No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

TALIYAH TAYLOR - PETITIONER

vs.

JOSEPH JOSEPH - RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

_____

PETITION FOR WRIT OF CERTIORARI

_____

TALIYAH TAYLOR

Bedford Hills Correctional Facility

P.O. Box 1000, 247 Harris Road

Bedford Hills, NY 10507-2499

QUESTIONS PRESENTED

In this case, the United States Court of Appeals for the Second Circuit held in Deluca v. Lord, 77 F.3d 578 (1996) that "failure to preserve and prepare for a defense of extreme emotional disturbance was sufficient to prove ineffective assistance under the Strickland test of "reasonable probability" of a different outcome. The questions presented are:

1) Does defense counsel in a second degree depraved indifference murder case violate the requirements of Strickland v. Washington by failing to investigate and present available affirmative evidence that could have convinced a jury to vote not guilty by mental disease or defect, as this Court concluded in Wiggins v. Smith and Courts of Appeals have concluded or is defense counsel's decision not to investigate such evidence "strategic" as the state supreme court held? and:

2) Whether the denial of Taylor's post-conviction relief was contrary to, or involved an unreasonable application of, clearly established federal law," as determined by the Supreme Court of the United States, within the meaning of 28 U.S.C. §2254(d)(1)?

LIST OF PARTIES

Pursuant to Supreme Court Rule 24.1(b), the following list identifies all of the parties before the United States Court of Appeals for the Second Circuit. Taliyah Taylor was the appellee below. Sabina Kaplan, former Warden of the Bedford Hills Correctional Facility, and Eric T. Schneiderman, Attorney General of the State of New York, were appellants below. Sabina Kaplan has since been replaced by Joseph Joseph, and pursuant to Supreme Court Rule 35.3, has been substituted as a party.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

CONSTITUTION AND STATUTES

MISCELLANEOUS

OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit, reported at 2018 WL 1418184 (2nd Cir. Feb. 8, 2018) is reported at Pet. App. A1 . The decision of the United States District Court for the Eastern District of New York, reported at WL 3948692 (2017), is reported at Pet. App. B1 The decision of the United States Supreme Court of Richmond County(May 31,2016) is reported at Pet. App. D1 . The order of the United States Court of Appeals for the Second Circuit, rehearing and rehearing en banc is set forth at Pet. App. E1

JURISIDICTION

The judgment of the Court of Appeals was entered February 8, 2018. A timely petition for rehearing and rehearing en banc was denied on April 5, 2018. The petition for writ of certiorari was filed on . This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth and Fourteenth Amendments to the United States Constitution, which provides in relevant part as follows: "In all criminal prosecutions, the accused shall enjoy the right...to have Assistance of Counsel for his defense," and "nor shall any State deprive any person of life, liberty or property, without due process of law." This case also involves 28 U.S.C. §2254 (d)(1), a provision of the AntiTerrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which provides that:

> An application for Writ of Habeas Corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted with respect to any claims that was adjudicated on the merits in the state court proceedings unless the adjudication of claim -
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States.

STATEMENT OF THE CASE

A. Background

On October 18, 2006, Taliyah Taylor, then 24-years old, intended to finish recording a rap music album and return home with her family. Because she had a previous

conviction for DWI and had her driver's license suspended, she chose to be driven to and from the studio by a licensed driver, Tricia Matthews. When **Taylor's** license was suspended in approximately September 2006, she hired Tricia to drive her wherever she needed to go.

In the weeks prior to October 18, 2006, **Taylor** began experiencing the symptoms of a psychotic break. Both witnesses and self-reported documentation evidenced that **Taylor** was hearing voices, increasingly more paranoid, under the impression that she was receiving messages from the radio and TV, and engaged in a spiritual battle between good and evil.(Dr. Wang's report, herinafter "WAN"). According to lay and expert witnesses, she suffered from sleep deprivation, delusions of grandeur, and a preoccupation with religiosity that manifested itself in increasingly erratic and seemingly nonsensical behavior. She reported, "she had spent the days before her arrest, having to be driven to churches to feel calm" (Id.).

On the night of October 18, 2006, in this weakened and progressively worsening mental state, **Taylor** drank one Heineken beer, smoked half of a "purple haze" marijuana cigarette and ingested an ecstasy tablet while in the recording studio trying to finish her album..She was driven to the studio by Tricia and also accompanied by her 7-year old nephew, Kaysean, cousin Maliyah, and her daughter Saniyah. While in the studio, **Taylor** became increasingly frustrated because she could not remember part of the lyrics to her own song. Her frustration exacerbated her deteriorating mental state. She and a friend argued about whether to leave or stay. Maliyah wanted to bring her daughter home and Tricia left with the vehicle to drop them off. **Taylor**, and Kaysean stayed. **Taylor** became anxious and paranoid and left with her nephew, and began walking.

Tricia came to pick **Taylor** up but she refused to get in the car with her.because she believed Tricia was a "demon." By the time she arrived at her grandmother's house, **Taylor** was in the throes of a complete psychosis. She ordered her cousin Maliyah to remove all of her clothes and the children's clothes because she felt that the devil was trying to attack them all and God wanted her to tell them to

remove all of their clothes.

Taylor later told Dr. Berrill that she was sure "some spirit was going to crawl into her clothing" (herinafter "BER" at 9).because she "thought she was dead and that everyone around her 'seemed like a demon'" (Id.). Trial Transcripts (herinafter "T.") state that **Taylor** recalled that she took her nephew's clothes off because "she wanted to get the evil off of [him]" (at 464).

When Maliyah refused to take off her own clothes, **Taylor** uncharacteristically began a physical altercation with her cousin. This impulsive and aggressive behavior alarmed neighbors who called the police, and Maliyah, who called **Taylor's** mother, who then called the police also. The last thing **Taylor** recalls about that moment is being placed, while naked in the back seat of the car with Kaysean and Saniyah. Before Tricia could drive off, Maliyah said she became afraid and took her daughter Saniyah out of the car. Kaysean said he jumped out of the car next. Tricia said **Taylor** then pushed her out of the car.

Although **Taylor** has no recollection of it, what is sure is that she ended up in the driver's seat and drove off alone. None of this mitigating evidence was presented to the jury during trial by **Taylor's** defense attorney Christopher Renfroe, despite the fact that Renfroe gave notice that he intended to present a psychiatric defense.

B. Trial

Taylor was charged with depraved indifference murder, reckless endangerment, and related offenses, arising from a traffic accident that killed pedestrian Larry Simoon, and moments later, injured Vincent and Jeanette Cavalieri. Instead of **Taylor's** attorney presenting the facts and circumstances to the jury at trial as they actually occurred, the information below was presented to the jury by the people. According to **Taylor's** post-arrest statements, upon which the People relied, someime after 6:30 p.m. on October 18, 2006, while trying to record a song as a tribute to her long-deceased father, she took a single ecstasy pill to help her concentrate, smoke some marijuana, and drank a beer. Hours later, as **Taylor** allegedly argued with her mother, she stripped to avoid the "evil" trying to enter

her clothing, and ran outside naked to escape "all the bad influences, the greed... all the problems, all the hate!" When her girlfriend appeared and got out of her car, ppellant jumped in and drove off.

Around 10:45 p.m., **Taylor** was observed driving on Forest Avenue in Staten Island between 80 and 90 miles per hour, without headlights, on the wrong side of the road, just before she hit Simon as he crossed the street, apparently in the middle of the block. Moments later, she went through a red light, hit the Cavalieri's car, and flipped over in a Lowe's parking lot.

Once extricated from her overturned car, she jumped up and down naked, chanting "money, power, respect!" infront of astonished onlookers, and allegedly tried to drive away in an unattended police car; her attorney never questioned if the keys were in the ignition of this unattended police car or how she got in to the alleged unattended police car.

When the police arrived, she told them, "God wanted her to drive naked!" She was arrested and taken to the hospital. Alternatively coherent and incoherent, she told police she was "driving to the light with [her] Dad," who had been murdered 17 years earlier

The trial commenced on October 6, 2008. In Renfroe's opening argument, he told the jury that he would "prove" that **Taylor** had a "schizophrenic attact" (Id.)at 41) on the night of the accident. His defense was that, because of **Taylor's** mental disease or defect, she could not have possessed the requisit mens rea to prove the depraved indifference charge, and, therefore, she should have been acquitted. Renfroe had a plethora of psychiatric evidence from lay witnesses, doctors, therapists, and other experts - and supporting mental health evaluations - at his disposal, to support **Taylor's** mental incapacity.

At the conclusion of the People's case, Renfroe moved to dismiss the murder charge, saying it "requires a depraved intent," which the People had not proven (T. 514). The ople relied on the record and the court denied the application (Id. 514-15).

On the afternoon of Tuesday, October 21, and before Renfroe began his case-in-chief, the People disclosed for the first time 88 recorded telephone calls **Taylor** had made from Riker's Island (Pet. App. K33-34, I56-58). At no time prior to or during trial had the prosecutor intimated to Renfroe that the People had these recordings or were attempting to obtain them (Pet. App. K33-34).

The first time Renfore heard about them was "[a]s [he] was getting ready to call Dr. Wang," who was waiting in the hallway to testify and thereby "set the parameters of the defense before calling the lay witnesses" (Pet. App. K36, K31). Instead, Renfroe was given the tapes of **Taylor's** Riker's Island calls, they adjourned, and he and his associate returned to the office and started listening to the tapes (Pet. App. K29) Renfroe asked Judge Collini to preclude the tapes because of the surprise nature of this evidence "in the middle of trial," arguing that the defense had been prejudiced, the defense expert had not seen the tapes, and that this was a matter of "fundamental fairness" (Pet. App. K45, I62, I61). The Court commended the People for disclosing the tapes at all (Pet. App. I56-58), and faulted **Taylor** for not telling her attorney about them (Pet. App. I59, I61-62).

Justice Collini had recognized that the tapes might "reflect upon" and "have some serious ramifications on" the defense **Taylor** had pursued "from the very beginning in this case," and that defense counsel would want to listen to the tapes, talk to his client about them, and "[o]bviously" speak to her doctors, who would "probably want to hear [them]," about what was in the tapes (Pet. App. I57, I59-60).

Instead of requesting a mistrial or even a continuance to thoroughly investigate the allegations and take the Judge's advice to consult with experts, the following morning, Renfroe abandoned the insanity defense mid-trial. He unilaterally decided to abandon the planned mental illness defense, without any consultation with **Taylor**. and against her wishes. Renfroe rested **Taylor's** case without presenting a case-in-chief to the jury, and without calling any witnesses. He did a summation on intoxication based on the People's case (Pet. App. K37, 48-49) Although Renfroe assured the jurors that he would "prove" his client had a "schizophrenic attack," the closing argument made

no mention of it. When Renfroe rested, he renewed the motion, arguing that the People had "not made out the recklessness to a degree to be of a depraved nature" (Pet. App. [63]). The Court denied the motion. The jury convicted **Taylor** of depraved indifference murder, reckless endangerment, and driving while intoxicated (Pet. App.). **Taylor** was sentenced to::20 years to life for second degree murder, 2 1/3 to 7 years for reckless endangerment, to be served concurrently, and 1 to 3 years for driving while under the influence, to be served consecutively.

C. Direct Appeal and Court of Appeals

In November 2011, **Taylor** was represented by Attorney Erica Horwitz who filed a Brief on her behalf in the Appellate Division. Horowitz argued the following points: (1) The evidence was insufficient to prove that **Taylor**, who took exstasy to "concentrate" better and "feel close" to her long deceased father, possessed a depraved indifference mens rea when, several hours later, she drove naked, speeding on the wrong side of the street and without lights, killed a pedestrian, and, moments later, hit another car, injuring its occupants, and (2) Sentencing **Taylor** to 22 1/3 years to life was excessive given her history of abuse, neglect, and trauma; the mental illness that contributed to her offense; and her demonstrated rehabilitative potential.

Taylor was granted permission to submit a pro se supplemental brief. In her brief, she raised the following points: (1) Insufficiency of evidence; (2) The trial judge erred when he used the incorrect standard of law regarding depraved indifference; (3) Ineffective assistance of counsel with seven subpoints; (4) Trial judge erred when he drew presumptive conclusions regarding evidence that he never saw, heard, or accepted as entered into evidence; (5) **Taylor's** Fifth Amendment right against self-incrimination was violated when she was read her Miranda warnings, despite her being in an incoherent mental state; (6) **Taylor's** sentence was excessive, cruel and unusual punishment in violation of the Eighth Amendment and is disproportionate to other DWI fatality cases; and (7) The Appellate Division should vacate **Taylor's** illegal murder and reckless endangerment sentence as a matter of law and in the interest of justice.

The Appellate Division held that: (1) **Taylor's** statements to the police were voluntarily

made, and (2) Ineffective assistance of counsel claim was appropriate for motion to vacate judgment, rather than direct appeal. The Appellate Division affirmed, finding legally sufficient evidence to support the conviction; that the sentence imposed was not excessive and that the rest of **Taylor's** remaining contentions were without merit (98 AD3d 593 [2d Dept. 2012]). It is worth noting that the Appellate Division's decision was not unanimous, as Judges J. Smith and J. Read both filed dissenting opinions (Id.). She was granted leave to appeal and the Court of Appeals affirmed the conviction (People v. Heigden (Taylor), 22 NY3d 259 (2013).

D. State Post-Conviction Proceedings

In October 2014, Taylor filed a petition for post-conviction relief with State Supreme Courtiinthe County of Richmond. On April 15, 2015, Honorable Wayne M. Ozzi ordered "upon consideration of all papers filed in the above-entitled matter, defendant shall be appointed counsel pursuanttto County Law §722 in order to conduct an evidentiary hearing, with all deliberate speed, before this Court on all of defendant's ineffective assistance of counsel claims raised within her pro se motion to vacate judgment. Defendant shall be permitted to raise any claims of ineffective assistance of counsel that she may not have included within her instant motion" (Pet. App.L13).

Before the hearing was conducted the case was reassigned to Honorable William E. Garnett. On November 25, 2015, Judge Garnett issued a new order limiting the scope of **Taylor's** hearing to the following:

> The defendant will be permitted to testify in regard to her claim that she was coerced to decide not to testify at her trial. The defendant may also testify to the purpose or reason for her phone calls to her witnesses. She will not be permitted to testify to the substance of the calls or to interpret the meaning of the words used during the phone calls. Mr. Renfroe is ordered to testify in regard to the claims made by the defendant. He may, of course, explain his trategy in deciding not to call Doctors Berrill and Wang and other witnesses (Pet. App.L14).

On December 14, 2015, **Taylor** filed a notice of motion to modify Judge Garnett's order to expand the scope of the evidentiary hearing to permit her testimony regarding the substance of her calls and her interpretation of the meaning of the words used during the calls; and the permission to raise additional claims of

ineffective assistance of counsel not included within her original 440 motion. **Taylor's** motion was denied by the Court (Pet. App. L1).

January 21, 2016, **Taylor** filed a notice of motion for reassignment of counsel because she felt the assigned counsel Phillip Smallman was not zealously representing her. In her motion, she argued that defense counsel was providing ineffective assistance for the adequate preparation of her defense at the evidentiary hearing. This request was denied by the Court.(Pet. App. O1).

On January 13, 2016, **Taylor** filed an application for subpoena for a production of a copy of the audio recordings which were the substance of the hearing. She had not received the evidence in its entirety. For completeness and accuracy and to adequately prepare for her defense at the hearing, that evidence was necessary. Copies of the audio recordings were mailed to the facility,,but due to the upgraded technology used to create the CD, **Taylor** was unable to read the disk on the facility's equipment. The Court agreed to grant an order for Smallman to bring a device into the facility in order for her to hear the recordings. Smallman never brought the device in and **Taylor** never was able to listen to this evidence to properly prepare for the hearing (Pet. App. M1).

On January 19, 2016, **Taylor** filed a motion for recusal and change of venue to ensure the proceedings were inherently fair and impartial, and to maintain the complete absence of impropriety due to local bias. The Court denied **Taylor's** request (Pet. App. N1).

On January 25, 2016, **Taylor** filed an addendum to her notice of motion for re-assignment of counsel requesting an in camera inspection. **Taylor's** motion was denied (Pet. App. P1).

1. Evidence at the Hearing

Smallman represented **Taylor** during the hearing. Two witnesses testified at the hearing: **Taylor** and her trial attorney Renfroe. Honorable Judge Garnett was assigned to the hearing. **Taylor** requested that her witnesses be able to testify at her hearing. The Court denied her request (Pet. App. K1).

2. The Intended Psychiatric Defense

Taylor had been driving naked at a high rate of speed at the time of the fatal accident (Pet. App. K9). When Renfroe began representing her, she was being treated at Elmhurst Psychiatric Hospital, having been found unfit to proceed pursuant to a 730 Examination (Pet. App. K2-13, K212, K23, K51).

Dr. Richard Wang had written one of the initial 730 reports (Pet. App. K23) and both he and a Dr. Pabon had found Taylor unfit to proceed (Pet. App. K23). Dr. Wang also treated Taylor at Elmhurst Hospital (Pet. App. K5, 27, 37-38). Later, she was found competent at a hering at which Dr. Wang testified (Pet. App. K28-29 During her two-year incarceration at Riker's, however, she remained on medication "by a Doctor's order" and was housed in the mental observation unit, rather than being put in general population (Pet. App. K18, K21).

Taylor testified that she expected her defense at trial to be one of mental disease or defect (Pet. App. K4). Dr. N.G. Berrill had examined and tested her for the defense (Pet. App. K5, K27-28). Taylor hoped that he and Doctor Wang would testify, along with Maliyah and Tricia, who had observed her in the days leading up to the accident and been present earlier that evening (Pet. App. K4-5, 13, 20) Taylor was "adamant" in her conversations with Renfroe that she wanted these witnesses to be called to explain her mental state (Pet. App. K5).

In his hearing testimony, Renfroe concurred that he had intended to present a psychiatric defense, supported by the testimony of several witnesses (Pet. App. K25-26). When the trial started, he planned to raise an insanity defense in the hope of obtaining a verdict of not responsible by reason of mental disease or defect (Pet. App. K25). He intended to call witnesses, including Tricia, who would testify that, three or four days before the incident, Taylor was "hearing voices" and "acting strange" (Pet. App. K26). He would also call Dr. Wang, because he had treated her, and Dr. Berrill, a psychologist he had retained to interview her and render an opinion regarding her mental capacity at the time of the incident (Pet. App. K29-30). And, Taylor would testify (Pet. App. K26).

In Dr. Berrill's opinion, set forth in his December 23, 2017 report, introduced by the People at the hearing (Pet. App.K30), **Taylor's** diagnosis was schizophrenic paranoid type and schizoaffective disorder; In Dr. Berrill's opinion, this rendered her not responsible for her actions on the night of the crime (Pet. App.K28). He concluded that she had been "suffering from serious psychiatric symptoms for some time," and was clearly decompensating and experiencing an increasing severity of the symptoms prior to the instant offense" (Pet. App.K28).

As the hearing Court observed, Dr. Berrill also concluded that, "given [**Taylor's**] description of her mental state at the time of the instant offense," it was "unimaginable that she possessed the ability and/or capacity to fform the intent to commit this crime" (Pet. App. K29).

Finally, Dr. Berrill observed:

> Clinically speaking, given the results of this examinaton, it is apparent that Ms. **Taylor** is an extremely disturbed individual. Further, she seems to be receiving benefit from her current psychiatric medicines, which is a plus. Given the nature of her mental illness and the seriousness of her condition, it is expectable that she will require psychiatric treatement either on an inpatient or outpatient basis for the remainder of her life (Pet. App. K29).

The hearing Court asked Renfroe if he had also sought an opinion from Dr. Berrill as to whether, based on psychiatric problems combined with alcohol and drugs, **Taylor** lacked the state of mind to act with depraved indiffernce to human life, what the Court described as a "fall back position from full insanity" (Pet. App.K29-30). Renfroe conceded: "To be honest,...I don't believe I had alfall back position" (Pet. App.K30).

The People had also hired an expert, Dr. Myles Schneider, who had found **Taylor** fit to proceed in a report dated February 4, 2007 (Pet. App.K29-30). Renfroe knew what Dr. Schneider's testimony would be: that **Taylor** suffered from antisocial personality disorder, which would not negate intent,and was malingering (Pet.K30 App. K31). REnfroe anticipated a "battle of the experts" (Pet. App. K31). Although there were dangers and difficulties in presenting an affirmative insanity defense, ne was aware of them at the beginning of the trial and decided to proceed with

the defense (Pet. App. K26, K33, K42-43, K47, K58).

Renfroe testified at the hearing that he advised the jury in his opening statement that he would be presenting an insanity defense (Pet. App. K47). In fact, he devoted the entirety of his opening (Pet. App. I1-6) to this defense and what evidence he would present to support it. He began by informing the jury that the defense would prove that Taylor had a "schizophrenic attack," on the day of the incident (Pet. App. I1), and then outlined "how" he was "going to prove that" (Pet. App. I2).

AFter recounting the police observations of some of **Taylor's** bizarre behavior and statements, REnfroe acknowledged in his opening that the jury might think this could be caused by different factors, including intoxication or schizophrenia (Pet. App. I2).

Anticipating the jurors wondering how he would "prove that" (Pet. App. I2), Renfroe referred to his "proof," to which the jury "must hold [him]" (Pet. App. I 3), and said this would include, inter alia, what **Taylor** said in the mental observation ward at Riker's Island, the medication that was prescribed for her schizophrenia, her friend's and counsin's accounts of her behavior before the incident, the testimony of Tricia Matthews about her observations that night, **Taylor's** statements about demons soon after her arrival at Riker's, and the testimony of treating physicians and other doctors about her "delusions," "not [being] inlher right mind," self-medication with Ecstasy, and other matters (Pet. App. I3-6). Renfroe concluded his opening by saying: "I have that burden. I have to prove that to you. I am going to bring that evidence in. And then I am going to tell you that they haven't proved these charges beyond a reasonable doubt, and I am going to ask you to return a verdict of not guilty" (Pet. App. I6).

3. **The Eleventh-Hour Disclosure of the Riker's Tapes**

Renfroe testified that he had "no advance warning whatsoever" of the tapes before they were handed over; he felt "ambushed" (Pet. App. K53). His "preparations for the defense had taken a direct hit" (Pet. App. K42). He and an associate listened

to the calls, some of them repeatedly (Pet. App.K34-35) He admitted, "I don't know if we even slept that night" (Pet. App.K35).

The following morning, Renfroe abandoned the insanity defense, having concluded based on the calls, that if he "went with the defense [he] probably would be killing [his] client" (Pet. App.K36). He believed the insanity defense "had been really seriously damaged" (Pet. App.K45), and his experts "would have been hammered" (Pet. App. K44). He believed he had a "better shot of saving Taliyah Taylor's life if [he] went with an intoxication defense" based on the People's case (Pet. App. K37,48-49). He acknowledged, however, that, unlike the insanity defense, intoxication would negate only some of the charges and, even if successful, result in a second-degree manslaughter conviction (Pet. App. K48-49).

The hearing court asked Renfroe whether he contemplated making a mistrial motion given the "gravity" and "significance" of the tapes to the case (Pet. App. K45-46). He admitted that "usually when there is something that affects the jury you ask for a mistrial" (Pet. App. K46). He said tht he did not think one would have been ranted, but did not suggest that was why he had failed to seek one (Pet. App. K49). He conceded that, with "20/20 hindsight," he should have requested a mistrial (Pet. App. K55,K61).

Renfroe also did not request a continuance, believing that, so "late in the game," the issue was not going to change (Pet. App.K44). "[A]nother two hours sleep" might have improved his summation, Renfroe said, but a longer continuance would not have changed his opinion about how to proceed (Pet. App.K44).

In continuing the case from the afternoon the tapes were disclosed to the following morning, Justice Collini told defense counsel that he "would want to listen to the tapes, talk to his client about them, and "[o]bviously" speak to his doctors, who would "probably want to hear [them]," about what was on the tapes (Pet. App.I57, 59-60). Despite how "obvious" this critical step to further investigate was to the sitting trial Judge, Renfroe disregarded it completely.

Nevertheless, when Renfroe was asked at the hearing what he thought would have

happened if he had asked Justice Collini for a few days' continuance to discuss the matter with his witnesses. Renfroe said it would have been denied because the "rulings were not going well" (Pet. App. K50).

Asked again about his failure to request a continuance, Renfroe said he had "been in battle before;" that deciding not to put on the insanity defense was an "easy" call; and that, being "punched," he had to "roll and come back" with another defense (Pet. App. K55).

What Renfroe regretted was not being able to convince **Taylor** he was "on her side" and she should accept the 15-year offer made to her pre-trial and renewed after the People disclosed the tapes (Pet. App. K56). Renfroe said he was not surprised by the People's renewed plea offer, which he attributed to their trying to find "a" fair resolution to a very difficult case where they knew at this moment that we'd been wounded badly" (Pet. App. K56-57

4. **Counsel's Unilateral Decision to Abandonna Psychiatric Defense**

Taylor testified unequivocally that she wanted Renfroe to present her psychiatric defense despite the Riker's calls, in which she did not believe she had done anything improper (Pet. App. K7-8, 9-11). When Renfroe told her how he planned to proceed, she disagreed with him and told him so (Pet. App. K10-15). Without ever saying it was her decision what evidence should be produced (Pet. App. K14), "he told [her] what he was going to do" (Pet. App. K16). "That's when [she] had the fundamental disagreement with him" (Pet. App. K16).

Until that point, **Taylor** believed Dr. Berrill, Dr. Wang, Maliyah, and Tricia would be called as witnesses (Pet. App. K17). She further testified:

> **Q.** Did Mr. Renfroe ever tell you that it was ultimately your decision to decide whether or not to call those witnesses?
> **A.** No.
> **Q.** Did he simply tell you it was his decision not to go that direction?
> **A.** Yeah. He told me what he was gonna do
> **Q....** Did you ask Mr. Renfroe for any more time to try and resolve this issue?
> **A.** He didn't discuss any time with me.
> **Q.** Did you ask him to ask the Judge to give you more time?
> **A.** No. I din't feel I had any decisions to make. He was making all the decisions regardless of what I wanted (Pet. App. K17A).

She did not testify on her own behalf because of Renfore's decision not to cal call any witnesses to prove her psychiatric defense; she thought noone would believe her without any supporting testimony Pet. App. K19-20.

Renfroe admitted that he alone had decided to abandon the insanity defense, although he knew Taylor disagreed Pet. App. K52-53, 59 This decision was not influenced by Dr. Berill's response to the tapes; counsel did not recall whether he ever conveyed what he heard on the calls to Dr. Berill, rather than just informing Berrill that "we had a problem with the defense and what direction I was going in," and did not know whether he asked Dr. Berrill's opinion "on that" Pet. App. K39 . He "did not" ask Dr. Berill whether particular calls would "affect his opinion" Pet. App K39 .

Renfroe explained that he did not ask Dr. Berrill about whether the tapes would affect his opinion because: "When I listened to the tape, you know, somebody, right or wrong, somebody's got to drive the car. I'm the guy that drives the car" Pet. App. K39 , emphasis added.

Renfroe was thinking about "the best way to try to win this case" Pet. App. K39 "[I] mean I had to make the call I am not putting on the insanity defense Pet. App. K55 ; emphasis added.

In fact, when pressed by the court at the evidentiary hearing, the following critical exchange ensued:

The Court: "Mr. Renfroe, do you recall what Dr. wang's reaction was to your disclosure of these tapes to him or at least the substance? Did he say 'now my diagnosis would be in doubt?"

Renfroe: "No"

The Court: "No."

Renfroe: I think he was more just relieved he wasn't going to have to be cross-examined again." Pet. App. K38-39 having previously [taken] some lump" and been "yell [ed] at" by Justice Collini at the comepetency hearing Pet. app. K23-24.

Renfroe made his decision to withdraw the psychiatric defense without giving **Taylor** an opportunity to explain what she said on the tapes, what she meant by her statements, or whether an incident she described on one of them was true or puffery (Pet. App. K52-53). Thus, it was patently clear that counsel's decision to abandon **Taylor's** planned insanity defense was made without either doctors' opinions that their testimony or conclusions about **Taylor's** mental state at the time of the crime would have been altered in the least bit. Only after he informed the court that he would not be proceeding with the insanity defense did Renfroe speak to **Taylor** about whether she was going to testify (Pet. App. K40-41). During that break, she said that, if she did not have her witnesses, she was not going to testify (Pet. App. K41-42). Renfroe thought **Taylor** "was expressing that she still wanted me to go forward with the defense" (Pet. App. K59). As Renfroe explained,

> I was telling her that I thought it was, you know, not a defense that we could go forward with. I'm making the choice to do that but she had the right to testify or not (Pet. App. K58 , emphasis added).

Although they discussed the disclosure of the tapes, Renfroe did not believe their conversation ever "got to the point" of **Taylor** explaining what she said on them (Pet. App. K59-60). She had not had the opportunity to listen to them (Pet. App. K60). When she was asked, "But she still wanted to advance her defense," Renfroe responded, "That's correct" (Pet. App. K60).

The court denied **taylor's** post-conviction relief stating, "The New York State standard [of meaningful representation]...offers greater protection than the federal test under strickland supra, the defendant's motion to set aside the judgment on this claim is likewise denied."

E. Federal Post-Conviction Review

Taylor sought a federal writ of habeass corpus pursuant to 28 U.S.C. §2254 on February 27, 2014. **Taylor** moved for a stay to exhaust ineffective assistance of her trial counsel claims. Having exhausted her state remedies on October 24,

2016, **Taylor** filed a motion for leave to amend habeas corpus. Honorable J. Koran allowed **Taylor** to amend her original 2014 petition in order to add claims exhausted in the 440.10 proceedings. On March 17, 2017 Korman issued a memorandum and order granting in part and denying in part to amend petition (Pet. App. B12). After reviewing the evidentiary hearing transcript and the state court's findings of fact and conclusions of law, the federal court judge agreed with the Richmond evidentiary judge and denied **Taylor's** petition for a writ of habeas corpus (Pet. App. B1).

F. Court of Appeals Second Circuit

Taylor filed a timely notice of appeal to the United States Court of Appeals for the Second Circuit on August 28, 2017. She requested a Certificate of Appealability on all claims. Since the district court adopted the state court's opinion affirming **Taylor's** conviction. Although that opinion did not deal with most claims asserted in her habeas petition. **Taylor** argued the district court's decision directly conflicted with Second Circuit opinions as well as sister Circuits and are nconsistent with clearly established Supreme Court law. On February 8, 2018, the court denied **Taylor's** motions for COA and appointment of counsel because they claimed she had not "made a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(1). **Taylor** filed a timely petition for panel re-hearing and re-hearing en banc.on February 21, 2018. The court denied the motion on April 5, 2018.

SUMMARY OF ARGUMENT

As this court's ruling in Taylor v. Illinois, 484 U.S. 400 (1988) makes clear the decision of the Eastern District Court in this case was both "contrary to" and an "unreasonable application of" Strickland v. Washington, 466 U.S. 668 (1984). **Taylor's** counsel completely failed to adequately prepare and present the evidence of mental disease or defect available to him. The jury that convicted **Taylor** of second degree murder and reckless endangerment never heard witnesses and compelling evidence of **Taylor's** longstanding mental illness - including symptoms of psychosis exhibited prior to, the night of, and after the crime, a childhood marked by abuse, neglect, her father's murder, her mother's drug addiction, her rape at age 12, and resulting

suicide attempts and drug abuse. **Taylor** was thus denied her constitutional right to effective assistance of counsel.

It is an "obvious truth" that "in our adversary system of criminal justice, any person hauled into court, who is too poor to afford a lawyer, cannot be assured a fair trial unless counsel is provided for him" Gideon v. Wainwright, 372 U.S. 335, 344 (1963); see also Powell v. Alabama, 287 U.S. 145 (1932). It is equally clear that "the right to counsel is the right to effective assistance of counsel." Strickland, 466 U.S. at 686 (quoting McMann v. Richardson, 367 U.S. 759, 771 n. 14 (1970). Indeed, "'[T]he very promise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective...' unless the accused receives the effective assistance of counsel, 'a serious risk of injustice infects the trial.'" United States v. Cronic, 466 U.S. 648, 655-56 (1984) (citation omitted). Counsel's duty is "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688.

In a context of trial, a "reliable adversarial testing process" counsel's function n representing a criminal defendant is to assist defendant, and because counsel owes client duty or loyalty, a duty to avoid conflicts of interest. From counsel's function as assitant to defendant derive the overarching duty to advocate defendant's cause and more particular to "consult with defendant on important decisions and to keep defendant informed of important developments in course of the prosecution." Strickland, at 688.

In **Taylor**, this court emphasized the employment of an "adversary system of criminal justice in which the parties contest all issues before a court of law" at 408. It is fundamental and comprehensive to develop all relevant facts in the adversary system. This court further stated "The ends of criminal justice would be defeated if judgments were founded on a partial or speculative presentation of the facts" **Taylor** at 408. In the wake of Strickland, a powerful judicial consensus has emerged among the federal courts of appeals and state supreme courts that "defense counsel has the obligation to conduct a reasonably substantial, independent investigation into the

potential mitigating circumstances." Neal v. Puckett, 286 F.3d 236-37 (5th Cir. 2002) (internal quotation marks and citation omitted), petition for cert. filed (U.S. filed June 13, 2002) (NO. 01-10 886). "prevailing norms of practice," including standards issued by the American Bar Association, reflected the same consensus.

The State Supreme Court nevertheless held that counsel had performed effectively, and the Eastern District upheld that ruling under § 2254 (d) on the ground that the §440.10 Judges conclusions were far from unreasonable. But Strickland precludes deference to "tactical" choices when, as here, they are not supported by adequate prior investigation. The plain fact is that because counsel never actually spoke with the experts he remained entirely unaware of whether and to what extent their testimony might have helped **Taylor's** case despite the phone calls. To defer to the "strategic" choices of counsel in such circumstances is contrary to, and an objectively unreasonable application of, Strickland.

Moreover, even if counsel's decision to abandon the insanity defense mid-trial at the expense of doing a summation on intoxication based on the People's case could be considered "tactical," it was virtually inexplicable and any state decision upholding it is objectively unreasonable. Counsel knew well in advance that the prosecution hired an expert to testify on rebuttal that **Taylor** suffered from antisocial personality disorder, which would not negate intent, and that she was malingering. Pet. App. K31).

Although there were dangers and difficulties in presenting the affirmative insanity defense, he was aware of them at the beginning of the trial and decided to proceed with the defense. Pet. App. K27 , 3213, 42-3,58 ,). Therefore, counsel should have anticipated the prosecutions ill tactics and consulted with his experts and his client before he unilaterally abandoned the mental disease or defect defense. Furthermore, counsel promised the jury he would "prove" that **Taylor** had a "Schizophrenic" attack Pet. App. I11), then presented literally nothing of the mental illness evidence, offering instead only the evidence presented by the prosecution on intoxication. Counsel thus bolstered the prosecutions case,

while omitting all of the compelling affirmative defense.

As if it were not enough, the decision to forgo the affirmative defense was particularly egregious because such evidence would have presented a stronger case rather than, counsel's chosen "strategy" of attempting to convince the jury that Taylor was extremely intoxicated.

Finally, Taylor was obviously prejudiced by her counsel's failures. The affirmative evidence that competent trial counsel would have presented to the jury was even more compelling than the evidence on intoxication. Accordingly, relief under §2254 (d) is warrented, and the Eastern District's contrary conclusion should be reversed.

ARGUMENT

I. THE PERFORMANCE OF TAYLOR'S COUNSEL FELL FAR SHORT OF THE STANDARD OF EFFECTIVE REPRESENTATION SET FORTH IN STRICKLAND

Because this case was brought pursuant to 28 U.S.C. §2254, as amended by the Antiterrorism and Effective Death Penalty Act, the question before this Court is whether the adjudication of Taylor's Sixth Amendment claim by the State Supreme Court and the Eastern District Court "resulted in a decision that [is] contrary to, or involved an unreasonable application of, clearly established federal law" as determined by this Court. 28 U.S.C §2254 (d)(1). In Taylor at 908, this Court clarified that few rights are more fundamental than that of an accused to present witnesses on his own defense, 484 U.S. at 408. Thus, contrary to the Eastern District's ruling this case relief is warranted. And Strickland v. Washington is indisputably "clearly established" law. Under Strickland, counsel's performance is ineffective for the Sixth Amendment purposes if it is not reasonable "under prevailing professional norms." 466 U.S. at 688. As will be shown, the decision of the New York Courts that Taylor's lawyer fulfilled his Sixth Amendment obligation is both contray to, and an objectively unreasonable application of, Strickland. Indeed, that conclusion follows directly from Strickland to reverse a conviction where counsel violates "complusory process for obtaining witnesses in his favor," and for failure to conduct a thorough investigation before abandoning her mental disease defect defense, 466 U.S. at 691.

A. Strickland Generally Requires Defense Counsel in Murder Cases to Abide by Compulsory Process for Obtaining Witnesses in Her Favor to Ensure a Fair Trial

In a long line of cases that include Powell, 287 U.S. 45, Johnson v. Zerbst, 304 U.S. 458, (1938) and Gideon, 372 U.S. 335 (1963), this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the counsel clause.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been previously ascertained law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Thus, a fair trial is one in which evidence subject to adversarial testing is presenting to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel>s skill and knowledge is necessary to afford defendants the "ample oppurtunity to meet the case off the prosecution" to which are entitled. Adams v. United States ex rel. MaCann, 317 U.S. 269 (1942); see Powell, Supra 287 U.S. at 68, 69, 53 S.ct. 63-64.

Because of the vital importance of counsel's assistance, this Court has held that, with certain exceptions, a person accussed of a federal or state crime has the right to have counsel appointed if retained counsel cannot be obtained See Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon, Supra; Johnson, Supra. That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of

the adversaial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

For that reason, the court has recognized that "the right to counsel is the right to the effective assistance of counsel." McMann, 397 U.S. 759 (1970). Government violates the right to effective assiatnce when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense. See;e.g., Geders v. United States, 425 U.S. 80 (1976) (bar on attorney-client consultation during overnight recess); Herring v. New York, 422 U.S. 853 (1975) (bar summation at bench trial); Brooks v. Tennesse, 406 U.S. 605 (1972); Ferguson v. Georgia, 365 U.S. 570 (1961) (bar on direct examination of defendant). Counsel, however, can also deprive a defendant of the right to effective assistance, Simply by failing to render "adequate legal assistance," Cuyler v. Sullivan, 466 U.S., at 344 (actual conflict of interest adversely affecting lawyer's performance renders assistance ineffective).

As the Court observed in a related context, defense counsel's failure to conduct an adequate investigation "puts at risk both the defendant's right to an ample opportunity to meet the case of the prosecution, and the reliability of the adversarial testing process." Kimmelman v. Morrission, 477 U.S. 365, 385 (1986) (internal quotation marks and citation ommitted). Strickland requires a through investigation for mitigation evidence, and that counsel's failure to do so constitutes deficient performance absent an extremely strong reason for believing such an investigation was unwarranted Thus, "the failure to present mitigation evidence at trial can be reasonable if shown to be the result of [a] tactical decision, the failure to investigate the existance of such evidence is ineffective assistance." State ex rel. Busby v. Butler, 538 So.2d 164, 171 (La. 1988).

In short, there is an overwhelming consensus, as **Taylor** confirms, that defense counsel in murder trial must guarantee clients right to put before jury

evidence that might influence the determination of guilt and thereby ensure the "reliable adversarial testing process" required by Strickland.

B. The Performance of Taylors' Trial Counsel Fell Far Short to This Established Standard

Taylors' counsel did not fill his obligation to conduct an investigation before his unilateral decision to abandon the mental disease or defect defense on which he had opened, and which **Taylor** still wanted him to advance, deprived her of her fundamental "right to present a defense." Taylor, 484 at 409. Because counsel failed to request a continuance to undertake a "reasonable investigation" Strickland, 466 U.S. at 691, and consult with his promising experts and his client about the significance of the Rikers calls and make a fully informed decision; he had no reason to believe they would not be valuable in securing a verdict of not guilty by reason of mental disease or defect on the charge of Murder in the Second Degree Depraved Indifference. The Supreme Court nonetheless held that **Taylors'** counsel had performed effectively, and the Eastern District upheld that ruling under sect. 2254 (d), on the ground that the state court's view of counsels' decisions were far from unreasonable. As will be shown, that result is objectively unreasonable under Strickland for three fundamental reasons.

First, counsel alone decided to abandon the mental disease or defect defense and that he did despite **Taylors'** disagreement with the decision. This Court established that criminal defendants' at trial have "the right to put before a jury evidence that might influence the determination of gulit. Pennsylvania v. Ritchie, 480 U.S. (1987) Here, by overiding **Taylors'** desire to advance the mental disease or defect defense that he set forth from the beginning of her trial, counsel denied **Taylor** due process.

Second, even apart from the failure to present a defense, counsel could not possibly have a "reasonable" basis for the tactical decision to not present the mental disease or defect defense without first having requested a continuance to thoroughly investigate the significance of the calls by with his experts and speaking with his client. Ignorant of the damage of

the calls or the lack thereof on **Taylors'** mens rea the night of the accident, he was in no position to know whether presenting the mental disease defect defense was a more propitious strategy than not presenting a defense at all and doing a summation on intoxication based on the Peoples case. Thus, **Taylors** lawyer neither made a "reasonable investigation" into the weight of the calls on **Taylors'** mens rea the night of the accident, nor made a "reasonable decision" that made such an investigation "unnecessary," Strickland, 466 U.S. at 691.

Third, when the prosecution's eleventh-hour disclosure of 88 Rikers Island telephone calls, without no prior notice to counsel, "ambushed" him, gave his defense a "Direct Hit," and left the defense "wounded Badly," defense counsel's failure to move for a mistrial rendered his performance ineffective.

1. Taylors' lawyer Unilaterally Upsurped her Fundamental Right to Present a Defense

The decision of the state supreme court cannot be defended as objectively reasonable on the ground that the unilateral decision of **Taylors'** lawyer to abandon her mental disease or defect defense violated her Sixth Amendment right to present a defense. "The right to compel a witness' presence in the courtroom could not protect the integrity of the adversary process if it did not embrance the right to have the witness' testimony heard by the trier of fact." Taylor U.S. 484 at 409.

It had never been the law that all decisions labeled "tactical" are per se beyond reproach. "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." Roe v. Flores- Ortega, 528 U.S. 470, 481 (2002). Strickland imposes a "duty to make reasonable investiagtions or to make a reasonable decision that makes particular investigations unnecessary," and requires that "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances." 466 U.S. at 691. **Taylors'** counsel deciding mid-trial to abandon the affirmative mental disease or defect defense in which he promised

the jury he would prove is not a "reasonable decision" for the obvious reason that counsel cannot know until after investigation whether the affirmative defense was actually compromised.

Legions of cases have interpreted Strickland to preclude deference to tactical choices unsupported by adequate prior investigation. As the Eleventh Circuit has noted, "case law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them." Horton v. Zant, 941 F.2d 1449, 1462 (11th Cir. 1991); See also Coleman v. Mitchell, 286 F.3d at 447-54 (counsel could not make a reasoned decision to forgo mitigation in favor of a residual doubt defense because counsel had not investigated, and therefore did not realize he could have presented a powerful case based on the defendants' abusive childhood); Combs v. Coyle, 205 F.3d 288 (6th Cir. 2000) (Finding Strickland violation, even though counsel's decision could "be considered a strategic one, because it was a decision made without undertaking a full investigation") Holladay v. Haley, 209 F.3d 1243, 1251-52 (11th Cir. 2000), (holding that an attorney's investigation is not "reasonable" within the meaning of Strickland when the facts of a case supply him with "notice" that a particular line of pre-trial investigation may substantially benefit his client, and he does not pursue it). Montgomery v. Peterson, 846 F.2d 407, 412 (7th Cir. 1988) (nonstrategic decision not to investigate is inadequate performance); Battenfield v. Gibson, 236 F.3d 1215, 1229 (10th Cir. 2001) (counsel's decision to focus on "sympathy and mercy," rather than a mitigation case, was unreasonable when counsel did not thoroughly investigate available mitigation evidence before choosing his strategy); Jackson v. Herring, 42 F.3d 1350, 1367 (11th Cir. 1995) ("Thus, our case law rejects the notion that a strategic decision can be reasonable when the attorney has failed to investigate his options and make the notion that a strategic decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them" (internal quotation marks and citation omitted). Indeed, in the absence of a thorough investigation, counsel cannot "competently advise [a client] regarding the meaning of mitigation evidence and the availability of possible mitigation strategies," much less make an informed decision

about which course to pursue. Battenfield at 1229; accord Coleman at 477; see also Strickland at 641 (counsel has a duty "to consult with the defendant on important decisions in the course of the prosecution").

The state supreme court held that **Taylor's** counsel's decision to forego the insanity defense was reasonable (Pet. App. D9). The Eastern District held that "the record on to what degree **Taylor's** lawyer made such consultations is unclear, but even assuming that his performance was deficient in that regard, the record cannot support a finding that it actually prejudiced **Taylor's** defense (Pet. App. B7). However, because counsel never actually spoke with the experts, he remained entirely unaware of whether and to what extent their testimony might have helped **Taylor's** case.

Counsel's failure to uncover and present extensive affirmative evidence could not be justified as a decision to focus on other defense because that decision was made prematurely, without the benefit of a thorough investigation Mayo v. Henderson, 13 F.3d 528, 533 (2d Cir. 1990) ("A petitioner may establish constitutionally inadequate performance if he shows that counsel omitted signficant and obvious issues while pursuing issues that were clearly and significantly weaker."). Counsel's lack of familiarity with the case, combined with his failure to investigate provided **Taylor** with a trial significantly different than she might have received if represented by a competent attorney. Moreover, this court's decision had spoken clearly about the centrality of the right to present a defense in a trial proceeding. Pennsylvania at 39; Chambers v. Mississippi, 410 U.S. 284 (1973); United States v. Nixon, 418 U.S. 683, 709 (1974); and Taylor at 409.

Nothing prevented **Taylor's** lawyers from investigating the allegations regarding the calls with his experts. Not only did counsel make a crucial decision that was not his to make, but the hearing record shows that he decided to abandon the psychiatric defense on little o r no sleep, and without sufficiently discussing the matter with his expert witnesses or even his own client. Having had no opportunity to fully investigate the pros and cons of taking this drastic step, counsel failed to ask for even a brief continuance to adequately consider and make a full-informed decision to

change the course on which he had charted his entire defense. Pavel v. Hollins, 261 F.3d 210 (2001) (finding defendant charge with sexually abusing his chilren was denied effective assistance of counsel as result of counsel's failure to prepare defense, to call important fact witnesses, to conduct adequate investiation, or to present medical expert"); United States ex.rel. Cosey v. Wolff, 727 F.2d 656 (7th Cir. 1984) (defense counsel's out-of-hand rejection of potential witnesses and decision not to ask witness because prosection's case was so weak falls below the minimum standards of professional competence); Chambers v. Armontrout, 885 F.2d 1318, 1323 (8th Cir. 1989) (counsel's decision not to interview and present witnesses supporting defendant's self-defense theory meets deficiency prong). Counsel made this all-important decision to abandon his defense without even asking his experts if the Riker's calls would change their testimony or opinions about Taylor's mental capacity when she was hospitalized (Dr. Wang), or at the time of the incident (Dr. Berrill), much less having them listen to any of the tapes. Nor did he question his client about why she made certain statements, what she meant by them, or whether particular things described were actually true or were simply boasting. This uninformed and precipitate decision was all the more inexplicable when the court had told counsel that he would want to not only listen to the tapes but also talk to his client and "[o]bviously" to the doctors about what was on them, and the doctors would "probably want to hear [them]" (Pet. App.T57, T59, T60). Lindstadt v. Keane, 293 F.3d 191 (2001). "Failure to consult an expert, failure to conduct any relevant research, and failure even to request copies of the underlying studies relied on by the [expert] contributed significantly to his ineffectiveness" Massaro v. U.S., 538 U.S. 500 (2003) (holding trial counsel had rendered ineffective assistance in failing to accept the trial court's offer of a continuance); United States ex. rel. Williams v. Brown, 721 F.2d 1115, 1119-1121 (7th Cir. 1983) (holding that counsel's inadequate preparation for trial, including counsel's failure to sufficiently consult with defendant, constituted ineffective

counsel); United States v. Tucker, 716 F.2d 576, 579-586, 595 (9th Cir. 1983)(same). Inexplicably, defense counsel did not even ask the court for additional time to conduct the necessary consultations, consider all the relevant factors, and make a fully-informed decision about this crucial matter. Rather, he simply announced that he would rest his case rather than presenting the psychiatric defense. Counsel's explanation that it was too "late in the game" and more time would not have changed his decision about how to proceed (Pet. App. K44) was not a legitimate or objectively reasonable one, given that he had not consulted necesary parties or even allowed himself some sleep before making aniirrevocable decision that would change the entire course of his client's defense.

His belief that he had no need to consult anyone, since he was "the guy that drivess the car" (Pet. App. K38) was no legitimate explanation for this purported strategy. Counsel's performance cannot fairly be attributed to a "strategic decision" arrived at by "diligent counsel...draw[ing] a line [based on] good reason to think further investigation would be a waste." Rampilla v. Beard, 545 U.S. 374, 383 (2005); Bell v. Miller, 500 F.3d 149 (2007) (holding Bell's lawyer failed even to consider consulting a medical expert regarding the reliability of Moriah's memory).

As federal and state courts applying Strickland have consistently held in comparable circumstances, counsel's knowledge of the allegations relating to the calls and the context thereof does not discharge the duty to investigate, but triggers it. Cf. United States v. Moore, 554F.2d 1086, 1093 (D.C. Cir. 1976) (stating that "counsel's anticipation of what a poetential witness would say does not excuse the failure to find out"); Crisp v. Duckworth, 743 F.2d 580, 584 (7th Cirl 1984);(counsel should not be allowed to shield his failure to investigate simply by raising claim of "trial strategy and tactics"); Lockett v. Anderson, 230 F.3d 695, 714 (5th Cir. 2000) (finding ineffectiveness where "there was enough information before counsel...to put him on notice" that he should have pursued further investigation; Jackson at 1367 (counsel had "a small amount of information"that necessitated further inquiries; Kenley v. Armontrout, 937 F.2d 1298, 1378 (8th Cir. 1991) (counsel'ineffective when "his

belief that mitigating evidence was too old and insubstantial resulted from his failure to follow available leads to more recent and persuasive mitigating evidence); Caro v. Woodford, 280 F.3d 1247, 1255 (9th Cir. 2002) (counsel ineffective when he was aware of defendant's "extraordinary history of exposure to pesticides and toxic chemicals, yet he neither investigated fully this history nor informed the experts who examined [the defendant] of these facts); Illinois v. Morgan, 719 N.E.2d at 705 (finding ineffectiveness when, "despite being aware of defendant's mental condition and brain damage, defense counsel failed to conduct an investigation into this relevant potential mitigation evidence"); Pennsylvania v. Smith, 675 A.2d at 1233-34 (ineffective assistance when "record relect[ed] that defendant suffered some mental problems" yet counsel "neither pursued nor presented any evidence of mental state at the penalty phase"); Goard v. Tennessee, 938 S.W.2d at 370 (holding that counsel were ineffective for "fail[ing] to adequately investigate and explore mitigating evidence" when "[c]ounsel were aware that the evidence existed prior to trial).

Taylor's counsel's knowledge of the allegations regarding the calls and context thereof does not excuse his failure to investigate them by consulting with experts and his client. To the extent the New York courts relied on trial stategy, their decision was both contary to, and an unreasonable application of, Strickland

~~In~~ this regard, the State Supreme Court committed, and the Eastern District repeated, a grievous factual error in concluding that **Taylor's** counsel was effective. Here, counsel's hearing testimony demonstrated that he had not "taken," or even requested, adequate "time to review and prepare...the facts relevant to" what defense to pursue after the disclosure of the Riker's calls. Manifestly, defense counsel did not fully and carefully investigate the facts relevant to whether to advance or forgo the psychiatric defense on which he based his entire trial strategy. Regardless of whether counsel would ultimately have reached the same decision, he did not collect the type of information that a lawyer would need in order to determine the best course of action for **Taylor**. Thus, to the extent the Eastern District Court's ruling rested on this factual point, it is "an unreasonable determination of the

facts in light of the evidence presented in the state court proceeding," and cannot be upheld under the application standard of review. See 28 U.S.C. sect. 2254 (d)(2)(e)(1).

2. Any "Strategic" Decision to do a Summation on the People's Evidence Instead of Developing and Presenting Affirmative Evidence was Ineffective Assitstance of Counsel in itself.

Even apart from failing to investigate and consult with experts and his client before unilaterally abandoning the affirmative defense, the performance of **Taylor's** lawyer fell woefully short of "prevailing professional norms." Strickland, at 668. The purported ground upon which the New York court's sought to justify counsel's performance was that he made a strategic decision to do a summation on the people's evidence and forgo the affrimative defense. The state elicited testimony from Renfroe, for example, that he believed the insanity defense "had been really seriously damaged" (Pet. App. K4 4), and his experts "would have been hammered" (Pet. App.K4 4) He believed he had a "better shot of saving Taliyah Taylor's life if he went with an intoxication defense" based on the people's case (Pet. App. K370). If counsel had conducted a thorough investigation regarding the significance of the phone calls on **Taylor's** mens rea the night of the crime, with experts, or an extremely strong reason for believing such an investigation was unwarranted and had made the "strategic choice not to present the affirmative defense, that decision would have been virtually inexplicable" Strickland, 466 U.S. at 690. Indeed, upholding the state Supreme Court on this ground would be objectively an unreasonable application of Strickland for at least three reasons.

First, **Taylor's** counsel's decision to forgo an adequate affrimative defense for a summation on the people's intoxication evidence was unreasonable. The jury never heard the testimony of doctors who treated **Taylor** on numerous occasions and documented her mental illness, hallucinations, and delusional behavior. Counsel knew of numerous doctors, in addition to Doctors Wang and Berrill, who had treated **Taylor** and had critical testimony that would have supported a psychiatric defense. The fact that counsel knew of their potential testimony and felt it was important to **Taylor's** [illegible]

defense was documented in the trial transcripts when counsel asked Judge Collini for permission to call them as witnesses (Pet. App. I9, I12, I13) Cosey, 526 F.Supp. 788 (N.D. Ill. 1981) (Petitioner's counsel failed to present any affirmative evidence at all on behalf of petitioner despite fact that such evidence clearly existed, denied petitioner his constitutional right to effective assistance of counsel).

Furthermore, counsel also knew of and intended to call several Riker's Island professionals who had witnessed **Taylor's** symptoms and actually referred her to mental health professionals. At trial, counsel told Judge Collini that he wanted to call, "the initial individuals that [saw] **Taylor**, they alerted the Doctor Calladine (sp) that there [was] a problem, and that he [did] the assessment and advise[d] within a day of admission, she [was] then assessed and sent to Elmhurst hospital" (Pet. App. I7-8) Workman v. Tate, 957 F.2d 1339 (C.A.6 1992)(holding that counsel's failure even to interview Wikerson and Osborne, and his subsequent failure to call them as witnesses, constituted ineffective assistance); Montgomery at 407 (failure of habeas corpus petitioner's trial attorney to investigate the only available disinterested alibi witness, a store clerk, from who petitioner allegedly purchased bicycle on the day or robbery was ineffective assistance of counsel.

It is not "the distorting effect of hindsight" to perceive this as a profound failure. Strickland at 689. "[R]econstruct[ing[the circumstances of counsel's challenged conduct, and evaluat[ing] the conduct from counsel's perspective at the time," Id., **Taylor's** lawyer had no basis for failing to present affirmative evidence. Counsel failed to present testimony of witnesses Matthews, Rowe, and McClain, who all would have testified to **Taylor's** disturbed appearance and demeanor before, on the day of, and after, the accident. Holladay at 1251-52 (11th Cir. 2000) (holding that an attorney's investigation is not "reasonable" within the meaning of Strickland when the facts of a case supply him with "notice" that a particular line of pre-trial investigation may substantially benefit his client, and does not pursue it). The jury needed to know that **Taylor** was placed in the vehicle in the throes of a psychosis and therefore not criminally responsible

for her conduct (Rowe, Matthews and McClain's affidavits)(Pet. App. Q1).
The observations of those witnesses were critical to disprove the allegation, subsequently to the accident, that **Taylor** was somehow "malingering" mental illness, and counsel failed to include them at trial is part of a psychiatric defense was ineffective assistance of counsel. Pavel at 210 (holding defendant charged with sexually abusing his children was denied effective assistance of counsel as a result of counsel's failure to prepare defense, to call important fact witnesses, to conduct adequate investigation, or to present medical expert); Maddox v. Lord, 818 F.2d 1058 (1987)(Trial counsel's failure to investigate affirmative defense of extreme emotional disturbance in New York murder trial, by interviewing doctor, who was prepared to testify that he had diagnosed petitioner as being extremely emotionally disturbed prior to, and during, commission of crime, was unreasonable and prejudiced petitioner); Bell at 149(2007)(defense counsel was constitutionally ineffective for failing to consult medical expert regarding reliability of shooting victim's identification); Lindstadt v. Keane, 239 F.3d 191 (2001) at 201 (granting writ where "[d]efense counsel made no challenge" to the prosecution's only physical evidence): Jackson, at 859 ("[R]elief may be warranted when a decision by counsel cannot be justified as a result of some kind of plausible trial strategy" (citing Kimmelman at 365, 385, and Mays v. Henderson, 13 D.3d 528, 533 ("[A] petitioner may establish constitutionally inadequate performance if he shows that counsel ommitted significant and obvious issues while pursuing issues that were clearly and signbificantly weaker.").
Second, **Taylor's** lawyer promised to present an affirmative defense, failure to fulfill his promise was ineffective assistance. Counsel's failure to present witnesses or present **Taylor's** version of the facts as well as the prosecution's version to the jury so they could see where the truth lied deprived **Taylor** of her right to offer the testimony of witnesses and deprived her of a right to a defense. Taylor v.Illinois, 484 U.S. 400 (1988). Especially in light of the mental health evidence he had at trial and the testimony of mental illness symptoms exhibited by **Taylor** from witnesses that were present prior to, on the night of, and after, the accident. When counsel began representing **Taylor** she was being treated at Elmhurst Psychiatric Hospital

having been found unfit to proceed pursuant to a 730 Examination. ~~Pet. App.~~ Counsel's failure to present any mental health evidence at all on behalf of **Taylor** despite the fact that such evidence existed. U.S. ex. rel. Cosey v. Wolff, 526 F. Supp. 778 (N.D. ILL. 1981)(holding petitioner's counsel who failed to present any affirmative evidence at all on behalf of petitioner despite fact that such evidence clearly existed denied petitioner his constitutional right to effective assistance of counsel). By not presenting that evidence, **Taylor's** lawyer left the jury to believe the prosecution's account of the incident because that was the only account presented. Moreover, **Taylor's** lawyer promised the jury in his opening statement that his "client had a schizophrenic attack, and that is a burden that I am going to prove to you by a preponderance of the evidence" (Pet. App. I1). He went even further and told jurors, "you must hold me to that proof" (Pet. App. I3), yet he failed to present such evidence. Instead counsel did a summation on intoxication which bolstered the prosecution's case. Counsel's failure was all the more egregious because the mental health evidence would have bolstered counsel's efforts to prove **Taylor** was not guilty by reason of mental disease or defect. This cannot be characterized as harmless error because **Taylor's** entire case was compromised by his failure to do so. Thus, most assuredly, after having no defense case at all, left jurors feeling that counsel had not "proven" his case, and thus, albeit erroneously, **Taylor** was guilty. Harris v. Reed, 894 F.2d 871 (1990) (holding a decision made without interviewing the witnesses, after preparing the jury for the evidence through the opening, and without consultation with Harris was unreasonable professional conduct); Anderson v. Butler, 8585 F.2d 16, 29 (1st Cir. 1988)(failure to produce expert witnesses in support of defense theory introduced in opening statement is a "speaking silence" that is prejudicial as a matter of law); and Deluca v. Lord, 77 F.3d 578 (1996)(Deluca's counsel in her state court trial was ineffective in two respects: first, in failing to adequately investigate, prepare for, and advise Deluca of a possible defense on extreme emotional disturbance ("EED"). Failure of **Taylor's** counsel to present witnesses on her behalf after promising jury he would was plainly unreasonable. Third, **Taylor's** lawyers acted unreasonable in failing to move for a mistrial after

eleventh-hour disclosure of Riker's Island calls. The People did not dispute at the hearing that **Taylor's** counsel had absolutely no advance notice of the Riker's Island calls which were turned over weeks into the trial, as he was on the verge of calling his first witness. Blind-sided, counsel worked throughthe night, listening to the 88 calls.

By the morning, he decided that the potential damage to the defense was so great that he had to withdraw the psychiatric defense on which he had predicated the trial and all his preparation and opened to the jury. Inexplicably, despite the devastating prejudice to his case, he failed to request a mistrial. That ommission constituted ineffective assistance of counsel. Escobedo v. Lund, 948 F.Supp.2d 951 (N.D. Iowa 2013)(holding state court's finding that petitioner was not prejudiced was unreasonable application of Strickland...and counsel's deficiency in failing to ask for mistrial prejudiced petitioner). Notwithstanding the trial court's belief that the people acted commendably by disclosing the tapes at all, they had an obligation to act fairly and not treat **Taylor's** murder trial as a sporting event where each side remains ignorant of facts in the hands of the adversary until events unfold at trial. Taylor at 400:

> The integrity of the adversary process, which depends both on the presentation of reliable evidence and the rejection of unreliable evidence, the interest in the fair and efficient administration of justice, and the potential prejudice to be truth-determining function of the trial process must also weightin the balance.

A delay in disclosing vital information, even if it resulted from oversight rather than bad faith, may be so prejudicial to the defense that a mistrial is required. Regardless of whether the people acted improperly or not, however, the immense prejudice to the defense cannot be underestimated. As **Taylor's** lawyer described it, the defense took a "direct hit" (Pet. App. K42) and was "wounded badly" (Pet. App. K56). His expert witnesses "would have been hammered" (Pet. App. K44), and he was convinced, rightly or not, that disclosure of the calls to the jury would "kill" his client (Pet. App. K36).

Yet, despite his belief that his defense was fatally wounded and him having no "fall back position from full insanity" (Pet. App. K30), counsel failed to request

a mistrial, which he conceded, in retrospect, he "should have" (Pet. App. K55, 61). A mistrial would have been warranted, regardless of the degree of prosecutorial fault, because of the immense and irrevocable prejudice to the defense. But counsel inexusably never asked for such relief. His failure to request a mistrial denied Taylor the effective assistance to which she was constitutionally entitled. Thus, for all these reasons, it was an unreasonable application of Strickland for the New York Courts to conclude that Taylor received the effective assistance to which the Sixth Amendment entitled her.

II. TAYLOR'WAS PREJUDICED BY HER COUNSEL'S PERFORMANCE

The State Supreme Curt and the Eastern District's determinations that Taylor was not prejudiced was "contrary to and involved an unreasonable application" of Strickland. The Strickland standard for assessing prejudice is that a petitioner must prove that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland at 694.

Taylor's Sixth Amendment right to effective counsel was violated when her lawyer failed to secure and offer available independent medical and psychiatric testimony. William v. Taylor, 529 U.S. 362 (2000) (it is undisputed that Williams had a right-to provide the jury with the mitigation evidence that his trial counsel either failed to discover or failed to offer); Cosey, v. 788, (Petitioner's counsel, who failed to present any affirmative evidence at all on behalf of petitioner despite fact that such evidence clearly existed, denied petitioner his constitutional right to effective assistance). Taylor's counsel was duty-bound to defend his client to the best of his ability and his failure to do so compromised her due process rights. It was incumbent upon counsel to enter evidence of Taylor's mental state to demonstrate that she did not have a depraved mens rea so that material element of the crime was not proven. As in DeLuca, with the EED defense, the mental disease or defect defense was of great importance to Taylor's case, that assertion of this defense would have been likely to produce a more favorable result for Taylor. By counsel abandoning all consideration of this defense at an early stage for no adequate reason, he failed to deliver effective representation.

Taylor was completely deprived of an adequate defense to her fundamental right to a fair trial. The Confrontation Clause embodies the right of the defendant to a "meaningful opportunity to present a complete defnse." see Crane v. Kentucky, 476 U.S. 683, 690 (1986). Taylor's counsel failed to investigate and prepare her case adequately.

Taylor was prejudiced by counsel's failure to present testimony which would have helped corrobrate Taylor's testimony and would have contradicted police officers as well as the prosecutions account of the incident. Ramonez v. Berghuis, 490 F.3d 482 (C.A. 6 2007) (Defendant was prejudiced by defense counsel's constitutionally deficient decision not to interview potential witnesses who could have presented testimony which would have helped corroborate defendant's testimony and contradicted that of complaining witnesses; even though the jury could have discredited the potential stories, there remained a reasonable probability that jury would have).

Furthermore, counsel's strategy was negligent and prejudiced her in that, counsel did not call any witnesses, expert or lay to testify on behalf of her psychological and historical background. Because these facts were not investigated, intorduced or addressed at trial. Taylor was highly prejudiced by this negligence becasue her mental capacity was the defining factor in her defense against depraved indifference to murder. Maddox, (holding although defense counsel raised this defense, he failed to investigate and pursue it thoroughly and, it was petitioner's strongest defense to the charges, counsel's decision not to develop it cannot be said to be "sound trial strategy"); See also DeLuca.

Moreover, Taylor, was hopelessly prejudiced at the continued trial. The jurors surely wondered what happened to the defense witnesses whose names they had heard and the insanity defense that counsel had so firmly promised to prove and outlined for them in detail in his opening, to the exclusion of any other defense(Pet. App. I1-6). Counsel's strategy throughout the trial, from jury selection through o opening and cross-examination of the People's witnesses, had been guided by the

psychiatric defense he was prepared to present. He was entirely committed to this defense, and the jurors obviously knew it, when the People disclosed the calls and counsel abruptly abandoned it and rested without doing any of the things he had told the jury he would. Escobedo at 951 (counsel's deficiency in failing to ask for mistrial prejudiced petitioner).

The First Circuit Court in Anderson reversed conviction because his counsel's (failure to produce expert witnesses in support of defense theory introduced in opening statement is a "speaking silence" that is prejudicial as a matter of law) at 18. The Seventh Circuit agreed in Harris that he was prejudiced by counsel's ineffectiveness (by resting without presenting any evidence in favor of defense, counsel left jury free to believe prosecution witness' account of incident as only account) at 872. See also Cosey at 788; Chambers at 1323, Ramonez at 482; and Maddox, at 1058, as other circuit's agree Taylor was prejudiced by the cumulative effect of counsel's errors.

III. REASONS FOR GRANTING THE PETITION

Counsel's overall performance, fell outside of the wide range of professional competen competent assistance for failing to present fact witnesses to impeach prosecution's allegations and would have cast doubt on **Taylor's** guilt. All of **Taylor's** evidence to support mental disease/defect was affected by her counsel's failures, and but for these failures, the prosecution's case quite likely would have collapsed all together. See Workman v. Tate, 957 F.2d 1339 (6th Cir. 1992); Williams v. Washington, 59 F.3d 673, 692-695 (7th Cir. 1995); United States v. Tucker, 776 F.2d 576, 592-95 (9th Cir. 1983); Wiggins v. Smith, 1239 S.Ct. 2527 (2003). As in Deluca at 578, **Taylor's** counsel's "failure to preserve and prepare for a defense of extreme emotional disturbance" was sufficient to prove ineffective assistance.

As counsel was ineffective in Harris, **Taylor's** counsel's overall performance, including his decision not to put on any witnesses in support of a viable mental disease or defect defense, fell outside of the wide range of professional competent assistance. In light of the powerful affirmative evidence on **Taylor's** mens rea the night of the accident, the jury never heard compared to the weakness of the prosecution's case, there is at a bare minimum a "reasonable probability" that at

least one of the twelve jurors would have concluded that **Taylor** was not criminally responsible by reason of mental disease or defect or at least deserved lesser culpability. See Wilson v. Mazzuca, 570 F.3d 490, 499 (2009); Lindstadt at 196; and Rivas v. Fischer, 780 F.3d 529, 532 (2015).

Thus, the state court's conclusion and the Eastern District's affirmance that **Taylor** received her Sixth Amendment right to counsel was an unreasonable application of Strickland and was therefore, erroneous. For the same reasons mentioned above the Court of Appeals' decision was also erroneous. **Taylor's** case was denied a Certificate of Appealibility and denied rehearing en banc on her ineffective assistance of counsel claims in the United States Court of Appeals Second Circuit. Yet, the same court reversed and remanded Maddox, Deluca, Pavel, Lindstadt, and Wilson for the same ineffective assistance of counsel claims raised by **Taylor** in this petition. Other Circuits have also reversed and remanded cases for similar ineffective assistance claims that **Taylor** raised. Therefore, it is of national importance to have the Supreme Court decide the questions involved in this case to prevent constitutional violations in murder cases at trial level from being overlooked. The importance of the decision of this case is not only for **Taylor** but for others similarly situated. For the most part, the cases cited in this petition have been reversed for the same ineffective assistance claims that **Taylor** has raised herein at the United States District or Court of Appeals level, and therefore, never made it to this Court. However, to prevent constitutional violations at state trial levels from being overlooked as they were in this case, it is respectfully requested that the Supreme Court decide the questions involved in this case.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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