencing phase, this Court must reverse Taylor's sentence.

In sum, Judge Heldman fell woefully short of conducting a constitutionally adequate examination of Richard Taylor's waiver of counsel. Accordingly, reversal is compelled. Reversal is also warranted because the evidence greatly preponderates against Judge Heldman's determination that Taylor's waiver of counsel was knowing, voluntary, and intelligent and because the record does not support a finding that Taylor clearly waived his right to counsel at the sentencing phase.

6. JUDGE HELDMAN ABUSED HIS DISCRETION BY APPLYING THE WRONG LEGAL STANDARD TO THE QUESTION WHETHER STANDBY COUNSEL SHOULD HAVE BEEN APPOINTED AND BY FAILING TO APPOINT STANDBY COUNSEL

A. INTRODUCTION

In this death penalty case, in which Richard Taylor had been adjudicated incompetent for the previous five years[60] and was likely incompetent for the previous nineteen years,[61] Judge

[60] In 1997, Judge William Russell determined that Taylor was not then presently competent to stand trial and was incompetent to be executed under Ford v. Wainwright, 477 U.S. 399 (1986). (Vol.2, 115). The State did not assert that Taylor was competent again until in 2002. (Vol. 5, 576).

Heldman permitted Taylor to represent himself at trial without standby counsel. Judge Heldman ruled that the Sixth Amendment *prohibited* him from appointing standby counsel over the objection of Taylor, a clearly erroneous application of the Sixth Amendment as determined by the United States Supreme Court. Faretta v. California, 422 U.S. 806, 834-34 n. 46 (1976). The court's failure to appoint standby counsel was reversible error for two reasons: (1) Judge Heldman failed to exercise his discretion to appoint standby counsel, which is a *per se* abuse of discretion; and (2) the factors that Judge Heldman was required but failed to consider in determining whether to appoint standby counsel -- the nature and gravity of the charge, the factual and legal complexity of the proceedings, and the intelligence and legal acumen of the schizophrenic, heavily sedated defendant -- compelled appointment of standby counsel in Taylor's case. State v. Small, 988 S.W.2d 671, 675 (Tenn. 1999). In any event, the state and federal constitutions necessitate the appointment of standby counsel in capital cases. Accordingly, reversal is required.

This issue was preserved in the motion for new trial. (Vol. 12, 1731).

B. FACTUAL BACKGROUND

Throughout the years that he was determined incompetent, Richard Taylor consistently asserted that he would represent himself as soon as he was given the opportunity. (See, e.g., Vol. 36, 10). On May 8, 2003, shortly after Jude Heldman determined that Taylor was competent to stand trial, Taylor filed a motion to represent himself. (Vol. 7, 865-866). Judge Heldman held a

[61] Judge Russell also found in 1997 that competent counsel would have explored Taylor's mental health condition in 1984, which could have led to a contrary finding on his competency. (Vol. 2, 114).

hearing on the motion where Taylor was unrepresented[62] and ruled that he could represent himself. (Vol. 9, 1206).

On July 15, 2003, Taylor's appointed counsel sought a rehearing of the court's determination that Taylor could represent himself. (Vol. 9, 1215). In a written order, Judge Heldman denied counsel's request for a rehearing, concluding that Taylor's counsel "lacked standing to contest or assert the issues raised by his motions." (Vol. 9, 1267). Judge Heldman held that "it would be *unconstitutional* for this Court in any way to force appointed counsel back on this case or to appoint 'elbow' counsel in light of Defendant's expressed, competent wishes." (Vol. 9, 1267-68) (emphasis added). Taylor did not have standby counsel at either the guilt-innocence or penalty phase[63] of the trial.

In addition to failing to appoint or permit standby counsel, Judge Heldman precluded Taylor's former guardian, Virginia Story, and Taylor's conservator, Edward Ryan, from participating in the proceedings or raising any issues in writing. On October 13, 2003, the first day of trial, Ms. Story attempted to file notice of Taylor's medications. Mr. Ryan appeared at the pre-trial competency hearing held that same day to testify about Taylor's medications. Judge Heldman issued an order finding that neither Ms. Story nor Mr. Ryan had standing in the Taylor case. (Vol. 11, 1512). He described it as "regrettable" that "Mr. Ryan and Ms. Story are interfering with the constitutional rights of Mr. Taylor in this matter." (Vol. 11, 1513). Judge Heldman ordered that Mr. Ryan and Ms. Story "be and hereby are enjoined and restrained from further interference with the constitutional rights of the defendant, Richard C. Taylor, applicable

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[62] Appointed counsel for Taylor was denied the opportunity to meaningfully participate in this "hearing." (Vol. 9, 1243). See also Point I, supra.

[63] Dr. Farooque, the state psychiatrist who had testified at Taylor's competency hearing, testified on the first day of trial that Taylor had stated that he wanted counsel at the penalty phase of the trial. (Vol. 17, 16).

to this case, that is, interfering with his state and federal constitutional right to represent himself in this case by filing papers in this Court or taking action in this Court in this case, presumably in his behalf, absent prior permission to do so from this Court." (Vol. 11, 1513).

C. JUDGE HELDMAN APPLIED THE WRONG LEGAL STANDARD TO THE QUESTION WHETHER STANDBY COUNSEL SHOULD HAVE BEEN APPOINTED AND ABUSED HIS DISCRETION

For over thirty years, the United States Supreme Court has recognized that the Sixth Amendment permits the appointment of standby counsel over the objection of the defendant. In Faretta, the Supreme Court held that a trial court "may -- even over the objection of the accused – appoint a `standby counsel' to aid the accused if and when the accused requests help, and to be available to the accused, in the event that termination of the defendant's self-representation is necessary." 422 U.S. at 834 n.46. Nineteen years later, the Court reiterated that "a defendant's Sixth Amendment rights *are not violated* when a trial judge appoints standby counsel – even over defendant's objection . . . " McKaskle v. Wiggins, 465 U.S. 168, 184 (1984) (emphasis added). Judge Heldman's ruling that appointing "elbow counsel in light of Defendant's expressed, competent wishes is unconstitutional" is squarely contrary to the holdings of Faretta and McKaskle. (1267-1268); See also, Martinez v. Court of Appeal of Calif., 528 U.S. 152, 162 (2000) (discussing the holdings of Faretta and McKaskle and noting that trial judge may "appoint standby counsel – even over the defendant's objection – if necessary").

Whether to appoint standby counsel is within the discretion of the trial court. See State v. Small, 988 S.W.2d 671, 675 (Tenn. 1999) ("[T]he trial court has the discretion to appoint advisory counsel."); U.S. v. Webster, 84 F.3d 1056 (8th Cir. 1996) (holding that "[a]ppointment of standby counsel is within the discretion of the district court"); cf. State v. Franklin, 714 S.W.2d 252, 258-59 (Tenn. 1986) (reviewing trial court's decision to permit hybrid

representation under the abuse of discretion standard because Article I, Section 9 of the Tennessee Constitution recognizes a permissive right to dual or hybrid representation).

Judge Heldman abused his discretion by reaching the erroneous legal conclusion that he lacked discretion and therefore by failing to exercise his discretion. A trial court abuses its discretion "when it applie[s] an incorrect legal standard." Mercer v. Vanderbilt University, 134 S.W.3d 121, 131 (Tenn. 2003) (citing Elridge v. Eldrige, 42 S.W.3d 82, 85 (Tenn. 2001) (citing State v. Shirley, 6 S.W.3d 243, 247 (Tenn. 1999))); See also State v. Shuck, 953 S.W.2d 662, 669 (Tenn. 1997) (same); Schlup v. Delo, 513 U.S. 298, 333, (1995) (O'Connor, J., concurring) (citing Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405, (1990) ("It is a paradigmatic abuse of discretion for a court to base its judgment on an erroneous view of the law")). *Furthermore, failure to exercise discretion is itself an abuse of discretion*. See Cheatham County v. Baker, 30 S.W. 2d 234, 238 (Tenn. 1930) (holding that judicial redress is available in cases of "gross or palpable abuse of discretion, or a failure to exercise it"); Lowery v. Faires, 1996 WL 718290 *2-3 (No. 03A 01-9605) (Tenn. Ct. App. Dec. 16 1996) (vacating summary judgment and remanding for new determination under abuse of discretion standard where "trial court did not exercise its discretion nor consider relevant factors"); United States v. Barbara, 683 F.2d 164, 166 (6th Cir. 1982) (holding that a "total failure to exercise discretion" is an exception to the rule that sentencing decisions within the statutory limits are unreviewable); Freeland v. Amigo, 103 F.3d 1271 (6th Cir. 1996) ("The failure to exercise discretion can also constitute an abuse of discretion") (citing Vinci v. Consolidated Rail Corp., 927 F.2d 287 (6th Cir. 1991)); Bellamy v. Pathak, 869 S.W.2d 45, 47 (Ky., 1994) ("[I]t has been held error for the trial court to make its decision on the issue without knowing it has discretion, and exercising that discretion."); State v. Lang, 272 S.E.2d 123, 124 (N.C. 1980) ("[T]here is error when the trial court refuses to exercise

discretion in the erroneous belief that it has no discretion as to the question presented."); People v. Stafford, 450 N.W.2d 559, 563 n.4 (Mich. 1990) (quoting People v. McIntosh, 234 N.W.2d 157 (Mich.App. 1975), modified on other grounds, 252 N.W.2d 779 (Mich. 1977) ("[T]he failure to exercise discretion when called on to do so constitutes an abdication and hence an abuse of discretion.")).

In this case, Judge Heldman abused his discretion by failing to exercise his discretion due to his erroneous interpretation of law. Mercer, 134 S.W.3d at 131; Cheatham County, 30 S.W. 2d at 234. Judge Heldman erroneously concluded that the constitution prohibited him from exercising discretion and appointing standby counsel over the defendant's objection. In fact, the Tennessee Supreme Court has unequivocally recognized the power and duty of courts to exercise discretion and appoint standby counsel when "necessary to ensure a defendant's right to a fair trial." Small, 988 S.W.2d at 674.

Had Judge Heldman exercised his discretion, he would have been compelled to appoint standby counsel because the appointment of standby counsel was required by (a) the nature and gravity of the charge; (b) the factual and legal complexity of the proceedings; and (c) the intelligence and legal acumen of the schizophrenic, heavily sedated defendant. See Small, 988 S.W. 2d at 674 (determination should be based upon "the nature and gravity of the charge, the factual and legal complexity of the proceedings, and the intelligence and legal acumen of the defendant."). The Tennessee Supreme Court has ruled that, in exercising its discretion to appoint standby counsel, the trial court should "determine the legal assistance necessary to ensure a defendant's right to a fair trial." Id. A trial court's determination regarding appointment of standby counsel will be overturned for abuse of discretion. Id. at 675.

Judge Heldman should have analyzed whether standby counsel was necessary under the Small factors. Had he done so, he would have necessarily reached the conclusion that the appointment of standby counsel was indeed necessary. The Small factors point inexorably to one conclusion – standby counsel was needed. The first factor, the nature and gravity of the charge, clearly pointed to the need to appoint standby counsel: this case involved the most serious charge of all – first-degree murder with the possibility of execution. In addition, the factual and legal complexity of the proceedings required standby counsel: here, Taylor faced a capital case arising from events over twenty-years-old and significant mental health issues at both the guilt-innocence and penalty phase. Furthermore, Taylor's intelligence and legal acumen required standby counsel: he had for years been deemed incompetent, uncontrovertibly suffered from schizophrenia and delusions at the time of trial, and was forcibly medicated with heavily sedating drugs at trial. Id.

Instead of exercising his discretion and appointing standby counsel, Judge Heldman failed to recognize that he had this discretion based on an erroneous understanding of the Constitution. Judge Heldman's failure to apply the correct legal standard and exercise his discretion constituted an abuse of discretion and requires reversal. Mercer, 134. S.W.3d at 131; See also, City of Fargo v. Rockwell, 597 N.W.2d 406, 410 (N.D. 1999) (finding an abuse of discretion because the trial court summarily denied a *pro se* defendant's request to have standby counsel give closing argument); People v. Bigelow, 691 P.2d 994, 1001 (Cal. 1984) (holding that failure of the trial court to refuse to consider appointment of advisory counsel is *per se* reversible error).

The trial court's failure to exercise its discretion is structural error and should not be subject to harmless error analysis. See Arizona v. Fulminante, 499 U.S. 279, 309 (1991); Gideon

v. Wainwright, 372 U.S. 335 (1953); McKaskle, 465 U.S. at 168; but see, State v. Franklin, 714 S.W.2d 252, 262 (Tenn. 1986) (noting that a trial court's discretionary decision to permit hybrid counsel was, "at worst, harmless error"); State v. Small, 1997 WL 408796, at *4 (Tenn.Crim.App. 1997) (applying harmless error doctrine to trial court's failure to appoint standby counsel).

However, Taylor is entitled to prevail on this claim even under the harmless error standard because the state cannot show "beyond a reasonable doubt" that Judge Heldman's failure to exercise discretion would not have resulted in appointment of standby counsel under the factors required by the Tennessee Court. Chapman v. California, 386 U.S. 18, 24 (1967); Small, 988 S.W. 2d at 674. Nor can the state prove beyond a reasonable doubt that the failure to appoint standby counsel "did not contribute to the verdict obtained." Chapman, 386 U.S. at 24. On the contrary, the court's failure to appoint standby counsel had clear and dramatic consequences: Taylor wore prison garb and sunglasses throughout the trial (Vol. 19, 108), he asked no voir dire questions (Vol 18, 51), called no witnesses at either phase, gave bizarre cross-examinations or no cross-examinations (Vol. 19, 117, 136, 147, 155, 174, 182, 194, 206, 220, 267, 272, 285), gave no closing statement (Vol. 20, 338) and presented no defense whatsoever at the penalty phase of the trial (Vol. 20, 398).

Standby counsel was not available to help procure a change of clothes for Taylor, an inmate who had not worn anything other than prison clothing for over twenty years. Nor was standby counsel available to help Taylor craft voir dire questions or help evaluate the voir dire responses the panel members gave to questions from the prosecutor and court. The lack of standby counsel left Taylor without counsel to "assist [him] in overcoming routine procedural evidentiary obstacles to the completion of some specific task, such as introducing evidence or

objection to testimony, that the defendant has clearly shown he wishes to complete." McKaskle, 465 U.S. at 183. For example, when Taylor attempted to argue his objection the admission of letters that he allegedly wrote while under the influence of torture and likely insane,[64] he had no standby counsel or advocate to assist him by subpoenaing the witnesses to support his objection.

Perhaps most importantly, the lack of standby counsel – combined with the lower court's prohibition on participation by Taylor's former guardian ad litem and current conservator – meant that the schizophrenic, heavily sedated Taylor had no assistance in developing and presenting a defense to the capital charge, developing and presenting defenses to the aggravating circumstances, and developing and presenting mitigation evidence, including but not limited to his severe mental illness, his deeply troubled childhood, and the fact that the prison officials recklessly neglected to give him his antipsychotic medications prior to the offense.

D. JUDGE HELDMAN ERRED BY FAILILNG TO APPOINT STANDBY COUNSEL IN THIS CASE BECAUSE STANDBY COUNSEL SHOULD BE APPOINTED IN CAPITAL CASES

The trial court also erred in this case by not appointing standby counsel because standby counsel should be appointed in capital prosecutions.[65] Permitting Taylor to proceed *pro se* without standby counsel in a capital case violated his right to a fair trial and a reliable guilt-innocence and penalty determination as guaranteed by the Fifth, Eighth, and Fourteen Amendments to the United States Constitution and Article I, Sections 8, 9 and 16 to the Tennessee Constitution.

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[64] See Point 14, infra (contending that it was error to admit the letters).

[65] Appellant also contends that the right to self representation guaranteed by the Sixth Amendment is outweighed by the constitutional rights to fair trial, due process, an a reliable sentence in capital cases and that defendants in capital prosecution should not be permitted to represent themselves. See Point 6, Section M. In the alternative, Taylor contends that at a minimum due process requires that standby counsel be appointed in capital cases.

The American Bar Association's Standards for Criminal Justice recognize that "[s]tandby counsel should always be appointed in capital cases and in cases when the maximum penalty is life without the possibility of parole." ABA STANDARDS FOR CRIMINAL JUSTICE § 6-3.7 (3d. ed. 1999). The appointment of standby counsel in capital cases is necessary to "ensure fairness and reliability in the administration of the death penalty." State v. Reddish, 859 A.2d 1173, 1204 (N.J. 2004); See also, State v. Savior, 480 N.W.2d 693, 695 (Minn. App. 1992) (finding that court's failure to appoint standby counsel denied defendant a fair trial).

Two of the factors identified in Small as determinative for whether standby counsel should be appointed – "the nature and gravity of the charge" and "the factual and legal complexity of the proceedings" – compel standby counsel in all capital cases at both the guilt-innocence and penalty phases. Small, 988 S.W. 2d at 674. "[T]he death penalty is the most severe punishment," and capital cases can only be described as cases involving the most serious charge. Roper v. Simmons, 543 U.S. 551, 568 (U.S. 2005). In addition to their serious nature and gravity, capital cases are unquestionably factually and legally complex. Reid v. State, 2006 WL 1727331, at *11 (Tenn. June 26, 2006) (Birch, J., concurring in part and dissenting in part) ("Capital cases tend to be, by their very nature, factually, legally and procedurally complex."); See also, Tennessee Supreme Court Rule 13 § 3(c)(3-4) (governing the appointment of counsel in capital cases and requiring specialized experience for lead trial counsel).

Appointing standby counsel is necessary to ensure a reliable outcome because standby counsel mitigates "[s]ome of the damage we can anticipate from a defendant's ill-advised insistence on conducting his own defense." Faretta, 422 U.S. at 845 n. 7 (Burger, J., dissenting). In the context of a capital case, this explanatory role is particularly important given the unique procedural complexity of capital cases, including "special voir dire of jurors; presentation of

evidence going to guilt or innocence and punishment; [and] special penalty procedures," ABA, TOWARD A MORE JUST AND EFFECTIVE SYSTEM OF REVIEW IN STATE DEATH PENALTY CASES, at 43, 49-50 (October 1989). Here, as demonstrated in the preceding section C, the court's failure to appoint standby counsel had clear and devastating consequences.

The United States Supreme Court has recognized that appointment of standby counsel is also important in "the event that termination of the defendant's self-representation is necessary." Faretta, 422 U.S. at 834, n. 46. For defendants with mental health issues, the need for standby counsel is paramount. If a defendant decompensates during the trial and is no longer able to represent himself, standby counsel is in a uniquely qualified position to raise the issue of the defendant's competency. See, e.g., Anne Bowen Poulin, The Role of Standby Counsel in Criminal Cases: In the Twilight of the Criminal Justice System, 75 N.Y.U.L. Rev. 676, 714-715 (explaining that standby should raise competency if "any concern exists" and noting that by "maintaining an adversarial balance, counsel helps the court make an accurate determination of the defendant's fitness to stand trial and reduces the risk of an incompetent defendant proceeding to trial *pro se*").

Furthermore, appointment of standby counsel at the penalty phase is necessary to ensure society's interest that "capital punishment must be imposed fairly, and with reasonable consistency." Eddings v. Oklahoma, 455 U.S. 104, 112 (1982); See also, Megan Morgan, Standby Me: Self-Representation and Standby Counsel in a Capital Case, 16 CAP. DEF. J. 367, 383-84 (2004). "Far from being harmless oversight, an inadequate and incompetent presentation by a *pro se* defendant in a penalty trial unacceptably poses a risk to the state of executing a defendant whose individual character and record do not warrant the ultimate punishment." State v. Reddish, 181 N.J. at 600 (internal citations and quotations omitted). In this case, the jury

literally heard no mitigation evidence at the penalty phase of the trial from the defense despite the plethora of evidence available about Taylor's lifelong and significant mental health problems and his troubled childhood.[66] The failure of the trial court to appoint standby counsel resulted in a penalty verdict that in no way can be said to represent the judgment of jurors who had fairly assessed Taylor's character and record. Cf. Penry v. Lynaugh, 492 U.S. 302, 327-28 (1989) (holding that the Eighth Amendment requires that "the jury ... give a reasoned moral response to the defendant's background, character and crime").

Therefore, this Court should reverse Richard Taylor's conviction and/or death sentence and remand for a new trial.

7. JUDGE HELDMAN'S APRIL 2003 COMPETENCY DETERMINATION WAS ERROR BECAUSE HE APPLIED THE WRONG STANDARD OF PROOF, BECAUSE HE MADE NUMEROUS ERRORS OF LAW, AND BECAUSE HIS FINDING WAS CONTRARY TO THE EVIDENCE.

Richard Taylor was found incompetent to stand trial by two judges -- Judge William S. Russell in 1997 after multiple days of hearing, and Judge Donald Harris in 2000 after a one-day hearing. However, in April 2003, Judge Russell Heldman found him competent and thus Richard Taylor was put to trial. At the April 2003 competency hearing, even though Taylor was presumptively incompetent, Judge Heldman failed to require the state to prove Taylor's competency beyond a reasonable doubt. As demonstrated below, this failure constituted reversible error. In addition, in finding Taylor competent, Judge Heldman made a number of

[66] See, e.g., (Vol. 2, 167-168) (finding that had the available evidence of Taylor's "background and medical history, which reflected a family history of mental problems, a difficult upbringing, and a long history of diagnosed mental problems" been presented, it would have "lent personal substance to mitigating the punishment to be imposed").

serious errors of law and drew conclusions contrary to the evidence. Accordingly, Taylor's conviction and sentence must be reversed.[67]

A. RELEVANT FACTS

1. The 1997 and 2001 Findings of Incompetency

In 1994 and 1995, Judge William S. Russell, presiding over Taylor's post-conviction proceedings by designation of the Tennessee Supreme Court, held multiple days of hearing at which the evidence demonstrated conclusively that Taylor had been diagnosed with paranoid schizophrenia as early as 1980 and as psychotic as early as 1979. (Vol. 2, 138-139, 154).[68] Judge Russell summarized the testimony regarding Taylor's history as follows: "[Taylor's] past is fraught with psychological problems as well as an equally extensive history of treatment for those mental illnesses." (Vol. 2, 105). In 1997, Judge Russell ruled that, "based on the extensive testimony and evidence in this case from psychiatrists, witnesses, and attorneys, [Taylor] is not presently competent to stand trial." (Vol. 2, 115).

Taylor's next competency hearing was held in front of Judge Donald Harris "to determine whether or not the Defendant is competent to stand trial/and or potentially enter into plea negotiations with the State." (Vol. 4, 388). Although Judge Harris sought appointment of an

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[67] The trial court's erroneous competency finding was raised in the motion for new trial. (Vol. 12, 1723-1730).

[68] The expert testimony was divided over Taylor's diagnosis. Dr. William Tragle, a psychiatrist, testified that Taylor was psychotic in an atypical way. (Vol. 2, 140). Dr. John Kirby Pate, a psychiatrist, testified that Taylor was psychotic. (Vol. 2, 148). Dr. Patricia Corey, a psychiatrist, testified that she had diagnosed Taylor as suffering from psychosis in 1979. (Vol. 2, 154). Dr. Pamela Mary Auble, a psychologist, testified that testing of Taylor revealed extensive psychopathology, but diagnosed Taylor with a borderline personality disorder. (Vol. 2, 146-147). Dr. Jonas Rappeport, a psychiatrist, testified that Taylor suffered from an antisocial personality disorder and was not psychotic nor delusional. (Vol. 2, 152). Dr. Rappeport also evaluated Taylor's competency at the time of the post-conviction hearing and concluded that he was competent to stand trial. (Vol.2, 152). Judge Russell determined that Taylor was incompetent despite this testimony. (Vol. 2, 115).

independent psychiatrist to conduct the competency evaluation, the Administrative Office of the Courts denied funds for the evaluation. (Vol. 4, 426). Judge Harris then directed the Middle Tennessee Mental Health Institute (MTMHI) to examine Taylor and evaluate his ability to understand the legal process, to understand the nature of the charges pending, to recognize the possible consequences of the charges against him, to assist counsel and participate in his defense, and to represent himself at trial. Id.

Judge Harris held a competency hearing on January 26, 2001 at which two MTMHI physicians testified: Dr. Sam Craddock, a psychologist, and Dr. Rokeya Farooque, a psychiatrist. Dr. Craddock interviewed Taylor on six occasions between June 9, 2000 and October 13, 2000. (Vol. 30, 9). He testified that Taylor suffered from a thought disorder, was psychotic, and was incompetent:

> It's my impression from the conversations I've had with Mr. Taylor, as well as his written or typed communications that has been sent to us, that he has a thought disorder. That he cannot communicate in a rational or coherent fashion at times. That he wants to represent himself in going to trial and I don't think that that would be in his best interests or that he would achieve the best possible outcome if he were solely to represent himself. He expresses beliefs that have no basis in reality. . . . [Taylor] is psychotic.

(Vol. 30, 20, 29). Dr. Farooque also testified that Taylor was psychotic, suffered from a thought disorder, and was incompetent to stand trial. (Vol. 30, 38). Judge Harris ruled that Taylor was incompetent and ordered that he be transferred for treatment to MTHMI.

2. *MTMHI's Shifting Views on Taylor's Competency in 2002*

On May 6, 2002, Dr. Southard, the Director of MTHMI, wrote to Judge Harris informing him of the opinion of MTHMI physicians that "Taylor's condition has improved sufficiently that he is currently competent to stand trial and to assist in his own defense." (Vol. 5, 576).

Approximately two weeks later, on May 23, 2002, Dr. Southard again wrote to Judge Harris because MTHMI had changed its opinion. Dr. Southard observed that "things have changed rather suddenly over the past four days to this date." (Vol. 5, 604). He explained that the attending physician "made a minor adjustment of the dosage level of some of the medication." (Vol. 5, 604). Shortly thereafter, MTMHI physicians determined that Taylor's "psychiatric condition had rapidly and significantly deteriorated over the weekend." (Vol. 5, 605). Dr. Southard noted that this "circumstance reflects the current fragility of [Taylor's] condition." (Vol. 5, 605).

On July 1, 2002, five weeks later, MTHMI again changed its opinion. (Vol. 5, 606). On this date, Dr. Southard maintained that Taylor "is now considered to be competent to stand trial and to assist in his own defense." He also reported that it was "the current opinion of the attending psychiatrist that Mr. Taylor could be effectively treated while in the custody of TDOC [Tennessee Department of Corrections]." Id.

MTHMI once again changed its opinion on August 29, 2002, this time about whether Taylor could be treated at TDOC. (Vol. 5, 652). On August 29, 2002, Dr. Southard sent a letter to the Court stating that MTMHI no longer believed that Taylor could be treated at TDOC. Id. Dr. Southard noted that their earlier opinion was based on representations by Taylor to MTHMI physicians that he would "accept necessary medication treatment if he were to return to TDOC." Id. Taylor, however, had made contradictory statements to other individuals, indicating that he would refuse treatment if transferred. Id. ("Although Mr. Taylor steadfastly contends to the FSP staff that he will continue to accept necessary medication treatment if he were to return to TDOC, he has apparently been telling others that he will stop his medication if returned to TDOC.") Dr. Southard reiterated the MTMHI position that Taylor was competent, but noted that

the "level of stability can certainly fluctuate as it will with many individuals who are severely mentally ill." (Vol. 5, 652).

3. The April 2-3, 2003 Competency Hearing In Front Of Judge Heldman

Following receipt of the letters from MTMHI, the case was reassigned to Judge Russell Heldman.[69] Judge Heldman held a third competency hearing on April 2, 2003 and April 3, 2003. Although Dr. Farooque again testified for the state, Dr. Craddock, the MTMHI psychologist, did not. Instead, the state called Dr. Stout, another MTMHI psychologist. The defense called a psychiatrist, Dr. Keith Caruso, and five of Taylor's former attorneys – Brad MacLean, Sue Palmer, Henry Martin, William Redick, and Michael Williamson – each of whom had contact with Taylor after MTMHI had proclaimed him competent. The defense also introduced two expert reports by Dr. Caruso and a written statement by Virginia Story, Taylor's guardian.

The fact that Taylor suffers from schizophrenia was undisputed at the competency hearing. See, e.g., testimony of state witnesses, Dr. Stout (Vol. 34, 14) and Dr. Farooque (Vol. 34, 92). Dr. Stout explained the disorder:

> Schizophrenia is a serious mental disorder that is marked by such symptoms as thought disturbance in the form of disorganized thinking. Or delusion at times. The patient may have hallucinations or other perceptual changes. The patient may have alternations in his sense of volition, such that he feels that his own behavior is not entirely under his control. The, the patient may become socially withdrawn. His behavior may take on a peculiar character and there may be changes in the outward expression of emotions, such that person's emotional expression doesn't match the situation he's in. Or he may not just show, may not do, just may not show much emotion at all outwardly.

(Vol. 34, 14).[70]

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[69] The record is silent about the reason for this transfer, and indeed there is no notice in the record of the transfer.

[70] There was no testimony – either lay or expert – suggesting that Taylor malingered.

The witnesses at the competency hearing also all agreed that Taylor continued to suffer from delusions and/or hallucinations. (Vol. 34, 40, 115-116; Vol. 35, 52-53, 62, 111, 182-83, 187). Delusions, a hallmark of schizophrenia, are fixed false beliefs that cannot be shaken, even in the face of incontrovertible evidence. (Vol. 35, 183). Multiple witnesses testified that one of Taylor's fixed beliefs is the presence of "unseen forces" that can strike and control his movement at times. (Vol. 34, 38; Vol. 35, 49, 120, 144-45). Dr. Stout explained:

> You know, different people who have dealt with Taylor are aware of his notions about unseen forces. I think I mentioned earlier when I described what schizophrenia's like that many patients with schizophrenia sometimes or even most of the time have a feeling that their behavior is not under their own control. This is I take to be what Taylor is communicating when he talks about being under the influence of 'unseen forces.'

(Vol. 34, 38.) Dr. Stout testified that at the time MTMHI found Taylor competent, Taylor "was stating that he felt himself to be under the influence of those 'unseen forces' [at the time of the offense] but not presently." (Vol. 34, 38.) In other words, although Taylor did not believe at the time of the competency hearing that the unseen forces *continued* to control his behavior, he had not relinquished his delusional belief that the unseen forces had guided his actions in the past.

Dr. Caruso testified that Taylor's delusional beliefs explained his insistence on wearing sunglasses at all times: he believes that wearing sunglasses is necessary to stop the police from controlling his mind. Dr. Caruso recounted his recent conversation with Taylor about his sunglasses: "I asked him about why are you wearing these glasses . . . . [H]e told me . . . that it cut the police from being able to bombard him with radio rays and control him. And that the police did this [to] everybody." (Vol. 35, 195-196). Both of the state's witnesses testified that they had not questioned Taylor about his decision to wear dark sunglasses. (Vol. 34, 42) (Dr. Stout noting that "[Taylor] was wearing dark glasses when he came to us. And I've just taken

that at face value and haven't pressed the issue."); (Vol. 34, 119) (Dr. Farooque explaining why she didn't question Taylor about his sunglasses: "[with] his glass[es], I do not want to press him, because insisting that his schizophrenic is mentally ill, we need to work with the patient.").

Dr. Caruso also testified that when he met with Taylor for the first time in August of 2002 – after MTMHI had declared him competent -- Taylor was dressed in a wool hat, flannel shirt, top and bottom thermals, and polyester pants. (Vol. 35, 195). At the hearing, Dr. Caruso explained that Taylor's bizarre dress is motivated by his delusional belief that police try to control him through sound waves. Taylor, sweating, explained that his dress was necessary to "help keep the police from being able to bombard me with radio waves." (Vol. 35, 196). Taylor was again dressed bizarrely in layers when Dr. Caruso met with him the week before the competency hearing. Id.

Dr. Stout agreed that Taylor dressed strangely in many layers of clothing, but conceded that he never explored the issue with Taylor:

> It, you know, the manner of his dress, you know, I see unusual modes of dress so commonly in schizophrenia that can, that I don't ask the patient to justify it. It, it's quite common in schizophrenia to see the patient dressed peculiar, peculiarly. In colors a [sic] clash. Sometimes you know a garment doesn't fit very well. Things of that nature.

(Vol. 34, 63-64).

Two of Taylor's former attorneys, Bill Redick and Henry Martin, testified that they had met with Taylor a week before the April, 2003 competency hearing. (Vol. 35, 128, 133). Bill Redick testified that Taylor had told them that he had shot President Kennedy. See (Vol. 35,127) ("Well, one thing that's to me, that's so bizarre its, its almost comical, is that he told Henry and I that, that he was the shooter on the grassy knoll that shot President Kennedy."). When Mr. Martin and Mr. Redick questioned the account by telling Taylor that he would have been only

three years old at the time, Taylor insisted that he was in fact thirteen when Kennedy was shot. (Vol. 35, 134) ("[H]e told us that he had, he was the shooter on the grassy knoll, but he was not 3 years old as he would have been as my understanding of when he was born. He was, he said 13 at the time that he, that he did, that he did that.").

In addition to holding delusional beliefs, Taylor suffered from both visual and auditory hallucinations at the time of the competency hearing. See, e.g., Report of Dr. Caruso (Vol. 6, 827) ("[H]e endorsed hearing musical hallucinations and wanted to check the room for a source."); Testimony of Dr. Stout (Vol. 34, 40) (explaining that Taylor might have visual hallucinations "sometimes at night, for example, in when he's alone in his room in the time before he falls asleep"). Dr. Stout testified that although Taylor "admits he continues to have hallucinations from time to time . . . [h]e indicates that they are much, much reduced in frequency and severity." (Vol. 34, 37). Dr. Farooque testified that Taylor denied having hallucinations to her until she confronted him with his admission to Dr. Stout:

> I can ask him, Richard, you told me last week you don't hear any voices, see anything. What about his vision that you telling Dr. Stout? Then he said, Dr. Farooque, I didn't tell you, yes, I still have visions. But they're very insignificant. It doesn't bother me.

(Vol. 34, 115-116).

Multiple witnesses testified that Taylor believed at the time of the competency hearing that he had died several times in the past,[71] and that if executed he would come back to life "within minutes." See Dr. Caruso (Vol. 35,183), (Vol. 7, 841-42). See also, Mr. MacLean (Vol. 35, 49) (Taylor explaining that in July, 2002 "he had been killed over at the old prison once before and had awakened . . . and he said that if he were executed the same thing's going to

[71] Taylor believed that he had been killed in the past by a shooting to his head in 1984 and, separately, by a stabbing. See Caruso report (Vol. 6, 829).

happen to him again. That he's not going to die."); Mr. Redick (Vol. 35, 110-111) ("Well he doesn't think that he can be executed. Or rather, I think to be more precise, he doesn't think that, he thinks if he's executed that he will rise from the dead. And, and Richard is of the opinion that he's died, well, when I saw him in September, he told me that he had died three times before and he recounted the instances when he died in some detail. *When I saw him a couple of weeks ago, he said he had died four, four times previously*.") (emphasis added); Mr. Martin (Vol. 35, 134) ("[Taylor] talked . . . [a]bout the number of times that he's died in the past. . . . He was uncertain during our conversation whether he had died two, three or four times in the past"). But see Dr. Stout (Vol. 34, 23) ("On March 11, when asked, he denied believing anymore that he had died and come back to life.")

Taylor's belief in the impermanency of death meant that he was unconcerned about the possibility of receiving a death sentence. (Vol. 6, 828-829) ("Taylor understood that, if convicted, he could face the death penalty or a life sentence. However, Taylor stated that he was unconcerned with the death penalty, as he had been killed twice previously, once in 1984 and once in 1985."). See also report of Virginia Story, filed on March 3, 2003 (Vol. 6, 796) ("Taylor does not understand the possible consequences of his conviction, although he acknowledges that he could get the death penalty he delusionally believes that he has been killed twice before and that death is not permanent."). Taylor explained in the months before the competency hearing that if he were executed, he expected to wake up on the outside, "maybe in Davidson county someplace." (Vol. 35, 62). On another occasion, Taylor explained that it was his goal to be executed because "then he would wake back up as he's done, I think he said four or five or six times before and be a free man, [and] . . . go to another country with a good prison system [like] Canada and Mexico and live in that prison system." (Vol. 35, 147).

Shortly before the competency hearing, Taylor told former counsel of his belief that other individuals, like him, have returned to life after their death. See, e.g., (Vol. 35, 134) ("He described things for us of other people who he had either seen or known to be killed who came back to life. He, he named one inmate that he knew had been, I think, stabbed to death in prison, that he later saw walking around in, in prison both alive and well.")

The testimony at the competency hearing established Taylor's fundamental distrust of attorneys, which arises out of his delusion that all attorneys are evil. Mr. MacLean (Vol. 35, 67, 53) (Taylor is "incapable of forming a trust, any kind of a, of a working relationship with counsel" and has "said that he believe[s] that John Appman is employed by a corporation that's run by the Attorney General."); Dr. Caruso (Vol. 35, 183-184) ("I believe he has delusions about his attorneys . . . He [told me that] he couldn't trust any attorney with his case . . . . He believes that [trial counsel] Mr. Appman is working for a corporation that is tasked with, or tasks him with making sure that Taylor will be convicted and get the death penalty."); Dr. Farooque acknowledged that Taylor "needs to understand that the lawyers [sic] is the means for him to talk in the courtroom." (Vol. 34, 97).

Dr. Caruso explained in his report that Taylor did not believe he needed counsel for his new trial because of grandiose delusions about his own capabilities. (Vol. 6, 829). Dr. Caruso testified that Taylor believed, for example, that he personally – not his attorneys – had cross-examined the witnesses at his post-conviction trial. (Vol. 35, 227-28).

Taylor also suffered from thought disorder at the time of the competency hearing. (Vol. 35, 197-199) (Dr. Caruso explaining that "the disordered form of thought" means that Taylor "goes off on tangents" and "won't let [a particular conversation topic] go".); (Vol. 35, 29) (Mr. MacLean describing how conversation with Taylor is "almost like, like speaking a foreign

language"). Dr. Caruso predicted that Taylor's thought disorder would likely decompensate under the pressure of trial. (Vol. 6, 845) ("This tendency to lose his train of thought was also apparent throughout each of my interviews with Taylor and is no better now . . . this is likely to get worse under the stress of a Capital trial.")

Mr. MacLean testified about how Taylor's delusional thought process affected his ability to work with counsel:

> [Mr. Taylor] becomes very invested in whatever position he wants to take and will not listen to advice, will not consider advice and will, will take it, will take just, you know, kind of bizarre and irrational positions. And will insist that his lawyer pursue those positions . . . And, and I saw no change in that talking with him just last week. You know, he was insisting on pursuing certain courses of action that made no sense.

(Vol. 35, 65).

Dr. Stout, the state witness, explained that Taylor's memory of the events surrounding the allegations was distorted. (Vol. 34, 57) ("I think that his memory for the, the offense is distorted. I think it's distorted in ways that might be seen in a mentally ill individual."). He affirmed that delusions become incorporated into a mentally ill person's reality and replace or distort the original memory of the event. (Vol. 34, 56). As a result, Dr. Stout could not agree that Taylor had a clear enough understanding of the facts to assist his attorneys:

> Q: Do you believe that Richard Taylor has a clear enough understanding of the facts of the crime itself to assist his attorneys in formulating a defense?
> A: I would check everything he said against collateral information.

(Vol. 34, 71).

When asked about their opinions about Taylor's competency, Dr. Farooque and Dr. Stout testified that they believed Taylor was competent. (Vol. 34, 96, 26). As proof of Taylor's competency, Dr. Farooque pointed, *inter alia*, to the fact that his medication made him capable

of listening to instructions, citing the fact that Taylor had removed his hat at her request. (Vol. 34, 92). However, Dr. Farooque conceded that, even with medication, "there are certain features that he's going to exhibit that will say that he's still suffering from mental illness." (Vol. 34, 97).

Dr. Stout confirmed that "competence can wax and wane and, and there may be many points over the past many years when he was competent and perhaps many points when he was incompetent." (Vol. 34, 66). Although he testified that Taylor was competent to stand trial, Dr. Stout also testified that Taylor might well decompensate if he represented himself. (Vol. 34, 80) ("I do not think he's equipped to represent himself . . . because he's, he's not a lawyer . . . [a]nd you know, if he had to do it all by himself, if he had to do it all by himself from beginning to end, I don't know if he could hold up to the stress."). Dr. Stout also testified that he had not seen any evidence of malingering. (Vol. 34, 42).

Dr. Caruso testified that in his expert opinion Taylor was not competent to stand trial and was not competent to waive his right to counsel or to represent himself at trial. (Vol. 35, 218). All of the lay witnesses also testified that, based on their recent interactions with Taylor, they did not believe him capable of working with counsel. (Vol. 35, 23-24, 35, 49-50, 53-54, 67, 113-15, 135, 153, 184).

After the hearing, in a conclusory one-paragraph order, Judge Heldman determined that Taylor was competent to stand trial. (Vol. 7, 854). In denying a motion for interlocutory appeal of the ruling, Judge Heldman provided an additional paragraph of explanation for his finding (Vol. 7, 862). He explained that Dr. Caruso's "testimony suggesting that Drs. Stout and Farooque have allowed defendant to deceive them into opinions that he is competent undermine his credibility," concluding that Dr. Caruso "appeared more as an advocate with a result-oriented agenda than an objective minded expert witness." (Vol. 7, 862). Judge Heldman also explained

that he placed "little weight on [the former defense lawyers' lay witnesses] testimony because of their prior interests and agendas as a result of their prior attorney-client relationships with the defendant, with the exception of attorney Bradley MacLean." Id. With these observations, Judge Heldman concluded that the evidence "preponderated in favor of finding defendant competent to stand trial." Id.

B. JUDGE HELDMAN ERRED BY APPLYING THE WRONG BURDEN OF PROOF TO THE COMPETENCY STANDARD

In Tennessee, the allocation of burden of proof for a competency hearing is based on constitutional parameters and the common law; there is no statutory directive. See Reid v. State, 164 S.W.3d 286, 306-07 (Tenn. 2005) (holding that the court must decide the appropriate burden of proof itself). In Reid, the Tennessee Supreme Court determined as a matter of first impression that the state may require a defendant to demonstrate his lack of competency by the preponderance of evidence at an initial competency hearing. Reid, 164 S.W. at 306-07.[72] Unlike Reid, in this case Taylor met his burden and proved his lack of competency on two previous occasions. The question for the trial court was what standard of proof to apply to a competency hearing held subsequent to a finding of incompetency (in other words, at a restoration competency hearing). Judge Heldman erred by applying the same standard of proof to Taylor's restoration competency hearing as was applied at the initial competency hearing.

Issues of law are reviewed *de novo*. See, e.g., Reid v. State, No. M2005-00260-SC-S09-PC, 2006 WL 1727331, at *3 (Tenn. July 20, 2006) (reviewing the legal question of the proper standard for review of competency to proceed in post-conviction under a *de novo* standard). The court's failure to require the state to prove Taylor's competency beyond a reasonable doubt at the

[72] The defendant, Paul Reid, had never been found incompetent. Id. at 304.

restoration competency hearing was preserved in the motion for new trial. See Motion for New Trial (Vol. 12, 1729).

The allocation of proof imposed by Judge Heldman – requiring Taylor to prove his incompetency by the preponderance of the evidence at the competency restoration hearing – meant that the court began with the erroneous presumption that Taylor was competent, in direct contravention of the previous two findings of the trial court. (Vol. 2, 115; Vol. 5, 542). The burden-shifting common law rule adopted by the Criminal Court of Appeals of Texas prevents such an illogical result: in Texas, like Tennessee, the defendant bears the initial burden of demonstrating his incompetency by a preponderance of the evidence standard, but if "a prior adjudication for incompetency is shown, the State must then prove the accused's competency to stand trial beyond a reasonable doubt." Manning v. Texas, 730 S.W.2d 744, 748 (Tex. Crim. App. 1987) (en banc).

This rule is entirely consistent with the Tennessee's Supreme Court's decision in Reid and its reliance on the United States Supreme Court's decision in Cooper v. Oklahoma, 517 U.S. 348 (1996). In Cooper, the Court held it was unconstitutional to require a criminal defendant to prove his incompetency by the clear and convincing standard because that standard "affects a class of cases in which the defendant has already demonstrated that he is more likely than not incompetent." Reid, 164 S.W.3d at 307 (quoting Cooper, 517 U.S. at 364). Like the clear and convincing standard struck down in Cooper, application of the preponderance standard to a competency restoration hearing "affects a . . . case in which the defendant ha[d] already demonstrated that he is more likely than not incompetent." Due Process under both the Tennessee and Federal Constitutions requires more because "an erroneous determination of competence threatens a 'fundamental component of our criminal justice system' – the basic

fairness of the trial itself." Cooper, 517 U.S. at 364 (citation omitted). Due Process requires that, at a competency restoration hearing, the state prove beyond a reasonable doubt that a defendant is competent. Because Judge Heldman applied the wrong standard of proof to the competency determination, Taylor's conviction and sentence must be reversed.

C. IN FINDING TAYLOR COMPETENT, JUDGE HELDMAN MADE A NUMBER OF SERIOUS LEGAL ERRORS; FURTHERMORE, HIS FINDING WAS CONTRARY TO THE EVIDENCE.

"In this State, a defendant is considered competent if he has the mind and discretion which would enable him to appreciate the charges against him, the proceedings thereon, and enable him to make a proper defense." State v. Black, 815 S.W.2d 166, 174 (Tenn. 1991) (quoting State v. Stacy, 556 S.W.2d 552, 553 (Tenn. Crim. App. 1977)). Both the Tennessee and federal Constitutions demand that the defendant "have the capacity to understand the nature and the object of the proceedings against him, to consult with counsel and to assist in preparing his defense." Reid, 164 S.W.3d at 306 (citing the Fourteenth Amendment to the United States Constitution and Article I, Section 8 of the Tennessee Constitution); Dusky v. United States, 362 U.S. 402 (1960) (*per curiam*) (adopting and citing the position of the Solicitor General) ("[I]t is not enough for the district judge to find that 'the defendant [is] oriented to time and place and [has] some recollection of events' . . . the 'test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him.'").

The standard for reviewing whether the trial court applied the correct competency standard is *de novo*. See Reid, 2006 WL 1727331 at *3; Laffery v. Cook, 949 F.2d 1546, 1550-56 (10th Cir. 1991). The trial court's factual findings related to competency "are conclusive on appeal unless the evidence preponderates against such findings." Reid, 164 S.W.3d at 306

(quoting State v. Oody, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991)). See also State v. Kelly, No. M2001-01054-CCA-R3-CD, 2002 WL 31730874 (Tenn. Crim. App. Dec. 5, 2002) (applying this standard and reversing trial court's finding of competency where state and appellant agreed on appeal that the defendant was not competent). As demonstrated below, in finding appellant competent, Judge Heldman made a number of serious legal errors. In addition, his finding was contrary to the evidence. Therefore, reversal is required.

(1) Judge Heldman Made a Number of Serious Legal Errors in Finding the Appellant Competent to Stand Trial.

Judge Heldman erred as a matter of law by discounting the testimony of witnesses Michael Williamson, William Redick, Henry Martin, and Sue Palmer on the basis "of their prior interests and agendas as a result of their prior attorney-client relationships with the defendant." (Vol. 7, 862). "[D]efense counsel has the most intimate association with the defendant," United States v. Bio, 155 F.3d 1181, 1188 (10th Cir. 1998), and, and as the United States Supreme Court has declared, "defense counsel will often have the best-informed view of the defendant's ability to participate in his defense." Medina v. California, 505 U.S. 437, 450 (1992). It was error for the trial court to find Mr. Redick, Mr. Martin, Ms. Palmer, and Mr. Williamson incredible merely because of their status as former defense counsel: it was this status that provided them with unique insight to Taylor and his ability to participate in his defense. Id. By rejecting their testimony, Judge Heldman neglected to consider the "best-informed view" of Taylor's ability to participate in his defense. Id. This rejection was reversible error.

Judge Heldman also erred by discrediting Dr. Caruso because of his testimony suggesting that Drs. Stout and Farooque were deceived by Taylor. (Vol. 7, 862). In finding this issue dispositive, Judge Heldman ignored evidence that Dr. Caruso asked Taylor about topics – such as his bizarre dress and sunglasses – that Dr. Stout and Dr. Farooque neglected. (Vol. 34, 42, 63-

64; Vol. 34, 119). Judge Heldman also ignored the evidence that MTMHI physicians acknowledged that Taylor had deceived them previously. In the August, 2002 letter to Judge Harris, Dr. Southard conceded that Taylor told the MTMHI physicians that he would continue to take his medications if transferred to the DeBerry Special Needs Facility, while telling others that he would refuse treatment if transferred. (Vol. 5, 652). Taylor admitted to Dr. Stout that he continued to have hallucinations, but denied that he was having hallucinations to Dr. Farooque. (Vol. 2, 115-116).

(2) The Evidence Preponderated Against Finding that Taylor Could Mount A Proper Defense or Had a Rational Understanding of the Proceedings

State and federal constitutional law required that Taylor have a rational understanding of the proceedings and be capable of assisting – or making – his own defense before he could be tried. See Black, 815 S.W.2d at 174 (holding that defendant must have sufficient mental health to "enable him to make his own defense"); Reid, 164 S.W.3d at 306 ("[S]ufficient contact with reality is the touchstone for ascertaining the existence of a rational understanding of the proceedings."); Wilcoxson v. State, 22 S.W.3d 289, 305 (Tenn. Crim. App. 1999).

The evidence in this case preponderated against finding that Taylor: (1) had a rational understanding of the proceedings and was capable of making "a proper defense"; (2) was capable of consulting with an attorney; (3) had the ability to recall and relate factual information; and (4), understood the object of the proceedings. Therefore, it was error for Judge Heldman to find Taylor competent. See Black, 815 S.W.2d at 174; Reid, 164 S.W.3d at 306, CRIMINAL MENTAL HEALTH STANDARDS (Am. Bar Ass'n, 1989).

Even if Judge Heldman did not commit reversible errors by using the wrong standard of proof and by summarily refusing to credit the testimony of Taylor's former lawyers and Dr. Caruso, the testimony of Dr. Stout, Dr. Farooque and Mr. MacLean alone clearly established by

a preponderance of the evidence that Taylor could not assist in his defense and that Taylor was too far out of touch with reality even to approach the competency standard. Judge Heldman's finding that Taylor had a rational understanding of the proceedings was contrary to the evidence of defense witnesses, including Brad MacLean, and even the state witness, Dr. Stout, all of whom believed that Taylor continued to operate under delusions and would be unable to handle the pressure of a capital trial.

Memory. One critical component of being able to participate in a defense is the ability of a defendant to recall relevant facts. The Commentary to ABA Criminal Mental Health Standards summarizes the importance of the ability to recall and relate relevant facts to competency:

> If a primary purpose of the prohibition against trying incompetent defendants is to preserve accuracy in factfinding, then defendants must be able to recall and relate factual occurrences. If they are not, they cannot reveal exonerating circumstances to their attorneys. This requirement has been variously phrased: that a defendant have sufficient memory to relate answers to questions posed to him or her, that "he can follow the testimony reasonably well," and that there be a "capacity to realistically challenge prosecution witnesses." Without that capacity, defendants realistically are unable to exercise the rights to consult with counsel, testify in personal defense, and confront accusers.

Commentary, CRIMINAL MENTAL HEALTH STANDARDS 7-4.1 (Am. Bar Ass'n, 1989); See also DeShazer v. Wyoming, 74 P.3d 1240, 1251 (Wyo. 2003) (quoting the commentary and noting that adequate competency evaluations should touch on each of the commentary's points); Conner v. Mississippi, 632 So. 2d 1239, 1248 n.1 (Miss. 1994) (citing the Commentary), overruled on unrelated grounds by Weatherspoon v. Mississippi, 732 So.2d 158 (Miss. 1999).

The testimony at the competency hearing was clear that Taylor's memory of the events of the offense was compromised by his delusions at the time. See, e.g., (Vol. 34, 57) (Dr. Stout testifying that Taylor's memory of the offense is distorted). When questioned by the prosecutor

about whether Taylor had a clear enough understanding of the facts to assist his attorneys in formulating a defense, Dr. Stout responded that "[he] would check everything [Taylor] said against collateral information" in those circumstances. (Vol. 34, 71). The testimony demonstrated that Taylor lacked sufficient memory to "follow the testimony reasonably well" or "realistically challenge prosecution witnesses." DeShazer, 74 P.3d at 1251.

Contact with reality. In addition, Taylor's continued delusional beliefs and active symptomatology of schizophrenia – including his bizarre dress, his insistence on wearing dark sunglasses at all times, his belief that his dress and glasses protected him from mind control by the police and his belief that he shot President Kennedy – were all clear signs of his lack of "sufficient contact with reality." Wilcoxson, 22 S.W.3d at 305; (Vol. 35, 195-96) (sunglasses as protection from police mind control); id. (dress as protection from police mind control); (Vol. 35, 127, 134) (delusion that Taylor shot President Kennedy from the grassy knoll).

Dr. Stout testified that after MTMHI determined Taylor was competent, Taylor "stat[ed] that he felt himself to be under the influence of those 'unseen forces' [at the time of the offense] but not presently." (Vol. 34, 38).[73] In other words, although Taylor did not believe that he was currently controlled by the unseen forces, he did not renounce their existence; he continued to adhere to his delusional belief system. "[A] finding of competency made under the view that a defendant who is unable to accurately perceive reality due to paranoid delusion need only act consistently with his paranoid delusion to be considered competent to stand trial" is inconsistent with the constitutional requirement of Due Process. Lafferty, 949 F.2d at 1554-55. See also

[73] Dr. Farooque similarly testified: "Q: Dr. Farooque, does Richard Taylor today know that the unseen forces at the time of the crime were, in fact, delusions? A: I cannot say like that way. I know that he says he doesn't have unseen forces now. He, he knows that. He talked about unseen forces before with us and he said I don't have those problems now. So I think he has some understanding that he was mentally ill before when he was having the problem with unseen forces, that he doesn't have now." (Vol. 34, 145).

United States v. Snyder, No. 5:04CR00017, 2006 WL 1401034 (W.D. Va. May 18, 2006) (finding defendant incompetent because he lacks the "rational understanding required for competency because he is delusional from a mental disease," despite the fact that he has "at a superficial level . . . a factual understanding of the criminal justice system").

Decompensation. The evidence also showed that Taylor's ability to make a defense would be further corroded in the context of the capital trial. Dr. Stout, one of the two state witness on whom Judge Heldman explicitly relied in his finding of competency, testified that he did not believe that Taylor was capable of representing himself because he did not think Taylor capable of holding up under the stress of representing himself at a capital trial. (Vol. 34, 80). The Commentary to the ABA Criminal Justice Mental Health Standards stresses that a critical factor for evaluation of competency "is a defendant's abilities to meet the competency criteria in the setting of the particular charges, the extent of the defendant's participation in trial proceedings, and the complexity of the case." Commentary, ABA CRIMINAL MENTAL HEALTH STANDARDS 7-4.1 (1989). Dr. Stout appropriately considered these factors and recognized that, although in his opinion Taylor had regained sufficient mental coherence that he was "competent" at the time of the April, 2003 hearing, the circumstances of self-representation at a capital trial might well break this fragile state. (Vol. 34, 80). This was consistent with the testimony of Dr. Caruso, who also indicated that Taylor's mental state would further decompensate with the stress of the trial. (Vol. 6, 845).

Judge Heldman erred by failing to adequately weigh testimony that Taylor was likely to decompensate at trial.

Consultation with counsel. A cornerstone of the competency evaluation is whether a defendant possesses the capacity to "consult with counsel." Reid, 164 S.W.3d at 306. "[C]ourts

have acknowledged that, even if a criminal defendant has an intellectual understanding of the charges against him, he may be incompetent if his impaired sense of reality substantially undermines his judgment and prevents him from cooperating rationally with his lawyer." Wilcoxson, 22 S.W.3d at 305 (citations omitted).

The testimony from former defense witnesses and Dr. Caruso was chillingly clear about Taylor's inability to work with defense counsel: Taylor has a fundamental, paranoid delusional distrust of all lawyers. (Vol. 35, 67-68, 183-184). Not a single former attorney of Taylor believes that he is capable of forming a meaningful relationship with counsel. Taylor's delusions and thought disorder compound the problem: he falsely believes that he was responsible for winning his post-conviction case and has a delusional view of his own capabilities, and his thought disorder causes him to latch onto irrational ideas and demand that defense counsel pursue them. See, e.g., Testimony of Brad MacLean (Vol. 35, 36).

Taylor's paranoid distrust of all lawyers is a fundamental barrier to the competency requirement that defendants be able to maintain an attorney-client relationship. Again, the ABA Commentary is instructive: "Defendants require a capacity to maintain the attorney-client relationship, embracing an ability to discuss the facts of a case with counsel 'without paranoid distrust,' to advise and accept advice from counsel rationally about a pending case which is something more than a superficial capacity to converse with others." Commentary, CRIMINAL MENTAL HEALTH STANDARDS 7-4.1 (1989).

Neither Dr. Farooque nor Dr. Stout directly addressed the issue of Taylor's relationship with his lawyers. Dr. Stout testified that Taylor is "very untrusting [a]nd he tends to see people as being opposed to him." (Vol. 34, 77). Dr. Farooque testified that Taylor was frustrated that his lawyers did not communicate with him, but then added that "Richard needs to understand that

the lawyers [sic] is the means for him to talk in the courtroom." (Vol. 34, 97). Therefore, Dr. Farooque was fully aware of Taylor's paranoid distrust of his attorneys speaking on his behalf in the courtroom.

Judge Heldman found Mr. MacLean, Dr. Stout, and Dr. Farooque credible. Their testimony regarding Taylor's fundamental paranoid distrust of counsel and inability to form a relationship with counsel cannot be reconciled with a finding of competency.

Appreciation of the Consequences of the Trial and Proceedings. Judge Heldman also erred by concluding that Taylor could "understand the nature and object of the criminal proceedings against him." (Vol. 7, 854). Taylor's delusional beliefs that he had died before and would not be harmed if executed because he would come back to life quickly and then live in Davidson County or maybe a prison in Canada, demonstrated his profound inability to appreciate the object of the criminal proceedings. (Vol. 35, 62, 147). Judge Heldman's conclusion that Taylor understood the object of the proceedings is fundamentally at odds with this testimony.[74]

At a minimum, given the prior findings of incompetency and the overwhelming testimony documenting Taylor's delusions, Judge Heldman should have appointed an independent psychiatrist to examine him. Cf. Black, 815 S.W.2d at 174 (appointing an independent psychiatrist to perform an evaluation after testimony of state psychiatrist and psychologist and defense psychologist because of "the seriousness of this matter [a capital case]").

[74] Indeed, Taylor testified at a hearing held a few months later in June that he had died previously. (Vol. 36, 78). Rather than demonstrating concern about this belief, Judge Heldman intervened to ask Taylor if he wanted to continue answering questions by his appointed counsel. Id.

In conclusion, Judge Heldman failed to require the state to prove Taylor's competency beyond a reasonable doubt. In addition, in finding Taylor competent, Judge Heldman made a number of serious errors of law and drew conclusions contrary to the evidence. In so erring, Judge Heldman violated Richard Taylor's rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 8, 9 and 16 of the Tennessee Constitution. For Taylor, "the consequences of [this] erroneous determination of competence [were] dire," Cooper, 517 U.S. at 364, and therefore, reversal of Taylor's conviction and sentence is mandated.

8. JUDGE HELDMAN COMMITTED REVERSIBLE ERROR BY FAILING TO DETERMINE WHETHER RICHARD TAYLOR WAS COMPETENT TO PROCEED WITH HIS POST-TRIAL MOTIONS.

As demonstrated below, the trial court had or should have had a bona fide doubt as to Richard Taylor's competence to proceed with his post-trial motions. Accordingly, the trial court committed reversible error by failing to determine appellant's competence to proceed with the motions in violation of his rights under the Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 8, 9 and 16 of the Tennessee Constitution. As described below, this issue was raised at the hearings on the motion for new trial.

A. RELEVANT FACTS

The record contains numerous instances where the trial court had or should have had a bona fide doubt as to Richard Taylor's competence to proceed with his post-trial motions. At an October 27, 2003, hearing on whether the trial court would continue to order forced medication, Taylor testified that he did not "really in depth" remember his newly appointed counsel, Kelly Gleason, talking to him about the trial and how he "felt about it." (Vol. 21, 17-18). He also testified that he did not recall Ms. Gleason asking him about the jury selection or whether he had

wanted an attorney at the penalty phase. (Vol. 21, 18.) He further testified that he did not remember what days of the week counsel's four visits with him had occurred or what she was wearing. (Id.) After his testimony, his court-appointed counsel asserted to the trial court: "It is our position that he is not competent today and that he was not competent during the trial, and that the testimony you just heard was not testimony of a competent man even though he was medicated." (Vol. 21, 20.)

During an August 24, 2004, hearing on Taylor's post-trial motions, counsel explained to the court that "Mr. Taylor is, due to his medication and his mental illness, unable to inform us of what occurred at the trial fully. So what we're attempting to do is recreate for ourselves in order to raise the motion for new trial issues what occurred then [sic]." (Vol. 23, 19). At the conclusion of the hearing, counsel unsuccessfully sought to be heard regarding "Mr. Taylor's current competency." (Vol. 23, 41-2.)

At a March 29, 2005, hearing, counsel for Taylor once again asserted that Taylor

> was incompetent then and is incompetent now. I am duty bound to alert the Court regarding my belief that Mr. Taylor is currently incompetent. Once we were able to get the transcripts and sit down and go through them, Mr. Taylor was unable to remember the testimony of several witnesses, specifically, Tenry, Atkinson, Rose, Kincaid and Ware. He cannot recall the testimony of everybody that testified. He was shocked when I brought a copy of the transcripts, when I said here's what I'm putting in the motion for new trial.
>
> He was unable to remember that one statement he did make in opening statement. Your Honor was originally – he told the jury – Mr. Smith and Mr. Davis weren't there. They couldn't know what happened. He said he wasn't going to talk about that now, but that he would talk about it later in closing arguments.
>
> Mr. Taylor did not recall saying the second part of the statement, that he would say something later. He thought it was stupid to say that and then not get back up later and say something. This goes to the issues we've raised regarding his competency and ability to

> consult with us rationally since he cannot remember events due to the forced medication he was on and still is. But it does cause us concern, and I wanted to alert the Court to that problem.

(Vol. 25, 1-2.)

On March 8, 2005, Taylor filed a *pro se* motion which read in its entirety:

> williamson cty circuit court
> state vs. taylor
> S83428
> medications and mental illness'. comes now taylor asserting he has no memory whatsoever off the testimony of agent tenery, sheriff atksons, jim rose, linda kincaid, and charlotte ware too. taylor atributes his mental lapse to medications and-or mental illness.
> minor. comes taylor asserting that he was a minor in the eyes of the letter of the law vis-a-vis he was abandoned at birth, orphaned, made a ward of the state and therefore a MINOR until he was 22 years of age. He was 21 when the offense occurred, but still a MINOR and cannot be executed.

(Vol. 14, 2002.)

On August 1, 2005, Richard Taylor filed another *pro se* motion which read in its entirety:

> State vs. Taylor. Case No. S83428
> Comes now Taylor and demands execution carried out A.S.A.P., as soon as possible.

(Vol. 15, 2065.)

On July 19, 2005, in a cursory written order, the trial court denied the Taylor's motions for a new trial without ever having made an attempt to determine his competence to proceed on those motions. (Vol. 15, 2061).

B. JUDGE HELDMAN ERRED BY NOT HOLDING A COMPETENCY HEARING TO DETERMINE APPELLANT'S COMPETENCY TO PROCEED WITH HIS POST-TRIAL MOTIONS

Because the record contains numerous instances where the trial court had or should have had a bona fide doubt as to Richard Taylor's competency to proceed with his post-trial motions, the trial court committed reversible error by failing to order a competency evaluation before acting on the post-trial motions.

"No one questions the existence of the fundamental right that [the defendant] invokes. [The United States Supreme Court has] repeatedly and consistently recognized that `the criminal trial of an incompetent defendant violates due process.'" Cooper v. Oklahoma, 517 U.S. 348, 354 (1996) (quoting Medina v. California, 505 U.S. 437, 453 (1992)). Moreover, a defendant has a constitutional and statutory right to be competent to proceed with a motion for a new trial, as set forth in Rule 33 of the Tennessee Rules of Criminal Procedure. T.C.A. § 33-7-301 (a)(4); See also Zapata v. Estelle, 588 F.2d 1017, 1020 n. 2 (5th Cir. 1979) (trial court has obligation to determine the defendant's competency if "a bona fide doubt about competency is raised at a hearing on any ... post-trial motion"). Cf. Commonwealth v. Silo, 364 A.2d 893, 894 (1976) (improper for appellate court to review defendant's direct appeal if defendant not competent); Reid v. State, No. M2005-00260-SC-S09-PC, 2006 WL 1727331 (Tenn. June 26, 2006) (defendant must be competent to proceed in state post-conviction); Carter v. State, 706 So.2d 874 (Fla. 1997); State v. Berry, 696 N.E.2d 1097 (Ohio 1997); People v. Owens, 564 N.E.2d 1184 (Ill. 1990); State v. Debra, A.E., 523 N.W.2d 727 (Wis. 1994); Rohan ex rel Gates v. Woodford, 334 F.3d 803, 814 (9th Cir. 2003). Indeed, the right of competence at common law "did not expire with the return of the jury's verdict. It persisted through entry of judgment and to execution ... for the prisoner may yet `allege[ ] something in stay of judgment or execution.'" Woodford, 334 F.3d at 808 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *24-25 and 1 SIR

MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN at 35 (Prof'l Books Ltd.19710 [1736])).

The touchstone for competency is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402, 402 (1960). As the Tennessee Supreme Court has stated, "[t]he standard for determining competency to stand trial is whether the accused has `the capacity to understand the nature and object of the proceedings against him, to consult with counsel and to assist in preparing his defense.'" State v. Blackstock, 19 S.W.3d 200, 205 (Tenn. 2000) (quoting State v. Black, 815 S.W.2d 166, 174 (Tenn. 1991) [citations omitted]). In Pate v. Robinson, 383 U.S. 375, 385 (1966), the United States Supreme Court held that where the evidence raises a bona fide doubt as to a defendant's competence the judge, on his or her own motion, must order a competency evaluation. See also T.C.A. § 33-7-301; Lokos v. Capps, 625 F.2d 1258, 1261 (5th Cir. 1980) ("Did the trial judge receive information which, objectively considered, should reasonably have raised a doubt about defendant's competence and alerted him to the possibility that the defendant could neither understand the proceedings, appreciate their significance, nor rationally aid his attorney in his defense?").

Here, the record contains numerous instances where the trial court had – or should have had – a bona fide doubt about appellant's competency to proceed with his post-trial motions. Counsel repeatedly informed the court of their belief that Taylor was not presently competent. As the United States Supreme Court stated, "*defense counsel will often have the best-informed view of defendant's ability to participate in his defense*." Medina v. California, 505 U.S. 437, 450 (1992) (emphasis added) (citing, *inter alia*, United States v. David, 511 F.2d 355, 360 (D.C.

Cir. 1975)).[75] See also Medina, 505 U.S. at 451 ("defendant's inability to assist counsel can, in and of itself, constitute probative evidence of incompetence"); Culbreath v. State, 903 So.2d 338, 340 (Fl. Dist. Ct. App. 2005) (reversing for failure to hold new competency hearing based on new evidence, including testimony from defense counsel that the defendant was unable to communicate with counsel).

Furthermore, Richard Taylor's serious and persistent memory deficiencies – as explained to the court by defense counsel and as demonstrated by his testimony -- should have raised a bona fide doubt about his competency. As the Mississippi Supreme Court has stated, a competent defendant is one who, *inter alia*, "is able to recall relevant facts." Conner v. State, 632 So.2d 1239, 1248-49 (Miss. 1994) (citing Commentary to ABA Criminal Mental Health Standards, 7-4.1 at 174-75 ["A third requirement . . . bears on the ability to recall and relate factual information. If a primary purpose of the prohibition against trying incompetent defendants is to preserve accuracy in factfinding, then defendants must be able to recall and relate factual occurrences. If they are not, they cannot reveal exonerating circumstances to their attorneys. This requirement has been variously phrased: that a defendant have sufficient memory to relate answers to questions posed to him or her. . . . Without that capacity, defendants realistically are unable to exercise the rights to consult with counsel. . . ."]). See also Howard v. State, 697 So.2d 415, 420-25 (Miss. 1997) (embracing ABA Standards cited in Connor and

[75] In holding that states may constitutionally give defendants the burden of proving their incompetency, the Court in Medina rejected the dissent's contention that "the testimony of defense counsel is far more likely to be discounted by the factfinder as self-interested and biased." 505 U.S. at 456, 466 (Blackmun, J., dissenting). See also Commentary, Standard 7-4.8, ABA Standards for Criminal Justice Mental Health Standards; Mickenberg, Competency to Stand Trial and the Mentally-Retarded Defendant: The Need for a Multi-Disciplinary Solution to a Multi-Disciplinary Problem, 17 Cal. W.L. Rev. 365, 386 (1981).

holding that trial court committed reversible error by failing to order competency hearing).[76] Taylor's post-trial, *pro se* motions are additional evidence of his poor memory of the trial and incoherent thought patterns, and should have raised serious questions about his competency to proceed.

Nor could the trial court rely solely on his own observations when confronted with serious questions as to the Taylor's competency. "While [a defendant's] demeanor at trial might be relevant to the ultimate decision as to his sanity, it cannot be relied upon to dispense with a hearing on that very issue." Pate v. Robinson, 383 U.S. at 386. See also State v. Watson, 504 A.2d 497, 500 (Conn. 1986) ("When a Pate inquiry is required, a court may not rely on the defendant's subjective appraisal of his own capacity or on the court's personal observations of the defendant but must hold an evidentiary hearing into the defendant's competence."); Howard v. State, 697 So.2d at 423 ("[T]rial courts are not ... fully insulated from review of the continuing duty to order a competency hearing by the mere fact of the judge's proximity to the defendant.... Where facts appear on the record which, when objectively considered, reasonably raise the question of a defendant's competence to stand trial or to continue to represent himself, the trial court is obligated [to order competency evaluation].")

Therefore, this Court should hold that the trial court committed reversible error by failing to determine Richard Taylor's competence to proceed with his post-trial motions.

9. JUDGE HELDMAN COMMITTED REVERSIBLE ERROR BY DENYING RICHARD TAYLOR'S MOTIONS TO CONTINUE AND RESCHEDULE THE HEARING ON THE MOTION FOR NEW TRIAL, AND AS A MATTER OF LAW, BY REFUSING TO PERMIT THE APPELLANT TO PRESENT COMPELLING EVIDENCE IN SUPPORT OF HIS MOTION FOR A NEW TRIAL.

[76] Defendant does not argue that his lack of recall rendered him *per se* incompetent, only that his lack of recall created a bona fide doubt as to his competency. Cf. State v. Leming, 3 S.W.3d 7 (Tenn. Crim.App. 1998).

After his conviction and death sentence, Richard Taylor was appointed counsel by the trial court. (Vol. 11, 1569). Counsel filed a number of motions for a new trial, including one that alleged, *inter alia*: that Taylor had been incompetent during the trial; that the side effects of his forced medication deprived him of a fair trial and his due process rights; that his waiver of counsel had not been knowing, voluntary, or intelligent; and that his forcible medication violated his constitutional rights. (Vol. 12, 1706-52). Counsel sought to prove these claims by seeking a continuance in order to present testimony from three of the Taylor's former attorneys, a reporter for a local newspaper, and Taylor's treating physician at DeBerry Special Needs Facility. Counsel also sought the continuance in order to introduce Taylor's medical records from the Middle Tennessee Mental Health Institute.

Judge Heldman declined to hear testimony from any of these witnesses, denying the continuance and, subsequently, Taylor's motions for a new trial. The court explained its rationale for denying the continuance and refusing to hear appellant's evidence as follows:

> The presentation of attorneys or a news reporter as to their lay person observations have no bearing on the Court's ruling on the new trial motion. Further, the Court heard from Mr. Reddick [sic] and Mr. McLean [sic] at the competency hearing. New testimony about later interviews with defendant or their earlier representation of defendant cannot now be used to bolster or attack the court's previous pre-trial ruling as to competency to stand trial. Additional testimony from these witnesses and other attorneys after defendant was found competent to represent himself, and began doing so, will have no bearing on the Court's previous orders.

(Vol. 14, 1949-50).

Judge Heldman's refusal to grant the continuance and decision to exclude evidence relating to the motion for new trial was based on a series of mistakes of law: (1) his mistaken conclusion that appellant's proffered lay testimony was legally incompetent and legally

irrelevant; (2) his mistaken finding that appellant's proffered evidence was irrelevant because it conflicted with the court's own observations and conclusions about appellant's competency; and (3) his erroneous finding that the evidence was legally irrelevant because it concerned the Taylor's mental condition at times *after* the trial court deemed him competent to stand trial.

Each of the trial court's erroneous legal conclusions violated the law of this State and this Country. A trial court's failure to grant a continuance is reviewed by this Court under the abuse of discretion standard. Where the trial court abuses its discretion in refusing to grant a continuance, this Court will reverse. State v. Russell, 10 S.W.3d 270, 275 (Tenn. Crim. App. 1999); See also State v. Melson, 638 S.W.2d 342 (Tenn. 1982); Baxter v. State, 503 S.W.2d 226, 230 (Tenn. Crim. App. 1973). Failure to apply the correct legal standard is a *per se* abuse of discretion. See, e.g., Mercer v. Vanderbilt University, 134 S.W.3d 121, 131 (Tenn. 2003) (ruling that a trial court abuses its discretion "when it applie[s] an incorrect legal standard") (quoting Elridge v. Eldrige, 42 S.W.3d 82, 85 (Tenn. 2001) (quoting State v. Shirley, 6 S.W.3d 243, 247 (Tenn. 1999)))); See also State v. Shuck, 953 S.W.2d 662, 669 (Tenn. 1997). This Court reviews questions of law *de novo*. See, e.g., Hart v. State, 21 S.W.3d 901, 903 (Tenn. 2000). The trial court also abuses its discretion by denying a continuance where the denial results in clear prejudice to the movant. Russell, 10 S.W. 3d at 275.

As a result of the trial court's erroneous application of law, the trial court failed to admit relevant, competent evidence on Richard Taylor's motion for a new trial. This failure resulted in clear prejudice to his motion. Moreover, because the offer of proof compelled the granting of the motion for a new trial, reversal is required. Alternatively, a remand is required for hearings on the post-trial motions so that the trial court may hear and consider Taylor's evidence before

ruling on his motions for a new trial.[77] The trial court's failure to do so violated Richard Taylor's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article 1, Sections 8, 9, 10, 13, 16, and 32 of the Tennessee Constitution as well as the other authorities cited herein.

A. RELEVANT FACTS.

On May 3, 2004, Richard Taylor filed a motion for a new trial. (Vol. 12, 1706). In it, he asserted, *inter alia*, that he had not been competent to stand trial, that the side effects of his forced medications deprived him of a fair trial and his due process rights, that his waiver of counsel was not knowing, voluntary and intelligent, and that his forcible medication violated his constitutional rights.[78]

On August 10, 2004, defense counsel learned that the trial court had scheduled a hearing on the motion for new trial on August 24, 2004. (Vol. 14, 1934). One week later, on August 18,

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[77] To the extent that this Court finds that the defendant's offer of proof does not compel reversal, this Court should remand so that the evidence might be heard and the defendant's rights preserved. See Williams v. State, 44 S.W.3d 464, 470 (Tenn. 2001) (affirming this Court's remand of case for evidentiary hearing to determine if due process required tolling of statute of limitations when attorney allegedly failed to properly withdraw from representation and failed to notify petitioner that no application for permission to appeal to supreme court had been filed); State v. Ellison, 841 S.W.2d 824, 826 (Tenn. 1992) ("[W]e cannot agree with the intermediate court's ruling that the record in this case conclusively supports the necessity of retrial. The appropriate remedy here, as with any alleged Batson violation, is to remand the case to the trial court for a hearing limited to that issue."); State v. Bell, 745 S.W.2d 858, 867 (Tenn. 1988) ("The case is remanded to the trial court for a further hearing in accordance with the directions set forth heretofore in this opinion. Upon the conclusion of that hearing the record will be returned to this Court for such further ruling as may be required in the case."); Nunn v. State, No. M2005-01404-CCA-R3-PC, 2006 WL 680900, at *1 (Tenn. Crim. App. Mar. 17, 2006) ("Because the record needs further development for this Court to decide this issue, we remand the case to the trial court for a further evidentiary hearing to determine the circumstances surrounding the Petitioner's untimely filing of his post-conviction petition."). See also TENN. R. APP. P. 36 & 43(a).

[78] On November 15, 2004, Taylor filed a supplemental motion for a new trial setting forth his prosecutorial misconduct claims and a number of evidentiary claims. (Vol. 14, 1957). On February 14, 2005, he filed a second supplemental motion for a new trial in which he set forth a number of jury selection claims and a number of trial error claims. Id. at 1990.

2004, Appellant filed a "Motion to Continue Hearing on Defendant's Motion for New Trial," stating as grounds that "counsel for the Defendant would show that evidence to be presented at the Defendant's Motion for New Trial will be from witnesses who are presently out of town and will not be returning until August 23, 2004, which leaves insufficient time for counsel for the Defendant to properly prepare for the hearing." (Vol. 14, 1922).

On August 20, 2004, Appellant filed a second motion, styled "Motion to Reschedule Hearing on Motion for a New Trial Currently Set for August 24, 2004." (Vol. 14, 1927). In this motion, counsel stated that "counsel are unable to adequately prepare for the hearing due to the unavailability of key witnesses due to previously scheduled vacations," and that these witnesses "are critical to establishing the evidentiary grounds alleged in the motion." (Vol. 14, 1927-29). Appellant further pointed out that "[t]he state has indicated that it does not object to rescheduling the hearing." (Vol. 14, 1927).

On August 24, 2004, Appellant filed his third motion to continue or reschedule, styled "Second Motion to Reschedule Hearing on Motion for a New Trial Currently Set for August 24, 2004." (Vol. 14, 1933). In it, counsel stated that "the Court had previously indicated that the Court would set a hearing date following the state's filing of a response [to the defendant's motion for a new trial] and that counsel would have a full day in order to present the case on behalf of Taylor." Id. Although the Court had not explicitly stated that counsel would be allowed to present evidence, counsel explained that it had "prepared and filed the motion for new trial with the understanding that counsel would be allowed to present evidence in support of the motion." Id. at 1934. Therefore, "counsel chose to offer witnesses subject to cross-examination at a hearing rather than to rely upon affidavits," as permitted by the Tennessee Rules of Criminal Procedure. Id. at 1934 & n.2; See also TENN. R. CRIM. P. 33. Counsel stated that it was only at

an August 23, 2004, off-the-record meeting with the court that counsel received their "first indication . . . that the Court was inclined not to hear evidence." (Vol. 14, 1934).

Attached to the second motion to reschedule was the affidavit of Kelly A. Gleason, one of Richard Taylor's court-appointed attorney. (Vol. 14, 1939). Ms. Gleason's affidavit described the extraordinary pertinence of the proposed testimony of Brad MacLean and Wiliam Redick, two of Taylor's former lawyers, both of whom were unavailable on August 24, 2004. Mr. MacLean had represented Taylor during his state post-conviction proceedings subsequent to his first trial. Mr. MacLean visited Taylor three times shortly before the second trial. According to Ms. Gleason's affidavit, Mr. MacLean would testify, *inter alia*, that during his first visit on September 26, 2003, he heard Taylor say "that he hoped that he would not have to conduct jury voir dire because he doesn't want to say anything, but if he needs to he will just say that he passes," that Taylor told him that he had "received a package from the Attorney General or the D.A. and a letter but he did not open either," and that Taylor seemed concerned because "he was being forced to take medication" and "his memory was not very good."

The affidavit stated that Mr. MacLean would testify that during a second visit on October 6, 2003, Taylor showed Mr. MacLean materials related to his case, including recent orders from the trial court and the state's proposed jury charge, and that Taylor intimated that "he had not read them." (Vol. 14, 1939). Taylor asked Mr. MacLean "to be his attorney at the sentencing hearing." It was Mr. MacLean's impression that Taylor "did not understand that the sentencing would immediately follow the culpability trial." Taylor said that "he still planned to do nothing at trial." Id.

Mr. Redick was Taylor's attorney during his first trial and, like Mr. MacLean, visited him shortly before his second trial. According to Ms. Gleason's affidavit, Mr. Redick would testify

that during a visit on or about October 2, 2003, "Taylor stated that he did not want to receive the death penalty but that he wanted to get back to Riverbend," and that Taylor "wanted to get the trial over with so that he [would] be able to stop taking the medications." Id.

At an August 24, 2004 hearing on the motion to continue and the motions to reschedule, Taylor's counsel made a compelling and highly pertinent offer of proof regarding the proposed testimony of Virginia Story. Ms. Story had served as Taylor's court-appointed guardian ad litem. Due to her close relationship with Taylor, Ms. Story observed the entire second trial, and had several conversations with him during the period that the trial was taking place. At the hearing, Taylor's counsel alerted Judge Heldman that Ms. Story would testify that based on her observations of Taylor he "appeared to be in a drugged, highly medicated state and that he did not understand the procedure." (Vol. 23, 37). Moreover, during their frequent conversations, Taylor "wasn't able to converse intelligently because of his drug [sic] state." Taylor did relate that "he would like to have counsel represent him at the penalty phase and thought that was going to take place down the road at some time." Id. Ms. Story would further put into evidence testimony that Taylor "appeared in open court in front of the jury during the trial in prison garb and shackled." Id.

Also during the August 24th hearing, Taylor's counsel sought to introduce an affidavit from Mr. Rob Johnson, a reporter for the Tennessean. See Defendant's Exhibit #1, for identification. Mr. Johnson interviewed Taylor several days before the trial.[79] (Vol. 23, 34). Attached to Mr. Johnson's affidavit were three articles he had written, which he stated were true

[79] Counsel indicated that Taylor's statements to Mr. Johnson were relevant to the issues raised in the motion for a new trial. (Vol. 23, 34-35.) However, the trial court marked the affidavit for identification only. Id. at 35.

and accurate reflections of Taylor's statements to him, and of his observations of Taylor during his interview and during the trial.

The first article, dated October 12, 2003, reported on Mr. Johnson's interview with Richard Taylor. Taylor told Mr. Johnson that he planned "to sit still" during the trial, and would not "counter" the state's case. Taylor indicated that he would "sit mute" during closing arguments as well. Later in the interview, Taylor told Mr. Johnson that he "died twice before," but that he "always came back." Taylor asked the reporter, "Haven't you been killed before?" When Mr. Johnson indicated that he had not, Taylor replied, "You haven't? Well, maybe you have, and you just didn't know it." Taylor also stated that, when he was not taking medication, he could "hear singing . . . [r]ampantly," and because "there's not much to do" in prison he would "like to hear the singing again." He also indicated that, if he were found guilty, he would like "to get an attorney to help . . . during sentencing."

According to Mr. Johnson's observations, Taylor was "not chatty but answers questions readily." Mr. Johnson noted that, although "he clearly understands that he is about to go on trial," Taylor "really wants, more than anything, to get off the medication." Taylor said that his medication was turning him "into a woman" by changing his hormones. "I am growing breasts," he said, and he complained that the medication made his head "foggy." Taylor hoped that if he were convicted he would not "have to keep taking the drugs."

In the second article, dated October 16, 2003, Mr. Johnson described Taylor's condition at the trial as "heavily medicated." In the third article, dated October 17, 2003, Mr. Johnson summarized Taylor's remarks during his interview by writing that "[Taylor] hoped to be convicted" because "he would be allowed to stop taking the medications that he says are fogging

his mind, turning him into a woman, and silencing the singing voices in his head." Taylor said that "he thinks that is worth a one-way trip to death row."

At the August 24, 2004 hearing, defense counsel also explained that they intended to call Dr. Casey Arney, who was Taylor's treating physician at DeBerry Special Needs Facility until late August 2003. (Vol. 23, 13). Dr. Arney was the physician who ordered Taylor's medications tapered off immediately before trial. (Vol. 17, 53). According to counsel, Dr. Arney's notes indicated "that Taylor immediately following his trial said he wasn't surprised. He was convicted and sentenced to death and indicated that he's just trying to get back to River Bend [sic] in order to get off his medication." Id. at 15. Dr. Arney was unavailable that day because "he has a full patient schedule on this date." Id. at 16.

Counsel also stated that they intended to introduce MTMHI records indicating a "course of communication between Taylor and the doctors who evaluated him" that were relevant to the issues raised in the motion for a new trial. Id. at 20. Counsel explained that MTMHI had notified them that it could not "get a certified copy of the records prepared for two weeks." Id. at 17.

The trial court issued a written order on August 27, 2004, denying the motion to reschedule the hearing and the motion for a continuance as well as the admission and consideration of Mr. Johnson's affidavit. (Vol. 14, 1945). The trial court acknowledged that Taylor's motion for a new trial "properly" contained challenges to its rulings that he was competent to stand trial; that his waiver of counsel was knowing, voluntary and intelligent; and that his forced medication did not violate the constitutional framework established by the United States Supreme Court in Riggins v. Nevada, 504 U.S. 127, 135-37 (1992), and Sell v. United States, 539 U.S. 166, 177 (2003). (Vol. 14, 1949). Nevertheless, the court ruled that it would

refuse to hear testimony from Taylor's witnesses or admit his evidence, including the Johnson affidavit.

On July 19, 2005, in a cursory written order, the trial court denied appellant's motions for a new trial without ever hearing critical testimony concerning Taylor's mental condition and thought processes during the trial at which his life hung in the balance and at which he did virtually nothing. (Vol. 15, 2601).

B. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY RULING THAT THE TESTIMONY OF APPELLANT'S LAY WITNESSES WAS LEGALLY INCOMPETENT EVIDENCE AND LEGALLY IRRELEVANT EVIDENCE.

One of the grounds relied upon by Judge Heldman in his decision to deny the continuance and refuse to hear Appellant's evidence was his erroneous legal conclusion that the testimony of lay witnesses was not legally competent or relevant to the motion for a new trial. Judge Heldman stated: "The presentation of attorneys or a news reporter as to their lay person observations have no bearing on the Court's ruling on the new trial motion." (Vol. 14, 1949-50). He also stated that the Johnson affidavit was "wholly irrelevant to any issue before [the court] in the motion for a new trial" because "[a] reporter's thoughts and observations (and perhaps opinions) about a death penalty trial do not remotely tend to make the existence of any fact more or less likely." Id. at 1951-52.

This ruling was an error of law. The decisions of the Tennessee Supreme Court have consistently recognized the probative value of lay witness testimony regarding matters bearing on a defendant's mental condition. In State v. Sparks, 891 S.W.2d 607 (Tenn. 1995), the Tennessee Supreme Court set forth the general rules. First, lay witnesses may always testify regarding their personal observations of a defendant's mental condition as well as their conversations with the defendant. Second, lay witnesses may also give an *opinion* as to a

defendant's mental condition "if a factual foundation is laid that is sufficient to justify the lay opinion and to give it credibility." Id. at 613-14 (citing COHEN, PAINE & SHEPHERD, TENNESSEE LAW OF EVIDENCE, § 701.4 (2d ed. 1990) (citing Edwards v. State, 540 S.W.2d 641, 647 (Tenn. 1976), cert. denied, 429 U.S. 1061 (1977))). See also State v. Thompson, 151 S.W.3d 434, 440-41. (Tenn. 2004) (finding the state's lay testimony and cross examination of defendant's witnesses sufficient to meet state's burden of proving the defendant's sanity beyond a reasonable doubt); Estate of Elam v. Oakley, 738 S.W.2d 169, 172 (Tenn. 1987) (ruling that opinions of lay witnesses are admissible on soundness of mind if based on details of conversations, appearances, conduct or other particular facts from which state of mind may be judged); TENN. R. EVID. 701.

Furthermore, the Tennessee courts have consistently recognized the probative value of lay testimony at competency hearings, including criminal competency hearings. See, e.g., State v. Blackstock, 19 S.W.3d 200, 206 (Tenn. 2000) (noting that appellant did not "produce any expert or *lay* evidence indicating that he lacked the capacity to understand the proceedings against him and to assist his attorney in his defense") (emphasis added); Conservatorship of Davenport, No. E2004-01505-COA-R3-CV, 2005 WL 3533299 (Tenn. Ct. App. June 14, 2005) ("The testimony of lay witnesses who have observed the alleged incompetent is admissible and highly probative since '[o]ne's mental capacity is best determined by his spoken words, his acts, and his conduct'") (quoting Urquhart Estate, 245 A.2d 141, 146 (Pa. 1968) (citation omitted)); State v. Reid, No. M2003-00539-CCA-R3-DD, 2005 WL 1315689, at *31, *34 (Tenn. Crim. App. June 3, 2005) (trial "court found Defendant competent to stand trial. The court based its findings on the testimony and reports of the experts and testimony of the lay witnesses . . . After a review of the record before us, we do not find that the trial court's determination that Defendant was competent to stand trial was erroneous."). See also TENN. R. EVID. 401 (defining relevant

evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"; advisory committee comments that "[t]he theoretical test for admissibility is a lenient one, as it should be.").

Moreover, United States Supreme Court precedent firmly establishes the relevance and legal competence of the proposed testimony of Mr. MacLean, Mr. Redick, and Ms. Story. The Court has declared: "defense counsel *will often have the best-informed view of defendant's ability to participate in his defense*." Medina v. California, 505 U.S. 437 (1992), (emphasis added), (citing United States v. David, 511 F.2d 355, 360 (D.C. Cir. 1975)).

In addition to contravening well-established Tennessee law as clearly defined by the Tennessee Supreme Court and the Tennessee Rules of Evidence, the trial court's ruling that the testimony of Taylor's lay witnesses was legally incompetent and irrelevant evidence violated appellant's rights to present a defense, to compulsory process, to due process of law, to effective assistance of counsel, and to be free of cruel and unusual punishment, as guaranteed him by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article I, Sections 7, 8, 9, 13, 16, 17, and 32 of the Tennessee Constitution, and T.C.A. § 40-17-105. See State v. Brown, 29 S.W.3d 427, 433-34 (Tenn. 2000); See also Holmes v. South Carolina, __ U.S. __,126 S.Ct. 1727, 1731 (2006).

Therefore, because it was rooted in the court's erroneous view that the appellant's lay witness testimony was legally incompetent and legally irrelevant, [80] the trial court's decision to

[80] In a footnote in its order, the court noted in passing that the defendant did not attach any affidavits to his motion for new trial, as permitted by Tenn. R. Crim. P. 33(c). (Vol. 14, 1949-50 & n.5). The court, however, did not rely upon counsel's failure to attach affidavits in denying the continuance. Rather, the court incorrectly ruled that the testimony of the lay witnesses was not legally relevant or competent because it concerned matters about which the trial had already

deny the continuance of the motion for new trial was a *per se* abuse of discretion. See In re C.T.S., 156 S.W.3d 18, 22 (Tenn. Ct. App. 2004). The trial court's ruling excluding the admission of the affidavit and refusing to hear the testimony of appellant's witnesses was an error of law that requires reversal or, in the alternative, a remand.

C. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY REFUSING TO CONSIDER THE TESTIMONY OF APPELLANT'S WITNESSES UNDER THE RATIONALE THAT THEIR EVIDENCE WAS INCONSISTENT WITH THE COURT'S OWN OBSERVATIONS ABOUT THE DEFENDANT'S COMPETENCY DURING THE TRIAL.

As demonstrated in the preceding section, each of the witnesses Taylor sought to call in support of his motion for a new trial would have given testimony regarding his mental condition and thought processes immediately prior to his trial and during his trial. During the August 24th hearing on Taylor's motions, Judge Heldman indicated that he would not hear from the witnesses because their testimony was inconsistent with his own observations. Judge Heldman stated that "[t]he Court observed Taylor throughout the trial," and "[Taylor] appeared competent throughout the trial." (Vol. 23, 39). Furthermore, the court noted that "[Taylor] did not appear drugged or heavily medicated in a state that would cause the appearance of someone that could not represent

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ruled (even though the court acknowledged that the motion for new trial "properly" challenged its previous rulings). In fact, the trial court refused to consider the Johnson affidavit on the same grounds despite the requirement of Rule 33 that affidavits "shall be considered as evidence by the court." Rule 33 merely permits a defendant to attach affidavits to his motion for a new trial. The rule does *not* make the attachment of an affidavit a necessary prerequisite to an evidentiary hearing – that is, it does not require a trial court to deny a defendant's motion if the defendant fails to attach affidavits to the motion. Indeed, this Court has held that affidavits are not necessarily a sufficient basis for granting a new trial and that, to establish an adequate evidentiary basis for the granting of a new trial, a defendant may have to subject his witnesses to the crucible of cross examination, which is precisely what counsel sought to do in this case. See, e.g., State v. Murray, No. 01C01-9702-CR-00066, 1998 WL 934578 at *21 (Tenn. Crim. App. Dec. 30, 1998).

themselves," and that if Taylor had appeared in such a state, "the Court would have taken action during the trial." Id. Under both state and federal law, this rationale was plainly wrong.

Judge Heldman's conclusion that he did not need to hear evidence inconsistent with his own observations and conclusions regarding Taylor's competency and the side effects of the forcible medication is contrary to the clear holding of the United States Supreme Court that a trial court may not rely solely on his own observations when confronted with issues pertaining to a defendant's competency. See Pate v. Robinson, 383 U.S. 375, 386 (1966) ("While [a defendant's] demeanor at trial might be relevant to the ultimate decision as to his sanity, it cannot be relied upon to dispense with a hearing on that very issue."); See also State v. Watson, 504 A.2d 497, 500 (Conn. 1986) ("When a Pate inquiry is required, a court may not rely on the defendant's subjective appraisal of his own capacity or on the court's personal observations of the defendant but must hold an evidentiary hearing into the defendant's competence."); Howard v. Mississippi, 697 So.2d 415, 423 (Miss. 1997) ("trial courts are not . . . fully insulated from review of the continuing duty to order a competency hearing by the mere fact of the judge's proximity to the defendant").

Moreover, even if Judge Heldman had the power to refuse to hear the evidence because it was inconsistent with his own observations and conclusions about Taylor's competency and the side effects of the forcible medication (which as demonstrated above is most certainly not the case), he still was required to hear and consider the evidence because it also was relevant to other claims raised by his motions for a new trial. The offers of proof show that the testimony of his witnesses also related to Taylor's claims that he was denied his right to counsel during the penalty phase, and that he did not knowingly or intelligently waive his right to counsel during the trial, including the penalty phase. Taylor told Mr. Maclean, Ms. Story, and Mr. Johnson that he

would like to be represented by counsel during the penalty phase. Ms. Taylor was "unable to converse intelligently" with Ms. Story due to the side effects of his medication, and therefore could not adequately represent himself, nor could he think rationally enough to make a knowing or intelligent waiver of counsel in the first instance. Even if he could, Mr. Redick's testimony reveals that Taylor merely wanted to get through the trial as quickly as possible so that he could stop taking his medications, which again was relevant to his claim that he did not knowingly or intelligently waive counsel.

Given this evidence, Judge Heldman's denial of Taylor's motion for a new trial was reversible error. Alternatively, this Court should remedy this defect by remanding this case back to the trial court so that Taylor's evidence may be heard and considered before his motions for a new trial are decided.

D. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY RULING THAT THE TESTIMONY OF TAYLOR'S WITNESSES WAS IRRELEVANT BECAUSE IT CONCERNED TAYLOR'S MENTAL CONDITION AFTER THE COURT HAD DEEMED HIM COMPETENT TO STAND TRIAL.

In refusing to hear Taylor's evidence on his motion for a new trial, the court asserted the following: "New testimony about later interviews with defendant or their earlier representation of defendant cannot now be used to bolster or attack the court's previous pre-trial ruling as to competency to stand trial. Additional testimony from these witnesses and other attorneys after defendant was found competent to represent himself, and began doing so, will have no bearing on this Court's previous orders." (Vol. 14, 1949-50). This assertion suggests a fundamental misunderstanding of the law of competency and the purpose of the hearing on Taylor's motion for a new trial.

By suggesting that Taylor's post-trial challenge to his competency to stand trial was necessarily limited to a challenge to his competency at the precise moments at which the trial

court had declared him competent, Judge Heldman was wrong for two reasons. First, a trial court's obligation to ensure that a criminal defendant is competent to stand trial is not frozen in time, but rather is an on-going obligation that continues throughout the trial and beyond. See Drope v. Missouri, 420 U.S. 162, 181 (1975). Drope is dispositive. There, the Court held that "[e]ven when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." Id. at 181.[81]

Second, as explained above, the evidence was relevant not only to the competency claim in the motion for a new trial, but also to the following claims, among others: the side effects of his forced medication rendered Taylor unable to defend himself in violation of the Fourteenth Amendment as construed in Sell; even if Taylor were competent at the time of the competency hearing, he later became incompetent as a result of the side effects of his medication; and Taylor's waiver of counsel was not knowing, voluntary and intelligent.

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[81] Following the mandate of Drope, courts in Florida, Alabama, Mississippi and Michigan have remanded cases for further proceedings where evidence of incompetence appeared in the record after courts had held competency hearings and found the defendants competent. See Ex parte Janezic, 723 So.2d 725, 729 (Ala. 1997) ("Because the trial court erred in failing to conduct a further inquiry into Janezic's competency . . . we conclude that this case should be remanded to the circuit court for a hearing to determine the issue."); Culbreath v. State, 903 So.2d 338, 340 (Fla. 2005) ("Even if a defendant has been declared competent, the trial court must remain receptive to revisiting the issue if circumstances change"); Nowitzke v. State, 572 So.2d 1346, 1349 (Fla. 1990) ("a prior determination of competency does not control when new evidence suggests the defendant is at the current time incompetent"); State v. Whyte, 418 N.W.2d 484, 486 (Mich. App. 1988) (remanding for further proceedings because "competency is an ongoing matter appropriately raised whenever evidence of incompetence appears"); State v. Mitchell, 345 N.W.2d 611, 614 (Mich. App. 1983) ("Even after a competency hearing is held at which a defendant is found competent to stand trial, a trial court must remain alert to changes in circumstances suggesting that a defendant is no longer competent because competency is an ongoing concern."); Howard v. Mississippi, 697 So.2d 415, 423 (Miss. 1997) ("Where facts appear on the record which, when objectively considered, reasonably raise the question of a defendant's competence to stand trial or to continue to represent himself, the trial court is obligated . . . to order a competency hearing.").

Judge Heldman's reliance on his misapplication of the law of competency was an error of law and therefore an abuse of his discretion. Reversal or, alternatively, a remand is required.

E. JUDGE HELDMAN ABUSED HIS DISCRETION BY DENYING THE CONTINUANCE BECAUSE THE DENIAL RESULTED IN CLEAR PREJUDICE TO RICHARD TAYLOR.

In addition to misapplying the law, Judge Heldman's abused his discretion in denying the continuance because the denial clearly prejudiced Appellant's motion for new trial. See Russell, 10 S.W.3d at 275 (holding that the trial court abuses its discretion in denying a continuance if the defendant makes a "clear showing of prejudice as a result of the continuance being denied"). The witnesses Appellant sought to call would have testified to a number of critical issues raised in his motion for a new trial,[82] including, *inter alia*, his claims: that the side effects of his forced medication rendered him unable to defend himself in violation of the Fourteenth Amendment as construed in Sell; that the trial court erred in finding Taylor competent to stand trial; that even if Taylor were competent at the time of the competency hearing, he later became incompetent as a result of the side effects of his medication; and that Taylor's waiver of counsel was not knowing, voluntary and intelligent. Given the extraordinary relevance of this evidence and the importance of the constitutional issues at stake, the trial court's refusal to grant Taylor a continuance in order to call these witnesses amounted to an abuse of its discretion, and this Court must reverse and remand.

For example, Appellant's offer of proof included testimony from Dr. Casey Arney and admission of his Middle Tennessee Mental Health Institute records. Dr. Arney treated Taylor at the DeBerry Special Needs Facility until the end of August, 2003. (Vol. 23, 13). Dr. Arney could have testified at the hearing about the change in Taylor's medication on the eve of trial,

[82] See supra discussion of proffer of testimony for proposed witnesses Brad MacLean, Bill Redick, and Virginia Story.

testimony relevant to Taylor's claims that he was incompetent at trial and to the Sell analysis. Furthermore, according to counsel, Dr. Arney's notes indicated that, immediately following his trial, Taylor "said he wasn't surprised." Rather, he indicated that "he's just trying to get back to River Bend [sic] in order to get off his medication." Id. at 15. This testimony was directly relevant, *inter alia*, to the question of the voluntariness of Taylor's waivers of counsel and mitigation. Dr. Arney's testimony and the MTMHI records were highly relevant to the appellant's motions for a new trial and the trial court should have considered them before ruling on those motions.

Accordingly, Judge Heldman violated Taylor's rights under the federal and state constitutions, the case law of this Court and the Tennessee Supreme Court, the Tennessee Rules of Evidence, and T.C.A. § 40-17-105 by refusing to grant the continuance and refusing to hear the Appellant's evidence. This Court should reverse. Alternatively, this Court should remand the case so that Taylor's evidence may be heard and considered before a decision is made on his motions for a new trial.

10. JUDGE HELDMAN COMMITTED REVERSIBLE ERROR BY FAILING TO FOLLOW THE TENNESSEE LEGISLATURE'S MANDATE TO INSTRUCT THE JURY ON STATUTORY MITIGATING CIRCUMSTANCES RAISED BY THE EVIDENCE.

Under the plain language of T.C.A. § 39-2-203(e), the case law of the Tennessee Supreme Court, Article I, Sections 8 & 16 of the Tennessee Constitution and the Eighth and Fourteenth Amendments to the U.S. Constitution, the trial court committed reversible error by failing to instruct the jury regarding the statutory mitigating circumstances contained at T.C.A. § 39-13-203(j)(2) ("[t]he murder was committed while the defendant was under the influence of extreme mental or emotional disturbance") and T.C.A. § 39-13-203(j)(8) ("[t]he capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the

requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment").

According to well-established Tennessee law and under the plain language of T.C.A. § 39-2-203(e), a trial court is statutorily obligated to instruct the jury at a capital penalty hearing on all statutory mitigating circumstances raised by the evidence at either the guilt-innocence phase or the sentencing phase. State v. Hartman, 703 S.W.2d 106, 118 (Tenn. 1985) ("[The] only *mandatory* instructions with respect to mitigating circumstances are that those statutory circumstances which are raised by the evidence shall be expressly charged.") (construing T.C.A. § 39-2-203(e) (amended 1989)[83] ("the trial judge *shall include* in his instructions for the jury to weigh and consider any mitigating circumstances and any of the statutory aggravating circumstances set forth in subsection (i) of this section which may be raised by the evidence at either the guilt or sentencing hearing, or both") (emphases added)). The Legislature's use of the term "shall" imposes a mandatory obligation on the trial court. See Safeco Ins. Co. of America v. State, Com'r of Commerce and Ins., 840 S.W.2d 355, 357 (Tenn. 1992) (citing Baker v. Seal, 694 S.W.2d 948, 951 (Tenn. Ct. App. 1984), for proposition that the use of the word "shall" in a statute implies legislative intent to make action or inaction *mandatory*); Federal Exp. Corp. v. Woods, 569 S.W.2d 408, 411 (Tenn. 1978) (when the words of a statute are plain and unambiguous, the assumption is that the "legislature intended what it wrote and meant what it

[83] The legislature amended Tennessee's capital sentencing statute in 1989 to expand the universe of mandatory instructions to include nonstatutory mitigating circumstances, raised by the evidence and requested by the defendant. T.C.A. § 39-13-204(e)(1) ("The trial judge shall also include in the instructions for the jury to weigh and consider any mitigating circumstances raised by the evidence at either the guilt or sentencing hearing, or both, which shall include, but not be limited to, those circumstances set forth in subsection (j)."). See also State v. Odom, 928 S.W.2d 18 (Tenn. 1996).

said"). See also Estate of Austin, No. 03A01-9310-PB-00338, 1994 WL 287436, *4 (June 30, 1994, Tenn. Ct. App.) ("The word `shall' is defined in Webster's College Dictionary as a directive with the force of the word `must.' `May,' on the other hand, is defined as a word used to express opportunity or permission. `Shall' is mandatory in nature, while `may' is permissive. To us, the plain meanings of these words are clear ..."). [84]

Here, the evidence clearly required that the trial court charge the jury on T.C.A. § 39-13-203(j)(2) and T.C.A. § 39-13-203(j)(8). At the guilt-innocence phase, the prosecution presented evidence that would support a finding that Richard Taylor was suffering extreme mental disturbance and substantially impaired judgment at the time of the offense. (Vol. 19, 152) ("I remember Wiser telling [Richard Taylor] to stop, hollering, `stop, stop,' and finally, you know, I remember Taylor looking at him and his eyes were wild and let him go"); (Vol. 19, 161) ("[Taylor] was talking so quick, saying some [sic] many things, I couldn't understand a lot of things he was saying"); (Vol.. 19,165-66) ("[Taylor] was coming up the hallway bouncing off the walls; he had a wild look on his face like he just spaced out, you know"); (Vol. 19, 188) ("I was yelling and screaming, you know, 'Stop, you're killing him, you're killing him.' . . . And when he stopped, he—you know, here I'd been yelling at him, and he looked up at me with the—you know, with the most emptiest eyes; you know, just like no one was home, and then turned around and walked down the hall"); (Vol. 19, 193) ("[Taylor] was just mumbling and just

[84] Tennessee law further provides Taylor with the right "to have every issue of fact raised by the evidence and material to his defense submitted to the jury upon proper instructions by the judge." State v. Thompson, 519 S.W.2d 789 (Tenn. 1975). Tennessee's Supreme Court has made a special effort to "review a patently incomplete instruction at a capital sentencing hearing under the 'plain error' doctrine, regardless of a defendant's failure to raise the issue." State v. Stephenson, 878 S.W.2d 530, 554 (Tenn. 1994). See also Lockett v. Ohio, 428 U.S. 586, 605 (1978) (finding that "[w]hen the choice is between life and death," the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty "is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments").

pissed . . . he was cussing and raving about the work area"); (Vol. 19, 202) ("[when Taylor arrived for interview] he was shaking"); (Vol. 19, 241) (quoting a letter in which Richard Taylor states: "[Y]ou know why that killing went down. I just got upset, couldn't control myself").

As a result of this evidence, the trial court—on its own initiative—proposed an instruction on diminished capacity at the conclusion of the guilt-innocence phase. (Vol. 20, 301). The state requested that the instruction be deleted, and Taylor objected. (Vol. 20, 307-10). The trial court ruled for Taylor and charged the jury as follows: "In this case you have heard evidence that the defendant might have suffered from a mental condition which could have affected his capacity to form the culpable mental state to commit a particular offense." (Vol. 20, 310, 357). Plainly, then, the evidence admitted at the guilt-innocence phase provided support for a finding that Taylor's suffered from mental disturbance and impaired judgment at the time of his crime. See Knight v. Dugger, 863 F.2d 705 (11th Cir. 1988) ("the standard for a finding of mental disturbance [is] less stringent at the sentencing phase than at the guilt-innocence phase").

Under Tennessee law, this evidence was automatically admitted at the penalty phase. See (Vol. 20, 399) (instructing jury that it was to consider "the evidence [admitted] throughout the entire course of this trial including the guilt-finding phase and sentencing phase or both"). See also T.C.A. § 39-2-203(e) (same); T.C.A. § 39-13-204(e) (same). Nevertheless, at the conclusion of the penalty phase, the trial court failed to instruct the jury on either of Tennessee's mental-condition statutory mitigating circumstances. Under T.C.A. 39-2-203(e) and the Tennessee Supreme Court's interpretation of it, as well as under T.C.A. § 39-13-204(e)(1), this failure constitutes reversible error. Thus, applying Tennessee law to this case requires the reversal of Taylor's death sentence.

Because in capital cases "jury instructions are critical in enabling the jury to make a sentencing determination that is demonstrably reliable," State v. Odom, 928 S.W.2d 18, 31 (Tenn. 1996), the Tennessee Legislature has required trial courts to instruct capital juries on every statutory mitigating circumstance raised by the evidence at either stage of the trial, regardless of whether the defendant requests it. See Hartman, 703 S.W.2d at 118 (finding charges on statutory mitigating factors "mandatory"); T.C.A. § 39-2-203(e). Cf. Odom, 928 S.W.2d at 31 ("[o]nce the trial court decides that the proffered evidence is 'mitigating' in nature and that it has been 'raised by the evidence,' it becomes a 'mitigating circumstance' as a matter of law, and the trial court must include it in the instructions").

The Tennessee Supreme Court in State v. Hartman expressly held that a charge on statutory mitigating circumstances is mandatory. 703 S.W.2d at 118. The Court in Hartman further held that a charge on nonstatutory mitigating circumstances was not mandatory. Id. at As the Court explained in Odom, by passing T.C.A. § 39-13-204 (*i.e.*, the 1989 Sentencing Reform Act) "the legislature intended the trial court to instruct the jury on nonstatutory mitigating circumstances when raised by the evidence and specifically requested by either the State or the defendant." 928 S.W.2d at 30. There is absolutely no indication that the Legislature intended to modify Hartman's holding that the trial court must charge on statutory mitigating circumstances regardless of whether the defendant requests the charge.

Other state supreme courts have reversed for precisely the error complained of here. The North Carolina Supreme Court has held that, "[w]hen evidence is presented in a capital case which may support a statutory mitigating circumstance, the trial court is mandated by the language in [the sentencing statute] to submit that circumstance to the jury." State v. Bacon, 390 S.E.2d 327, 335 (N.C. 2004) (citation omitted). See also State v. Zuniga, 498 S.E.2d 611, 613

(N.C. 1998) ("The court was required to submit to the jury any statutory mitigating circumstances which the evidence would support regardless of whether the defendant objects to it or requests it."); State v. Walker, 469 S.E.2d 919, 922 (N.C. 1988) ("the trial court has no discretion; the statutory mitigating circumstance must be submitted to the jury, without regard to the wishes of the State or the defendant"). The supreme courts of South Carolina, Wyoming, and Florida all concur. See State v. Caldwell, 388 S.E.2d 816, 823 (S.C. 1990) (reviewing error *in favorem vitae* and holding that "[t]he trial judge has a duty to review all statutory mitigating circumstances and instruct the jury as to any which may be supported by the evidence and not merely those requested by the defendant . . . [c]onsequently, Caldwell is entitled to a new sentencing hearing") (citation omitted); Olsen v. State, 67 P.3d 536, 590 (Wyo. 2003) (finding that trial court committed reversible error by failing to instruct on statutory mitigating circumstance of duress); Stewart v. State, 558 So.2d 416, 420-21 (Fla. 1990) (deciding that failure to give instruction on statutory substantial impairment mitigating factor reversible error despite nonstatutory mitigating circumstance instruction). See also id. at 421 (Grimes, J., concurring in part, dissenting in part) ("In setting forth statutory aggravating and mitigating circumstances, the legislature has concluded that these are the most significant factors to be considered in determining whether to impose the death penalty."); State v. Ross, 849 A.2d 649, 731 (Conn. 2004) (in enacting statutory mitigating factors, "the legislature was concerned with identifying the specific factual circumstances under which a reasonable person would find" that the imposition of a death sentence might be "inherently unfair").

Moreover, the North Carolina Supreme Court has "repeatedly held that the failure to submit to the jury a statutory mitigating circumstance that is supported by the evidence is reversible error," because "each statutory mitigating circumstance must be given individual

weight, if found to exist." Zuniga, 498 S.E.2d at 216, 218. Thus, failing to give a statutory mitigating circumstance raised by the evidence cannot be harmless error beyond a reasonable doubt because one or more jurors who did not find the mitigating circumstance may have done so "if a peremptory instruction had been given." State v. Holden, 450 S.E.2d 878, 883 (N.C. 1994) (citing State v. Gay, 434 S.E.2d 840, 855 (N.C. 1993)). Cf. Zuniga, 498 S.E.2d at 613 (finding that unlike statutory circumstances, "the jury was not required to give mitigating value to the nonstatutory mitigating circumstances"); State v. Green, 443 S.E.2d 14, 32 (N.C. 1994) (refusing to require "that the peremptory instructions to be used with regard to nonstatutory mitigating circumstances should be identical to those used with regard to statutory mitigating circumstances" because "jurors may reject the nonstatutory mitigating circumstance if they do not deem it to have mitigating value"). See also State v. Ross, 849 A.2d 649, 683 n.25 (Conn. 2004) ("[J]urors must consider the mitigating nature of statutory mitigating factors," but not nonstatutory mitigating factors).

Evidence of Taylor's seriously impaired mental state at the time of the offense was presented at the guilt phase of his trial and, as a result, the court instructed the jury on diminished capacity. Under Tennessee law, this same evidence compelled the judge to instruct the jury with respect to the statutory mitigating circumstances contained at T.C.A. § 39-13-204(j)(2) and T.C.A. § 39-13-204(j)(8). See Knight v. Dugger, 863 F.2d 705 (11th Cir. 1988) ("[T]he standard for a finding of mental disturbance [is] less stringent at the sentencing phase than at the guilt-innocence phase"). The court's failure to do so was reversible error.

This Court should reverse Taylor's death sentence. Enforcement of the will of the Tennessee Legislature, as expressed in its mandatory language regarding statutory mitigating circumstances, requires nothing less.

11. JUDGE HELDMAN COMMITTED REVERSIBLE ERROR BY PERMITTING DR. FILLEY TO TESTIFY AT THE PENALTY PHASE THAT THE APPELLANT WAS SANE AT THE TIME OF THE OFFENSE.

The trial court committed reversible error by permitting the prosecution, during its case-in-chief at the penalty phase of the trial, to call Dr. John Filley to testify that Richard Taylor was sane at the time of the offense. The trial court further erred by overruling appellant's motion for a new trial, which asserted this claim as error.[85] The trial court's actions violated the defendant's rights under the Tennessee Rules of Criminal Procedure, the Tennessee Rules of Evidence, the case law of this Court, the Tennessee Supreme Court and the United States Supreme Court, the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 9 and 16 of the Tennessee Constitution.

Tennessee Rule of Criminal Procedure Rule 12.2 (c) specifically prohibits the prosecution from introducing any statements made by the defendant during a mental health examination, or introducing any fruits of those statements, unless used for the purposes of impeachment or rebuttal of the defendant's psychiatric evidence. TENN. R. CRIM. P. 12.2 (c).[86] In Martin v. State, 950 S.W.2d 20 (Tenn. 1997), the Tennessee Supreme Court held that, although this rule provides the state an opportunity to request—and the trial court an opportunity to order—a psychiatric examination of the defendant, "[t]he prosecution's use of the defendant's statements, or the 'fruits' derived from such statements, is expressly limited to impeachment or rebuttal of the evidence concerning mental state introduced by the defendant." Id. at 24-25. See

[85] This claim was raised below in the Motion for New Trial and in the Supplemental Motion for a New Trial. (Vol. 12, 1743; Vol. 14, 1962-63).

[86] "No statement made by the defendant in the course of any examination provided for by this rule, whether the examination be with or without the consent of the defendant, no testimony by the expert based upon such statement, and no other fruits of the statement shall be admitted in evidence against the defendant in any criminal proceeding except for impeachment purposes or on an issue respecting mental condition on which the defendant has introduced testimony."

also State v. Huskey, 964 S.W.2d 892, 899 (Tenn. 1998) (holding that the purpose of the rule is "to provide the prosecution with a means to obtain necessary information to rebut evidence of mental condition presented by the defendant, while at the same time safeguarding the defendant's right against self-incrimination"). Thus, Rule 12 (c) permits the state to admit expert psychiatric evidence regarding a defendant's mental condition *only* for impeachment or rebuttal of the defendant's mental-condition evidence.

Taylor presented no mental-condition evidence during either the guilt phase or the penalty phase of his trial. Nor did he notify the court of an intention to mount an insanity defense under Rule 12 (a) (1), or introduce evidence pertaining to Tennessee's mental-condition statutory mitigating circumstances. See T.C.A. § 39-2-203 (j) (2); T.C.A. § 39-2-203 (j) (8). At its case-in-chief during the penalty phase, the prosecution called Dr. John Filley, a psychiatrist formerly employed at the Middle Tennessee Mental Health Institute who had interviewed Richard Taylor in December of 1983 and January of 1984.[87] (Vol. 20, 377-79). Dr. Filley testified as follows:

> Q. Did you come to a conclusion as to whether the defense of insanity could apply in Mr. Richard Taylor's case?
> A. I did.
> Q. What was your conclusion?
> A. I felt it could not be applied.
> Q. Repeat that please.
> A. There was not grounds for an insanity defense.
> Q. Not grounds?
> A. Right.

[87] The record does not disclose whether Dr. Filley examined Richard Taylor pursuant to a defense request or pursuant to a *sua sponte* court order. As demonstrated infra, however, because Richard Taylor never placed his mental state at issue or produced any evidence relating to his mental condition, the circumstances under which Dr. Filley examined the defendant make no difference as a matter of law.

(Vol. 20, 379). Taylor did not offer any psychiatric evidence in response to Dr. Filley's testimony (and did not even cross examine Dr. Filley). Id.

Accordingly, the trial court committed reversible error under Rule 12.2 (c) by permitting the state to introduce Dr. Filley's testimony, and this Court must reverse.

Dr. Filley's testimony that Taylor was sane at the time of offense was entirely irrelevant and yet profoundly prejudicial and, thus, also violated Richard Taylor's rights under the Eighth and Fourteenth Amendments to the United States Constitution, Article I, Section 16 of the Tennessee Constitution, and the Tennessee Rules of Evidence. Rule 401 defines "relevant evidence" as any evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." TENN. R. EVID. 401. Rule 403 provides that evidence must be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." TENN. R. EVID. 403.[88] Insanity is a defense to a crime, not a mitigating circumstance. See, e.g., T.C.A. § 39-2-203 (j) (8) ("[t]he capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication *which was insufficient to establish a defense to the crime* but which substantially affected his judgment") (emphasis added)); Black's Law Dictionary 236 (7th ed. 1999) (defining mitigating circumstance as a "fact or situation that does not justify or excuse a wrongful act or offense but that reduces the degree of culpability and thus may reduce . . . the punishment"). See also Penry v. Lynaugh, 492 U.S. 302, 319 (1989) ("'[E]vidence about

[88] The Tennessee Supreme Court has stated that where a trial court abuses its discretion in allowing evidence under Rule 403, it will reverse. State v. McCary, 922 S.W.2d 511, 515 (Tenn. 1996). This Court has held that where no "material evidence exists to support the decision," the trial court has abused its discretion. State v. Jackson, 52 S.W.3d 661, 669 (Tenn. Crim. App. 2001). Because Dr. Filley's testimony had absolutely no probative value, there is no material evidence to support the trial court's admission of Dr. Filley's testimony and reversal is required.

the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.") (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring))); Zant v. Stephens, 462 U.S. 862, 885 (1983) (stating that mental illness short of insanity can be mitigating). If a capital penalty phase is convened, the issue of the defendant's sanity at the time of the offense is not in dispute and, therefore, evidence pertaining to the defendant's sanity is necessarily irrelevant.

Dr. Filley's gratuitous testimony – without a scintilla of relevance – was profoundly prejudicial. Dr. Filley's testimony that Richard Taylor was sane at the time of the offense – presented during the state's case-in-chief at the penalty phase – in essence indicated to the jury that the test of whether Taylor's mental condition was a mitigating circumstance was the same as the test of legal sanity. In State v. English, 367 So. 2d 815, 819 (La. 1979), the Louisiana Supreme Court held it was error to "indicate to the jury that the test of the [the state's diminished capacity] mitigating circumstance was the same as the test of legal insanity" because "by permitting the jury to consider the mental condition of the offender as a mitigating circumstance even though he was guilty . . . it is obvious to us that the legislature intended to permit the jury to take into consideration, in deciding not to impose the death penalty, an abnormal mental condition short of legal insanity." Id.

This testimony was highly prejudicial for another reason. As demonstrated in Point 13, infra,, the voir dire in this case contained virtually no exploration of the jurors' understanding of and ability to follow the law of mitigation. There is a constitutionally intolerable risk that Dr. Filley's testimony, while irrelevant, reinforced jurors' erroneous view that mental-condition

mitigation evidence must show insanity at the time of the offense to be considered. Cf. T.C.A. § 39-2-203 (j) (8); T.C.A. § 39-2-203 (j) (2). A recent study has demonstrated that even jurors who have sat on death-penalty cases often believe that mental condition evidence is mitigating only if it establishes insanity. See Ursula Bentele & William J. Bowers, How Jurors Decide on Death: Guilt Is Overwhelming; Aggravation Requires Death; and Mitigation Is No Excuse, 66 Brooklyn L. Rev. 1011, 1030-31 (2001). Examining interviews with 240 jurors from 58 capital trials in six states, the authors found that, contrary to the Eighth Amendment, "unless the evidence in mitigation either proves that the killing was not deliberate or furnishes an excuse for the killing, such as insanity or duress . . . it does not provide adequate reason [for jurors] to impose a sentence other than death." Id. at 1042.

Dr. Filley's testimony that Richard Taylor was sane at the time of the offense was entirely irrelevant and profoundly prejudicial, and thus its introduction was reversible error.

The trial court also violated Taylor's Fifth Amendment right against self-incrimination when it admitted Dr. Filley's testimony. In the seminal case of Estelle v. Smith, 451 U.S. 454, 466 (1981), the United States Supreme Court held that, where no Miranda waiver had been made and where the defendant does not introduce psychiatric evidence, the introduction of psychiatric testimony by the state violates the defendant's Fifth Amendment right against self-incrimination. See also Martin v. State, 950 S.W.2d 20, 24-25 (Tenn. 1997) (holding that Tennessee Rule of Criminal Procedure 12.2 (c)'s prohibition against the introduction of a defendant's statements during an examination pursuant to the rule (or fruits thereof), *except* in rebuttal or for impeachment, "safeguards defendant[s'] right[s] against self-incrimination under the United States and Tennessee Constitutions). Here, the state produced no evidence that Taylor waived

his right against self-incrimination prior to his interviews with Dr. Filley.[89] Furthermore, appellant produced no psychiatric evidence. Accordingly, the admission of Dr. Filley's testimony violated Taylor's rights under the Fifth Amendment and Article I, Section 9 of the Tennessee Constitution.

Further, if Dr. Filley examined Taylor pursuant to a defense request, allowing the prosecution to call the doctor violated Taylor's right to the attorney work-product privilege as established by Tennessee law as well as his right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 9 of the Tennessee Constitution. The United States Supreme Court has held that the work-product doctrine bars the state from presenting evidence prepared by a defense expert if the defendant does not offer the evidence. United States v. Nobles, 422 U.S. 225, 238-39 (1975); Hickman v. Taylor, 329 U.S. 495, 510-11 (1947). See also TENN. R. CRIM. P. 16(b)(2)(B) (exempting statements "made by the defendant to the defendant's *agents* or attorneys" from the reciprocal discovery requirement) (emphasis added). The Court's decision in Nobles must be read to ground the work-product privilege in the Sixth Amendment's right to counsel.[90] Therefore, by allowing the state to introduce Dr. Filley's testimony the trial court violated Taylor's right to

[89] Miranda v. Arizona, 384 U.S. 436, 475 (1966), holds that the government bears a "heavy" burden to show a waiver of constitutional rights. The state in this case made no attempt to meet this heavy burden.

[90] See Izazaga v. Superior Court, 815 P.2d 304, 323 (Cal. 1991) (Kennard, J., concurring) ("[a]lthough the United States Supreme Court has never expressly decided whether the attorney work-product privilege is founded on the federal Constitution, in . . . Nobles . . . it has strongly hinted that in criminal cases the privilege is grounded in the Sixth Amendment right to counsel"); State v. Mingo, 392 A.2d 590, 592 (N.J. 1978) ("it is essential that [the defense attorney] be permitted full investigative latitude in developing a meritorious defense"; this latitude would be too far proscribed, and the defendant's Sixth Amendment right thus violated, if "defense counsel must risk a potentially crippling revelation to the State of information discovered in the course of investigation which he chooses not to use at trial."); Hutchinson v. People, 742 P.2d 875, 876 (Colo. 1987) (same).

effective assistance of counsel and his right to the attorney work-product privilege under Tennessee law.

The introduction of Dr. Filley's testimony by the state during its case-in-chief at the penalty phase of Taylor's capital trial violated the clear mandates of the Tennessee Rules of Procedure and the Tennessee Rules of Evidence, as well as appellant's rights under the Fifth, Sixth, and Eighth Amendments to the U.S. Constitution and Article I, Sections 9 and 16 of the Tennessee Constitution. [91] Accordingly, this Court should vacate Taylor's death sentence and remand for a new penalty phase trial.

12. JUDGE HELDMAN COMMITTED NUMEROUS REVERSIBLE ERRORS WITH RESPECT TO THE PRIOR VIOLENT FELONY AGGRAVATING CIRCUMSTANCE CONTAINED AT T.C.A. § 39-2-204 (i) (2).

At Richard Taylor's trial, the prosecution sought to prove the aggravating circumstance that Taylor was convicted of a prior violent felony. See T.C.A. § 39-2-204 (i) (2). The prosecution introduced Richard Taylor's 1980 guilty plea to simple robbery as well as a copy of the indictment charging him with armed robbery. (Vol. 20, 376); Exh. 22. At the time of the Appellant's prior conviction, simple robbery was defined as follows: "the felonious and forcible taking from the person of another, goods or money of any value, by violence or putting the person in fear." T.C.A. § 39-2-501 (a) (1982) (repealed). In Taylor's first direct appeal, the Tennessee Supreme Court explained that: "The fear constituting an element of robbery is a fear of bodily injury and of present personal peril from violence offered or impending." State v.

[91] Furthermore, the numerous violations by the trial court in admitting Dr. Filley's testimony cannot satisfy the heightened reliability required by the Eighth Amendment of the United States Constitution as well as Article I, Section 16 of the Tennessee Constitution. The United States Supreme Court has held that, because of the qualitative difference between the death penalty and a sentence of life imprisonment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976). The Tennessee Supreme Court more recently echoed this sentiment in Van Tran v. State, 66 S.W.3d 790, 807 (Tenn. 2001).

Taylor, 771 S.W.2d 387, 398 (Tenn. 1989) (citing Sloan v. State, 491 S.W.2d 858, 861 (Tenn. Crim. App. 1973)).

The trial court instructed the jury as follows with respect to this aggravating factor:

> [T]he defendant was previously convicted of one or more felonies other than the present charge which involved the use or threat of violence to the person.
>
> In this case the State has introduced evidence that the defendant was convicted of simple robbery. Simple robbery is the felonious and forceful taking of goods or money from the person or presence of another by violence or putting the person in fear.
>
> The use of a deadly weapon is not an essential element of the offense of simple robbery. If a deadly weapon is used to commit the robbery, then the offense would be robbery by use of a deadly weapon for which a greater punishment is provided.

(Vol. 20, 405-6). The jury found this aggravating circumstance. (Vol. 20,412). ("The defendant was previously convicted of one or more felonies other than the present charge which involved the life [sic] or threat of violence to the person").

As demonstrated below, Judge Russ Heldman committed a number of reversible errors with respect to this aggravating circumstance by: (1) permitting the admission of the 1980 indictment for armed robbery although Taylor was only convicted of simple robbery; (2) erroneously instructing the jury that a prior conviction for a "threat of violence," instead of "use of violence," was sufficient to establish the aggravating circumstance; and (3) directing a verdict on whether Taylor's prior conviction involved the use of violence, or in the alternative, failing to instruct the jury on the correct definition of fear. The only constitutionally admissible proof, the evidence that Appellant was convicted of simple robbery, did not constitute proof beyond a reasonable doubt that Appellant's prior conviction "involved the use or threat of violence to the person" as required by T.C.A. § 39-2-203(i)(2). Appellant raised the legal insufficiency of the

evidence of this aggravating circumstance in his motion for a new trial. (Vol. 12, 1743-44). See also See also T.C.A. § 39-13-206 (c) (1) (B) (in reviewing death sentence, court "shall determine whether ... [t]he evidence supports the jury's finding of statutory aggravating circumstance or circumstances"). Because these errors were not harmless, reversal is required.

A. THE INTRODUCTION OF THE 1980 INDICTMENT FOR ARMED ROBBERY TO BE USED AS SUBSTANTIVE EVIDENCE TO PROVE THE AGGRAVATING CIRCUMSTANCE OF PRIOR VIOLENT FELONY VIOLATED RICHARD TAYLOR'S RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION, ARTICLE I, SECTION 16 OF THE TENNESSEE CONSTITUTION, AND THE CASE LAW OF THE TENNESSEE SUPREME COURT.

To prove the prior violent felony aggravating circumstance, T.C.A. § 39-2-204(i)(2), Judge Heldman permitted the prosecution to introduce a 1980 indictment charging Richard Taylor with *armed robbery*, even though his ultimate conviction was merely for *simple robber*y. See (Vol. 20, 376); Exhibit 32. The court's admission of the non-proven 1980 indictment as substantive evidence violated Richard Taylor's rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 16 of the Tennessee Constitution.

First, under the due process clause of the Fourteenth Amendment "guilt is to be established by probative evidence" "*not on grounds of* official suspicion, *indictment*, continued custody or other circumstances not adduced as proof at trial." Taylor v. Kentucky, 436 U.S. 478, 485-86 (1978) (emphasis added) (citing Estelle v. Williams, 425 U.S. 501, 503 (1976)). In Taylor, the Court made clear that an indictment does not constitute "probative evidence" at trial. 436 U.S. at 485. Here, the trial court violated Richard Taylor's state and federal rights to due process by permitting the prosecution to prove the aggravating circumstance contained at

T.C.A.§ 39-2-204 (i) (2) by introducing the non-proven (nor admitted to) 1980 indictment charging him with armed robbery.

Analyzing virtually identical facts to those presented here, the Tennessee Supreme Court recently found error when the trial court permitted the prosecution to prove this aggravating circumstance by introducing a prior indictment into evidence even though the defendant had been convicted of a lesser offense. See State v. Ivy, 188 S.W.3d 132, 154 (Tenn. 2006). The Court squarely held the introduction of the indictment improper:

> [T]he trial court erred in allowing the prosecution to introduce Ivy's prior indictment for first degree murder when Ivy's prior conviction was for second degree murder. *First, there is no authority allowing an offense charged in a prior indictment to be considered as an aggravating circumstance*. . . . Second, there is no authority allowing admission of a defendant's prior indictment simply because the prosecution is relying on a prior conviction stemming from that indictment to establish the "prior violent felony" aggravating circumstance under Tennessee Code Annotated section 39-13-204(i)(2). [T]he threshold question of whether a prior conviction satisfies the requirements of section 204(i)(2) is a question of law for the trial court and not a question of fact for the jury to decide.
>
> In addition, the prior indictment for first degree murder was *not "evidence" of the "facts and circumstances" of Ivy's prior conviction for second degree murder as required for admission under Tennessee Code Annotated section 39-13-204(c). An indictment is not evidence of an offense*. . . In sum, because a prior indictment is not evidence of a charged offense, *it cannot properly be considered "evidence of the facts and circumstances of [a] prior conviction.*"

Ivy, 188 S.W.3d at 154 (quoting T.C.A. § 39-13-204(c)) (emphasis added). Under Ivy, there can be no doubt but that the trial court erred in admitting Taylor's 1980 indictment into evidence.[92]

The trial court's admission of the 1980 armed robbery indictment also violated Taylor's rights under the Confrontation Clause of the state and federal constitutions. See U.S. Const.

[92] Without explicitly saying so, the Ivy court clearly overruled State v. Smith, 755 S.W.2d 757, 764 (Tenn. 1988) (permitting the introduction of non-proven (nor admitted to) indictment "in order to establish that each offense involved the use or threat of violence to the person").

amends. VI; XIV; Tenn. Const. art. I, § 9.[93] The indictment was a testimonial out-of-court statement admitted for the truth of the matter asserted in order to prove the aggravating circumstance contained at T.C.A.§ 39-2-204 (i) (2). The indictment – the prosecutor's "written accusation . . . drawn up and submitted to a grand jury by the public prosecuting attorney, investigated and adopted by that body, and presented upon oath by them to the court," State v. Davidson, 103 S.W.2d 22, 23 (1937) – is quintessential testimonial evidence. Its admission against Taylor violated his constitutional right to confrontation. See Crawford v. Washington, 541 U.S. 36, 68 (2004) ("Whatever else the term covers, [testimonial] applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations").[94]

In addition, the court's admission of the 1980 indictment, based on secret evidence before a grand jury which Taylor did not hear and to which he could not respond, violated his right to due process. Gardner v. Florida, 430 U.S. 349, 363 (1977) ("We conclude that petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain.").

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[93] The United States Supreme Court has squarely held that due process considerations apply to capital sentencing proceedings. Bullington v. Missouri, 451 U.S. 430, 446 (1981). See also Specht v. Patterson, 386 U.S. 605, 610 (1967) (emphasis added) ("Due process ... requires that [the defendant] be present with counsel, have an opportunity to be heard, be *confronted with witnesses against him*, have the right to cross-examine, and to offer evidence of his own [at sentencing proceedings.]"); State v. Stephenson, 195 S.W.3d 574, 590 (Tenn. 2006).

[94] Indeed, the admission of the indictment raises double hearsay problems because the allegation of the prosecutor, adopted by the grand jury, was not upon personal knowledge, but upon the hearsay allegations embodied in the testimony of the grand jury witnesses. While T.C.A.§ 39-2-204 (c) permits the introduction of hearsay at the sentencing phase, the statute prohibits "evidence secured in violation of the constitution of the United States or the constitution of Tennessee." Id. Reading the statute to permit hearsay introduced in violation of Crawford's Sixth Amendment protections would obviously render it unconstitutional.

Furthermore, admission of evidence of unadjudicated conduct violates the Sixth, Eighth Amendments and the corresponding provisions of the Tennessee Constitution because "a capital defendant cannot receive a fair sentencing hearing – governed by reliable procedures and free from prejudice – unless the introduction of these allegations is barred or, in the less-preferred alternative, severely restricted in its application." Steven Paul Smith, Note, Unreliable and Prejudicial: The Use of Extraneous Unadjudicated Offenses in the Penalty Phase of Capital Trials, 93 Colum.L.Rev. 1249, 1251 (1993); see also cases cited therein. See also Cook v. State, 369 So.2d 1251, 1257 (Ala. 1978) (presumption of innocence precludes use of unadjudicated offenses in capital sentencing); Commonwealth v. McCoy, 172 A.2d 795, 799 (Pa. 1961) (precluding admission of this evidence because it "would lead to the injection of collateral and diverting issues and [would] . . . produce confusion which could deprive an accused of the orderly trial to which he is entitled."); see also United States v. Bradley, 880 F.Supp. 271, 286-87 (M.D.Pa. 1994) (citing McCoy).

Accordingly, because the prosecution introduced substantive evidence of alleged unadjudicated misconduct in the form of a mere indictment, Richard Taylor's death sentence must be vacated and his case remanded for another penalty trial.

B. BECAUSE THE 1989 AMENDMENT TO THE AGGRAVATING CIRCUMSTANCE CONTAINED AT T.C.A. § 39-13-204 (I) (2) REDUCES THE POSSIBILITY OF A DEFENDANT RECEIVING A DEATH SENTENCE IF HE HAS A PRIOR FELONY CONVICTION INVOLVING MERELY THE "THREAT OF VIOLENCE," THE TRIAL COURT'S INSTRUCTION ON THE PRIOR LAW INCLUDING THIS PHRASE WAS ERROR AND THE JURY'S VERDICT A NULLITY.

Consistent with the court's charge on this aggravating circumstance, (Vol. 20, 405), the jury's verdict reflected a finding that Richard Taylor had "previously [been] convicted of one or more felonies other than the present charge which involved the life [sic] or *threat of violence to*

the person." (Vol. 20, 412) (emphasis added). The court's instruction setting forth this aggravating factor was error and the jury's verdict a nullity because the 1989 ameliorative amendment to the capital sentencing law limited the availability of the death penalty based on this aggravating circumstance to first-degree murderers with prior felony convictions "whose statutory elements involve the *use* of violence." T.C.A. § 39-13-204 (i) (2) (emphasis added).

Not all persons convicted of first-degree murder in Tennessee may be sentenced to death. Instead, the law states that "[n]o death penalty . . . shall be imposed but upon a unanimous finding that the state has proven beyond a reasonable doubt the existence of one (1) or more statutory aggravating factors." T.C.A. § 39-13-204 (i). Prior to 1989, one of the enumerated aggravating factors read as follows: "'The defendant was previously convicted of one or more felonies, other than the present charge, which involves *the use or threat of violence* to the person.'" State v. Moore, 614 S.W.2d 348, 351 (1981) (quoting T.C.A. § 39-2404 (i) (2) (repealed) (emphasis added)). [95] In 1989, the (i) (2) aggravating factor was amended to (to its present form) to read as follows: "The defendant was previously convicted of one (1) or more felonies, other than the present charge, whose statutory elements involve the *use of violence* to the person." T.C.A. § 39-13-2404 (i) (2) (emphasis added).

T.C.A. § 39-11-112 controls whether a new penal statute applies to offenses committed before the statute's enactment, and states as follows:

> Whenever any penal statute or penal legislative act of the state is repealed or amended by a subsequent legislative act, any offense, as defined by the statute or act being repealed or amended, committed while such statute or act was in full

[95] The designation of the enumerated aggravating circumstances within the Tennessee Code has changed over the years. A subsequent version was enacted as T.C.A. § 39-13-203 by Ch. 591, Pub. Acts 1989, and was redesignated as T.C.A. § 39-13-204 by Ch. 1038, § 3 Pub. Acts 1990. See State v. Brimmer, 876 S.W.2d 75, 81 n.2 (1994). In each of these versions of the law, the aggravating circumstance was contained at subdivision (i) (2). For convenience, this aggravating factor will sometimes be referred to as the (i) (2) aggravating factor.

> force and effect shall be prosecuted under the act or statute in effect at the time of the commission of the offense. Except as provided under the provisions of § 40-35-117,[96] *in the event the subsequent act provides for a lesser penalty, any punishment imposed shall be in accordance with the subsequent act.*

Id. (emphasis added).

Because the newer version of aggravating circumstance (i) (2) reduces, if not eliminates, the possibility of a defendant receiving a death sentence if he has a prior felony conviction involving merely the "threat of violence," the 1989 statute resulted in a possible lesser penalty for this class of offenders. Thus, the ameliorative proviso set forth in T.C.A. § 39-11-112 – requiring the application of the new statute to crimes predating it – applies.[97] Under T.C.A. § 39-11-112, the jury should have been instructed to render a verdict on the 1989 version of aggravating circumstance (i) (2), which is satisfied only

[96] "The provisions of Sentencing Commission Comments to T.C.A. § 40-35-117 and 118 [] indicate that first degree murder is excluded from the provisions of these sections." State v. Brimmer, 876 S.W.3d 75, 82 (1994). See also State v. Smith, 893 S.W.2d 908, 919 (Tenn. 1995) (citing Brimmer and relying on T.C.A. § 39-11-112 in lieu of provisions set forth in T.C.A. § 40-35-117).

[97] Cf. Smith, 893 S.W.2d at 919 (finding ameliorative proviso within T.C.A. § 39-11-112 did not apply to other part of 1989 amendment to capital sentencing law, which altered the procedure by under which the jury would decide the appropriate sentence, rather than the available punishment). One of the aggravating circumstances in the 1982 version of the capital sentencing law was that "the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind." T.C.A. § 39-2-203 (i) (5) (1982). The 1989 amended version provides that "the murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death." T.C.A. § 39-13-204(i)(5) (1991). The Tennessee Supreme Court has held that this 1989 amendment does not apply to crimes committed before its enactment. See State v. Cazes, 875 S.W.2d 253, 267 (1994). Unlike the amendment to the (i) (2) aggravating circumstance, however, the amendment to the (i) (5) aggravating circumstance was not obviously ameliorative because the change from "depravity of mind" to "serious physical abuse beyond that necessary to produce death" does not necessarily narrow the availability of the death penalty or lessen the punishment for first degree murder accompanied by depravity of mind. In any event, precedent is based on points argued and decided, and there is no indication that the Cazes court or any Tennessee appellate court has addressed this issue with respect to the (i) (5) aggravating circumstance.

when the previous felony conviction involves the *use* of violence, rather than the threat of violence.

The difference between the new and old version of these aggravating circumstances is critical. The record contains not a scintilla of evidence that Taylor's 1980 simple robbery conviction involved the actual use of violence. See also subsections (A), supra, and (E), infra. Indeed, in Taylor's first appeal, the Tennessee Supreme Court's affirmed solely upon the notion that Taylor's 1980 simple robbery involved the *threat* of violence. See Taylor, 771 S.W.2d at 398.

The result of the trial court's application of the wrong aggravating circumstance in this case was an erroneous jury instruction (Vol. 20, 405), and a death verdict predicated on an invalid aggravating circumstance. (Vol. 20, 412). Such a verdict is a nullity, precluding a sentence of death. See State v. Stephenson, 878 S.W.2d 530, 556 (1994) (finding death verdict based on wrong version of statute a "mere nullity").

C. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY DIRECTING A VERDICT ON THE ELEMENT OF WHETHER THE APPELLANT'S PRIOR CONVICTION INVOLVED THE USE OF VIOLENCE TO THE PERSON.

By instructing the jury that "[s]imple robbery is the felonious and forceful taking of goods or money from the person or presence of another by violence or putting the person in fear," the trial court in effect directed a verdict on the question whether the prior conviction "involve[d] the use or threat of violence to the person."[98]

[98] The arguments set forth in this subsection and subsections (D) and (E), infra, presuppose rejection of the argument set forth in subsection (B), supra. In that sense these are three alternative arguments. On the other hand, if the Court determines that the jury should have applied the 1989 version of the (i) (2) aggravating circumstance, that would only strengthen each of these arguments because "use of violence" is much more difficult to prove than "use" *or* "threat" of violence.

In directing a verdict on this issue, the trial court violated Richard Taylor's rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution as well as Article I, Section 16 of the Tennessee Constitution.

The United States Supreme Court's decisions in United States v. Gaudin, 515 U.S. 506, 512 (1995), and Ring v. Arizona, 536 U.S. 584, 589 (2002), dispose of this claim, and should compel this Court to reverse.[99] In Gaudin, as numerous courts have recognized and applied it, the Court set forth a clear syllogism – a defendant has a right to have a jury decide all elements of the offense and, therefore, when something is an element, a jury must decide whether it has been established. Under Gaudin a jury must decide *every* element of an offense, even if it is characterized as presenting a purely legal question, and courts may not direct verdicts on elements.[100]

In Ring, the United States Supreme Court held that capital defendants have a right under the Sixth and Fourteenth Amendments to have a jury decide whether the state has proven its aggravating factors beyond a reasonable doubt because aggravating factors operate as the functional equivalent of elements of an offense. Ring, 536 U.S. at 609. See also Sattazahn v. Pennsylvania, 537 U.S. 101, 111 (2003) (reiterating that aggravating factors are functional equivalent of elements). Thus, under Ring, for purposes of constitutional examination, aggravating factors are to be treated the same way as elements of a crime and must be found by the jury.

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[99] The Tennessee Supreme Court has previously rejected similar arguments resting on the Ring and Apprendi v. New Jersey, 530 U.S. 466, 497 (2000) line of cases. See, e.g., State v. Young, __ S.W.3d __, 2006 WL 1816310, * 20 (June 30, 2006 Tenn.)). It is not, however, clear that the Court had an opportunity to consider the arguments set forth here.

[100] Under current Supreme Court precedent interpreting the Sixth Amendment, the historical fact of the prior conviction need not be proven to a jury. See Ring, 536 U.S. at 597 n.4; Almendarez-Torres v. United States, 523 U.S. 224, 226-27 (1998). Here, the trial judge went beyond merely determining the historical fact of the prior conviction.

Accordingly, the trial court committed reversible error by using its jury instructions to direct a verdict that Richard Taylor's prior simple robbery conviction involved the threat or use of violence. (Vol. 20, 405-06). His death sentence must be vacated and his case remanded for a new penalty phase trial.

D. IN THE ALTERNATIVE, THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO INSTRUCT THE JURY THAT THE FEAR CONSTITUTING AN ELEMENT OF ROBBERY IS A FEAR OF BODILY INJURY AND OF PRESENT PERSONAL PERIL FROM VIOLENCE OFFERED OR IMPENDING.

Alternatively, if this Court somehow finds that the trial court did not direct a verdict on whether Taylor's prior simple robbery conviction involved the threat or use of violence, the trial court erred by failing to instruct the jury as to the meaning of "fear" in the definition of simple robbery. In its decision on Richard Taylor's previous direct appeal, the Tennessee Supreme Court ruled that: "The fear constituting an element of robbery is a fear of bodily injury and of present personal peril from violence offered or impending." State v. Taylor, 771 S.W.2d 387, 398 (Tenn. 1989) (citing Sloan v. State, 491 S.W.2d 858, 861 (Tenn. Crim. App. 1973)).

However, the simple robbery statute – forbidding forcible taking from another by violence or putting the person in fear, T.C.A. § 39-2-501 (a) (1982) (repealed) – and the aggravating circumstance – requiring a prior conviction involving "the use or threat of violence to the person," T.C.A. § 39-2-203 (i) (2) (repealed) – can be read not to be synonymous. The simple robbery statute does not require proof of the use or threat of violence to the person. And the trial court never explained to the jury that in order to find that the fear produced during the 1980 robbery constituted the use or threat of violence the jury had to find that the fear was "of bodily injury and of present personal peril from violence offered or impending." Taylor, 771 S.W.2d at 398. The court's instruction was error.

This Court recently held that the trial court has a duty to give a complete charge, "*defin[ing] the element[s] in connection with [the charged] offense,*" and that a defendant's right to such a complete charge is "constitutional" in nature. State v. Hawkins, __ S.W.3d __, 2006 WL 1703817, *17 (Tenn. Crim. App. June 21, 2006) (emphasis added).

The trial court in this case clearly failed to comply with this constitutional imperative. The court failed to instruct the jury that it had to find that the fear allegedly caused by the 1980 simple robbery was a fear "of bodily injury and of present personal peril from violence offered or impending" before the jury could find the aggravating circumstance contained at T.C.A. § 39-2-204 (i) (2). Accordingly, Richard Taylor's death sentence must be vacated and his case remanded for a new penalty phase trial.[101]

E. THE PROSECUTION FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE APPELLANT'S PRIOR SIMPLE ROBBERY CONVICTION "INVOLVED THE USE OR THREAT OF VIOLENCE TO THE PERSON," AS REQUIRED BY T.C.A. § 39-2-203 (I) (2) (REPEALED).

The prosecution failed to prove beyond a reasonable doubt that Appellant's prior simple robbery conviction "involve[d] the use or threat of violence to the person," as required by T.C.A.§ 39-2-203 (i) (2) (repealed). See Tenn. R. App. P. 13(e), and Jackson v. Virginia, 443

[101] Critically, at least one of the arguments in subsections (C) and (D), supra, must be valid. If the argument under subsection (C) is rejected, that could only mean that violence was not necessarily inherent in the fear the trial judge instructed the jury that Taylor caused with the 1980 robbery. Under that scenario, the argument under subsection (D) must be valid: if fear could be caused *without* the threat of violence, then the trial judge was required to so instruct the jury in connection with its explanation of the 1980 simple robbery, appropriately prompting the jury to decide whether the threat or use of violence was, in fact, present. On the other hand, if violence or the threat thereof *always* accompanies the fear caused in simple robbery, then the jury had no choice but to find the aggravating circumstance contained at T.C.A. § 39-2-204 (i) (2) under the court's instruction. Such a directed verdict – allowing the judge to make a finding clearly reserved for the jury under the Sixth Amendment – violated Ring, 536 U.S. at 609, and Gaudin, 515 U.S. at 522.

U.S. 307, 313-14 (1979). The prosecution merely introduced an indictment charging Appellant with armed robbery and a guilty plea to simple robbery. The admission of the indictment violated the Appellant's constitutional rights. See (A), supra. Thus, the only constitutionally admissible proof was that Appellant was guilty of simple robbery: "the felonious and forcible taking from the person of another, goods or money of any value, by violence or putting the person in fear." Tenn. Code Ann. § 39-2-501 (a) (1982) (repealed).

The prosecution failed to introduce proof beyond a reasonable doubt that Appellant's prior conviction involved the use of or threat of violence, but see State v. Taylor, 771 S.W.2d 387, 398 (Tenn. 1989) (rejecting this claim), much less the actual use of violence. See (B), supra.

F. REVERSAL IS REQUIRED BECAUSE THE STATE CANNOT MEET ANY OF ITS HARMLESS ERROR BURDENS, AND BECAUSE ONE OF THE ERRORS IS A STRUCTURAL ERROR, FOR WHICH HARMLESS ERROR ANALYSIS IS INAPPLICABLE.

As described more fully below, three different standards apply for the five different claims raised in this point. The claims raised in subsections (A), (B), and (E) are reversible under the new harmless error test set forth by the United States Supreme Court in Brown v. Sanders, __ U.S. __, 126 S.Ct. 884, 892 (2006). Furthermore, these errors, as well as the error demonstrated in subsection (D), are reversible because the prosecution cannot prove that the errors were harmless beyond a reasonable doubt. The court's error in directing a verdict (subsection (C)) is a structural error, not subject to harmless error analysis.

With respect to the claims contained in subsections (A), (B), and (E), the issue is whether the state can prove beyond a reasonable doubt that "one of the other sentencing factors enable[d] the sentencer to give aggravating weight to the same facts and circumstances." Brown v. Sanders, __ U.S. __, 126 S.Ct. 884, 892 (2006). See also id. ("If the presence of the invalid

sentencing factor allowed the sentencer to consider evidence that would not otherwise have been before it, due process would mandate reversal without regard to the rule we apply here."). These errors require reversal because the state cannot prove beyond a reasonable doubt that another sentencing factor would have enabled the jury to give aggravating weight to the constitutionally-inadmissible "evidence" that Taylor allegedly used a weapon during the 1980 prior simple robbery, or even to the simple robbery conviction itself (which should have been excluded from the jury's consideration altogether for the reasons set forth in subsections (B) and (E)).

While the Tennessee Supreme Court recently declined to apply Brown's harmless error standard in State v. Rice, 184 S.W.3d 646, 678 n.4 (Tenn. 2006), the Court only did so because it assumed that Brown always provides less protection than Tennessee provides with its traditional constitutional harmless error analysis. Id. This rationale is appropriate as far as it goes – when a federal constitutional guarantee provides less protection than a state provides under its own law, state courts are free to reject the federal standard and to impose their own. See, e.g., Michigan v. Long, 463 U.S. 1032, 1044 n.10 (1983). By contrast, however, a state may not apply lower protections than guaranteed by either the Fourteenth Amendment or those parts of the Bill of Rights guaranteed through selective incorporation of the Fourteenth Amendment (which include the Eighth Amendment's prohibition against cruel and unusual punishment). See Robinson v. California, 370 U.S. 660, 666 (1962). Thus, Richard Taylor is simultaneously entitled to the Tennessee harmless error standard when it provides greater protection and the federal standard whenever it provides greater protection. While it is clear that the state cannot prove that any of these errors were harmless beyond a reasonable doubt, that analysis is not black and white. Analysis under Brown, however, is black and white. The sentence of death must be set aside because the state clearly cannot prove beyond a reasonable doubt that any of the information

about the 1980 robbery (including the non-proven indictment for armed robbery) would have been before the jury but for the errors described in subsections (A), (B), or (E).

In any event, the state cannot prove beyond a reasonable doubt that the introduction of this evidence did not impact the jury's decision to impose a death sentence. The Tennessee Supreme Court has repeatedly held that the prior violent crime aggravating circumstance set forth in T.C.A. § 39-11-204 (i) (2) is "'more qualitatively persuasive and objectively reliable than others.'" State v. Odom, 137 S.W.3d 572, 582 (Tenn. 2004) (quoting State v. Howell, 868 S.W.2d 238, 261 (Tenn. 1993)); King v. State, 992 S.W.2d 946, 954 (Tenn. 1999) (same); State v. Boyd, 959 S.W.2d 557, 561 (Tenn. 1998) (same). Given the strength of this type of aggravating circumstance (when its admission is proper), and the prosecutor's reliance on it in arguing to the jury for the death penalty (Vol. 20, 374; 393-94), the state simply cannot prove, beyond a reasonable doubt, that the error in permitting the jury to consider the 1980 robbery conviction and the indictment charging armed robbery did not impact the jury's decision to return a death verdict.[102]

With respect to the instructional claim contained in subsection (D) the issue is whether the state can prove beyond a reasonable doubt that, absent the error, the jury would have returned a death verdict. Satterwhite v. Texas, 486 U.S. 249, 258 (1988); Ivy, 188 S.W.3d at 152. Again,

[102] See, e.g., State v. Johnson, 661 S.W.2d 854, 862 (Tenn. 1983) ("Accordingly, we find that the probability of prejudice from the [improper] introduction of the evidence . . . [evidence of grand larceny and attempted auto burglary] is so great as to require a reversal of the death sentence," despite presence of murder conviction, which was properly admitted to prove this aggravating circumstance); State v. Adkins, 653 S.W.2d 708, 716 (Tenn. 1983) (finding introduction of two felonies which were not violent and did not qualify as (i) (2) factors, and other error, not harmless and reversible, despite proper introduction of prior felony murder to show this aggravating circumstance); Cozzolino v. State, 584 S.W.2d 765, 767-68 (Tenn. 1979) (finding reversible error where court "permit[ed] the State to introduce, in its case in chief, evidence that the defendant committed crimes subsequent to the murder [because] this evidence was not relevant to the proof of the presence or absence of any statutory aggravating circumstance or mitigating factor").

the state cannot meet this burden. There is no possible way to determine whether, absent this error, the jury would have returned a death verdict.

With respect to the error set forth in section (C), supra, although Tennessee courts have previously applied traditional constitutional harmless error analysis to similar errors, Ivy, 188 S.W.3d at 152, United States Supreme Court precedent establishes that the court's error in directing a verdict that Richard Taylor's 1980 simple robbery crime involved the use or threat of violence is a structural error, not subject to harmless error analysis. See Rose v. Clark, 478 U.S. 570, 578 (1986) (holding that "harmless-error analysis would not apply if a court directed a verdict for the prosecution in a criminal trial by jury"); Neder v. United States, 527 U.S. 1, 17 n.2 (1990) ("We have no hesitation reaffirming Rose['s]" statement that harmless error analysis does not apply to a directed verdict); Powell v. Galaza, 328 F.3d 558, 566-67 (9th Cir. 2003). In any event, for the reasons already described, the state cannot prove beyond a reasonable doubt that the court's error in directing the jury that the 1980 robbery involved violence did not impact the jury's decision to impose the death penalty.

Taylor's motion for a new trial challenged the legal insufficiency of the evidence of this aggravating circumstance. See Vol. 12, 1743-44 (¶ 66). See also T.C.A. § 39-13-206 (c) (1) (B) (in reviewing death sentence, court "shall determine whether ... [t]he evidence supports the jury's finding of statutory aggravating circumstance or circumstances"). That issue is certainly preserved for appellate review. As explained in the section of this brief addressing preservation, this error and all of the other errors raised in this point must be reviewed for three additional reasons: (1) the plain error rule; (2) the common law, fundamental error rule; and (3) the fact that this is a capital case in which Richard Taylor's life hangs in the balance.

This Court must vacate Richard Taylor's death sentence and remand for a new capital penalty trial.

13. JUDGE HELDMAN COMMITTED NUMEROUS REVERSIBLE ERRORS BY DENYING APPELLANT'S MOTIONS FOR NEW TRIAL.

As demonstrated below, the trial court committed reversible errors by denying Richard Taylor's motions for a new trial in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article 1, Sections 8, 9, 10, 13, 16, and 32 of the Tennessee Constitution, as well as the other authorities cited herein.

On May 3, 2004, Richard Taylor filed a motion for a new trial setting forth numerous claims. (Vol. 12, 1706). On November 15, 2004, Taylor filed a supplemental motion for a new trial setting forth his prosecutorial misconduct claims and a number of trial error claims. (Vol. 14, 1957). On February 14, 2005, he filed a second supplemental motion for a new trial in which he set forth various jury selection claims and additional trial error claims. (Vol. 14, 1990). In responding to these motions, the state argued that some of the claims were procedurally barred because of the lack of objection at trial. On July 19, 2005, in a cursory written order, the trial court denied *on the merits* all of the claims in Taylor's motions for a new trial. (Vol. 15, 2061). See also State v. Faulkner, 154 S.W.3d 48, 58 (Tenn. 2005) (issues can be raised for first time in motion for new trial); State v. Lynn, 924 S.W.2d 892, 898-899 (Tenn. 1996) (same).

The trial court committed numerous reversible errors by denying Richard Taylor's motions for new trial. Many of the issues raised in the appellant's motions for new trial are addressed elsewhere in this brief and those demonstrations of error are incorporated herein. In the interests of brevity, appellant limits this brief section to claims not addressed elsewhere.

A. JUDGE HELDMAN FAILED TO ENSURE THAT RICHARD TAYLOR RECEIVED A FAIR TRIAL BY PERMITTING NUMEROUS TRIAL

ERRORS IN VIOLATION OF TAYLOR'S CONSTITUTIONAL RIGHTS, INCLUDING HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL

The numerous trial errors by the trial court, described in the sections below and throughout this brief, individually and cumulatively,[103] denied Richard Taylor's constitutional rights identified above as well as the other authorities cited herein. *Pro se* defendants forfeit the advice and advocacy of counsel. They do not, however, forfeit their fundamental rights to a fair trial. See U.S. Const. amend. XIV; Tenn. Const. art. I, § 9. The trial judge, alone, is charged with ensuring a fair trial. Nowhere is a trial judge's obligation to ensure a fair trial more important than in a capital trial. And nowhere is such protection more necessary than where, as here, a forcibly-medicated and mentally ill defendant attempts to represent himself.

"Implicit in the Constitutional rights to a fair trial and self-representation is a requirement that the judge take minimal steps to ensure that the defendant is aware of the basic rights he may

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[103] Walker v. Engle, 703 F.2d 959, 963 (6th Cir. 1985) ("Errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair."); State v. Brewer, 932 S.W.2d 1, 28 (Tenn. Crim. App. 1996) ("It is well recognized that while individual errors may not require relief, the combination of multiple errors may necessitate the reversal of a conviction."); State v. Cribbs, 967 S.W.2d 773, 789 (Tenn. 1998) ("[T]he combination of multiple errors may necessitate the reversal of a death penalty even if individual errors do not require relief."); State v. Bigbee, 885 S.W.2d 797, 812 (Tenn. 1994) ("Though each of the errors discussed above might have been harmless standing alone, we find that, considered cumulatively . . . [they] affected the jury's sentencing determination to the defendant's prejudice."); State v. Hambrick, 2000 WL 823467, at *12 (Tenn. Crim. App. 2000) ("[E]ven if the convictions were not reversed on the basis of any particular assigned error, the sum of these concerns questions the reliability of the verdict and necessitates a new trial."). See also Malek v. Fed. Ins. Co., 994 F.2d 49, 55 (2d Cir. 1993) ("Although each of the erroneous evidentiary rulings discussed above, standing alone, may be insufficient to justify reversal, we cannot say that the cumulative effect is harmless"); United States v. Sepulveda, 15 F.3d 1161, 1195-96 (1st Cir. 1993) (same); Alvarez v. Boyd, 225 F.3d 820, 824 (7th Cir. 2000) ("Trial errors which in isolation are harmless might, when aggregated, alter the course of a trial so as to violate a petitioner's right to due process of law."); United States v. Riddle, 103 F.3d 423, 434-35 (5th Cir. 1997) (cumulative effect of errors in which trial court abused its discretion prejudiced the defendant). See also Kyles v. Whitley, 514 U.S. 419, 437 (1995) (materiality of withheld Brady material must be assessed by considering its cumulative effect); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (Eighth Amendment requires heightened reliability in death penalty cases).

exercise in his effort to represent himself at trial." Myron Moskovitz, Advising the *Pro Se* Defendant: The Trial Court's Duties Under Faretta, 42 Brandeis L.J. 329, 346 (2004) (herein after "Trial Court's Duties Under Faretta"). See also U.S. Const. amend. IV; VIII; XIV; Tenn. Const. art. I, §§ 8, 9, 16, 32. Even though Judge Heldman concluded that Taylor could proceed *pro se*, he also should have protected Taylor's rights to a fair trial. He failed to do so and, therefore, this Court should reverse.

B. THE TRIAL COURT ERRED BY PERMITTING THE JURY TO VIEW TAYLOR IN HIS PRISON GARB AT TRIAL

Almost thirty years ago, the United States Supreme Court held that the government "cannot, consistently with the Fourteenth Amendment, compel an accused to stand before a jury while dressed in identifiable prison clothes." Estelle v. Williams, 425 U.S. 501, 513 (1976). Here, the government did just that to Richard Taylor when, without any identified correctional interest, it displayed Taylor in a prison jump suit and, apparently, shackles[104] in front of the jury. Forcing Taylor to stand trial in this conspicuous prison garb violated his constitutional rights to due process of law and to the presumption of innocence. Accordingly, his conviction, obtained in violation of these indispensable rights and his rights under the Eighth Amendment and its Tennessee analogues, cannot stand. See U.S. Const. amends. VIII; XIV; Tenn. Const. art. I, §§ 8, 9, 16; Estelle, 425 U.S. at 503.[105]

[104] At the hearing on Taylor's motion for a new trial, defense counsel proffered testimony by a witness that would show that Taylor "appeared in open court in front of the jury during the trial in prison garb and shackled." Vol. 23, 37. Judge Heldman, however, declined to hear this testimony, and accordingly, the record is silent about whether Taylor was shackled in front of the jury.

[105] This issue was raised in the Motion for New Trial. (Vol. 12, 1742).

When a criminal defendant stands before the jury in readily-identifiable prison garb, this is "constant reminder of the accused's [incarcerated] condition." 425 U.S.at 504. Such a reminder is not lost on jurors, whose judgment is likely to be thereby influenced. Id. Indeed, such readily-identifiable prison garb "is so likely to be a continuing influence throughout the trial that, not unlike placing a jury in the custody of deputy sheriffs who were also witnesses for the prosecution, an *unacceptable risk* is presented of impermissible factors coming into play." Id. at 505 (citing Turner v. Louisiana, 379 U.S. 466, 473 (1965) (emphasis added)).

This case presents the unique circumstance where an attorney was not responsible for any decision about whether his or her client would don prison garb in front of the jury. [106] Representing himself and without standby counsel, only Taylor could make a decision on this issue. But Taylor could not make a strategic decision to wear or not wear prison garb without first knowing that he had a right to appear in civilian clothing. Although Judge Heldman informed Taylor that he was not required to wear the same prison uniform he had been wearing for more than twenty years, he did so only *after* Taylor had appeared before the jury in prison garb. (Vol. 19, 107-08). Switching to civilian clothing at that point would have been a futile gesture. The bell could not be unrung. The extremely dangerous impression wearing a prison uniform created could not be erased. To uphold due process of law for Taylor as he proceeded *pro se* and to guarantee his right to a fair trial, Judge Heldman was required to inform Taylor

[106] The element of compulsion in the Estelle rule derives from the fact that "it is not an uncommon defense tactic to produce the defendant in jail clothes in the hope of eliciting sympathy from the jury." Estelle, 425 U.S. at 508. Thus, a "defendant and his attorney [have] the burden to make known that the defendant desire[s] to be tried in civilian clothes before the state [can] be accountable for his being tried in jail clothes." Id. (internal quotations omitted). The right to appear in civilian clothing is amongst those decisions "for which [the lawyer] bears the ultimate responsibility, [and] will ordinarily be binding [on the defendant], even though important constitutional rights may be lost." Ennis v. LeFevre, 560 F.2d 1072, 1075 (2d Cir. 1977) (collecting Estelle and other cases).

before he appeared before the jury that he could appear in civilian clothing. See, e.g., Moskovitz, Trial Court's Duties Under Faretta, 42 Brandeis L.J. at 341 (listing amongst the rights judges should advise *pro se* defendants the right to appear in civilian clothing). Without possessing this information, it simply cannot be concluded that it was a strategic decision by Taylor to remain in prison garb. Thus, in these circumstances, the trial court committed reversible error.

C. THE TRIAL COURT ERRED AT THE GUILT-INNOCENCE PHASE BY PERMITTING THE INTRODUCTION OF VICTIM-IMPACT EVIDENCE AND OTHER HIGHLY PREJUDICIAL EVIDENCE

Richard Taylor's constitutional rights identified above were violated when the trial court permitted the prosecution to introduce highly prejudicial evidence at the guilt-innocence phase, including the victim-impact testimony of Ronald Moore's sister Lenjoy Wilsdorf and inmates Howard Wayne Patterson, Jeff Garnder, Michael Compton, and Robert Hodson. (Vol. 19, 114-16, 140, 149, 159, 185; vol. 20, 325, 337).

The highly prejudicial and irrelevant victim impact testimony at the guilt-innocence phase came on direct examination from Mr. Moore's sister and from prison inmates:

· Ronald Moore's sister Lenjoy Wilsdorf testified on direct examination that Mr. Moore was her guardian and partial parent and that he was in the Army National Guard and the rescue squad. (Vol. 19, 114). She also testified that she learned of her brother's death when she was 16 years old from three men who came to the door. The prosecutors displayed on a projector a postmortem photograph of her brother Ronald Moore and asked Ms. Wilsdorf to identify her brother from that photograph. (Vol. 19, 115). The deliberate soliciting of grief from Ms. Wilsdorf clearly constitutes error.

· Four inmates testified to the good character of Ronald Moore. Inmate Howard Wayne

Patterson testified that Ronald Moore was “one of my best friends”; “he’s good people”; “he talked about his wife and he’s fixing to have a child . . . he was wanting to better himself, and he went by the book.” (Vol. 19, 159). Inmate Jeff Garner testified that Ronald Moore was “a pretty good feller . . . pretty nice” and that he discussed his military experience with Garner. (Vol. 19, 140). Inmate Michael Compton testified that Ronald Moore was “a decent officer . . . strictly by the rules,” (Vol. 19, 149), and inmate Robert Hodson testified that Ronald Moore was “by the book” and enforced the rules. (Vol. 19, 185).

Separately and combined, it was error for the trial court to permit the prosecutors to introduce this highly prejudicial victim impact testimony at the guilt-innocence phase of the trial. The testimony of Ms. Wilsdorf and the four inmates regarding Mr. Moore's fine character and his importance to them personally was not relevant to any issue to be resolved at the guilt-innocence phase and thus was inadmissible under Rule 401 of the Tennessee Rules of Evidence. Moreover, any probative value was vastly outweighed by the extreme prejudicial effect and thus admission of the testimony violated Rule 403 of the Tennessee Rules of Evidence. Indeed, the prejudicial effect was sufficiently prejudicial to violate Richard Taylor’s due process rights under the Fourteenth Amendment to the United States Constitution and Article I, Section 8 of the Tennessee Constitution. See Payne v. Tennessee, 501 U.S. 808, 825 (1991) (introduction of victim-impact information may not be "so unduly prejudicial that it renders the trial fundamentally unfair" under the due process clause).[107] See also Armstrong v. State, 826 P.2d 1106, 1116 (Wyo. 1992) ("[c]onsideration of victim-impact testimony or argument remains

[107] See also id. at 835 (O'Connor, J., concurring) ("[w]e do not hold today that victim impact evidence must be admitted or even that it should be admitted . . . If, in a particular case, a witness' testimony or a prosecutor's remark so infects the sentencing proceeding as to render it fundamentally unfair, the defendant may seek appropriate relief under the Due Process Clause of the Fourteenth Amendment.").

inappropriate during proceedings determining the guilt of an accused."); Barnes v. State, 858 P.2d 522, 534 (Wyo. 1993) (victim impact statements at the guilt-innocence phase are "absolutely *irrelevant* with respect to the issues before the jury."); Ex parte Rieber, 663 So. 2d 999, 1005 (Ala. 1995) (finding that victim impact evidence was "not relevant with respect to the question of his guilt or innocence and, therefore, that it was inadmissible in the guilt-innocence phase of the trial."); Wayne A. Logan, Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials, 41 ARIZ. L. REV. 143, 144 (1999) (use of victim impact evidence during the guilt-innocence phase contradicts rationale of Payne).

The trial court also erred by permitting the prosecutors to introduce testimony from Department of Corrections employee Ricky Bell (current Warden of Riverbend Maximum Security Institution) that correctional officer Ronald Moore was "murdered" on August 29, 1981, and testimony from inmate Robert Hodson that the killing of Mr. Moore was a "murder." (Vol. 19, 122-23; 189). The question of whether Mr. Moore was "murdered" was a matter for the jury to decide, not the proper subject of opinion testimony by a fellow correctional officer or an inmate. Furthermore, these lay witnesses could not give this opinion testimony under the Tennessee Rule of Evidence 701 (governing the opinion testimony of lay witnesses) as well as Taylor's constitutional rights as identified above.

The trial court further erred by permitting the prosecutors to introducie testimony from Ricky Bell that he was told that Richard Taylor "was the one who committed the murder." (Vol. 19, 124-125). This testimony also violated Tenn. Rule of Evidence 701 and Taylor's constitutional rights. In addition, the testimony was inadmissible hearsay and violated Taylor's right to confront all witnesses against him. See Tenn. R. Evid. 801, 802; Crawford v.

Washington, 541 U.S. 36, 68 (2004) (introduction of out-of-court, testimonial evidence violates defendant's right to confront all witnesses against him).

D. THE PROSECUTOR ENGAGED IN REPEATED AND PERVASIVE MISCONDUCT IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS.

As shown below, prosecutorial misconduct permeated the trial in this case. This misconduct violated Taylor's rights to due process, a fair trial and to be free of cruel and unusual punishment as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 8, 9 and 16 of the Tennessee Constitution.[108]

In considering this claim, this Court should recognize that society's interest in fair trials "impose[s] a special obligation on the trial court to protect a *pro se* defendant from an overreaching prosecutor who tries to take advantage of a defendant's lack of legal knowledge...." Myron Moskovitz, Advising the Pro Se Defendant: The Trial Court's Duties under Faretta, 42 Brandeis L.J. 329, 339 (2004) (citing California v. Barnum, 64 P.3d 788, 799 n.4 (Cal. 2003). See also Massachusetts v. Sapoznik, 549 N.E.2d 116 (Mass. App. Ct. 1990)):

> We are not ruling that a judge must become a lawyer for an unrepresented defendant. In this case, however, the judge should have recognized very early in the trial that the prosecutor was engaging in improper tactics and taking advantage of the defendant's unrepresented status. The judge should have promptly intervened, not to be of assistance to the defendant, but to assert a judge's traditional role of making sure that all the parties receive a fair trial.

Id. at 120 n.4.

Presentation of False and/or Misleading Testimony. **T**he prosecutors engaged in misconduct in presenting the victim-impact testimony of inmates Garner, Compton, Patterson and

[108] These various prosecutorial misconduct issues were raised in the Motion for New Trial (Vol. 12, 1742-43), the Supplemental Motion for New Trial (Vol. 14, 1958-65), and the Second Supplemental Motion for New Trial. (Vol. 14, 1998-99).

Hodson described above because the prosecutors knew or should have known that their victim-impact testimony was false and/or highly misleading. Napue v. Illinois, 360 U.S. 264, 269-70 (1959) (prosecution commits reversible error by knowingly presenting false evidence); Dupart v. United States, 541 F.2d 1148, 1150 (5th Cir. 1976) (reversible error under Napue to present highly misleading evidence). Mr. Moore was on probation for insufficient performance and poor attendance at the time of the killing[109] but nonetheless the prosecutors presented, without correction, the false and/or highly misleading testimony of these inmates.

The prosecutors committed misconduct by introducing testimony from Ricky Bell that the environment at the Turney Center in August 1981 was "like a college campus at the time" (Vol. 19, 120) when the state was aware that a prison expert who visited the Turney Center a few weeks before the death of Ronald Moore described it as a "death trap." The prosecutors knew or should have known that this testimony was false and/or highly misleading. Napue v. Illinois, 360 U.S. 264, 269-70 (1959).

Prosecutorial Misconduct In Closing Argument. In State v. Goltz, 111 S.W.3d 1 (Tenn. Crim. App. 2003), this Court found that, within closing argument, five general areas of prosecutorial misconduct are recognized:

> 1. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.
> 2. It is unprofessional conduct for the prosecutor to express his [or her] personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant. See State v. Thornton, 10 S.W.3d 229, 235 (Tenn. Crim. App. 1999); Lackey v. State, 578 S.W.2d 101, 107 (Tenn. Crim. App. 1978); TENN.CODE OF PROF'L RESPONSIBILITY DR 7-106(c)(4).
> 3. The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury. See [State v.] Cauthern, 967 S.W.2d [726,] 737 (1998); State v. Stephenson, 878 S.W.2d 530, 541 (Tenn.

[109] See, e.g., Taylor v. State, No. 01C01-9709-CC-00384, 1999 WL 512149, at *6 (Tenn. Crim. App. July 21, 1999), regarding the testimony of Sheriff Frank Atkinson.

1994).

4. The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict. See Cauthern, 967 S.W.2d at 737; State v. Keen, 926 S.W.2d 727, 736 (Tenn. 1994).
5. It is unprofessional conduct for a prosecutor to intentionally refer to or argue facts outside the record unless the facts are matters of common public knowledge. (111 S.W.3d at 6 (quoting STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION §§ 5.8-5.9 Commentary (ABA Project on Standards for Criminal Justice, Approved Draft 1971))).

Id. at 6.

The prosecutors committed misconduct by arguing to the jury in the sentencing phase closing argument that Ronald Moore, "lying out in a grave," "calls out to you for justice." This argument was in direct violation of the United States Supreme Court's holding in Payne v. Tennessee, 501 U.S. 808, 825 (1991) (introduction of victim-impact information may not be "so unduly prejudicial that it renders the trial fundamentally unfair" under the due process clause).

The prosecutor also committed misconduct by arguing in the sentencing phase closing argument that it was his "duty" to ask the jurors to sentence Richard Taylor to die. (Vol. 20, 391). The prosecutor has no duty or obligation to seek the death penalty or to urge a jury to return a death verdict. The prosecutor in suggesting otherwise improperly diminished the jurors' responsibility for deciding whether Richard Taylor would live or die. See Caldwell v. Mississippi, 472 U.S. 320, 336 (1985); State v. West, 767 S.W.2d 387, 398-99 (Tenn. 1989) (Caldwell applies to any diminishing of the jury's responsibility in its decision on life or death); Gray v. State, 235 S.W.2d 20, 24 (Tenn. 1950) (pre-Caldwell case in which the prosecutor improperly argued that if the jury made a mistake, it could be corrected on appeal). The court erred in not striking the argument and admonishing the jury accordingly.

The prosecutors next committed misconduct by arguing in closing argument at the sentencing phase that the jurors should consider the victim impact evidence introduced at the guilt-innocence phase when deciding Taylor's sentence. (Vol. 20, 394-396).

Importantly, the prosecutor committed misconduct by arguing in the sentencing phase closing argument that "there are few or none" mitigating factors in this case. (Vol. 20, 392). The state knew or should have known that there were the substantial mitigating evidence in the case. Napue v. Illinois, 360 U.S. 264, 269-70 (1959). Judge Russell, for example, pointed to Taylor's "family history of mental problems, a difficult upbringing, and a long history of diagnosed mental problems." Vol. 3, 167 (July 21, 1999, Opinion of this Court, affirming trial court's vacatur of conviction and sentence).[110] Further, the prosecutors were aware that all mental health professionals involved in the retrial had determined that Taylor is profoundly mentally ill and suffers from schizophrenia. The court erred in not striking the argument and admonishing the jury accordingly.

Prosecutorial Misconduct In Opening Statement. Given the finding that Taylor was incompetent made by the post-conviction Court and this Court, it violated Taylor's constitutional rights identified above for the prosecutor to state in opening argument, and for the court to fail to instruct the jury to disregard the statement, that when Taylor was advised of his rights not to talk with interrogators "he understood those rights" and "showed absolutely no remorse." (Vol. 18, 97). Napue v. Illinois, 360 U.S. 264, 269-70 (1959).

This Prosecutorial Misconduct Mandates Reversal. When an appellate court finds an

[110] At the first trial the presiding court found pursuant to Rule 12 of the Tennessee Supreme Court Rules that several mitigating circumstances were present, including: Richard Taylor suffers from an extreme mental or emotional disturbance, he was young at the time of the offense, he suffers from a mental disease or defect, he was misclassified by the Tennessee Department of Corrections, he received inadequate medical treatment, and that he was a neglected and abandoned child.

argument improper, "the established test for determining whether there is reversible error is whether the conduct was so improper or the argument so inflammatory that it affected the verdict to the Appellant's detriment." State v. Goltz, 111 S.W.3d 1, 5 (Tenn. Crim. App. 2003) (citing Harrington v. State, 385 S.W.2d 758, 759 (Tenn. 1965)). In measuring the prejudicial impact of an improper argument, this Court should consider the following factors: "(1) the facts and circumstances of the case; (2) any curative measures undertaken by the court and the prosecutor; (3) the intent of the prosecution; (4) the cumulative effect of the improper conduct and any other errors in the record; and (5) the relative strength or weakness of the case." Goltz, 111 S.W.3d at 5-6 (citing Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976)). See also State v. Buck, 670 S.W.2d 600, 609 (Tenn. 1984). These factors also compel reversal. The facts and circumstances of this case are that Richard Taylor was heavily and forcibly sedated during a trial at which he went *pro se*. There were no curative measures undertaken by the court or the prosecutor. The prosecutor's intent was clearly to obtain a conviction and death sentence against a heavily and forcibly sedated *pro se* defendant. The cumulative effect of the improper misconduct and the numerous other errors demonstrated in this brief clearly support reversal. Furthermore, the state's case was extraordinarily weak both with respect to a conviction for first-degree murder given that Richard Taylor was incapable of premeditation and with respect to the appropriateness of a death sentence. This Court should reverse.

E. APPLICATION OF THE "CORRECTIONS OFFICER" AND "LAWFUL CUSTODY" AGGRAVATING CIRCUMSTANCES WAS UNCONSTITUTIONAL

Application of the "corrections officer" aggravating circumstance, Tenn. Code Ann. § 39-3-204(I)(9), was unconstitutional because Richard Taylor was insane at the time of the offense and could therefore not formulate the intent required by this statute. Further, application of this

aggravator violated due process and Eighth Amendment heightened reliability requirements under the circumstances of this case since the corrections investigation into the offense resulted in findings that Richard Taylor was deprived of appropriate psychiatric care and that Ronald Moore was insufficiently trained. It is fundamentally unfair for the state to create the circumstances which led to this offense and then use those circumstances to justify a death sentence.[111]

Application of the murder while in "lawful custody" aggravating circumstance, Tenn. Code Ann. § 39-3-204(I)(8), violated due process and Eighth Amendment heightened standard requirements under the circumstances of this case since corrections investigation resulted in findings that the TDOC deprived Richard Taylor of appropriate psychiatric care and insufficiently trained Ronald Moore. Following this offense and the investigation into the appalling conditions at the Turney Center, the prison was razed and rebuilt and changes were implemented to improve the correctional system. Applying this aggravating circumstance is fundamentally unfair when the prison system's treatment of Taylor – both before and following the offense – has been so egregious.

Taylor's rights to due process, reliable capital sentencing, and to be free from double jeopardy were violated by the application of both the (I)(8) and (I)(9) aggravating circumstances. As applied in this case, the state used the same factual basis to support both aggravating circumstances. Thus, the additional aggravating circumstance added unfair weight to the scale in the balance of mitigating and aggravating circumstances.

F. APPELLANT'S RIGHTS TO A SPEEDY TRIAL WERE VIOLATED.

[111] This issue was raised in the Motion for New Trial. (Vol. 12, 1744-45).

Richard Taylor had both a constitutional and statutory right to a speedy trial. U.S. Const. amends. VI, XIV; Tenn. Const. art. I, §9. See also T.C.A. § 40-14-101 ("In all criminal prosecutions, the accused is entitled to a speedy trial . . . ."). As shown below, the State of Tennessee violated that right.[112] Therefore, his conviction must be reversed and rendered.

"The speedy trial guarantee is designed to protect the accused from oppressive pre-trial incarceration, the anxiety and concern due to unresolved criminal charges, and the risk that the accused's defense will be impaired by dimming memories or lost evidence." State v. Simmons, 54 S.W.3d 755, 758 (Tenn. 2001) (citing Doggett v. United States, 505 U.S. 647, 654 (1992); State v. Utley, 956 S.W.2d 489, 492 (Tenn. 1997)).

Under Barker v. Wingo, 407 U.S. 514, 534 (1972), a court must consider four factors in determining whether a defendant has been denied his right to a speedy trial: (1) the length of delay; (2) the reason for the delay; (3) whether, when, and how the defendant asserted his right to a speedy trial; and (4) whether the defendant was prejudiced by the delay.

(1) **Length of delay**. "Generally, post-accusation delay must approach one year to trigger a speedy trial inquiry." Simmons, 54 S.W.3d at 759 (citing Doggett, 505 U.S. at 652 n.1; Utley, 956 S.W.2d at 494). Here, the delay was twenty-two years. Taylor was charged with capital murder in 1981. (Vol. 18, 13). He was first tried for tried capital murder in 1984. (Vol. 6, 695). That conviction was set aside in 1997. (Vol. 6, 694). He was not retried until 2003. This factor weighs heavily in favor of the appellant.

(2) **The reason for the delay**. Judge Russell determined that Taylor was incompetent to stand trial in 1997. (Vol. 6, 712). His opinion was affirmed by the Court of Appeals in 1999. (Vol. 6, 722). Despite this finding of incompetency, the state made no attempt to treat Taylor's

[112] This issue was raised in the Motion for New Trial. (Vol. 12, 1734).

mental condition. In May of 2000, the trial court finally *ordered* the state to examine Taylor. (Vol. 6, 722). Taylor was not transferred to the state facility for treatment until 2001. The delay between 1997 and 2001 is explained only by the institutional bias of the prison system against Taylor. See Mot. for a New Trial at ¶ 42; Vol. 4, 510-511 (state hospital stating that they do not wish to accept Taylor for admission); June 22, 1996 Aff. of Sgt. Dale Hunt, (Vol. 3, 350). This factor weighs very heavily in favor of appellant.

(3) **Whether, when and how the defendant asserted his right to a speedy trial.** At a May 8, 2002, hearing,Taylor asserted: "I have asked for a fast and speedy trial, they haven't performed this." (Vol. 29, 4). On August 1, 2000, Taylor filed a motion in limine for "Rule 48 Dismissal" "due to the `unnecessary delay in bringing a defendant to trial.'" (Vol. 4, 477). In October 2000, counsel filed a motion to dismiss the indictment, based upon several grounds, including that "it is a violation of his due process rights to hold him for an indefinite time in the future to determine whether or not he ever becomes competent to stand trial." (Vol. 4, 491). This factor weighs heavily in favor of appellant.

(4) **Whether the defendant was prejudiced by the delay.** "Prejudice to a defendant is not confined to the possible prejudice to his defense . . . ." Moore v. Arizona, 414 U.S. 25, 26-27 (1973). Courts should assess prejudice in light of the interests which the speedy trial right was designed to protect. Barker, 407 U.S. at 533. See also State v. Browder, No. 02C01-9606-GS-00201, 1998 WL 47877, at *5 (Tenn. Crim. App. Feb. 9, 1998) ("The Barker Court identified three [speedy trial] interests: 1. To prevent oppressive pretrial incarceration. 2. To minimize anxiety and concern of the accused. 3. To limit the possibility that the defense will be impaired.").

There is evidence in the record that Taylor was prejudiced by the delay. For example,

when the trial court asked Richard Taylor whether he wanted to call any witnesses in support of his motion to suppress letters allegedly written by him because they were the product of torture, Taylor replied: "No, I had a witness and I was going to call him, but he died. I have no witness, no." (Vol. 19, 251).

In any event, "[i]t is often extremely difficult ...for a defendant to demonstrate specifically how the delay has impaired his ability to defend himself. Courts have recognized this difficulty and consequently do not necessarily require a defendant to affirmatively prove particularized prejudice." State v. Wood, 924 S.W.2d 342, 348 (Tenn. 1996), citing Doggett, 505 U.S. at 654-55, and Moore. See also State v. Picklesimer, No. M2003-03087-CCA-R3-CD, 2004 WL 2683743, at *5 (Tenn. Crim. App. Nov. 24, 2004) ("In Barker, the United States Supreme Court expressly rejected the notion that an affirmative demonstration of prejudice was essential to establish a denial of a right to a speedy trial. That concept was confirmed in [Moore]."). This factor also weighs in favor of appellant.

It is clear that the State of Tennessee has violated Richard Taylor's constitutional and statutory rights to a speedy trial. Thus, his conviction must be reversed and rendered.

G. THE PROSECUTION'S EVIDENCE DID NOT SUPPORT A VERDICT OF PREMEDITATED FIRST-DEGREE MURDER, AND THE JURY'S VERDICT OF FIRST-DEGREE MURDER WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

As Taylor argued in his motion for a new trial (Vol. 12, 1742), the state failed to carry its burden of proving beyond a reasonable doubt that the homicide was a first-degree murder in that it was carried out with "cool purpose," and the contrary finding below was so overwhelmingly against the weight of the evidence as to be manifestly unjust. See Rule 13(e), T.R.A.P., and Jackson v. Virginia, 443 U.S. 307 (1979); State v. Mabry, 2000 WL 33288754, *3 (Tenn.Crim.App.).

First-degree murder is defined as "a premeditated and intentional killing of another." T.C.A. § 39-13-202(a). Premeditated is defined as "an act done after the exercise of reflection and judgment." T.C.A. § 39-13- 202(d). “The mental state of the accused at the time the accused allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation.” Id.

The state has the burden of proving a killing constitutes murder in the first degree, including by proving premeditation. Bailey v. State, 479 S.W.2d 829 (Term. Crim. App. 1972). In State v. Brown, 836 S.W.2d 530 (Tenn. 1992), the Tennessee Supreme Court defined deliberation as: a "cool purpose" requiring reflection (id. at 538),; an intent to kill that is not formed in passion or, if formed in passion, is "executed after the passion has had time to subside" (id. at 539-40); and an intent that is not formed in an instant. Id. at 543. Thus, the prosecution must prove that the accused was sufficiently free from excitement and passion so as to be capable of premeditation as required by T.C.A. § 39-l3-202(d).

The state failed to do so in this case. In fact, the evidence demonstrated that Richard Taylor was *not* acting with “cool purpose” during the offense: (Vol. 2, 152) (“I remember Wiser telling [Richard Taylor] to stop, hollering, `stop, stop,’ and finally, you know, I remember Taylor looking at him and his eyes were wild and let him go,”); (Vol. 2, 161) (Taylor “was talking so quick, saying some [sic] many things, I couldn’t understand a lot of things he was saying,”); (Vol. 2, 165-65) (Taylor “was coming up the hallway bouncing off the walls; he had a wild look on his face like he just spaced out, you know. . . .”); (Vol. 2, 188) (“I was yelling and screaming, you know, ‘Stop, you’re killing him, you’re killing him.’ . . . And when he stopped, he – you know, here I’d been yelling at him, and he looked up at me with the – you know, with the most emptiest eyes; you know, just like no one was home, and then turned around and walked down

the hall. . . ."); (Vol. 2, 193) (Taylor "was just mumbling and just pissed. . . . He was cussing and raving about the work area. . ."); (Vol. 2, 202) (when Taylor arrived for interview "he was shaking"); (Vol. 2, 241) (letter in which Richard Taylor states, "[Y]ou know why that killing went down. I just got upset, couldn't control myself. . . ."). Indeed, the trial court charged the jury on diminished capacity. Vol. 3, 357.

Accordingly, the prosecution presented insufficient evidence to justify a rational trier of fact in finding beyond a reasonable doubt that the killing was premeditated and the jury's contrary finding was against the overwhelming weight of the evidence in violation of Richard Taylor's rights under the Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 8, 9 and 16 of the Tennessee Constitution. His first-degree murder conviction must be reduced to second-degree murder.

H. JUDGE HELDMAN'S FAILED TO CONDUCT A CONSTITUTIONALLY-SUFFICIENT VOIR DIRE.

Richard Taylor was denied his rights to a fair and impartial jury, as guaranteed by the state and federal constitutions.[113] The jury selection in this case was conducted almost exclusively by the prosecutor, who asked only limited questions, stacking the deck heavily in favor of conviction and a death sentence. Unaided by Richard Taylor, who was too sedated, mentally ill, and unfamiliar with the law to insist upon a constitutionally-sufficient voir dire, the trial court failed to conduct a voir dire which would ensure that a fair and impartial jury was selected. A fair and impartial jury in a case such is this consists of jurors open to considering acquittal, conviction and a life sentence, or conviction and a death sentence. All that can be ascertained as relevant after the court's incomplete voir dire, however, is that the selected jurors

[113] This issue was raised in the Second Supplemental Motion for New Trial. (Vol. 1990-98).

were able to consider the death penalty, and would not hold Taylor's *pro se* status against the prosecutor.[114]

The United States Supreme Court has long recognized that "[v]oir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981).

"[P]art of the guaranty of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors." Morgan v. Illinois, 504 U.S. 719, 729 (1992) (citations omitted). The Supreme Court has "not hesitated, particularly in capital cases, to find that certain inquiries must be made to effectuate constitutional protections." Id. at 730. General questions of fairness and impartiality are insufficient to probe specific concerns because "[i]t may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining dogmatic beliefs about the death penalty would prevent him or her from doing so." Id. at 734. Thus, despite the trial judge's use of such general questions in Morgan, the Supreme Court reversed the death sentence because the judge did not ask prospective jurors whether they would "*automatically"* impose the death penalty upon a conviction the capital offense. Id. at 721 (emphasis added). In so ruling, the Court explained, "Were voir dire not available to lay bare the foundation of petitioner's challenge for cause against those prospective jurors who would always impose death following conviction, his right not to be tried by such jurors would be rendered as

[114] The jury selection in this capital murder case took only a few hours. The jurors who were selected as a result of this process were not fair and impartial. During the guilt-innocence phase deliberations, the jurors sent a note asking who does the sentencing and when does that occur if the verdict is murder in the first degree. (Vol. 20, 366.) This is *per se* evidence that jury selection was constitutionally inadequate.

nugatory and meaningless as the State's right, in the absence of questioning, to strike those who would never do so." Id. at 733-34.

Here, Richard Taylor's right "not to be tried by prospective jurors who would always impose death" was rendered "nugatory and meaningless" by the trial court's failure to conduct an adequate voir dire. Id. Neither the heavily-sedated, mentally-ill, and unlearned Richard Taylor nor the judge asked questions of the prospective jurors as a group. The judge's questions were minimal, Taylor's non-existent. As a result, the prosecutor conducted the entire voir dire. The prosecutor asked essentially only one question about the death penalty and that was whether the jurors had any feelings, morals, biases or scruples that would substantially interfere with their ability to give the death penalty and "follow the law." Vol. 18, 31. In response to the death penalty question, nearly all the jurors either nodded or indicated they had no problem with the death penalty. No questions were ever asked to identify whether any jurors would automatically impose the death penalty. No questions were asked regarding whether jurors could consider specific mitigating circumstances which were previously found to exist by the presiding trial court at Taylor's first trial and by the post-conviction court. Specifically, no juror was informed that Taylor was severely mentally ill and had been incompetent for years, only appearing before them due to being forcibly drugged with antipsychotics. No juror was asked about his or her beliefs on these issues. The voir dire was thus inadequate as a matter of fundamental constitutional law. Morgan, 504 U.S. at 726-27, 729, 734-35.

The answers of Juror Sandra Isenberger triggered the one and only time that the prosecutor asked whether the jurors could weigh aggravating and mitigating circumstances. First, the prosecutor asked whether this juror could impose death if the aggravators outweigh the mitigators and the juror nodded her head (presumably a yes). (Vol. 18, 71). Then he asked

whether if "you heard aggravating and mitigating factors and you found that the mitigating factors outweigh the aggravating factors, would you then vote not to impose the death penalty?" (Vol. 18, 72). *The answer was "No."* (Vol. 18, 72). If juror Isenberger meant what she said, she would ignore Tennessee law and impose a sentence of death even if the mitigating factors outweigh the aggravating factors. A followup question was asked – "So you wouldn't impose it in any circumstance regardless?" to which the answer was: "SHAKES HEAD."[115] (Vol. 18, 72). Immediately following this question, the prosecutor asked "about the rest of you, would you all – can you do that?" and the transcript notes that "JURORS NOD HEADS." (Vol. 18, 72). Thus, it appears that all the jurors agreed that they would impose death even if mitigating circumstances outweighed the aggravating factors. In any event, the trial judge's constitutionally deficient voir dire did nothing to clarify the matter.

As recognized by the Supreme Court in Morgan, 504 U.S. at 726-27, 729, 734-35, an inadequate jury selection process, such as this one, is proven to result in a failure to identify jurors who are substantially, and as in this case are sometimes *completely*, impaired in their ability to consider a sentence other than death. The voir dire the trial court utilized utterly failed to meet its constitutionally-mandated function of ferreting out such jurors so that they could be excused for cause. Having the stacked the deck for a death sentence in this manner, the trial court erred. Reversal is required.

I. APPELLANT'S RIGHTS WERE VIOLATED BY THE TRIAL COURT'S FAILURE TO INFORM THE JURY OF TAYLOR'S MEDICATED STATE.

Judge Heldman also violated Taylor's constitutional rights by permitting him to make his

[115] Given her previous answer and the reliance upon nonverbal queues as set down by the court reporter, the record is at best highly questionable about the juror's beliefs, but clearly indicates that she stated in response to the prosecutor's question that she would impose death regardless of mitigation.

opening statement without instructing the jury that Taylor was being forcibly medicated in order to render him "competent" to stand trial.[116] See Riggins v. Nevada, 504 U.S. 127 (1992). Cf. Lawrence v. Georgia, 454 S.E.2d 446 (Ga. 1995) (defendant entitled to a jury charge that his behavior in the jury's presence is conditioned by medication if insanity is an issue at trial). It is telling that the sole argument Taylor made to the jury which would determine whether he lived or died was:

> I'm not going to talk to you much. I want you to know that the General here, he wasn't at Turney Center on August 29, 1981. He wasn't there. The proof he's talking about is testimony, mainly in the form of testimony.
> I'm not going to say much during the trial. I'll talk to you later here in closing arguments and try to go over point by point where he is incorrect. Thank you.

(Vol. 18, 98). Taylor never addressed the jury again, a compelling demonstration of the effect his severe mental illness and the forced drugging had upon his ability to perceive and participate in the proceedings upon which his life depended.

J. IT WAS ERROR TO ADMIT EVIDENCE OF THE VIDEO TAPE GIVEN THE LACK OF FOUNDATION.

Introduction of the videotape of the Turney Center (State's Ex. # 2) was improper since Ricky Bell testified that the tape was only a "pretty close" depiction of the prison and that conditions reflected on the tape (bars in the housing unit) did not reflect the prison on August 29, 1981. See Tenn. Rules of Evidence 901 and 401; Phillips v. F.W. Woolworth Co., 867 S.W.2d 316, 318 (Tenn. App., 1992) (before photographs are admitted, "[i]It must be determined by the trial court that the photographs will assist the trier of fact, and *the photographs must be a true and accurate depiction of their subject matter*.") (emphasis added).[117]

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[116] This issue was raised in the Second Supplemental Motion for New Trial. (Vol. 14, 1999).
[117] This issue was raised in the Supplemental Motion for New Trial. (Vol. 14, 1960).

K. THE UNCONSTITUTIONAL AND SHOCKING TORTURE OF RICHARD TAYLOR BY CORRECTION OFFICERS WAS UNCONSTITUTIONAL AND DEMANDS COMMUTATION OF HIS SENTENCE.

The mental and physical torture and abuse of Richard Taylor by Tennessee correction officers while on death row constituted cruel and inhumane treatment in violation of his rights under the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 8, 13, and 16 of the Tennessee Constitution. This constitutional violation demands commutation of Taylor's death sentence. See, e.g., McKenzie v. Day, 57 F.3d 1461, 1488 n.22 (9th Cir. 1995) (Norris, J., dissenting) (arguing that commutation is the appropriate remedy for a Lackey v. Texas, 115 S.Ct. 1421 (1995) Eighth Amendment violation claim.)[118]

As described in his affidavit, Dale Hunt, a Tennessee Corrections Officer, together with other correction officers tortured Taylor while he was on death row. (Vol. 19, 350-377). Hunt affirmed under oath that the correction officers put Taylor "through pure hell" because they "wanted him to suffer as much as he could." (Vol. 19, 357, 367). They beat Taylor, starved him, and "tried to make [him] a lot crazier than he was" by playing mind tricks, like going into the air chamber behind Taylor's cell to "ma[k]e voices," saying things like "Jesus Christ is coming to see you." (Vol. 19, 357). On one occasion, Taylor set his clothes on fire and the guards turned the air vents on to fuel the fire. (Vol. 19, 367).

American jurists have long recognized that claims of the infliction of mental anguish and physical torture are cognizable under the Eighth Amendment. See, e.g., Hudson v. McMillan, 112 U.S. 995, 1004 (1992) (Blackmun, J., concurring) ("I am unaware of any precedent of this

[118] The motion for new trial raised both Taylor's long period on death row and the physical and mental abuse of the prison guards as a bar to his execution. (Vol. 12, 1737-38). Taylor's excruciating and protracted period on death row, and the resulting constitutional violations, are discussed more fully in Section 15.

Court to the effect that psychological pain is not cognizable for constitutional purposes [under the Eighth Amendment]. If anything, our precedent is to the contrary."); Furman v. Georgia, 408 U.S. 238, 271-73 (1972) (Brennan, J., concurring) ("The Framers also knew that there could be exercises of cruelty other than those which inflicted bodily pain or mutilation."); Smith v. Aldingers, 999 F.2d 109, 110 n.4 (5th Cir. 1993) (collecting recent cases holding that mental or psychological torture can violate the Eighth Amendment).

Furthermore, because of the torture of Taylor, society's interest in retribution or deterrence can no longer (if ever) be served by his execution, and accordingly, his execution would violate the constitution's prohibition against cruel and unusual punishment. Furman v. Georgia, 408 U.S. 238, 312 (1972). Given the unique circumstances of this case, imposition of the death penalty would be "patently excessive" and would be a "pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes." Lackey v. Texas, 514 U.S. 1045 (1995) (J. Stevens, concurring in denial of *certiori* but noting importance of issue).

L. JUDGE HELDMAN ERRED BY PERMITTING APPELLANT TO REPRESENT HIMSELF AT A CAPITAL TRIAL.

Judge Heldman also committed reversible error by permitting Appellant to represent himself at the capital trial because the right to self representation is outweighed by the constitutional rights to a fair trial and due process. See Martinez v. Court of Appeal of California, 528 U.S. 152, 161-62 (2000) (holding that the right to self-representation is "not absolute," and that "even at the trial level, the government's interest in ensuring the integrity and efficiency of the trial at time outweighs the defendant's interest in acting as his own lawyer."); United States v. Farhard, 190 F.3d 1097, 1101 (9th Cir. 1998) (Reinhardt, J., concurring) (observing that "[b]y now, it is clear that the dissenters' concerns [in Faretta that the Sixth

Amendment right to self representation would lead to unfair trials and unjust convictions] have been borne out" and calling for the overruling of Faretta v. California, 422 U.S. 806 (1975)); People v. Simpson, 792 N.E.2d 265, 294-95 (Ill. 2001) (J. Kilbride, dissenting) (arguing that the Faretta right to self-representation should yield to governmental interests in reliability and fundamental fairness in capital trials after the return of the guilty verdict); People v. Clark, 833 P.2d 561, 631 (Cal. 1992) (Mosk, J., dissenting) (contending that an interpretation of the constitution that permits capital defendants to represent themselves cannot be squared with "the heightened requirement of cases in which the issue is life or death"); Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (capital punishment must be imposed in a fair and reliable manner). Permitting Appellant to represent himself at both the guilt-innocence and penalty phases violated Appellant's rights to a fair trial and due process in violation of the Fifth, Eighth and Fourteenth Amendments of the United States Constitution and Article I, Sections 8, 9, and 16 of the Tennessee Constitution.

In sum, Judge Heldman committed numerous reversible errors by denying Taylor's motions for a new trial. The trial court's actions violated appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article 1, Sections 8, 9, 10, 13, 16, and 32 of the Tennessee Constitution, as well as the other authorities cited herein. Judge Heldman utterly failed in his solemn obligation to ensure Richard Taylor's right to a fair capital trial. The motion for a new trial should have been granted. Reversal is required.

14. JUDGE HELDMAN COMMITTED REVERSIBLE ERROR BY DENYING APPELLANT'S MOTION TO SUPPRESS LETTERS BECAUSE THEY WERE A PRODUCT OF STATE TORTURE

Pretrial, Richard Taylor moved to prohibit admission of a number of letters allegedly written by him about the offense. (Vol. 11, 1457). The motion was heard during the trial. (Vol.

19, 242-51). The trial court asked Taylor if he had any evidence to support his motion, and Taylor offered an affidavit executed by Sgt. Dale Hunt. (Vol. 19, 244). The Hunt affidavit describes in detail the physical and mental torture of Richard Taylor by Hunt and other prison guards while Taylor was on death row awaiting trial, from 1981 through 1984. (Vol. 19, 350-377). Hunt affirmed under oath that the guards put Taylor "through pure hell" because they "wanted him to suffer as much as he could." (Vol. 19, 357, 367). The guards beat Taylor and starved him by denying him food for long stretches of time. (Vol. 19, 357-59). They went into the air chamber behind Taylor's cell "and cut the water on and off" and "made voices," saying things like "Jesus Christ is coming to see you." (Vol. 19, 357). The guards deliberately "tried to make [Taylor] a lot crazier than he was." (Vol. 19, 357). On one occasion, Taylor set his clothes on fire and the guards turned the air vents on to fuel the fire. (Vol. 19, 367).

The trial court held that the Hunt affidavit was inadmissible as a matter of law and, accordingly, summarily denied Taylor's motion. (Vol. 19, 252-54) ("The affidavit is hearsay and the sergeant that gave the affidavit, it's not – he's not going to be called as a witness; he hasn't been subpoenaed, and your position is that you don't intend to call him as a witness, *so I can't consider his testimony in support of your attack***.**") (emphasis added).

In so ruling, the trial court erred as a matter of law.[119] The Tennessee Rules of Evidence could not be clearer. They do *not* govern preliminary questions concerning the admissibility of evidence such as the admissibility of the letters allegedly written by Taylor. See TENN. R. EVID. 104(a) ("Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court . . . In making its determination the court is not bound by the rules of evidence except those with respect to privileges"). The Advisory Commission Comments to Rule 104 are

[119] The issue is preserved. See TENN. R. EVID. 103(a)(2).

even clearer: "Part (a) governs the fact questions to be resolved by trial courts in deciding whether a sufficient foundation has been laid . . . This preliminary determination can be based on hearsay, because the judge should be able to separate reliable from unreliable proof." TENN. R. EVID. 104 advisory committee's note. See also State v. Drake, No. E2004-00247-CCA-R3-CD, 2005 WL 1330844, at *16 & n.2 (Tenn. Crim. App. Jan. 25, 2005) ("Inasmuch as the defendant opted to litigate the admissibility of the TBI test results pretrial, the trial court was authorized to consider hearsay in making its ruling"). See also State v. Manning, No. 03C01-9501-CR-00012, 1998 WL 103317, at *12 & n.2 (Tenn. Crim. App. Feb. 27, 1998) ("Although we recognize that this testimony is hearsay under Tenn. R. Evid. 801, a trial court is not bound by the rules of evidence when it considers a preliminary question of admissibility, except those with respect to privileges."); TENN. R. EVID. 104.

Accordingly, the trial court erred as a matter of law refusing to consider the Hunt affidavit when resolving Taylor's motion to suppress the letters.[120] The affidavit, which could have been considered under the Rules of Evidence, was substantial evidence supporting Taylor's claim that he was tortured at the time he allegedly wrote the letters. The affidavit raises the very serious possibility that the letters, if written by Taylor at all, were written under threat or force of

[120] At the very least, the trial court erred by refusing to decide whether it would exercise its discretion to allow admission of the Hunt affidavit. The law of Tennessee is well-settled that a trial court abuses its discretion "when it applie[s] an incorrect legal standard." Mercer v. Vanderbilt University, 134 S.W.3d 121, 131 (Tenn. 2003) (quoting Elridge v. Eldrige, 42 S.W.3d 82, 85 (Tenn. 2001) (quoting State v. Shirley, 6 S.W.3d 243, 247 (Tenn. 1999))); See also State v. Shuck, 953 S.W.2d 662, 669 (Tenn. 1997). *Failure to exercise discretion is itself an abuse of discretion*. See Cheatham County v. Baker, 30 S.W. 2d 234 (Tenn. 1930) (holding that judicial redress is available in cases of "gross or palpable abuse of discretion, or a failure to exercise it"); Lowery v. Faires, No. 03A-01-9605, 1996 WL 718290, at *2-3 (Tenn. Ct. App. Dec. 16, 1996) (vacating summary judgment and remanding for new determination under abuse of discretion standard where "trial court did not exercise its discretion nor consider relevant factors").

the guards. This case must be remanded for a new trial or, in the alternative, for another hearing on appellant's motion at which the trial court duly considers the Hunt affidavit.

15. THIS COURT SHOULD HOLD THAT RICHARD TAYLOR CANNOT BE EXECUTED CONSISTENT WITH THE INTENT OF THE FRAMERS AND MODERN CIVILIZED STANDARDS, GIVEN THAT HE HAS SPENT OVER TWENY-FIVE YEARS AWAITING HIS EXECUTION.

Richard Taylor has been envisioning his death by execution for over twenty-five years.[121] His extraordinarily lengthy and torturous incarceration on death row amounts to cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 8 & 16 of the Tennessee Constitution. Accordingly, because the imposition of a death sentence -- and, indeed, the state's continued placement of Taylor on Tennessee's death row -- would be cruel and unusual punishment under both the state and federal constitutions this Court must permanently vacate his death sentence and order him removed from death row.[122] See Lackey v. Texas, 514 U.S. 1045 (1995) (opinion of Stevens, J., respecting denial of certiorari); Elledge v. Florida, 525 U.S. 944 (1998**)** (Breyer, J., dissenting from denial of certiorari); and Foster v. Florida, 537 U.S. 990 (2002) (Breyer, J., dissenting from denial of certiorari) ("as Justice Stevens and I have previously pointed out, the combination of uncertainty of execution and long delay is arguably `cruel.' This Court has recognized that such a combination can inflict `horrible feelings' and `an immense mental anxiety amounting to a great increase of the offender's punishment.'") (citations omitted). See also District Attorney v. Watson, 411 N.E.2d 1274, 1291-1292 (Mass. 1980) (Liacos, J., concurring) ("[t]he raw terror and unabating stress that [the condemned] experienced was torture").

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[121] Richard Taylor was moved to death row immediately upon his arrest in 1981. (Vol. 2, 106-107) He remained on death row between 1981 and 2001. (Vol. 30, 10, 31, 65, 74; Vol. 2, 145; Vol. 5, 542). He was sentenced to death in 1984 and his death sentence was not vacated until 1997. He was again sentenced to death in October of 2003.

[122] This issue was preserved in the Motion for New Trial. (Vol. 12, 1737).

The torturous effects of "death row phenomenon" -- that is, the psychologically devastating impact of a lengthy stay on death row -- have been widely noted by jurists during the last three decades.[123] Similar views have been expressed by legal commentators and mental health experts.[124]

The United States Supreme Court's jurisprudence construing the Eighth Amendment instructs that the threshold question is whether a challenged punishment was considered unacceptable at the time of the adoption of our Bill of Rights. Ford v. Wainwright, 477 U.S. 399, 405-06 (1986). At the time the United States Constitution was written, over twenty-five years under sentence of death was clearly "unusual." See, e.g., Elledge v. Florida, 525 U.S. 944 (1998) (Breyer, J., dissenting from denial of certiorari).[125] Moreover, such a lengthy gap between imposition of the sentence and execution would have been considered both cruel and unusual in England – the country whose legal system inspired our own – at the time the United

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[123] See, e.g., Coleman v. Balkcom, 451 U.S. 949, 952 (1981) (Stevens, J., concurring in the denial of certiorari) (recognizing that the mental pain suffered by a condemned prisoner awaiting execution "is [a] significant form of punishment" that "may well be comparable to the consequences of the ultimate step itself [i.e., the actual execution]"); Solesbee v. Balkcom, 339 U.S. 9, 14 (1950) (Frankfurter, J., dissenting) ("In the history of murder, the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon."); Furman v. Georgia, 408 U.S. 238, 288-89 (1972) (Brennan, J., concurring) ("[W]e know that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death.").

[124] See, e.g., Schabas, Execution Delayed, Execution Denied, 5 CRIM. L. FORUM 180 (1994); Lambrix, The Isolation of Death Row, in FACING THE DEATH PENALTY 198 (M. Radelet ed. 1989); Millemann, Capital Post-Conviction Prisoners' Right to Counsel, 48 MD. L. REV. 455, 499-500 (1989) ("There is little doubt that the consciousness of impending death can be immobilizing. ... This opinion has been widely shared by [jurists], prison wardens, psychiatrists and psychologists, and writers.") (citing authorities).

[125] P. Mackay, HANGING IN THE BALANCE: THE ANTI-CAPITAL PUNISHMENT MOVEMENT IN NEW YORK STATE, 1776-1861, p. 17 (1982) (executions took place soon after sentencing in New York); T. Jefferson, A BILL FOR PROPORTIONING CRIMES AND PUNISHMENTS (1779), reprinted IN THE COMPLETE JEFFERSON 90, 95 (S. Padover ed. 1943); 2 PAPERS OF JOHN MARSHALL 207-09 (C. Cullen & H. Johnson eds. 1977) (petition seeking commutation of a death sentence in part because of lengthy five-month delay).

States Constitution was drafted. State ex. rel. Francis v. Resweber, 329 U.S. 459, 463 (1947); Pratt & Morgan v. Attorney Gen. of Jamaica, [1994] 2 A.C. 1, 2-3, 17 (P.C. 1993) ("It is difficult to envisage any circumstance in which in England a condemned man would have been kept in prison for years awaiting an execution."); Lackey v. Texas, 514 U.S. 1045 (1995) (opinion of Stevens, J., respecting denial of certiorari).

The United States Supreme Court has now recognized that the views of the "world community" are relevant to U.S. constitutional analysis.[126] It is therefore significant that several foreign courts have found that "death row phenomenon" is cruel and inhumane.[127]

The length of time that Taylor has been made to endure on death row constitutes an additional cruel and unusual punishment inflicted upon him -- a punishment to which he was not sentenced, and that is deliberate, barbaric and inhuman. It is the sort of treatment that is condemned by Article I, Sections 8 & 16 of the Tennessee Constitution and the Eighth and Fourteenth Amendments to the U.S. Constitution.[128] Richard Taylor must be sentenced to life imprisonment.

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[126] See Atkins v. Virginia, 536 U.S. 304, 317, n.21 (2002); Roper v. Simmons, 543 U.S. 551, 575-76 (2005) ("Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty."); Lawrence v. Texas, 539 U.S. 558, 576-77 (2003) (reaffirming significance of international practice in interpreting constitutional norms and citing the European Court of Human Rights).

[127] See, e.g., Soering v. United Kingdom, 11 EUR. HUM. RTS. REP. 439 (1989) (European Court of Human Rights refused to extradite a German national to face capital murder charges because of anticipated time that he would have to spend on death row if sentenced to death).

[128] See, e.g., Estelle v. Gamble, 429 U.S. 97, 102 (1976) (Eighth Amendment embodies "broad and idealistic concepts of dignity, civilized standards, humanity and decency" against which forms of punishment must be measured); Robinson v. California, 370 U.S. 660, 676 (1962) (Douglas, J., concurring) (Eighth Amendment "expresses the revulsion of civilized man against barbarous acts -- the `cry of horror' against man's inhumanity to his fellow man"); Ford v. Wainwright, 477 U.S. 399, 410 (1986) (Eighth Amendment "aim[s] . . . to protect the condemned from [unnecessary] fear and pain . . . or to protect the dignity of society itself from the barbarity of exacting mindless vengeance").

16. THE "ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL" AGGRAVATING CIRCUMSTANCE IS CONSTITUTIONALLY VAGUE AND OVERBROAD, EVEN WITH JUDGE HELDMAN'S PURPORTED LIMITING INSTRUCTION.

Both on its face and as defined by the trial court, the "especially heinous, atrocious or cruel" aggravating circumstance contained in T.C.A. § 39-2-203 (i) (5) is unconstitutionally vague and overbroad. Furthermore, in light of Ring v. Arizona, 536 U.S. 584 (2002), Tennessee courts can no longer cure this unconstitutionality by independently determining beyond a reasonable doubt whether the offense was "especially heinous" using the limiting construction announced by the Tennessee Supreme Court in State v. Dicks, 615 S.W.2d 126, 131 (Tenn. 1981), cert. denied, 454 U.S. 933 (1981). Furthermore, even if the Tennessee courts could make such a determination, the prosecution's evidence does not support a finding beyond a reasonable doubt that this offense was "especially heinous," as that phrase was interpreted in Dicks. In addition, under Brown v. Sanders, __ U.S. __, 126 S.Ct. 884 (2006), and State v. Howell, 868 S.W.2d 238 (Tenn. 1993), this Court cannot find the error harmless because, *inter alia*, the jurors had no other sentencing factor with which to weigh the evidence presented by the prosecution in support of this aggravating circumstance.

The capital statute governing Richard Taylor's case included as an aggravating circumstance that "the murder was especially heinous, atrocious, or cruel in that it involved torture of depravity of mind." T.C.A. § 39-2-203 (i) (5) (1982). At Taylor's 2003 retrial, the trial court instructed the jury as follows regarding this aggravator:

> In determining whether or not the State has proven or has proved the aggravating circumstance that the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind, you are governed by the following definitions: Heinous. Heinous mean [*sic*] grossly wicked or reprehensible, abominable, odious, vile, atrocious.

> Atrocious. Atrocious means extremely evil or cruel, monstrous, exceptionally bad, abominable. Cruel. Cruel means disposed to inflict pain or suffering, causing suffering, painful.
>
> Torture. Torture means the infliction of of [*sic*] severe physical or mental pain upon the victim while he remains alive and conscious. *Depravity. Depravity means moral corruption, wicked or perverse act.*

(Vol. 20, 406) (emphasis added). Much as the words of the statute themselves, this purported limiting instruction was itself unconstitutionally vague and overbroad. Virtually every intentional murder involves "moral corruption" or a "wicked act" or a "perverse act," and these terms failed to provide a "principled basis" for distinguishing between those cases in which the death penalty is assessed and those cases in which it is not. Arave v. Creech, 507 U.S. 463, 474 (1993). Thus, "[i]f the sentencer fairly could conclude that an aggravating circumstance applies to *every* defendant eligible for the death penalty, the circumstance is constitutionally infirm." Id. (emphasis in original). Accordingly, the jury's verdict finding that the offense was "especially heinous" was grounded in an unconstitutionally vague and overbroad definition of that aggravating factor. See, e.g., Espinosa v. Florida, 505 U.S. 1079, 1081 (1992) ("especially wicked, evil, atrocious or cruel" instruction unconstitutionally vague); Shell v. Mississippi, 498 U.S. 1 (1990); id. at 3 (Marshall, J., concurring) ("the phrases 'extremely wicked or shockingly evil' and 'outrageously wicked and vile' could be used by "[a] person of ordinary sensibility [to] fairly characterize almost *every* murder."'") (citing Godfrey v. Georgia, 446 U.S. 420 (1980), and Maynard v. Cartwright, 486 U.S. 356 (1988)) (emphasis in original)). See also Stringer v. Black, 503 U.S. 222, 235-236 (1992). But see Terry v. State, 46 S.W.3d 147, 159-160 (Tenn. 2001).

Furthermore, despite the holding of Clemons v. Mississippi, 494 U.S. 738 (1990), this Court cannot attempt to cure the error by independently determining whether the prosecution

proved this aggravating circumstance beyond a reasonable doubt using the construction of the aggravator adopted by the Tennessee Supreme Court in State v. Dicks, 615 S.W.2d 126 (Tenn. 1981), cert. denied, 454 U.S. 933 (1981). See Bell v. Cone, 543 U.S. 447, 454 n.6 (2005) (approving of the Dicks construction but noting that Ring v. Arizona, 536 U.S. 584 (2002), does not apply retroactively and thus "this case does not present the question whether an appellate court may, consistently with Ring, cure the finding of a vague aggravating circumstance by applying a narrower construction."). In Ring, the United States Supreme Court overruled Walton v. Arizona, 497 U.S. 639 (1990), and held that capital defendants have a right under the Sixth and Fourteenth Amendments to have a jury decide whether the state has proven aggravating circumstances beyond a reasonable doubt. 536 U.S. at 589 (2002) ("Capital defendants, no less than non-capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."). Therefore, it is clear that under Ring Tennessee's appellate courts can no longer attempt to cure this constitutional error by determining for themselves whether the prosecution has proven an aggravating circumstance beyond a reasonable doubt.

In any event, the evidence in this case would not support a finding by this Court that the offense was "especially heinous, atrocious, or cruel," as that phrase was interpreted in Dicks: this crime was not "the conscienceless or pitiless crime which [was] unnecessarily torturous to the victim." Dicks, 615 S.W.2d at 132 (citing State v. Dixon, 283 So.2d 1, 9 (Fla. 1973)). Nor could this Court find that the offense "evinc[ed] a depraved state of mind." State v. Pritchett, 621 S.W. 2d 127, 139 (Tenn. 1981) (evidence insufficient to find depravity of mind). Cf. State v. Taylor, 771 S.W.2d 387, 399 (Tenn. 1989) (holding only that evidence sufficient to support jury verdict finding this aggravator).

Moreover, under the new standard recently announced by the United States Supreme Court in Brown v. Sanders, the state must prove beyond a reasonable doubt that "one of the other sentencing factors enable[d] the sentencer to give aggravating weight to the same facts and circumstances." Brown v. Sanders, __ U.S. __, 126 S.Ct. 884, 892 (2006). See also State v. Howell, 868 S.W.2d 238, 260-61 (Tenn. 1993) (in determining whether invalid aggravating factor harmless error, court must consider "the evidence admitted to establish the invalid aggravator"; issue is whether "invalid aggravating circumstance was established by evidence that was ... admissible only to support invalid aggravator, or whether the evidence was otherwise admissible in either the guilt or sentencing phases of the proceeding.... In evaluating a jury's consideration of an invalid aggravating factor, it is important to ask whether removal of that factor from the sentencer's consideration also removes any evidence from the jury's total consideration.... "). Here, the prosecution admitted evidence that was relevant *only* to the especially heinous aggravator, including virtually the entire testimony of Police Officer Jerry Simmons (Trial Tr. vol. 3, 386 Oct. 16, 2003). This evidence was not relevant to any other sentencing factor; therefore, under Brown, the error cannot be harmless.

Regardless, the state cannot prove beyond a reasonable doubt that absent the error the jury would have returned a death verdict. Satterwhite v. Texas, 486 U.S. 249, 258 (1988). As stated above, the prosecution introduced extensive evidence that was relevant only to this invalid aggravator. See Howell, 868 S.W.2d at 260-61. Furthermore, the prosecution devoted significantly more time arguing this aggravating circumstance than the other aggravators. (Vol. 20, 394-396). See Howell, 868 S.W.2d at 260-61 (in determining whether invalid aggravating factor harmless error, court must consider "the prosecutor's argument at sentencing.... [T]he extent to which the prosecutor emphasizes the invalid aggravating factor during closing

argument [] is relevant to the harmless error analysis"). In addition, the other three aggravating circumstances found by the jury either merely involved a prior simple robbery conviction (T.C.A. §39-13-204(I)(2)) or factors that essentially duplicated the elements of the offense (T.C.A. §§ 39-13-204(I)(9) (corrections officer) & 39-13-204(I)(8) (lawful custody)), and therefore did not speak to Taylor's character or background with any degree of probative force. See also Howell, 868 S.W.2d at 260-61 (in determining whether invalid aggravating factor harmless error, court must consider "the number *and strength* of remaining valid aggravating circumstances....[E]ven more crucial than the sum of the remaining aggravating circumstances is the qualitative nature of each circumstance, its substance and persuasiveness, as well as the quantum of proof supporting it" (emphasis added)). Thus, under Howell, the error cannot be harmless.

Accordingly, this Court must reverse Richard Taylor's death sentence and remand for a new capital penalty phase.[129]

17. THE JURY CHARGE AT THE PENALTY PHASE VIOLATED TAYLOR'S CONSTITUTIONAL AND STATUTORY RIGHTS BY TELLING THE JURORS THAT THEY WERE THE JUDGES OF THE LAW.

Judge Heldman committed reversible error by instructing the jurors in the penalty phase that they were the judges of the law. This jury charge violated Richard Taylor's rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article I, Sections 8, 9, 10, 13, 16, and 32 of the Tennessee Constitution, and T.C.A. § 39-2-203.

At the penalty-phase, Judge Heldman instructed the jurors as follows:

> The jury is the sole judge of the facts and of the law as it applies to

[129] Taylor's motion for a new trial raised these issues. See Vol. 12, 1745 (¶ 70). See also T.C.A. § 39-13-206 (c) (1) (B) (in reviewing death sentence, court "shall determine whether ... [t]he evidence supports the jury's finding of statutory aggravating circumstance or circumstances").

> the facts in this case. In arriving at your verdict you are to consider the law in connection with the facts. But the Court is the proper source from which you are to get the law. In other words, *you are the judges of the law as well as the facts under the direction of the Court.* (Vol. 20, 399) (emphasis added).

This "jury nullification" charge – which permitted the jurors to disregard the mandates of the Eighth Amendment, Article I, Section 16 and T.C.A. § 39-2-203 -- violated Richard Taylor's rights. Tennessee's capital punishment system is constitutional only because its capital punishment statute has been held to be constitutional. See T.C.A. § 39-2-203; Gregg v. Georgia, 428 U.S. 153, 187 (1976). Yet, the jurors in Richard Taylor's case were instructed that they did not have to follow the law as set forth in Tennessee's death penalty statute and as dictated by the Eighth Amendment and Article I, Section 16. The United States Supreme Court stated over one hundred years ago that the "jury's duty is to receive and follow the law as given by the court." Sparf v. United States, 156 U.S. 51, 192 (1895). In capital cases, jurors are constitutionally required to consider the defendant's mitigating factors in determining whether or not the defendant lives or dies and may not disregard this constitutional imperative. See, e.g., Eddings v. Oklahoma, 455 U.S. 104, 114 (1982) ("The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. *But they may not give it no weight by excluding such evidence from their consideration*.") (emphasis added); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality); Woodson v. North Carolina, 428 U.S. 280 (1976). Furthermore, capital jurors are constitutionally required to follow the law. See Morgan v. Illinois, 504 U.S. 719, 729 (1992) ("A juror who will automatically vote for the death penalty *in every case* will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to.") (emphasis added). Cf. Adams v. Texas, 448 U.S. 38, 45 (1980) (state may challenge for cause jurors whose views on the death penalty "would prevent or substantially impair the performance of [their] duties as a juror in accordance

with [their] instructions] and [their] oath"); Wainwright v. Witt, 469 U.S. 412, 424 (1985) (standard for state juror exclusion is "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath").

In short, the trial court's charge to the jury which instructed the jurors that they were the judges of law and could disregard the mandates of the Eighth Amendment, Article I, Section 16 and T.C.A. § 39-2-203 was statutory and constitutional reversible error.

18. JUDGE HELDMAN VIOLATED RICHARD TAYLOR'S CONSTITUTIONAL RIGHT TO COMPULSORY PROCESS WHEN IT FAILED TO RULE ON TAYLOR'S MOTION TO SUBPOENA WITNESSES WITH MATERIAL AND RELEVANT INFORMATION.

A. INTRODUCTION

Trial counsel from Richard Taylor's first trial were found constitutionally ineffective for failing to develop "a complete picture of [Taylor's] family history, background, and mental history . . . which reflected a family history of mental problems, a difficult upbringing, and a long history of diagnosed mental problems." (Vol. 3, 167 (July 21, 1999, Opinion of this Court, affirming trial court's vacatur of conviction and sentence)). Acting as his own attorney at the retrial, Richard Taylor did not present the testimony of any of the witnesses who could have brought this critical information to the jury. Prior to trial, however, Taylor had moved for the trial court to sign numerous subpoenas for witnesses who had testified to such information at his post-conviction hearing, as well as other defense witnesses. (Vol. 4, 402.) Judge Heldman never decided this "motion to provide compulsory process" (id.), and nor did he sign any of the subpoenas Taylor submitted to the court. (See, e.g., Vol. 4, 409-16.)

Judge Heldman abused his discretion and denied Richard Taylor his constitutional rights to compulsory process, to present a defense, to be free of cruel and unusual punishment, and to due process of law when he failed to decide Taylor's motion to provide compulsory process and

failed to sign any of his subpoenas. See U.S. Const. amends. VI; VIII, XIV; Tenn. Const. art. I, § 8, 9, 16; Rock v. Arkansas, 483 U.S. 44, 55-56 (1987); see Chambers v. Mississippi, 410 U.S. 284, 302 (1973); Washington v. Texas, 388 U.S. 14, 16 (1967). Without these witnesses, Taylor had no defense, much like at the constitutionally-flawed first trial. The court's inaction rendered Taylor's trial fundamentally unfair and requires reversal.

B. RELEVANT FACTS

After Richard Taylor was awarded a new trial in 1997, he remained in pretrial status until his retrial commenced in 2003 because he was incompetent to stand trial. On April 3, 2000, still awaiting trial, Taylor filed his self-styled *pro se* motion "to provide compulsory process," seeking a "subpoena for the following parties . . ." (Vol. 4, 402.[130]) The motion then listed the names of dozens of witnesses, including several witnesses who had testified at the post-conviction hearing leading to Taylor's new trial, and other witnesses who had testified at the 1984 trial. Id. The motion also sought compulsory process of Sergeant Dale Hunt. Id. Sergeant Dale Hunt had signed an affidavit in 1996 that corroborated that Taylor was insane at the time of the offense, and detailed the retaliation against Taylor for Moore's death by Hunt and other corrections' officers, including gross mistreatment and abuse over a several-year period. (Vol. 3, 350-77.)

In addition to the motion for compulsory process, Taylor filed motions for subpoenas of witnesses. On May 1, 2000, Taylor filed a motion to subpoena the documents possessed by post-conviction counsel, and provided the court with a subpoena to sign. (Vol. 4, 409; 413-15). On November 8, 2000, Taylor filed a motion "to secure defendant access to witnesses." (Vol. 4, 508 (citing Sixth Amendment right to fair trial and to confront witnesses).) On December 28, 2000,

[130] On April 4, 2000, the Clerk of the Court wrote Taylor to notify him that this motion (and others) had been calendared. (Vol. 4, 407).

Taylor filed a motion stating: "[i]n order that defendant may avail himself of as full fair trial subsequent to defendant's demand for a jury trial on the issues, defendant requires the following persons appear and give testimony." (Vol. 4, 522). Numerous potential witnesses were listed, including Dale Hunt. Id.

Judge Donald Harris presided over Taylor's case after this Court affirmed the granting of post-conviction relief. On May 8, 2000, Judge Harris assured Taylor that he was keeping track of Taylor's motions and would "entertain [] motions" as soon as Taylor was found competent and was representing himself. (Vol. 28, 7). On May 8, 2000, Taylor complained that the prison warden was prohibiting him from visiting with potential witnesses for trial. (Vol. 29, 9. See also Vol. 4, 421 (motion detailing prison's actions blocking Taylor from meeting with witnesses).) Again, Judge Harris assured Taylor, "At the time I allow you to represent yourself, we'll deal with that." (Vol. 29, 9).

On April 9, 2003, Judge Russ Heldman ruled that Taylor was competent to stand trial. (Vol. 7, 854). Two months later, on June 10, 2003, Judge Heldman granted Taylor's *pro se* motion to waive counsel. (Vol. 7, 854; Vol. 36, 84.) Then, with Taylor's agreement, Judge Heldman struck defense counsel's previously-filed motions, and instructed Taylor to file any new motions he wanted the court to consider. (Vol. 36, 85-86). Judge Heldman, however, neither ruled on Taylor's previously-filed *pro se* motions for compulsory process and subpoena of witnesses nor struck the motions, nor asked Taylor to refile or reset them. As a result, the witnesses which constitutionally-ineffective trial counsel failed to call in the first trial were also never called to the stand in the second trial.

C. ANALYSIS

In Washington v. Texas, 388 U.S. 14 (1967) the Supreme Court explained the importance of the right to compel the attendance of witnesses and offer their testimony at trial:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the [fact-finder] so it may decide where the truth lies . . . This right is a fundamental element of due process of law.

Id.. at 19.[131]

In particular, the Compulsory Process Clause grants a criminal defendant the right to call witnesses that are "material and favorable to his defense." Valenzuela-Bernal, 458 U.S. at 867.[132] Similarly, in Tennessee, a "defendant has a fundamental constitutional right to compulsory process for the obtaining of witnesses and when the witness is shown to be material, the trial court has no discretion as to the issuance of such process." State v. Morgan, 825 S.W.2d 113, 117 (Tenn. Crim. App. 1991); see also Tenn. Const. art. I, § 9; T.C.A. § 40-17-105 (providing that all criminal defendants have the right to compulsory process in order to acquire favorable witnesses).

With specific reference to a defendant's subpoena of witnesses, the Tennessee Supreme Court has explained: "A trial judge has no discretion as to who he shall allow a defendant to subpoena. If a prospective witness is or probably will be a material one then a defendant has a constitutional right to have compulsory process." Bacon v. State, 385 S.W.2d 107, 109 (Tenn.

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[131] See also Taylor v. Illinois, 484 U.S. 400, 498 (1999) (holding that the right to offer the testimony of defense witnesses "is an essential attribute of the adversary system itself"); United States v. Valenzuela-Bernal, 458 U.S. 858, 875 (1982) (O'Connor, J., concurring) ("[T]he right to compulsory process is essential to a fair trial"); In re Oliver, 333 U.S. 257, 273 (1948) ("A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense-a right to his day in court-are basic in our system of jurisprudence.").

[132] Materiality is established by demonstrating a "reasonable likelihood that the testimony could have affected the judgment of the trier of fact." Id. at 364 & n.10 (citing United States v. Agurs, 427 U.S. 97, 112-113 (1976); Gigolo v. United States, 405 U.S. 150, 154 (1972)).

1964). A trial court's determination of materiality is generally reviewed for an abuse of discretion. See, e.g., State v. Burrus, 693 S.W.2d 926, 929 (Tenn. Crim. App. 1985).

Where, however, a trial court fails altogether to rule on an incarcerated prisoner's motion for compulsory process, there is no exercise of "discretion" to review. Thus, the only appropriate course is reversal. See Williams v. Carter, 10 F.3d 563, 567 (8th Cir. 1983) (reversing where trial court failed to consider list of witnesses *pro se* litigant sought to subpoena and stating "we believe that the Magistrate Judge should at least have looked at the [witness] list and made a determination as to whether any of the persons listed were likely to provide relevant and material evidence").

Here, Judge Heldman left no record of exercising discretion which can be reviewed on appeal: he simply failed to issue the subpoenas or rule on the motions for compulsory process. And as demonstrated in further detail below, the witnesses Taylor sought to call to the stand had material testimony to offer in his favor. The record is replete with information verifying the importance of these witnesses.

1. Taylor Sought to Compel Multiple Expert Psychiatric Witnesses at Trial Who Could Have Testified to Taylor's Insanity at the Time Of the Offense and to his Social and Mental Health History

Taylor sought to compel testimony of Dr. Royeka Farooque, Dr. Samuel Craddock, Larry Southard, Dr. Patricia Correy, and Dr. White (Vol. 4, 522), "all psychiatric experts" (Vol. 4, 402), and "all doctors and experts referred to during the 1984 trial and 1994-95 post-conviction hearings." (Vol. 4, 402.) Testimony of these witnesses would have been highly material to the defense at both the guilt-innocence and penalty phases.

For example, Dr. Farooque could have testified that Taylor was schizophrenic and psychotic. (Vol. 30, 38; 34, 92). She could have testified to his medical history and his recent

medications, explaining the side effects to the jury. (Vol. 31, 8; 17, 53) Dr. Craddock could have explained Taylor's thought disorder and his inability to communicate in a rational or coherent fashion. (Vol. 30, 20). Dr. Correy could have testified that she diagnosed Taylor with psychosis as early as 1979 and that when she first met Taylor, before the offense, he suffered from visual and audio hallucinations. (Vol. 2, 112). She could have testified that she prescribed antipsychotic medication to Taylor before the offense. (Id.)

This Court's decision affirming the vacatur of Taylor's original conviction and sentence confirms the importance of the wealth of mental health evidence that the witnesses for whom Taylor sought compulsory process could have provided. (See, e.g., Vol. 2, 160 (finding that "the evidence regarding the petitioner's severe mental health problems that was . . . not presented . . . would probably have altered the convicting court's determination that the petitioner was competent to stand trial, the jury's conclusion that he was guilty of first degree murder beyond a reasonable doubt and the jury's conclusion that the death penalty was appropriate.").)[133]

The prejudice standard for ineffective assistance of counsel is the same as the materiality standard applied to determine whether there has been a violation of the Sixth Amendment rights to compulsory process and to present a defense. See, e.g., Strickland v. Washington, 466 U.S. 668, 694 (1987) ("Accordingly, the appropriate test for prejudice finds its roots. . . in the test for materiality of testimony made unavailable to the defense by Government deportation of a witness") (citing Valenzuela-Bernal, 458 U.S. at 872-874; United States v. Agurs, 427 U.S. 97, 104 (1976))). "The defendant must show that there is a reasonable

[133] Taylor also requested subpoenas for Marlina Bruno, a paralegal, and Bill Redick and Henry Martin, former attorneys, each of whom testified at his post-conviction trial. Vol. 4, 402. This Court previously reviewed the favorable and material evidence that these witnesses testified to at the post-conviction hearing. See (Vol. 2, 108-110, 136-137, 145-146). They would have been additional favorable and material witnesses at trial.

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. Because this Court has already decided that the absence of these witnesses in Taylor's original trial resulted in prejudice sufficient to find ineffective assistance of counsel, the witnesses' testimony is certainly favorable and material under Valenzuela-Bernal. The trial court erred in failing to resolve Taylor's compulsory process motion. Its failure to decide whether to subpoena these material and favorable defense witnesses was not an exercise of discretion at all.[134] Reversal is required.

2. The Record Clearly Demonstrates that Dale Hunt's Testimony Would Also Have Been Favorable to the Defense and Material.

Sergeant Dale Hunt was another witness Richard Taylor sought to subpoena. (Vol. 4, 402, 522). Sergeant Dale Hunt was a guard at the Tennessee State Penitentiary when Richard Taylor was incarcerated there from August 1981 to 1989. Hunt saw Taylor on a daily basis in his capacity as the guard in charge at the units where Taylor was housed. (Vol. 3, 350). On June 19, 1996, Hunt was interviewed by Taylor's post-conviction counsel, and the interview was taped and later transcribed. (Vol. 3, 350-51). [135]

In his interview, Hunt explained that he and his fellow prison guards tried to "make it as rough as we could on the guy." (Vol. 3, 356). The guards denied him food for days at a time, beat him, and frequently denied him showers so he could "stay in there and rot for a long time." (Vol. 3, 356, 357-358, 360-61). When Taylor's odor became so bad that they had "to force shower him," they would "smack him around and . . . get him by the hair, head, pull him out and shower him." (Vol. 3, 361).

[134] Moreover, even if Judge Heldman had ruled on the motions and refused to subpoena the witnesses, he would have abused his discretion because the witnesses were clearly material.
[135] In his affidavit, Hunt agreed that the transcription, which is part of this record on appeal, was accurate and that his statements during the interview were true and correct to the best of his knowledge. (Vol. 3, 351.)

Realizing that there was "something wrong with the guy" (Vol. 361), the guards tried to exacerbate Taylor's condition by going in an "air chamber" behind his cell, "cutting" the water on and off, and imitating voices, such as that of Jesus Christ. (Vol. 3, 357). Using a bed sheet as a prop, the guards often discussed hanging Taylor. (Vol. 3, 376). They told him, "Well, [we] ought to just hang you tonight, man. Go ahead and execute yourself." (Vol. 3, 376). Their goal was to make it "horrible" for Taylor, (Vol. 3, 356), make it "pure hell" for him, (Vol. 3, 357), make him "suffer as much as he could," (Vol. 3, 367), and to "try to do make him do something" to the guards (Vol. 3, 356), or "go off." (Vol. 3, 360.)

Hunt detailed Richard Taylor's numerous symptoms of severe mental illness. Taylor "shook" all the time, (Vol. 3, 356), even worse when he was not fed. (Vol. 3, 374). Hunt realized something was wrong with Taylor when he saw Taylor drinking his own urine and eating his own bowel movements. Id. He described how when Taylor arrived at the penitentiary, he "was so messed up he was gone." (Vol. 3, 368). As Hunt explained,

> He was . . . the man didn't even know where he was at and we tried to help him along a little bit to even make it worse for him . . . . He would very seldom speak to us, but when he did, you couldn't understand what he was saying so we kind of made fun of him and mock[ed] him and we made it hard on the guy. . . . That's the way he was. He was in . . . . the guy . . . he was shaking. He . . . it's hard to explain to you exactly how he was. He was like "one flew over the cuckoo's nest." . . . He was in pretty bad shape. He was like that. It's just . . . we was glad he was like that. We just . . . we was hoping he would croak over at the time
>
> * * *
>
> He would just get in front of his cell . . . Now I remember this well. He's [sic] get in front of his cell. He would get completely naked in his cell and he'd put a white sheet around him and he had this long hair. . . . [H]e would tell us he was Jesus Christ. . . . He took a Styrofoam cup and he started urinating in it. . . . I couldn't . . . it was awful. And when he done that, I said, "Man, I know this guy's crazy. He's got to be."

(Vol. 3, 368). According to Hunt's observations, "[e]verybody[, f]rom the nurses to the wardens to all the employees that worked there, all the inmates, they all knew he was insane." (Vol. 3, 368). Taylor was the "worst [Hunt had] ever seen," id., and Hunt had worked in the "special needs" unit with the mentally ill prisoners. (Vol. 3, 373). (See also Vol. 3, 369 ("He was about the worst I've ever seen.").)

Taylor's substantial mental illness continued without him ever receiving any mental health treatment. "They didn't have psych doctors back in them days that come to see people all the time. They just didn't have'em. And I never knowed [Taylor] seeing anybody." (Vol. 3, 374).

Despite possessing this wealth of valuable information, Dale Hunt was not called to the stand at Richard Taylor's trial.[136] Hunt was listed as a witness in Richard Taylor's motion for compulsory process. (Vol. 4, 402.) If he had been subpoenaed, and testified consistently with his statement in 1996, his testimony would have lent powerful corroboration to the wealth of evidence of mental illness discussed above. Hunt's knowledge about Taylor's severe mental illness and bizarre behavior over several years would have been material and favorable to the defense for the same reasons as the evidence addressed in this Court's 1999 decision was. See, e.g., (Vol. 2, 160) (finding "the evidence regarding the petitioner's severe mental health problems that was . . . not presented by his trial counsel would probably have altered the convicting court's determination that the petitioner was competent to stand trial, the jury's conclusion that he was guilty of first degree murder beyond a reasonable doubt and the jury's conclusion that the death penalty was appropriate.").

[136] Although Hunt could only speak for himself, his statement suggests that other corrections witnesses listed in Taylor's motion for compulsory process would have possessed similar material and helpful defense evidence. (Vol. 4, 402.)

The second way in which Hunt's live testimony would have been material and favorable is that it would have substantially bolstered Taylor's motion to suppress the highly prejudicial and inculpatory letters Taylor allegedly wrote while incarcerated under Hunt's supervision. See (Vol. 19, 262-68). Taylor moved to suppress these letters because they were a product of torture during his incarceration. (Vol. 11, 1457) (citing Hunt's statement). As discussed in Point 14, infra, Judge Heldman denied this motion because he would not consider Hunt's affidavit and, without it, "there[was] insufficient evidence for the Court to find torture or abuse linked to the time of writing of these letters." (Vol. 19, 254). Ironically, in so ruling, Judge Heldman stated that Dale Hunt had not been subpoenaed, (Vol. 19, 253), notwithstanding Taylor's still-pending motion to subpoena him. (Vol. 4, 402).

Finally, and perhaps most importantly, Hunt's testimony would have been material and favorable in that it would have provided the jury with an additional reason to spare Richard Taylor's life. Taylor had been grossly abused by prison guards, agents of the State of Tennessee, in retaliation for his perceived responsibility for killing Moore. Hunt and the other prison guards took justice in their own hands, and exacted a cruel, sadistic, and ongoing punishment against a man they knew was vulnerable and severely mentally ill. Completely improper and unlawful, Hunt and his fellow Tennessee Corrections Officers' actions constituted severe retribution against Taylor. There is more than a reasonable probability that the combination of Tennessee's agents' retribution and a life sentence would have satisfied the jury as an appropriate punishment. At a minimum, justice demands a new trial in which the jury hears this evidence and decides for itself whether the death penalty is an appropriate punishment, given the torture and abuse to which Tennessee's agents have already subjected Richard Taylor.

The witnesses Taylor sought to call were crucial to his defense. It is no answer that, after ruling that Taylor could represent himself, Judge Heldman instructed Taylor to file any new motions he wanted the court to consider. (Vol. 36, 85-86.) Taylor had already filed numerous *pro se* motions, the Clerk of the Court had specifically calendared this motion (Vol. 4, 407), and Judge Harris had clearly assured him that the motions would be considered once Taylor had been found competent. (Vol. 28, 7; Vol. 29, 9). Judge Heldman struck defense counsel's previously-filed motions, (Vol. 36, 85-86), but neither struck nor ruled upon Taylor's *pro se* motion for compulsory process. The result was a one-sided presentation of the evidence and a fundamentally unfair trial. Reversal is required.

19. JUDGE HELDMAN DENIED RICHARD TAYLOR HIS RIGHT TO DUE PROCESS OF LAW AND TO REPRESENT HIMSELF BY FAILING TO RULE ON THE VAST MAJORITY OF HIS PRO SE MOTIONS.

Judge Russ Heldman ruled on Richard Taylor's *pro se* motion to represent himself, granting that motion at the shortly after he found Taylor competent to stand trial. (Vol. 36, 84-86). Judge Heldman also suggested, and Taylor agreed to, striking defense counsel's previously-filed motions. Id. In contrast to his willingness to address Taylor's desire to proceed *pro se* and to strike his defense attorney's motions, Judge Heldman decided almost none of Taylor's *pro se* motions. The court's inaction violated Taylor's right to represent himself and his right to due process of law. See U.S. Const. amends. VI; XIV; Tenn. Const. art. I, § 9; Faretta v. California, 422 U.S. 806, 836 (1975).

A. FACTS

While awaiting retrial, Richard Taylor filed numerous *pro se* motions. (Vol. 3, 241-85; Vol. 4, 385-87, 390-458, 470-71, 476-78, 508, 522-25; Vol. 5, 531-37, 552-53, Vol. 7, 865-66). On several occasions, the Clerk of the Court wrote Taylor, notifying him that his motions had

been calendared for decision. (Vol. 4, 407, 432, 459). Although the merit of some of these motions was not immediately obvious, numerous of the motions warranted serious consideration, if not a full blown hearing. See, e.g., (Vol. 3, 247) (Motion for the Appointment of Psychiatrist, Psychologist, Investigator); (Vol. 4, 396-97) (Motion to Challenge Jury Pool Composition); (Vol. 4, 402-03) (Motion to Provide Compulsory Process, see Point 18, supra); (Vol. 5, 533) (Motion Objecting to Custodial Conditions); (Vol. 5, 534) (Motion to Suppress Custodial Statements).

On February 11, 2000, then-presiding Judge Donald Harris assured Taylor that he was keeping track of Taylor's *pro se* motions and would "entertain [the] motions" if Taylor were found competent to represent himself. (Vol. 28, 7). Subsequently, Judge Russ Heldman ruled that Taylor was competent, and granted Taylor's *pro se* motion to waive counsel. (Vol. 36, 84.) Then, with Taylor's approval, Judge Heldman struck defense counsel's previously-filed motions, and instructed Taylor to file any new motions he wanted the court to consider. (Vol. 36, 85-86). Judge Harris, however, neither ruled on Taylor's previously-filed *pro se* motions nor struck them, nor asked Taylor to refile or reset them.[137] As a result, Richard Taylor went to trial with almost none of his pretrial motions decided.

B. ANALYSIS

The Sixth and Fourteenth Amendment right to self-representation enjoyed by every criminal defendant would be meaningless if did not include the right to file *pro se* motions. See Faretta v. California, 422 U.S. 806, 836 (1976). Indeed, one of the problems the Faretta Court noted in describing the facts was that the defendant, seeking to represent himself, was not

[137] The only exceptions were Taylor's motions to proceed *pro se* and his ongoing objection to forcible medication.

permitted to file motions on his own behalf. 422 U.S. at 810 ("Faretta's . . . efforts to make certain motions on his own behalf . . . were rejected").

When a judgment is obtained against a *pro se* litigant without his or her pending motions first being resolved, the judgment is a nullity. See Bell v. Todd, 2005 WL 2240958, * 3 (Tenn. Ct. App. Sept. 14, 2005) (reversing judgment due to trial court's failure to decide *pro se* prisoner's motions). In Bell, the this Court explained:

> Appellate courts frequently have been confronted with cases in which the trial courts have disposed of claims either filed by or asserted against self-represented prisoners without first addressing the prisoner's pending motions. No matter whether the prisoner is the plaintiff or the defendant, reviewing courts have consistently held that *trial courts err when they proceed to adjudicate the merits of the claim without first addressing the prisoner's pending motion or motions.* These oversights have generally been found to be prejudicial rather than harmless because the failure to address pending motions "give[s] the impression that a litigant is being ignored," Logan v. Winstead, 23 S.W.3d [297, 302 (Tenn. 2000)]. We have also held that a prisoner's failure to comply with local rules requiring motions to be set for hearing does not provide a trial court with an excuse for failing to address the pending motions. Chastain v. Chastain, [Slip. Op.] 2004 WL 725277, []*2 [(Tenn. Ct. App. 2004)]. Accordingly, when a trial court has failed to rule on an incarcerated litigant's pending motions, *reviewing courts have consistently vacated the judgment and remanded the case to the trial court with directions to consider and act on the pending motions*.

Bell, 2005 WL 2240958, * 3 & n.3 (emphasis added) (citing Logan, 23 S.W.3d at 302 (vacating a summary judgment dismissing a prisoner's legal malpractice claim because the trial court had not considered or acted upon the prisoner's motion to hold the case in abeyance)).

Considered in tandem with Faretta's Sixth and Fourteenth Amendment right to self representation, and with the other constitutional protections to which a criminal defendant is entitled, the right of a *pro se* defendant to be heard in motion practice is crucial to a fair trial. By violating this critical right, the trial court denied Richard Taylor a fair trial. As an error that

"affec[ted] the framework within which the trial proceed[ed]," the denial of Taylor's right to file *pro se* motions as a part of his self-representation was structural error, requiring reversal irrespective of a showing of prejudice. United States v. Gonzalez-Lopez, __ U.S. __, 126 S.Ct. 2557, 2564 (2006) (collecting examples of structural error, including the denial of a defendant's right to self representation); Bell, 2005 WL 2240958 *3.

20. ARTICLE ONE, SECTIONS EIGHT AND SIXTEEN OF THE TENNESSEE CONSTITUTION, THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND T.C.A. § 39-13-206 (c)(1)(A) CATEGORICALLY EXEMPT FROM THE DEATH PENALTY DEFENDANTS SUCH AS RICHARD TAYLOR WHO ARE SEVERELY MENTALLY ILL AT THE TIME OF THEIR OFFENSES.

Richard Taylor suffers from one of the most debilitating mental diseases known to humankind – schizophrenia. Schizophrenia has long been recognized as a "devastating brain disorder . . . [which] interferes with a person's ability to think clearly, to distinguish reality from fantasy, to manage emotions, make decisions, and relate to others."[138] The World Health Organization lists schizophrenia as one of the ten most disabling diseases afflicting humans.[139] Among the symptoms associated with schizophrenia are "gross impairment in reality testing", "grossly disorganized behavior" and "structural brain abnormalities". Am. Psychiatric Association, Diagnostic and Statistical Manual 297, 300, 304-05 (4th ed., Text Rev. 2000) [hereinafter DSM-IV-TR]. This disease distorts identity and warps behavior – "schizophrenia is characterized by profound disruption in cognition and emotion, affecting the most fundamental

[138] National Alliance on Mental Illness, About Mental Illness: Schizophrenia, at http://www.nami.org/Template.cfm?Section=By_Illness&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=54&ContentID=23036 (last updated October 2003).

[139] See World Health Organization, The Global Burden of Disease: A Comprehensive Assessment of Mortality and Disability from Diseases, Injuries, and Risk Factors in 1990 and Projected to 2020 (Harvard University Press 1996) (executive summary available at http://www.hsph.harvard.edu/organizations/bdu/GBDseries_files/gbdsum3.pdf.).

human attributes: language, thought, perception, affect, and sense of self."[140] Because schizophrenia strikes at those "most fundamental human attributes," moreover, it directly affects those aspects of moral judgment, social interaction and impulse control implicated in criminal behavior.

In Atkins v. Virginia, 536 U.S. 304 (2002), the United States Supreme Court held that the Eighth Amendment's ban on excessive and cruel and unusual punishments prohibits the execution of individuals who suffered from mental retardation at the time of the capital offense. The Court declared that, "[b]ecause of their disabilities in the areas of reasoning, judgment, and control of their impulses, [the mentally retarded] do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." Id. at 306. The Court also recognized that juries are poorly positioned to weigh properly the mitigating aspects of mental retardation. Id. at 320-21 (mentally retarded persons have a "lesser ability . . . to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors" in part because they "are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes."). id. at 321 ("reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." The Court explained:

> Because of their impairments . . . they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others . . . . Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

[140] Surgeon General of the United States, Mental Health: A Report by the Surgeon General 269, available at http://www.surgeongeneral.gov/library/mentalhealth/pdfs/c4.pdf (1999).

Atkins, 536 U.S. at 318.

In Van Tran v. State, 66 S.W.3d 790 (Tenn. 2001), the Tennessee Supreme Court anticipated Atkins in finding that:

> [T]he Eighth Amendment to the United States Constitution and article I, section 16 of the Tennessee Constitution prohibit the execution of mentally retarded individuals because such executions violate evolving standards of decency that mark the progress of a maturing society, are grossly disproportionate, and serve no valid penological purpose in any case.

Id. at 792. Like Atkins, Van Tran cited "fundamental concerns that necessarily bear on a mentally retarded person's mental state, culpability, blameworthiness, and the proportionality of death as a punishment." Id. at 807. Likewise, the Court in Van Tran found that "the jury's consideration of mental retardation as a mitigating factor is by itself insufficient to address the concerns protected under the Eighth Amendment or article I, § 16." Id. at 809.

In Roper v. Simmons, 543 U.S. 551 (2005), the United States Supreme Court adopted a categorical prohibition against executing people under eighteen, finding that:

> The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability. An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death. In some cases a defendant's youth may even be counted against him.

Id. at 572-73. The Court found that juries were ill-equipped to make the subtle distinction between immature but redeemable juvenile offenders and those exhibiting "irreparable corruption." Id. at 573.

The holdings in Atkins, Roper and Van Tran logically compel the conclusion that Article I, Sections 8 & 16 of the Tennessee Constitution and the Eighth and Fourteenth Amendments to

the United States Constitution prohibit the execution of individuals who suffer from serious mental illness.[141] Richard Taylor's execution also is prohibited by T.C.A. § 39-13-206 (c)(1)(A) (requiring this Court to review death sentence to determine whether it "was imposed in any arbitrary fashion").

The United States Supreme Court "has fashioned a three-prong analysis for determining whether a punishment constitutes cruel and unusual punishment under the Eighth Amendment . . . . 'First, does the punishment for the crime conform with contemporary standards of decency? Second, is the punishment grossly disproportionate to the offense? Third, does the punishment go beyond what is necessary to accomplish any legitimate penological objective?'" New Jersey v. Nelson, 803 A.2d 1, 41 (N.J. 2002) (Zazzali, J., concurring) (finding under state constitution that death is a disproportionate sentence for mentally ill defendant) (citing Gregg v. Georgia, 428

[141] See Corcoran v. Indiana, 774 N.E.2d 495, 502, 503 (Ind. 2002) (Rucker, J. dissenting) ("The underlying rationale for prohibiting executions of the mentally retarded is just as compelling for prohibiting executions of the seriously mentally ill, namely evolving standards of decency."). See also RALPH REISNER ET AL., 2002 UPDATE, LAW AND THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS 17 (2002) (discussing the logical extension of Atkins' protections to persons with mental illness); Christopher Slobogin, Mental Disorder as an Exemption from the Death Penalty: The ABA-IRR Task Force Recommendations, 54 Cath. U. L. Rev. 1133, 1136-37 (2005) ("People with significant mental disorder at the time of the offense may often be culpable enough to deserve conviction for murder, but they are never as culpable as the consummately evil killer envisioned by the Supreme Court's death penalty jurisprudence") [hereinafter Slobogin, Mental Disorder as an Exemption]; Elizabeth Rapaport, Straight is the Gate: Capital Clemency in the United States from Gregg to Atkins, 33 N.M. L. Rev. 349, 367-68 (2003) ("The Atkins decision itself provides ample jurisprudential justification, mutatis mutandis, for the exclusion of juveniles and the mentally ill as well as the mentally retarded from capital prosecution."); Douglas Mossman, Atkins v. Virginia, A Psychiatric Can of Worms, 33 N.M. L. Rev. 255, 289 (2003) ("Increased knowledge about the biological underpinnings of mental illness may well help convince courts that sufferers of several mental disorders deserve the same constitutional protections that Atkins confers upon defendants with mental retardation."); John Blume & Sheri Lynn Johnson, Killing the Non-Willing: Atkins, the Volitionally Incapacitated, and the Death Penalty, 55 S.C. L. Rev. 93 (2003); Christopher Slobogin, What Atkins Could Mean for People with Mental Illness, 33 N.M. L. Rev. 293 (2003) (there is no rational basis for distinguishing the severely mentally ill and the mentally retarded) [hereinafter Slobogin, What Atkins Could Mean].

U.S. 153, 173 (1976)). See also Corcoran, 774 N.E.2d at 503 (Rucker, J. dissenting) ("I would hold that a seriously mentally ill person is not among those most deserving to be put to death. To do so in my view violates the Cruel and Unusual Punishment provision of the Indiana Constitution.").

Because capital punishment is not disproportionate to the offense of murder, in this brief, as in Atkins, only the first and third prongs of the Gregg test are at issue. Under the Eighth Amendment, death is an excessive penalty for a crime when it is contrary to "contemporary values" – that is, "the 'evolving standards of decency that mark the progress of a maturing society.'" Penry v. Lynaugh, 492 U.S. 302, 330-331 (1989) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)). The "evolving standard," the Court stated in Atkins, "should be informed by 'objective factors to the maximum possible extent,'" including the actions of legislatures, juries and prosecutors, but "in the end [the Court's] own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." Atkins, 536 U.S. at 311-3112 (citing, *inter alia*, Coker v. Georgia, 433 U.S. 584, 597 (1977)). Furthermore, in Atkins, the Court again recognized that social and professional opinions must play a significant role in defining the evolving standards of decency that mark the progress of a maturing society. 536 U.S. at 2249 n.21. The Court looked to the opinions of social and professional organizations with "germane expertise," the opposition to the practice by "widely diverse religious communities," international practice, and polling data, in determining that death is a disproportionate punishment for the mentally retarded. Id.

In Roper v. Simmons, the Court again turned to international opinion, finding that "[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions." Roper, 543 U.S. at 578. In reviewing

international law and opinion, the Court found that "the United States now stands alone in a world that has turned its face against the juvenile death penalty." Id. at 577. In rejecting juvenile executions, the Court stated: "[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom." Id. at 578.

A. DEATH AS PUNISHMENT FOR THE SERIOUSLY MENTALLY ILL IS CONTRARY TO THE EVOLVING STANDARDS OF DECENCY THAT MARK THE PROGRESS OF A MATURING SOCIETY.

Many of the factors considered by the Court in Atkins point directly to a conclusion that death is disproportionate for such defendants [142] As in Atkins, professional organizations with relevant expertise are overwhelmingly opposed to the execution of the mentally ill. The American Bar Association supports a categorical exemption of the severely mental ill from capital punishment:

> Defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences, or wrongfulness of their conduct; (b) to exercise rational judgment in relation to conduct; or (c) to conform

[142] There does not appear to be conclusive evidence that legislatures, juries and prosecutors view the execution of individuals who suffered from mental illness at the time of the capital offense as disproportionate punishment. See Blume and Johnson, Killing the Non-Willing, supra, at 131-143. But see Connecticut General Statutes § 53(a)-46(a) (exempting a capital defendant from execution if "his mental capacity was significantly impaired or his ability to conform his conduct to the requirements of law was significantly impaired but not so impaired in either case as to constitute a defense to prosecution"); New Jersey v. Nelson, 803 A.2d 1, 41, 42-44 (N.J. 2002) (Zazzali, J., concurring) ("An examination of *jury verdicts* in New Jersey capital sentencing trials ... shows that attitudes toward those with mental illness or defects are evolving, with a growing reluctance to execute those whose mental disease or defect or intoxication contributes to their difficulty in reasoning about that they are doing.... Notably, *prosecutors* have sought the death penalty at a significantly decreased rate for defendants who present evidence" of mental defects or illnesses; these trends "suggest an evolving aversion in our community to subjecting defendants with mental disease or defects to execution") (emphasis added).

> their conduct to the requirements of the law. A disorder manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for purposes of this provision.

Recommendations of the American Bar Association Section of Individual Rights and Responsibilities Task Force on Mental Disability and the Death Penalty, 54 Cath. U. L. Rev. 1115, 1115 (2005) [hereinafter ABA Task Force Recommendations]. The ABA Recommendations have been adopted by the National Alliance on Mental Illness (NAMI),[143] The National Mental Health Association (NMHA)[144] and the American Psychiatric Association,[145] and were approved by the ABA House of Delegates on August 8, 2006.[146]

Virtually every major mental health association in the United States that has addressed the issue of the execution of mentally ill offenders vigorously supports either an outright ban or a moratorium until an adequate comprehensive evaluation system is implemented. The National Alliance for the Mentally Ill (NAMI) believes that "the death penalty is *never* appropriate for a

[143] See Public Policy Committee of the Board of Directors and the NAMI Department of Public Policy and Research, Public Policy Platform of the National Alliance on Mental Illness, § 9.6, at 43, (available at http://www.nami.org/Content/NavigationMenu/Inform_Yourself/About_Public_Policy/public_policy_platform_11-29-04.pdf (7th ed. Dec. 2004)). See also Laurie Flynn, No Death Penalty for Persons with Severe Mental Illnesses, National Alliance on Mental Illness, at http://www.nami.org/Content/ContentGroups/Press_Room1/1998/January_1998/No_Death_Penalty_For_Persons_With_Severe_Mental_Illnesses_hr__i_Statement_By_Laurie_M__Flynn,_Execut.htm (released Jan. 12, 1998).

[144] See NMHA Position Statement: Death Penalty and People with Mental Illness, National Mental Health Association, at http://www.nmha.org/position/deathPenalty/deathpenalty.cfm (approved June 11, 2006).

[145] See American Psychiatric Association, Position Statement: Diminished Responsibility in Capital Sentencing, American Psychiatric Association, at http://www.psych.org/edu/other_res/lib_archives/archives/200406.pdf (approved Dec. 2004).

[146] See ABA Online Media Kit: News from the Annual Meeting, American Bar Association, at http://www.abavideonews.org/ABA374/index.php (visited Aug. 9, 2006).

defendant suffering from schizophrenia or other serious brain disorders."[147] The National Mental Health Association (NMHA) takes a similar position.[148]

The former president of the American Psychiatric Association, Dr. Alan A. Stone, has written that:

> From a biopsychosocial perspective, primary mental retardation and significant Axis I disorders [such as schizophrenia] have similar etiological characteristics. And the mentally ill suffer from many of the same limitations that, in Justice Stevens' words, 'do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.' 'Evolving standards of decency' mean many different things to different people. But an important part of our standards of decency derive from our scientific understanding of behavior. I believe the time will come when we recognize that it is equally indecent to execute the mentally ill.[149]

Furthermore, the Human Rights Committee of the United Nations has interpreted the International Covenant on Civil and Political Rights (ICCPR) to forbid the execution of persons with severe mental illness. See William A. Schabas, International Norms on Execution of the Insane and the Mentally Retarded, 4 Crim. L.F. 95, 100-01 (1993). See also International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 6, 999 U.N.T.S. 171, 174. The United Nations Commission on Human Rights has consistently adopted resolutions calling on all states that maintain the death penalty "not to impose the death penalty on a person suffering from

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[147] See Laurie Flynn, No Death Penalty for Persons with Severe Mental Illnesses, National Alliance on Mental Illness, supra note 9.

[148] See NMHA Position Statement: Death Penalty and People with Mental Illness, National Mental Health Association, supra note 10.

[149] Alan Stone, Supreme Court Decision Raises New Ethical Questions for Psychiatry, Psychiatric Times (September 2002; Vol. XIX; Issue 9) (available at http://www.psychiatrictimes.com/p020901b.html; visited July 26, 2006). Dr. Stone is also Touroff-Glueck Professor of Law and Psychiatry in the faculty of law and the faculty of medicine at Harvard University.

any form of mental disorder or to execute any such person."[150] As recently as 2000, the U.N. Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions called on the United States "to take immediate steps to bring [its] domestic legislation and legal practice into line with the international standards prohibiting the imposition of death sentences in regard to minors and mentally ill or handicapped persons."[151]

Thus, just as in Atkins and Roper, where international law and considered professional opinion weighed against the execution of persons with diminished culpability due to youth or mental retardation, international law and professional opinion strongly suggest that the severely mentally ill should not be subject to execution. See Anthony Bishop, The Death Penalty in the United States: An International Human Rights Perspective, 43 S. Tex. L. Rev. 1115, 1138-1139 (2002).

In addition, as in Atkins, polling of the citizens of this country makes clear that Americans overwhelmingly reject death as punishment for the mentally ill. According to a Gallup Poll taken in 2002, 75 percent of those surveyed opposed executing the mentally ill, while only 19 percent supported it. The poll surveyed 1,012 Americans across the country from May 6-9 of 2002. See http://www.pollingreport.com/crime.htm (visited July 18, 2006). Such data constitute "'objective evidence of how our society views a particular punishment today.'" Van Tran, 66 S.W.3d at 801 (quoting Penry, 492 U.S. at 331 (citations omitted)).

Knowledge about the seriousness and complexity of mental illness is also increasing in the judiciary. Justice Pfeifer of the Ohio Supreme Court stated in a stirring dissent that:

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[150] See, e.g., The Question of the Death Penalty, U.N. Commission on Human Rights Res. 2005/59, ¶ 7(c), U.N. Doc. E/CN.4/RES/2005/59 (Apr. 20, 2005)

[151] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, delivered to the Economic and Social Counsel, Commission on Human Rights, ¶ 97, U.N. Doc. E/CN.4/2000/3 (Jan. 25, 2000).

> Mental illness is a medical disease. Every year we learn more about it and the way it manifests itself in the mind of the sufferer. At this time, we do not and cannot know what is going on in the mind of a person with mental illness. As a society, we have always treated those with mental illness differently from those without. In the interest of human dignity, we must continue to do so . . . . I believe that executing a convict with a severe mental illness is cruel and unusual punishment.

State v. Scott, 748 N.E.2d 11, 20 (Ohio 2001) (Pfeifer, J., dissenting), cert. denied, 532 U.S. 1034 (2001).

In short, the execution of defendants who were seriously mentally ill at the time of the offense is contrary to the evolving standards of decency that mark the progress of a maturing society.

B. A CATEGORICAL PROHIBITION AGAINST EXECUTING OFFENDERS WITH SEVERE MENTAL ILLNESS AT THE TIME OF THE CRIME IS NECESSARY TO PROTECT THEIR RIGHTS TO BE FREE OF CRUEL AND UNUSUAL PUNISHMENT.

Relying on juries to weigh the mitigating value of mental illness is inadequate to protect the right of mentally-ill defendants to be free of cruel and unusual punishment: "Juries and judges, like people generally, harbor hostile attitudes toward people with mental disability. Numerous studies document that capital sentencing juries tend to devalue evidence of significant mental disorder, often treating it as an aggravating circumstance rather than a mitigating one. And prosecutors routinely play to this bias." Slobogin, Mental Disorder as an Exemption, supra, at 1150-51 (citation omitted)..

The American Psychiatric Association voiced its concern that juries commonly misapply evidence of severe mental illness:

> Even though defendants with mental illness are entitled to introduce mental health evidence in mitigation of sentence, commentators on capital sentencing have often observed that juries tend to devalue undisputed and strong evidence of diminished

> responsibility in the face of strong evidence in aggravation. Indeed, such evidence is often a double-edged sword, tending to show both impaired capacity as well as future dangerousness.[152]

The Court's reasoning in Atkins and Roper that juries are poorly positioned to weigh properly the mitigating aspects of mental retardation and youth applies equally to severe mental illness. There is an intolerable risk that capital juries will treat mental illness as an aggravator, in part because they incorrectly assume that mental illness significantly increases future dangerousness. As with juvenile offenders and the mentally retarded, only a categorical ban on executing offenders who were severely mentally ill at the time of the crime can adequately protect their constitutional rights.

C. THE INFLICTION OF CAPITAL PUNISHMENT UPON INDIVIDUALS WHO WERE MENTALLY ILL AT THE TIME OF THE OFFENSE MAKES NO MEASURABLE CONTRIBUTION TO THE ACCEPTABLE GOALS OF PUNISHMENT AND IS NOTHING MORE THAN THE PURPOSELESS AND NEEDLESS INFLICTION OF PAIN AND SUFFERING.

The United States Supreme Court has held that the death penalty is excessive when "it 'makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering.'" Penry, 492 U.S. at 335 (quoting Coker, 433 U.S. at 592). The Court has identified "'two principal social purposes'" served by capital punishment: "'retribution and deterrence of capital crimes.'" Penry, 492 U.S. at 335-36 (quoting Gregg, 428 U.S. at 183). In Enmund v. Florida, 458 U.S. 782 (1982), the Court held that, "unless the death penalty when applied to those in [the defendant's] position measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and

[152] Position Statement on Diminished Responsibility in Capital Sentencing, available at http://www.psych.org/edu/other_res/lib_archives/archives/200406.pdf (approved Dec. 2004) (citations omitted). See also Amnesty International, The Execution of Mentally Ill Offenders 69, available at http://web.amnesty.org/library/pdf/AMR510032006 ENGLISH/$File/AMR5100306.pdf (Jan. 31, 2006) (citations omitted)).

needless imposition of pain and suffering,' and hence an unconstitutional punishment." Id. at 798 (quoting Coker, 433 U.S. at 592).

Capital punishment inflicted on individuals who were seriously mentally ill at the time of the offense is nothing more than the purposeless and needless imposition of pain and suffering. It makes no measurable contribution to the acceptable goals of punishment, and fails to serve any legitimate penal purpose more effectively than a less severe penalty, including both retribution and deterrence.

(i) Retribution is not served by executing those who were mentally ill at the time of the offense.

The United States Supreme Court has explained that "retribution as a justification for executing [offenders] very much depends on the degree of [their] culpability." Enmund, 458 U.S. at 800. The rationale of the Court's acceptance in Atkins that mentally retarded murderers are categorically so lacking in moral blameworthiness as to be ineligible for the death penalty should lead to the conclusion that the seriously mentally ill are likewise ineligible.

The severely mentally ill have the same cognitive and volitional impairments relied upon by the Court in Atkins and Roper. See California v. Danks, 82 P.3d 1249, 1285 (Cal. 2004) (Kennard, J., concurring and dissenting). "Often persons experiencing symptoms of mental disabilities have cognitive impairments and distortions of reality that reduce their culpability in ways that are similar to, but arguably even more substantial than, the developmental shortcomings of 16 and 17 year olds." John Parry, The Death Penalty and Persons with Mental Disabilities: A Lethal Dose of Stigma, Sanism, Fear of Violence, and Faulty Predictions of Dangerousness, 29 Mental & Physical Disability L. Rep. 667, 668 (2005).

Of all serious mental illnesses, schizophrenia is among the most mitigating, since it often distorts perception and judgment, leading sufferers to take actions based on delusions about the people and situations around them:

> Simply put, knowledge relies on cognition, and cognition can be affected by schizophrenia . . . . 'The characteristic symptoms of Schizophrenia involve a range of cognitive and emotional dysfunctions that include perception' . . . . Symptoms include delusions, which are 'erroneous beliefs that usually involve a misinterpretation of perceptions or experiences.'

Clark v. Arizona, __ U.S. __, 126 S. Ct. 2709, 2739 (2006) (Kennedy, J., dissenting) (quoting DSM-IV-TR at 299).

Persons who are severely mentally ill have significantly reduced moral culpability. Therefore, their executions will not serve the goal of retribution.

(ii) Deterrence is not served by executing those who were seriously mentally ill at the time of the offense.

Defendants who at the time of their offenses suffer from severe mental illness will not be deterred from committing their offenses by the threat of capital punishment. "The characteristic symptoms of schizophrenia," for example, "involve a range of cognitive and emotional dysfunctions that include perception, inferential thinking, language and communication, behavioral monitoring…volition and drive, and attention." DSM-IV-TR, supra, at 299. As a result of these dysfunctions, schizophrenics often hold bizarre beliefs and make decisions based on distorted perceptions of reality. Id. As Justice Powell noted, "the death penalty has little deterrent force against defendants who have reduced capacity for considered choice." Skipper v. South Carolina, 476 U.S. 1, 13 (1986) (Powell, J., concurring), citing Eddings v. Oklahoma, 455 U.S. 104, 115 n.11 (1982).

As with juveniles and the mentally retarded,[153] the fear of execution, even if it deters some defendants, cannot plausibly be thought to deter mentally ill persons.

"A defendant cannot be used as an example to others, through her execution, if it is unjust to put her to death because of lessened culpability." New Jersey v. Nelson, 803 A.2d 1, 41, 48 (N.J. 2002) (Zazzali, J., concurring) (citing H.L.A. Hart, Prolegomena to the Principles of Punishment, in Punishment and Responsibility 1-27 (1968) (arguing that general deterrence justifies practice of punishment, but allocation of punishment on specific occasion must be deserved)). As the Tennessee Supreme Court recognized in Van Tran, "inflicting the death penalty on a mentally defective person" in the absence of a legitimate penological objective "becomes a process in which society seeks vengeance, not retribution or deterrence. Such a result is neither civilized, nor humane." 66 S.W.3d at 808 (citation omitted).

This Court should hold that Article I, Sections 8 & 16 of the Tennessee Constitution, the Eighth and Fourteenth Amendments to the U.S. Constitution and T.C.A. § 39-13-206 (c)(1)(A) categorically exempt from capital punishment those who were severely mentally ill at the time of the offense.

21. BECAUSE IT GIVES PROSECUTORS UNFETTERED AND STANDARDLESS DISCRETION TO SEEK OR DECLINE TO SEEK A SENTENCE OF DEATH, T.C.A. § 39-2-203 VIOLATES THE 6TH, 8TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ARTICLE 1, §§ 8, 9, 10, 13, 16, AND 32

[153] In Thompson v. Oklahoma, 487 U.S. 815, 837 (1988) the Court observed that, for murderers under the age of sixteen, "the likelihood that the ... offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent." In Roper v. Simmons, the Court noted that "it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles", finding that "the absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence." 543 U.S. at 571.
In Atkins, the Court said that, for mentally retarded offenders, the "cold calculus" of cost and benefit is "at the opposite end of the spectrum from behavior." 536 U.S. at 319.

OF THE TENNESSEE CONSTITUTION AND T.C.A. § 39-13-206(c) (1) (A).

Under Tennessee law, the decision whether to seek the death penalty is within the complete discretion of the individual Offices of the District Attorneys General. Such unbridled discretion is unconstitutional under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article 1, §§ 8, 9, 10, 13, 16 and 32 of the Tennessee Constitution. But see Keen v. State, No. W2004-02159-CCA-R3-PD, 2006 WL 1540258 *51-52 (Tenn. Crim. App. June 5, 2006) (rejecting similar claim) (citing State v. Keen, 31 S.W.3d 196, 233 (Tenn. 2000)); State v. Thomas, 158 S.W.3d 361, 407 (Tenn. 2005).

T.C.A. § 39-2-203 allows prosecutors complete discretion as to whether or not to seek the execution of defendants convicted of first-degree murder. There are no known standards, procedures or review mechanism. The Tennessee law permitting individual District Attorneys General to make non-reviewable god-like decisions stands in stark contrast to the strict procedures that must be followed by the a United States Attorneys Office before seeking the death penalty in federal court. See DEPARTMENT OF JUSTICE, UNITED STATES ATTORNEYS MANUAL §§ 9-10.020-9-10.100 (2002). That office must first obtain written authorization from the U.S. Attorney General in Washington, D.C., which purportedly seeks to make decisions that are intended to be fair and consistent nationwide. This written authorization needs to be obtained prior to jury selection for the guilt phase of the trial. Additionally, the decision of the Attorney General, either yes or no, is then filed with the United States District Court Clerk under 18 U.S.C. Title 18 §3593(a).

Tennessee's statutory framework governing (or rather failing to govern) the decision of which defendant in which judicial district should be sentenced to death is on its face and as it is being applied in this case and throughout the state arbitrary and capricious. It violates Richard

Taylor's right to due process of law and the equal protection of the law and constitutes cruel and unusual punishment. Therefore, it violates the Eighth and Fourteenth Amendments to the United States Constitution and Article 1, Sections 8, 9, 10, 13, 16 and 32 of the Tennessee Constitution.

In determining the scope of the due process to be afforded an individual before the government may deprive him of his very *life*, the United States and Tennessee Constitutions require consideration and balancing of three factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the state's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Mathews v. Eldridge, 424 U.S. 319, 335 (1976); State v. Pearson, 858 S.W.2d 879, 885 (Tenn. 1993). Application of these factors shows that Tennessee's current statutory framework which invests individual District Attorneys General in each judicial district with the unbridled discretion to seek or not to seek a defendant's death violates due process of law.

First, the framework affects a fundamental interest, *life itself*.

Moreover, the decision to seek a defendant's death is the most important -- and most irrevocable -- decision that can be made by a state official in Tennessee. There is certainly a high risk of an erroneous decision -- with fatal consequences. On the other hand, the additional procedural safeguards followed in federal courts would greatly reduce that risk.

Furthermore, the state's interest in granting prosecutors unbridled discretion to decide whether a defendant will live or die is minimal at best. On the contrary, the State of Tennessee has a strong interest in ensuring that a decision to seek the death of one of its citizens is made pursuant to comprehensive standards carefully applied by more than one individual. Due process

requires nothing less.

In addition to due process, Tennessee's standardless system violates equal protection of the law. In Bush v. Gore, 531 U.S. 98, 110 (2000), the United States Supreme Court held that a recount of the vote in the presidential election would violate the equal protection rights of voters because there were no uniform statewide standards to govern the recount. The Court stated that, when a statewide scheme is in effect, "there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied." Id. at 109.

This equal protection principle must apply to the right to life as well as the right to vote. Therefore, Tennessee's standardless process by which certain defendants are chosen to be penalized with death violates the Equal Protection Clauses of the United States and Tennessee Constitutions.

In addition, requiring standards to ensure that prosecutors do not, through the exercise of unfettered discretion, arbitrarily value some peoples' lives over others' would vindicate the 8th Amendment and Section 16's mandate of reliability and consistency in the application of the death penalty. Johnson v. Mississippi, 486 U.S. 578, 584 (1988). When a defendant's life is at stake, a court must be "particularly sensitive to insure that every safeguard is observed." Gregg v. Georgia, 428 U.S. 153, 187 (1976). This heightened standard of reliability is "a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." Ford v. Wainwright, 477 U.S. 399, 411 (1986).

Finally, the prosecution's unfettered and standardless discretion is the epitome of arbitrariness, and thus violates T.C.A. § 39-13-206(c) (1) (A), which requires this Court to ensure that sentences of death are not "imposed in any arbitrary fashion."

Accordingly, this Court must hold Tennessee's standardless system of prosecutorial discretion regarding matters of life and death to be unconstitutional and in violation of T.C.A. § 39-13-206(c) (1) (A).

22. T.C.A. § 39-13-206 VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 8 & 16 OF THE TENNESSEE CONSTITUTION; ADDITIONALLY, APPELLANT'S DEATH SENTENCE IS DISPROPORTIONATE UNDER T.C.A. § 39-13-206.

T.C.A. § 39-13-206 (c) (1) (D) requires that a court reviewing a sentence of death determine whether "[t]he sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant." State v. Godsey, 60 S.W.3d 759, 781-82 (Tenn. 2001); State v. Bland, 958 S.W.2d 651, 661-74 (Tenn. 1997).

Although comparative proportionality review is not specifically required by the United States Constitution in every case,[154] the State of Tennessee does have an overriding constitutional obligation to guard against the "arbitrary and inconsistent imposition of the death penalty." Bland, 958 S.W.2d at 663 (citing Gregg v. Georgia, 428 U.S. 153 (1976)). Regardless of the specific mechanism a state chooses to review death sentences,

> [t]he Eighth Amendment requires a 'meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.' In Tennessee, an essential aspect of that 'meaningful basis' required by the United States Constitution is the proportionality review mandated by Tenn. Code Ann. § 39-13-206(c)(1)(D).

Id. (citation omitted) (quoting Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J.,

[154] See Pulley v. Harris, 465 U.S. 37, 50-51 (1984) (holding there is "no basis in our cases for holding that comparative proportionality review by an appellate court is required in every case in which the death penalty is imposed and the defendant requests it.").

concurring).

Moreover, "[i]n addition to the requirements of the Eighth Amendment and Article I, Section 16, constitutional due process requires a rational and consistent imposition of the death sentence." Bland, 958 S.W.2d at 675 (Reid, J., concurring and dissenting) (citing Harris v. Blodgett, 853 F. Supp. 1239, 1291 (W.D. Wash. 1994)). Thus, Tennessee is required to implement *some* mechanism to "[guard] against the arbitrary, capricious and freakish imposition of capital punishment." Id. (citing State v. Harris, 839 S.W.2d 54, 84 (Tenn. 1992) (Reid, C.J., and Daughtrey, J., dissenting)).

Tennessee need not utilize proportionality review in every case, but having chosen that method to meet its constitutional obligations, such review must be performed in a constitutionally adequate manner. Contra State v. Hugueley, No. W2004-00057-CCA-R3-CD, 2005 WL 645179, at *13 (Tenn. Crim. App. 2005).[155] Because of the "essential" role played by the state's comparative proportionality review procedure, constitutional deficiencies in its implementation render the state's overall death penalty review process unreliable. But see State v. Reid, 91 S.W.3d 247, 313 (Tenn. 2002); State v. Cazes, 875 S.W.2d 253, 270-71 (Tenn. 1994); State v. Harris, 839 S.W.2d 54, 77 (Tenn. 1992).

A. TENNESSEE'S COMPARATIVE PROPORTIONALITY REVIEW PROCEDURE IS CONSTITUTIONALLY FLAWED.

Tennessee's comparative proportionality review procedure is constitutionally flawed for three reasons: (i) the proportionality test is overbroad; (ii) the "pool" of cases used for comparison is inadequate; and (iii) the review process is overly subjective.

[155] See also State v. Pritchett, 621 S.W.2d 127, 140 (Tenn. 1981) (holding that automatic judicial review of all death sentences is an "integral part of the death penalty statute.").

Overbreadth. Under the current standard of proportionality review, "a sentence is disproportionate only if the case under review 'is plainly lacking in circumstances consistent with those in similar cases in which the death penalty has been imposed.'" Godsey, 60 S.W.3d at 794 (Birch, J., concurring and dissenting) (quoting Bland, 958 S.W.2d at 665). Indeed, "[e]ven if a defendant can show that others received life sentences for similar crimes and no discernible basis exists to distinguish the cases, the sentence will 'not necessarily [be found] disproportionate.'" Godsey, 60 S.W.3d at 794 (Birch, J., concurring and dissenting). This overbreadth renders Tennessee's mechanism for comparative proportionality review unconstitutional because it does not identify *disproportionate* sentences. Instead, this test permits disparate penalties to be "imposed in [factually] indistinguishable cases." Id.

To remedy this arbitrary test, this Court should adopt a standard which assesses "whether a given case, viewing its circumstances as objectively as possible, is more consistent with the circumstances of similar capital cases and capital defendants wherein the death penalty was not imposed."[156] Id.

Inadequate Comparison Pool. The Tennessee Supreme Court has limited its proportionality review to first-degree murder cases in which the state seeks the death penalty and a sentencing jury imposes death, deliberately excluding from the pool of cases that are pled or "in which a plea bargain is reached with respect to the punishment or in which the State does not seek the death penalty." Reid, 164 S.W.3d at 316 (citation omitted) (citing State v. Godsey, 60 S.W.3d 759, 783 (Tenn. 2001)).[157]

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[156] Accord State v. DiFrisco, 662 A.2d 442, 448 (N.J. 1995); Tichnell v. State, 468 A.2d 1, 1 n.18 (Md. 1983); Stamper v. Commonwealth, 257 S.E.2d 808, 824 (Va. 1979).

[157] The Court refuses to "review the exercise of prosecutorial discretion" in cases where the state did not seek death for fear of discouraging the state from plea bargaining and exercising its

This limitation on the pool of cases under review unconstitutionally narrows the range of cases with which the Appellant's case may be compared,[158] thereby violating his constitutional rights under the United States and Tennessee Constitutions. Instead, "the pool should include all cases in which the defendant was initially indicted for a capital offense." Godsey, 60 S.W.3d at 794 (Birch, J., concurring and dissenting). Such a comparison pool would "compare all similar crimes and defendants," not just those the state singles out as capital cases. Id. See also id. at 795 (finding it illogical for state to determine "the cases considered in proportionality review).

Overly subjective review. Tennessee's mechanism for conducting comparative proportionality review is too subjective to provide constitutionally adequate consistency and reviewability in the state's death sentences. Given the "multitude of variables" present in every first-degree murder case,[159] a court may analogize or distinguish any case from any other based on whichever criteria it chooses to emphasize. For this reason, mere 'similarity' is too malleable

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discretion not to seek the death penalty. Id. at 784. But see Bush v. Gore, 531 U.S. 98 (2000) (holding that state courts must make provisions that their rulings are carried out in a fair and impartial manner); Reid, 164 S.W.3d at 324 n.2 (Birch, J., concurring and dissenting) (citing a July 2004 study by the Tennessee Comptroller of the Treasury showing that Tennessee prosecutors are inconsistent in their pursuit of the death penalty and concluding that "this inconsistency contributes to arbitrariness in the imposition of the death penalty").

[158] See, e.g., Public pays tab for most suspects' legal defense, Tennesean.com, at http://http://tennessean.com/apps/pbcs.dll/article?AID=/20060625/NEWS1302/606250356 (June 25, 2006) (reporting that inmate Malcom Jenkins was allowed to plead guilty in Davidson County in exchange for life imprisonment in the beating and strangling death of corrections officer Frederick Hyatt in November 2003, during a five-man escape attempt).

[159] Tennessee courts consider a broad, non-exclusive list of factors when reviewing proportionality: (1) the means of death, (2) the manner of death, (3) the motivation for the killing, (4) the place of death, (5) the victim's age, physical condition, and psychological condition, (6) the absence or presence of provocation, (7) the absence or presence of premeditation, (8) the absence or presence of justification, and (9) the injury to and effect on non-decedent victims, as well as the defendant's (1) prior criminal record, (2) age, race, and gender, (3) mental, emotional, and physical condition, (4) role in the murder, (5) cooperation with authorities, (6) level of remorse, (7) knowledge of the victim's helplessness, and (8) potential for rehabilitation. State v. Hugueley, No. W2004-00057-CCA-R3-CD, 2005 WL 645179, at *16 (Tenn. Crim. App. 2005).

a standard to produce constitutionally adequate proportionality review: "the scope of the analysis . . . appears to be rather amorphous and undefined – expanding, contracting, and shifting as the analysis moves from case to case." Godsey, 60 S.W.3d at 797 (Birch, J., concurring and dissenting).

Accordingly, T.C.A. § 39-13-206 (c) (1) (D) violates the Eighth and Fourteenth Amendments to the United States Constitution and Articles I, Sections 8 and 16 of the Tennessee Constitution.

B. APPELLANT'S DEATH SENTENCE IS EXCESSIVE AND DISPROPORTIONATE TO THE PENALTY IMPOSED IN SIMILAR CASES, CONSIDERING BOTH THE NATURE OF THE CRIME AND OF APPELLANT.

Additionally, as shown below, Richard Taylor's death sentence is excessive and disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and of appellant. See T.C.A. § 39-13-204.

Factors about the Crime. The nature of the crime itself is evidence that Appellant was severely mentally ill at the time of the crime. Appellant's bizarre motive for the crime (that the victim had removed a towel from *another* inmate's cell window) indicates the delusional state Appellant was in at the time of the crime. It is undisputed that prior to the offense Appellant was denied antipsychotic medication that had been prescribed for him. (Vol. 2, 106). A TDOC Commissioner noted that the system "failed" Richard Taylor. (Vol.1, 56).

Furthermore, there is no indication that Taylor committed the offense in pursuance of some other crime such as escape or robbery. This makes the instant case fundamentally different from cases such as State v. Henderson, 24 S.W.3d 307 (Tenn. 2000) (upholding death sentence where defendant shot deputy in back of head during escape from dentist office) and State v.

Workman, 667 S.W.2d 44 (Tenn. 1984) (upholding death sentence where defendant shot and killed police officer following robbery of fast food restaurant).

Factors about the Appellant. Taylor's lifelong severe mental illness requires imposition of a life sentence under proportionality review. See, e.g., Edwards v. State, 441 So.2d 84, 88-93 (Miss. 1983) (finding death sentence disproportionate for schizophrenic defendant). As recognized by Judge Russell in his post-conviction findings (Vol. 2, 98-115), Taylor's "past is fraught with psychological problems as well as equally extensive history of treatment for those mental illnesses." (Vol. 2, 105). As early as twelve years old, Taylor was treated for substance abuse problems (common in individuals with schizophrenia).[160] (Vol. 2, 106). As early as sixteen years old, Taylor had a documented history of suicide attempts. (Vol. 2, 106). In 1980, Taylor attempted suicide by eating glass. (Vol. 2, 106). In the years leading up the offense in this case and for years thereafter, Taylor's severe mental illness required treatment with powerful antipsychotic drugs. (Vol. 2, 106-07).

The offense in this case took place only two months after Taylor was sent back to the Turney Center and deprived of his antipsychotic medication. (Vol. 2, 106). At the time of the offense, Taylor was mentally ill, suicidal, delusional and likely insane. Immediately after the offense, Taylor was so disturbed he ate his own feces and drank his own urine in the presence of Tennessee Department of Correction employees. (Vol. 3, 355-56).

In other killings of corrections employees such as State v. Hugueley, no similar findings of mental illness were made. Hugueley, 2005 WL 645179, at *17. Taylor's mental illness is so

[160] See American Psychiatric Association, Diagnostic and Statistical Manual 304 (Fourth Edition, Text Revision 2000) [hereinafter DSM-IV-TR] ("Rates of comorbidity with Substance-Related Disorders are high.").

severe, pervasive, and clearly documented that it makes his case fundamentally dissimilar from other cases in which the death penalty has been imposed.

Taylor's relatively minor criminal history is another factor in favor of imposition of a life sentence. Taylor had previously been convicted of simple robbery at the time of his offense. Taylor's previous criminal record is also significantly less serious than those found in other death penalty cases.[161]

The death sentence is also excessive and disproportionate because Taylor was tortured by the Tennessee Department of Correction for years while on death row. See, e.g., Point 18, (B), describing in detail the Sgt. Dale Hunt Affidavit and the psychological and physical torture inflicted on Taylor. The systematic and shocking torture of Taylor by the Tennessee Department of Correction requires a life sentence.

Perhaps most importantly, Taylor's death sentence is excessive and disproportionate because the jury was never presented – and thus never considered – much of the strong mitigating evidence in Taylor's case. Taylor was allowed to represent himself at trial despite his severe mental illness, his heavy sedation from the forcible administration of antipsychotic medication, his incompetency and the fact that his waiver of counsel was not competent, knowing, voluntary or intelligent. Moreover, the trial court erroneously assumed that it was precluded from appointing standby counsel to assist Taylor. Taylor did not present any

[161] Cf. Hugueley, 2005 WL 645179, at *17 (prior convictions of first degree murder and attempted first degree murder). State v. McKinney, 74 S.W.3d 291 (Tenn. 2002) (prior convictions for aggravated robbery as adult and aggravated assault as juvenile); State v. Chalmers, 28 S.W.3d 913 (Tenn. 2000) (prior convictions for attempted especially aggravated robbery and attempted first degree murder); State v. Keough, 18 S.W.3d 175, 183 (Tenn. 2000) (prior convictions for assault to commit voluntary manslaughter and manslaughter); State v. Smith, 993 S.W.2d 6 (Tenn. 1999) (prior convictions for robbery and first degree murder); State v. Boyd, 959 S.W.2d 557 (Tenn. 1998) (prior conviction for second degree murder); State v. Adkins, 725 S.W.2d 660 (Tenn. 1987) (prior convictions for second degree murder, and aggravated assault in which defendant shot victim in the abdomen).

mitigating evidence to his capital jury and the trial court failed to conduct the legally-required inquiry into whether this waiver was knowing, voluntary and intelligent. As a result, the jury never was permitted to conduct a properly searching inquiry into the abundant mitigating evidence available in this case or to formulate an informed, "reasoned moral response to the defendant's background, character, and crime." Roper v. Simmons, 543 U.S. 551, 603 (2005) (citing California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)).

As recognized by the Arizona Supreme Court, abundant and persuasive evidence of severe mental illness can compel a reviewing court to reduce a death sentence to life imprisonment. Arizona v. Roque, No. CR-03-0355-AP, 2006 WL 2337230, at *34-35 (Ariz. Aug. 14, 2006). The facts of the current case compel a similar conclusion: "taken as a whole, the mitigating evidence here raises a substantial question whether the death is an appropriate sentence." Id. (citing Arizona v. Trostle, 951 P.2d 869, 888 (Ariz. 1997) (setting aside death sentence and giving serious consideration to defendant's mental illness because of its impact on his ability to conform to the law)).

A similar question about the appropriateness of death exists in the current case. Given the unique and irreversible nature of the death penalty, this Court should reduce Taylor's sentence to life imprisonment under T.C.A. § 39-13-204, the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 8 and 16 of the Tennessee Constitution.

23. THE PENALTY OF DEATH VIOLATES THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ART. I, §§ 8, 9, 10, 13, 16 AND 32 OF THE TENNESSEE CONSTITUTION, AND T.C.A. § 39-13-205.

It is now clear that the death penalty as currently administered is illegal and unconstitutional under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, Article I, Sections 8, 9, 10, 13, 16, and 32 of the Tennessee Constitution and T.C.A.

§ 39-13-205 (now, 39-13-206). As the United States Supreme Court has stated, "we cannot ignore the fact that in recent years a disturbing number of inmates on death row have been exonerated." Atkins v. Virginia, 536 U.S. 304, 321 & n. 25 (2002). In a recent dissent in which he was joined by Justices Ginsburg, Breyer and Stevens, Justice Souter wrote: "Today, a new body of fact must be accounted for in deciding what, in practical terms, the Eighth Amendment guarantees should tolerate, for the period starting in 1989 has seen repeated exonerations of convicts under death sentences, in numbers never imagined before the development of DNA tests. ... We are thus in a period of new empirical argument about how `death is different' .... [N]ot only would these false verdicts defy correction after the fatal moment, the Illinois experience shows them to be remarkable in number, and they are probably disproportionately high in capital cases." Kansas v. March, __ U.S. __, 126 S.Ct. 2516, 2541, 2544-45 (2006) (Souter, J., dissenting.)

In his concurrence in Ring v. Arizona, 536 U.S. 584, 613 (2002), Justice Breyer delineated some of the death penalty's numerous constitutional deficiencies, including: (1) "the continued difficulty of justifying capital punishment in terms of its ability to deter crime, to incapacitate offenders, or to rehabilitate criminals"; (2) the number of death-row inmates who have been exonerated and the fact that "death is not reversible"; (3) the arbitrariness of capital punishment, in which "the face of the victim [*i.e.*, the race] and socio-economic factors seem to matter"; (4) "the suffering inherent in a prolonged wait for execution" [including the prolonged suffering of the victim's family]; (5) "the inadequacy of representation in capital cases, a fact that aggravates the other failings"; and (6) the fact "that other nations have increasingly abandoned capital punishment." Id., at 614-18 (citations omitted.). Justice Breyer also pointed out that "[m]any communities may have accepted some or all of these claims, for they do not impose capital sentences." Id. (citing LIEBMAN, J., *et al.*, A BROKEN SYSTEM, [Part II: Why There Is So Much Error in Capital Cases, and What Can be Done About It (Feb. 11, 2002),] App. B, Table 11A (more than two-thirds of American counties have never imposed the death penalty since Gregg v. Georgia, 428 U.S. 153 (1976), (2,064 out of 3,066), and only 3% of the Nation's

counties account for 50% of the Nation's death sentences (92 out of 3,066))). See also Moore v. Parker, 425 F.3d 250, 257, 268-270 (6th Cir. 2005) (Martin, J., dissenting) ("the death penalty in this country is arbitrary, biased, and so fundamentally flawed at its very core that it is beyond repair"; "the death penalty ... is so transparently arbitrary that the system in its entirety fails to satisfy due process. [Since Justice Blackmun's statements in Callins v. Collins, 510 U.S. 1141 (1994), ten years ago,] [i]t has only gotten worse"; "The death penalty has proved to be an ineffective cure for society's ills, public support continues to erode, and we share the dubious distinction of being the only western democracy that continues to put its own citizens to death"; *"...lest there be any doubt, the idea that the death penalty is fairly and rationally imposed in this country is a farce*.") (emphasis added).

This Court should declare the death penalty illegal and unconstitutional under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, Article I, Sections 8, 9, 10, 13, 16, and 32 of the Tennessee Constitution, and T.C.A. § 39-13-205.

CONCLUSION

For the foregoing reasons, considered individually and collectively, this Court should grant the relief requested in this brief.

Respectfully submitted,

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