NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DALE W. EATON,

***Petitioner*,**

v.

MICHAEL PACHECO, WARDEN,
WYOMING STATE PENITENTIARY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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APPENDIX

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United States Court of Appeals for the Tenth Circuit

July 23, 2019, Filed

Nos. 15-8013 & 16-8086

Reporter
931 F.3d 1009 *; 2019 U.S. App. LEXIS 21978 **; 2019 WL 3296799

DALE W. EATON, Petitioner - Appellant, v. MIKE PACHECO, Warden, Wyoming Department of Corrections State Penitentiary, Respondent - Appellee.

Prior History: **[**1]** Appeal from the United States District Court for the District of Wyoming. (D.C. No. 2:09-CV-00261-ABJ).

Eaton v. Wilson, 2014 U.S. Dist. LEXIS 163567 (D. Wyo., Nov. 20, 2014)

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Katherine A. Adams, Assistant Attorney General (Peter K. Michael, Attorney General, Christyne M. Martens, Deputy Attorney General, and Benjamin E. Fisher, Assistant Attorney General, with her on the briefs), Cheyenne, Wyoming, for Respondent-Appellee.

Judges: Before HARTZ, MORITZ, and EID, Circuit Judges.

Opinion by: MORITZ

Opinion

[*1012] **MORITZ**, Circuit Judge.

More than a decade after the crimes occurred, Dale Eaton was tried for and convicted of the kidnapping, sexual assault, robbery, and murder of Lisa Kimmell. A Wyoming jury sentenced him to death, and he later sought federal habeas relief from his convictions and death sentence. The federal district court agreed that Eaton was entitled to partial relief and vacated his death sentence. But the district court refused to disturb Eaton's underlying convictions. And it also refused to bar the state from conducting new death-penalty proceedings.

On appeal, Eaton argues the district **[**2]** court erred in (1) denying relief on the constitutional claims that implicate his convictions; (2) refusing to modify the conditional writ to bar the state from conducting new death-penalty proceedings; and (3) subsequently concluding that the state didn't waive its right to pursue new death-penalty proceedings by failing to timely comply with the conditional writ's requirements. We reject these arguments and affirm the district court's orders.

Background

On March 25, 1988, Kimmell set out from Colorado and headed north towards Montana. She never reached her destination. Instead, a fisherman found her body a week later in the water near Government Bridge in Natrona County, Wyoming. An autopsy indicated that Kimmell bled to death as the result of multiple stab wounds to her chest—wounds that were inflicted

shortly after she suffered what would have otherwise been a fatal blow to the head. Investigators also found semen in Kimmell's vagina and on her underwear.

Kimmell's 1988 murder went unsolved for over a decade. But in 2002, a DNA hit from the semen implicated Eaton.[1] Investigators **[*1013]** later found Kimmell's car buried on Eaton's property. Wyoming then charged him with various offenses, including **[**3]** first-degree murder.

Although there was some question as to Eaton's mental health, Eaton's trial counsel insisted that Eaton was competent and showed "no interest" in pursuing a defense based on mental disease or defect. *Eaton, 192 P.3d at 55-56*. Thus, although the trial court expressed concern about Eaton's apparent "memory problems" and his potential "inability to assist [in] his defense," the matter proceeded to trial in 2004. *Id. at 55*.

At trial, the government relied in part on the testimony of Joseph Dax to prove its case. Dax testified that Eaton confessed to Kimmell's murder while the two men were incarcerated together at the Natrona County Jail. *Id. at 51*. According to Dax, Eaton said that Kimmell agreed to give him a ride; Eaton then "made a pass at" Kimmell; Kimmell "became angry and stopped her car and ordered him to get out"; and Eaton "instead grabbed her and sexually assaulted her." *Id. at 76*. When the prosecutor asked Dax how he knew that Eaton indeed had sexual contact with Kimmell, Dax replied that Eaton told him Kimmell "was 'a lousy lay.'" *Id.*

The jury found Eaton guilty of first-degree premeditated murder, felony murder, aggravated kidnapping, first-degree sexual assault, and aggravated robbery. At sentencing, Eaton **[**4]** confessed, via the testimony of his examining physician, to killing Kimmell. According to Eaton's physician, Eaton admitted that he found Kimmell's car parked on his land, pulled her from her car at gunpoint, and "ended up raping and killing her after keeping her on his property for several days so that he would not be alone at Easter." *Id. at 52*.

Based on this and other evidence presented during the guilt phase and at sentencing, the jury concluded that the state proved multiple aggravating circumstances beyond a reasonable doubt.[2] And after finding that no mitigating circumstances existed, it voted to impose the death penalty.

Eaton then appealed to the Wyoming Supreme Court (WSC). As relevant here, Eaton asserted on direct appeal that he received ineffective assistance of counsel (IAC) during both the guilt phase and the sentencing phase of his trial. Specifically, he argued trial counsel provided IAC during the guilt phase (by allegedly failing to recognize and argue that Eaton was incompetent to stand trial) and during the sentencing phase (by allegedly failing to investigate and present mitigating evidence). To that end, Eaton requested a partial remand to the trial court for an evidentiary **[**5]** hearing on his IAC claims under *Calene v. State, 846 P.2d 679 (Wyo. 1993)*.[3] Finally, Eaton argued that the trial **[*1014]** court erred when it allowed Dax to testify that Eaton said Kimmell "was 'a lousy lay.'" *See Eaton, 192 P.3d at 76-77*.

The WSC granted Eaton's *Calene* motion, stayed the appeal, and remanded the matter to the trial court with directions to conduct a *Calene* hearing and to issue a ruling within 90 days. Eaton objected to the 90-day deadline and asked both the trial

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[1] More specifically, law enforcement submitted certain physical evidence to Cellmark Diagnostics for additional DNA testing in 2000. Cellmark Diagnostics then entered the results of that testing into the Combined DNA Index System (CODIS). Eaton's DNA profile—which was on file with CODIS as the result of an unrelated felony conviction—"matched" the DNA profile that Cellmark Diagnostics derived from the additional testing. Thus, entering the results of that additional testing into CODIS yielded a "hit," App. vol. 7, 429, which ultimately "led the authorities to Eaton," *Eaton v. State, 2008 WY 97, 192 P.3d 36, 51 (Wyo. 2008)*.

[2] The jury determined that Eaton (1) had a previous conviction for "a felony involving the use or threat of violence to [a] person"; (2) murdered Kimmell in a manner that "was especially atrocious or cruel, being unnecessarily torturous to [Kimmell]"; (3) "killed [Kimmell] purposely and with premeditated malice and while engaged in a[] robbery"; (4) "killed [Kimmell] purposely and with premeditated malice and while engaged in a[] sexual assault"; and (5) "killed [Kimmell] purposely and with premeditated malice and while engaged in a[] kidnapping." App. vol. 1, 469-70.

[3] Under *Calene*, a defendant should request such a remand when "contentions of ineffectiveness are first developed by appellate counsel during record examination and [preparation for] appellate briefing." *846 P.2d at 692*.

court and the WSC for additional time to investigate. Both courts denied these requests for more time. The trial court then conducted an evidentiary hearing, after which it concluded that trial counsel wasn't ineffective during either the guilt phase or the sentencing phase of Eaton's trial. The appeal was then argued to the WSC, which agreed with the trial court's findings on remand and rejected Eaton's IAC claims. The WSC also rejected Eaton's argument that the trial court abused its discretion in admitting Dax's statement. The WSC then affirmed Eaton's convictions and his death sentence.

After Eaton's subsequent efforts to obtain postconviction relief in state court proved unsuccessful, he filed a *28 U.S.C. § 2254* motion in federal district court. Under amendments made to *§ 2254* by the Antiterrorism **[**6]** and Effective Death Penalty Act (AEDPA) of 1996, a federal court may "entertain an application for a writ of habeas corpus [o]n behalf of a person in custody pursuant to the judgment of a [s]tate court . . . on the ground that [the petitioner] is in custody in violation of the Constitution." *§ 2254(a)*. But before a federal court may grant relief to such a petitioner "with respect to any claim" that a state court has already "adjudicated on the merits," the petitioner must demonstrate that the state court's "adjudication of the claim" either (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established [f]ederal law" or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate[-]court proceeding." *§ 2254(d)*.

Here, Eaton's *§ 2254* motion alleged that trial counsel provided ineffective assistance during the guilt phase of Eaton's trial by allowing Eaton to be tried while incompetent (the guilt-phase IAC claim); that trial counsel provided ineffective assistance during the sentencing phase of Eaton's trial by failing to adequately investigate and present mitigating evidence (the sentencing-phase **[**7]** IAC claim); that appellate counsel provided ineffective assistance during Eaton's direct appeal by failing to investigate and present—to either the trial court during the *Calene* remand or subsequently to the WSC—the mitigating evidence that trial counsel should have presented at sentencing (the appeal-phase IAC claim); and that the state committed a *Brady* violation[4] by failing to disclose the full extent of its relationship with Dax (the *Brady* claim).

The district court first denied relief on the *Brady* claim. In doing so, it determined that the claim was procedurally defaulted because Eaton failed to present it in state court. And because the district court found there was no reasonable likelihood that Dax's testimony affected either the verdict or the sentence, it ruled that Eaton couldn't satisfy the cause-and-prejudice **[*1015]** exception to the procedural-default rule.[5]

Next, the district court addressed the guilt-phase IAC claim. The district court initially noted that in advancing this claim, Eaton relied heavily on new evidence of his incompetence to stand trial—i.e., evidence of incompetence that Eaton never presented to the WSC. And the district court further noted that the WSC "addressed **[**8]** the merits of" the guilt-phase IAC claim in Eaton's direct appeal. App. vol. 13, 909. Thus, the district court refused to consider Eaton's new evidence in evaluating whether Eaton could satisfy *§ 2254(d)*.[6] And in light of the evidence that Eaton *did* present to the WSC, the district court concluded that the WSC's decision rejecting the guilt-phase IAC claim wasn't "contrary to clearly established federal law, did not involve an unreasonable application of clearly established federal law, and was not based on an unreasonable determination of the facts" then before the WSC. App. vol. 13, 911; *see also* *§ 2254(d)*. Thus, the district court denied Eaton relief on the guilt-phase IAC claim.

The district court then turned to the sentencing-phase IAC claim. The district court agreed with Eaton that the WSC's rejection of the sentencing-phase IAC claim was "based on an unreasonable determination of the facts in light of the evidence" that was before the WSC when it adjudicated this claim, thus satisfying *§ 2254(d)(2)*. App. vol. 13, 902. More specifically, the district

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[4] "[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." *Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)*.

[5] Federal habeas courts are typically barred from considering procedurally defaulted claims unless a petitioner "can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson, 501 U.S. 722, 750, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991)*.

[6] Review under *§ 2254(d)(1)* "is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster, 563 U.S. 170, 181, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011)*; *see also* *Hooks v. Workman, 689 F.3d 1148, 1163 (10th Cir. 2012)* (extending *Pinholster*'s rule to *§ 2254(d)(2)*).

court concluded that Eaton's appellate counsel had insufficient time in which to prepare for the *Calene* remand hearing, and thus Eaton lacked **[**9]** "an adequate opportunity to present [the sentencing-phase IAC claim] before the state courts." *Id.* at 901. And it reasoned that because it was "arbitrary and unreasonable for the state courts to acknowledge the critical importance of [the] facts supporting" the sentencing-phase IAC claim "while simultaneously denying [Eaton] the necessary means of discovering" those same facts, Eaton could satisfy *§ 2254(d)(2)*. *Id.*

Accordingly, the district court ruled that in determining whether Eaton was entitled to habeas relief on the sentencing-phase IAC claim, it could consider new mitigation evidence—i.e., mitigation evidence that Eaton never presented to the WSC but instead presented for the first time during the federal habeas proceedings.[7] And in light of Eaton's new mitigation evidence, the district court concluded that trial counsel was indeed ineffective at sentencing because (1) trial counsel's "preparation for the penalty phase of [Eaton's] trial" was deficient; and (2) there was a reasonable probability that, but for trial counsel's deficient **[*1016]** performance, the jury would have spared Eaton's life. App. vol. 18, 713.

Finally, the district court addressed the appeal-phase IAC claim and reasoned that **[**10]** Eaton's new mitigation evidence compelled the same conclusion.[8] That is, the district court determined that (1) appellate counsel performed deficiently during the *Calene* remand and on appeal by failing to discover and present in state court the mitigation evidence that trial counsel should have discovered and presented to the jury, and (2) appellate counsel's deficient performance prejudiced Eaton.

As a result of its rulings on the sentencing-phase and appeal-phase IAC claims, the district court vacated Eaton's death sentence on November 20, 2014. But in doing so, it issued a conditional writ: it gave the state 120 days in which to pursue "a new sentencing proceeding" if it opted to do so. *Id.* at 963; *see also Hilton v. Braunskill, 481 U.S. 770, 775, 107 S. Ct. 2113, 95 L. Ed. 2d 724 (1987)* (noting that in addition to ordering petitioner's immediate release, "federal courts may delay the release of a successful habeas petitioner in order to provide the [s]tate an opportunity to correct the constitutional violation found by the court"). The district court also ordered the state to "promptly appoint[] experienced death[-]penalty counsel . . . to represent [Eaton] in any further [state-court] proceedings." App. vol. 18, 964. Finally, the district court ruled that if the state **[**11]** decided "not to grant [Eaton] a new sentencing proceeding," Eaton would automatically receive "a sentence of life without parole."[9] *Id.*

Eaton then filed a motion to amend the judgment under *Federal Rule of Civil Procedure 59(e)*. In that motion, Eaton asked the district court to make its conditional writ an unconditional one. In other words, Eaton asked the district court to "modify its judgment to prohibit" the state from "attempt[ing] to resentence [him] to death." *Id.* at 967. In support, Eaton argued that the underlying *Sixth Amendment* violation—i.e., trial counsel's ineffective assistance during the sentencing phase—could not "be cured by" a new sentencing proceeding "in light of the number of mitigation witnesses who have died or otherwise become unavailable since [Eaton's] original trial." *Id.*

The district court denied Eaton's *Rule 59(e)* motion. In doing so, it pointed out that Eaton could present any "issues associated with a resentencing," including his arguments about "the availability of mitigation witnesses," to Wyoming's state courts. *Id.* at 1824. More specifically, the district court reasoned that "under the notion of 'comity,'" such issues would be "best resolved by the state[-]court system if" the state indeed opted to pursue resentencing. *Id.* at 1825 (quoting *Younger v. Harris, 401 U.S. 37, 44, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971)*).

[12]** Eaton filed a notice of appeal on March 16, 2015. On April 6, 2015, the district court granted him a certificate of appealability (COA). *See 28 U.S.C. § 2253(c)(1)(A)*. In relevant part, that COA granted Eaton permission to appeal the district court's orders (1) rejecting the guilt-phase IAC claim; (2) rejecting the *Brady* claim; and (3) denying Eaton's *Rule 59(e)* motion. Notably, in granting Eaton a COA to appeal its ruling on the *Brady* claim, the district court narrowed the scope of that COA to

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[7] Relying on Justice Breyer's separate opinion in *Pinholster*, we have previously indicated that once a petitioner satisfies *§ 2254(d)(1)*, a federal habeas court may then consider new evidence in determining whether the petitioner is entitled to habeas relief. *See Milton v. Miller, 744 F.3d 660, 673 (10th Cir. 2014)* (citing *Pinholster, 563 U.S. at 205* (Breyer, J., concurring in part and dissenting in part)).

[8] For reasons not relevant to this appeal, the district court concluded that it could also consider Eaton's new evidence in evaluating the appeal-phase IAC claim.

[9] The State didn't appeal any aspect of the district court's order granting Eaton a conditional writ.

the question of whether the state's alleged **[*1017]** act of "withholding information about its relationship with" Dax "was material to the question of punishment." App. vol. 18, 2125. In other words, the district court granted Eaton a COA to appeal its resolution of the *Brady* claim, but only to the extent that claim arises from the *sentencing* phase of Eaton's trial; the district court did not authorize Eaton to appeal its resolution of the *Brady* claim to the extent that claim arises from the *guilt* phase of Eaton's trial.

We docketed Eaton's initial appeal as Appeal No. 15-8013. But before we could set a briefing schedule for that appeal, the conditional writ's 120-day deadline expired. As a result, we directed a limited remand to the district court "to determine whether the [state] ha[d] complied with the terms of [the district court's] conditional grant of habeas relief and, if not, whether the result of that noncompliance [was] the waiver of [the state's] right to hold a new death[-]penalty proceeding." *Id.* at 2144.

On remand, the district court determined that the state had indeed failed to comply with the terms of the conditional writ. But the district court nevertheless ruled that the state's noncompliance didn't result in a waiver of its ability to pursue new death-penalty proceedings. Notably, in reaching that conclusion, the district court relied in part on the fact that Eaton himself had filed with the state trial court a notice in which he argued that, in light of the ongoing proceedings in federal court, **[**13]** it would be "premature . . . to initiate *any* further state[-]court proceedings." App. vol. 19, 27.

Eaton then filed a new notice of appeal in which he challenged the district court's order on remand. We separately docketed that appeal as Appeal No. 16-8086 and then consolidated Eaton's appeals for procedural purposes.

Analysis

In these consolidated appeals, Eaton advances four general arguments. He asserts that (1) the district court erred in denying relief on the guilt-phase IAC claim; (2) the district court abused its discretion in denying his *Rule 59(e)* motion; (3) the district court abused its discretion in ruling that the state may conduct new death-penalty proceedings despite its failure to comply with the terms of the conditional writ; and (4) the district court erred in denying relief on the *Brady* claim. We address each of these arguments in turn.

I. The Guilt-Phase IAC Claim

At the heart of the guilt-phase IAC claim is Eaton's assertion that he was incompetent to stand trial. And in attempting to demonstrate as much in district court, Eaton relied on new evidence. That is, he relied on evidence of his incompetence that he never presented to the WSC.

The district court refused to consider **[**14]** this new evidence as it related to this particular claim, ruling the court was instead "limited to" the state-court record. App. vol. 13, 909. According to Eaton, this was error. He asserts that nothing "prevented the district court from considering" his new evidence in evaluating the guilt-phase IAC claim.[10] Aplt. Br. 90. The state disagrees. It maintains that in determining whether Eaton is entitled to relief on the guilt-phase IAC claim, "the district court **[*1018]** correctly limited its . . . review to" the state-court record. Aplee. Br. 81.

Because our resolution of these arguments turns on the applicable standard of review, we begin our discussion there. To the extent the district court denied relief on the guilt-phase IAC claim, no one disputes that we review its decision de novo. That is, we afford no deference to the district court's legal analysis. *See Bonney v. Wilson, 817 F.3d 703, 711 (10th Cir. 2016)*. But we must also determine the quantum of deference that we owe—and that the district court owed—to the WSC's analysis of this claim. For its part, the state argues that the WSC's adjudication of Eaton's claim is "subject to the highly deferential standards of" *§ 2254(d)*. Aplee. Br. 78. Eaton, on the other hand, insists that the WSC's decision **[**15]** is entitled to no such deference.

[10] Eaton likewise relies on this new evidence in asserting on appeal that he is entitled to relief on the guilt-phase IAC claim. In fact, as the state points out, Eaton doesn't even attempt to argue in his opening brief that he is entitled to relief on the guilt-phase IAC claim "based on the state[-] court record [alone]." Aplee. Br. 83.

The parties' disagreement on this point stems from the language of § 2254(d) itself. In relevant part, HN1[] that language allows a federal habeas court to grant relief to a state prisoner "with respect to a[] claim that" a state court has already "adjudicated on the merits"—but only under the narrowest of circumstances. § 2254(d). Specifically, a federal habeas court cannot grant relief on such a claim unless the state court's decision (1) "was contrary to, or involved an unreasonable application of, clearly established [f]ederal law" or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate[-]court proceeding." § 2254(d)(1)—(2).

As this language suggests, and as we note above, HN2[] a federal court's review of a state court's decision under § 2254(d) is exceedingly deferential. *See* Fairchild v. Trammell, 784 F.3d 702, 710 (10th Cir. 2015) (explaining that § 2254(d) requires us to give such state-court decisions "the benefit of the doubt" (quoting Pinholster, 563 U.S. at 181)). For instance, to satisfy § 2254(d)(1)'s unreasonable-application prong, a petitioner must do more than merely establish that the state court's adjudication of his or her constitutional claim was wrong. *See* Williams v. Taylor, 529 U.S. 362, 410, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) ("[A]n *unreasonable* application of federal law is different from an *incorrect* ***[**16]*** application of federal law."). Instead, "[a]s a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington v. Richter, 562 U.S. 86, 103, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011).

Similarly, HN3[] "that we think a state court's factual determination was incorrect—or, put differently, that we would have made a different determination ourselves in the first instance—does not render the state court's determination objectively unreasonable" for purposes of § 2254(d)(2). Smith v. Aldridge, 904 F.3d 874, 880 (10th Cir. 2018). Instead, "a factual determination only qualifies as unreasonable under § 2254(d)(2) if all '[r]easonable minds reviewing the record' would agree it was incorrect." *Id.* (alteration in original) (quoting Brumfield v. Cain, 135 S. Ct. 2269, 2277, 192 L. Ed. 2d 356 (2015)).

Critically, HN4[] in determining whether a petitioner has satisfied § 2254(d)'s rigorous requirements, a federal habeas court's review "is limited to the record that was before the state court that adjudicated the claim on the merits." Pinholster, 563 U.S. at 181. In other words, "evidence introduced [for the first time] in federal court has no bearing on **[*1019]** § 2254(d)(1) review. If a claim has been adjudicated on the merits by a state court, a **[**17]** federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court." Id. at 185; *see also* Hooks, 689 F.3d at 1163 (extending *Pinholster*'s pronouncement to § 2254(d)(2) review).

"If this standard" for obtaining federal habeas relief sounds "difficult to meet, that is because it was meant to be." Richter, 562 U.S. at 102. HN5[] By requiring state prisoners to clear this high bar before obtaining federal relief, § 2254(d) "confirm[s] that state courts are the principal forum for asserting constitutional challenges to state convictions." Id. at 103.

But HN6[] the concerns that animate § 2254(d), including "comity, finality, and federalism," don't apply with the same force when a state court declines to reach the merits of a particular constitutional claim. Williams v. Taylor, 529 U.S. 420, 436, 120 S. Ct. 1479, 146 L. Ed. 2d 435 (2000); *see also* Robert D. Sloane, *AEDPA's "Adjudication on the Merits" Requirement: Collateral Review, Federalism, and Comity*, 78 St. John's L. Rev. 615, 632 (2004) ("[I]f the state court did not adjudicate a federal claim on the merits, then comity applies differently or not at all."). Thus, "if the state court did not decide a claim on the merits, and the claim is not otherwise procedurally barred, we address the issue de novo and [§ 2254(d)'s] deference requirement does not apply." Gipson v. Jordan, 376 F.3d 1193, 1196 (10th Cir. 2004).

Moreover—and again, critically for our purposes—HN7[] because *Pinholster*'s "bar **[**18]** on new evidence is coterminous with the scope of § 2254(d)," our review of "a claim that was not adjudicated on the merits by the state courts" isn't "necessarily limited to the state record." Stokley v. Ryan, 659 F.3d 802, 808 (9th Cir. 2011); *see also* Toliver v. Pollard, 688 F.3d 853, 859 (7th Cir. 2012) ("*Pinholster* prohibits federal evidentiary hearings only on inquiries that are subject to [§ 2254(d)]—that is, inquiries that the state courts have addressed."). Thus, in analyzing such an unadjudicated claim, it may be possible for a federal court to consider evidence presented for the first time during federal habeas proceedings. *See* Pinholster, 563 U.S. at 205 (Breyer, J., concurring in part and dissenting in part); Stokley, 659 F.3d at 809.

As the foregoing discussion illustrates, our resolution of the parties' deference disagreement turns on whether the WSC adjudicated the guilt-phase IAC claim on the merits. If so, then Eaton must not only "overcome the limitation[s] of §

2254(d)[]"; he must do so based solely "on the record that was before" the WSC when it adjudicated the guilt-phase IAC claim. Pinholster, 563 U.S. at 185; *see also* Hooks, 689 F.3d at 1163. If not, then § 2254(d) deference doesn't apply; review is de novo; and *Pinholster* doesn't preclude Eaton from relying on evidence he presented for the first time during the federal habeas proceedings. *See* Gipson, 376 F.3d at 1196; Stokley, 659 F.3d at 808.

Here, the district court concluded that the WSC adjudicated **[**19]** the guilt-phase IAC claim on the merits. Thus, the district court determined that § 2254(d) applies to this claim and declined to consider new evidence that Eaton "submitted with [his federal] habeas petition." App. vol. 13, 909. Instead, the district court confined its review to "the record before" the WSC when it adjudicated the guilt-phase IAC claim. *Id.* And on that record, the district court concluded that Eaton couldn't satisfy § 2254(d).

[*1020] Eaton advances three challenges to this ruling. First, he asserts that the WSC didn't *fully* adjudicate the merits of the guilt-phase IAC claim. Second, he argues that even if the WSC fully adjudicated the merits of this claim, "the cause-and-prejudice standard" operates to allow him to present new evidence. Aplt. Br. 86-87. Third, he maintains that he is "entitled to relief" on the guilt-phase IAC claim "notwithstanding" § 2254(d). Id. at 87. We address and reject each of these arguments below.

A. The WSC's Resolution of the Guilt-Phase IAC Claim

Eaton doesn't dispute that the WSC generally considered and rejected the guilt-phase IAC claim. Instead, he points out that to succeed on this claim, he was required to make two distinct showings: (1) that trial counsel's performance was **[**20]** deficient, and (2) that trial counsel's deficient performance prejudiced him. *See* Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). And as Eaton points out, when a state court bypasses *Strickland*'s performance prong and resolves a petitioner's IAC claim based solely on *Strickland*'s prejudice prong, then § 2254(d) deference doesn't apply to the unadjudicated performance prong. *See* Porter v. McCollum, 558 U.S. 30, 39, 130 S. Ct. 447, 175 L. Ed. 2d 398 (2009) ("Because the state court did not decide whether [petitioner's] counsel was deficient, we review this element of [petitioner's] *Strickland* claim de novo.").

According to Eaton, that's precisely what happened here. He asserts that in adjudicating the guilt-phase IAC claim, the WSC never addressed *Strickland*'s performance prong. Instead, he insists, the WSC rejected this claim based solely on its conclusion that Eaton couldn't establish prejudice. Thus, Eaton argues, the district court erred in reviewing the performance-prong aspect of this claim under § 2254(d). And he asserts that it therefore *also* erred in confining its review of that aspect of his claim to the evidence he presented to the WSC. *See* Porter, 558 U.S. at 39; Toliver, 688 F.3d at 859.

To support his assertion that the WSC bypassed *Strickland*'s performance prong and resolved the guilt-phase IAC claim based solely on the prejudice prong, Eaton relies on three **[**21]** aspects of the WSC's decision. First, he points to language in which the WSC stated, "[A]t this juncture we intend only to address the initial premise, i.e., that Eaton was not competent to stand trial." Eaton, 192 P.3d at 52. Second, he directs us to the WSC's statement that the "materials" before it didn't "suggest that Eaton was incompetent." Id. at 60. Third, Eaton cites the following passage from the WSC's opinion: "We have concluded that the record on appeal does not indicate that Eaton was not competent to be tried. Hence, we also conclude that [trial] counsel w[as] not ineffective for permitting the trial to go forward." Id. at 70.

According to Eaton, these three statements, when considered together, demonstrate that the WSC "addressed only *Strickland*'s prejudice prong, without deciding whether trial counsel's performance was deficient." Aplt. Br. 84. We disagree.

To begin, Eaton divorces the first two statements from their context. The WSC made both of these statements in analyzing Eaton's standalone due-process claim—in which he asserted that he "was unable to assist in his own defense and thus was not competent to be tried"—rather than in addressing the separate guilt-phase IAC claim—in which he asserted that "[c]ounsel's **[**22]** failure to address th[e] fundamental problem [of his alleged incompetency] and election to allow the case to **[*1021]** proceed under these circumstances" violated the Sixth Amendment. Eaton, 192 P.3d at 49-50 (listing due-process claim and IAC claim as separate "issues"); *compare* id. at 52-60 (addressing Eaton's assertion that he was incompetent), *with* id. at 70 (addressing Eaton's assertion that "counsel's election to allow the trial to proceed when Eaton was not competent to

stand trial" violated *Sixth Amendment*). Thus, these first two statements reveal little, if anything, about how the WSC resolved the guilt-phase IAC claim.

That leaves only the third statement that Eaton identifies, which does appear in the portion of the WSC's opinion addressing the guilt-phase IAC claim. That portion of the WSC's opinion states, "We have concluded that the record on appeal does not indicate that Eaton was not competent to be tried. Hence, we also conclude that [trial] counsel w[as] not ineffective for permitting the trial to go forward." *Id. at 70*.

Although Eaton fails to explain as much, it appears he interprets this portion of the WSC's opinion as concluding that because the record before the WSC didn't indicate Eaton was actually incompetent, trial counsel's failure to argue otherwise **[**23]** didn't prejudice Eaton. In other words, Eaton seems to suggest the WSC concluded that even if trial counsel had argued below that Eaton was incompetent to stand trial, the trial court would have rejected such an argument for lack of support. And under those circumstances (so Eaton's enthymematic argument presumably goes), there would exist no "reasonable probability that, but for counsel's unprofessional error[], the result of the proceeding would have been different." *Strickland, 466 U.S. at 694* (setting forth applicable test for prejudice).

The state agrees with Eaton that "[i]f nothing in the record established that Eaton was not competent, then . . . Eaton could not have been prejudiced" by trial counsel's failure to challenge his competency. Aplee. Br. 88. And so do we. *See Grant v. Royal, 886 F.3d 874, 911 (10th Cir. 2018)* ("[E]ven assuming arguendo the performance of [petitioner's] trial counsel was constitutionally deficient for failing to . . . seek a second competency trial[,] if [petitioner] was *actually competent*, [counsel's] unconstitutional performance would not have prejudiced him."). But as the state points out, "[i]f nothing in the record established that Eaton was not competent," then it's *also* the case that "counsel could not be deficient **[**24]** for not challenging [Eaton's] competency." Aplee. Br. 88; *see also, e.g., Camacho v. Kelley, 888 F.3d 389, 395 (8th Cir. 2018)* (concluding that petitioner couldn't show counsel was "deficient in failing to have a competency evaluation performed" where "[n]othing in any of the three reports that [counsel] received and reviewed would have caused a reasonably professional counsel to conclude that [petitioner] was incompetent"); *Hibbler v. Benedetti, 693 F.3d 1140, 1150 (9th Cir. 2012)* ("As we have explained, the state court reasonably concluded that [petitioner's] lawyers had no reason to doubt that he was competent at the time he pleaded guilty. Thus, even on de novo review, [petitioner] could not establish that his counsel's performance was deficient.").

In other words, the WSC's finding that Eaton wasn't actually incompetent was dispositive of both the performance prong *and* the prejudice prong—not just one or the other. Accordingly, by relying on this finding to resolve the guilt-phase IAC claim, the WSC implicitly adjudicated both *Strickland* prongs, even if it didn't expressly explain that it was doing so. *See Wood v. Carpenter, 907 F.3d 1279, 1296 & n.15 (10th Cir. 2018)* (holding that state court performed both steps in *Strickland* analysis where, despite fact that state **[*1022]** court "never used the words 'deficient performance' or 'prejudice,' . . . the substance **[**25]** of its concluding statement reache[d] both *Strickland* prongs"), *cert. denied*, *No. 18-8666, 139 S. Ct. 2748, 2019 U.S. LEXIS 4313, 2019 WL 1458935 (U.S. June 24, 2019)*; *Reaves v. Sec'y, Fla. Dep't of Corr., 872 F.3d 1137, 1151-52 (11th Cir. 2017)* (concluding that state court adjudicated both prongs of petitioner's IAC claim where state court relied on factor that was "[r]elevant to both prongs" of *Strickland* analysis, even though state court didn't expressly "explain every step of its decision-making process"), *cert. denied*, *138 S. Ct. 2681, 201 L. Ed. 2d 1078 (2018)*. And because the WSC adjudicated Eaton's argument that counsel's performance was deficient, that means he isn't "entitled to de novo review of the performance prong of his *Strickland* claim."[11] Aplt. Br. 69 (emphasis omitted). More importantly, it means that we must reject Eaton's first basis for arguing that the district court erred when, in analyzing the guilt-phase IAC claim, it refused to consider evidence that wasn't before the WSC. *See Pinholster, 563 U.S. at 181*; *Hooks, 689 F.3d at 1163*.

[11] This conclusion renders it unnecessary for us to address Eaton's related assertion that, when *§ 2254(d)* doesn't "apply to the *performance* prong" of a petitioner's IAC claim, *Pinholster* doesn't bar a federal habeas court from considering new evidence in evaluating *prejudice*—even if that evidence wasn't before the state court that adjudicated the petitioner's IAC claim. Aplt. Br. 90 (emphasis added). For the reasons discussed above, *§ 2254(d)* applies to the performance prong here. Thus, we need not discuss whether or how de novo review of the performance prong should have affected the district court's review the prejudice prong.

B. Cause and Prejudice

Next, Eaton asserts that even if both *Strickland* prongs are subject to § 2254(d) deference, the district court's finding that appellate counsel was ineffective in "failing to develop the record on the prejudice prong of" the sentencing-phase IAC claim during the *Calene* remand nevertheless satisfied the cause-and-prejudice test and allowed the **[**26]** district court to consider Eaton's new evidence of incompetence in evaluating the guilt-phase IAC claim. Aplt. Br. 113. This is so, Eaton argues, because "the same body of evidence" supports both the sentencing-phase IAC claim and the guilt-phase IAC claim. Aplt. Br. 74.

In other words, Eaton's position appears to be that (1) the *mitigating evidence* the district court said trial counsel should have discovered and presented to the jury at sentencing and (2) the "*mental*[-]*health*" *evidence* Eaton says trial counsel should have discovered and presented to show Eaton was incompetent to stand trial are in fact one and the same. *Id.* (emphasis added). Further, because the district court ruled that appellate counsel was ineffective in failing to develop and present this evidence to support the *sentencing-phase* IAC claim, Eaton insists that appellate counsel was also necessarily ineffective in failing to develop and present this same evidence to support the *guilt-phase* IAC claim. And according to Eaton, this latter ineffectiveness satisfied the cause-and-prejudice test and allowed the district court to consider Eaton's new evidence in evaluating the guilt-phase IAC claim.[12]

[*1023] We typically encounter such cause-and-prejudice arguments when a habeas claim is procedurally defaulted—i.e., when a petitioner presented a particular claim in state court, but "the state court declined to consider the merits of that claim based 'on independent and adequate state procedural grounds.'" *Smith v. Allbaugh, 921 F.3d 1261, 1267 (10th Cir. 2019)* (quoting *Maples v. Thomas, 565 U.S. 266, 280, 132 S. Ct. 912, 181 L. Ed. 2d 807 (2012)*). ***HN8***[↑] Federal habeas courts generally can't review such procedurally defaulted claims. *See id.* But there exists an exception to this general rule: "[A] court may excuse a procedural default 'if a petitioner can "demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law."'"[13] *Id.* (quoting *Magar v. Parker, 490 F.3d 816, 819 (10th Cir. 2007)*). And notably, when the procedurally defaulted claim alleges that *trial counsel* was ineffective, a petitioner may be able to establish both cause and prejudice by demonstrating that *appellate counsel* was ineffective in failing to raise trial counsel's ineffectiveness. *See Ryder ex rel. Ryder v. Warrior, 810 F.3d 724, 747 (10th Cir. 2016)* (analyzing petitioner's "argument that appellate counsel's ineffectiveness in failing to raise . . . trial counsel['s] ineffectiveness demonstrate[d] cause and prejudice to overcome the procedural bar" and explaining that such "[a] claim of ineffective assistance of appellate counsel **[**28]** can serve as cause and prejudice to overcome a procedural bar, if it has merit").

Here, Eaton doesn't suggest the guilt-phase IAC claim is procedurally defaulted. Indeed, as we discuss above, the WSC indisputably reached and resolved the merits of that claim. *Compare supra* Section I.A., *with Smith, 921 F.3d at 1267* & n.2. Nevertheless, Eaton cites the Supreme Court's pre-AEDPA decision in *Keeney v. Tamayo-Reyes* for the proposition that, "[a]s

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[12] We need not and do not decide whether, as Eaton alleges, appellate counsel was ineffective in failing to adequately develop and present this evidence for purposes of the guilt-phase IAC claim. Even assuming Eaton is correct on this point, his cause-and-prejudice argument fails for the reasons discussed in the text.

We stress, however, that to the extent we (1) assume for purposes of resolving Eaton's cause-and-prejudice argument that appellate counsel was ineffective in failing to adequately litigate the guilt-phase IAC claim, and yet (2) nevertheless ultimately refuse to disturb Eaton's convictions, we in no way mean to suggest that a petitioner can never obtain federal habeas relief based on a standalone claim alleging ineffective assistance of appellate counsel. Indeed, Eaton did just that in this very case: based in part on the appeal-phase IAC claim—in which Eaton alleged he was entitled to habeas relief because appellate counsel was ineffective in failing to adequately litigate the *sentencing-phase* IAC claim—the district court granted the writ and vacated Eaton's death sentence.

Critically, however, we question whether Eaton adequately presented to the district court any argument that he is entitled to habeas relief based on a standalone claim that appellate counsel was ineffective in failing to adequately litigate the *guilt-phase* ***[**27]*** IAC claim. *See Hancock v. Trammell, 798 F.3d 1002, 1011 (10th Cir. 2015)* (noting that petitioner forfeited argument by failing to raise it in district court). Likewise, Eaton presents no such standalone claim to us on appeal. And we cannot grant Eaton habeas relief based on a claim he does not present.

[13] In this context, the term "actual prejudice" refers to the "prejudice arising 'from the errors' that form the basis of" the procedurally defaulted claim. *Smith, 921 F.3d at 1271* (quoting *United States v. Frady, 456 U.S. 152, 168, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982)*).

in cases of state procedural default, application of the cause-and-prejudice standard to excuse a state prisoner's failure to develop material facts in state court will appropriately accommodate concerns of finality, comity, [and] judicial economy." Aplt. Br. 116 (quoting *504 U.S. 1, 8, 112 S. Ct. 1715, 118 L. Ed. 2d 318 (1992)*). And he asserts that *Keeney* survived *Pinholster* unscathed, "thus leaving untouched [a] federal court's power to hear evidence that was not presented to the state court because of constitutionally ineffective [appellate] counsel." Aplt. Br. 116. Finally, he points to the district court's ruling below that appellate counsel was **[*1024]** ineffective in failing to adequately develop the *sentencing-phase* IAC claim during "the *Calene* hearing and on appeal," App. vol. 18, 960, argues that this unchallenged finding **[**29]** requires us to conclude that appellate counsel was also ineffective in failing to develop the same evidence for purposes of the *guilt-phase* IAC claim, and concludes that he was therefore entitled to rely on his new evidence for purposes of that latter claim. Aplt. Br. at 116.

Eaton's argument on this point is somewhat difficult to decipher.[14] But at bottom, it appears he is asking us to recognize an exception to *Pinholster*'s evidentiary rule—an exception that applies when inadequacies in the state-court record are the result of appellate counsel's ineffectiveness. According to Eaton, failure to acknowledge such an exception would yield unjust results by punishing petitioners for conduct that is "attributable to the state." *Id. at 116*; *cf. Cuyler v. Sullivan, 446 U.S. 335, 343-44, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980)* (explaining that "the [s]tate participate[s] in the denial of . . . [t]he right to counsel guaranteed by the *Sixth Amendment*" when it "conduct[s] trials at which persons who face incarceration must defend themselves without adequate legal assistance").

Yet as the state points out, the *Pinholster* majority was unquestionably aware of the potentially unjust consequences of its holding. Indeed, Justice Sotomayor cited those consequences as the primary basis for her dissent. **[**30]** *See Pinholster, 563 U.S. at 214-15, 217* (Sotomayor, J., dissenting) (accusing majority of potentially "foreclos[ing] habeas relief for diligent petitioners who, *through no fault of their own*, were unable to present [certain] evidence to the state court that adjudicated their claims," and citing this consequence as "good reason to conclude" that majority's holding was incorrect (emphasis added)).

Notably, Justice Sotomayor's express concerns didn't deter the *Pinholster* majority from unequivocally holding—without carving out an exception for diligent petitioners who received ineffective assistance of appellate counsel—that "review under *§ 2254(d)(1)* is limited to the record that was before the state court that adjudicated the claim on the merits." *Id. at 181* (majority opinion); *see also id. at 185* ("[E]vidence introduced in federal court has no bearing on *§ 2254(d)(1)* review. If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of *§ 2254(d)(1)* on the record that was before that state court.").

Instead, the *Pinholster* majority responded to Justice Sotomayor's concerns by suggesting that in some circumstances, the new evidence a petitioner presents for the first time in federal court may be so different from the **[**31]** evidence he or she was able to develop in state court that the new evidence "fundamentally change[s]" the petitioner's claim, thus "render[ing] it effectively unadjudicated." *Id. at 187 n.11*; *see also id. at 186 n.10* (suggesting that such additional facts "may well present a new claim" rather than one "adjudicated on the merits"); *id. at 216* (Sotomayor, J., dissenting) ("The majority presumably means to suggest that the petitioner might be able to obtain federal-court review of his new evidence if he can show cause and **[*1025]** prejudice for his failure to present the 'new' claim to a state court.").

Notably, Eaton doesn't argue in his opening brief that the new evidence of his incompetence renders the guilt-phase IAC claim a "new claim" that the WSC never adjudicated.[15] *Id. at 186 n.10* (majority opinion). Nor does he identify a single authority indicating there might exist a cause-and-prejudice exception to *Pinholster*'s evidentiary rule for circumstances in which appellate counsel's ineffectiveness results in an inadequate state record. And in light of the interplay between the majority opinion and Justice Sotomayor's dissent in *Pinholster*, we see no space to carve one out. We therefore reject Eaton's argument that appellate counsel's ineffectiveness **[**32]** provided the district court with an avenue for considering Eaton's new evidence in determining whether he was entitled to relief on the guilt-phase IAC claim.

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[14] Indeed, we question whether Eaton's one-paragraph argument is sufficient to adequately brief this point at all. *See Grant v. Trammell, 727 F.3d 1006, 1025 (10th Cir. 2013)* (noting that "[e]ven a capital defendant can waive an argument by inadequately briefing" it).

[15] Eaton attempts to make a new-claim argument for the first time in his reply brief. But arguments advanced for the first time in a reply brief are waived. *See United States v. Beckstead, 500 F.3d 1154, 1162 (10th Cir. 2007)*.

C. Satisfying § 2254(d) on the State-Court Record

In his final challenge to the district court's order denying relief on the guilt-phase IAC claim, Eaton asserts that even assuming (1) § 2254(d) applies to the guilt-phase IAC claim and (2) the cause-and-prejudice exception didn't permit the district court to consider the new evidence in determining whether Eaton can satisfy § 2254(d), he can nevertheless satisfy § 2254(d)(2) based solely on the record before the WSC when it adjudicated the guilt-phase IAC claim. Specifically, Eaton asserts that by denying appellate counsel's requests for more time to investigate during the *Calene* remand, the WSC (1) denied him "an adequate opportunity to develop" the evidence that would have established prejudice for purposes of the guilt-phase IAC claim and then (2) "denied [the guilt-phase IAC claim] because he failed to show that he was prejudiced." Aplt. Br. 118-19. And in doing so, Eaton asserts, the WSC "whipsawed" him, *id. at 119*, just as the state court did to the petitioner in *Brumfield, 135 S. Ct. 2269, 192 L. Ed. 2d 356*. Thus, he insists, the WSC's "failure to afford [him] **[**33]** an adequate opportunity to develop" the guilt-phase IAC claim "establishes that its denial of [that] claim 'was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate[-]court proceeding.'" Aplt. Br. 118 (quoting § 2254(d)(2)).

Although the procedural facts of this case are not entirely dissimilar to those before the Court in *Brumfield*, Eaton's reliance on the Court's decision in that case is nevertheless misplaced. In *Brumfield*, the state court first denied the petitioner's request for funding to investigate his intellectual disabilities and then denied the petitioner's request for an evidentiary hearing based on the petitioner's failure to make a threshold showing of those same disabilities. *See 135 S. Ct. at 2275*. And as Eaton points out, the federal district court in *Brumfield* concluded that "denying [the petitioner] an evidentiary hearing" after denying him "funding to develop" the very evidence he needed to entitle him to such a hearing satisfied § 2254(d)(1) because—according to the *Brumfield* district court—that decision unreasonably applied clearly established due-process law. *Id.* Further, Eaton points out, the Supreme Court ultimately agreed with the federal district court's **[**34]** conclusion that the petitioner "satisfied the requirements of § 2254(d)." *Id. at 2283*. Thus, Eaton asserts, we must reach the same conclusion here.

[*1026] We disagree. Critically, in affirming the district court's § 2254(d) ruling in *Brumfield*, the Court expressly declined to address the federal district court's § 2254(d)(1) ruling. *See id. at 2276*. That is, the Court declined to address whether depriving the petitioner of an opportunity to present certain evidence and then denying relief based on the petitioner's subsequent failure to present that very same evidence satisfied § 2254(d)(1). *See id.* Instead, the Court affirmed based solely on the federal district court's alternative ruling that the petitioner in that case satisfied § 2254(d)(2). *Id.* And in doing so, the Court relied on two specific factual findings that it said were unreasonable in light of the record before the state court when it adjudicated the petitioner's claim: (1) the state court's finding that the petitioner's "reported IQ score of 75 somehow demonstrated that he could not possess subaverage intelligence" and (2) state court's finding "that the record failed to raise any question as to" whether the petitioner's adaptive skills were impaired. *Id. at 2278-79*; *see also id. at 2275-76*.

Here, on the other hand, Eaton fails **[**35]** to explain in his opening brief which, if any, of the WSC's specific factual findings were unreasonable based on the record before it when it adjudicated the guilt-phase IAC claim. Instead, in arguing he can satisfy § 2254(d)(2), he relies solely on his assertion that the WSC impermissibly "whipsawed" him "in the same way" the state court "whipsawed" the petitioner in *Brumfield*.[16] Aplt. Br. 119. But in *Brumfield*, the federal district court ruled that state court's actions in "whipsaw[ing]" the petitioner satisfied § 2254(d)(1), not § 2254(d)(2)—an argument Eaton doesn't make here. *Id.*; *see also Brumfield, 135 S. Ct. at 2275*. And more to the point, the Court expressly declined to address whether this aspect of the district court's ruling in *Brumfield* was correct. *See 135 S. Ct. at 2276*. Thus, nothing in *Brumfield* supports Eaton's argument that he can satisfy § 2254(d)(2) based on the record before the WSC when it adjudicated the guilt-phase IAC claim.

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[16] In his reply brief, Eaton makes a different § 2254(d)(2) argument. There, he concedes that the evidence before the WSC when it adjudicated the guilt-phase IAC claim was insufficient to establish he was *actually* incompetent to stand trial. But he insists—for the first time—that this evidence was nevertheless sufficient to put trial counsel "on notice" of the *possibility* of his incompetence, thus triggering trial counsel's duty to investigate further. Rep. Br. 19. And given this evidence, he asserts, the WSC's adjudication of the guilt-phase IAC claim was "based on an unreasonable determination of [the] facts in light of" the state-court record. *Id.* at 16. But because Eaton advances this § 2254(d)(2) argument for the first time in his reply brief, we decline to address it. *See Beckstead, 500 F.3d at 1162*.

Further, because Eaton fails to satisfy § 2254(d), we need not address whether, as Eaton next argues, appellate counsel's "diligen[ce]" in attempting to develop the state-court record during the *Calene* remand satisfies § 2254(e)(2)(A)(ii) and therefore entitles him to rely on his new evidence to support the guilt-phase IAC claim. *Id. at 117* (quoting **[**36]** R. vol. 18, 960); *see also Smith, 904 F.3d at 886*. (explaining that petitioner must satisfy *both* § 2254(e)(2) *and* § 2254(d) before federal habeas court may conduct evidentiary hearing or consider new evidence developed at such hearing).

In summary, because the WSC adjudicated both of the *Strickland* prongs in rejecting the guilt-phase IAC claim, the district court properly confined its § 2254(d) analysis to the record before the WSC when it adjudicated that claim. And Eaton fails to demonstrate in his opening brief that the WSC's adjudication of the **[*1027]** guilt-phase IAC claim satisfies § 2254(d) in light of the state-court record. We therefore affirm the district court's order denying him relief on the guilt-phase IAC claim and turn next to those of Eaton's arguments that implicate his sentence.

II. The *Rule 59(e)* Motion

After the district court vacated his death sentence, Eaton filed a *Rule 59(e)* motion in which he asked the district court to modify its conditional writ to preclude the state from conducting new death-penalty proceedings. In support, Eaton argued that the underlying *Sixth Amendment* violation—i.e., trial counsel's ineffectiveness in failing to adequately investigate and present mitigating evidence at sentencing—couldn't be "cured by" a new sentencing proceeding "in light **[**37]** of the number of mitigation witnesses who have died or otherwise become unavailable since [his] original trial." App. vol. 18, 967. In fact, Eaton insisted, conducting new death-penalty proceedings wouldn't merely fail to remedy the underlying *Sixth Amendment* violation; it would violate anew "his *Sixth Amendment* right to counsel, the *Eighth Amendment's* prohibition of cruel and unusual punishment, and the *Due Process Clause of the Fourteenth Amendment*." *Id.* at 971.

The district court declined to address whether, given the number of now-unavailable mitigation witnesses, new death-penalty proceedings could cure the underlying constitutional error. Likewise, it declined to address whether conducting such proceedings might further violate Eaton's constitutional rights. Instead, it ruled that "under the notion of 'comity,'" Eaton should first present these issues in state court "if a resentencing is, in fact, pursued." *Id.* at 1825 (quoting *Younger, 401 U.S. at 44*).

In evaluating Eaton's challenges to this ruling, we review only for abuse of discretion. *See Douglas v. Workman, 560 F.3d 1156, 1176 (10th Cir. 2009)* (***HN9***[↑] "We review the district court's formulation of an appropriate habeas corpus remedy for abuse of discretion."); *Butler v. Kempthorne, 532 F.3d 1108, 1110 (10th Cir. 2008)* ("We review the district court's denial of a *Rule 59(e)* motion for an abuse of discretion."). Under this deferential standard of review, we won't disturb the district court's **[**38]** ruling unless it was "arbitrary, capricious, whimsical, or manifestly unreasonable." *United States v. Munoz-Nava, 524 F.3d 1137, 1146 (10th Cir. 2008)* (quoting *United States v. Byrne, 171 F.3d 1231, 1236 (10th Cir. 1999)*); *see also United States v. McComb, 519 F.3d 1049, 1053 (10th Cir. 2007)* (explaining that "in many cases there will be a range of possible outcomes the facts and law at issue can fairly support," and that "rather than pick and choose among them ourselves, we will defer to the district court's judgment so long as it falls within the realm of these rationally available choices").

In challenging the district court's ruling, Eaton first reiterates his assertion that the underlying *Sixth Amendment* error "cannot be cured by" new death-penalty proceedings because so many of his mitigation witnesses have died or otherwise become unavailable since his 2004 trial and sentencing. Aplt. Br. 50. He then advances a two-part argument for reversal. First, he alleges that under these circumstances, the district court had discretion to grant an unconditional writ. Second, he argues the district court abused that discretion by instead deferring resolution of Eaton's constitutional arguments to Wyoming's state courts.

Eaton's first point finds some support in our case law. *See United States v. Bergman, 746 F.3d 1128, 1134 (10th Cir. 2014)* **[*1028]** ("If so much time has passed and so many witnesses have died and so much evidence has been lost that not even **[**39]** Daniel Webster could provide constitutionally adequate representation, precluding a new trial could become an appropriate remedy for [a *Sixth Amendment* violation based on counsel's ineffectiveness]."); *Capps v. Sullivan, 13 F.3d 350, 352 (10th Cir. 1993)* (noting that federal habeas courts retain authority to bar retrial "when the error forming the basis for the relief cannot be corrected in further proceedings").

Nevertheless, for two independent reasons, we decline to reverse the district court's order denying Eaton's Rule 59(e) motion. First, as the state points out, Eaton raised this argument—i.e., that the underlying constitutional error couldn't be cured by a new sentencing proceeding and that the *only* appropriate remedy the district court could constitutionally impose was an unconditional writ—for the first time in his Rule 59(e) motion. And as the state further points out, **HN10**[↑] a Rule 59(e) motion isn't the appropriate vehicle in which to advance for the first time "arguments that could have been raised earlier" in the proceedings. Aplee. Br. 50 (quoting United States v. Christy, 739 F.3d 534, 539 (10th Cir. 2014)); *see also* Servants of Paraclete v. Does, 204 F.3d 1005, 1012 (10th Cir. 2000) ("Absent extraordinary circumstances . . . the basis for the [motion to reconsider] must not have been available at the time the first motion was filed.").

Eaton doesn't appear to disagree with the state's assertion **[**40]** that he never expressly asked the district court, at any point before he filed his Rule 59(e) motion, to bar the state from conducting new death-penalty proceedings. On the contrary, Eaton concedes that he actually "*requested* a conditional writ" in his § 2254 motion and that he initially failed to make "a specific request" for an unconditional one. Rep. Br. 9, 10 n.6 (emphasis added). Nevertheless, Eaton asserts, his unavailable-witnesses argument formed a proper basis for his Rule 59(e) motion because he had previously "raised *the problem* of deceased mitigation witnesses before the district court" and had likewise "*presented evidence* that a fair resentencing was impossible." Id. at 9-10 (emphases added).

But **HN11**[↑] merely raising the specter of an argument (or even presenting evidence that might give corporeal form to such an argument once made) doesn't equate to advancing an argument itself. *Cf.* Eizember v. Trammell, 803 F.3d 1129, 1141 (10th Cir. 2015) (finding issue waived where petitioner failed to present it "in a way that might fairly inform opposing counsel or a court of its presence in the case"). Thus, Eaton's Rule 59(e) motion wasn't an appropriate vehicle in which to advance, for the first time, his argument that an unconditional writ was the *only* adequate remedy the district court **[**41]** could constitutionally impose. *See* Servants of Paraclete, 204 F.3d at 1012. And we could therefore affirm the district court's order denying Eaton's Rule 59(e) motion on this basis alone. *See* Newmiller v. Raemisch, 877 F.3d 1178, 1194 (10th Cir. 2017) (noting that we may affirm district court's ruling on any basis that finds support in record), *cert. denied*, *139 S. Ct. 59, 202 L. Ed. 2d 43 (2018)*.

Second, even assuming Eaton properly raised his request for an unconditional writ in his Rule 59 motion, we hold that the district court didn't err—let alone abuse its discretion—in rejecting that request on the merits. In denying Eaton's Rule 59(e) motion, the district court reasoned that "under the notion of 'comity,'" Eaton's arguments about the constitutionality of conducting a new death-penalty proceeding would be "best resolved by the state[-]court system" if the state chooses **[*1029]** to pursue resentencing. App. vol. 18, 1825 (quoting Younger, 401 U.S. at 44). That is, the district court recognized there was "a range of possible outcomes the facts and law at issue c[ould] fairly support," McComb, 519 F.3d at 1053, and chose what it believed to be the "best" of those outcomes, App. vol. 18, 1825. Thus, we will affirm unless Eaton can demonstrate the district court's decision falls outside "the realm of . . . rationally available choices." McComb, 519 F.3d at 1053.

Eaton fails to make that showing here. In particular, he fails **[**42]** to identify on appeal any reason to think that Wyoming's state courts "will be unable to evaluate the prejudicial effect of [the] lapse of time" on his mitigation case. Woodfox v. Cain, 805 F.3d 639, 648 (5th Cir. 2015). And in the absence of such an argument, we see nothing unreasonable about the district court's decision to defer that matter to the state-court system. *Cf.* id. at 647-49 (holding that district court abused its discretion in granting unconditional writ despite fact that "forty years had passed since the crime at issue and . . . a number of witnesses had passed away"; noting that district court "failed to explain why these issues could not be addressed by a *state court* first at retrial" and reasoning that "[f]ederal habeas courts . . . should let state courts address constitutional and evidentiary issues in the first instance"). Accordingly, we affirm the district court's order denying Eaton's Rule 59(e) motion.

III. The State's Failure to Timely Comply with the Writ's Requirements

Even assuming the district court acted within its discretion in declining to grant him an unconditional writ barring resentencing, Eaton argues that the state nevertheless forfeited its right to pursue such resentencing by failing to comply with the conditional writ's **[**43]** requirements. Specifically, Eaton points out that the writ (1) gave the state 120 days in which to commence new death-penalty proceedings and (2) required the state to promptly appoint experienced death-penalty counsel to represent him in such proceedings.

In light of the state's apparent noncompliance with these requirements, we directed a limited remand to the district court to address whether the state failed to comply with the writ and, if so, whether its noncompliance resulted in a waiver of the state's right to pursue new death-penalty proceedings. On remand, the district court found that the state indeed violated the terms of the writ by failing to promptly appoint experienced death-penalty counsel.[17] But it nevertheless ruled that the state's noncompliance didn't result in a waiver of its right to pursue resentencing. Notably, in reaching that conclusion, the district court relied in part on the fact that Eaton had filed with the state trial court a notice in which he argued that, in light of the ongoing proceedings in federal court, it would be "premature . . . to initiate *any* further state [-]court proceedings." App. vol. 19, 27. Thus, the district court reasoned, Eaton himself **[**44]** was at least partially responsible for any delay in the appointment of counsel.

On appeal, Eaton argues the district court's ruling on remand constitutes an abuse of discretion. Yet, with the exception of a two-sentence footnote, his opening brief fails to address the district court's finding that Eaton couldn't use the state's delay in appointing counsel as a basis for finding waiver when Eaton himself argued to the state trial court that **[*1030]** "*any* further state[-]court proceedings" would be premature in light of the ongoing federal litigation. *Id.* And ***HN12***[↑] "[a]rguments raised in a perfunctory manner, such as in a footnote, are waived." *United States v. Hardman, 297 F.3d 1116, 1131 (10th Cir. 2002)*. So too are arguments made for the first time in a reply brief, which is where Eaton attempts to fully engage with the district court's conclusion that he was at least partially responsible for the delay in appointing counsel.[18] *See Beckstead, 500 F.3d at 1162*.

We could affirm on this basis alone. Nevertheless, we alternatively conclude that the arguments Eaton advances for the first time in his reply brief fail. There, Eaton asserts that the trial court misinterpreted his notice and that he can't be held responsible for the trial court's misinterpretation because his notice **[**45]** accurately quoted the language of the writ. But Eaton did more than merely quote the writ's language. He also affirmatively argued to the trial court that "*any* further state[-]court proceedings"—including, presumably, the appointment of counsel—would be premature in light of the ongoing federal litigation. App. vol. 19, 27. Further, as the state points out, Eaton *inaccurately* informed the trial court that the federal district court had "stay[ed]" the state-court proceedings; in reality, the district court had only stayed Eaton's *execution. Id.*

Thus, Eaton fails to demonstrate any error in the district court's conclusion that Eaton was at least partially to blame for the state's noncompliance with the writ's requirements. Under these circumstances, we conclude that the district court did not abuse its discretion in refusing to preclude the state from conducting new death-penalty proceedings. *Cf. Gibbs v. Frank, 500 F.3d 202, 207-10 (3d Cir. 2007)* (holding that district court didn't abuse its discretion in excusing state's noncompliance with conditional writ's deadline where district court concluded that defendant was at least partially responsible for delay); *Chambers v. Armontrout, 16 F.3d 257, 260-61, 261 n.2 (8th Cir. 1994)* (rejecting defendant's argument that district court lacked "authority to modify **[**46]** [Eighth Circuit's] mandate by granting the state additional time to retry him," in part because "there was also some evidence that the delay in retrial" was partially attributable to defendant).

IV. The *Brady* Claim

To recap, we have thus far determined that the district court didn't err in denying relief on the guilt-phase IAC claim. And we have also resolved that the district court didn't abuse its discretion in refusing to preclude the state from conducting new death-penalty proceedings, either when it denied Eaton's *Rule 59(e)* motion or when it declined to find waiver on remand.

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[17] Curiously, the district court didn't address whether the state had likewise failed to commence new death-penalty proceedings within the writ's 120-day time limit.

[18] Moreover, in light of this waiver, we need not address the arguments that Eaton *does* adequately present in his opening brief. Those arguments challenge the district court's other reasons for concluding that the state isn't precluded, as a result of its failure to comply with the writ's requirements, from pursuing new death-penalty proceedings. Even if Eaton could prevail on those arguments, the district court's order "would still stand on the alternative ground" that Eaton fails to adequately challenge in his opening brief: namely, Eaton cannot be heard to complain of a delay that he was at least partially responsible for causing. *Bones v. Honeywell Int'l, Inc., 366 F.3d 869, 877 (10th Cir. 2004)*; *cf. also Harvis v. Roadway Exp. Inc., 923 F.2d 59, 60 (6th Cir. 1991)* (noting that "a party may not complain on appeal of errors that he himself invited or provoked the court or the opposite party to commit").

That leaves only Eaton's argument that the district court erred in denying relief on **[*1031]** the *Brady* claim, which the district court found to be procedurally defaulted. In relevant part, the *Brady* claim alleges that (1) the state suppressed certain impeachment evidence about its relationship with Joseph Dax, who testified at trial that while the two men were incarcerated together, Eaton confessed to kidnapping, sexually assaulting, and murdering Kimmell, and (2) Dax's testimony prejudiced Eaton, both during the guilt phase and the sentencing phase. But as the state points out, Eaton will now receive either an automatic life **[**47]** sentence or a new death-penalty sentencing proceeding. Thus, to the extent Eaton's *Brady* claim rests on an assertion of prejudice at sentencing, the state argues that this aspect of Eaton's *Brady* claim is now moot. *See* S. Utah Wilderness All. v. Smith, 110 F.3d 724, 727 (10th Cir. 1997) (holding that claim was moot where "relief ha[d] already been obtained"). Notably, Eaton doesn't respond to the state's mootness argument in his reply brief. Accordingly, we treat any non-obvious responses he could have made as waived and assume the state's mootness analysis is correct. *Cf.* Hardy v. City Optical Inc., 39 F.3d 765, 771 (7th Cir. 1994) (**HN13**[↑] "When an appellee advances an alternative ground for upholding a ruling by the district judge, and the appellant does not respond in his reply brief or at argument . . . he [or she] waives, as a practical matter anyway, any objections not obvious to the court to specific points urged by the appellee.").

Yet this conclusion doesn't entirely resolve Eaton's argument that the district court erred in denying relief on the *Brady* claim. As discussed above, Eaton argues that the state's alleged suppression of impeachment evidence resulted in prejudice at the guilt phase of his trial as well. Specifically, he asserts that Dax's testimony was the only "direct evidence of premeditation" and **[**48]** that "premeditation was the only contested issue" during the guilt phase. Aplt. Br. 134, 136.

But Eaton did not seek—and the district court did not grant—a COA to appeal the district court's ruling that there existed no "reasonable likelihood that Dax's alleged[ly] false testimony affected *the verdict*." App. vol. 13, 956 (emphasis added). Instead, Eaton sought a COA on the question of whether Dax's testimony was "material to the question of *punishment*." App. vol. 18, 1828 (emphasis added). And the district court granted a COA only on this basis.

Thus, any argument that Eaton is entitled to relief under *Brady* based on prejudice arising from the guilt phase of his trial is beyond the scope of his COA. *See* § 2253(c)(3) (requiring COA to designate "specific issue or issues" that satisfy § 2253(c)(2)'s requirements). And to the extent Eaton's arguments are beyond the scope of his COA, we decline to consider them. *See* Smith v. Duckworth, 824 F.3d 1233, 1238 n.1 (10th Cir. 2016) (declining to address claims that fell outside scope of issues designated in COA); Fields v. Gibson, 277 F.3d 1203, 1216 n.8 (10th Cir. 2002) ("'[A]ppellate review of the habeas denial is limited to the specified issues' in the [COA]." (first alteration in original) (quoting Ramsey v. Bowersox, 149 F.3d 749, 759 (8th Cir. 1998)). Accordingly, we will not disturb the district court's ruling denying relief on **[**49]** the *Brady* claim.

Conclusion

Because the WSC adjudicated the guilt-phase IAC claim on the merits, the district court correctly declined to consider Eaton's new evidence in determining whether Eaton was entitled to relief on that claim. Further, because Eaton fails to demonstrate in his opening brief that he can satisfy § 2254(d) based solely on the record that was before the WSC, we affirm the **[*1032]** district court's order denying relief on the guilt-phase IAC claim.

We likewise affirm the district court's orders (1) refusing to modify the conditional writ to preclude resentencing and (2) ruling that the state didn't waive its right to pursue such resentencing by failing to timely comply with the conditional writ's requirements. Specifically, we hold that the district court acted within its discretion in concluding that Wyoming's state courts should be the first to address Eaton's arguments about the constitutionality of resentencing and in determining that Eaton's own actions contributed to the state's failure to promptly appoint counsel.

Finally, we decline to address Eaton's argument that the district court erred in denying relief on the *Brady* claim; Eaton has waived any response to the state's argument **[**50]** that part of this claim is now moot, and what remains of Eaton's *Brady* claim falls outside the scope of his COA.

We remand this matter to the district court with instructions to effectuate the conditional writ of habeas corpus that it granted on November 20, 2014, and stayed in part on December 21, 2015.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

DALE W. EATON, Petitioner, vs. EDDIE WILSON, Warden, Wyoming Department of Corrections State Penitentiary, Respondent.	Case No. 09-CV-261-J DEATH PENALTY CASE

ORDER GRANTING, IN PART, AND DENYING, IN PART, RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND GRANTING, IN PART, PETITIONER'S REQUEST FOR EVIDENTIARY HEARING

Petitioner Dale Eaton, an inmate incarcerated in the Wyoming Department of Corrections State Penitentiary, has filed through counsel a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Doc. 64.) Respondent has moved for summary judgment on all claims. (Doc. 132, 150.) Eaton requests the Court deny Respondent's motion and proceed to an evidentiary hearing on his claims. (Doc. 144, 155, 157.) After considering the parties' arguments and being fully advised, the Court finds as follows.

I. BACKGROUND

A. Factual Background

On March 25, 1988, Lisa Marie Kimmell left Denver, Colorado, intending to drive to Billings, Montana, with a stop in Cody, Wyoming. (Trial Tr. at 1874.) Ms. Kimmell did not arrive in Cody as planned, and a search for her began on March 26, 1988. (Trial Tr. at 1880.) On April 2, 1988, Ms. Kimmell's body was found by a fisherman in the North Platte River southwest of Casper, Wyoming, near what is called Government Bridge. (Trial Tr. at 1956.) An autopsy showed that Ms. Kimmell died from multiple stab wounds to her chest, which were inflicted after a severe blow to the head. (Trial Tr. at 2335.) The examination also revealed semen in her vagina. (Trial Tr. at 2220-24.) Samples of that semen were taken and preserved. (*Id*.) In 2001, DNA from the semen samples was matched to Dale Eaton, a former resident of Moneta, Wyoming. (Trial Tr. at 2138.) Law enforcement agents obtained a search warrant for Eaton's property in Moneta, where they found Ms. Kimmell's car buried. (Trial Tr. at 2852, 2905-14.)

B. Procedural Background

1.

The Natrona County District Attorney charged Eaton with first-degree premeditated murder, first-degree felony murder, kidnapping, first-degree sexual assault, and aggravated

robbery. (Trial Tr. at 76-77.) A jury trial was conducted before the Honorable David Park in the Seventh Judicial District, at the Natrona County Courthouse in Casper, Wyoming. Eaton was represented by Wyatt Skaggs and Vaughn Neubauer from the Trial Division of the Wyoming Public Defender's Office. The trial commenced in February 2004 and lasted two weeks. At the close of the guilt/innocence stage of the proceedings, the jury returned guilty verdicts on all counts. (Trial Tr. at 854-59.)

At the penalty phase, the State called three witnesses. Shannon Breeden testified that while on I-80 outside of Rock Springs, Wyoming, Eaton threatened her with a rifle in 1997. (Trial Tr. at 3436.) Sweetwater County Sheriff's Deputy, Rich Haskell, testified that he investigated the aggravated assault on Breeden. (Trial Tr. at 3438-39.) Prosecuting attorney Tony Howard testified that Eaton was convicted on the aggravated assault charge. (Trial Tr. at 3445.)

The defense presented two expert witnesses: Dr. Kenneth Ash, a psychiatrist; and Dr. Lisa Gummow, a neuropsychologist. Dr. Ash described that he met with Eaton on four separate occasions for a total of about twelve and a half hours, during which time he observed Eaton and discussed his life history and present circumstances. (Trial Tr. at 3461.) Dr. Ash examined Eaton's available medical records, including those from the Colorado Psychiatric Hospital from when he was sixteen and from the Torrington Hospital in 1986

(Trial Tr. at 3463.) From those records, Dr. Ash noted the consistent finding of depression. Dr. Ash assessed a global assessment of functioning (GAF) of 31, which indicated a major impairment. Dr. Ash opined that Eaton committed the Kimmell homicide when under the influence of extreme emotional disturbance and extreme distress. (Trial Tr. at 3492.)

Dr. Gummow testified that she spent two days with Eaton, seventy-five percent of which was test administration and the remainder was interview. (Trial Tr. at 3600.) Dr. Gummow reviewed relevant life documents such as medical, educational, psychiatric and police records, including statements from Eaton's sisters and father and developed a chronology of Eaton's life which she presented to the jury. Dr. Gummow opined: Eaton suffers from a depressive disorder NOS, which was present in a severe phase in 1988; Eaton's depression is probably genetic and his major depressive disorder is considered to be a brain disease; Eaton has significant brain damage; and Eaton has a long-standing learning disorder, with an IQ range from 76 (borderline) to high 80s to 90s. (Trial Tr. at 3594-3665.)

Four family members also testified on Eaton's behalf. Loren Ferrins, Eaton's uncle, testified that Eaton's father, Merle, picked on Eaton. (Trial Tr. at 3538-53.). Betty Ferrins, Eaton's aunt, testified that she did not want Eaton to die and stated "I don't think he was in his right mind when he did this." (Trial Tr. at 3557.) Marilu O'Malley, Eaton's maternal aunt, testified that Merle abused his children and Eaton got the brunt of it. Natrona County

Deputy Sheriff, Lynn Cohee, presented testimony from her interview with Sharon Slagowski, Eaton's sister. Cohee stated that Slagowski recalled physical and emotional abuse by her father; Merle hit Eaton with a belt, his fists and hit him over the head with a beer bottle. (Trial Tr. at 3701-04.)

Finally, the defense presented testimony from four friends. Shirley and Floyd Widmer testified they had always "gotten along real good" with Eaton and that Eaton had never exhibited a bad temper around them. Virginia Schifferns testified that Eaton had stayed with them in the past and she could not believe that he would do anything violent. Lodine Schifferns testified he liked Eaton and he couldn't believe this could happen.

The jury returned a unanimous verdict fixing Eaton's sentence at death. The jury found beyond a reasonable doubt the existence of three statutory aggravating circumstances: Eaton was previously convicted of a felony involving the use or threat of violence to the person; the murder was especially atrocious or cruel, being unnecessarily torturous to the victim; and Eaton killed another human being purposely and with premeditated malice while engaged in robbery, sexual assault and kidnapping. (Trial Tr. at 3792-93.) No mitigating factors were found to exist. (Trial Tr. at 3793.)

2.

Represented by Donna Domonkos, Ryan Roden, Diane Lozano and Tina Kerin from

the Appellate Division of the Wyoming Public Defender's Office, Eaton appealed to the Wyoming Supreme Court. On January 10, 2005, appellate counsel filed a motion to withdraw from the case due to a conflict of interest created by the fact that both trial and appellate counsel were supervised by the same individual, Kenneth Koski.[1] (Mot. Withdraw, Jan. 10, 2005.) Andy Fraser, the investigator assigned to the case had withdrawn from the case because he "heard that Mr. Skaggs [was] not happy with the fact that [he was] working on the Eaton appeal." (Pet., Ex. I, Fraser Aff., January 12, 2005.) Appellate counsels' withdrawal motion was denied by the Wyoming Supreme Court on January 19, 2005. (Order Denying Mot. Withdraw as Counsel, Jan. 18, 2008.)

Eaton raised the following claims on appeal:

> I. The trial court committed reversible error and violated the Ex Post Facto Clause by applying post–1989 amendments to Wyo. Stat. Ann. § 6–2–102 (1982) to Eaton's case.
>
> II. Eaton received ineffective assistance of counsel.
>
> > A. Eaton's counsel were ineffective for stipulating to the use of the entire 2001 amended version of Wyo. Stat. Ann. § 6–2–102 (1982), excluding "future dangerousness." Amended portions were more disadvantageous to Eaton and violated the Ex Post Facto Clause of the United States and Wyoming constitutions.

[1] Mr. Koski died on September 6, 2006, while backpacking in Wyoming's Wind River Mountains.

B. Defense counsel were ineffective by failing to comply in substantive ways with the ABA Guidelines which establish specific standards for both experience and performance in trying death penalty cases.

C. Failure to know the law.

D. Concession of Eaton's guilt without valid consent from him.

E. Eaton was unable to assist in his defense and thus not competent to be tried. Counsel's failure to address this fundamental problem and election to allow the case to proceed under these circumstances rendered trial patently unfair.

F. Trial counsel were ineffective for waiving objection to venue.

G. The oversights, errors and decisions to forego (i.e., the sorts of things set out above) amounted to an abandonment of Eaton's defense by his own counsel.

H. Defense counsel were ineffective in failing to adequately investigate potential mitigation evidence, failing to offer appropriate mitigation evidence, and failing to provide necessary information to mitigation experts.

I. Counsel's failure to object to the given instructions which were substantively different than those proposed by the defense constituted substandard performance and substantially prejudiced Eaton.

J. Counsel did not assure that Eaton's jury was given a constitutionally adequate sentencing form.

III. The jury was not properly instructed on the law as intended by Wyoming's death penalty statute.

> IV. An unconstitutional and fatally defective voir dire deprived Eaton of a fair and impartial jury to determine his guilt or innocence and to decide on life or death.
>
> V. The trial court was biased at trial and in limiting the remand, showing such hostility to his claims that Eaton was deprived of due process and prejudiced as a result.
>
> VI. Prosecutorial misconduct occurred, violating Eaton's due process rights and warranting reversal.
>
> VII. Eaton was unable to assist in his own defense and thus was not competent to be tried.
>
> VIII. The trial court erred in denying defense counsel's motion for mistrial, where a juror conducted his own investigation and discussed his investigation during deliberations.
>
> IX. The trial court erred in the admission and presentation of evidence.
>
> X. The trial court erred in permitting the testimony of Dr. Ash without Eaton's express waiver of privilege, and without insuring the protection of Eaton's Fifth Amendment right against self-incrimination.
>
> XI. Is the record below reversibly incomplete?
>
> XII. Cumulative error occurred, warranting reversal of Eaton's convictions and death sentence.

Eaton v. State, 192 P.3d 36, 49-51 (Wyo. 2008).

In a procedure unique to Wyoming, the Wyoming Supreme Court granted a remand pursuant to *Calene v. State*, 846 P.2d 679 (Wyo. 1993), for the limited purpose of conducting an evidentiary hearing on Eaton's claims of ineffective assistance of counsel. (Order

Granting Mot. Partial Remand, April 5, 2005.) The Wyoming Supreme Court ordered that the trial court rule on those claims within ninety days. (*Id*.) Eaton objected to the "speedy schedule" and moved for a continuance in order to investigate his claims for relief. (Mot. Continuance, June 2, 2005.) The trial court, and the Wyoming Supreme Court, denied motions to continue the *Calene* hearing, and the hearing was held by the trial court on June 6-10, 2005. Counsel for defense, Skaggs and Neubauer, testified at the hearing. (*Calene* Remand Tr. at 62-466.) The deposition of defense mitigation expert, Priscilla Moree, was presented. (Doc. 145, Moree Dep. Tr., June 2, 2005.)

Judge Park issued a decision letter on July 1, 2005, finding trial counsel were not ineffective. (Dec. Ltr., July 1, 2005) The Judge found that the "additional mitigation evidence [did] not present new mitigating factors, it only reinforce[d] evidence of a known mitigator (i.e., that Eaton had a terrible childhood)." (*Id.* at 30.) Weighing the aggravating and mitigating factors, the court determined Eaton was not prejudiced by any failures to investigate or present mitigating evidence. (*Id*.)

On July 13, 2006, a hearing was conducted to address Eaton's motion for new trial based on competence issues. (Mot. New Trial Tr., July 13, 2006.) Counsel also attempted to introduce new mitigation-based evidence, including an affidavit from Brian Conrado, Eaton's childhood friend, and school records not previously presented. (*See id*.) The trial court issued

an oral ruling denying the motion. (*Id*. at 49-55.)

On August 18, 2008, the Wyoming Supreme Court in a detailed 110 page decision unanimously affirmed Petitioner's convictions and sentence. *Eaton*, 192 P.3d at 49, 124.

3.

On June 3, 2009, represented by Michael Reese, Eaton filed a petition for post-conviction relief in the trial court, raising six issues:

> 1. The eighth amendment, at a minimum, bans the death penalty for individuals who are so mentally ill that *Panetti v. Quarterman* mandates a vacation of the death penalty.
>
> 2. Petitioner was deprived of meaningful appellate review.
>
> 3. Defense counsel stipulated to use of a hybrid statute (that is, a statute that contained elements of both the law in effect at the time of the crime and the law in effect at the time of the trial) and by so doing, violated the ex post facto clause.
>
> 4. The death penalty, at least as presently administered in Wyoming, is cruel and unusual punishment under the eighth and fourteenth amendments.
>
> 5. W.S. § 6-2-102 is further unconstitutional pursuant to the holding in *Panetti* and *Atkins.*
>
> 6. Wyoming's law on post-conviction relief in [sic] unconstitutional and should be overturned.

(Appl. for Post-Conviction Relief, June 3, 2009.)

The State moved for dismissal on the basis that none of Eaton's claims were

cognizable in post-conviction relief proceedings. (Resp't's Mot. to Dismiss Pet. for Post-Conviction Relief, June 24, 2009.) Specifically, Wyo. Stat. Ann. § 7-14-101 limits postconviction relief to constitutional violations that occurred in the proceedings resulting in conviction. Alleged constitutional violations related to the sentencing phase are not cognizable on postconviction review. *Id*. The trial court held a hearing on the State's motion, and issued its Order Granting Respondent's Motion to Dismiss Petition for Post-Conviction Relief on November 4, 2009. (Decision Ltr., Oct. 15, 2009.) Eaton petitioned the Wyoming Supreme Court for a writ of review, which that court denied.

4.

Eaton filed his Petition for Writ of Habeas Corpus in this Court on August 13, 2010 (Doc. 64). He raises eleven claims for relief:

> 1. Lead trial counsel Wyatt Skaggs' failure to recognize and respond appropriately to Mr. Eaton's cognitive and emotional impairment generated mutual distrust, animosity and disloyalty toward his client, and a corresponding failure to communicate with Mr. Eaton, which precluded the development of a workable attorney-client relationship and resulted in an irreparable conflict of interest, in violation of Mr. Eaton's Sixth and Fourteenth Amendment right to the effective assistance of counsel.
>
> 2. Trial counsel failed to conduct a reasonable investigation into Mr. Eaton's background, character and mental health.
>
> 3. Trial counsel Wyatt Skaggs was ineffective for failing to investigate and assert the issue of Mr. Eaton's lack of mental competence to proceed. As a result, there is a reasonable probability that Mr. Eaton was brought to trial

while mentally incompetent.

4. Mr. Eaton's Appellate counsel were burdened by a conflict of interest because of their professional affiliation with trial counsel Wyatt Skaggs and State Public Defender Ken Koski, whose personal and professional interests were adverse to Mr. Eaton's interests, and who actively undermined appellate counsel's ability to investigate and pursue legitimate claims of ineffective assistance of trial counsel against Mr. Skaggs.

5. Mr. Eaton's right to due process of law was violated when the prosecution failed to disclose the full extent of its relationship with, and consideration extended to, key prosecution witnesses, including Joe Dax, thus misleading the court, the jury and the defense about witness Dax's incentive to perjure himself.

6. Trial counsel was ineffective for withdrawing Mr. Eaton's motion to change venue and for failing otherwise to assert his client's rights to protect him from devastating effects of highly inflammatory and prejudicial pretrial publicity.

7. Trial counsel was ineffective for failing to question the jury panel effectively regarding the issues of predisposition to impose the death penalty and pretrial publicity, and failed to challenge jurors who admitted bias, resulting in a violation of Mr. Eaton's Sixth and Fourteenth Amendment rights to a fair and impartial jury and to due process of law.

8. Mr. Eaton's trial was tainted by juror misconduct which included an unauthorized, unsupervised trip to the crime scene by one juror who reported his findings to the rest of the jurors, following which several opinions were expressed concerning the crime scene evidence as to tire tracks such that it was the subject of substantial discussion during deliberations, thereby depriving Mr. Eaton of his right to a fair and impartial jury, his Due Process right to a verdict based solely on the evidence and testimony adduced at trial, given under oath, subjected to cross-examination by counsel, and with the opportunity to rebut, under the Sixth and Fourteenth Amendments to the United States Constitution.

9. The application to Mr. Eaton of disadvantageous changes in Wyoming capital sentencing law that occurred after the commission of the offense violated the Ex Post Facto clause of the United States Constitution.

10. The failure to properly instruct Mr. Eaton's jury as to mitigating circumstances left the jury with a fatally flawed formula to weigh aggravating circumstances against mitigating circumstances prior to reaching a verdict, and precluded the jury from considering mitigating evidence and circumstances, violating Mr. Eaton's rights under the Due Process Clause of the 14th Amendment and the Cruel and Unusual Punishment clause of the 8th Amendment.

11. Trial Counsel was ineffective for failing to know the law and assert Mr. Eaton's rights, including, but not limited to:

(a) Trial counsel failed to insist that the jury be properly instructed on its duty to weigh aggravating and mitigating circumstances prior to deciding punishment and trial counsel failed to challenge jury instructions and prosecutorial argument telling the jury that it could not consider or find mitigating factors not causally connected to the crime;

(b) Trial counsel failed to assert the Ex Post Facto clause violation that occurred when the trial court instructed the jury that the defense had the burden of establishing mitigating factors by a preponderance of the evidence;

(c) Trial counsel's choice of "defense" reflected a flawed understanding of Wyoming's felony murder rule, as interpreted in *Bouwkamp v. State*; and

(d) Trial and appellate counsel failed to assert the Sixth Amendment/*Bruton v. United States* violation that occurred when Detective Tholson informed the jury that Mr. Eaton confessed his guilt to federal inmate Bret Hudson.

(Pet. at 36-301.)

Respondent moves for summary judgment on all claims (Doc. 132, 150) on the grounds that Eaton has failed to meet his burden of proof under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Eaton disagrees and moves for an evidentiary hearing on his claims. (Doc. 144, 155, 157.)

II. STANDARD OF REVIEW

A. Summary Judgment

Summary judgment is proper when the record shows "no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). In ordinary civil cases, a district court considering a motion for summary judgment must construe disputed facts in a light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *see Barber v. General Elec. Co.*, 648 F.2d 1272, 1276 n. 1 (10th Cir. 1981). In the habeas context, Rule 56 applies only to the extent it does not conflict with any statutory provisions or habeas corpus rules. *See* Rules Governing Habeas Corpus Cases Under Section 2254, Rule 12.

B. 28 U.S.C. § 2254

The instant petition is reviewed under the provisions of the AEDPA which became effective on April 24, 1996. *Lockyer v. Andrade*, 538 U.S. 63, 70 (2003). Under the AEDPA,

relitigation of any claim adjudicated on the merits in state court is barred unless a petitioner can show that the state court's adjudication of his 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; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d); *Harrington v. Richter*, ---U.S.---, ---, 131 S.Ct. 770, 783-84 (2011).

As a threshold matter, the Court must "first decide what constitutes 'clearly established Federal law, as determined by the Supreme Court of the United States.'" *Lockyer v. Andrade*, 538 U.S. 63, 70 (2003). In determining what is "clearly established Federal law," the Court must look to the holdings, as opposed to the dicta, of United States Supreme Court decisions as of the time of the relevant state-court decision. *Carey v. Musladin*, 549 U.S. 70, 74 (2006); *Williams v. Taylor*, 592 U.S. 362, 412 (2000).

If the Court determines there is governing clearly established Federal law, the Court must then consider whether the state court's decision was "contrary to, or involved and unreasonable application of" the clearly established Federal law. *Lockyer*, 538 U.S. at 72. Under the "contrary to" clause, a federal habeas court may grant the writ if that state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Court has on a set of materially

indistinguishable facts. *Williams*, 529 U.S. at 412-13; *Gipson v. Jordan*, 376 F.3d 1193, 1196 (10th Cir. 2004).

Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from the Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. *Williams*, 529 U.S. at 413; *Gipson*, 376 F.3d at 1196. A federal court may not issue a habeas writ simply because it concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly; rather, that application must have been unreasonable. *Williams*, 529 U.S. at 411. The writ may issue only "where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme Court's] precedents." *Richter*, 131 S.Ct. at 784.

AEDPA requires considerable deference to the state courts. "[R]eview under §2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits," and "evidence introduced in federal court has no bearing on 2254(d)(1) review." *Cullen v. Pinholster*, --- U.S.---, ---, 131 S.Ct. 1388, 1398-99 (2011). "Factual determinations by the state courts are presumed correct absent clear and convincing evidence to the contrary." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003), *citing* 28 U.S.C. § 2254(e)(1).

Only if a petitioner can overcome the deferential standard set forth in 28 U.S.C. §2254 will this Court review petitioner's claims *de novo* to determine whether the petitioner is in custody in violation of the Constitution or law or treaties of the United States. In making that determination, the Court may not grant habeas relief if the State can show the constitutional error was harmless—that the decision did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrehamson*, 507 U.S. 619, 637 (1993). Where a habeas petition governed by AEDPA alleges ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), the *Strickland* prejudice standard is applied and courts do not engage in a separate analysis applying the *Brecht* standard. *Byrd v. Workman*, 645 F.3d 1159, 1167 n.9 (10th Cir. 2011).

To establish ineffective assistance of counsel "a defendant must show both deficient performance by counsel and prejudice." *Knowles v. Mirzayance*, 556 U.S. 111, ---, 129 S.Ct. 1411, 1419 (2009).

> To establish deficient performance, a person challenging a conviction must show that counsel's representation fell below an objective standard of reasonableness. A court considering a claim of ineffective assistance must apply a strong presumption that counsel's representation was within the wide range of reasonable professional assistance. The challenger's burden is to show that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment.

Richter, 131 S.Ct. at 770 (internal citations and quotations omitted); *Strickland*, 466 U.S. at

687-89. To demonstrate prejudice, a petitioner must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *United States v. Challoner*, 583 F.3d 745, 749 (10th Cir. 2009) (quoting *Strickland*, 466 U.S. at 688). That is, petitioner must show "counsel's errors were so serious as to deprive [him] of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687.

In a recent United States Supreme Court decision, the Court explained:

> Surmounting *Strickland's* high bar is never an easy task. An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial [or in pretrial proceedings], and so the *Strickland* standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is all too tempting to second-guess counsel's assistance after conviction or adverse sentence. The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom.
>
> Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is 'doubly' so. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential

standard.

Premo v. Moore, --- U.S.---, ---, 131 S.Ct. 733, 739-40 (2011) (internal citations and quotations omitted).

III. ANALYSIS OF CLAIMS

A. Ineffective Assistance of Appellate Counsel Claims

Claim 4. Mitigation Evidence

In his fourth claim for relief, Eaton contends that appellate counsel were burdened by a conflict of interest due to their professional affiliation with trial counsel Wyatt Skaggs and State Public Defender Ken Koski which impeded appellate counsels' ability to conduct an independent investigation of their ineffectiveness claims (Pet. at 140-58; Pet'r's Resp. Mot. Summ. J. at 66.) Eaton asserts that because the "Wyoming courts have no jurisdiction to entertain claims of ineffective assistance of appellate counsel for failing to present a claim of ineffective assistance of trial counsel where the underlying claim involves punishment rather than guilt/innocence," there is no available state court remedy and the claim is technically exhausted. (Summ. J. Tr. (Doc. 153) at 48.) He further argues that because the state courts do not have jurisdiction here, the claim is not procedurally defaulted and is before this Court for *de novo* review. (*Id*.) The Court agrees.

Defendants have a right to effective assistance of counsel on appeal. *See Halbert v.*

Michigan, 545 U.S. 605 (2005); *Evitts v. Lucey*, 469 U.S. 387 (1985). Generally, claims of ineffective assistance of appellate counsel are pursued in a postconviction relief petition. In Wyoming, however, the state statutory scheme places certain limitations on postconviction relief petitions. Wyoming limits postconviction review to constitutional violations that resulted in conviction:

> Any person serving a felony sentence in a state penal institution who asserts that in the *proceedings which resulted in his conviction* there was a substantial denial of his rights under the constitution of the United States or of the state of Wyoming, or both, may institute proceedings under this act.

Wyo. Stat. Ann. § 7-14-101(b) (emphasis added). A claim which affects petitioner's sentence cannot be raised in a postconviction review petition in Wyoming. *See Whitney v. State*, 745 P.2d 902, 903-04 (Wyo. 1987). In fact, Eaton raised an ineffective assistance of appellate counsel claim on postconviction review. The claim was denied because it related to sentencing, and thus was not cognizable in state postconviction relief. (Dec. Ltr., Oct. 15, 2009 ("The issues presented by Eaton's application are not cognizable under Wyoming statutes allowing petitions for post-conviction relief.").)

"As a rule, a state prisoner's habeas claims may not be entertained by a federal court when (1) a state court has declined to address those claims because the prisoner had failed to meet a state procedural requirement, and (2) the state judgment rests on independent and adequate state procedural grounds." *Maples v. Thomas*, --- S.Ct. ---, 2012 WL 125438 (Jan.

18 2012) (internal citations and quotations omitted), *citing Walker v. Martin*, 562 U.S. ---,---, 131 S.Ct. 1120, 1127 (2011). *See also Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991). A state procedural default is "independent" if it relies on state law, rather than federal law. *Smith v. Workman*, 550 F.3d 1258, 1274 (10th Cir. 2008). A state ground will be considered "adequate" only if it is strictly or regularly followed and applied evenhandedly to all similar claims. *Smallwood v. Gibson*, 191 F.3d 1257, 1268 (10th Cir. 1999). Determining whether the state procedural bar is adequate is a federal question. *Lee v. Kemna*, 534 U.S. 362, 375 (2002); *Douglas v. Alabama*, 380 U.S. 415, 422 (1965) ("[T]he adequacy of state procedural bars to the assertion of federal questions is itself a federal question.") The Tenth Circuit has indicated that the state bears the burden of proving the adequacy of a procedural bar as it is "undoubtedly in a better position to establish the regularity, consistency and efficiency with which it has applied [its own rules] in the past." *Hooks v. Ward*, 184 F.3d 1206, 1217 (10th Cir.1999).

The question for this Court is whether Wyoming's bar on sentencing-based postconviction claims qualifies as an independent state ground adequate to bar habeas corpus relief in federal court. Since the State has not offered any meaningful argument addressing the adequacy and evenhandedness of Wyo. Stat. Ann. § 7-14-101(b)'s application, the Court finds that the State has not carried its burden. The predicament caused by the fact that

Wyoming courts are powerless to grant relief to a prisoner who received ineffective assistance of appellate counsel on issues relating to sentence, even a sentence of death, surfaced in *Harlow v. Murphy*. (Civ. Dkt. 05-CV-39-CAB.) In *Harlow*, this Court found that because federal court provided the first forum in which a Wyoming prisoner could be heard on claims of appellate counsel ineffectiveness on issues pertaining to a death sentence, the doctrines of exhaustion and procedural bar presented no barrier to consideration of those claims in federal court. (*Id*., Doc. 210 at 14-19.) Wyoming's bar on sentencing-based postconviction claims, both by design and in operation, discriminates against death penalty claimants where sentencing-based error on the part of counsel is often the focus. Accordingly, Respondent's motion to grant summary judgment on Claim 4 is denied.

Eaton's appellate counsel ineffectiveness claims cannot be raised in the Wyoming state courts, hence it would be futile for Eaton to return to state court. *See Williams v. Taylor*, 529 U.S. 420, 444 (2000). Instead, Eaton may present Claim 4 in this Court *de novo*. *See Cone v. Bell*, 556 U.S. 449, 129 S.Ct. 1769, 1784 (2009) (where state court relies on inadequate procedural bar and does not address merits, "federal habeas review is not subject to the deferential standard that applies under AEDPA to 'any claim that was adjudicated on the merits in State court proceedings.' Instead, the claim is reviewed *de novo*." (Quoting 28 U.S.C. § 2254(d)).

A habeas petitioner who raises a claim not adjudicated on the merits in state court is not subject to § 2254(d). *Pinholster*, 131 S.Ct. at 1401. A petitioner may present new evidence in federal court, as long as he satisfies the requirements of 28 U.S.C § 2254(e). The Supreme Court has explained that, "[u]nder the opening clause of § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Williams*, 529 U.S. at 432. As explained above, Eaton was diligent; he repeatedly moved for continuances seeking time to develop his ineffective assistance of counsel claims, but he was denied this opportunity by the state courts. Because Eaton attempted but was precluded from developing his claims in state court, § 2254(e) presents no barrier, and this Court may consider new evidence. Accordingly, Eaton's request to proceed to an evidentiary hearing on Claim 4 is granted.

Claim 11(d). *Bruton* Claim

In his second ineffective assistance of appellate counsel argument, Claim 11(d), Eaton asserts that his Sixth and Fourteenth Amendment Right to effective assistance of trial and appellate counsel was violated when counsel failed to assert the Sixth Amendment violation that occurred when Detective Tholson informed the jury that Eaton confessed his guilt to federal inmate Bret Hudson. (Pet. at 295-301; Pet'r's Resp. Mot. Summ. J. at 171.)

Eaton argues that appellate counsel was ineffective in failing to raise a *Bruton* claim on direct appeal. The parties agree that this issue was neither raised nor decided in the Wyoming courts, and thus, the claim is technically exhausted but procedurally defaulted. Out of an abundance of caution, because Eaton insisted this was a sentencing-based claim, the Court determined that given the peculiar limitations on appellate counsel and sentencing-based claims in Wyoming, the Court would examine the merits of Eaton's *Bruton* claim. (Doc. 136 at 14.) Respondent has moved for summary judgment on Claim 11(d) (Doc. 150), to which Eaton objects (Doc. 155).

A petitioner is not entitled to habeas corpus relief on a claim of ineffective assistance of counsel unless he can demonstrate that his counsel's performance was deficient and that the deficient performance was prejudicial. *Strickland*, 466 U.S. at 687; *Osborn v. Shillinger*, 997 F.2d 1324, 1328 (10th Cir.1993). To establish the first prong, a petitioner must show that his counsel performed below the level expected from a reasonably competent attorney in criminal cases. *Strickland*, 466 U.S. at 687-88. To establish the second prong, a petitioner must show that this deficient performance prejudiced the defense to the extent that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694; *see also Sallahdin v. Gibson*, 275 F.3d

1211, 1235 (10th Cir. 2002). Failure to establish either prong of the *Strickland* standard will result in denial of relief. *Strickland*, 466 U.S. at 697. It is with this test in mind that the Court will analyze Eaton's *Bruton* claim.

The factual underpinnings of this claim are as follows. During the direct examination of Joe Dax,[2] Dax testified that Eaton said he could not figure out how the police found out about the car and speculated that maybe they got tipped off by "some guy out in Colorado." (Trial Tr. at 2691.) Eaton argues that the government reminded the jury of Dax's testimony and then linked it to Hudson through testimony from Detective Tholson:

> Blonigen: Now, there was reference in Mr. Dax's testimony to a person from Colorado. Had you ever interviewed a person from Colorado?
>
> Tholson: Yes.
>
> Blonigen: What was his name?
>
> Tholson: Bret Hudson.
>
> Blonigen: Did your department ever release in any way, prior to this case or prior to the time Mr. Dax would have been in there, information regarding a statement from Bret Hudson?
>
> Tholson: No, we did not.
>
> Blonigen:. In the interview of Joe Dax, did you –cover certain basic points

[2] Eaton's *Brady* challenge involving Joe Dax's testimony is explored under Claim 5 below.

with him?

Tholson: Yes, I did.

Blonigen: For instance, did he ever tell you why Mr. Eaton was concerned about the motor vehicle?

Tholson: Yes, he did.

Blonigen: What did he say?

Tholson: He said he was concerned because it had been found on his property, and he didn't know how it had been found.

(*Id*. at 3061-63.)

According to Eaton, through Tholson's testimony, the jury was lead to believe that Hudson had informed the authorities that Kimmel's car was buried on Eaton's property, which was false. Eaton argues that the "Confrontation Clause violation was instrumental in the state's effort to sell the jury on Joe Dax's highly inflammatory version of Mr. Eaton as a compassionless, cold-blooded and remorseless killer. Hudson's out-of-court statement, not under oath or subject to cross-examination, was admitted as substantive evidence of the proposition that Mr. Eaton told him where he buried the victim's car, and this in turn enhanced the believability of Joe Dax." (Pet'r's Resp. to Resp't's Mot. Summ. J. at 5.) Eaton urges that had Hudson's testimony been subject to cross-examination, it would have called into question the portions of Dax's testimony that Eaton lacked remorse. (*See* Pet., Ex. 12

at 155, indicating Eaton sought forgiveness for his sins and was tearful when discussing killing a young person in the past.)

The Sixth Amendment to the Constitution provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. The Confrontation Clause in the Sixth Amendment is extended to the States by the Fourteenth Amendment, and guarantees the right of a criminal defendant to be confronted with the witnesses against him. *Richardson v. Marsh*, 481 U.S. 200, 206 (1987). In *Bruton v. United States*, 391 U.S. 123 (1968), the Supreme Court held that "a defendant is deprived of his rights under the Confrontation Clause when his nontestifying codefendant's confession naming him as a participant in the crime is introduced at their joint trial, even if the jury is instructed to consider that confession only against the codefendant." *Richardson*, 481 U.S. at 201-02. The rule announced in *Bruton* is a limited one, and the rule does not apply to "statements that are not directly inculpatory but only inferentially incriminating." *United States v. Nash*, 482 F.3d 1209, 1218 (10th Cir. 2007) (internal quotation marks omitted).

The Court does not find that Tholson's testimony implicated a *Bruton* challenge. The instant case does not involve the confession of a co-defendant. The guilt/innocence stage of the proceeding is not being challenged. At issue before this Court is the penalty phase

proceedings. Eaton contends that Dax's testimony portraying him as a remorseless killer was critical to the government's case. As explained in some detail in Claim 5 below, Dax did not testify, nor did the prosecution rely upon Dax's testimony during the penalty phase. Consequently, the Court cannot find that the *Bruton* rule extends to the presented scenario. Furthermore, for Eaton to succeed under the *Strickland* test, he must show that a *Bruton* objection by counsel to Tholson's testimony, or a challenge on appeal raising an ineffective assistance of trial counsels' failure in this respect, would have changed the outcome of the proceedings. After a complete review of the record, the Court finds that Eaton has not shown prejudice as required under *Strickland*. As Eaton had no *Bruton* objection, it was neither deficient performance for Eaton's counsel not to make an objection under *Bruton*, nor would such objections have had a reasonable probability of affecting the outcome. In turn, the Court finds that Eaton cannot succeed here. There are no issues of material fact, and Respondent's motion for summary judgment as to Claim 11(d) should be granted.

B. Ineffective Assistance of Trial Counsel Claims

Eaton's habeas petition includes seven claims of ineffective assistance of trial counsel. He argues that lead trial counsel, Skaggs, elevated the concerns of his employer, the Wyoming Public Defender's Office, above the interests of his client, forsaking critical resources, while failing to communicate with his client (Claim 1). Next, he argues trial

counsel failed to conduct a reasonable mitigation investigation (Claim 2), and failed to investigate and assert the issue of Eaton's lack of mental competence to proceed (Claim 3). Further, Eaton contends trial counsel was ineffective for withdrawing his motion to change venue (Claim 6), failing to effectively question the jury panel during voir dire (Claim 7), failing to properly instruct the jury as to mitigating circumstances (Claim 10), and in failing to know the law (Claims 11a-c).

Eaton's ineffective assistance of trial counsel arguments focus on the 28 U.S.C. § 2254(d)(2) standard: whether the state court adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Given the unique procedures utilized in Wyoming, before analyzing the present claims, it is necessary to review the state courts' treatment of Eaton's ineffective assistance of trial counsel claims.

The Wyoming specific *Calene* remand proceeding presented Eaton with an opportunity to develop a record to support his claims of ineffective assistance of trial counsel. *See Calene*, 846 P.2d at 692. Here, the Wyoming Supreme Court granted counsels' motion for partial remand for an evidentiary hearing on Eaton's ineffective assistance of counsel claims on April 5, 2005, therein granting the trial court ninety days to hear evidence and enter a ruling. (Order Granting Mot. Partial Remand, April 5, 2005.) Eaton objected to the

"speedy schedule" and moved unsuccessfully for continuances in both the trial and Wyoming Supreme Court. (Mot. Continuance, June 2, 2005.)

In support of their motions, appellate counsel submitted affidavits from national Mitigation Coordinator, Russell Stetler, and Federal Capital Resource Counsel, Richard Burr. Stetler described the standard of care necessary in capital cases and stated that "investigation of a client's background, character, life experiences and mental health is axiomatic in the defense of a capital case." (Stetler Aff., March 29, 2005 at 4.) Stetler emphasized the need for extensive life-history and social-history investigations and explained that because it takes time to establish rapport with a client and his family, this history cannot be completed in a matter of hours or days... and may even require hundreds of hours. (*Id*. at 7-8.) After reviewing relevant records, Stetler opined that trial counsels' representation of Eaton in the penalty phase was grossly deficient by the standards of 2004. (*Id*. at 10.) Burr also reviewed relevant records and opined that defense counsels' performance in investigating and presenting mental health-related evidence and mitigating evidence was unreasonable and constitutionally deficient. (Burr Aff., June 2, 2005 at 4.) Burr indicated that for appellate counsel to make the necessary prejudice showing, they would need the time and resources to:

> (a) conduct in-depth interviews with all of Mr. Eaton's siblings and children, his former wife, and his father concerning Mr. Eaton's expression of anger,

abusive behavior, and redeeming qualities...;

(b) conduct in-depth interviews with Mr. Eaton's father concerning his abusive treatment of Mr. Eaton during childhood;

(c) identify, locate, and interview in-depth as many former co-workers of Mr. Eaton as can now be found;

(d) obtain all medical records pertaining to the pregnancy of Marion Eaton with Dale Eaton, and to the birth of Dale Eaton;

(e) interview Merle Eaton and all of Marion Eaton's and Merle Eaton's siblings concerning Marion Eaton's health during her pregnancy with Dale Eaton, including any material ingestion of alcohol, drugs, and prescription medications, and exposure to environmental toxins and trauma, and concerning the conditions of Dale Eaton's birth;

(f) work intensely with Mr. Eaton to help him disclose all that he can now remember about his actions, thoughts, and feelings during the entire course of the crime against Ms. Kimmell;

(g) provide all new information that is discovered in connection with the foregoing tasks to mental health experts, ask those experts to interview Mr. Eaton extensively concerning the crime against Ms. Kimmell, ask those experts to redetermine the nature of Mr. Eaton's mental illness and brain dysfunction, and ask those experts to examine how Mr. Eaton's mental disorders, together with his experience of childhood abuse and trauma, impacted him during the entire course of the crime against Ms. Kimmel;

(h) in light of all the new information about and evaluation of Mr. Eaton, ask the mental health experts to examine to the extent possible retrospectively whether Mr. Eaton was competent to stand trial.

(*Id.* at 14-15.)

The trial court determined it was bound by the schedule set forth by the Wyoming

Supreme Court and denied defense counsels' request for continuance. (Mot. Hrg. Tr., May 10, 2005.) The Wyoming Supreme Court "decline[d] to interfere in the district court's discretionary decision to determine precisely when (within the parameters set by th[e Wyoming Supreme] Court) the remand proceedings should be conducted" and denied the request. (Order Denying Mot. Cont., June 29, 2005.)

A five day hearing was conducted by the trial court on June 6-10, 2005. Appellate counsel thus was granted sixty days to review the record, engage experts to review the record and make assessments, and research and present their ineffectiveness claims. On July 1, 2005, the trial court authored a decision letter determining that Eaton was effectively represented at trial by Skaggs and Neubauer. (Dec. Ltr., July 1, 2005.)

Relying on the record developed by the trial court, the Wyoming Supreme Court addressed and denied each of Eaton's ineffective assistance of trial claims. *Eaton*, 192 P.3d 36 (2008). In his habeas petition, Eaton contends that the Wyoming Supreme Court's decision was both an unreasonable application of the facts under § 2254(d)(2) and contrary to or an unreasonable application of clearly established federal law under § 2254(d)(1). Section 2254 presents a highly deferential standard "which demands that state-court decision be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002). In order to succeed on his claims, Eaton must "show that the state court's ruling on the claim being

presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 131 S.Ct. at 786-87. What is more, unless Eaton can overcome the § 2254 hurdle, review by this Court is limited to the record in existence before the state court. *Pinholster*, 131 S.Ct. at 1399.

Claims 1-2. Mitigation Presentation

Eaton's first two claims are unquestionably linked. First, he asserts that a conflict of interest[3] and communication breakdown led Skaggs to forsake critical resources, resulting in an incomplete investigation and limiting the penalty phase presentation (Claim 1). Second, Eaton argues trial counsel performed ineffectively at the penalty phase by failing to conduct a reasonable investigation into his background, character and mental health, and that his attorneys left undiscovered many types of humanizing details that would have significantly enhanced his mitigation case (Claim 2). Eaton contends that the state courts' handling and disposition of those claims resulted in an unreasonable application of clearly established federal law and an unreasonable application of the facts. Respondent has moved for summary judgment on Claims 1 and 2. (Resp't's Mot. Summ. J. (Doc. 132); Resp't's

[3] Again, Eaton is alleging that appellate counsel were burdened by a conflict of interest due to their affiliation with Skaggs and Koski which impeded their ability to conduct an independent investigation of trial counsel.

Mem. in Support of Resp't's Mot. Summ. J. (Doc. 133) at 13-48.)

The state courts addressed Eaton's ineffective assistance and mitigation presentation claim on the merits. First, the trial court examined Eaton's claim of trial counsels' unreasonable investigation and mitigation presentation. (Dec. Ltr., July 1, 2005.) Relying on *Rompilla v. Beard*, 545 U.S. 374 (2005), the trial court explained:

> It is clear that prejudice can be established only by following up on the information alleged to have been missed by the trial counsel and showing how this information might have resulted in a different outcome.
>
> With two exceptions, no new evidence was produced at the hearing after remand. The Court is unable to determine whether appellate counsel ran into the same roadblocks as trial counsel or whether they failed to contact and interview witnesses and obtain allegedly missing records. This Court has no evidence as to what additional mitigation might have been adduced from these witnesses or records that appellate counsel now alleges were insufficiently investigated.

(Dec. Ltr., July 1, 2005 at 28-29.)

Second, the Wyoming Supreme Court reviewed whether trial counsel were ineffective in their investigation and presentation of mitigation evidence in the sentencing phase. *Eaton*, 192 P.3d at 89-115. The court concluded:

> We now have a complete picture of the "life history" mitigating evidence that trial counsel and his investigator explored, developed, and presented in the sentencing phase of Eaton's trial; the additional but scant "life history" mitigating evidence that Eaton explored, developed, and presented at the remand evidentiary hearing and in his motion for a new trial based on newly discovered evidence; and the testimony of trial counsel and his investigator at

> the remand evidentiary hearing that informs us concerning trial counsel's decisions in the presentation of the "life history" mitigating evidence in the sentencing phase. We have analyzed this complete picture in the light of those legal standards and analytical model set forth in the *Strickland* line of cases earlier mentioned. We hold that, in light of all the circumstances and with application of a heavy measure of deference to trial counsel's judgments, trial counsel's decisions in the matters identified by Eaton were within the wide range of professionally competent assistance. Eaton has failed to show that trial counsel's performance was deficient.

Id. at 108.

The question pending before this Court is whether Eaton was afforded an adequate opportunity to present his claims of ineffective assistance of counsel before the state courts given the sixty-day window to prepare and present his claims at the *Calene* remand hearing. Put differently, was it arbitrary and unreasonable for the state courts to acknowledge the critical importance of facts supporting a constitutional claim while simultaneously denying the necessary means of discovering them? Eaton sets forth a compelling argument in this respect, an argument to which Respondent has wholly failed to respond. The Court has given thought to whether appellate counsel should have been prepared in anticipation of the *Calene* hearing. However, in light of the fact that investigator Andy Fraser withdrew from the case in January of 2005 under pressure from Skaggs (Pet., Ex. I, Fraser Aff., January 12, 2005), thus forcing a new investigator into the case mid-stream; and considering Eaton's conflict of interest allegations, under the circumstances of this case, the Court finds that Eaton has

surmounted a tall hurdle and shown that the state courts' decisions were based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Accordingly, Respondent's motion for summary judgment on Claims 1 and 2 is denied. Section 2254 deference does not apply to Eaton's first and second claims, and instead, he may present his claims *de novo* at an evidentiary hearing.

Claim 3. Competence

In his third claim for relief, Eaton alleges that his Sixth Amendment right to effective assistance of counsel and his Fourteenth Amendment Due Process rights were violated when he was brought to trial without an adequate investigation of his mental competence by trial counsel (Pet. 127-37), and without adequate inquiry into the issue by the trial court (Pet. 137-39), resulting in his being tried while incompetent (Pet. 140). Respondent argues that this claim is unavailing and moves for summary judgment. (Resp't's Mot. Summ. J. (Doc. 132); Resp't's Mem. in Support of Mot. Summ. J. (Doc. 133) at 48-66.)

Background

The issue of Eaton's competence was investigated starting at the initial proceedings in this case. At arraignment, Skaggs informed the trial court that Eaton was being examined by a mental health professional. (June 6, 2003 Arraignment Tr. at 4.) At the October 2, 2003 motions conference, the trial court inquired about the possibility of Eaton entering a plea of

not guilty by reason of mental illness or deficiency. (Oct. 2, 2003 Mot. Hrg. Tr. at 19.) In response, Skaggs stated:

> Well, Your Honor, the question that you asked is improper. We didn't—we didn't necessarily have him interviewed for purposes of not guilty by reason of mental deficiency or illness. We did have him interviewed for a number of different reasons, competency being number one, of course; and second thing, to develop possible mitigating circumstances in the penalty phase. At this particular point, we have no—we have no inclination to enter a plea of not guilty by reason of mental illness or deficiency; and at this particular point, we have no interest in continuing the case by doing that sort of thing.

(*Id*. at 19.)

At the request of the trial court, one month prior to trial, Skaggs filed a memorandum (under seal), submitting authority to the effect that Eaton's memory problems did not constitute incompetence to stand trial. (Jan. 13, 2004 Mem.) Defense counsel never asserted a plea of not guilty by reason of mental illness, and he never questioned Eaton's competency before the trial court. At the penalty phase of trial, an expert for Eaton, Dr. Kenneth Ash, testified that although Eaton was clinically depressed, after performing testing and reviewing relevant records, Eaton was competent to stand trial. (Trial Tr. at 3460.)

Skaggs' handling of competency matters was discussed at the 2005 *Calene* remand hearing:

> Q. In this case, you did not pursue a plea of not guilty by reason of mental incapacity?

[Defense Counsel]: That's clear.

Q. Did you ever enter such a plea?

A. Never did.

Q. And did you ever consider entering such a plea?

A. Absolutely.

Q. And you, at some point, decided not to enter that plea but, instead, to pursue as a mitigating factor that portion of the statutory mitigators that you just read into the record; correct?

A. Right. Right.

Q. And what is the difference in being able to appreciate the wrongfulness of your conduct that you find in 7-11-305, your NGMI statute, versus the language in that mitigator that you just read?

A. In the NGMI statute, the language is black and white, either you are or you aren't. You're unable to appreciate the wrongfulness of your conduct, da, da, da. In this - - in these - - and there is - - is a huge difference, which I don't understand why - - well, forget that. I'll withdraw that. But there is a huge difference. And the difference is in the words "substantially impaired" and "committed while the defendant was under the influence of an extreme emotional or mental disturbance." But the word "substantially impaired" mitigated or - - not mitigated - - but lessen the standard that would exist under NGMI. There's a big difference between NGMI and these particular standards. It requires less, basically.

Q. Excuse me?

A. It requires less.

Q. Do you have to have expert testimony to go forward with an NGMI plea?

A. I think you should have.

Q. Do you have to have?

A. You have the burden of showing that you - - you have the burden of going forward with that. I don't know how you would ever be able to do it without some expert testimony.

Q. Because you did not enter a plea of not guilty by reason of mental incapacity or mental illness, did you have opportunity during the guilt/innocence phase of the trial to talk about Mr. Eaton's mental status or stressors he might have been under?

A. You know, we talked about that throughout the case, really. It was a hot topic of discussion. And there are some real severe limitations on sending Mr. Eaton - - or entering that particular plea and having Mr. Eaton go off to Evanston. The limitations are that you buy yourself essentially two expert witnesses that will most likely come in and rebuttal in your penalty phase in rebuttal to your two experts. And so, consequently, unless you want that kind of testimony, you've got to be extremely careful about entering an NGMI plea or entering a competency plea, realizing that I have to if I feel that there is grounds to do that. But you have to be careful.

So I consulted with two doctors, Dr. Gummow, Dr. Ash. Both of them were under a duty to determine, number one, is he competent; and, number two, does he fit the statutory definition of NGMI. And both of them indicated that he was competent; and, no, he did not fit the statutory definition, although we could still use these as mitigators because they are less than the statutory definition of NGMI.

And so, consequently, there was no reason to enter a competency plea. And as a matter of fact, I would consider that to be verging on malpractice in that particular situation, because all you would have gotten is a mental status report that wouldn't have said that he was incompetent, because he wasn't; but that he had a lot of personality disorders that made him possibly future dangerous. That's a lot of things that can come out of that, and none of them are

particularly good.

Q. So you - -

A. And I was not going to send him to Evanston unless I absolutely had to.

(June 6, 2005 *Calene* Remand Hr'g Tr. at 160-63).

On cross-examination, Skaggs explained that he had experience identifying mental health issues and defenses from his thirty-plus years as an attorney. (*Id*. at 217.) He further explained that due to his experience, he brought experts, doctors Ash and Gummow, into the case early. (*Id*. at 218.) Skaggs specifically discussed Eaton's competence to stand trial with his experts. (*Id*. at 223.) Both doctors Ash and Gummow determined that there were no competency issues, and that Eaton was able to appreciate the wrongfulness of his conduct. (*Id*. at 223-24.) Skaggs also testified that he never observed any conduct that led him to question Eaton's competency, and he acknowledged his obligation to raise the issue had he seen behavior indicating such a problem. (*Id*. at 224.) Skaggs did state that communication with his client was an issue from time to time in the case, but that Neubauer communicated best with Eaton. (*Id.* at 224-25.)

The Wyoming Supreme Court performed a merits analysis of Eaton's competency claims. *Eaton*, 192 P.3d at 52-60. First, the court set forth the applicable test:

> The test of trial competence is whether or not a defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational

> understanding, and whether or not he has a rational as well as a factual understanding of the proceedings against him. Wyo. Stat. Ann. § 7–11–302 (LexisNexis 2007) provides:
>
> > (a) No person shall be tried, sentenced or punished for the commission of an offense while, as a result of mental illness or deficiency, he lacks the capacity, to:
> >
> > (i) Comprehend his position;
> >
> > (ii) Understand the nature and object of the proceedings against him;
> >
> > (iii) Conduct his defense in a rational manner; and
> >
> > (iv) Cooperate with his counsel to the end that any available defense may be interposed.

Eaton, 192 P.3d at 52-53. Further, the court explained:

> If it appears at any stage of a criminal proceeding by motion or upon the court's own motion, that there is reasonable cause to believe that the defendant has a mental illness or deficiency making the defendant unfit to proceed, all further proceedings shall be suspended and an examination ordered as required by W.S. 7–11–301 *et. seq*.

Eaton, 192 P.3d at 54.

The court reviewed the relevant evidence cited above. Also, the court considered Eaton's competence as suggested by events at trial. The court considered whether Eaton's "outbursts" at trial evidenced incompetence, and whether the trial court should have inquired further into Eaton's competence. *Id*. at 58-60. The court found that the record did not suggest

that Eaton was incompetent as contemplated by § 7–11–302. *Id*. at 60. Relying on its substantive analysis, the court determined:

> We have concluded that the record on appeal does not indicate that Eaton was not competent to be tried. Hence, we also conclude that defense counsel were not ineffective for permitting the trial to go forward.

Id. at 70.

Discussion

A defendant has a due process right not to be tried while incompetent. *Drope v. Missouri*, 420 U.S. 162, 171–72 (1975); *Pate v. Robinson*, 383 U.S. 375, 385 (1966). To be competent to stand trial, a defendant must have "a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and must possess "a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960). Due Process requires the trial court to inquire *sua sponte* as to the defendant's competence in every case in which there is a reason to doubt the defendant's competence to stand trial. *Drope*, 420 U.S. at 173; *Pate*, 383 U.S. at 385. Moreover, counsel's failure to request the trial court to order a hearing or evaluation on the issue of the defendant's competency could violate the defendant's right to effective assistance of counsel provided there are sufficient indicia of incompetence to give objectively reasonable counsel reason to doubt the defendant's competency, and there is a reasonable probability that the

defendant would have been found incompetent to stand trial had the issue been raised and fully considered. *See e.g.*, *Jermyn v. Horn*, 266 F.3d 257, 283 (3rd Cir. 2001). Because the Wyoming Supreme Court addressed the merits of Eaton's competency claim, *Eaton*, 192 P.3d at 52-60, the relevant inquiry here is whether there is *any* reasonable argument that counsel satisfied *Strickland's* deferential standard. *Richter*, 131 S.Ct. at 788 (emphasis added).

In support of this claim, Eaton submits evidence not presented to the state courts. (*See* Pet. Ex. 5, Declaration of Kenneth Ash, M.D.) Review under AEDPA is limited to the record that was before the Wyoming Supreme Court when it adjudicated the claim on the merits. *See Pinholster*, 131 S.Ct. at 1398. Therefore, the Court will not consider the declaration from Dr. Ash submitted with the habeas petition. The Court has reviewed the record before the state courts, including Dr. Ash's determination that Eaton was competent to stand trial. (Trial Tr. at at 3460.) The Court cannot find a single mental health professional who clearly opined in the state court record that Eaton was incompetent at the time of trial.

The Court has reviewed the opinion of Dr. William Logan. (Pet., Ex. 52.) Dr. Logan performed a psychiatric examination at the Wyoming State Penitentiary on May 27, 2006, and reviewed documents from experts, the trial court record and mental health records. (*Id*. at 2-3.) Dr. Logan opined that while Eaton was aware of the proceedings against him, he

lacked sufficient emotional control to cooperate with counsel in preparing his defense. (*Id*. at 9.) The record clearly indicates communication difficulties between Skaggs and Eaton, however, the record also shows that Neubauer was able to effectively communicate with Eaton. In response to Eaton's "outbursts" at trial, the trial court conducted an in-chambers conference to inquiry about Eaton's apparent dissatisfaction with his attorneys:

> [Eaton:] I was mad because of the fact that this morning, the guy I didn't even know, I'm supposed to have talked to; then everybody that has come in so far sat there and lied about me. And they haven't done nothing about it. It's—I mean, my own son come in; and you can tell someone taught—led him along about it, because all of a sudden he knows what is all in a CRX. And the only Honda that he had, I had after he had done left and went back. I had a Honda back there three or four years ago. Pardon me. Before I got in trouble, I had a Honda in that Moneta.
>
> And I—they keep telling me to write stuff down. I write—as I remember something, I write it down. And they never use any of it.

(Trial Tr. at 2817-18.) The district court explained in detail what the limitations are for examination and cross-examination of witnesses, and Eaton expressed his understanding of that and conceded that his attorneys had explained "some of it" to him. (*Id.* at 2820.) Eaton was asked if he wanted a different attorney and he declined, although he qualified it with the statement, "Let's just go on with it." (*Id*. at 2821.) This Court cannot find that the alleged communication difficulties between Skaggs and Eaton gives rise to a constitutional violation.

Upon a thorough review of the record and the applicable law, it is clear that the state

court's adjudication of this claim was not contrary to clearly established federal law, did not involve an unreasonable application of clearly established federal law, and was not based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.

First, consistent with the legal standard for competency, Skaggs' interactions with Eaton and Eaton's communication with Neubauer–paired with Dr. Ash's report and testimony indicating Eaton was competent to stand trial–were sufficient for counsel to reasonably forego a competency hearing. In light of the record, there is not a substantial likelihood of a different result had counsel sought a competency hearing. The Wyoming Supreme Court reasonably applied *Strickland* in rejecting Eaton's argument. "[S]o long as 'fairminded jurists could disagree' on the correctness of the state court's decision," habeas relief is precluded by section 2254(d). *Richter*, 131 S.Ct. at 786 (citation omitted).

Second, Eaton cannot succeed on his procedural competency claim. A procedural competency claim is based upon a trial court's alleged failure to hold a competency hearing. *McGregor v. Gibson*, 248 F.3d 946, 952 (10th Cir. 2001). A trial court's failure to inquire into competency, *sua sponte*, where there is reason to doubt a defendant's competency, violates due process because it deprives the defendant of his right to a fair trial. *Drope*, 420 U.S. at 172; *Pate*, 383 U.S. at 385-86. But barring indicia of incompetence, due process does

not require that a competency hearing be held. *Godinez v. Moran*, 509 U.S. 389, 402 n. 13 (1993). The Supreme Court has not "prescribe[d] a general standard with respect to the nature or quantum of evidence necessary to require resort to an adequate procedure" but it has explained:

> [A] defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances, be sufficient. There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated. That they are difficult to evaluate is suggested by the varying opinions trained psychiatrists can entertain on the same facts.

Drope, 420 U.S. at 172.

Here, the trial court was sensitive to Eaton's "outbursts" and based on its observations, the court delayed the proceedings for an in-chambers conference to discuss Eaton's agitation. (Trial Tr. at 2817-21.) Based on the court's discussion with Eaton and his counsel, Eaton's ability to respond to the trial court's inquiries, and his ability to engage with counsel, the trial court did not express concern over Eaton's competency.

On review, the Wyoming Supreme Court set forth language from the *deShazer* case:

> [W]e are confronted with determining whether, in light of all the information available to the district court, it should have *sua sponte* suspended the proceedings, declared a mistrial, excused the jury, and ordered a mental examination of *deShazer* before a new trial could be held. Wyo. Stat. Ann. §

> 7–11–303 does not make it entirely clear what procedure should be followed in an instance such as this where the problem does not come fully to light until the middle of a jury trial...

Eaton, 192 P.3d at 58 (citing *deShazer v. State*, 74 P.3d 1240, 1249-51 (Wyo. 2003)). The court concluded that the record did not suggest that Eaton was incompetent, thus the test articulated in *deShazer* was inapplicable. *Eaton*, 192 P.3d at 58-60. At the very least, "'fairminded jurists could disagree' on the correctness of the state court's decision," *Richter*, 131 S.Ct. at 786, and therefore, the state court's determination precludes federal habeas relief on this claim.

Third, Eaton cannot succeed on his substantive competency claim. A substantive competency claim is founded on the allegation that an individual was tried and convicted while incompetent. *McGregor*, 248 F.3d at 952. As stated above, to be competent a defendant must have "a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and must possess "a rational as well as factual understanding of the proceedings against him." *Dusky*, 362 U.S. at 402. This Court will presume that the state courts' findings that Eaton was competent were correct, unless Eaton can rebut "the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e). This Court's review of Eaton's claim is restricted to the record in existence before the Wyoming Supreme Court. *Pinholster*, 131 S.Ct. at 1398.

Eaton's competency is supported by the state court record. Dr. Ash testified at trial that Eaton was competent to stand trial. (Trial Tr. at at 3460.) There is nothing in the record that suggests that the state courts' competency determinations were contrary to or an unreasonable application of *Drope*, *Pate*, or *Dusky*. Eaton simply cannot show that the Wyoming Supreme Court's determination "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 131 S.Ct. at 786. Accordingly, Respondent's motion for summary judgment on Claim 3 is granted.

Claim 6. Venue

In his sixth claim for relief, Eaton argues Skaggs was ineffective for withdrawing his motion to change venue and for failing otherwise to assert his client's rights to protect him from devastating effects of highly inflammatory and prejudicial pretrial publicity. (Pet. at 186-200.) Eaton argues that the Wyoming Supreme Court's decision that defense counsel were not ineffective for not more vigorously seeking an alternative venue for Eaton's trial, *see Eaton*, 192 P.3d at 70, was based on an unreasonable determination of the facts and was contrary to *Rompilla v. Beard*, 545 U.S. 374 (2005), and *Sears v. Upton*, 130 S.Ct. 3259 (2010). Because the Wyoming Supreme Court performed a merits adjudication of Eaton's change of venue argument, *Eaton*, 192 P.3d at 70, to be eligible for habeas relief, Eaton

"must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 131 S.Ct. at 786–87. Review is limited to the record that was before the state courts. *Pinholster*, 131 S.Ct. at 1398-99. Respondent asserts that Eaton cannot meet the *Harrington v. Richter* showing and therefore summary judgment should be granted on Claim 6.

Background

Defense counsel filed a motion for change of venue on June 24, 2003, due to the amount of pretrial publicity the case had generated. (Trial Ct. R., Vol. I at 127-28.) A motion hearing was conducted on November 14, 2003, at which time Judge Park informed the parties that if a change of venue were granted, it would have to be to a county that did not have a full-time district court judge, or perhaps to the federal courthouse in Jackson, Wyoming. (Mot. Hrg. Tr., Nov. 14, 2003 at 199.)

The motion for change of venue issue was revisited on December 12, 2003:

> Skaggs: [T]his has been the subject of much thought. And with respect to the defense-- and I did want to get a copy of the questionnaires that were sent out by the Court where potential jurors were asked specifically whether or not they made up their mind with respect to the facts of this case. Certainly, there have been some jurors, Your Honor, but not nearly as many as I anticipated. It appears to me that at least 50 to 60 percent, if not more, have indicated that they have no opinion with respect to the guilt or innocence of my client. That's a factor that we took into consideration.

> The second factor that we took into consideration with respect to this particular motion is the fact that all jurors have been exposed to what I consider to be the biggest problem with respect to the pretrial publicity in this case, and that's the Casper Star-Tribune. I think all statewide jurors have been pretty much exposed to that particular problem. And I don't know that we would be able to eliminate that problem by moving to another jurisdiction. I mean, we've still got the Casper Star-Tribune problem, and that's not going away.
>
> The third thing that we've looked at is the jurisdictions that would be available to have a trial. Certainly, it would be the defense's preference to have a trial in Laramie. That's where I prefer to have it. That's where my home is. And there are some other factors with respect to sentencing phase and things like that that would mitigate towards a trial in Laramie. That's my preference. But Laramie is not a possibility...
>
> So that leaves us with northern counties that don't have a sitting judge. There are a number of those, including Thermopolis, maybe Worland, Buffalo for example, Crook County for example, and possibly Wheatland. All of those counties I think have significant difficulties, both logistically for getting witnesses in and out of; and, secondly, with respect to their feelings with respect to the death penalty, and that would make a trial there untenable at least for the defense.
>
> So, consequently, due to the fact that we have very few courtrooms available, that's a logistical problem that I think is a consideration in a change of venue motion. Also, due to the fact that the questionnaires coming back, the majority of them I believe have not made up their mind; and also, due to the fact that the Casper Star-Tribune is a statewide newspaper, I don't believe that we'll pursue the change of venue; and I'll waive that motion.

(Mot. Hrg. Tr., Dec. 12, 2003 at 14-16.)

On appeal, defense counsel argued that Skaggs was ineffective for withdrawing his request for a change in venue. The Wyoming Supreme Court determined:

Defense counsel initially sought a change of venue. It was the defense's goal to have venue changed to Albany County. Albany County was home to the lead defense counsel and the mitigation expert, providing a sort of home court advantage as well as the comfort level in working out of one's own office, etc. Moreover, we take notice that Laramie is perceived in many quarters as a unique venue in Wyoming, in terms of the demographics of its population and because it is the home of the University of Wyoming. That certainly was the view of the defense. It was also the view of the defense that, although Natrona County was not a favorable venue because of the enormous amount of pretrial publicity generated by Wyoming[']s only newspaper of statewide distribution, the Casper Star–Tribune, there were no other venues in the state that were particularly more favorable, or if there were venues somewhat more favorable, no courtroom was available for a trial in the applicable time frame. The effort to obtain a change of venue was abandoned when it became clear that a courtroom would not be available in Albany County.

Two factors to be considered in whether or not to grant a change of venue are the nature and extent of the publicity surrounding the case and the difficulty or ease in selecting a jury. As was the case in *Olsen*, here we do not perceive that publicity made the selection of an unbiased or "untainted" jury especially difficult.

It is conceded that no scientific studies of any sort were done by the defense to verify its view that Natrona County was as good a venue as any other, under the circumstances of this case (including that this case had a high profile in Wyoming and Montana, as well as a considerable profile nationally). However, we are cited no authority that the defense is required to make such studies, or that the failure to do such studies is reversible error, at least insofar as the guilt/innocence phase of trial is concerned. Likewise, we take note that the argument presented by Eaton in support of this issue was not especially persuasive. Appellate counsel go so far as to say that defense counsel simply "abandoned" Eaton with respect to this matter, as well as several others. We find no support for such a view in the record on appeal. Perhaps we too often tend to look at Wyoming as a "unique" place, or at least an "out of the ordinary" state. It is said that Wyoming's highways make up Wyoming's "Main Street." There is at least a kernel of truth in that supposition, and we

> conclude that, based upon the record on appeal extant, defense counsel were not ineffective for not more vigorously seeking an alternative venue for Eaton's trial.

Eaton, 192 P.3d at 70 (internal citations omitted).

Discussion

The Sixth Amendment secures to criminal defendants the right to trial by an impartial jury. U.S. Const. amend. VI. Wyoming law requires a change of venue if "there exists within the county where the prosecution is pending so great a prejudice against the defendant that the defendant cannot obtain a fair and impartial trial in that county." Wyo.R.Crim. P. 21(a). When reviewing whether a change of venue motion should have been granted due to pretrial publicity, the Wyoming Supreme Court uses a two-part test: "First, the nature and extent of the publicity must be considered; second, the difficulty or ease in selecting a jury must be considered along with the amount of prejudice which actually appears during voir dire examination." *Murry v. State*, 713 P.2d 202, 208 (Wyo. 1986). To establish a claim of ineffective assistance based on failure to move for a change of venue due to prejudicial pretrial publicity, a petitioner must show that the trial court would have or should have granted a change of venue motion, which requires him to show actual or presumed prejudice on the part of the jurors. *Hale v. Gibson*, 227 F.3d 1298, 1332 (10th Cir. 2000). A movant may establish prejudice by showing either (1) pretrial publicity was so pervasive and

prejudicial that it created a presumption of an unfair trial (presumptive prejudice), *see Sheppard v. Maxwell*, 384 U.S. 333 (1966), or (2) pretrial publicity actually prejudiced the empaneled jury against the defendant (actual prejudice), *see Irvin v. Dowd*, 366 U.S. 717 (1961). Presumptive prejudice attends only to extreme cases. *Skilling v. United States*, ---, U.S. ---, 130 S.Ct. 2896, 2915 (2010). Those cases have included:

> the televised broadcast of a defendant's taped confession to a bank robbery and murder in a small Louisiana town, *see Rideau v. Louisiana*, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963), excessive exposure during preliminary court proceedings that "bombarded ... the community with sights and sounds" of the pretrial hearing while media overran the courtroom, *see Estes v. Texas*, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965), and a case in which the media created a pervasive "carnival atmosphere" in the courthouse during the trial of a man accused of bludgeoning his pregnant wife to death, *see Sheppard*, 384 U.S. at 358, 86 S.Ct. 1507.

Dunlap v. Clements, 448 Fed.Appx. 820, 823 (10th Cir. 2011).

The pretrial publicity in the Eaton case was extensive. This was a cold case from 1988 that resurfaced after DNA testing linked Eaton to Ms. Kimmell in 2001. Eaton asserts that the most highly inflammatory article was the Casper Star-Tribune's February 22, 2004 photograph of a hangman's noose on his Moneta property. (Pet., A1, Ted Monoson, *Eaton Jury Selection to Begin*, Casper Star Tribune, Feb. 22, 2004.) When jury selection began on February 24, 2004, Skaggs raised the issue of the February 22 article before the court and requested a limiting instruction. (Trial Tr. at 9.) At jury selection, the judge instructed the

jury:

> Please do not follow any media coverage of this case, either print or TV or radio; and please disregard any previous media coverage, specifically the photo that occurred in the February 22 Casper Star-Tribune, and do not consider that earlier media coverage. You must be able to decide this case solely on the evidence presented at trial in conjunction with these instructions and not base your verdict or any sentencing decision on anything you may have heard outside of court.

(*Id*. at 22.) Later, at the instruction stage of the proceeding, the trial judge again emphasized:

> avoid news accounts of the trial. Sometimes those accounts are based upon incomplete information or give a distorted view of the case. At best, they represent the perception of the reporter, and you must make any decisions based solely on your own perception.

(*See* March 20, 2004, Jury Instructions at 1.) The trial court's instructions were unequivocal; the jurors were to disregard any previous media coverage, including February 22 Casper Star-Tribune photograph, and decide the case solely on the evidence presented at trial. (Trial Tr. at 22.) After reviewing all relevant articles and considering the court's limiting instructions, the Court does not find that the instant case rises to the level of a circus atmosphere or lynch mob mentality on par with the extreme cases cited above. Eaton is unable to clear the high bar facing him. *See Dennis v. United States*, 302 F.2d 5, 8 (10th Cir. 1962) ("[T]he mere fact of unfavorable publicity does not of itself raise a presumption of prejudice.... The prejudice must have manifested itself so as to corrupt due process.")

Eaton has not demonstrated actual prejudice. Actual prejudice manifests at jury

selection when voir dire reveals "the effect of pretrial publicity ... is so substantial as to taint the entire jury pool." *Goss v. Nelson*, 439 F.3d 621, 628 (10th Cir. 2008). The Supreme Court has explained:

> It is not required [ ] that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Dowd, 366 U.S. at 722-23; *see also Murphy v. Florida*, 421 U.S. 794, 800 (1975).

After reviewing the jury questionnaires, Skaggs concluded that a fair jury could be obtained in Natrona County. *See Huls v. Lockhart*, 958 F.2d 212, 214-15 (8th Cir. 1992) (counsel's informed decision to not seek a change of venue based upon his "familiarity with the county, its citizens, and the particular jurors, and the possibility of reduced prejudices in deciding not to seek a change of venue" was a reasonable trial strategy and did not constitute ineffective assistance of counsel). The trial transcript shows that of the twelve final and deliberating jurors, ten stated that, despite pretrial publicity, they had not formed an opinion on Eaton's guilty or innocence. The other two jurors expressed that they had formed an

opinion of guilt, but clearly stated that they could set their opinions aside and make their decisions based only on the evidence presented at trial. (Trial Tr. at 1464, 1470, 1613, 1622.) *See Gardner v. Galetka*, 568 F.3d 862 (10th Cir. 2009) (holding that there was no actual prejudice although 55% of prospective jurors had formed an opinion about guilt, and four of the twelve empaneled indicated that they thought defendant was guilty but could decide the case on the evidence alone). Returning to the test articulated in *Murry*, 713 P.2d at 208, Eaton has not shown that trial counsel's withdrawal of his motion to change venue breached an objective standard of reasonableness or that there is a reasonable probability that such a motion would have been successful and the result different. In sum, because fairminded jurists would disagree whether the publicity required a change of venue, Eaton's claim is without merit.

Eaton further asserts that the trial court and the Wyoming Supreme Court ignored the nature and extent of publicity in this case, thus amounting to an unreasonable determination of the facts under 28 U.S.C. § 2254(d)(2). This Court disagrees. Simply because the state court focused its attention on the difficulty or ease in selecting a jury, along with the amount of prejudice appearing during the *voir dire* examination, does not indicate the court ignored the nature and extent of publicity. The Wyoming Supreme Court's informed and well reasoned decision indicates that the Court carefully considered this matter. Eaton has not met

his burden of proving with clear and convincing evidence that the state courts erred in finding Skaggs was not ineffective for withdrawing his request for a change in venue. Eaton's Claim 6 is without merit, and the Court finds that Respondent's motion for summary judgment should be granted on Claim 6.

Claim 7. Voir Dire

In his seventh claim for relief, Eaton argues that Skaggs was ineffective for failing to question the jury panel effectively regarding the issues of predisposition to impose the death penalty and pretrial publicity, and failed to challenge jurors who admitted bias, resulting in a violation of Mr. Eaton's Sixth and Fourteenth Amendment rights to a fair and impartial jury and to due process of law. (Pet. at 201-19; Pet'r's Resp. Mot. Summ. J. at 98.) There is no debate this claim was addressed on the merits by the state courts. Eaton asserts the Wyoming Supreme Court's decision is contrary to or an unreasonable application of Supreme Court precedent, including *Witherspoon v. Illinois*, 391 U.S. 510 (1968); *Wainwright v. Witt*, 469 U.S. 412 (1985); and *Morgan v. Illinois*, 504 U.S. 719 (1992). (Pet'r's Resp. Mot. Summ. J. (Doc. 144) at 98-115.) Eaton further argues that the Wyoming courts' decisions are based on an unreasonable determination of the facts. Respondent asserts that Eaton has not met his burden here and summary judgment should be granted as to Claim 7. (Mem. in Support of Resp't's Mot. Summ. J. at 89-98.)

The right to a jury trial guarantees a criminal defendant the right to fair and impartial jurors. *Turner v. Louisiana*, 379 U.S. 466, 471 (1965). In *Witherspoon v. Illinois*, the Court held that the state of Illinois violated that right when the court removed all potential jurors who "voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." 391 U.S. at 522. The Supreme Court further indicated that prospective jurors in a capital case could be excluded if they made it:

> unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*.

Id. at 522 n. 21 (emphasis in original).

The *Witherspoon* decision was revisited by the Supreme Court in *Wainwright v. Witt*, 469 U.S. 412 (1985). *Witt* held that "the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment ... 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.' " 469 U.S. at 424.

In *Morgan v. Illinois*, 504 U.S. 719 (1992), the Supreme Court faced the opposite question—whether a defendant may ask potential jurors if they would always vote for the death penalty, and exclude potential jurors who answered that they would. The Supreme

Court held:

> 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 do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror. Therefore, based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views. If even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence.

Morgan, 504 U.S. at 729. The Court noted: "[a]ll veniremen are potentially biased. The process of voir dire is designed to cull from the venire persons who demonstrate that they cannot be fair to either side of the case. Clearly, the extremes must be eliminated—i.e., those who, in spite of the evidence, would automatically vote to convict or impose the death penalty or automatically vote to acquit or impose a life sentence." *Id*. at 734 n. 7 (citations removed).

In the case at hand, the *Calene* hearing presented Eaton with an opportunity to raise and argue his claims of ineffective assistance based on inadequate *voir dire* arguments. The *Calene* remand hearing was held in June 2005. The *voir dire* in question occurred only one year prior, before the same Judge now receiving the *Calene* arguments. The trial court determined that additional evidence on the *voir dire* claim was unnecessary because the record was sufficient on this claim. (Dec. Ltr., May 27, 2005 at 6.) Under the circumstances

of this case, the Court cannot find this decision amounts to an unreasonable application of the facts.

The Wyoming Supreme Court, applying the standards from *Witherspoon, Witt* and *Morgan*, determined that defense counsel was not ineffective during *voir dire*. *Eaton*, 192 P.3d at 79-83. The court explained that it had thoroughly examined the *voir dire* record and it was clear that potential jurors who answered they would always vote for the death penalty were excused for cause, and that potential jurors who stated they would never vote for the death penalty were also excused for cause. *Id*. at 83. The court concluded that the transcript as a whole demonstrated that qualified potential jurors were passed by the parties for cause, while unqualified jurors were excused. *Id*.

The Supreme Court has emphasized that jury selection is "particularly within the province of the trial judge." *Skilling v. U.S.*, ---U.S.---, 130 S.Ct. 2896, 2917 (2010) (citing *Ristaino v. Ross*, 424 U.S. 589, 594–595 (1976) (internal quotation marks omitted)). Further, "[n]o hard-and-fast formula dictates the necessary depth or breadth of *voir dire*." *Id*. In the present case, Eaton argues that four members of the jury, specifically, jurors Cetak, Smith, Burgess and VanHouten, were predisposed to impose the death penalty. The Court has reviewed the *voir dire* record in its entirety and finds that the Wyoming Supreme Court's decision that defense counsel did not render ineffective assistance during *voir dire* is

consistent with the clearly established federal law in this area.

The *voir dire* of juror Cetak is found at pages 168-88 of the trial transcript. Eaton claims that defense counsel's *voir dire* of Cetak was ineffective because it was clear that she was "an automatic death penalty juror in all cases where the defendant admits culpability." (Pet'r's Resp. Mot. Summ. J. at 92.) The record shows that Cetak did respond affirmatively when asked whether she would always vote for the death penalty if the defense admitted culpability (Trial Tr. at 181); however, the follow up questions clarified that Cetak would look at the whole picture and consider the aggravating and mitigating circumstances as required by the instructions. (*Id*. at 182-83.) Cetak explained, "I am not just going to, blanket, that's what he gets. I mean, that's not my -- that's not how I operate, I guess." (*Id*. at 182). Review of Cetak's *voir dire* as a whole demonstrates that she would impartially decide the case based on open-minded and fair consideration of the applicable law and evidence.

The *voir dire* of juror Smith is found at pages 558-73 of the trial transcript. Juror Smith clearly stated that she would consider all of the person's life before imposing a sentence of death. (Trial Tr. at 571.) Further, she agreed that she would consider all of the penalty options, including life without parole, even in a brutal or premeditated case. (*Id*. at 573.)

The *voir dire* of juror Burgess is found at page 998-1009 of the trial transcript. Juror

Burgess agreed she would consider all of the circumstances and evidence presented, she would keep an open mind and weigh the evidence in considering which penalty is appropriate. (Trial Tr. at 1002-03.) In her questionnaire, Burgess wrote "I don't feel he should be really put to death. I think he should be put in prison, and I think he should be put to hard labor." (*Id*. at 1005-06.) Further, Burgess agreed she could follow the instructions and properly consider aggravating and mitigating circumstances. (*Id*. at 1006.)

The *voir dire* of juror VanHouten is found at pages 1463-76 of the trial transcript. Juror VanHouten indicated that she would consider the circumstances of the case and consider the mitigating evidence before deciding whether a life or death sentence was appropriate. (*Id*. at 1467, 1475.)

Contrary to Eaton's assertion that four members of the jury were "automatic death jurors," the record indicates that those jurors would make a decision based on the facts presented at trial. Eaton cannot demonstrate that the Wyoming Supreme Court's ruling on this claim "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 131 S.Ct. at 786–87. In turn, the Court finds that Respondent's motion for summary judgment should be granted in respect to Petitioner's Claim 7.

Claims 10-11. Penalty Phase Instructions and Failure to Know the Law

In his final ineffective assistance of counsel claims, Eaton argues that Skaggs' failure to object to improper jury instructions on mitigating circumstances left the jury with a fatally flawed formula to weigh aggravating circumstances against mitigating circumstances prior to reaching a verdict, and precluded the jury from considering mitigating evidence and circumstances, violating his rights under the Due Process Clause of the 14th Amendment and the Cruel and Unusual Punishment clause of the 8th Amendment (Claim 10). (Pet. at 257-81; Pet'r's Resp. Mot. Summ. J. at 142-156.) Further, he asserts Skaggs was deficient in: (a) failing to object to sentencing instructions and verdict forms that precluded the jury's consideration of mitigating circumstances; (b) failing to object to the application of disadvantageous provisions of the 2003 death penalty statute; and (c) pursuing a nonsensical and incomprehensible choice of defense for Eaton (Claim 11).[4] (Pet. at 281-302; Pet'r's Resp. Mot. Summ. J. at 165-57.)

At this junction in the case, the Court has determined that Eaton may proceed to an evidentiary hearing to present evidence to prove that trial counsel was unconstitutionally ineffective at the penalty phase for failing to investigate and present substantial mitigating

[4] Eaton's petition included a fourth argument, a *Bruton* claim. Analysis of Eaton's *Bruton* claim can be located under the ineffective assistance of appellate counsel claims section above.

evidence. Because Eaton is proceeding to an evidentiary hearing to develop his mitigation claims, *see* Claims 1, 2 and 4 above, any analysis of the state courts' adjudication of ineffective assistance of counsel claims related to mitigation instructions and presentation is rendered moot. Consequently, the Court declines to reach the merits of Claims 10 and 11(a-c).

C. Merits Determination

Claim 8. Juror Misconduct

In his eighth claim for relief, Eaton argues that his trial was tainted by juror misconduct which included an unauthorized, unsupervised trip to the crime scene by one juror who reported his findings to the rest of the jurors, following which several opinions were expressed concerning the crime scene evidence as to tire tracks such that it was the subject of substantial discussion during deliberations, thereby depriving Mr. Eaton of his right to a fair and impartial jury, his Due Process right to a verdict based solely on the evidence and testimony adduced at trial, given under oath, subjected to cross-examination by counsel, and with the opportunity to rebut, under the Sixth and Fourteenth Amendments to the United States Constitution. (Pet. at 219-237; Pet'r's Mot. Summ. J. at 116-30.) Eaton asserts that the Wyoming Supreme Court's decision denying Eaton's juror misconduct claim is both based upon an unreasonably application of clearly established federal law and an

unreasonable determination as to the facts.

Background

On March 15, 2004, the jury started their deliberations as to Eaton's guilt or innocence. (Trial Tr. at 3272.) Shortly thereafter, the trial judge received a note from the jury foreman, expressing concern about one of the jurors (juror Campbell or JJC) who had apparently conducted his own investigation of Government Bridge. (*Id*. at 3277.) The trial judge called in the attorneys along with juror Campbell to discuss the matter. (*Id*.) Campbell admitted that the Sunday prior, he had driven out past the area of Government Bridge, where Ms. Kimmel's body was discovered, and on his way back into town, stopped at Government Bridge. (*Id*. at 3278.) He told the court that while he was at the bridge he made "an observation that there were tracks out there," referring to the presence of tire tracks in the area where Eaton dumped Ms. Kimmel's body off the bridge. (*Id*.) At trial, the state presented two witnesses who described the area at Government Bridge on the day they recovered Kimmel's body, and testified that they did not observe any tire tracks. (Trial Tr. at 2043-44, 3076-77.)

Juror Campbell admitted to telling the other jurors that he had seen tire tracks, and

indicated the topic of tire tracks did arise during deliberations[5] (Trial Tr. at 3278-79.) Juror Campbell maintained that "All I—all I said was that I noticed that there were tire tracks there." (*Id.* at 3280.) Campbell also stated that no one disagreed with him regarding the tire tracks, nor did any of the jurors comment about his observation. (*Id.* at 3280-81.)

After the court and counsel were done meeting with Juror Campbell, the court called in the jury foreman (Philbrick) and the author of the note to the court. (*Id.* at 3282.) The foreman told the court that he and other jurors believed "opinions were expressed," and it was the subject of "substantial discussion." (*Id.*) The prosecutor asked:

> Q: Mr. Philbrick, did any of the jurors indicate they formed an opinion on the evidence based on what Mr. Campbell was saying.
>
> A. They didn't indicate that they had formed an opinion of their own. The jury expressed- several members of the jury expressed concern that it was in direct violation of the judge's instructions that we received as jurors.
>
> Q. Okay. And you heard from-how many jurors did you hear from?
>
> A. There were probably nine of the twelve that expressed comment about their serious concern. So it would have been nine out of eleven.

(*Id.* at 3283-84.)

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[5] The Court notes that Ms. Kimmell's body was found by a fisherman in the North Platte River on April 2, 1988. Roughly sixteen years passed before the juror in question apparently conducted his own investigation of tire tracks at Government Bridge in March 2004.

After the discussion with the jury foreman, defense counsel moved for a mistrial. (*Id*. at 3287.) The court heard argument from the attorneys, interviewed each juror individually, and then denied the motion. (*Id.* at 3291-3351.) The court excused Juror Campbell and swore in an alternate juror. (*Id.* at 3290, 3355-57.)

Eaton raised the instant claim before the Wyoming Supreme Court. The court determined:

> The juror in question went to the Government Bridge crime scene to take a look for himself and then relayed his findings during the jury's deliberations. Unquestionably, the juror's conduct was improper and remedial action of some sort was required. Any independent inquiry by a juror about the evidence violates the juror's duty to limit his consideration to the evidence, arguments, and law presented in open court. However, it is also necessary for a defendant to demonstrate that a juror's misconduct operates in such a manner so as to prejudice his right to a fair trial.
> ...
> It is evident that the juror misconduct created a significant crisis in these proceedings. We will give the "death is different" axiom its full measure of importance in this context. However, that axiom is tempered by the equally important concept that, even in a death penalty case, a defendant is entitled to a fair trial, but not a perfect trial. The misconduct did create a crisis, but the district court ably surmounted that crisis by doing all that could have been done to salvage the hard work that had already been accomplished, while at the same time ensuring Eaton's right to a fair trial.
> ...
> The eleven remaining jurors were then brought into the courtroom for further inquiry. We will summarize their responses to the district court's questions (which the parties agreed to), numbering the jurors (1)-(11) as their responses appear in the record:
>
> (1) Juror (1) said she could put aside JJC's comments and begin deliberations

> anew, with a new juror, relying only on the evidence presented at trial.
>
> (2) Juror (2) said the same.
>
> (3) Juror (3) was more of a problem. Initially he did not think he would be able to put the errant comments of JJC aside and that it would influence him in further deliberation. Eventually, the district court clarified the crux of the question Juror (3) was being asked, and he changed his mind (i.e., once the juror understood that JJC would no longer be on the jury). Although it took up over six pages of the transcript to straighten this out, the juror eventually agreed that he could start deliberations over from scratch with a clean slate.
>
> (4)(5)(6)(7)(8)(9)(10)(11). The remainder of the jurors said they could put aside JJC's comments and begin deliberations anew, with a new juror, relying only on the evidence presented at trial.
>
> Defense counsel then renewed his motion for mistrial and, failing that, that Juror (3), discussed above, also be replaced with an alternate juror. The district court denied both motions.
>
> We conclude that Eaton was not prejudiced by JJC's misconduct and that the district court adequately addressed all of the concerns raised by that misconduct.

Eaton, 192 P.3d at 74-75.

Discussion

The Wyoming Supreme Court's determination that Eaton was not prejudiced by juror misconduct is not inconsistent with U.S. Supreme Court precedent. In *Remmer v. United States*, 347 U.S. 227, 228-30 (1954), a hearing was required to determine prejudice where a third party attempted to bribe the jury foreman. Here, the Wyoming Supreme Court found

that the trial court properly held a fact-finding hearing to determine if the alleged juror misconduct occurred. The court considered the trial court's findings that Juror Campbell did visit the scene and would be dismissed for doing so. Further, the trial court received affirmative confirmation from each remaining juror that he or she could begin deliberations anew, with a new juror, relying only on the evidence presented at trial, thus prejudice was assessed. Eaton argues that the trial court had an obligation to conduct a far more searching investigation of jury misconduct than was conducted. The undersigned disagrees. Based on the representations by the jurors that they could begin deliberations anew, with a new juror, relying only on the evidence presented at trial, Eaton has not shown that the state court's ruling on the claim was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded agreement. *Richter*, 131 S.Ct. at 786-87; *Renico v. Lett*,---U.S.---, 130 S.Ct. 1855, 1866 (2010) ("AEDPA prevents defendants—and federal courts—from using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts."); *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (Section 2254(d) "demands that state-court decisions be given the benefit of the doubt."). Given the procedures employed and the inquiry conducted in the case at bar, Eaton has not demonstrated his entitlement to relief. Respondent's motion for summary judgment on Claim 8 should be granted.

Claims 9. Ex Post Facto Clause

In his ninth claim for relief, Eaton asserts the retroactive application of disadvantageous changes in Wyoming capital sentencing law that occurred after the commission of the offense violated the *Ex Post Facto* Clause of the United States Constitution. (Pet. at 238-57; Pet'r's Resp. Mot. Summ. J. at 130-142.)

Background

The history of this claim is somewhat peculiar. Prior to trial, on October 21, 2003, Eaton's counsel filed a motion to preclude use of the 1989-2000 sentencing scheme. The trial court conducted a hearing on this matter on November 14, 2003. On December 12, 2003, the trial court granted defense counsel's request for application of the sentencing procedures in effect at the time of the crime. However, the order on the decision, allegedly prepared by Skaggs and issued on January 13, 2004, included language showing a "stipulation" between the parties that the "future dangerous" aggravator from the 2003 version would be excluded, but that "in all other respects the current statutory scheme [2003 version] shall govern th[e] case." (Trial Ct. Record, Vol. III at 662.) Accordingly, it appears the parties reached a compromise to impose a hybrid version of the statutes: the "future dangerousness" aggravator would not apply, but all other aspects of the 2003 statute would apply. (*Id*.; *see also* Calene Remand Tr. at 202.)

Those other aspects included language requiring Eaton to prove mitigating factors by a preponderance of the evidence, where previously, the jury was to consider simply "whether sufficient mitigating circumstances exist[ed]." *See* Wyo. Stat. § 6-2-102(d)(i)(B)(1977) ("1988 version of the statute"). At the *Calene* remand hearing, appellate counsel questioned Skaggs on his decision to adopt the hybrid statute:

> Q. Which statute was used?
>
> A. Okay. That's an excellent question, because we used kind of a hybrid. We used the '98 -- or the '88 statute to exclude future dangerousness. But we used the 2002 statute to develop a better definition for heinous, atrocious. We used it for particularly the penalty, life without the possibility of parole. And, generally -- generally, overall, used it for everything else with the exception of that future dangerousness.
>
> Q. You used the 2002 for everything else.
>
> A. Yeah.
>
> Q. Okay. So was your goal to pick and choose between the two statutes as to what was most favorable for your client?
>
> A. Oh, not necessarily; but, certainly, I wanted to use life without the possibility of parole as an option to the jury... Certainly did not want future dangerousness as an aggravator. And certainly wanted the expanded definition of heinous, atrocious. As long as that's an aggravator, I wanted to use the 2002 version of that rather than the '88 version, which is unconstitutional, I think.
> ...
> Q. [D]oes it way [sic] in [the 1988] statute that mitigating circumstances have to be proved by a preponderance of the evidence?
> ...
> A. I don't believe it does.

...
Q. Why, in this matter, was the jury instructed that mitigating circumstances must be established by a preponderance of the evidence?

A. That must have come from the new statute.

Q. Did you agree to that?

A. Well, we certainly wouldn't have agreed to the fact that they didn't have to be proved by a preponderance of the evidence. We certainly wouldn't have agreed to reasonable doubt or anything like that.

Q. Well, reasonable doubt is not in the older version of 6-2-102, is it?

A. No. No.

Q. In fact, there's no burden of proof?

A. Okay.

Q. -- that I see, but preponderance is certainly a lot less than reasonable doubt.

(*Calene* Hrg. Tr. at 184-87.)

The application of the 2003 statute to Eaton's case was examined on appeal. *Eaton*, 192 P.3d at 83-89. Before analyzing the claim, the Wyoming Supreme Court set forth the 1988 and 2003 versions of Wyoming's death penalty statutes:

1988 Wyoming Death Penalty Statute

At the time Eaton committed these crimes, Wyo. Stat. Ann. § 6–2–102 (Michie 1983) provided:

§ 6–2–102. Presentence hearing for murder in the first degree; mitigating

and aggravating circumstances; effect of error in hearing.

(a) Upon conviction of a person for murder in the first degree the judge shall conduct a separate sentencing hearing to determine whether the defendant should be sentenced to death or life imprisonment. The hearing shall be conducted before the judge alone if:

(i) The defendant was convicted by a judge sitting without a jury;

(ii) The defendant has pled guilty; or

(iii) The defendant waives a jury with respect to the sentence.

(b) In all other cases the sentencing hearing shall be conducted before the jury which determined the defendant's guilt or, if the judge for good cause shown discharges that jury, with a new jury impaneled for that purpose.

(c) The judge or jury shall hear evidence as to any matter that the court deems relevant to a determination of the sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (h) and (j) of this section. Any evidence which the court deems to have probative value may be received regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements, and provided further that only such evidence in aggravation as the state has made known to the defendant or his counsel prior to his trial shall be admissible.

(d) Upon conclusion of the evidence and arguments the judge shall give the jury appropriate instructions, including instructions as to any aggravating or mitigating circumstances, as defined in subsections (h) and (j) of this section, or proceed as provided by paragraph (ii) of this subsection:

(i) After hearing all the evidence, the jury shall deliberate and render a recommendation of sentence to the judge, based upon the following:

(A) Whether one (1) or more sufficient aggravating circumstances exist as set forth in subsection (h) of this section;

(B) Whether sufficient mitigating circumstances exist as set forth in subsection (j) of this section which outweigh the aggravating circumstances found to exist; and

(C) Based upon these considerations, whether the defendant should be sentenced to death or life imprisonment.

(ii) In nonjury cases, the judge shall determine if any aggravating or mitigating circumstances exist and impose sentence within the limits prescribed by law, based upon the considerations enumerated in subparagraphs (A), (B), and (C) of this subsection.

(e) The death penalty shall not be imposed unless at least one (1) of the aggravating circumstances set forth in subsection (h) of this section is found. The jury, if its verdict is a recommendation of death, shall designate in writing signed by the foreman of the jury the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. If the jury cannot, within a reasonable time, agree on the punishment to be imposed, the judge shall impose a life sentence.

(f) Unless the jury trying the case recommends the death sentence in its verdict, the judge shall not sentence the defendant to death but shall sentence the defendant to life imprisonment as provided by law. Where a recommendation of death is made, the court shall sentence the defendant to death.[This subsection was repealed in 2001. 2001 Wyo. Sess. Laws ch. 96 § 3.]

(g) If the trial court is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment.

(h) Aggravated circumstances are limited to the following:

(i) The murder was committed by a person under sentence of imprisonment;

(ii) The defendant was previously convicted of another murder in the first degree or a felony involving the use or threat of violence to the person;

(iii) The defendant knowingly created a great risk of death to two (2) or more persons;

(iv) The murder was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual assault, arson, burglary, kidnapping or aircraft piracy or the unlawful throwing, placing or discharging of a destructive device or bomb;

(v) The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(vi) The murder was committed for pecuniary gain;

(vii) The murder was especially heinous, atrocious or cruel;

(viii) The murder of a judicial officer, former judicial officer, district attorney, former district attorney or former county and prosecuting attorney, during or because of the exercise of his official duty.

(j) Mitigating circumstances shall be the following:

(i) The defendant has no significant history of prior criminal activity;

(ii) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(iii) The victim was a participant in the defendant's conduct or consented to the act;

(iv) The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor;

(v) The defendant acted under extreme duress or under the substantial domination of another person;

(vi) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired;

(vii) The age of the defendant at the time of the crime.

2003 Wyoming Death Penalty Statute

At the time of Eaton's trial, Wyo. Stat. Ann. § 6–2–102 (LexisNexis 2003) provided that (Additional material and reorganized material are indicated by **bold-face** type. Material deleted is shown in strike out, although in a few cases it has merely been moved elsewhere in the statute.):

§ 6–2–102. Presentence hearing for murder in the first degree; mitigating and aggravating circumstances; effect of error in hearing. [Bold in both versions.]

(a) Upon conviction of a person for murder in the first degree **in a case in which the state seeks the death penalty**, the judge shall conduct a separate sentencing hearing to determine whether the defendant should be sentenced to death, **life imprisonment without parole** or life imprisonment. The hearing shall be conducted before the judge alone if:

(i) The defendant was convicted by a judge sitting without a jury;

(ii) The defendant has pled guilty; or

(iii) The defendant waives a jury with respect to the sentence.

(b) In all other cases the sentencing hearing shall be conducted before the jury which determined the defendant's guilt or, if the judge for good cause shown discharges that jury, with a new jury impaneled for that purpose. **The jury shall be instructed that if the jury does not unanimously determine that the defendant should be sentenced to death, then the defendant shall be sentenced to life imprisonment without parole or life imprisonment.**

(c) The judge or jury shall hear evidence as to any matter that the court deems relevant to a determination of the sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (h) and (j) of this section. Any evidence which the court deems to have probative value may be received regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements, and provided further that only such evidence in aggravation as the state has made known to the defendant or his counsel prior to his trial shall be admissible.

(d) Upon conclusion of the evidence and arguments the judge shall give the jury appropriate instructions, including instructions as to any aggravating or mitigating circumstances, as defined in subsections (h) and (j) of this section, or proceed as provided by paragraph **(iii)** of this subsection:

(i) After hearing all the evidence, the jury shall deliberate and render a recommendation of sentence to the judge, based upon the following:

(A) Whether one (1) or more ~~sufficient~~ aggravating circumstances exist **beyond a reasonable doubt** as set forth in subsection (h) of this section;

(B) Whether ~~sufficient~~, by a preponderance of the evidence, mitigating circumstances exist as set forth in subsection (j) of

this section ~~which outweigh the aggravating circumstances found to exist~~; and

(C) ~~Based upon these considerations, whether the defendant should be sentenced to death or life imprisonment~~. **The mere number of aggravating or mitigating circumstances found shall have no independent significance.**

(ii) **The jury shall consider aggravating and mitigating circumstances unanimously found to exist, and each individual juror may also consider any mitigating circumstances found by that juror to exist. If the jury reports unanimous agreement to impose the sentence of death, the court shall discharge the jury and shall impose the sentence of death. If the jury is unable to reach a unanimous verdict imposing the sentence of death within a reasonable time, the court shall instruct the jury to determine by a unanimous vote whether the penalty of life imprisonment without parole shall be imposed. If the jury is unable to reach a unanimous verdict imposing the penalty of life imprisonment without parole within a reasonable time, the court shall discharge the jury and impose the sentence of life imprisonment**;

(iii) In nonjury cases, the judge shall determine if any aggravating or mitigating circumstances exist and impose sentence within the limits prescribed by law, based upon the considerations enumerated in subparagraphs (A), (B), and (C) **of paragraph (i)** of this subsection.

(e) The death penalty shall not be imposed unless at least one (1) of the aggravating circumstances set forth in subsection (h) of this section is found. In nonjury cases the judge shall make such designation. The jury, if its verdict is a **sentence** ~~recommendation~~ of death, shall designate in writing signed by the foreman of the jury: ~~the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In nonjury cases the judge shall make such~~

~~designation. If the jury cannot, within a reasonable time, agree on the punishment to be imposed, the judge shall impose a life sentence~~.

(i) The aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt;

(ii) The mitigating circumstance or circumstances which it unanimously found by a preponderance of the evidence; and

(iii) The mitigating circumstance or circumstances which any individual juror found by a preponderance of the evidence.

(f) ~~Unless the jury trying the case recommends the death sentence in its verdict, the judge shall not sentence the defendant to death but shall sentence the defendant to life imprisonment as provided by law. Where a recommendation of death is made, the court shall sentence the defendant to death~~. **Repealed by Laws 2001, ch. 96, § 3.**

(g) If the trial court is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment.

(h) Aggravated circumstances are limited to the following:

(i) The murder was committed by a person ~~under sentence of imprisonment~~;

(A) Confined in a jail or correctional facility;

(B) On parole or on probation for a felony;

(C) After escaping detention or incarceration; or

(D) Released on bail pending appeal of his conviction.

.

(ii) The defendant was previously convicted of another murder in the first degree or a felony involving the use or threat of violence to the person;

(iii) The defendant knowingly created a great risk of death to two (2) or more persons;

(iv) The murder was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, ~~any robbery, sexual assault, arson, burglary, kidnapping or~~ aircraft piracy or the unlawful throwing, placing or discharging of a destructive device or bomb;

(v) The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(vi) The murder was committed **for compensation, the collection of insurance benefits or other similar** pecuniary gain;

(vii) The murder was especially ~~heinous~~ atrocious or cruel, being unnecessarily torturous to the victim;

(viii) The murder of a judicial officer, former judicial officer, district attorney, former district attorney, **defending attorney, peace officer, juror or witness** ~~or former county and prosecuting attorney~~, during or because of the exercise of his official duty **or because of the victim's former or present official status**.

(ix) The defendant knew or reasonably should have known the victim was less than seventeen (17) years of age or older than sixty-five (65) years of age;

(x) The defendant knew or reasonably should have known

the victim was especially vulnerable due to significant mental or physical disability;

(xi) The defendant poses a substantial risk and continuing threat of future dangerousness or is likely to commit continued acts of criminal violence;

(xii) The defendant killed another human being purposely and with premeditated malice and while engaged in, or as an accomplice in the commission of, or attempt to commit, or flight after committing or attempting to commit, any robbery, sexual assault, arson, burglary, kidnapping or abuse of a child under the age of sixteen (16) years.

(j) Mitigating circumstances shall ~~be~~ **include** the following:

(i) The defendant has no significant history of prior criminal activity;

(ii) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(iii) The victim was a participant in the defendant's conduct or consented to the act;

(iv) The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor;

(v) The defendant acted under extreme duress or under the substantial domination of another person;

(vi) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired;

> (vii) The age of the defendant at the time of the crime;
>
> **(viii) Any other fact or circumstance of the defendant's character or prior record or matter surrounding his offense which serves to mitigate his culpability.**

Eaton, 192 P.3d at 83-88 (emphasis in original).

Performing *de novo* review, the Wyoming Supreme Court concluded:

> Where the changes in a death penalty statute are procedural, and on the whole ameliorative, the Ex Post Facto clause is not violated... We have carefully examined the 2003 version of the statute and conclude, as did the district court, that the changes that were applied to Eaton's case did not impose any additional burdens on him and that the procedural changes were, in their totality and as applied, salutary for his case. Hence, the Ex Post Facto Clause was not violated.

Id. at 89 (internal citation omitted). Later in its decision, the court explained that "[a]ggravators had to be proved beyond a reasonable doubt, whereas mitigators only had to be proved by a preponderance of the evidence, the lowest burden of proof known to the law. We think it was advantageous to Eaton to have a much lesser burden described by the sentencing form, and so we do not identify this as a disadvantage." *Id*. at 115.

Discussion

Article I of the United States Constitution provides that neither Congress nor any State shall pass any "ex post facto Law." Art. I, § 9, cl. 3; Art. I, § 10, cl. 1. A law is a violation of the ex post facto clause if it operates retroactively to (1) make previously innocent conduct

criminal, (2) aggravate a crime, or make it greater than it was, when committed (3) change or increase the punishment for a crime after its commission, or (4) alter the legal rules of evidence, and receive less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender. *Calder v. Bull*, 3 U.S. 386, 390, (1798); *Collins v. Youngblood*, 497 U.S. 37 (1990); *Carmell v. Texas*, 529 U.S. 513 (2000).

Eaton urges the Court to find that because the 2003 version of Wyoming's capital sentencing statute, instructing the sentencing jury that Eaton had a burden to prove mitigating circumstances by a preponderance of the evidence, it meets *Calder's* definition of ex post facto. The hybrid version of the statute the parties stipulated to did not change the elements of the crime of first degree murder, nor did it alter the fact that this crime was punishable by death in Wyoming, a fact of which pre-existing state law gave Eaton clear notice. The newer version of the statute did not remove certain mitigating factors from the jury's consideration, in fact, it did just the opposite. In adopting the hybrid version of the statute, defense counsel was successful in removing the "future dangerousness" aggravator from the jury's consideration, while welcoming advantageous provisions included in the 2003 version of the statute. For example, a third option of life imprisonment without parole was added to the options of life imprisonment or death. Wyo. Stat. Ann. § 6–2–102(b). Further, the scope of mitigation evidence was expanded to include "[a]ny other fact or circumstance of the

defendant's character or prior record or matter surrounding his offense which serves to mitigate his culpability." *Id*. § (j)(viii). The adoption of the "preponderance of evidence" standard for considering mitigating factors was a change in the procedures, as opposed to a change in the substantive law of crimes. *Collins*, 497 U.S. at 45; *see also Booth-El v. Nuth*. 288 F.3d 571, 577-80 (4th Cir. 2002). "Even though it may work to the disadvantage of a defendant, a procedural change is not ex post facto." *Dobbert v. Florida*, 432 U.S. 282, 293 (1977).[6]

This Court disagrees with the Wyoming Supreme Court's statement that the hybrid version of the statute stipulated to by the parties did not oppose any additional burdens on Eaton. The Court concedes that the procedure for determining mitigating factors was modified by the preponderance of the evidence standard found in the 2003 version. However, the Court agrees with the Wyoming Supreme Court's determination that the changes here were procedural, and on the whole ameliorative such that the ex post facto clause was not

[6] *Dobbert* was a capital case in which ten of twelve jurors recommended life imprisonment. The trial judge overruled the jury and imposed the death penalty. Under the law in effect at the time of the murders, the jury's recommendation was binding on the trial judge. But the law was changed, rendering the jury's view advisory at the time of trial. The Supreme Court determined there was no ex post facto clause violation because the "new statute simply altered the methods employed in determining whether the death penalty was to be imposed; there was not change in the quantum of punishment attached to the crime." *Dobbert*, 432 U.S. at 293-94.

violated. *See id*. For this Court to grant a habeas writ, Eaton must show that the Wyoming Supreme Court decision is both wrong and objectively unreasonable. *Williams v. Taylor*, 529 U.S. 362, 412 (2000). Eaton must show that the Wyoming Supreme Court's denial of the claim "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 131 S.Ct. at 786–787. For the stated reasons, the Court finds that Eaton has not shown entitlement to relief under this claim and Respondent's motion for summary judgment on Eaton's Claim 9 should be granted.

D. New Claim

Claim 5. ***Brady* Claim**

In his fifth claim for relief, Eaton asserts that "his right to due process of law was violated when the prosecution failed to disclose the full extent of its relationship with, and consideration extended to, key prosecution witnesses, including Joe Dax, thus misleading the court, the jury and the defense about witness Dax's incentive to perjure himself." (Pet. at 158-86). Eaton alleges that the State planted Dax in the cell next to him at the Natrona County Detention Center in April 2003, and that Dax's U.S.S.G. § 5K1.1 reduction (from 180 months imprisonment to 120 months imprisonment) in *United States v. Dax*, U.S. District Court of Wyoming, No. 02-CR-119-CAB, was directly related to the Eaton case.

(Pet'r's Mot. to Authorize Discovery, 105 at 40.) Furthermore, Eaton states that Blonigen led the jury to believe that there were no deals with Dax for his testimony. (Pet'r's Supplemental Br. at 15.)

Pending before the Court is Respondent's motion for summary judgment on Claim 5 (Doc. 150, 151) and Eaton's Response (Doc. 157). Because this claim was not raised in the state courts, Eaton cannot proceed absent a showing of cause for the noncompliance and some showing of actual prejudice resulting from the alleged constitutional violation. *See Wainwright v. Sykes*, 433 U.S. 72 (1977). The Court has carefully considered this claim and finds that Eaton cannot show the requisite prejudice to excuse the procedural default.

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." A well-established three-part test is to be applied by the Court in determining whether a *Brady* violation has occurred: (1) the evidence at issue must be favorable to the defendant, either because it is exculpatory or impeaching in nature; (2) the evidence must have been either willfully or inadvertently suppressed by the government; and (3) prejudice must result from this suppression. *See Banks v. Dretke*, 540 U.S. 668, 691 (2004) (citing *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)). Evidence is

favorable to an accused under *Brady* "if it would tend to exculpate him or reduce the penalty ... " *Brady*, 373 U.S. at 87-88. "The materiality standard for *Brady* claims is met when 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *Banks*, 540 U.S. at 672 (citing *Kyles v. Whitley*, 514 U.S. 419, 435 (1995)). "In short, [the petitioner] must show a 'reasonable probability of a different result.'" *Banks*, 540 U.S. at 698 (quoting *Kyles*, 514 U.S. at 434). The petitioner bears the burden of presenting evidence to establish a *Brady* violation. *Foster v. Ward*, 182 F.3d 1177, 1191 (10th Cir. 1999).

Eaton urges the Court to compare and contrast the decisions of *Strickler v. Greene*, 527 U.S. 263 (1999) and *Banks v. Dretke*, 540 U.S. 668 (2004) before determining materiality under *Brady*. (Pet'r's Supp. Br. at 17.) Eaton argues the instant case is more analogous to *Banks* than *Strickler*. The Court has studied those cases, along with the entire court file and simply cannot find that Eaton can show materiality under *Brady*.

In *Strickler*, the petitioner had been convicted of capital murder, based, in part, on witness Stoltzfus' testimony that she had seen the petitioner violently abduct the victim. 527 U.S. at 270-73. The exculpatory material that defendant successfully argued should have been disclosed included documents prepared by Stoltzfus, and notes of interviews with her, that impeached significant portions of her testimony. The Supreme Court determined that

"Stoltzfus' testimony was prejudicial in the sense that it made Petitioner's conviction more likely than if she had not testified, and discrediting her testimony might have changed the outcome of the trial." *Id*. at 289. However, after reiterating the materiality test, "the question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict,'" *id*. at 290 (citing *Kyles*, 514 U.S. at 435), the Court ultimately concluded "[t]he record provides strong support for the conclusion that petitioner would have been convicted of capital murder and sentenced to death, even if Stoltzfus had been severely impeached." *Strickler*, 527 U.S. at 294.

The Court in *Strickler* further noted:

> Petitioner also maintains that he suffered prejudice from the failure to disclose the Stoltzfus documents because her testimony impacted on the jury's decision to impose the death penalty. Her testimony, however, did not relate to his eligibility for the death sentence and was not relied upon by the prosecution at all during its closing argument at the penalty phase. With respect to the jury's discretionary decision to impose the death penalty, it is true that Stoltzfus described petitioner as a violent, aggressive person, but that portrayal surely was not as damaging as either the evidence that he spent the evening of the murder dancing and drinking at Dice's or the powerful message conveyed by the 69-pound rock that was part of the record before the jury. Notwithstanding the obvious significance of Stoltzfus' testimony, petitioner has not convinced us that there is a reasonable probability that the jury would have returned a different verdict if her testimony had been either severely impeached or excluded entirely.

Id. at 295-96.

In *Banks*, the Supreme Court held the State's suppressing a key punishment-phase

witness'[7] (Robert Farr's) police-informant status affected "the reliability of the jury's verdict regarding punishment," 540 U.S. at 703 (2004); and, therefore, Banks was entitled to habeas relief for his sentence. The Court explained, "(h)ad jurors known of Farr's continuing interest in obtaining Deputy Sheriff Huff's favor, in addition to his receipt of funds to "set [Banks] up," *id*. at 442, they might well have distrusted Farr's testimony, and, insofar as it was uncorroborated, disregarded it."

The Court finds Eaton's case more analogous to the *Strickler* case. Here, Dax testified for the prosecution during the guilt/innocence stage of trial. (Trial Tr. at 2685-2714.) He did not testify during the penalty phase. This suggested impeachment evidence would have made no difference. It was not utilized by the government as, or in support of, an aggravating factor. As was the case with Stoltzfus' testimony in *Strickler*, Dax's testimony in the present case did not relate to Eaton's eligibility for the death sentence and was not relied upon by the

[7] Under Texas' statutory capital murder scheme in 1980, if the jury answered yes to each of the "special issues", the trial court was obligated to sentence Banks to death. "The critical question at the penalty phase in Banks's case was: 'Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, Delma Banks, Jr., would commit criminal acts of violence that would constitute a continuing threat to society?'" *Id*. at 679. Farr testified to this question, stating that he and Banks were going to pull some robberies and if there was trouble, Banks "said he would take care of it." *Id*. at 680. Farr's testimony, the prosecution argued, was "of the utmost significance" because it showed "[Banks] is a danger to friends and strangers, alike." *Id.* at 681-82.

prosecution at all during its closing argument at the penalty phase.

Even assuming the existence of an agreement between Blonigen and Dax, this Court is not persuaded that "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435. There is no clear record of precisely how Kimmell found herself at Eaton's residence. If the jurors believed Dax's version of events, Eaton confessed to Kimmell giving him a ride before he sexually assaulted and killed her. If the jurors believed the defense's version of events, Eaton arrived home to find Ms. Kimmell on his property. Either way, there is no question that Eaton took, kept, sexually assaulted, killed and disposed of Ms. Kimmell's body. (Trial Tr. at 3236.) This much was conceded by defense counsel. (*Id*.) The Court cannot find a reasonable likelihood that Dax's alleged false testimony affected the verdict or sentence. Because the Court cannot find that the disputed evidence is material under *Brady*, or caused the necessary prejudice, Petitioner cannot succeed on his claim. Respondent's motion for summary judgment on Petitioner's Claim 5 is granted. It follows that Eaton's pending motion for discovery related to Claim 5 should be denied as moot.

IV. CONCLUSION

For the foregoing reasons, the Court hereby orders as follows:

1. Respondent's motion for summary judgment is GRANTED, IN PART.

Respondent's motion for summary judgment on Eaton's Claims 3, 5, 6, 7, 8, 9 and 11(d) is GRANTED. Eaton's petition for federal habeas relief is DENIED in respect to those claims. Eaton's pending motion for discovery relating to Claim 5 is denied as moot.

2. Respondent's motion for summary judgment on Eaton's Claims 1, 2 and 4 is DENIED. The Court will proceed to an evidentiary hearing on Claims 1, 2 and 4. Because Eaton may proceed to an evidentiary hearing on his mitigation claims, this renders moot Claims 10 and 11(a-c).

3. No later than June 8, 2012, the parties shall file a joint report providing an estimate of: (i) the discovery schedule; (ii) time needed by the parties for the presentation of evidence at the hearing; and (iii) the date by which the parties will be prepared for the evidentiary hearing.

IT IS SO ORDERED.

Dated this 3rd day of May, 2012.

Alan B. Johnson
United States District Judge

Eaton v. Wilson

United States District Court for the District of Wyoming

November 20, 2014, Decided; November 20, 2014, Filed

Case No. 09-CV-261-J

Reporter
2014 U.S. Dist. LEXIS 163567 *; 2014 WL 6622512

DALE W. EATON, Petitioner, vs. EDDIE WILSON, Warden, Wyoming Department of Corrections State Penitentiary, Respondent.

Opinion by: ALAN B. JOHNSON

Opinion

ORDER GRANTING CONDITIONAL WRIT OF HABEAS CORPUS

Dale W. Eaton, Petitioner, is an inmate incarcerated at the Wyoming Department of Corrections State Penitentiary. He has filed, through counsel, a Petition for Writ of Habeas Corpus pursuant to *28 U.S.C. § 2254*. [Doc. 64].

The Court, having carefully reviewed and considered each pleading, the exhibits, the evidentiary presentation, arguments, and written briefs of counsel for Petitioner and Respondent, having thoroughly reviewed the file herein, and being otherwise fully advised, finds and concludes the Petition for Writ of Habeas Corpus pursuant to *28 U.S.C. § 2254* should be conditionally **[*2]** granted.

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Factual Background

Lisa Marie Kimmell left Denver, Colorado, on March 25, 1988, intending to drive to Billings, Montana, with a stop in Cody, Wyoming. [Doc. 83-5, p. 20]. Ms. Kimmell did not arrive in Cody as planned, and a **[*4]** search for her began on March 26, 1988. [Doc. 83-5, p. 27]. Her body was found by a fisherman on April 2, 1988, in the North Platte River southwest of Casper, Wyoming, near what is called Government Bridge. [Doc. 83-6, p. 53]. An autopsy revealed she died from multiple stab wounds to her chest, inflicted after a severe blow to the head. [Doc. 83-12, p. 47]. The examination also revealed semen in her vagina. Samples of the semen were taken and preserved. *Eaton v. State, 2008 WY 97, 192 P.3d 36, 51 (Wyo. 2008)*. [Doc. 83-10, pp. 62, 63, 64]. DNA from the semen samples was matched, in 2001, to Petitioner, who had formerly resided in Moneta, Wyoming. *Eaton v. State, 192 P.3d at 51*. Law enforcement agents obtained a search warrant for Petitioner's property in Moneta, where they found Ms. Kimmell's buried car. [Doc. 84-9, p. 3; Doc. 84-10, pp. 11-20].

State Court Trial

The Natrona County District Attorney charged Petitioner with first-degree premeditated murder, first-degree felony murder, kidnaping, first-degree sexual assault, and aggravated robbery. *Eaton v. State, 192 P.3d at 49, fn 1*. A jury trial was conducted before the Honorable David Park of the Seventh Judicial District at the Natrona County Courthouse in Casper, Wyoming. Petitioner was represented by Wyatt Skaggs and Vaughn Neubauer from the Trial **[*5]** Division, Wyoming Public Defender Office. [Doc. 81-3, pp. 2, 3, 4]. The trial commenced in February, 2004, and continued for two weeks. The jury, at the close of the guilt/innocence stage of the proceedings, returned guilty verdicts on all counts. *Eaton v. State, 192 P.3d at 49, fn 1*. [Doc. 85-6, pp. 6, 7, 8, 9].

The State of Wyoming, during the penalty phase of the trial, called three witnesses. Shannon Breeden testified she was traveling in 1997 on Interstate 80 outside of Rock Springs, Sweetwater County, Wyoming, when Petitioner threatened her with a rifle. [Doc. 85-7, pp. 55, 56]. Sweetwater County Sheriff Deputy Rich Haskell testified he investigated the aggravated assault on Ms. Breeden. [Doc. 85-7, pp. 57, 58, 59]. Sweetwater County Prosecuting Attorney Tony Howard testified Petitioner was convicted of aggravated assault. [Doc. 85-8, pp. 1-5].

Petitioner's trial team, during the penalty phase, presented two expert witnesses, Dr. Kenneth Ash, a psychiatrist, and Dr. Lisa Gummow, a neuropsychologist. Dr. Ash testified he met with Petitioner on four separate occasions for a total of approximately twelve and one-half hours, during which time he observed Petitioner and discussed his life history and present circumstances. **[*6]** [Doc. 85-8, pp. 19, 20, 21]. Dr. Ash also examined Petitioner's available medical records, including those from the Colorado Psychiatric Hospital (University of Colorado Medical Center) where Petitioner was a patient at age sixteen, and from the Torrington Hospital from 1986. [Doc. 85-8, p. 22]. Dr. Ash, from those hospital records, noted a consistent finding of depression. He also determined Petitioner had a global assessment of functioning (GAF) of 31, which indicated a major impairment. [Doc. 85-8, pp. 34, 35]. Dr. Ash expressed his professional opinion Petitioner committed the Kimmell homicide while under the influence of extreme emotional disturbance and extreme distress. [Doc. 85-8, p. 51].

Dr. Gummow testified she spent two days with Petitioner. Test administration accounted for seventy-five percent (75%) of the two days, with interviews accounting for the remaining twenty-five percent (25%). [Doc. 85-11, p. 11]. Dr. Gummow also indicated she reviewed relevant life documents such as medical, educational, psychiatric, and police records, including statements from Petitioner's sisters and father, and developed a chronology of Petitioner's life which she presented to the jury. Dr. **[*7]** Gummow stated in her professional opinion Petitioner suffered from a depressive disorder NOS, which was present in a severe phase in 1988. His depression was probably genetic, and his major depressive disorder was considered a brain disease. She further indicated Petitioner had significant brain damage along with a long-standing learning disorder. His IQ ranged between 76 (borderline) to high 80s to 90s. [Doc. 85-11, pp. 6-60; Doc. 85-12, pp. 1-16].

Four family members also testified on behalf of Petitioner. Loren Ferrins[1], his uncle, testified Petitioner's father, Merle, picked on Petitioner. [Doc. 85-9, pp. 37-50]. Betty Ferrins, Petitioner's aunt, testified she did not want Petitioner to die, and stated "I don't think he was in his right mind when he did this." [Doc. 85-9, pp. 55, 56]. Marilu O'Malley, Petitioner's maternal aunt, testified Merle abused his children, and Petitioner got the brunt of the abuse. [Doc. 85-9, pp. 58, 59]. Natrona County Deputy Sheriff Lynn Cohee presented testimony from her interview with Sharon Slagowski, Petitioner's sister. Deputy Cohee stated Ms. Slagowski recalled physical and emotional abuse by her father. Merle hit Petitioner with a belt, his fists, **[*8]** and hit him over the head with a beer bottle. [Doc. 85-12, pp. 52-56].

Petitioner's counsel also presented testimony from four friends. Shirley and Floyd Widmer testified they had always "gotten along real good" with Petitioner, and he had never exhibited a bad temper around them. Virginia Schifferns testified Petitioner had previously stayed with them, and she could not believe he would do anything violent. Lodine Schifferns testified he liked Petitioner, and he couldn't believe this could happen. [Doc. 85-10, pp. 8-27].

The jury returned a unanimous penalty verdict fixing Petitioner's sentence at death. The jury found beyond a reasonable doubt the existence of three statutory aggravating circumstances. Petitioner was previously convicted of a felony involving the use or threat of violence to the person. The murder of Ms. Kimmell was especially atrocious or cruel, being unnecessarily torturous to the victim. **[*9]** Petitioner had killed another human being purposely and with premeditated malice while engaged in robbery, sexual assault and kidnaping. No mitigating factors were found to exist. [Doc. 85-14, pp. 18, 19, 20].

State Court Appeal

Petitioner, represented by Donna Domonkos, Ryan Roden, Diane Lozano, Marion Yoder, and Tina Kerin Olson from the Appellate Division, Wyoming Public Defender Office, appealed his convictions and sentence to the Wyoming Supreme Court. *Eaton v. State, 192 P.3d at 36*. Appellate counsel, on January 10, 2005, filed a motion to withdraw from representation of Petitioner asserting a conflict of interest based on the fact both the trial team and appellate counsel were supervised by the same individual, Kenneth Koski, the Wyoming Public Defender.[2] [Doc. 67-5, Exhibit 26, Exhibit 56, Exhibit 59]. An additional basis for the request to withdraw was the fact Andy Fraser, the investigator assigned to Petitioner's appeal, had withdrawn from participation asserting he "heard that Mr. Skaggs [was] not happy with the fact that [he was] working on the Eaton appeal."

[1] Petitioner's pleadings have spelled this name "Farrens." The apparent correct spelling, based upon the trial transcript and Petitioner's exhibits, is "Ferrins." Any reference in the transcript of the evidentiary hearing before this Court to "Farrens" should be considered "Ferrins."

[2] Mr. Koski died on September 6, 2006, while backpacking in the Wyoming Wind River Mountains.

[Doc. 70-10, pp. 3,4]. The motion to withdraw by Petitioner's appellate counsel was denied by the Wyoming Supreme Court on January 19, 2005. [Exhibit **[*10]** 28, Exhibit 60].

Petitioner raised the following claims on appeal:

> I. The trial court committed reversible error and violated the *Ex Post Facto* Clause by applying post—1989 amendments to *Wyo. Stat. Ann. § 6-2-102* (1982) to Eaton's case.
> II. Eaton received ineffective assistance of counsel.
>
> A. Eaton's counsel were ineffective for stipulating to the use of the entire 2001 amended version of *Wyo. Stat. Ann. § 6-2-102* (1982), excluding "future dangerousness." Amended portions were more disadvantageous to Eaton and violated the *Ex Post Facto* Clause of the United States and *Wyoming constitutions*.
> B. Defense counsel were ineffective by failing to comply in substantive ways with the ABA Guidelines which establish specific standards for both experience and performance in trying death penalty cases.
> C. Failure to know the law.
> D. Concession of Eaton's guilt without valid consent from him.
> E. Eaton was unable to assist in his defense and thus not competent to be tried. Counsel's failure to address this fundamental problem and election to allow the case to proceed under these circumstances rendered trial patently unfair.
> F. Trial counsel were ineffective for waiving objection to venue.
>
> G. The oversights, **[*11]** errors and decisions to forego (i.e., the sorts of things set out above) amounted to an abandonment of Eaton's defense by his own counsel.
> H. Defense counsel were ineffective in failing to adequately investigate potential mitigation evidence, failing to offer appropriate mitigation evidence, and failing to provide necessary information to mitigation experts.
> I. Counsel's failure to object to the given instructions which were substantively different than those proposed by the defense constituted substandard performance and substantially prejudiced Eaton.
> J. Counsel did not assure that Eaton's jury was given a constitutionally adequate sentencing form.
> III. The jury was not properly instructed on the law as intended by Wyoming's death penalty statute.
> IV. An unconstitutional and fatally defective voir dire deprived Eaton of a fair and impartial jury to determine his guilt or innocence and to decide on life or death.
> V. The trial court was biased at trial and in limiting the remand, showing such hostility to his claims that Eaton was deprived of due process and prejudiced as a result.
> VI. Prosecutorial misconduct occurred, violating Eaton's due process rights and warranting reversal.
>
> VII. Eaton **[*12]** was unable to assist in his own defense and thus was not competent to be tried.
> VIII. The trial court erred in denying defense counsel's motion for mistrial, where a juror conducted his own investigation and discussed his investigation during deliberations.
> IX. The trial court erred in the admission and presentation of evidence.
> X. The trial court erred in permitting the testimony of Dr. Ash without Eaton's express waiver of privilege, and without insuring the protection of Eaton's *Fifth Amendment* right against self-incrimination.
> XI. Is the record below reversibly incomplete?
> XII. Cumulative error occurred, warranting reversal of Eaton's convictions and death sentence.

Eaton v. State, 192 P.3d at 49-51.

The Wyoming Supreme Court granted a remand pursuant to *Calene v. State, 846 P.2d 679 (Wyo. 1993)*, for the limited purpose of conducting an evidentiary hearing on Petitioner's claims of ineffective assistance of counsel. The Supreme Court ordered the trial court rule on those claims within ninety days. [Doc. 272, Exhibit 350], *Eaton v. State, 192 P.3d at 61*. Petitioner objected to the "speedy schedule," and moved for a continuance in order to investigate his claims for relief. [Doc. 272, Exhibit 351]. The trial court, and the Wyoming Supreme Court, denied the motions to continue the *Calene* hearing, which was **[*13]** then held by the trial court on June 6-10, 2005. [Doc. 272, Exhibit 352; Doc. 272, Exhibit 353], *Eaton v. State, 192 P.3d at 61*. Trial counsel for Petitioner, Wyatt Skaggs and Vaughn Neubauer, testified at the hearing. [Doc. 86-3, pp 18-44; Doc. 86-4, pp. 1-44; Doc. 86-5, pp. 1-44; Doc. 86-6, pp. 1-44; Doc. 86-7, pp. 1-44; Doc. 86-8, pp. 1-44; Doc. 86-9, pp. 1-4; Doc. 86-10, pp. 6-55; Doc.

86-11, pp. 1-55; Doc. 86-12, pp. 1-40; Doc. 87-8, pp. 11-48; Doc. 87-9, pp. 1-48; Doc. 87-10, pp. 1-24]. The deposition of defense mitigation expert, Priscilla Moree, was presented. [Doc. 86-5, p.145; Doc. 144-1].

Judge Park issued a decision letter on July 1, 2005, finding trial counsel were not ineffective. [Doc. 272, Exhibit 354]. He found the "additional mitigation evidence [did] not present new mitigating factors, it only reinforce[d] evidence of a known mitigator (i.e., that Eaton had a terrible childhood)." [Doc. 272, Exhibit 354, p. 30]. Judge Park, after weighing the aggravating and mitigating factors, determined Petitioner was not prejudiced by any failure to investigate or present mitigating evidence. [Doc. 272, Exhibit 354, p. 30].

A hearing was conducted on July 13, 2006, to address Petitioner's motion for new trial based on competence **[*14]** issues. Counsel also attempted to introduce new mitigation-based evidence, including an affidavit from Brian Conrado, Petitioner's childhood friend, and school records not previously presented. The motion was denied. [Doc. 145-4].

The Wyoming Supreme Court, on August 18, 2008, in a lengthy decision, unanimously affirmed Petitioner's convictions and sentence. *Eaton v. State, 192 P.3d at 49, 124*.

State Court Post-Conviction Relief

Petitioner, represented by Michael Reese, filed a petition for post-conviction relief with the trial court on June 3, 2009. The petition raised six issues:

1. The *Eighth Amendment*, at a minimum, bans the death penalty for individuals who are so mentally ill that *Panetti v. Quarterman* mandates a vacation of the death penalty.
2. Petitioner was deprived of meaningful appellate review.
3. Defense counsel stipulated to use of a hybrid statute (that is, a statute that contained elements of both the law in effect at the time of the crime and the law in effect at the time of the trial) and by so doing, violated the ex post facto clause.
4. The death penalty, at least as presently administered in Wyoming, is cruel and unusual punishment under the *Eighth* and *Fourteenth Amendments*.

5. W.S. *§ 6-2-102* is further unconstitutional pursuant to the holding in *Panetti* and *Atkins*.

6. Wyoming's **[*15]** law on post-conviction relief in [sic] unconstitutional and should be overturned.

[Doc. 272, Exhibit 355].

The State moved for dismissal on the basis none of Petitioner's claims were cognizable in post-conviction relief proceedings. [Doc. 272, Exhibit 356]. It specifically argued *Wyo. Stat. Ann. § 7-14-101* limits postconviction relief to constitutional violations which occurred in the proceedings resulting in conviction. Alleged constitutional violations related to the sentencing phase are not cognizable on postconviction review. [Doc. 272, Exhibit 356]. The trial court, following a hearing on the State's motion, issued an Order Granting Respondent's Motion to Dismiss Petition for Post-Conviction Relief on November 4, 2009. [Doc. 272, Exhibit 357]. Petitioner sought a writ of review [Doc. 272, Exhibit 358] from the Wyoming Supreme Court, which was denied. [Doc. 272, Exhibit 359].

Federal Habeas Corpus

Petitioner filed his Petition for Writ of Habeas Corpus herein on August 13, 2010. [Doc. 64]. He raised eleven claims for relief.

1. Lead trial counsel Wyatt Skaggs' failure to recognize and respond appropriately to Mr. Eaton's cognitive and emotional impairment generated mutual distrust, animosity and disloyalty toward **[*16]** his client, and a corresponding failure to communicate with Mr. Eaton, which precluded the development of a workable attorney-client relationship and resulted in an irreparable conflict of interest, in violation of Mr. Eaton's *Sixth* and *Fourteenth Amendment* right to the effective assistance of counsel.
2. Trial counsel failed to conduct a reasonable investigation into Mr. Eaton's background, character and mental health.

3. Trial counsel Wyatt Skaggs was ineffective for failing to investigate and assert the issue of Mr. Eaton's lack of mental competence to proceed. As a result, there is a reasonable probability that Mr. Eaton was brought to trial while mentally incompetent.
4. Mr. Eaton's appellate counsel were burdened by a conflict of interest because of their professional affiliation with trial counsel Wyatt Skaggs and State Public Defender Ken Koski, whose personal and professional interests were adverse to Mr. Eaton's interests, and who actively undermined appellate counsel's ability to investigate and pursue legitimate claims of ineffective assistance of trial counsel against Mr. Skaggs.

5. Mr. Eaton's right to due process of law was violated when the prosecution failed to disclose the full extent of its **[*17]** relationship with, and consideration extended to, key prosecution witnesses, including Joe Dax, thus misleading the court, the jury and the defense about witness Dax's incentive to perjure himself.
6. Trial counsel was ineffective for withdrawing Mr. Eaton's motion to change venue and for failing otherwise to assert his client's rights to protect him from devastating effects of highly inflammatory and prejudicial pretrial publicity.
7. Trial counsel was ineffective for failing to question the jury panel effectively regarding the issues of predisposition to impose the death penalty and pretrial publicity, and failed to challenge jurors who admitted bias, resulting in a violation of Mr. Eaton's *Sixth* and *Fourteenth Amendment* rights to a fair and impartial jury and to due process of law.

8. Mr. Eaton's trial was tainted by juror misconduct which included an unauthorized, unsupervised trip to the crime scene by one juror who reported his findings to the rest of the jurors, following which several opinions were expressed concerning the crime scene evidence as to tire tracks such that it was the subject of substantial discussion during deliberations, thereby depriving Mr. Eaton of his right to a fair and impartial **[*18]** jury, his Due Process right to a verdict based solely on the evidence and testimony adduced at trial, given under oath, subjected to cross-examination by counsel, and with the opportunity to rebut, under the *Sixth* and *Fourteenth Amendments to the United States Constitution*.
9. The application to Mr. Eaton of disadvantageous changes in Wyoming capital sentencing law that occurred after the commission of the offense violated the Ex Post Facto clause of the United States Constitution.
10. The failure to properly instruct Mr. Eaton's jury as to mitigating circumstances left the jury with a fatally flawed formula to weigh aggravating circumstances against mitigating circumstances prior to reaching a verdict, and precluded the jury from considering mitigating evidence and circumstances, violating Mr. Eaton's rights under the *Due Process Clause of the 14th Amendment* and the *Cruel and Unusual Punishment clause of the 8th Amendment*.
11. Trial Counsel was ineffective for failing to know the law and assert Mr. Eaton's rights, including, but not limited to:

(a) Trial counsel failed to insist that the jury be properly instructed on its duty to weigh aggravating and mitigating circumstances prior to deciding punishment and trial counsel failed to challenge jury instructions and prosecutorial argument telling the jury that it could not consider or find mitigating factors not causally connected to the crime; **[*19]**
(b) Trial counsel failed to assert the Ex Post Facto Clause violation that occurred when the trial court instructed the jury that the defense had the burden of establishing mitigating factors by a preponderance of the evidence;

(c) Trial counsel's choice of "defense" reflected a flawed understanding of Wyoming's felony murder rule, as interpreted in *Bouwkamp v. State*; and

(d) Trial and appellate counsel failed to assert the *Sixth Amendment*/*Bruton v. United States* violation that occurred when Detective Tholson informed the jury that Mr. Eaton confessed his guilt to federal inmate Bret Hudson.

[Doc. 64, pp. 36, 56, 126, 140, 158, 186, 201, 219, 238, 257, 281].

Respondent moved for summary judgment on all claims, asserting Petitioner had failed to meet his burden of proof under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). [Doc. 132, Doc. 150]. Petitioner opposed the motion, and requested an evidentiary hearing on all claims. [Doc. 144, Doc. 155, Doc. 157]. A hearing on Respondent's Motion for Summary Judgment was held December 19 and December 20, 2011. [Doc. 147, Doc. 148, Doc. 153, Doc. 154]. An Order was entered May 3, 2012, granting Respondent's motion for summary judgment on Petitioner's Claims **[*20]** 3, 5, 6, 7, 8, 9, and 11(d). [Doc. 158, p. 91]. The Court, however, agreed with the assertion by Petitioner "Wyoming courts have no jurisdiction to entertain claims of ineffective assistance of appellate counsel for failing to present a claim of ineffective assistance of trial counsel where the underlying claim involves punishment rather than guilt/innocence," thus there is no available state court remedy, and Claim 4 was technically exhausted. [Doc. 158, p. 19]. The Court further agreed because the state courts did not have jurisdiction, the claim was not procedurally defaulted, and could be review by the Court *de novo*. [Doc. 158, p. 19] The

Court further concluded a return to state court would be futile, *Williams v. Taylor, 529 U.S. 420, 444, 120 S. Ct. 1479, 146 L. Ed. 2d 435 (2000)*, and presentation of new evidence in the federal court proceeding was appropriate. [Doc. 158, pp. 22, 23]. Respondent's motion for summary judgment on Claim 4 was denied.

The Court also denied Respondent's motion for summary judgment on Claim 1 and Claim 2, which are unquestionably linked. [Doc. 158, p. 33]. The Court concluded Petitioner had overcome the deferential standard of *§ 2254*, and had thus shown the state courts' decisions with regard to Claim 1 and Claim 2 were based on an unreasonable **[*21]** determination of the facts in light of the evidence presented to those courts. [Doc. 158, pp. 32, 35, 36].

Petitioner's Claim 10 and Claims 11(a-c) were denied as moot. His request for an evidentiary hearing on Claims 1, 2, and 4 was granted, [Doc. 158, pp. 90, 91]. An evidentiary hearing was held July 30, 2103, July 31, 2013, August 1, 2013, August 2, 2013, August 5, 2013, August 6, 2013, August 7, 2013, August 8, 2013, August 9, 2013, and August 10, 2013. [Doc. 242; Doc. 245; Doc. 246; Doc. 248; Doc. 251; Doc. 253; Doc. 254; Doc. 255; Doc. 257; Doc. 258; and Docs. 261-271].

APPLICABLE LEGAL PRINCIPLES

28 U.S.C. § 2254

The petition at issue is subject to review pursuant to the AEDPA which became effective on April 24, 1996. *Lockyer v. Andrade, 538 U.S. 63, 70, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003)*. Relitigation of any claim adjudicated on the merits in state court is barred by the AEDPA unless a petitioner can show the state court adjudication of his 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; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court **[*22]** proceeding.

28 U.S.C. § 2254(d); *Harrington v. Richter, 562 U.S. 86, 131 S.Ct. 770, 783-784, 178 L. Ed. 2d 624 (2011)*.

The Court has previously concluded Petitioner has overcome the deferential standard set forth in *28 U.S.C. §2254* as applicable to Claim One and Claim Two, and Claim Four is technically exhausted. [Doc. 158, pp. 19, 32, 35, 36]. A *de novo* review of Petitioner's claims is, therefore, appropriate to determine whether Petitioner is in custody in violation of the Constitution or law or treaties of the United States. The Court, in making such a determination, may not grant habeas relief if Respondent can show the constitutional error was harmless, *i.e.*, the error did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson, 507 U.S. 619, 637, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993)*. A habeas petition governed by AEDPA which alleges ineffective assistance of counsel under *Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*, is considered in light of the *Strickland* prejudice standard. A separate analysis applying the *Brecht* standard is not required. *Byrd v. Workman, 645 F.3d 1159, 1167 fn.9 (10th Cir. 2011)*.

Ineffective assistance of counsel

A petitioner, in order to establish an ineffective assistance of counsel claim, "must show both deficient performance by counsel and prejudice." *Knowles v. Mirzayance, 556 U.S. 111, 122, 129 S.Ct. 1411, 1419, 173 L. Ed. 2d 251 (2009)*.

"To establish a claim for ineffective assistance of counsel, a defendant must show that (1) his counsel's performance was constitutionally **[*23]** deficient, and (2) counsel's deficient performance was prejudicial." *United States v. Cook, 45 F.3d 388, 392 (10th Cir. 1995)* (citing *Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*); *Harringtfon v. Richter, 562 U.S. 86, 131 S. Ct. at 787-792*. Counsel's performance is deficient if the representation "falls below an objective standard of reasonableness." *Strickland v. Washington, 466 U.S. at 690*. Prejudice entails "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington,*

466 U.S. at 694. *See also, United States v. Challoner, 583 F.3d 745, 749 (10th Cir. 2009)*(quoting *Strickland v. Washington, 466 U.S. at 688, 694)*. A petitioner, to prove his counsel's performance was deficient, must show the attorney's performance was not within the wide range of competence demanded of attorneys in criminal cases. *Laycock v. State of New Mexico, 880 F.2d 1184 (10th Cir. 1989)*.

The United States Supreme Court, in 2011, in *Harrington v. Richter, 562 U.S. 86, 131 S.Ct. 770, 178 L. Ed. 2d 624 (2011)*, reiterated its philosophy on deficient performance and prejudice first set out in *Strickland v. Washington*. The Supreme Court, with regard to deficient performance, stated:

> To establish deficient performance, a person challenging a conviction must show that "counsel's representation fell below an objective standard of reasonableness." *466 U.S. at 688, 104 S.Ct. 2052*. A court considering a claim of ineffective assistance must apply a "strong presumption" that counsel's representation was within the "wide range" of reasonable professional assistance. *Id., at 689, 104 S.Ct. 2052*. The challenger's burden is to show "that counsel made errors so serious that **[*24]** counsel was not functioning as the 'counsel' guaranteed the defendant by the *Sixth Amendment*." *Id., at 687, 104 S.Ct. 2052*.
> . . .
>
> The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Strickland, 466 U.S., at 690, 104 S.Ct. 2052*.
> . . .
>
> *Strickland*, however, permits counsel to "make a reasonable decision that makes particular investigations unnecessary." *466 U.S. at 691, 104 S.Ct. 2052*.
> . . .
>
> Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies. See *Knowles, supra, at 125-26, 129 S.Ct. at 1421-22*; *Rompilla v. Beard, 545 U.S. 374, 383, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005)*; *Wiggins v. Smith, 539 U.S. 510, 525, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)*; *Strickland, 466 U.S., at 699, 104 S.Ct. 2052*.
> . . .
>
> *Strickland*, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. *466 U.S., at 688, 104 S.Ct. 2052*.
> . . .
>
> Representation is constitutionally ineffective only if it "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair trial. *Strickland, supra, at 686, 104 S.Ct. 2052*.

Harrington v. Richter, 562 U.S. 86, 131 S.Ct. at 787, 788, 789, 790, 791. *See also, United States v. Rushin, 642 F.3d 1299, 1306, 1307, 1308 (10th Cir. 2011)*.

The United States Supreme Court in *Harrington v. Richter*, as concerns prejudice, also stated:

> With respect to prejudice, a challenger must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A **[*25]** reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id., at 694, 104 S.Ct. 2052*. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." *Id., at 693, 104 S.Ct. 2052*. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id., at 687, 104 S.Ct. 2052*.
> . . .
>
> In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. See *Wong v. Belmontes, 558 U.S. 15, 17, 130 S.Ct. 383, 390, 175 L.Ed.2d 328 (2009) (per curiam)*; *Strickland, 466 U.S., at 693, 104 S.Ct. 2052*. Instead, *Strickland* asks whether it is "reasonably likely" the result would have been different. *Id.,*

> at 696, 104 S.Ct. 2052. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." Id., at 693, 697, 104 S.Ct. 2052. The likelihood of a different result must be substantial, not just conceivable. Id., at 693, 104 S.Ct. 2052.

Harrington v. Richter, 562 U.S. 86, 131 S.Ct. at 787-788, 791-792. *See also,* United States v. Rushin, 642 F.3d at 1309-1310.

The United States Supreme Court has also offered this explanation of the "deficient performance" and "prejudice" standard, and its relationship to the AEDPA:

> " 'Surmounting **[*26]** *Strickland* 's high bar is never an easy task.' Padilla v. Kentucky, 559 U.S. 356, 371 [130 S.Ct. 1473, 1485, 176 L.Ed.2d 284] (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial [or in pretrial proceedings], and so the *Strickland* standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve. Strickland, 466 U.S., at 689-690 [104 S.Ct. 2052]. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is 'all too tempting' to 'second-guess counsel's assistance after conviction or adverse sentence.' Id., at 689 [104 S.Ct. 2052]; see also Bell v. Cone, 535 U.S. 685, 702, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); Lockhart v. Fretwell, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom. Strickland, 466 U.S., at 690, 104 S.Ct. 2052.
>
> "Establishing that a state court's application of *Strickland* was unreasonable under *§ 2254(d)* is all the more difficult. The standards created by *Strickland* and *§ 2254(d)* are both 'highly deferential,' id., at 689 [104 S.Ct. 2052]; Lindh v. Murphy, 521 U.S. 320, 333, n. 7, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997) **[*27]** , and when the two apply in tandem, review is 'doubly' so, Knowles, 556 U.S., at 123, 129 S.Ct., at 1420. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. 556 U.S., at 123 [129 S.Ct., at 1420]. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under *§ 2254(d)*. When *§ 2254(d)* applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland* 's deferential standard."

Premo v. Moore, 562 U.S. 115, 131 S.Ct 733, 739-740, 178 L. Ed. 2d 649 (2011)(quoting Harrington v. Richter, 562 U.S. 86, 131 S. Ct. at 788).

Logic would seem to dictate a defendant must show deficient performance before showing how such performance prejudiced him. A reviewing court, however, may consider the two inquiries, performance and prejudice, in any order, and there is no reason "to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland v. Washington, 466 U.S. at 697. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which [the Supreme Court] expect[s] will often be so, that course should be followed." Strickland v. Washington, 466 U.S. at 697.

The proper standard for measuring attorney performance is not one of perfection. United States v. Haddock, 12 F.3d 950, 955, 956 (10th Cir. 1993). It is rather one of reasonably effective assistance. Gillette v. Tansy, 17 F.3d 308, 310, 311 (10th Cir. 1994).

A petitioner, to establish prejudice, has a difficult burden. More than a theoretical effect must be shown on the outcome of petitioner's case as a result of attorney errors. A petitioner must show that, but for those errors, there is a reasonable probability the results would have been different, *i.e.*, petitioner would have been acquitted, or would not have pleaded guilty, or would have received a more **[*28]** favorable sentence. Strickland v. Washington, 466 U.S. at 694. *See also,* Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985), and Lasiter v. Thomas, 89 F.3d 699, 703 (10th Cir. 1996).

> "In analyzing whether counsel's alleged errors prejudiced petitioner, [the Court] must keep in mind the standard to be applied in assessing whether petitioner is entitled to an evidentiary hearing in federal court on his ineffectiveness claim.

> First, the petitioner bears the burden of alleging facts which, if proved, would entitle him to relief. Moreover, his allegations must be specific and particularized; conclusory allegations will not suffice to warrant a hearing."

Hatch v. State of Oklahoma, 58 F.3d 1447, 1457 (10th Cir. 1995) (overruled on other grounds by *Daniels v. United States, 254 F.3d 1180, 1188 n.1 (10th Cir. 2001)*) (citations and quotations omitted). If a petitioner is unable to meet this burden with regard to either prong of the test, his motion must be denied. *Hatch v. State of Oklahoma, 58 F.3d at 1457*.

A court's review, in measuring an attorney's performance, must be highly deferential:

> It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort **[*29]** be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, Petitioner must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. There are countless ways to provide effective assistance in any given case.

Strickland v. Washington, 466 U.S. at 689 (citations and quotation omitted). *See also, United States v. Taylor, 454 F.3d 1075, 1079 (10th Cir. 2006)* (quoting *Strickland v. Washington, 466 U.S. at 689*).

The parameters for consideration of a claim of deficient performance are thus, in summary:

1. Measuring standard is reasonably effective assistance, not perfection.

2. Performance is deficient if it falls below an objective standard of reasonableness.

3. Strong presumption performance falls within wide range of reasonable assistance.

4. Standard is prevailing professional norms, not best practices or common custom.

5. Decision not to pursue a particular investigation may be a reasonable decision.

6. Reasonable strategy to balance limited **[*30]** resources with effective trial tactics and strategies.

The parameters for consideration of a claim of prejudice can be summarized as:

1. Prejudice must be more than theoretical.

2. "But for" deficient performance reasonable probability results would have been different, *i.e.* more favorable sentence.

3. The fact the errors [deficient performance] had some conceivable effect on outcome is not sufficient.

4. Likelihood of a different result must be substantial, not just conceivable.

The Tenth Circuit in *Hooks v. Workman, 689 F.3d 1148 (10th Cir. 2012)*, addressed, in some depth, deficient performance and prejudice with regard to mitigation in a capital case.

> **b. Counsel's failures**
> Mr. Evans's mitigation case failed to meet the standards we have set out for counsel in capital-sentencing proceedings. Indeed, the presentation was sub-par in almost every relevant respect. Evidence of family and social history was sorely lacking; the mental-health evidence presented was inadequate and quite unsympathetic; and Mr. Evans not only failed to rebut the prosecution's case in aggravation but actually bolstered it by his own statements.
>
> ***Family and social history***. The testimony by Mr. Hooks's family members was perfunctory, to put it mildly. Mr. Evans made **[*31]** no attempt to educate the jury, through the testimony of Clara and Vargus Hooks, on Mr. Hooks's life

circumstances and his tragic, chaotic upbringing. Even the most minimal investigation would have uncovered a life story worth telling: a premature birth, an openly abusive father, frequent moves, educational handicaps, and personal family tragedies. We have previously recognized that "this type of evidence 'is exactly the sort of evidence that garners the most sympathy from jurors.' . . . The information was readily available from Clara and Vargus, but Mr. Evans neglected even to ask.

Mental-health evidence. While Dr. Murphy's testimony may have helped the jury see that Mr. Hooks suffered from mental problems, it was troubling in a number of respects. First, throughout the testimony, Mr. Evans made little effort to connect Dr. Murphy's diagnosis to the circumstances of the crime. The importance of counsel's role in this regard cannot be overstated, as we have repeatedly recognized. Counsel in capital cases must explain to the jury why a defendant may have acted as he did—must connect the dots between, on the one hand, a defendant's mental problems, life circumstances, and personal history **[*32]** and, on the other, his commission of the crime in question. . . . Here, in listening to Dr. Murphy, the jury was left with almost no explanation of how Mr. Hooks's mental problems played into the murder of Ms. Blaine (both the fatal beating he administered, and his apparent remorse and attempt to secure help immediately thereafter).
Absent this explanation, Dr. Murphy's testimony at several points actually worked in the State's favor. . . He repeatedly referred to Mr. Hooks as "violent," . . . even once as "very, very violent," and "crazy," . . . True, Dr. Murphy did opine at one point that Mr. Hooks could not have committed "cold-blooded, premeditated" murder. ... But that aspect of his testimony was significantly undermined when the jury learned, on cross-examination, that Dr. Murphy knew almost nothing about Mr. Hooks's case—that he had not read the police reports, had not listened to Mr. Hooks's confession, and had not seen the photographs. . . . Mr. Evans totally failed to prepare his witness, thus strongly diminishing the potential mitigating impact of the testimony.

Further investigation into readily available evidence also would have revealed that the mental-health problems were **[*33]** enduring. Since childhood, Mr. Hooks had struggled in school, was frequently evaluated for mental retardation, and was placed in special-education classes. . . While he may not meet the legal definition of mentally retarded under Oklahoma law, no one disputes that by the time of trial he had been clinically diagnosed with mild or borderline mental retardation. . . . Evidence of Mr. Hooks's educational handicaps was surely relevant to the jury's appraisal. It was readily available and should have been part of Mr. Evans's mitigation case. *See* Anderson, 476 F.3d at 1143.

Even more importantly, Mr. Hooks's premature birth, the head injury he suffered in an eighteen-wheeler accident, and the problems he experienced thereafter were clear markers for organic brain damage. . . Five years after conviction and sentencing, Dr. Gelbort diagnosed Mr. Hooks with diffuse organic brain damage and testified at the 1997 federal evidentiary hearing that Mr. Hooks has damage to his frontal lobes, the "gas pedal and the brake pedal of behavior." . . . Evidence of organic brain damage is something that we and other courts, including the Supreme Court, have found to have a powerful mitigating effect. . . . And for good reason—the **[*34]** involuntary physical alteration of brain structures, with its attendant effects on behavior, tends to diminish moral culpability, altering the causal relationship between impulse and action. . . . Neither Mr. Evans nor Dr. Murphy looked into the possibility of organic brain damage. Had they done so, as Dr. Gelbort did, Mr. Evans could have sketched a more sympathetic figure of Mr. Hooks, one less deserving of death.

Hooks v. Workman, 689 F.3d at 1203, 1204 (internal citations and footnotes omitted, emphasis in original).

American Bar Association Guidelines

The United States Supreme Court has concluded, when considering deficient performance in death penalty cases, the American Bar Association guidelines in effect at the time of the representation may well indicate the appropriate "prevailing norms" which reasonably diligent attorneys would follow.

Under *Strickland*, we first determine whether counsel's representation "fell below an objective standard of reasonableness." *466 U.S., at 688, 104 S.Ct. 2052*. Then we ask whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id., at 694, 104 S.Ct. 2052*. The first prong—constitutional deficiency—is necessarily linked to the practice and expectations **[*35]** of the legal community: "The proper measure of attorney performance remains simply reasonableness under prevailing professional

> norms." *Id., at 688, 104 S.Ct. 2052*. We long have recognized that "[p]revailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable ... ." *Ibid.; Bobby v. Van Hook, 558 U.S. 4, 5, 130 S.Ct. 13, 16, 175 L.Ed.2d 255 (2009) (per curiam)*; *Florida v. Nixon, 543 U.S. 175, 191, 125 S. Ct. 551, 160 L. Ed. 2d 565, and n. 6, (2004)*; *Wiggins v. Smith, 539 U.S. 510, 524, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)*; *Williams v. Taylor, 529 U.S. 362, 396, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)*. Although they are "only guides," *Strickland, 466 U.S., at 688, 104 S.Ct. 2052*, and not "inexorable commands," *Bobby, 558 U.S., at 7, 130 S.Ct., at 17*, these standards may be valuable measures of the prevailing professional norms of effective representation[.]

Padilla v. Kentucky, 559 U.S. 356, 366, 367, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010). *See also, Hinton v. Alabama, U. S. , , 134 S. Ct. 1081, 1088, 188 L. Ed. 2d 1 (2014)*(quoting *Padilla v. Kentucky, 559 U.S. at 366*); *Heard v. Addison, 728 F.3d 1170, 1180 (10th Cir. 2013)*.

> Counsel's conduct similarly fell short of the standards for capital defense work articulated by the American Bar Association (ABA)-standards to which we long have referred as "guides to determining what is reasonable." *Strickland, supra, at 688, 104 S.Ct. 2052*; *Williams v. Taylor, supra, at 396, 120 S.Ct. 1495*. The ABA Guidelines provide that investigations into mitigating evidence "should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989) (emphasis added).

Wiggins v. Smith, 539 U.S. 510, 524, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003). *See also, Young v. Sirmons, 551 F.3d 942, 957 (10th Cir. 2008)*(quoting *Wiggins v. Smith, 539 U.S. at 524*).

> Counsel must perform in accordance with **[*36]** "prevailing professional norms." *Young v. Sirmons (Julius Young), 551 F.3d 942, 956-57 (10th Cir.2008)* (quoting *Wiggins, 539 U.S. at 523, 123 S.Ct. 2527*). In capital cases, we refer to the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases ("ABA Guidelines") in assessing those "professional norms." *Id. at 957*. Generally, "[a]mong the topics defense counsel should investigate and consider presenting include *medical history*, educational history, employment and training history, family and social history, prior adult and juvenile correctional experiences, and religious and cultural influences." *Id*. (emphasis added).
>
> Counsel must conduct a "thorough investigation—in particular, of mental health evidence—in preparation for the sentencing phase of a capital trial." *Wilson, 536 F.3d at 1083*. "We recently had occasion to expound on this principle, drawing on a trilogy of Supreme Court cases—*Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)*, *Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)*, and *Rompilla v. Beard, 545 U.S. 374, 125 S. Ct. 2456, 162 L.Ed.2d 360 (2005)*—involving ineffective assistance at capital-sentencing proceedings." *Victor Hooks, 689 F.3d at 1201* (referring to the discussion in *Wilson, 536 F.3d at 1084-85*). We set forth "three important principles" that are derived from these cases:
>
> > First, the question is not whether counsel did *something*; counsel must conduct a full investigation and pursue reasonable leads when they become evident. Second, to determine what is reasonable investigation, courts must look first **[*37]** to the ABA guidelines, which serve as reference points for what is acceptable preparation for the mitigation phase of a capital case. Finally, because of the crucial mitigating role that evidence of a poor upbringing or *mental health problems* can have in the sentencing phase, defense counsel must pursue this avenue of investigation with due diligence.
>
> *Wilson, 536 F.3d at 1084-85* (emphasis added) (internal quotation marks omitted) (citations omitted); *see id. at 1085* (noting that "[o]ur own Circuit has emphasized this [due-diligence] guiding principle").

Littlejohn v. Trammell, 704 F.3d 817, 859, 860 (10th Cir. 2013).

> Restatements of professional standards, we have recognized, can be useful as "guides" to what reasonableness entails, but only to the extent they describe the professional norms prevailing when the representation took place.

Bobby v. Van Hook, 558 U.S. 4, 6, 130 S. Ct. 13, 175 L. Ed. 2d 255, (2009)(citing *Strickland v. Washington, 466 U.S. at 688*). *See also, Welch v. Workman, 639 F.3d 980, 1015 (10th Cir. 2011)*; *Detrich v. Ryan, 677 F.3d 958, 973-974 (9th Cir. 2012)*.

Petitioner's state court trial resulted in a sentence of death imposed on June 3, 2004. *Eaton v. State, 192 P.3d at 49*. The American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Revised Edition, February, 2003, thus represent the "guides to determining what is reasonable" in considering the deficient performance aspect of the ineffective assistance of counsel allegations. *Bobby v. Van Hook, 558 U.S. at 6*.

There are a number of American **[*38]** Bar Association Guidelines possibly relevant to the assertions by Petitioner.[3]

Guideline 1.1 Objective and Scope of Guidelines

A. The objective of these Guidelines is to set forth a national standard of practice for the defense of capital cases in order to ensure high quality legal representation for all persons facing the possible imposition or execution of a death sentence by any jurisdiction.

B. These Guidelines apply from the moment the client is taken into custody and extend to all stages of every case in which the jurisdiction may be entitled to seek the death penalty, including initial and ongoing investigation, pretrial proceedings, trial, post-conviction review, clemency proceedings, and any connected litigation.

Definitional Notes

Throughout these Guidelines:

1. As in the first edition, "should" is used as a mandatory term.

. . .

5. The term "post-conviction" is a general one, including (a) all stages of direct appeal within the jurisdiction and certiorari (b) all stages of state collateral review proceedings (however denominated under state law) and certiorari, (c) all stages of federal collateral **[*39]** review proceedings, however denominated (ordinarily petitions for writs of habeas corpus or motions pursuant to *28 U.S.C. § 2255*, but including all applications of similar purport, e.g., for writ of error coram nobis), and including all applications for action by the Courts of Appeals or the United States Supreme Court (commonly certiorari, but also, e.g., applications for original writs of habeas corpus, applications for certificates of probable cause), all applications for interlocutory relief (e.g., stay of execution, appointment of counsel) in connection with any of the foregoing.

. . .

Commentary

. . .

Representation at Trial

An attorney representing the accused in a death penalty case must fully investigate the relevant facts. Because counsel faces what are effectively two different trials — one regarding whether the defendant is guilty of a capital crime, and the other concerning whether the defendant should be sentenced to death — providing quality representation in capital cases requires counsel to undertake correspondingly broad investigation and preparation. Investigation and planning for both phases must begin immediately upon counsel's entry into the case, even before the prosecution has affirmatively **[*40]** indicated that it will seek the death penalty. Counsel must promptly obtain the investigative resources necessary to prepare for both phases, including at minimum the assistance of a professional investigator and a mitigation specialist, as well as all professional expertise appropriate to the case. Comprehensive pretrial investigation is a necessary prerequisite to enable counsel to negotiate a plea that will allow the defendant to serve a lesser sentence, to persuade the prosecution to forego seeking a death sentence at trial, or to uncover facts that will make the client legally ineligible for the death penalty. At the same time, counsel must consciously work to establish the special rapport with the client that will be necessary for a productive professional relationship over an extended period of stress.

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[3] The ABA Guidelines are available online at *http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/de*athpenaltyguidelines2003.authcheckdam.pdf.

. . .

Along with preparing to counter the prosecution's case for the death penalty, defense counsel must develop an affirmative case for sparing the defendant's life. A capital defendant has an unqualified right to present any facet of his character, background, or record that might call for a sentence less than death. [*Eddings v. Oklahoma, 455 U.S. 104, 116, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982)]* This *Eighth Amendment* right to offer mitigating evidence "does nothing to **[*41]** fulfill its purpose unless it is understood to presuppose that the defense lawyer will unearth, develop, present and insist on the consideration of those 'compassionate or mitigating factors stemming from the diverse frailties of humankind.'" Nor will the presentation be persuasive unless it (a) is consistent with that made by the defense at the guilt phase and (b) links the client's behavior to the evidence offered in mitigation.

. . .

Post-conviction Review

Ensuring high quality legal representation in capital trials, however, does not diminish the need for equally effective representation on appeal, in state and federal post-conviction proceedings, and in applications for executive clemency.

. . .

A. Representation on Direct Appeal

The Constitution guarantees effective assistance of counsel on an appeal as of right. [*Evitts v. Lucey, 469 U.S. 387, 395-396, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985)]*.

. . .

Conclusion

Unless legal representation at each stage of a capital case reflects current standards of practice, there is an unacceptable "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." [*Lockett v. Ohio, 438 U.S. 586, 605, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978)]*. Accordingly, any jurisdiction wishing to impose a death sentence must at minimum provide representation that comports with **[*42]** these Guidelines.

ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, February 2003, [ABA Guidelines] pp. 1, 5, 6, 7, 8, 10, 11, 12, 13, 14, 17(footnotes omitted, selected case citations from footnotes included in text).

Guideline 4.1 The Defense Team and Supporting Services

. . .

A.1. The defense team should consist of no fewer than two attorneys qualified in accordance with Guideline 5.1, an investigator, and a mitigation specialist.

A. 2. The defense team should contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments.

. . .

Commentary

Introduction

In a capital case reaffirming that fundamental fairness entitles indigent defendants to the "basic tools of an adequate defense," the United States Supreme Court stated:

> We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the [prosecution] proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an **[*43]** effective defense. [*Ake v. Oklahoma, 470 U.S. 68, 77, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985)]*.
> It is critically important, therefore, that each jurisdiction authorize sufficient funds to enable counsel in capital cases to conduct a thorough investigation for trial, sentencing, appeal, post-conviction and clemency, and to procure and effectively present the necessary expert witnesses and documentary evidence.

The Team Approach to Capital Defense

> National standards on defense services have consistently recognized that quality representation cannot be rendered unless assigned counsel have access to adequate supporting services, including, "expert witnesses capable of testifying at trial and at other proceedings, personnel skilled in social work and related disciplines to provide assistance at pretrial release hearings and at sentencing, and trained investigators to interview witnesses and to assemble demonstrative evidence."
> This need is particularly acute in death penalty cases.
> . . .
>
> In particular, mental health experts are essential to defending capital cases. Neurological and psychiatric impairment, combined with a history of physical and sexual abuse, are common among persons convicted of violent offenses. Evidence concerning the defendant's mental status is **[*44]** relevant to numerous issues that arise at various junctures during the proceedings, including competency to stand trial, sanity at the time of the offense, capacity to intend or premeditate death, ability to comprehend Miranda warnings, and competency to waive constitutional rights. The Constitution forbids the execution of persons with mental retardation, making this a necessary area of inquiry in every case. Further, the defendant's psychological and social history and his emotional and mental health are often of vital importance to the jury's decision at the punishment phase. Creating a competent and reliable mental health evaluation consistent with prevailing standards of practice is a time-consuming and expensive process.
> . . .
>
> Counsel's own observations of the client's mental status, while necessary, can hardly be expected to be sufficient to detect the array of conditions (e.g., post-traumatic stress disorder, fetal alcohol syndrome, pesticide poisoning, lead poisoning, schizophrenia, mental retardation) that could be of critical importance. Accordingly, Subsection A (2) mandates that at least one member of the defense team (whether one of the four individuals constituting the **[*45]** smallest allowable team or an additional team member) be a person qualified by experience and training to screen for mental or psychological disorders or defects and recommend such further investigation of the subject as may seem appropriate.
> . . .

The Core Defense Team

> In addition to employing the particular nonlegal resources that high quality legal representation requires in each individual case, the standard of practice demands that counsel have certain specific forms of assistance in every case. This Guideline accordingly requires that those resources be provided.

A. The Investigator

> The assistance of an investigator who has received specialized training is indispensable to discovering and developing the facts that must be unearthed at trial or in post-conviction proceedings.
> . . .

B. The Mitigation Specialist

A mitigation specialist is also an indispensable member of the defense team throughout all capital proceedings. Mitigation specialists possess clinical and information-gathering skills and training that most lawyers simply do not have. They have the time and the ability to elicit sensitive, embarrassing and often humiliating evidence (e.g., family sexual abuse) that the defendant **[*46]** may have never disclosed. They have the clinical skills to recognize such things as congenital, mental or neurological conditions, to understand how these conditions may have affected the defendant's development and behavior, and to identify the most appropriate experts to examine the defendant or testify on his behalf.

Perhaps most critically, having a qualified mitigation specialist assigned to every capital case as an integral part of the defense team insures that the presentation to be made at the penalty phase is integrated into the overall preparation of the case rather than being hurriedly thrown together by defense counsel still in shock at the guilty verdict. The mitigation specialist compiles a comprehensive and well-documented psycho-social history of the client based on an exhaustive investigation; analyzes the significance of the information in terms of impact on development, including effect on personality and behavior; finds mitigating themes in the client's life history; identifies the need for expert assistance; assists in locating appropriate experts; provides social history information to experts to enable them to conduct competent and reliable evaluations; and works **[*47]** with the defense team and experts to develop a comprehensive and cohesive case in mitigation.

The mitigation specialist often plays an important role as well in maintaining close contact with the client and his family while the case is pending. The rapport developed in this process can be the key to persuading a client to accept a plea to a sentence less than death.

For all of these reasons the use of mitigation specialists has become "part of the existing 'standard of care'" in capital cases, ensuring "high quality investigation and preparation of the penalty phase."

[ABA Guidelines, pp. 28, 29, 30, 31, 32, 33, (footnotes omitted, selected case citations from footnotes included in text)].

Guideline 5.1 Qualifications of Defense Counsel

. . .

B.1. That every attorney representing a capital defendant has:

. . .

c. satisfied the training requirements set forth in Guideline 8.1.

B.2. [T]he pool of defense attorneys as a whole is such that each capital defendant within the jurisdiction receives high quality legal representation. Accordingly, the qualification standards should insure that the pool includes sufficient numbers of attorneys who have demonstrated:

a. substantial knowledge and understanding **[*48]** of the relevant state, federal and international law, both procedural and substantive, governing capital cases;

b. skill in the management and conduct of complex negotiations and litigation;

c. skill in legal research, analysis, and the drafting of litigation documents;

d. skill in oral advocacy;

e. skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;

f. skill in the investigation, preparation, and presentation of evidence bearing upon mental status;

g. skill in the investigation, preparation, and presentation of mitigating evidence; and

h. skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements.

[ABA Guidelines, p. 35].

Guideline 8.1 Training

. . .

B. Attorneys seeking to qualify to receive appointments should be required to satisfactorily complete a comprehensive training program, approved by the Responsible Agency, in the defense of capital cases. Such a program should include, but not be limited to, presentations and training in the following areas:

1. relevant state, federal, and international law; **[*49]**

2. pleading and motion practice;
3. pretrial investigation, preparation, and theory development regarding guilt/innocence and penalty;
4. jury selection;
5. trial preparation and presentation, including the use of experts;
6. ethical considerations particular to capital defense representation;
7. preservation of the record and of issues for post-conviction review;
8. counsel's relationship with the client and his family;
9. post-conviction litigation in state and federal courts;
10. the presentation and rebuttal of scientific evidence, and developments in mental health fields and other relevant areas of forensic and biological science;
11. the unique issues relating to the defense of those charged with committing capital offenses when under the age of 18.
. . .

Commentary

As indicated in the Commentary to Guideline 1.1, providing high quality legal representation in capital cases requires unique skills. Accordingly, the standard of practice requires that counsel have received comprehensive specialized training before being considered qualified to undertake representation in a death penalty case. Such training must not be confined to instruction in the substantive law and procedure applicable to **[*50]** legal representation of capital defendants, but must extend to related substantive areas of mitigation and forensic science. In addition, comprehensive training programs must include practical instruction in advocacy skills, as well as presentations by experienced practitioners.
[ABA Guidelines, pp. 46, 48, (footnotes omitted)].

Guideline 10.4 The Defense Team
. . .
B. Lead counsel bears overall responsibility for the performance of the defense team, and should allocate, direct, and supervise its work in accordance with these Guidelines and professional standards.
. . .
C. As soon as possible after designation, lead counsel should assemble a defense team by:
. . .
2. . . . selecting and making any appropriate contractual agreements with non-attorney team members in such a way that the team includes:
a. at least one mitigation specialist and one fact investigator;
b. at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments; and
c. any other members needed to provide high quality legal representation.

D. Counsel should demand on behalf of the client all resources necessary to provide high quality legal representation. **[*51]** If such resources are denied, counsel should make an adequate record to preserve the issue for post-conviction review.

Commentary

As reflected in Guideline 4.1 and the accompanying Commentary, the provision of high quality legal representation in capital cases requires a team approach that combines the different skills, experience, and perspectives of several disciplines.
. . .
The defense team should include at least two attorneys, a fact investigator, and a mitigation specialist. . . . In addition, as also described in the Commentary to Guideline 4.1, the team must have a member (who may be one of the foregoing or an

additional person) with the necessary qualifications to screen individuals (the client in the first instance, but possibly family members as the mitigation investigation progresses) for mental or psychological disorders or defects and to recommend such further investigation of the subject as may seem appropriate.

The team described in the foregoing paragraph is the minimum.

Lead counsel is responsible, in the exercise of sound professional judgment, for determining what resources are needed and for demanding that the jurisdiction provide them.

. . . .

If such requests are denied, **[*52]** counsel should make an adequate record to preserve the issue for post-conviction review.

[ABA Guidelines, pp. 63, 65, 66 (footnotes omitted)].

Guideline 10.5 Relationship with the Client

A. Counsel at all stages of the case should make every appropriate effort to establish a relationship of trust with the client, and should maintain close contact with the client.

. . .

C. Counsel at all stages of the case should engage in a continuing interactive dialogue with the client concerning all matters that might reasonably be expected to have a material impact on the case, such as:

1. the progress of and prospects for the factual investigation, and what assistance the client might provide to it;
2. current or potential legal issues;
3. the development of a defense theory;
4. presentation of the defense case;
5. potential agreed-upon dispositions of the case;
6. litigation deadlines and the projected schedule of case-related events; and
7. relevant aspects of the client's relationship with correctional, parole, or other governmental agents (e.g., prison medical providers or state psychiatrists).

. . .

Commentary

Counsel's Duty

Although ongoing communication by non-attorney members of the defense team is important, **[*53]** it does not discharge the obligation of counsel at every stage of the case to keep the client informed of developments and progress in the case, and to consult with the client on strategic and tactical matters. Some decisions require the client's knowledge and agreement; others, which may be made by counsel, should nonetheless be fully discussed with the client beforehand.

Establishing a relationship of trust with the client is essential both to overcome the client's natural resistance to disclosing the often personal and painful facts necessary to present an effective penalty phase defense, as discussed in the text accompanying notes 101-04 supra, and to ensure that the client will listen to counsel's advice on important matters such as whether to testify and the advisability of a plea. Client contact must be ongoing. An occasional hurried interview with the client will not reveal to counsel all the facts needed to prepare for trial, appeal, post-conviction review, or clemency. Similarly, a client will not — with good reason — trust a lawyer who visits only a few times before trial, does not send or reply to correspondence in a timely manner, or refuses to take telephone calls ..... **[*54]**

Often, so-called "difficult" clients are the consequence of bad lawyering — either in the past or present. Simply treating the client with respect, listening and responding to his concerns, and keeping him informed about the case will often go a long way towards eliciting confidence and cooperation.

Overcoming barriers to communication and establishing a rapport with the client are critical to effective representation. Even apart from the need to obtain vital information, the lawyer must understand the client and his life history. To communicate effectively on the client's behalf in negotiating a plea, addressing a jury, arguing to a post-conviction court,

or urging clemency, counsel must be able to humanize the defendant. That cannot be done unless the lawyer knows the inmate well enough to be able to convey a sense of truly caring what happens to him.

. . .

[ABA Guidelines, pp. 68, 70, 71, 72 (footnotes omitted)].

Guideline 10.7 Investigation

A. Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty.

. . .

2. The investigation regarding penalty should be conducted regardless of any statement by the client **[*55]** that evidence bearing upon penalty is not to be collected or presented.

B. 1. Counsel at every stage have an obligation to conduct a full examination of the defense provided to the client at all prior phases of the case. This obligation includes at minimum interviewing prior counsel and members of the defense team and examining the files of prior counsel.

. . .

Commentary

Penalty

Counsel's duty to investigate and present mitigating evidence is now well established. [*Williams v. Taylor, 529 U.S. 362, 365-396, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)*; *Caro v. Woodford, 280 F.3d 1247, 1255 (9th Cir. 2002) cert. denied, 536 U.S. 951, 122 S. Ct. 2645, 153 L. Ed. 2d 823 (2002)*; *Coleman v. Mitchell, 268 F.3d 417, 449-451 (6th Cir. 2001) cert. denied, 535 U.S. 1031, 122 S. Ct. 1639, 152 L. Ed. 2d 647 (2002)*; *Jermyn v. Horn, 266 F.3d 257, 307-308 (3d Cir. 2001)]*. The duty to investigate exists regardless of the expressed desires of a client. [*Blanco v. Singletary, 943 F.2d 1477, 1501-1503 (11th Cir. 1991) cert. denied, 525 U.S. 837, 119 S. Ct. 96, 142 L. Ed. 2d 76 (1989)]*. Nor may counsel "sit idly by, thinking that investigation would be futile." [*Voyles v. Watkins, 489 F. Supp. 901, 910 (N.D. Miss. 1980)*; *accord Austin v. Bell, 126 F.3d 843, 849 (6th Cir. 1997) cert. denied, 523 U.S. 1079, 118 S. Ct. 1526, 140 L. Ed. 2d 677 (1998)]*.

. . .

Because the sentencer in a capital case must consider in mitigation, "anything in the life of the defendant which might militate against the appropriateness of the death penalty for the defendant," [*Brown v. State, 526 So.2d 903, 908 (Fla. 1988)*(citing *Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987)]*, "penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history." In the case of the client, this begins with the moment of conception. Counsel needs to explore:

(1) Medical history (including hospitalizations, mental and physical **[*56]** illness or injury, alcohol and drug use, pre-natal and birth trauma, malnutrition, developmental delays, and neurological damage);

(2) Family and social history (including physical, sexual or emotional abuse; family history of mental illness, cognitive impairments, substance abuse, or domestic violence; poverty, familial instability, neighborhood environment and peer influence); other traumatic events such as exposure to criminal violence, the loss of a loved one or a natural disaster; experiences of racism or other social or ethnic bias; cultural or religious influences; failures of government or social intervention (e.g., failure to intervene or provide necessary services, placement in poor quality foster care or juvenile detention facilities);

(3) Educational history (including achievement, performance, behavior, and activities), special educational needs (including cognitive limitations and learning disabilities) and opportunity or lack thereof, and activities;

(4) Military service, (including length and type of service, conduct, special training, combat exposure, health and mental health services);

(5) Employment and training history (including skills and performance, and barriers **[*57]** to employability);

(6) Prior juvenile and adult correctional experience (including conduct while under supervision, in institutions of education or training, and regarding clinical services);

. . .

Counsel should bear in mind that much of the information that must be elicited for the sentencing phase investigation is very personal and may be extremely difficult for the client to discuss. Topics like childhood sexual abuse should therefore not be broached in an initial interview. Obtaining such information typically requires overcoming considerable barriers, such as shame, denial and repression, as well as other mental or emotional impairments from which the client may suffer. As noted supra in the text accompanying note 101, a mitigation specialist who is trained to recognize and overcome these barriers, and who has the skills to help the client cope with the emotional impact of such painful disclosures, is invaluable in conducting this aspect of the investigation.

It is necessary to locate and interview the client's family members (who may suffer from some of the same impairments as the client), and virtually everyone else who knew the client and his family, including neighbors, teachers, **[*58]** clergy, case workers, doctors, correctional, probation or parole officers, and others. Records — from courts, government agencies, the military, employers, etc. — can contain a wealth of mitigating evidence, documenting or providing clues to childhood abuse, retardation, brain damage, and/or mental illness, [*Williams v. Taylor, 529 U.S. 362, 395, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)]* and corroborating witnesses' recollections. Records should be requested concerning not only the client, but also his parents, grandparents, siblings, and children. A multi-generational investigation frequently discloses significant patterns of family dysfunction and may help establish or strengthen a diagnosis or underscore the hereditary nature of a particular impairment. The collection of corroborating information from multiple sources — a time- consuming task — is important wherever possible to ensure the reliability and thus the persuasiveness of the evidence.

Counsel should use all appropriate avenues including signed releases, subpoenas, court orders, and requests or litigation pursuant to applicable open records statutes, to obtain all potentially relevant information pertaining to the client, his or her siblings and parents, and other family members, including but not limited **[*59]** to:

a. school records
b. social service and welfare records
c. juvenile dependency or family court records
d. medical records
e. military records
f. employment records
g. criminal and correctional records
h. family birth, marriage, and death records
i. alcohol and drug abuse assessment or treatment records
j. INS records

If the client was incarcerated, institutionalized or placed outside of the home, as either a juvenile or an adult, the defense team should investigate the possible effect of the facility's conditions on the client's contemporaneous and later conduct. The investigation should also explore the adequacy of institutional responses to childhood trauma, mental illness or disability to determine whether the client's problems were ever accurately identified or properly addressed.

[ABA Guidelines, pp. 76, 80, 81, 82, 83, 84, (footnotes omitted, selected case citations from footnotes included in text)].

Guideline 10.11 The Defense Case Concerning Penalty

A. As set out in Guideline 10.7(A), counsel at every stage of the case have a continuing duty to investigate issues bearing upon penalty and to seek information that supports mitigation or rebuts the prosecution's case in aggravation.

B. Trial **[*60]** counsel should discuss with the client early in the case the sentencing alternatives available, and the relationship between the strategy for the sentencing phase and for the guilt/innocence phase.

C. Prior to the sentencing phase, trial counsel should discuss with the client the specific sentencing phase procedures of the jurisdiction and advise the client of steps being taken in preparation for sentencing.

D. Counsel at every stage of the case should discuss with the client the content and purpose of the information concerning penalty that they intend to present to the sentencing or reviewing body or individual, means by which the mitigation presentation might be strengthened, and the strategy for meeting the prosecution's case in aggravation.

E. Counsel should consider, and discuss with the client, the possible consequences of having the client testify or make a statement to the sentencing or reviewing body or individual.
F. In deciding which witnesses and evidence to prepare concerning penalty, the areas counsel should consider include the following:

1. Witnesses familiar with and evidence relating to the client's life and development, from conception to the time of sentencing, that **[*61]** would be explanatory of the offense(s) for which the client is being sentenced, would rebut or explain evidence presented by the prosecutor, would present positive aspects of the client's life, or would otherwise support a sentence less than death;
2. Expert and lay witnesses along with supporting documentation (e.g. school records, military records) to provide medical, psychological, sociological, cultural or other insights into the client's mental and/or emotional state and life history that may explain or lessen the client's culpability for the underlying offense(s); to give a favorable opinion as to the client's capacity for rehabilitation, or adaptation to prison; to explain possible treatment programs; or otherwise support a sentence less than death; and/or to rebut or explain evidence presented by the prosecutor;
3. Witnesses who can testify about the applicable alternative to a death sentence and/or the conditions under which the alternative sentence would be served;
4. Witnesses who can testify about the adverse impact of the client's execution on the client's family and loved ones;
. . .

Commentary

The Defense Presentation at the Penalty Phase

[A]reas of mitigation are extremely broad **[*62]** and encompass any evidence that tends to lessen the defendant's moral culpability for the offense or otherwise supports a sentence less than death. [*Penry v. Lynaugh, 492 U.S. 302, 327-328, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989)]*. In particular, a mitigation presentation may be offered not to justify or excuse the crime "but to help explain it." If counsel cannot establish a direct cause and effect relationship between any one mitigating factor and the commission of a capital offense, counsel should endeavor to show the combination of factors that led the client to commit the crime. In any event, it is critically important to construct a persuasive narrative, rather than to simply present a catalog of seemingly unrelated mitigating factors.
Since an understanding of the client's extended, multigenerational history is often needed for an understanding of his functioning, construction of the narrative normally requires evidence that sets forth and explains the client's complete social history from before conception to the present. Expert witnesses may be useful for this purpose and, in any event, are almost always crucial to explain the significance of the observations.
. . .

Family members and friends can provide vivid first-hand accounts of the poverty and abuse **[*63]** that characterize the lives of many capital defendants.
. . .
In addition to humanizing the client, counsel should endeavor to show that the alternatives to the death penalty would be adequate punishment. Studies show that "future dangerousness is on the minds of most capital jurors, and is thus 'at issue' in virtually all capital trials," whether or not it is argued by the prosecution or is a statutorily mandated sentencing consideration.
. . .

Counsel should emphasize through evidence, argument, and/or instruction that the client will either never be eligible for parole, will be required to serve a lengthy minimum mandatory sentence before being considered for parole, or will be serving so many lengthy, consecutive sentences that he has no realistic hope of release. [*Kelly v. South Carolina, 534 U.S. 246, 122 S. Ct. 726, 151 L. Ed. 2d 670 (2002)]*.
[ABA Guidelines, pp. 104, 107, 108, 109, (footnotes omitted, selected case citations from footnotes included in text)].

There are no American Bar Association Guidelines for determining whether a deficient performance by either trial counsel or appellate counsel resulted in actual prejudice, without which there is a substantial likelihood a different result would have occurred, *i.e.*, as regards Petitioner, a sentence of life **[*64]** imprisonment. The United States Supreme Court has, however, outlined the proper prejudice inquiry for evaluating a claim of ineffective assistance of counsel in the context of a penalty phase mitigation investigation.

> We certainly have never held that counsel's effort to present *some* mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant. To the contrary, we have consistently explained that the *Strickland* inquiry requires precisely the type of probing and fact-specific analysis that the state trial court failed to undertake below. [footnote omitted] In the *Williams* decision, for instance, we categorically rejected the type of truncated prejudice inquiry undertaken by the state court in this case. *529 U.S., at 397-398, 120 S.Ct. 1495*. And, in *Porter*, we recently explained:
>
> "To assess [the] probability [of a different outcome under *Strickland*], we consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweig [h] it against the evidence in aggravation." *558 U.S., at 30[, 130 S.Ct., at 453-54*] (internal quotation marks omitted; third alteration in original).
>
> That same standard applies—and will **[*65]** necessarily require a court to "speculate" as to the effect of the new evidence—regardless of how much or how little mitigation evidence was presented during the initial penalty phase.

Sears v. Upton, 561 U.S. 945, 130 S.Ct. 3259, 3266-3267, 177 L. Ed. 2d 1025 (2010). *See also, Littlejohn v. Trammell, 704 F.3d at 864* (quoting *Sears v. Upton, 561 U.S. 945, 130 S.Ct. at 3266*).

DISCUSSION

CLAIM ONE

Lead trial counsel Wyatt Skaggs' failure to recognize and respond appropriately to [Petitioner's] cognitive and emotional impairment generated mutual distrust, animosity and disloyalty toward his client, and a corresponding failure to communicate with [Petitioner], which precluded the development of a workable attorney-client relationship and resulted in an irreparable conflict of interest, in violation of [Petitioner's] *Sixth* and *Fourteenth Amendment* right to the effective assistance of counsel.

CLAIM TWO

Trial counsel failed to conduct a reasonable investigation into [Petitioner's] background, character and mental health.

These two claims as presented by Petitioner through his *§ 2254* petition are unquestionably linked as each asserts ineffective assistance of trial counsel. Petitioner alleges lead trial counsel failed to recognize and respond appropriately to his, Petitioner's, cognitive and emotional impairment. He asserts this failure created an atmosphere of mutual distrust and animosity **[*66]** between Petitioner and his counsel, with a resulting lack of communication which precluded a workable attorney-client relationship. The consequence of this communication breakdown was an irreparable conflict of interest, in violation of Petitioner's *Sixth* and *Fourteenth Amendment* right to the effective assistance of counsel.

Petitioner further alleges his trial counsel was ineffective for failing to perform an appropriate investigation into his life history, character, and mental health for presentation during the penalty phase of Petitioner's trial.

Petitioner, in order to establish an ineffective assistance claim, must show both deficient performance as well as prejudice resulting from such performance. *United States v. Cook, 45 F.3d 388, 392 (10th Cir. 1995)* (citing *Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*; *Knowles v. Mirzayance, 556 U.S. 111, 122, 129 S.Ct. 1411, 1419, 173 L. Ed. 2d 251 (2009)*; *Harrifngton v. Richter, 562 U.S. 86, 131 S. Ct. at 787-792*. *See also, United States v. Rushin, 642 F.3d 1299, 1306, 1307, 1308 (10th Cir. 2011)*. Performance is measured against an objective reasonableness standard, while prejudice requires a showing of "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington, 466 U.S. at 694*. *See also, Harrington v. Richter, 562 U.S.*

86, 131 S.Ct. at 787-788, 791-792, and *United States v. Rushin, 642 F.3d at 1309-1310*. A reviewing court may consider the two inquiries, performance and prejudice, in any order, and there is no reason "to address both components of the inquiry if the defendant makes an insufficient showing on one." *Strickland v. Washington, 466 U.S. at 697*. And a court's **[*67]** review of a counsel's performance must be highly deferential. *Strickland v. Washington, 466 U.S. at 689*; *United States v. Taylor, 454 F.3d 1075, 1079 (10th Cir. 2006)* (quoting *Strickland v. Washington, 466 U.S. at 689*). *See also, Premo v. Moore, 562 U.S. 115, 131 S.Ct 733, 739-740, 178 L. Ed. 2d 649 (2011)*(quoting *Harrington v. Richter, 562 U.S. 86, 131 S. Ct. at 788*).

DEFICIENT PERFORMANCE

The United States Supreme Court has concluded, when considering deficient performance in death penalty cases, the ABA Guidelines in effect at the time of the representation may well indicate the appropriate "prevailing norms" which reasonably diligent attorneys would follow. *Wiggins v. Smith, 539 U.S. 510, 524, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003)*. *See also, Young v. Sirmons, 551 F.3d 942, 957 (10th Cir. 2008)*(quoting *Wiggins v. Smith, 539 U.S. at 524*); *Bobby v. Van Hook, 558 U.S. 4, 6, 130 S. Ct. 13, 175 L. Ed. 2d 255, (2009)*(citing *Strickland v. Washington, 466 U.S. at 688*); *Welch v. Workman, 639 F.3d 980, 1015 (10th Cir. 2011)*; and *Detrich v. Ryan, 677 F.3d 958, 973-974 (9th Cir. 2012)*.

> Counsel must perform in accordance with "prevailing professional norms." *Young v. Sirmons (Julius Young), 551 F.3d 942, 956-57 (10th Cir.2008)* (quoting *Wiggins, 539 U.S. at 523, 123 S.Ct. 2527*). In capital cases, we refer to the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases ("ABA Guidelines") in assessing those "professional norms." *Id. at 957*.

Littlejohn v. Trammell, 704 F.3d at 817.

There are a number of ABA Guidelines relevant to the performance of trial counsel. Wyatt Skaggs, as Petitioner's lead trial counsel, acknowledged he had read the ABA Guidelines, and agreed the objective of the Guidelines was "to set forth a national standard of practice for the defense of capital cases in order to ensure high quality legal representation for all persons facing possible imposition or execution of a death sentence by any jurisdiction." [Doc. 261, p. 24; ABA Guidelines, p. 1]. **[*68]** He further agreed with the Guidelines Commentary "[u]nless legal representation at each stage of a capital case reflects current standards of practice, there is an unacceptable 'risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'" [Doc. 261, p. 24; ABA Guidelines, p. 17]. Mr. Skaggs did caveat his acknowledgment and agreement with the ABA Guidelines with the assertion "there were several times" during his representation of Petitioner compliance was not "practical." [Doc. 261, p. 46].

ABA Guideline 4.1

The ABA Guidelines mandate[4] a team approach in the defense of capital cases. The defense team, at a minimum, should consist of two qualified attorneys, an investigator, and a mitigation specialist, the need for which Mr. Skaggs as lead trial counsel specifically agreed [Doc. 261, pp. 69, 91], and at least one member should be qualified to detect the presence of mental or psychological disorders. [ABA Guideline 4.1, p. 28]. The Guideline Commentary notes while defense counsel's own observations of a defendant are necessary, such observations can not be expected to detect the vast array of possible conditions, e.g., post-traumatic stress disorder, **[*69]** fetal alcohol syndrome, pesticide poisoning, lead poisoning, schizophrenia, mental retardation, which could be critical in preparation of the defense case, thus the need for a person qualified to screen for mental and psychological disorders. [ABA Guideline 4.1, pp. 31]. The Commentary also notes a trained investigator to discover and develop facts is necessary as "the prevailing national standard of practice forbids counsel from shouldering primary responsibility for the investigation." [ABA Guideline 4.1, p. 32]. The mitigation specialist should possess "clinical and information-gathering skills and training" which most lawyers lack, and is a critical part of the defense team to insure the penalty phase of the defense presentation is integrated into the entire defense case. The task of mitigation specialist includes

[4] "Throughout these Guidelines:

1. As in the first edition, 'should' is used as a mandatory term." **[*70]** ABA Guideline 1.1, p. 1.

development of a "comprehensive and well-documented psycho-social history" based on in-depth investigation as well as development of mitigation themes, locating and coordinating appropriate experts, and development of a cohesive case in mitigation. [ABA Guideline 4.1, p. 33].

Two Qualified Attorneys

The capital defense team, at a minimum, should consist of two qualified attorneys. [ABA Guideline 4.1, p. 28]. Those qualifications include a substantial knowledge of the relevant law governing capital cases, as well as demonstrated skill in complex litigation; in legal research and analysis; in oral advocacy; in the use of expert witnesses and familiarity with common areas of forensic investigation; in the investigation, preparation and presentation of mental status; in the investigation, preparation and presentation of mitigation evidence; along with skill in all elements of trial advocacy. [ABA Guidelines 5.1.B.2, p. 35]. The ABA Guidelines also require an attorney defending a capital case to have completed a training course which includes many of the areas enumerated in ABA 5.1.B.2 as well as ethical considerations unique to capital defense, and defense counsel's relationship with the defendant and his or her family. [ABA Guideline 8.1, p.46].

Wyatt Skaggs

Mr. Skaggs, during his representation of Petitioner both before and during his state court trial, was chief trial counsel, and chief capital trial counsel, for the Wyoming Public Defender **[*71]** Office. He was, as he agreed, essentially the "capital unit" of the Public Defender Office. [Doc. 261, pp. 19, 21; Doc. 262, p. 146]. He was, at least in the capital unit, and in the cases to which he was assigned, responsible for implementing standards of performance. [Doc. 261, p. 23].

Mr. Skaggs, as the chief trial counsel for the capital unit of the Public Defender Office, appears, based upon his own testimony, to have had limited capital training and experience. The only formal training he identified as having attended, prior to representing Petitioner, was four "Life in the Balance" seminars sponsored by the National Legal Aid and Defender Association. [Doc. 261, pp. 28, 35].

Mr. Skaggs capital defense experience prior to representing Petitioner was limited as well. His first significant experience occurred as "second chair" during the retrial of the penalty phase of the trial of Mark Hopkinson[5] [Doc. 261, p. 46], who was ultimately executed in 1992.[6] [Doc. 261, p. 47]. Mr. Skaggs admitted he had received no formal capital defense training prior to representing Mr. Hopkinson. [Doc. 261, p. 47].

[*73] Mr. Skaggs next capital defense experience came as lead counsel for Roy Engberg, at which time he still lacked any formal capital defense training. [Doc. 261, p. 48]. Mr. Engberg's death sentence was ultimately overturned, and he was resentenced to life in prison.[7]

Mr. Skaggs third capital defense experience came as lead counsel for Marty Olsen. Mr. Skaggs, prior to representing Mr. Olsen, had attended one Life in the Balance seminar in 1996. [Doc. 261, pp. 49, 50]. Mr. Olsen's death penalty was later overturned on appeal.[8] [Doc. 261, p. 49].

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[5] *Hopkinson v. State, Wyo., 632 P.2d 79 (1981)*, cert. denied ***455 U.S. 922, 102 S. Ct. 1280, 71 L. Ed. 2d 463 (1982)*** [*Hopkinson I*]; *Hopkinson v. State, 664 P.2d 43 (Wyo. 1983)* cert. denied ***464 U.S. 908, 104 S. Ct. 262, 78 L. Ed. 2d 246 (1983)*** [*Hopkinson II*]; *Hopkinson v. State, Wyo., 679 P.2d 1008 (Wyo. 1984)* cert. denied ***469 U.S. 873, 105 S. Ct. 228, 83 L. Ed. 2d 157 (1984)*** [*Hopkinson **[*72]** III*]; and *State ex rel. Hopkinson v. District Court, Teton County, 696 P.2d 54 (Wyo. 1985)* cert denied. ***474 U.S. 865, 106 S. Ct. 187, 88 L. Ed. 2d 155 (1985)***[*Hopkinson IV*]; and *Hopkinson v. State, Wyo., 704 P.2d 1323 (1985)* cert denied. ***474 U.S. 1026, 106 S. Ct. 582, 88 L. Ed. 2d 564 (1985)*** [*Hopkinson V*].

[6] "Wyoming Conducts State's First Execution in 26 Years", Boston Globe, January 23, 1992, 1992WLNR 1893963.

[7] *Engberg v. Meyer, 820 P. 2d 70 (Wyo. 1991)*; *Engberg v. State, 874 P.2d 890 (Wyo. 1994)*.

[8] *Olsen v. State, 2003 WY 46, 67 P.3d 536 (Wyo. 2003)*.

Q. All right. When you try a capital case and your client is sentenced to death, do you have any meetings with your team to sit down and ask what might we have done differently to get a better outcome for our client?

A. After the case?

Q. After the case.

A. No.

Q. Do you use your losses as a learning experience in that way?

A. No.

[Doc. 261, p. 50, lines 21-25, p. 51, lines 1-5].

Vaughn Neubauer

Mr. Neubauer, while there is no question of his sincerity and diligence in his representation of Petitioner, clearly did not meet the ABA Guideline standards for a capital defense counsel. He was, in fact, as an appointed public defender, not required to meet any particular standards to function as a capital defense counsel since the Wyoming Public Defender Office, prior to Petitioner's trial, had no such standards. [Doc. 261, p. 30]. Mr. Skaggs also stated his opinion the "second attorney qualified in accordance with" the ABA Guidelines **[*74]** did not have to have "capital experience." [Doc. 261, p. 53, lines 19-22].

Mr. Neubauer, prior to his entry of appearance as counsel for Petitioner on September 12, 2003, had graduated from law school only three years earlier, and had been practicing law for only two and one-half years. He had no previous experience representing a capital defendant, and his only "formal" capital trial training consisted of one lecture by a Wyoming attorney on the "Wymore" method of jury selection. [Doc. 261, pp. 25, 96; Doc. 262, pp. 145, 146, 147]. He thus clearly lacked substantial knowledge of the law governing capital cases, and his limited experience, even if gleaned from "very serious felony cases," as alleged by Mr. Skaggs [Doc. 261, p. 25], was not sufficient to demonstrate the required skills necessary in complex litigation, *et al*. outlined by ABA Guideline 5.1.B.2. He obviously as well had no training in those areas, nor with regard to the ethical considerations unique to capital cases and the relationship between counsel and a capital defendant, and his or her family. [ABA Guideline 8.1]. Mr. Neubauer, in fact, affirmatively stated he had, prior to being appointed counsel for Petitioner, **[*75]** no specific training as to the relationship of trial counsel with a capital defendant or his family. [Doc. 262, p. 167].

The ABA Guidelines quite clearly require two qualified attorneys who possess defined skills and knowledge with regard to the defense of capital defendants. [ABA Guideline 4.1, p. 28; 5.1.B.2, p. 35; 8.1, p. 46]. Mr. Neubauer, without question, did not meet the ABA Guidelines for a qualified capital defense attorney. The answer to the question of whether Mr. Skaggs was "qualified" as defined by the ABA Guidelines is somewhat less distinct, however, based on his very limited formal training and obviously limited capital defense experience, as he himself described, he was, at best, marginally qualified, and clearly not so over qualified as to overcome the lack of qualification by Mr. Neubauer.

The combination of Mr. Skaggs and Mr. Neubauer as counsel for Petitioner did not achieve the level of two qualified attorneys mandated by the ABA Guidelines. While this failure alone may not be sufficient, in and of itself, to render their representation of Petitioner deficient under *Strickland v. Washington*, it is a factor relevant to a deficient performance inquiry.

Investigator/Mitigation **[*76]** Specialist

The ABA Guidelines mandate, as part of the team approach to the defense of capital cases, the "team" should include both an investigator, as well as a mitigation specialist. [ABA Guideline 4.1, p. 28]. A qualified investigator and a qualified mitigation specialist each have unique skills which allow them, as opposed to trial counsel, to address the challenges

which arise in developing facts, and presenting a strong mitigation case, on behalf of a defendant. [ABA Guideline 4.1, pp. 32, 33].

Mr Skaggs, as lead trial counsel responsible for the selection and performance of the capital defense team [ABA Guideline 10.4; Doc. 261, pp. 52, 64, 70; Doc. 262, p. 150], made the conscious decision to combine and delegate the responsibilities of both investigation and mitigation to a single person. He made this decision notwithstanding the fact the ABA Guidelines, which he acknowledged having read [Doc. 261, p. 24], mandate a capital defense team have at least two qualified attorneys, an investigator, **and** a mitigation specialist.

Guideline 4.1 The Defense Team and Supporting Services

. . .

A.1. The defense team should consist of no fewer than two attorneys qualified in accordance with Guideline **[*77]** 5.1, an investigator, and a mitigation specialist.

[ABA Guidelines, p. 28].

As soon as possible after designation, lead counsel should assemble a defense team by:

. . .

2. . . . selecting and making any appropriate contractual agreements with non-attorney team members in such a way that the team includes:

a. at least one mitigation specialist and one fact investigator;

[ABA Guidelines, p. 63].

It was Mr. Skaggs position the ABA requirement for an investigator and a mitigation specialist did not require two separate individuals. One person might be sufficient.

A. Okay. Now, if you -- it doesn't say it's got to be separate, investigator and mitigation specialist. It says you have to have both.

Q. An investigator and a mitigation specialist.

A. You're saying two different individuals. I'm saying one different individual is sufficient.

Q. All right. So a grammatical reading of this would be 1plus 1 plus 1 equals 4, but you -- now, let me ask you this question. If you had asked Mr. Koski for an investigator and a mitigation specialist, he would have said yes, wouldn't he?

A. I think so.

Q. You did not ask him --

A. Did not --

Q. -- for a four-member team?

A. -- no.

Q. All right. Because you interpreted **[*78]** this "and" to mean two people?

A. Could be two. Could be one; could be two

[Doc. 261, p. 54, lines 2-19].

The single person Mr. Skaggs chose to fulfill the responsibilities of both investigator **and** mitigation specialist was Ms. Priscilla Moree. [Doc. 261, pp. 26, 61, 100; Doc. 262, pp. 168, 213, 219]. She was, as a result, expected to perform the functions of both an investigator, for which she had considerable experience, and a mitigation specialist, for which she little experience.[Doc. 262, pp. 223, 224].

Ms. Moree, to fulfill her responsibilities as an investigator, possessed experience and skills gleaned from performing investigative work for plaintiff attorneys in both Wyoming and Colorado, including two significant and large contamination cases, as well as medical malpractice and product liability cases. [Doc. 262, pp. 214, 215]. She, prior to being hired in Petitioner's case for the dual role of investigator and mitigation specialist, had also functioned as a mitigation specialists in one other capital murder trial, [Doc. 262, p. 222], and provided some limited assistance to the designated mitigation specialist in an earlier capital case. [Doc. 262, p. 215].

Ms. Moree, prior to **[*79]** taking on the responsibility of mitigation specialist for Petitioner, had no formal training or education in the fields of mental health, social work, or education, [Doc. 262, p. 216], although she had attended "several

death penalty workshops."] Doc. 262, p. 218]. And Mr. Skaggs, while he agreed a mitigation specialist should be capable by training and experience to prepare a psycho social history [Doc. 261, p. 83]; should possess clinical and information-gathering skills [Doc. 261, p. 90]; and have the "ability to elicit sensitive, embarrassing and often humiliating evidence, such as family sexual abuse," [Doc. 261, p. 91], he did not actually inquire of Ms. Moree as to whether she possessed any of those skills. He did not, in fact, even interview her or inquire as to her qualifications to be a mitigation specialist. He failed to do what would normally be considered a job interview, rather, he simply had a discussion with Ms. Moree on the telephone and had a copy of her resume. [Doc. 261, p. 82; Doc. 262, pp. 214, 216, 217]. Mr. Skaggs, even after hiring Ms. Moree to fulfill the responsibilities of a mitigation specialist, provided no guidance to her with regard to his thoughts or **[*80]** concepts on the mitigation process other than "let's just do it."[Doc. 262, p. 224]. The idea of "mitigation" was simply not clearly defined. [Doc. 262, p. 224].

There is, in addition, a question as concerns the actual amount of time Ms. Moree was able to devote to the mitigation responsibilities in her dual role as investigator and mitigation specialist. While she was delegated the mitigation responsibilities by Mr. Skaggs [Doc. 261, pp. 62, 100], it appears other tasks he delegated to her actually consumed the vast majority of her time working on Petitioner's case. Those tasks included researching and reporting to Mr. Skaggs on media coverage [Doc. 261, p. 62]; reviewing jury questionnaires [Doc. 261, p. 62]; traveling to Wisconsin with Mr. Neubauer to interview a prosecution witness, Joe Dax; as well as discovery review, travel, and time in court. The time records Ms. Moree utilized in submitting her billings to Mr. Skaggs indicate, of the 544.6 total hours itemized, she spent only 107.4 hours in actual mitigation work. [Doc. 212-1, 2, 4,7, 8, 11, 12,15,17, 18, 22, 25; Doc. 328, pp. 2, 3]. Mr. Russell Stetler, the national mitigation coordinator for the Federal Death Penalty Projects **[*81]** [Doc. 264, p. 7], stated, in his expert opinion, based on his review of Ms. Moree's billings, she spent very little time in what he would characterize as the mitigation function, in fact, a fraction of the hours necessary to perform a typical mitigation investigation. [Doc. 264, pp. 7, 25, 67, 69, 70, 71; Doc. 328, pp. 2, 3].

Ms. Moree, while arguably a skilled investigator based on her background and experience, obviously did not have the training or the experience, nor was she allowed to devote the time necessary, to be an effective mitigation specialist. The ABA Guidelines mandate two separate qualified persons as part of capital defense team, one to act as an investigator, and one to fulfill the responsibilities of a mitigation specialist. [ABA Guidelines, p. 63]. Ms. Moree was likely qualified to act as an investigator, and did fulfill said function as part of Petitioner's trial team. She was not, however, qualified by either training or experience, as well as being restrained by time, to act as a mitigation specialist.[9]

Mental or psychological disorders

Adherence to the ABA Guidelines requires at least one member of a capital defense team be qualified to screen for the presence of mental or psychological disorders. [ABA Guideline 4.1, p. 28]. The observations of defense counsel, while necessary and important, can not reasonably be expected to detect some or all of the vast array of possible conditions which may well be critical in defending a capital case, e.g., post-traumatic stress disorder, fetal alcohol syndrome, pesticide poisoning, lead poisoning, schizophrenia, and mental retardation, thus the need for a person qualified to screen for those disorders. [ABA Guideline 4.1, p. 31]. The Guideline appears to embrace a conclusion expressed in 1992, by Dr. Deana Logan, a psychologist and capital defense attorney. She suggested, in light of the fact only the capital defense team members have access to their client over a period of time, it is their duty to "act as the observational caretakers for the mental status symptoms of the client." 19 Cal. Attys For Crim. Just. F. 40, 40 (1992). A capital defense team member **[*83]** (or members) must therefore be trained to "perceive data from multiple sources," including "history, ...nonverbal cues, [and] listening at multiple levels." 19 Cal. Attys For Crim. Just. F. at 40. Such training and skills are an integral part of any capital defense team since the information which can therefore be gathered, "if properly noted by the legal team and passed on to the mental health expert, ...will help guide the expert to make a more accurate evaluation." 19 Cal. Attys For Crim. Just. F. at 40.

[9] Mr. Neubauer also readily agreed he did not, during preparation for Petitioner's trial, have "the qualifications, training, and experience that you would want to **[*82]** have in a mitigation specialist on a death penalty team." [Doc. 262, p. 153, lines 14-17].

Mr. Skaggs, while acknowledging the value of a member of the defense team having the clinical skills and ability to recognize mental or psychological disorders and impairments as required by the ABA Guidelines, nevertheless then contradicts the Guideline suggestion a defense counsel alone is not qualified to fulfill said function. [Doc. 261, p. 70]. He believes, through his lifetime experience, he, in fact, had the ability to perform such function with regard to Petitioner.

> Q. (BY MR. O'BRIEN) ABA Guideline 4.1.2, "The defense team should contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or **[*84]** impairments."
> . . .
> Q. And this gives us some qualifications that would be necessary to a capital defense team. Do you disagree that those are necessary qualifications?
> A. I think they should be able to recognize if an individual has a mental or psychological disorder or impairment.
> Q. Right. We're not talking about diagnosing but just simply recognizing; right?
> A. Recognizing.
> Q. And so you're not a psychologist; right?
> A. No.
> Q. I'm not a psychologist.
> A. No.
> Q. So you are not the person described in Guideline 4.1.2, are you?
> A. Well, I think I can do pretty much that when it comes to screening individuals at least for the presence of mental or psychological disorders or impairments.
> Q. You can.
> A. I think that lifetime experience gives me that ability.

[Doc. 261, p. 70, lines 4-7; p. 71, lines 1-16].

Mr. Skaggs believes he was qualified by training and experience, during his representation of Petitioner, to screen individuals for the presence of psychological disorders or impairments even though he is not, and was not, familiar with many of the subtle signs of mental illness apparent in an individual's speech.

> Q. Do you -- you agree that speech is one of the most sensitive ways in which mental **[*85]** health experts can identify mental illness?
> A. I don't know.
> Q. You don't know that?
> A. I don't know.
> Q. So you've not been trained to look for subtle signs of mental illness in an individual's speech?
> A. In what way? In what way are you talking about? Which -- speech impairment? A lot of individuals are very qualified even though they have speech impairments.
> Q. That's true. Well, let me ask you some specific questions. For example, would you be able to identify a client whose speech includes neologisms?
> A. Speech -- I didn't hear you. You dropped off right at the end.
> Q. Neologism.
> A. I again didn't hear you.
> Q. N-e-o-l-i-g-i-s-m [sic], neologism.
> A. I don't know what that is.
> Q. You don't know what that is.
> A. No.
> Q. Let's try paraphasia.
> A. I don't know what that is either.
> Q. Let's try dysarthria.
> A. I don't know what that is.
> Q. Let's try aprosody.
> A. Aprosody?
> Q. A-p-r-o-s-o-d-y.

A. I don't know what that is.
Q. Tangentiality?
MR. DELICATH: Your Honor, I'll object. The witness has already testified that he is not a mental health professional.
MR. O'BRIEN: Maybe I could clear that up with one more question, Your Honor.
THE COURT: You may.

Q. (BY MR. O'BRIEN) So you would admit you are not qualified by **[*86]** training and experience to screen individuals for the presence of psychological disorders or impairments, are you?
A. I think I am.
Q. Let's continue. What is tangentiality?
A. Pardon me?
Q. What is tangentiality?
A. Similar to, same plane, uh.
Q. Let me try another one. What is circumstantiality?
A. Circumstantiality?
Q. Yes, as a sign of mental impairment.
A. Oh, I don't know.
Q. What is blocking as a sign of mental impairment?
A. Walking?
Q. Blocking, b-l-o-c-k-i-n-g.
A. I don't know.
Q. Okay. Are you ready to admit that you are not the person qualified by training and experience to screen for the presence of mental disorders or impairments?
A. No, I'm not.

[Doc. 261, p. 72, lines 16-25; p. 73, lines 1-25; p. 74, lines 1-22].[10] Mr. Skaggs, in fact, further believed Ms. Moree had the same ability, maybe even better than his, to screen for mental health issues, even though she had no formal training in the mental health field, and her exposure to the screening concept was the result of attendance at only three death penalty seminars. [Doc. 261, p. 75; Doc. 262, pp. 216, 218]. Ms. Moree, however, definitively stated she was not responsible for the screening function as a member of Petitioner's trial **[*87]** team. [Doc. 262, p. 218].[11]

Petitioner's trial team did employ Linda J. Gummow, Ph.D., a neuropsychologist, who Mr. Skaggs believe was qualified to screen for mental or psychological impairments. [Doc. 262, p. 66]. It appears from the record before the Court, however, Dr. Gummow was not a member of the defense team in the sense contemplated by the ABA Guidelines, and thus did not have the opportunity to observe Petitioner over an extended period of time as the trial counsel did. She was primarily an expert witness who evaluated Petitioner and testified at trial. [Exhibits 169-64, 171-15, 216-16, and 220-30].

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[10] Neologisms are basically gibberish, but may sound like sentences. "Pressure of speech" is also described as "rapid speech," in which the client "[t]alks rapidly and is hard to interrupt," his "[s]entences [are] left unfinished because of eagerness to move on," he "[c]ontinues talking even when interrupted;" the client "[o]ften speaks loudly and emphatically," and "[t]alks too much and interrupts others." "Circumstantial" describes "[s]peech pattern [that] is circuitous, indirect, or delayed in reaching its goal;" it "[i]ncludes many tedious details, seems 'long-winded,'" and "[r]equires that you interrupt in order to finish business." Speech is "tangential" when the subject "[a]nswers questions in an oblique or irrelevant way." Blocking occurs when the client "[s]tops in the middle of a thought and after some silence [c]annot remember what he was talking about;" he "says his 'mind went blank.'" 19 Cal. Attys For Crim. Just. F. at 40, 43, 44 "Paraphasia" is a form of aphasia in which a person has lost the ability to speak correctly, substituting one word for another and jumbling words and sentences unintelligibly. "Dysarthria" is a disturbance of speech due to emotional stress, to brain injury, or to paralysis, incoordination, or spasticity of the muscle **[*88]** used for speaking. "Aprosody" is the absence, in speech, of the normal pitch, rhythm, and variations in stress. *Steadmans Medical Dictionary* (27th ed. 2000).

[11] Mr. Neubauer testified before this Court although he felt, at the time of Petitioner's trial, he had the ability to screen for mental health issues based on his "on-the-job experience" and discussions with "a lot of psychologists," in retrospect he concluded he did not. [Doc. 262, p. 396].

Adherence to the team approach to capital defense outlined by ABA Guideline 4.1 basically requires the team leader to take four affirmative steps. First, select two **[*89] qualified** attorneys. Second, select an investigator. Third, select a mitigation specialist. And fourth, ensure one of the team members is qualified to detect by observation and interaction with the defendant the presence of any mental or psychological disorders. [ABA Guideline 4.1, p. 28]. Petitioner's trial team failed to fulfill at least three of these requirements.

Mr. Neubauer, as one of Petitioner's trial team, was clearly not a qualified capital defense attorney pursuant to the ABA Guidelines. And while Mr. Skaggs may arguably have fulfilled the required qualifications, his abilities were not such as to overcome the fact Mr. Neubauer was not qualified. Petitioner's trial team thus did not fulfill the "two qualified attorneys" element.

Ms. Moree was hired by Mr. Skaggs to fulfill both the investigator and mitigation specialist element set out by the Guidelines. She apparently had the background and experience to fulfill, and did fulfill, the responsibilities of the team investigator. She was not, however, qualified by either experience or training to fulfill the responsibilities of a mitigation specialist. She had, prior to Petitioner's trial, functioned as a mitigation specialist **[*90]** in only one other capital case, and had attended, at most, three death penalty seminars. Petitioner's trial team thus lacked a qualified mitigation specialist.

Finally, Petitioner's trial team clearly lacked a member with the ability to screen for mental or psychological disorders. Ms. Moree affirmatively indicate she had not been asked to fulfill such responsibility, and Mr. Neubauer recognized, albeit after Petitioner's trial, he was not qualified to fulfill the screening function. The third team member, and leader of Petitioner's trial team, Mr. Skaggs, while firmly convinced of his own ability to fulfill the screening responsibilities, was not qualified to do so. The basis for his perceived ability was his "lifetime experience," yet he was not familiar any of the subtle signs of mental illness which might be manifested by an individual's speech. Petitioner's trial team thus lacked anyone with the skills necessary "to screen individuals for the presence of mental or psychological disorders or impairments." [ABA Guideline 4.1.2.A, p. 28].

Petitioner's trial team failed, at the time of his trial, to adhere to the prevailing standards for the defense of capital cases set out by ABA Guideline **[*91]** 4.1.

ABA Guideline 10.4

The responsibility for assembling and supervising the capital defense team falls squarely on the shoulders of lead counsel. He or she is responsible for selecting the investigator and mitigation specialist, as well as co-counsel, and allocating, directing and supervising the work of the entire team in accord with the ABA Guidelines and professional standards. [ABA Guideline, 10.4, p. 63]. Mr. Skaggs, as lead trial counsel for Petitioner, did not, as previously discussed, fulfill this mandate. He not only failed to select qualified co-counsel, he as well failed to hire a qualified mitigation specialist, and enlist the assistance of a person qualified by training and experience to screen for mental and psychological disorders.

Mr. Skaggs, as lead trial counsel, was also charged with the responsibility of demanding and acquiring "on behalf of the client all resources necessary to provide high quality legal representation," and make an adequate record for post-conviction review if such resources are not provided. [ABA Guideline, 10.4, p. 63]. It appears, based on the testimony and record evidence before the Court, this mandate as well was not rigorously fulfilled, **[*92]** arguably to the detriment of Petitioner.

Mr. Skaggs, in testimony during the evidentiary hearing before this Court, professed to be a "frugal person" when "it comes to public money," even if it meant economizing on an indigent defense. [Doc. 261, pp. 64, 65]. He felt keeping costs down is always a consideration, [Doc. 261, p. 80], and economizing is important. [Doc. 261, p. 81]. There was even some evidence presented, which Mr. Skaggs did not directly dispute, indicating he had expressed the opinion the more funds expended on outside experts and travel in defense of a case, the less funds available in the public defender budget for personnel salaries and raises. [Doc. 261, p. 80].

> Q. Did he discuss with you anything with respect to public funds, anything along those lines?
>
> A. Yes. During the conversation he indicated that it was very important to preserve the funds of the public defender system so that the employees of the public defender system could continue to receive raises.

Q. Now, did Mr. Skaggs mention anything else besides the need for raises with regard to the public funding that he was worried about?

A. No, just that he was, he was very concerned that we conserve money, uh, so **[*93]** that the public defender system could, you know, reward its people for their hard work.

[Doc. 267, p. 30 lines 17-22].

Mr. Skaggs expressed his fiscal philosophy with specific reference to the defense of Petitioner in a letter to State Public Defender Ken Koski justifying a request for trial expenditures for a Dr. Spitz.

Q. (BY MR. O'BRIEN) You're talking about expenditures generally. "I think the expenditures in this case are quite low when compared to other notable trials such as Harlow, McKinney, Dowdell and Collins. Check them; the costs to trial in those cases were very high. We have spent just over $10,000 on a mitigator which includes both investigation and helping Garri mitigate. That $10,000 figure contains the $5,000 which is up for approval at this time. These costs are very low and helped by the fact that Garri is shouldering some of the load."

[Doc. 261, p. 86 lines 7-16; Doc. 65-2, p. 2].

Q. All right. And so -- but as compared to those other cases, you were spending far, far less on the mitigation function, weren't you?

A. I thought I was, and that should allow me to get a little bit more money than might be ordinarily given.

[Doc. 261, p. 87 lines 9-13].

Q. (BY MR. O'BRIEN) **[*94]** -- now it's the middle paragraph, or you told Mr. Koski that, "The expenses up to now are a drop in the bucket compared to trial expenses. We have no choice, but I'm proud of the fact that my expenses are running considerably less than we have paid out in other cases and the expenses may still come in under the expenses that we spent in Marty Olsen's case." Isn't that true? That's what you told --

A. In justification for the Spitz expense I said that, yes.

Q. Yeah. In fact, you advise Mr. Koski that this case -

"This is a bargain Ken and it will continue to be so." Correct?

A. I did.

[Doc. 261, p. 89 lines 11-22; Doc. 65-2, p. 2].

Frugality, in and of itself, may well be a philosophy appropriate when expending public funds. Such philosophy, however, as manifested in certain decisions by Mr. Skaggs as lead counsel, clearly adversely impacted not only the composition of the trial team, but the ability of those team members as well to perform their duties to the prevailing professional standards.

Mr. Skaggs chose to hire one person rather than separate individuals to handle the mitigation and investigation responsibilities of the team as mandated by the ABA Guidelines. [ABA Guideline 4.1(A)(1); **[*95]** 10.4(C)(2)(a)]. His stated philosophy was "why hire four when you can get by with three." [Doc. 261 pp. 54, 55]. He made this decision notwithstanding the fact he believed Kenneth Koski, the Wyoming Public Defender, would have granted his request to hire both an investigator and a mitigation specialist, [Doc. 261 pp. 54], as had occurred in prior death penalty cases defended by the Wyoming Public Defender Office. [Doc. 261, pp. 78, 88; Doc. 262, pp. 215, 223, 232]. Ms. Moree seems to have the same impression. The concern she felt with regard to funding came from Mr. Skaggs. [Doc. 263, pp. 97, 98].

The team member perhaps most adversely impacted by Mr. Skaggs' frugality was Ms. Moree, who had the combined responsibilities of investigator and mitigation specialist. [Doc. 262, p. 213]. It was apparent to Ms. Moree from her initial conversation with Mr. Skaggs cost containment was a priority with him.

Q. Did you talk about fees at all?

A. We discussed it, as I recall, and, uh, I, I believe I quoted that I would do the case for 40 an hour.

Q. All right. And at that time were you aware or were you made aware of Mr. Skaggs' concerns about funding?

. . .

A. Well, it's been nine years ago, so I'm **[*96]** trying to recall as best I can, but that was -- that's the impression that Mr. Skaggs gives during an interview.

Q. All right. And the impression -- what impression?

A. That we keep costs down.
Q. All right. And so is the impression that he gave you during that interview about the need to keep costs down reflected in your engagement letter of May 4th, 2003?
A. Yes, it is.
[Doc. 262, p. 220 lines 13-17; p. 221 lines 1-9].

Ms. Moree, as a result of Mr. Skaggs' cost concerns, agreed to an hourly rate of $40 rather than the $65 per hour previously paid by the Wyoming Public Defender Office for someone acting solely as a mitigation specialist. [Doc. 262, pp. 218, 219]. She also acknowledged her understanding of the funding concerns in her engagement letter to Mr. Skaggs.
Q. Okay. On the screen in front of you, Ms. Moree, is Exhibit 4, which is your engagement letter of May 4th, 2003. And I'd like you to look at the second paragraph up from the bottom and the last sentence. "I understand the need to keep costs to a minimum" --
A. Yes, uh-huh.
Q. Yes. "I understand the need to keep costs to a minimum in a capital case, and you can be assured I will do my part to that end."
A. Yes.

Q. Is that line in **[*97]** your letter a product of your discussion with Mr. Skaggs about his concern about funding?
A. Yes, it is.
Q. All right. Did that seem pretty important to Mr. Skaggs?
A. Yes.
[Doc. 262, p. 221 lines 16-24; Doc. 65-4].

Ms. Moree also felt her work was constrained by the funds allotted to her for both investigation and mitigation.
Q. Explain how your work on the Eaton case compares to that.
A. Well, I was, I was constrained by not only the, my hours, money spent, uh, and just the time. We had, we had a trial date set, and that was the way it was going to be, and, uh, so you're working against the calendar, and you -- I felt like I was working against, uh, my expenses.
Q. Stop right there for a minute and explain to me what you mean by working against your expenses.
A. Well, in Mr. Eaton's case I was allotted X number of dollars, uh, by what Mr. Skaggs would request from the Public Defender's Office. And during Eaton I know -- I believe I only turned in one voucher for a motel room. I stayed with a friend in Casper. So that I did ask for a few meals, and I did ask for some mileage between Laramie and Casper, but as far as staying in a motel or anything like that, uh, I, I don't believe I did.

Q. **[*98]** Okay. And I want to make sure that I'm interpreting what you just said correctly. So, for example, if you were allocated $10,000 for your work, and if you spent mileage on travel or you bought a plane ticket or you stayed in a hotel room and purchased meals, that came out of that $10,000?
A. Yes.
. . .
Q. All right. And so if you spent a thousand dollars of that 10,000 dollars on, on travel expenses, out-of-pocket expenses, then you're just left with $9,000 worth of time that you could devote to the case; is that correct?
A. Yes.
[Doc. 262, p. 233 lines 19-25; p. 234 lines 1-13, 19-23].

Mr. Skaggs' frugality, and desire to economize on an indigent defense, also manifested itself in his approach to contacting and interviewing potential mitigation witnesses. He had a strong preference for telephone rather than in-person interviews.
Q. All right. And if it's possible for you to economize in indigent defense, you will do that, won't you?
A. I will do that. Yes, I will.
Q. And the phone call issue is an example of that, isn't it?
A. That is an example, yes.
Q. All right. And so you would ask Priscilla to call a witness such as Richard Eaton, Dale's brother, on the telephone — --
A. Or Kerry Rose.

Q. **[*99]** -- or Kerry Rose, that's another example, and say find out on the telephone if they'll be good candidates perhaps for being a mitigation witness in the case?
A. Well, find out on the telephone where they are, where they stand with respect to the case. Particularly family members were in a different standing at that time than were other people because family members sometimes weren't cooperating. So we used telephone calls to determine where they stood. Followed up by a visit in person if practical, but sometimes we used telephone calls for that, too, for in-depth interviews, and then followed up by interviews by myself.
Q. Okay. Follow up by interviews in person if practical. Is that what I heard you say?
A. If practical.
Q. What do you mean by if practical?
A. Okay. There are a number of things that go into interviews in person. Number one, how important the witness is.
....

[Doc. 261, p. 65 lines 12-25; p. 66 lines 1-12; Doc. 262, pp. 240, 241]. He, in fact, basically required Ms. Moree, his mitigation specialist, to have telephone contact with a potential witness before granting her permission to travel to conduct an in-person interview.

Q. There was some -- we've had some discussion in **[*100]** the case about telephone versus in-person interviews. Mr. Skaggs had a strong preference that you do your work by telephone, didn't he?
A. Yes.
Q. What is the reason for that?
A. I suppose cost containment.
Q. In fact, in order to get permission to go see a witness in person, did you have to tell Mr. Skaggs that you had contacted that person by phone and that they were going to be home and you had an appointment and they had agreed to visit with you?
A. Yes, I had to get permission for the travel.
Q. And if you had not had that prior telephone contact, you wouldn't get permission until you had --
A. Correct.

[Doc. 261, p. 469 lines 20-25; p. 470 lines 1-9].

Mr. Skaggs' preference for telephone screening and telephone interviews rather than in person interviews of potential mitigation witnesses was, as discussed *infra*, in conflict with the prevailing standards of performance for mitigation investigation during his representation of Petitioner.

Mr. Skaggs' frugality and desire to economize also affected who would be called as a witness at trial. One particular example was Kerry Rose, a potential mitigation witness whom Ms. Moree, based upon a couple of telephone conversations, concluded would **[*101]** have been a "very good witness" for Petitioner. [Doc. 263, p. 56]. Mr. Skaggs declined to call her at trial as a mitigation witness based, in part, on the fact she did not live in Wyoming. The other reasons he expressed for not calling her were apparently not significant as he would have "rethought" his decision if she had lived in Wyoming.

Q. And, in fact, you said had she lived in Wyoming you might have made a different decision; isn't that true?
A. I probably said that, and I would agree with you, I certainly would have rethought that decision had she lived in Wyoming. But the funding was certainly a problem ...

[Doc. 261, p. 197 lines 9-15].[12]

The apparently successful effort by Mr. Skaggs to "economize" on the expense in defense of Petitioner is troubling. The ABA Guidelines mandate lead counsel "demand on behalf of the client **all** resources necessary to provide high quality representation." [ABA Guideline 10.49(D), p. 63 (emphasis added)]. Mr. Richard Burr, **[*102]** as an attorney, has spent almost all of his legal career defending death penalty cases. [Doc. 265, p. 106]. The Court allowed him to testify as an expert on the performance of capital defense teams. [Doc. 265, p. 122]. He offered these thoughts with regard to counsel who self-censor and self-constrain when it comes to acquiring adequate defense funding.

[12] Mr. Skaggs' preference in defense of Petitioner for telephone interviews and only in-state personal interviews was not unique. He had a similar philosophy when working with Mary Goody on the defense of Marty Olsen. [Doc. 261, p. 79].

Q. Is there anything about this case that would justify deviating from the well-established norm?

A. Not -- I mean, the only justification for it that I saw Mr. Wyatt put forth was cost, and, and that can't be a reason -- I mean, it may be a constraint. I'm not saying that everybody gets all the money they need. We don't. I've never gotten all the money I needed in any of my cases, but I've gotten a lot more than -- I haven't self-constrained, and self-constraint, even if you're, you know, if you're working as a state employee -- and, you know, we all -- all of us are appointed in these cases, and, you know, we, we serve because of the grace of the government that pays us, and we can't abuse that. So we do have some trust relationship with the government that pays us, but the government pays us to do our work, and **if we self-censor and [*103] self-constrain and don't argue for the funds that we need to do the work well and effectively, then we're doing a disservice to our clients**.

[Doc. 265, p. 159 lines 9-25 (emphasis added)].

The failure by Mr. Skaggs to seek from Kenneth Koski, the State Public Defender, adequate funding, which he apparently knew would be approved, for Petitioner's defense clearly adversely impacted the trial defense, particularly, as discussed *infra*, the mitigation phase.

Petitioner's trial team clearly failed to meet the mandates of ABA Guideline 10.4.

ABA Guideline 10.5

The ABA Guidelines also mandate defense counsel "make every appropriate effort to establish a relationship of trust" with a defendant, including "a continuing interactive dialogue" concerning all materials which might well impact the defendant's case. [ABA Guideline 10.5, p. 68]. The Commentary suggests while communication with the defendant by non-attorney members of the defense team is important, such communication "does not discharge the obligation of counsel" to keep the defendant apprised of case development and progress. The establishment of a trust relation with the defendant is essential, thus contact must be ongoing. So-called **[*104]** "difficult" defendants may well be the consequence of bad lawyering, either current or previous, and establishing communication and rapport with the defendant is "critical to effective representation." [ABA Guideline, 10.5, pp. 70, 71].

Mr. Skaggs failed to establish even a minimally effective trust relationship with Petitioner, primarily because he completely failed to engage in a "continuing interactive dialogue" with him which was essential to establishing the communication and rapport "critical to effective representation." He apparently basically concluded because Petitioner was competent to stand trial, his inability, or failure, to provide, when requested, a life history, a work history, in fact, any information which might assist in his defense, or in the mitigation of a death penalty, was willful and intentional.

A. But he seemed to be relatively competent. In other words, he could understand what I was asking, he could understand the reasons why I was asking, and he seemed to me to be relatively competent, and —

[Doc. 261, p. 104 lines 15-18].

Q. I thought you said you had reached that conclusion after Priscilla Moree's June 10th, 2003 visit with Mr. Eaton.

A. Uh, you know, I **[*105]** reached that conclusion in talking to the expert, so --

Q. You told us --

A. -- and he was competent.

[Doc. 261, p. 123 lines 24-25; p. 124 lines 1-4].

Q. And one of the questions is whether or not in making this conclusion, now, you're drawing the conclusion that, you know, he's competent and therefore his refusal to cooperate is willful -- is that what I hear you saying?

A. Yes.

Q. You don't see an intermediary position at all on that spectrum?

A. With that particular defendant, no.

[Doc. 261, p. 142 lines 1-8].

Q. All right. But you would say that Mr. Eaton was unable to relate to you, wouldn't you?

A. Again, it's a matter of degree.

Q. Or is it a matter --

A. I wouldn't say that he was unable to. I would say that he did not want to.

[Doc. 261, p. 143 lines 4-9].

Mr. Skaggs reaffirmed a number of times in his testimony before this Court his "position" with regard to Petitioner's failure to provide requested information.

Q. And you understand that one of the issues in this case is the difference between couldn't give information and wouldn't give information; correct?
A. That may be one of your issues. I don't know that it's one of mine.

Q. All right. Because you were solidly ensconced in the camp **[*106]** that he would not give you information; correct?
A. I am in the camp that he didn't want to give information.

[Doc. 261, p. 112 lines 12-19].

Q. All right. Well, let me back up a minute and ask. There are other factors that might frustrate a client who is asked to give an institutional history, such as a school history, might there be, in a case like Mr. Eaton's?
A. I don't know of any factors that would have frustrated Mr. Eaton in doing that other than the fact he didn't want to talk about it.

[Doc. 261, p. 115 lines 12-18].

Q. -- there was -- he moved a lot from job to job because these jobs are temporary jobs; right?
A. By nature.
Q. Quite often. And so over the course of his work history do you have any idea how many jobs he had worked?
A. Priscilla can talk to you about that, but I think that we probably identified six or eight.
Q. There were a lot of -
A. And then he was an independent contractor, too, you know, so I don't know how you lump those into jobs. I don't know how many jobs he had as an independent contractor.

Q. All right. And so a question to Mr. Eaton about how many jobs have you had could be data that he might have a little bit of frustration and difficulty coming up with, **[*107]** mightn't it?
A. Not necessarily.
Q. But you acknowledge that that's possible?
A. In some clients, yes. In Mr. Eaton's situation, I don't think so.

[Doc. 261, p. 119 lines 8-25].

Q. -- beforehand. And so wouldn't you agree that a doctor saying that your client is depressed, it affects the brain, and he has significant problems with concentration, with thinking, might very well cause him to be unable to give you a history of the schools that he attended?
A. I would disagree with that.
Q. You disagree.
A. My, my interactions with him indicated that he simply did not want to present that information for whatever reason he had. He just didn't like talking about it.
Q. He didn't like talking about his background?
A. No.

[Doc. 261, p. 149 line 25; p. 150 lines 1-11].

Q. All right. A malfunctioning brain could cause the problems that you saw with Mr. Eaton, couldn't it?
A. In this particular case, I don't believe so.
Q. All right. And that's your opinion.
A. That's my opinion.
Q. You are not a psychologist?
A. Not a psychologist.

[Doc. 261, p. 151 lines 5-11].

Q. Yeah. And so on page 293 you indicated that you tried to explain to Mr. Eaton about the importance of family mitigation, but you said he really didn't **[*108]** understand the importance of family history in terms of mitigation, didn't understand it, didn't want to know that part of the case at all. Is that correct?
A. Didn't want to talk about it.
Q. Yeah, he just didn't understand it.

A. Well, that's what I said.
Q. All right.
A. Didn't want to understand it.
Q. But, on the other hand, if he suffered from a mental disorder that would impair his ability to communicate with you, that would raise different issues, wouldn't it?
A. If he did, but again --
Q. If he did --
A. -- that's why I have him checked out.
Q. That wasn't my question. If he did, that would impair his ability to communicate with you?
A. Might. Might. It depends --
Q. Yes.
A. -- on degree. It depends on a lot of different things. But in this particular case I felt that he did not want to answer the question, not that he didn't have the ability to, he didn't want to cooperate.

[Doc. 261, p. 121 lines 22-25; p. 122 lines 1-21].

Q. Did you review with her particular techniques and instructions in the field of mental health that are used to establish a rapport with, say, troubled mental patients, for example?
A. No, because it was my belief he wasn't troubled mentally.

Q. And this -- it was your **[*109]** belief at the time of that first visit he was not troubled mentally?
A. I had not seen any indication of that.
Q. And you hadn't seen any neologisms on his part?
A. I had not seen any indication that he was troubled mentally.
Q. All right.
A. I had seen plenty of indication of obstructionism or stubbornness, but I hadn't seen any indication that he was troubled mentally.

[Doc. 261, p. 103 lines 11-25].

Mr. Skaggs maintained this position even though he eventually acknowledged Petitioner "had mental illnesses," [Doc. 261, p. 142 line 18], and had, as well, major mental impairments.

Q. You think it's good judgment to refuse to cooperate with your capital defense team?
A. Can't think of any situation in which it would be good judgment, but I can envision circumstances in which they don't knowingly and voluntarily, and I found one.
Q. Mm-hmm. And yet your expert is telling you he has major impairments in relationships, judgment, thinking and mood; isn't that true?
A. I don't dispute that. In fact, I saw major impairment in relationships, judgment, that sort of thing, and I could have developed that.

Q. Yeah. And certainly the difficulties you experienced with Mr. Eaton were consistent with a major **[*110]** impairment in judgment, thinking, and mood, weren't they?
A. He had, he had problems in judgment.
Q. Yeah.
A. There's no question about that.

[Doc. 261, p. 152 lines 20-25; p. 153 lines 1-11].

Mr. Skaggs, however, did not discuss, at least with Ms. Moree who he had hired as the mitigation specialist, conditions or symptoms of possible disorders which might cause Petitioner to act against his best interest. Mr. Skaggs left the impression with Ms. Moree he did not put "much stock" in mental health issues.

Q. You would agree that a capital defendant's refusal to cooperate with counsel would be contrary to his best interests, wouldn't it?
A. Yes.
Q. Did Mr. Skaggs ever discuss with you conditions or symptoms of possible disorders or other explanations that might prompt Mr. Eaton to act against his best interests?
A. No, that wouldn't fit Mr. Skaggs' approach to this, I don't believe.
Q. What do you mean by that?

A. I believe that -- I'm not sure how much stock he put into, uh, mental health issues.
Q. He just doesn't believe in mental health issues, does he?
A. I could -- that's the inference that I got.
Q. And, in fact, Dr. Ash found that Mr. Eaton suffered from major depression; right?
A. Yes.

Q. And **[*111]** Dr. Gummow found that Mr. Eaton suffered from significant brain damage; correct?
A. Yes.
Q. Did Mr. Skaggs ever discuss with anyone, with you or anyone in your presence, whether these conditions could explain what you were seeing in Mr. Eaton?
A. No.
[Doc. 263, p. 73 lines 23-25; p. 74 lines 1-21].

Mr. Skaggs relationship with Petitioner was also characterized by a philosophy he, Mr. Skaggs, was the one making decisions concerning Petitioner's defense, and if those decisions did not "meet with Mr. Eaton's approval, it's tough."

Q. So I think this is the first time you mentioned that you had a directive from Dale about not wanting Kerry Rose involved in the trial. You had other disagreements with Mr. Eaton, didn't you, about who should be called and who shouldn't be called, didn't you?
A. I don't call that a disagreement, but I went on ahead and called the witnesses I thought needed to be called, were necessary to be called in his defense, and if he didn't like it, tough, tough.
. . .

Q. In fact, that language that you just used is kind of reminiscent of a discussion that you had with the trial court about his disagreement with your trial strategy. Do you recall that discussion with Judge Park **[*112]** in front of Dale during a recess in the trial when Dale was grumbling about how you were handling his case?
A. I recall taking him in front of the judge in an ex parte hearing, yeah.
Q. Right. You said: I control the cross-examination in this case. I have told that to Mr. Eaton, and I'm gonna tell him one more time for the record. I'm going to make a decision on which questions I want to ask, how I want to ask them, and how I'm going to approach the witness, and if some of those things don't meet with Mr. Eaton's approval, it's tough. Right?
A. Very well could have said that. If that's on the transcript, I did.
[Doc. 261, p.197 lines 19-25, p. 198 lines 1-23].

Mr. Skaggs relationship with Petitioner deteriorated to the point Petitioner indicated a number of times he would like to have a different lawyer, [Doc. 262, p. 24 lines 8-12], and Mr. Skaggs, in fact, considered withdrawing as counsel. He ultimately did not withdraw, in part because who would he "dump this on."

Q. And, in fact, you considered withdrawing from this case, didn't you?
A. Yeah, I did. Yes, I did.
Q. And that had to do with your relationship with Mr. Eaton, didn't it?
A. Not entirely, no.

Q. But do you -- you explained your **[*113]** thought process to the Calene court about why you chose not to move to withdraw. Do you remember what you said?
A. Not exactly, no.
Q. Do you remember why you chose not to withdraw?
A. Remembering now, and again I haven't reviewed my Calene, Calene testimony at all, but remembering now it would have been a very difficult proposition to get new lawyers for him, to say the least, very difficult.
Q. Do you remember the language you used to express that to the Calene court?
A. No, but my language is quite plain and quite simple.
Q. And you said, "Who am I gonna dump this on?" Is that right?
A. Well, I could have said that, yeah.
[Doc. 262, p. 28 lines 6-25; p. 29 line 1].

Q. Now, as lead counsel, did you ever consider, when he refused to talk to you on those occasions, just withdrawing from the case and getting some other counsel in there?

A. Oh, that was always a consideration far back in the list of considerations in this case. But I had considered it. My thought was who else who am I going to dump this on? Who is qualified to do it?
[Doc. 86-7, p. 4 lines 18-25; p. 5 line 1].

Mr. Skaggs' apparent solution to his failure to establish a continuing dialogue and a trust relationship with Petitioner **[*114]** was to have Ms. Moree and Mr. Neubauer attempt to fulfill such responsibility.

Ms. Moree, according to Mr. Skaggs, put in "considerable effort" in her attempt to establish a dialogue and rapport with Petitioner, and thus have him share information helpful to his defense, and, in particular, mitigation of any death penalty. [Doc. 261, p. 124 lines 13-17].

Q. Here's what I'm asking. What else did you do to help Ms. Moree establish -- you're talking about considerable effort, and I'm giving you every opportunity to describe that considerable effort?
A. Well, she put considerable effort in to getting him to talk. She tried, as she told me anyway, several different methods to get him to talk . . . .
. . .
Q. Well, you're the one that represented she put considerable effort into this; right? A. I believe she did, yes.
[Doc. 261, p. 104 lines 21-25, p. 105 line 1; p. 105 lines 14-16].

Ms. Moree's "considerable effort" involved only two visits with Petitioner in the Natrona County Jail, which lasted a total of 50 minutes. Mr. Skaggs believes such an effort was "considerable."

Q. Well, you're the one that represented she put considerable effort into this; right?
A. I believe she did, yes.

Q. Okay, and **[*115]** I'm asking you to describe it. So how many visits?
A. Pardon?
Q. How many visits did she make with Mr. Eaton?
A. As I told you, I know of two definitely.
Q. So two visits, in your view, is considerable effort?
A. Yes.
[Doc. 261, p. 105 lines 14-23].

Q. And then Ms. Moree shows up the first time on the 6th --
A. I see that.
Q. -- is that correct?
A. Yes.
Q. And so this is the, this is her first making of a considerable effort to establish that rapport?
A. I would assume so. I would assume that's her first visit overall.
Q. Yeah. I don't know where my underline went. There we go. And that visit began at 10:00 a.m. and ended at 10:35 a.m.; correct?
A. Yes, it did.
Q. 35 minutes total --
A. Right.
Q. -- correct? And I see you left about six minutes prior to that, it appears. Is that correct?
A. Yes.
Q. And then let's continue going down, looking for her next visit. Oh, here's her name again on June the 10th, 2003?
A. Yes.
Q. And she checked in at 13:27 hours and checked out at 13:43 hours; correct?
A. Yeah, she was with me.
Q. And that was a 15-minute-long visit; correct?
A. That's correct.

Q. And so just so we're clear, in your view her considerable effort took place within a total span of 50 minutes on two visits? [*116]

A. I think that was a considerable effort, yes, under the circumstances —

Q. By your standards --

A. -- under the circumstances, yes.

Q. -- that's a considerable effort?

A. Yes.

[Doc. 261, p. 107 lines 24-25; p. 108 lines 1-25; p. 109 lines 1-8(emphasis added)].

Ms. Moree did not agree with the characterization by Mr. Skaggs of her efforts to establish a dialogue with Petitioner as "considerable," and, in fact, did not recall any request by Mr. Skaggs she make such effort.

Q. I want to go back to your first efforts with Dale. Did you and Mr. Skaggs discuss, after your visit with Dale when he kind of shut down on you, did you talk about what happened and why it might have happened?
A. Yes.
Q. Did he give you directions to go back and make a considerable effort to establish a working rapport with Mr. Eaton?
A. No.

Q. Exhibit 175 is already in evidence. It's a visitation log. It does show one additional visit more than two months later on June the 10th of 2003, you and Mr. Skaggs, and it reflects that you entered the prison -- entered the jail at 13:27 hours and left at 13:43 hours, so that would be a 15-minute visit. Would you consider your visit with Mr. Eaton on that occasion a considerable effort **[*117]** to establish a working rapport with him?
A. No.
Q. In fact, did Mr. Skaggs ever direct you to make a considerable effort to do that?
A. No.
Q. Was there any attempt on your part to make a considerable effort to do that?
A. Uh, no.
Q. And after June 10th of 2003 there were no further visits of Mr. Eaton by you; correct?
A. Correct.

[Doc. 263, p. 71 lines 23-25; p. 72 lines 1-24].[13]

The visits by Ms. Moree with Petitioner were obviously not sufficient to establish either a "continuing interactive dialogue" nor a trust relationship with him. And even if Ms. Moree had been able to establish a productive dialogue and trust relationship with Petitioner, her success as a non-attorney member of the defense team "does not discharge the obligation of counsel" to keep the defendant apprised of the case development and progress as mandated by the ABA Guidelines.

Mr. Skaggs felt Mr. Neubauer had better rapport with Petitioner then he did. [Doc. 262, p. 72 lines 2-7]. He thus apparently assigned **[*118]** Mr. Neubauer the responsibility of communicating with Petitioner concerning the progress of his defense, including "signing off" on the way the defense would proceed. [Doc. 262, p. 72 lines 11-14]. Mr. Neubauer testified, however, Petitioner would not "talk to me about the case." [Doc. 262, p. 163 line 13]. Petitioner would discuss with him such things as the "oil field," as well as hunting antelope and fishing, and seemed comfortable doing so. [Doc. 262, p. 162 lines 10-25]. Mr. Neubauer agreed there may well have been reasons other than simply being stubborn or recalcitrant, such as malfunctioning brain and mental illness, which would explain Petitioner's failure or inability to provide information his defense team was requesting.

Q. Okay. Would you agree there are a lot of explanations for the behavior that you observed in Dale besides Dale simply being recalcitrant?
A. Absolutely.
Q. A mentally ill person might be distrustful?
A. I agree.
Q. A person with severe mood disorder might be unable to comply with your requests for information?

[13] Mr. Neubauer was unaware until the day before he testified during the evidentiary hearing before this Court Ms. Moree had visited Petitioner only twice before trial in the Natrona County Jail. [Doc. 262, pp. 198, 199].

A. Possibly, yes.
Q. Even though those requests to you seemed quite simple?
A. Yes.
[Doc. 262, p. 189 lines 4-14].

Q. Would you agree, having heard those **[*119]** experts testify and then what you've experienced with Dale Eaton, that a malfunctioning brain could have caused the problems that you or Wyatt Skaggs had been observing in Mr. Eaton?
A. Hmm, I, I suppose it's possible, yes.
Q. Your experts didn't rule that out, did they?
A. No.
Q. In fact, they said a malfunctioning brain is part of his condition.
A. I seem to recall that, yes.
Q. Would you agree that problems with concentration and thinking could cause the problems that you had been observing in Dale Eaton?
A. Yes.
Q. And your experts didn't rule that out either, did they?
A. No.
Q. Would you agree that Dale Eaton's response to your attempts to help him as you were trying to talk to him about the things you wanted to discuss with him as his attorney, could have been due to his hopelessness or suicidal thinking?
A. It's possible, yes.
Q. And the experts that were brought on board didn't rule that out either, did they?
A. No.
[Doc. 262, p. 195 lines 9-25; p. 196 lines 1-4].

Q. And certainly the difficulties that either you, Wyatt, or Priscilla Moree may have been experiencing with Dale Eaton are consistent with a major impairment in judgment, major impairment in thinking, or a major impairment in **[*120]** mood. Is that fair to say?
A. Yes.
[Doc. 262, p. 196 lines 19-24].

Mr. Skaggs' theory the inability or failure of Petitioner to provide needed information for his defense and mitigation of a death penalty was "willful and intentional" is significantly undercut by the fact other counsel representing Petitioner, both before and after Mr. Skaggs and his trial team, had the ability to work with Petitioner despite his mental illnesses and impairments, and thus acquire his cooperation in their representation of him.

Ms. Tina Olson[14] was lead counsel on the Wyoming Public Defender Office appellate team which represented Petitioner in the appeal of his conviction and sentence docketed in the Wyoming Supreme Court on August 27, 2004, [Doc. 263, pp. 145-150], as well as the *Calene* hearing in June, 2005. [Doc. 86-2, p. 2].

Ms. Olson's first attempt to meet with Petitioner at the Wyoming State Penitentiary was not successful as Petitioner "would not come out and talk to us." His case manager explained "we had come too late in the day. We had come in the afternoon after **[*121]** lunchtime." [Doc. 263, p. 185 lines 5-16; Exhibit 219-3]. She was eventually able to meet with Petitioner in April, 2005, after at least two prior attempts to meet with him failed because of road closures. [Doc. 263, p. 226 lines 10-22; Doc. 264, p. 175 line 10; Exhibit 249-5]. Petitioner explained at this first meeting with his appellate counsel why he had not met with her on October 7th.

Q. In your meetings with Dale Eaton did he ever explain to you why he did not meet with the team October 7th, 2004?
A. Yes.
Q. What did he tell you?

[14] Doc. 66-7 is a Declaration of Tina Kerin executed by Ms. Olson in August, 2010, prior to her marriage. [Doc. 263, p. 145 lines 22-24].

A. He actually told me that in that first meeting. He said that he had not been showered that day, taken to the shower that day, that he felt that he was dirty, um, and he was ashamed of that, and, uh, so he didn't want to try to meet with us that day.

[Doc. 264, p. 178 lines 4-12].

Petitioner also during his first meeting with Ms. Olson was very suspicious of her, expressing his belief she would be "just like that other one, just like that other one," referring to Mr. Skaggs. [Doc. 264, p. 175 lines 20-25; p. 176 lines 1-3]. Petitioner also at various times expressed to Ms. Olson his frustration with Mr. Skaggs.

Q. You talked about this briefly, but did there **[*122]** ever come a time during your meetings with Dale Eaton where he again would discuss Wyatt Skaggs and how he felt about Wyatt Skaggs?
A. Yes.
Q. What would Dale tell you?
A. Um, that, that Wyatt, uh, did not listen to him. Uh, that Wyatt, uh, disregarded -- that's my word, not his - things that Dale did say to him. That he had tried to do what Priscilla had asked him to do, because she had apparently asked him to make lists and so forth, um, but that Wyatt was frustrated with him, uh, well, I believe his word was mad at him for not being able to, uh, produce like a list of, a linear list of schools, a linear list of employers. Again, "linear" is my word. Um, that, um --
Q. And apologize for interrupting. When you say linear, like —
A. Chronology.
Q. -- a proper chronology?
A. A proper chronology. Basically it was just an expression over and over of kind of an anger and frustration that he hadn't been listened to and hadn't, um -- there was not a relationship there. I discerned no relationship there

[Doc. 264, p. 178 lines 13-25; p. 179 lines 1-10].

Ms. Olson, in her meetings with Petitioner, noticed signs of the same types of impairments which were also apparent to his trial team, but which were **[*123]** not recognized as a possible cause for his inability or failure to comply with their information requests. Ms. Olson indicted his speech was pressured and he has difficulty expressing himself. [Doc. 264, p. 176 lines 18-23]. He did not "stay on topic," and was prone to go off on a tangent. You had to be very gentle in keeping him on topic or it would be frustrating to him. [Doc. 264, p. 176 lines 23-25; p. 177 lines 1-17]. Ms. Olson stated Petitioner showed signs of mental impairments, including, in particular, intellectual disabilities. She questioned, based on her visits with him, whether Petitioner had any kind of organic brain damage. [Doc. 264, p. 179 lines 11-25; p. 180 lines 1-4].

Ms. Olson and her appellate team, notwithstanding Petitioner's apparent impairments, were able to meet with Petitioner and have him participate in attorney-client meetings.

Q. We'll talk a little bit about what you did in response to that here in a little bit, but I want to stick with your visits? Despite Dale's apparent impairments, when you or the team would meet with Dale, would he participate in the attorney-client meetings?
A. Yes.
Q. Other than that first time where he wouldn't come out.
A. Yeah.

Q. **[*124]** When asked, would Dale discuss life history topics with you, such as his employment or work history?
A. Yes.
Q. Schools?
A. Yes.
Q. Where he lived at various times in his life?
A. Yes.
Q. Friends?
A. Yes.
Q. People --
A. Well --
Q. -- he worked with?

A. Yes.
Q. You kind of hesitated with respect to friends. Tell us what's on your mind there.
A. Oh, he, he just, you know, he was, um -- he had a lot of interpersonal relationship difficulties, um, but you could tell he had a number of people that he was obviously very fond of. I don't know if they were really his friends or not, but certainly people he had known that he was very fond of that he had those types of feelings towards.
[Doc. 264, p. 180 lines 5-25; p. 181 lines 1-9].

Q. "During divorce, trying to make things better."
Do these notes reflect whether Dale seemed to be discussing with you his life history?
A. Yes, he was very open with us about his life history.
MR. HARRIS: Your Honor, I --
A. Not in a straight line, but very open.
[Doc. 264, p. 186 lines 3-8].

Ms. Olson and her team were, over time, able to gain Petitioner's trust, and she offered the reasons why.

Q. (BY MR. HARRIS) Over time did it seem you and your team were able to gain Dale's **[*125]** trust?
A. Yes.
Q. Did it take time?
A. Yes.
Q. And how did you do that?
A. We went to see him. We did what we said we would do. We, uh, tried to address some of the issues he was having at the prison. We did the things that you're supposed to do.
[Doc. 264, p. 186 lines 13-21].

Robert Pepin is an Assistant Federal Public Defender for the District of Colorado working in Denver. He has significant state and federal court criminal experience including death penalty cases. [Doc. 263, pp. 101-104]. He met Petitioner in 2002 when he was assigned to represent him on a charge of manslaughter arising out of the death of an inmate in the federal prison in Florence, Colorado. [Doc. 263, p. 105]. Petitioner was acquitted of all charges after a jury trial. [Doc. 263, p. 126; Exhibit 303-48].

Mr. Pepin, in his representation of Petitioner, found him to be a warm but challenging client. He found him to have significant limitations with his ability and comfort level in communicating. He would get easily frustrated and had limited basic communication skills. His thinking, his thought processes, were not at all organized. [Doc. 263, pp. 107, 108, 110]. These limitations clearly affected Petitioner's ability **[*126]** to assist his attorney. Mr. Pepin was, however, able to obtain Petitioner's assistance basically through patience.

Q. In spite of Dale's limitations, were you able to obtain his assistance?
A. I was.
Q. And how did you do that?

A. Well, with patience and with, uh -- I mean, by the time I represented Dale Eaton, I had been a lawyer for maybe 20 years. I had worked on death penalty cases. I'd worked with a variety of different kinds of people, people who had -- clients who had mental health issues sometimes who were suffering from extraordinary pressures from all different kinds of sources, whether it's family or the jail or wherever, and I had a pretty good idea that you just can't go in bullying someone like Dale Eaton. It was very, very obvious very early on that my approach was gonna have to be I sit, I try and get to know him, I try and listen to what he had to say, uh, tried to understand what was going on with him at a given moment, what he might be afraid of or frustrated with. We did a fair amount of work just trying to understand what he had gone through and what people thought of him and saw of him in the prison. We went back and talked to -- my investigator, I should say, went **[*127]** back and talked to people he had been there with, try to get perspectives on him, and then just tried to show the patience to hear what he -- what was going on with him and respond accordingly.
[Doc. 263, pp. 109 lines 7-25; p. 110 lines 1-5].

Mr. Pepin was able to establish a rapport with Petitioner who was eventually able to help with defense of the charges against him, in part by providing the names of persons Mr. Pepin could contact and talk with. [Doc. 263, p. 118]. Mr.

Pepin ultimately felt he had a good relationship with Petitioner. [Doc. 263, p. 114]. He also offered his philosophy he would never tell any client, including a difficult client, that he was the "decider" and if the client disagrees with a decision "that's tough." [Doc. 263, p. 112].

Mr. Pepin, during his representation of Petitioner, became aware his possible connection to the death of Miss Kimmell. [Doc. 263, p. 130]. After Petitioner was acquitted of the charges against him, Mr. Pepin attempted to contact whomever might be representing Petitioner on the charges in the death of Miss Kimmell in Wyoming. He eventually was contacted by Ms. Moree who indicated they were having problems communicating with Petitioner. **[*128]** Mr. Pepin offered to help. [Doc. 263, p. 135].

> I offered -- I learned that the trial wasn't that far away. I had been trying to find out why no one was contacting me about the fact that I had represented this man and had made offers of assistance. I felt I had information that would be important or could well be important to them. When she called, I made some inquiries concerning that generally, just that I hadn't heard from you and I was glad to hear from you. I told her about the fact that we had collected -- and I don't know if it was this date. I only recall one conversation with her. There may have been more, but I don't know if it was on this date -- that I had records that we had collected and a stack of them. I guess, from looking at a deposition of hers, there may have been about 10 inches of stuff that we sent her, and I know that we sent her a bunch of stuff. I kept my file out so that I could send it to this defense team, and it sat there forever, and finally I had someone to send it to. I told her about my relationship with Dale. I understood from talking with her that they were having problems communicating with him. I offered to help them communicate with him because **[*129]** I had a good relationship with him or I had had a year and a half or whatever it was before. I told them that we had done investigation that involved talking to people in the prisons in the background, I know something about building a life history and the detail you go into, and we had information that could contribute to that and that we could offer them to help them.

[Doc. 263, p. 134 lines 3-25; p. 135 lines 1-3].

Mr. Pepin never spoke to Mr. Skaggs, [Doc. 263, p. 132], and was more than a little surprised no one from Petitioner's capital defense team, other than Ms. Moree, had contacted him as an attorney who had successfully represented Petitioner.

> Q. Did it surprise you, regardless of your efforts to reach out to Dale's team, that you were never contacted as a previous attorney?
> A. Other than the contact by -- is it Ms. Moree?
> Q. Ms. Moree, yeah.
> A. Astounded.
> Q. Can you expand? Why were you astounded?
>
> A. These kinds of cases invariably involve emotional issues. I mean, you have whole communities who refuse to be involved, sometimes families, to be involved. It is not always easy to find people who have a little bit of a window into one of our clients in these circumstances, into them **[*130]** and into their capacity for sadness or remorse or compassion who are willing to work with them. I mean, it isn't that often. It's a struggle. And to have something sitting there in front of you, somebody saying I'll be happy to help, I mean, I don't want to take over your case, I'm happy to help, and to not even be contacted? It's astounding.

[Doc. 263, p. 135 lines 21-25; p. 136 lines 1-13].

Mr. Skaggs, as the acknowledged leader of Petitioner's trial team, quite clearly failed to develop, and arguably never attempted to develop,[15] the continuing dialogue and trust relationship with Petitioner which was a key part of providing him a competent defense. This failure is compounded by the fact he failed to take advantage of the offer of assistance by Mr. Pepin, an experienced criminal defense attorney, including death penalty cases, who had developed a good working

[15] The visitation records of the Natrona County Sheriff's Office for Petitioner indicate Mr. Skaggs visited Petitioner eleven times **[*131]** before trial while he was incarcerated in Natrona County. The first visit occurred on April 21, 2003, and last on January 12, 2004. The shortest visit was one minute. The longest was 3 hours and 14 minutes. The total time for all eleven visits over the nine month period was 7.89 hours. [Exhibit 175, pp. 17-20].

relationship with Petitioner, and had successfully defended him on manslaughter charges. The mandates of ABA Guideline 10.5, as applicable to the trial defense of Petitioner, were clearly not fulfilled.

ABA Guideline 10.7

The ABA Guidelines, in effect during Petitioner's trial, further mandate defense counsel conduct a thorough and independent investigation with particular emphasis on the penalty issues. The investigation should be undertaken notwithstanding the fact a defendant may not want evidence bearing on the penalty phase to be collected or presented. [ABA Guideline, 10.7, p. 76]. The Commentary points out the duty to investigate regardless of the desires of the defendant is well established by case law, citing *Williams v. Taylor, 529 U.S. 362, 365-396, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)*; *Caro v. Woodford, 280 F.3d 1247, 1255 (9th Cir. 2002) cert. denied, 536 U.S. 951, 122 S. Ct. 2645, 153 L. Ed. 2d 823 (2002)*; *Coleman v. Mitchell, 268 F.3d 417, 449-451 (6th Cir. 2001) cert. denied, 535 U.S. 1031, 122 S. Ct. 1639, 152 L. Ed. 2d 647 (2002)*; *Jermyn v. Horn, 266 F.3d 257, 307-308 (3d Cir. 2001)*; *Blanco v. Singletary, 943 F.2d 1477, 1501-1503 (11th Cir. 1991) cert. denied, 525 U.S. 837, 119 S. Ct. 96, 142 L. Ed. 2d 76 (1989)*; and *Voyles v. Watkins, 489 F. Supp. 901, 910 (N.D. Miss. 1980)*; *accord Austin v. Bell, 126 F.3d 843, 849 (6th Cir. 1997) cert. denied, 523 U.S. 1079, 118 S. Ct. 1526, 140 L. Ed. 2d 677 (1998)*. [ABA Guideline, 10.7, p. 80].

Preparation for the penalty phase of a death case requires "extensive and generally unparalleled investigation into personal and family history," including medical records, family and social history, educational history, military service, employment **[*132]** and training history, as well as prior juvenile and adult correctional experiences. [ABA Guideline, 10.7, p. 80, 81, 82]. This preparation and investigation should include interviews with family members, as well as anyone who might know or have known the defendant or his family such as neighbors, teachers, clergy, case workers, doctors, correctional, probation and parole officers. It should also include a review of the records for the defendant and his or her siblings, parents, and other family members from schools, social service agencies, juvenile courts, along with medical, military, criminal and correctional, birth, marriage, and death and alcohol and drug abuse treatment records. [ABA Guideline, 10.7, p. 84].

Mr. Skaggs "totally" agreed with these mandates of the ABA Guidelines, and acknowledged the United States Supreme Court had stated the Guidelines were a "well-defined norm."

> Q. Well, look at this language from *Wiggins versus Smith*?
> "The ABA Guidelines provide that investigations into mitigating evidence should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor."
>
> Is that **[*133]** correct?
> A. I agree with that totally.
> Q. Do you agree with that standard?
> A. Yes, I do.
> Q. All right. And, in fact, the U.S. Supreme Court referred to this very standard as a well-defined norm. Would you agree?
> A. Well, if the U.S. Supreme Court said it, it's hard to disagree, but I, I think that, uh, it's well written.

[Doc. 261, p. 34 lines 17-25; p. 35 lines 1-6

> Q. (BY MR. O'BRIEN) Taking you to American Bar Association Guideline 10.7:A on investigation, and I think we've talked about this language, the counsel at every stage have an obligation to conduct thorough and independent investigations relating to issues of both guilt and penalty. We're in agreement that that's an appropriate standard, aren't we?
> A. That is.
>
> Q. And we've talked earlier about *Wiggins versus Smith* which says that investigation into mitigation evidence should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravation -- any aggravating evidence that may be introduced by the prosecutor; right?
> A. That's correct.

[Doc. 261, p. 163 lines 6-19].

The preparation for the penalty phase of Petitioner's trial by his trial team, notwithstanding this clear acknowledgment by Mr. **[*134]** Skaggs of the appropriate standards, was significantly inadequate, and as a result completely failed to fulfill the mandates of ABA Guideline 10.7.

The foundations for the modern standards of death penalty defense are be found in *Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972)*, which struck down all death penalty statutes in the United States in light of the risk of arbitrary and capricious infliction of such penalty. Justice Stewart put it most succinctly: "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and un-usual."*Furman v. Georgia, 408 U.S. at 309* (Stewart, J., concurring). Each of the nine Supreme Court justices filed separate opinions, however, the common thread running through the five justices in the majority indicated the *Eighth Amendment's Cruel and Unusual Punishment Clause* is violated by a system of capital punishment in which a capital sentencer has unbridled discretion in choosing whether to impose the death penalty.

The Supreme Court in *Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976)*, authorized the resumption of capital punishment, however, the personal value and dignity of the common man and the scientific advancement in the understanding of human behavior concepts identified by Justice Brennan in *Furman v. Georgia, 408 U.S. at 296* are now two pillars of capital defense representation. The humanity of the accused, in the wake **[*135]** of *Furman v. Georgia*, is now a focal point of capital litigation. The United States Supreme Court has concluded, because "[t]he need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases," a capital sentencer must be allowed to consider "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio, 438 U.S. 586, 604-605, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978)*. Chief Justice Berger, writing for the full Court, concluded "that an individualized decision is essential in capital cases." *Lockett v. Ohio, 438 U.S. at 605*.

The Supreme Court has spoken "in the most expansive terms" when defining the scope of mitigating evidence necessary to individualized sentencing. *Tennard v. Dretke, 542 U.S. 274, 284, 124 S. Ct. 2562, 159 L. Ed. 2d 384 (2004)* (citing *McKoy v. North Carolina, 494 U.S. 433, 440-41, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990))*. The Court has emphasized the concept of mitigation extends far beyond factors related to a defendant's culpability in the underlying offense, striking down any requirement to establish a causal nexus between a mitigating factor and the crime. *Tennard v. Dretke, 542 U.S. at 284*. A casual nexus requirement "will screen out any positive aspect of a defendant's character, because good character traits are neither 'handicap[s]' nor typically traits to which criminal **[*136]** activity is 'attributable.'" *Tennard v. Dretke, 542 U.S. at 285*. The Supreme Court further noted "that impaired intellectual functioning is inherently mitigating," *Tennard v. Dretke, 542 U.S. at 287*, regardless of whether it contributed to the commission of the crime. The Supreme Court deems the unrestricted scope of mitigating evidence necessary to "be sure that the sentencer has treated the defendant as a 'uniquely individual human bein[g]' and has made a reliable determination that death is the appropriate sentence." *Penry v. Lynaugh, 492 U.S. 302, 319, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989)* (quoting *Woodson v. North Carolina, 428 U.S. 280, 304, 305, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976))* (alteration in original).

The referenced principles are important when analyzing the performance of Petitioner's trial counsel in light of the *Eighth Amendment* constitutional right to offer mitigating evidence.

> Consider, for example, the bedrock *Eighth Amendment* rule that a sentencer must be free to consider all mitigating evidence that the defendant proffers as a basis for imposing a sentence less than death, a rule designed at least in part to minimize the arbitrariness that comes when a sentencer treats cases that are fundamentally different as the same. Although it makes no express demands on counsel, the rule does nothing to fulfill its purpose unless it is understood to presuppose that the defense lawyer will unearth, develop, present, and insist on the consideration **[*137]** of those "compassionate or mitigating factors stemming from the diverse frailties of humankind."

Louis D. Bilionis & Richard A. Rosen, *Lawyers, Arbitrariness and the Eighth Amendment*, *75 Tex L. Rev. 1301, 1316-1317 (1997)*(footnotes omitted), and *Woodson v. North Carolina, 428 U.S. at 304*. The Supreme Court, after observing "[t]he lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing," has concluded "[i]nvestigation is essential to fulfillment of these functions."

Wiggins v. Smith, 539 U.S. at 524-525, *citing* 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed.1982).

Consideration of the fact Petitioner was facing the death penalty is thus essential to proper application of the familiar *Strickland v. Washington* ineffective assistance of counsel standard to the conduct of Petitioner's trial counsel. "First, the defendant must show that counsel's performance was deficient . . . . Second, the defendant must show that the deficient performance prejudiced the defense." *Strickland v. Washington, 466 U.S. at 687*. In assessing counsel's performance, "prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable."*Wiggins v. Smith, 539 U.S. at 522*, citing *Strickland v. Washington, 466 U.S. at 688-89*.

The Supreme Court in *Wiggins v. Smith* recognized counsel's duty **[*138]** in a death penalty case to conduct a thorough investigation of the client's background.

> The ABA Guidelines provide that investigations into mitigating evidence "should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989). . . . Cf. *id*., 11.8.6, p. 133 (. . . among the topics counsel should consider presenting are medical history, educational history, employment and training history, *family and social history*, prior adult and juvenile correctional experience, and religious and cultural influences).

Wiggins v. Smith, 539 U.S. at 524-525 (emphasis in original). Courts reviewing capital cases must therefore determine whether trial counsel satisfied his "duty to conduct the 'requisite, diligent' investigation into his client's background." *Wiggins v. Smith, 539 U.S. at 523* citing *Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)*. This assessment "includes a context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time.'" *Wiggins v. Smith, 539 U.S. at 522*, quoting *Strickland v. Washington, 466 U.S. at 689*. The Supreme Court explained:

> In assessing the reasonableness of an attorney's investigation . . . a court must consider **[*139]** not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.

Wiggins v. Smith, 539 U.S. at 527. Where an attorney is alleged to have failed to present substantial mitigation evidence, "we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of [the defendant's] background *was itself reasonable*." *Wiggins v. Smith, 539 U.S. at 523*. Where facts known to counsel suggest further investigation would be fruitful, the failure to investigate results from "inattention, not reasoned strategic judgment." *Wiggins v. Smith, 539 U.S. at 526*.

The Tenth Circuit Court of Appeals also recognizes the constitutional design of the adversarial process in criminal cases depends on a thorough, independent investigation by defense counsel.

> In order to make the adversarial process meaningful, counsel has a duty to investigate all reasonable lines of defense. *Nguyen v. Reynolds, 131 F.3d 1340, 1345 (10th Cir. 1997)*; see also *Strickland, 466 U.S. at 691* ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."). This duty is "strictly observed in capital cases." *Nguyen, 131 F.3d at 1347*.

Fisher v. Gibson, 282 F.3d 1283, 1291 (10th Cir. 2002). In other words, as Mr. Stetler, the national mitigation coordinator for the Federal Death Penalty Projects, testified, **[*140]** the investigation comes *before* the strategic judgment, not the other way around, "so that you can make fully informed decisions about what you are going to present."[Doc. 264, p. 101 lines 7,8].

The duty to investigate in a specific case may well include consideration of the aggravating factors on which the prosecution may rely.

> There is an obvious reason that the failure to examine Rompilla's prior conviction file fell below the level of reasonable performance. Counsel knew that the Commonwealth intended to seek the death penalty by proving

> Rompilla had a significant history of felony convictions indicating the use or threat of violence, an aggravator under state law. Counsel further knew that the Commonwealth would attempt to establish this history by proving Rompilla's prior conviction for rape and assault, and would emphasize his violent character by introducing a transcript of the rape victim's testimony given in that earlier trial. App. 665-666. There is no question that defense counsel were on notice, since they acknowledge that a "plea letter," written by one of them four days prior to trial, mentioned the prosecutor's plans. *Ibid*. It is also undisputed that the prior conviction **[*141]** file was a public document, readily available for the asking at the very courthouse where Rompilla was to be tried.

Rompilla v. Beard, 545 U.S. 374, 383-384, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005). The prosecution, prior to Petitioner's trial, gave notice, as discussed *infra*, it would use his Sweetwater County kidnaping and assault convictions in aggravation and gave the trial team the entire court file of the case, which clearly included mitigation, mental health and investigative leads. There would appear to be no reasonable strategic reason for failing to investigate a file which includes information the prosecution has indicated it will present at trial. As the United States Supreme Court has observed, "looking at a file the prosecution says it will use is a sure bet: whatever may be in that file is going to tell defense counsel something about what the prosecution can produce." *Rompilla v. Beard, 545 U.S. at 389*. The notice and disclosure by the prosecution prior to Petitioner's trial concerning his Sweetwater County convictions resulted in an unconditional duty on the part of his trial team to investigate the information they knew the jury was going to hear. Such an investigation arguably would have resulted in possible mitigating evidence as well as investigative leads which could result **[*142]** in further research.

> But once counsel had an obligation to examine the file, counsel had to make reasonable efforts to learn its contents; and once having done so, they could not reasonably have ignored mitigation evidence or red flags simply because they were unexpected.

Rompilla v. Beard, 545 U.S. at 391 n. 8.

Mr. Burr, an attorney who has spent almost all of his legal career defending death penalty cases, and was permitted to testify as an expert on the performance of capital defense teams, in discussing the clear line of decisions beginning with *Williams v. Taylor* and including *Wiggins v. Smith, Rompilla v. Beard, Sears v. Upton, and Porter v. McCollum, 558 U.S. 30, 130 S. Ct. 447, 175 L. Ed. 2d 398 (2009)*, offered these observations.

> [I]n all of these cases, starting with *Wiggins*, the centerpiece was the failure to investigate. The court has, has, to my knowledge, . . . never decided somebody was ineffective for failing to present a certain kind of mitigation. The premise starting with *Strickland* is if you have conducted a reasonable, reasonably effective investigation, then your strategy decision about what to present and what not to is almost untouchable. It's rare that the court would second-guess that. The whole question is what you investigate, because if you have -- again, the premise is if you have **[*143]** not investigated, you can't make a decision that's informed by the facts. And all of these cases dealt with failures to investigate. There was investigation done to a certain extent in all of them, to varying extents, and there were experts retained and some mitigation witnesses put on and experts put on in all of those cases, but the quantity and quality of mitigating evidence that was uninvestigated was so important that the court found ineffective assistance in all those cases.

[Doc. 265, p. 128 lines 19-25; p. 129 lines 1-12].

The concept of mitigation, as applicable within the confines of the *Eighth Amendment Cruel and Unusual Punishment Clause*, is quite broad, and there is, as noted by Mr. Burr, a direct relationship between a thorough psychosocial history and reliable psychiatric findings.

> The mental health experts can only do effective insightful work if they have good information to work with. And so the key to working with a mental health expert is having a kind of life history of the sort I've been describing that, that goes as far through the layers of this person's life as you can get with the time and the resources that you've got, and provides that information to experts who then sift through and make sense of it . . . with **[*144]** their expertise. And without that body of information, they're left with much smaller databases, as it were, or sets of facts to work with, and what they have to say often doesn't seem to fit the life of this person or just doesn't have much meaning. It sounds sort of contrived.

[Doc. 265, p. 136 lines 11-22].

A complete psychosocial history is important. "[T]he less complete your history is going in, the less accurate, reliable, and persuasive and meaningful the opinion is coming out. It's very, a very direct relationship." [Doc. 265, p. 139 lines 18-21]. The capital defense lawyer bears the responsibility for an accurate and complete psychosocial history. Ineffective assistance of expert is not a recognized legal concept.

> The investigation that goes into it and the working with experts is a lawyer's task. And there's not ineffective assistance of expert. There's ineffective assistance and a guarantee of effective assistance in the Constitution by counsel. And so it's the lawyer's duty to assure that, you know, an adequate mental health history is presented to the mental health expert.

[Doc. 265, p. 139 lines 8-14].

The results in *Rompilla v. Beard* are an example of the consequences of an incomplete **[*145]** psychosocial history. Three experts, without the benefit of a good life history for Mr. Rompilla, found him to be antisocial, yet after a thorough life history investigation, there was little doubt he suffered from fetal alcohol syndrome, borderline mental retardation, brain damage, and a serious mental illness, complicated by a extreme abuse and neglect in childhood. *Rompilla v. Beard, 545 U.S. at 391-393*. Such issues are at the core of capital mitigation work, and Mr. Skaggs agreed a psychosocial report, generally prepared by a qualified mitigation specialist, is an important tool in the defense of a capital case. "It's part and parcel of the mitigation, sure." [Doc. 261, p. 83 line 2]. Mr. Skaggs acknowledged the commentary to ABA *Guideline* 4.1 states the mitigation specialist should compile a comprehensive and well documented psychosocial history, based upon an exhaustive investigation which pursues investigative leads to mitigation evidence. [Doc. 261, p. 95 lines 20-22]. He stated, "I sure would like to have one," [Doc. 261, p. 94 line 11], and "Generally it's something I would aspire to, yes." [Doc. 261, p. 95 line 19].[16] The trial lawyers in *Wiggins v. Smith, Rompilla v. Beard, Sears v. Upton*, and *Porter v. McCollum* ***[*146]*** all consulted mental health experts, however, they neglected to give those experts important background information about the client.[Doc. 265, p. 129 lines 6-20].

Mr. Skaggs conceded other "very helpful" tools in the investigation, organization and presentation of mitigating evidence and themes are the genogram of the client's family, and a detailed chronology of the client's life. [Doc. 261, pp. 84-85; Doc. 262, pp. 44, 45]. These tools can provide a useful template for guiding a life history investigation and identifying mitigating themes. [Doc. 264, pp. 96, 97, 98 (psychosocial histories); pp. 102-105 (chronologies); pp. 105-109 (genograms)]. Neither Mr. Skaggs nor anyone on the trial team used these tools in Petitioner's case. [Doc. 264, pp. 98, 105, 109].

Mr. Skaggs also acknowledged the purpose of gathering documents was to develop leads for further investigation. He stated "[d]ocuments are very valuable" in a capital case **[*147]** investigation. They not only describe conditions and events, but also name people who might have relevant information was well. [Doc. 261, p. 200]. Ms. Moree used the term "dot-to-dot" to describe a similar investigative approach.

> Q. And explain what you mean by dot-to-dot?
>
> A. I mean it as I look at one document, it's going to give me a lead perhaps on the same direction or a different direction, and that's the path that I choose to take. When I, when I do that and I find something else, then I would, I would meet with Wyatt and, and show him what I found and, uh, and proceed from that point.

[Doc. 262, p. 227 lines 10-16]. Mr. Stetler testified the standard for capital defense calls for a cyclical approach to investigation, in which documents are gathered, leads are followed, and more documents are gathered and more witness interviews or re-interviews are conducted based on what is learned. [Doc. 264, pp. 115, 116].

Mr. Skaggs acknowledged the value of each of the referenced tools and approaches to the defense of a capital case, yet none of them were used in preparing Petitioner's trial defense. The trial team's files apparently contained numerous investigative leads in documents obtained **[*148]** from several sources. A more thorough investigation based on these leads would very well have provided, as discussed *infra*, significant mitigation evidence which the trial team did not discover, and thus could not present to the jury. Many of these documents, similar to what occurred in *Rompilla v. Beard*, were provided by the prosecution, with notice of their intent to use Petitioner's criminal history against him. "But looking at a file the prosecution says it will use is a sure bet: whatever may be in that file is going to tell defense counsel

[16] Mr. Skaggs also stated there are circumstances when an exhaustive investigation is excused, as was the case, in his opinion, with Petitioner, when he refused to cooperate, and his family members as well were not a resource. [Doc. 261, p. 94 lines 17-25; p. 95 lines 1-13].

something about what the prosecution can produce." *Rompilla v. Beard, 545 U.S. at 389*. Other documents, such as an incomplete copy of Mr. Eaton's middle school file from Meeker, Colorado, and Marian Eaton's admission and discharge summary at the Colorado State Hospital, were obtained by Ms. Moree. Most, if not all, of the mitigation evidence presented by Petitioner to this Court, and all of the witnesses who testified at the hearing before this Court, or whose testimony was filed by declaration, can be traced back to a lead which was contained in the trial team's files. A few examples of significant leads which were not pursued merit discussion.

Meeker, Colorado

Petitioner's **[*149]** trial team was "on notice" from multiple sources there were valuable mitigation witnesses to be found in the Meeker, Colorado area, including John, Syble, and Lyn Barney, Phyllis Barney Lake, and Brian Conrado. The trial team had a report by Dr. Donald Langsley to Weld County Judge Donald Carpenter regarding a psychiatric assessment of Petitioner. [Exhibit 223-14]. Mr. Skaggs conceded life history documents such as the report by Dr. Donald Langsley should be reviewed for leads to potential mitigation witnesses. [Doc. 261, p. 216 lines 11-24]. Dr. Langsley, in his report, advised Judge Carpenter Petitioner "...states that the only time in his life that he has ever been happy has been in working on the ranch of a Mr. and Mrs. Barney of Meeker, Colorado, over this past summer and after school during last spring." [Doc. 261, p. 220 lines 7-14; Exhibit 223-14, p. 2 ¶ 1]. Mr. Skaggs agreed the information related by Dr. Langsley "sure would" indicate Petitioner had a positive relationship with the Barneys. He conceded a thorough investigation would include going to Meeker to interview them, and if they had mitigating evidence, it would be reasonably discoverable. [Doc. 261, p. 220 lines **[*150]** 15-24]. Mr. Skaggs, however, had no idea what Mr. and Mrs. Barney could have added to the mitigation case. [Doc. 261, p. 220 line 25; p. 221 lines 1-2]. This report would, however, suggest to a qualified mitigation specialist Mr. and Mrs. Barney could well be potential mitigation witnesses, as well as provide insight into Petitioner's life history. As National Mitigation Coordinator Russell Stetler explained, he would want to interview them

> ...because of the content of this report. If this is the only time he's been happy, these people are going to have some insight into who he was at that time, maybe something about the dynamics in his own family that were different from his treatment when he was staying with them?
> Q. All right. Does it indicate that this is potentially a fruitful endeavor if you go to Meeker, Colorado?
> A. Yes, absolutely.
> Q. All right.
> A. I mean, the other thing you may be looking for here is, you know, the limits on their contact. You know, if only they had been able to keep him in their living environment for a longer period of time, maybe things would have turned out a little differently for him. So they're potentially a wealth of information.

[Doc. 264, p. 123 lines **[*151]** 25-25; p. 124 lines 1-13]. Richard Burr relates the same thought, testifying competent capital counsel would have pursued contacting the Barneys.

> Oh, yes, a statement like this where a child of * * * 16 says the only time he's ever been happy in his life has been working with these people, it says you've got to know what was going on to make his life so unhappy at that point and find out what was so good about that and what those people learned about him in his life, because they themselves could be rich historians about -- you know, he may have talked with them about how he saw his life at that point."

[Doc. 266, p. 45 lines 20-25; p. 46 lines 1-5].

Independent of Dr. Langsley's report, the mental health experts utilized by the trial team also uncovered information suggesting the Barney ranch as a possible source of mitigation evidence. Dr. Ash wrote to Mr. Skaggs on May 17, 2003.

> As far as depression, the first time that Mr. Eaton felt suicidal, was when he was 13 and working at a ranch nearby. It was getting close to the end of time that he would be working at the ranch and he would have to go home and be around his father. He snuck the .22 pistol from the fellow he was with and went **[*152]** out behind the building to put the gun to his head. The lady saw him and took the gun away.

[Doc. 261, p. 221 lines 12-19; Exhibit 16, p. 1 ¶ 5]. In light of Petitioner's age and circumstances, "the lady" was unquestionably Mrs. Barney. The episode was, in fact, verified by Mrs. Barney's daughter, Phyllis Lake, who testified, "Dale had taken a gun and had put it up to his head, and my mother saw him and made him stop. But he was tired of the torment that he had." [Doc. 268, p. 25 lines 5-7].

Dr. Gummow, in rather cryptic notes of her interviews with Petitioner, also refers to this or a similar incident, and mentions Petitioner had a history of suicide attempts. Though "never able to follow through," he had put a "gun to head multiple times." [Exhibit 169-64, p. 1863]. This incident was grouped with other attempts which included tying a rope around his neck and kicking a horse out from under him, and attempting to overdose on pills in Evanston. [Exhibit 169-64, p. 1863]. Dr. Gummow, in her notes, drew a line connecting "suicide" group of notes to the phrase, "Mrs. Barney, Meeker, caught him and fired him from ranch job." [Exhibit 169-64, p. 1863].

Another indication the Barney ranch in **[*153]** Meeker, Colorado, was a possible source of mitigation evidence was supplied through information from the trial prosecutor. Natrona County Deputy Lynn Cohee tape-recorded a telephone interview with Petitioner's sister, Sharon Slagowski, which was transcribed and provided to Petitioner's trial team in discovery. Deputy Cohee asked Ms. Slagowsky, "Do you know if [Dale] had any childhood friends?"Petitioner's sister replied, "Oh boy. I know in Meeker, the only ones that I can think of, is their names was Barney's, but that's..." [Exhibit H, p. 11]

There were thus four distinct leads, three by mental health experts and the fourth by Petitioner's sister, which suggested to the trial team the Barney ranch in Meeker, Colorado, was a potential source of mitigation evidence. John and Phyllis Barney, though living and able to testify at the time of Petitioner's trial, have, unfortunately, since died. Their son, Lyn Barney, died in a car accident after Petitioner's trial. Phyllis Barney Lake was, however, available to testify at the hearing before this Court to some of what her parents and brother could have said about Petitioner. [Doc. 268, pp. 6-32]. An experienced mitigation specialist would **[*154]** also realize a visit to the Meeker area, and conversations with the Barney family prior to Petitioner's trial, would likely have lead to other possible mitigation witnesses, a possibility recognized by Ms. Moree even though she was not asked by Mr. Skaggs to travel to the Meeker area. [Doc. 263, p. 43 lines 1-17]. Mr. Burr also recognized the same possibility.

> I know Ms. Moree last week talked about connecting the dots. That's another way to think of it, but very person you talk to and every record you talk to will lead you to somebody else or to some other records. And I mean, it's - on occasion you'll find somebody who doesn't have somebody else you can talk to, but almost never because they know somebody who knew your client, and they know somebody who knew your client. And it's the collection of all of those experiences with your client, observations of your client, and stories about your client that -- I mean, there are literally hundreds of them, thousands of them. It's those stories that . . . give us the ability to capture our clients' lives. And . . . it's capturing our clients' lives in the fullest and deepest way possible that give our clients the best chance of getting a **[*155]** life sentence.

[Doc 265, p. 133 lines 4-18].

Mr. Burr agreed the Declaration by Phyllis Lake provided compelling mitigation information with respect to Petitioner. He also noted, as stated in her Declaration, Mrs. Lake's parents, Mr. and Mrs. Barney, "were available and, both mentally and physically, back at the time of" Petitioner's trial, and they along with Phyllis' brother Lyn "would have been an important person for the team to talk to as well because he was more of a peer age person for Dale Eaton, and they had lots of interaction, and you would have wanted to talk with him." [Doc. 266, p. 46, 47, 48; Exhibit 33].

A reasonable investigation in the Meeker, Colorado area, based on the information regarding Petitioner's time living in the area, of which the trial team had actual notice, would have very likely produced additional mitigating witnesses, including Brian Conrado, a friend of Mrs. Lake. [Doc. 268, pp. 50, 54].

Mr. Conrado, when he testified at Petitioner's evidentiary hearing before this Court, was 66 years old and had lived in Meeker, Colorado for 61 years. [Doc. 268, p. 33 lines 13, 14]. He was 12 years old and in the sixth grade when he first met Petitioner. [Doc. 268, **[*156]** p. 40]. He offered the following observations of Petitioner during the time he was living in Meeker, observations which would have been appropriate mitigation evidence if Mr. Conrado had testified at Petitioner's trial.

> Q. Tell us about the Dale Eaton that you knew back when the two of you were kids in Meeker, Colorado?
>
> A. Dale, uh, Dale that I knew, uh, was a terrifically hardworking kid. He, uh, he was the brunt of all kinds of harassment and belittling. He was different. His parents didn't have money. In my view, he was a good kid.

[Doc. 268, p. 40 lines 16-21].

> Q. Did Dale do anything outside of school as far as extracurricular-type activities?

A. The only thing that I know that I can remember that Dale did, and it wasn't a school sanctioned, was a 4H electric program . . .

Q. And tell us what you remember about that 4H electric club. Was that something Dale did for that one year?

A. Actually, he did it for several years. And, um, I think that was probably the only organization or extracurricular anything that Dale ever did.

. . .

We would have the meetings and always had refreshments, and then we would go outside and wait for our parents to show up or whoever to take us back to town. And **[*157]** Dale in that time would, while we were waiting, would usually end up being harassed and belittled, unbeknownst to the leader. And -- the two leaders, I should say. And on one occasion I can remember that we depantsed him and ran Canadian thistles over his genitals.

[Doc. 268, p. 41 lines 15-19, 24,25; p. 42 lines 1-3, 9-16].

Q. How did Dale fit in with you and the other kids his age?

A. He didn't.

Q. Was he treated well, just -- or at least just, as just another kid?

A. No.

Q. How was he treated?

A. He was belittled.

[Doc. 268, p. 43 lines 2-8].

Q. Did you and Dale have anything in common?

A. I liked Dale, and down deep I felt sorry for Dale, but you got this peer pressure. And we both mowed lawns in the summer.

. . .

Q. Okay. Tell us about Dale's lawnmower.

A. Well, um, Dale I'm sure didn't -- his parents didn't buy him that lawnmower. There was a competing hardware store other than my father's, and the guy that owned it gave Dale a break. It was a red Toro. And he trusted Dale. He financed Dale on that lawnmower so that he could start his little business.

Q. Did Dale pay for that lawnmower? A. Yes, I'm sure he did.

Q. He believed in Dale and gave him a chance?

A. He did.

[Doc. 268, p. 43 lines 16-19; **[*158]** p. 44 lines 9-19].

Q. You talked about the Canadian thistles incident. Were you ever involved personally in any other sort of harassment or bullying of Dale?

A. I was with groups of people that were older than me. I had a neighbor that was three years older than me, and he had friends that were even older than that who had their licenses. Dale, when he mowed lawns, wow, he -- you know, you could see him, it might be 6:00, 7 o'clock at night when he was pushing his mower down the street heading home. And I can remember -- I wasn't involved 'cause, I mean, I was just - I wasn't as big as these guys by any means, and -- but I was in the car when it happened several times. And they'd pull over, and they would, pardon my language, threaten to beat the shit out of Dale if he didn't give them his money or his candy bars.

Q. Did you stand up for Dale on those occasions?

A. I didn't.

Q. Did Dale ever fight back to keep the money he had earned?

A. No, because he was, he was outnumbered. These guys were, were high school kids.

[Doc. 268, p. 45 lines 19-25; p. 46 lines 1-13].

Q. How did Dale react to the constant bullying?

A. He withdrew. He, he, he didn't socialize. He didn't -- I, you know, I can only **[*159]** imagine what went through his mind, but he, uh, he didn't retaliate. And I think about what could he do?

Q. Would anyone stand up for Dale when he was bullied?

A. No. No, um, I don't even think -- I don't even think there was an adult that, um, that did in the school system or -- I -- no.

[Doc. 268, p. 46 lines 20-25; p. 47 lines 1-3].

Q. Do you remember whether Dale had a younger brother who was handicapped?
A. I do.
Q. Tell us about that.
A. Well, I would see, uh, Dale would pull him around in a wagon. And he was, he was also in a wheelchair. I wasn't really, um, you know, I wasn't concerned what was wrong with him. Back then the polio thing was, was a big thing, and so I assumed he had polio, but I really didn't know what it was. And, you know, I feel bad, but I really didn't care.
Q. Where would you see Dale pulling his younger brother?
A. He'd be pulling him towards school.

[Doc. 268, p. 47 lines 13-24].

Mr. Skaggs stated, apparently in reference to Brian Conrado: "I would have used that witness that, that called me from Meeker, Colorado. Had I known about him, had he been reasonably available, I would have used him." [Doc. 262, p. 142 lines 1-13]. Mr. Skaggs and Petitioner's trial team **[*160]** would likely have found Mr. Conrado had they simply pursued the leads with regard to potential mitigation witnesses contained in their files.

The report by Dr. Donald Langsley to Weld County Judge Donald Carpenter regarding a psychiatric assessment of Petitioner, Exhibit 223-14, contains an additional reference to records which were not researched by the Petitioner's trial team. The very first sentence indicates "Dale Eaton was hospitalized at the Colorado Psychopathic Hospital from October 16, 1961, through October 26, 1961, for psychiatric examination and diagnosis." [Exhibit 223-14, p. 1; Doc. 261, p. 217 lines 9-14]. When asked if the referenced sentence suggested the possible existence of hospital records, Mr. Skaggs replied, "No, it doesn't tell me that at all. It tells me there probably was a record at one time." He then stated, after agreeing if the records existed in 2013, he could have obtained them in 2003, "[t]his particular situation I didn't want to develop." [Doc. 261, p. 217 lines 15-25; p. 218 lines 1-2]. He made his decision without even knowing what the records might reveal.

The records of Petitioner's ten-day evaluation at the Colorado Psychopathic Hospital (now the University **[*161]** of Colorado State Hospital, Exhibit 169, pp. 498, 504) do indeed exist, were obtained using a HIPAA-compliant release, and are in evidence as Exhibit 169-4 and 169-59. Exhibit 169-4 contains additional information with regard to Mr. and Mrs. Barney. The contents of those records are discussed *infra*.

Marion Eaton Hospital Files

Mr. Skaggs, being aware family mental health history was important, directed Ms. Moree to obtain the records concerning the involuntary commitment to the Colorado State Hospital of Petitioner's mother, Marian Eaton. Ms. Moree, as a result, received Exhibit L, a letter advising her Mrs. Eaton's records had been destroyed. The letter enclosed an admission/discharge summary of Mrs. Eaton's intermittent psychiatric hospitalization between March, 1962, and 1965, which indicated a diagnosis of chronic undifferentiated schizophrenia. [Doc. 261, pp. 200-202; Exhibit L, p. 1]. Mr. Skaggs, when asked if this document reflected significant family history, stated, "Well, it could have been a lot better . . . Schizophrenic reaction doesn't say very much." [Doc. 261, p. 202 lines 2-9]. "In fact, my belief was it wasn't particularly greatly significant without a whole lot of **[*162]** other records to back it up." [Doc. 261, p. 202 lines 16-18]. He made it clear, "...we wanted all those records." [Doc. 261, p. 203 lines 4-8]. The fact is the trial team could have obtained them. Mr. Skaggs, through his investigator, Ms. Moree, was aware Mrs. Eaton had been involuntarily committed, and the summary Ms. Moree received in fact so indicates. [Exhibit L, p. 6 "Admission Type: RE-Commitment (412)"; p. 10 "Type of Admission -Commitment"]. Mr. Skaggs acknowledged a judicial process would necessarily have preceded Mrs. Eaton's involuntary commitment, and the notation "Weld D.C. 84M" was a court file, however, he did not ask Ms. Moree to attempt to obtain that file. [Doc. 261, p. 203 lines 22-24; p. 204 lines 1-25; p. 206 lines 1-9]. He stated, "We stopped with that that piece of paper you got right there." [Doc. 261, p. 206 lines 11, 12]. He was thus unaware of what the file might contain, although he did agree the file could have referred to a physician and a local hospital from which records might be recovered. [Doc. 261, p. 205 lines 1-25]. He also admitted, however, a reasonable, thorough investigation would have included researching the district court file, and any hospitalization **[*163]** records from 1965 (which he opined "are not ordinarily available") discovered by such an investigation would be helpful. [Doc. 261, p. 206 lines 13-25; p. 207 lines 1-

18]. Petitioner's habeas counsel pursued this investigative lead, and obtained contains 214 pages of Mrs. Eaton's psychiatric hospitalization records. [Exhibit 176].

The letter advising Ms. Moree the records of Mrs. Eaton's involuntary hospitalization had been destroyed, Exhibit L, also identifies Mrs. Claude Thomison, complete with contact information in Greeley, Colorado, as a sister of Mrs. Eaton. [Exhibit L, p. 8]. Mr. Skaggs, when asked if the listing of Mrs. Thomison on a hospital record might suggest she had a close relationship with Mrs. Eaton, replied, "I'm not aware. We didn't pursue that lead." [Doc. 261, p. 207 lines 19-25; p. 208 lines 1-2]. Mr. Skaggs did not know Mrs. Thomison was Mrs. Eaton's sister, notwithstanding the fact she is listed as such on the hospital records. [Exhibit L, p. 8; Doc. 261, p. 208 lines 3-6]. Neither Mr. Skaggs nor anyone else on the trial team ever attempted to speak with Mrs. Thomison, and thus had no idea what she might have said on behalf of Petitioner. [Doc. 261, p. 208 lines **[*164]** 7-17].

Alan Eaton

Alan Eaton, the younger brother of Petitioner, was born with cerebral palsy. [Doc. 263, p. 47 lines 13-25]. Ms. Moree did not interview him. She was advised by their sister, Judy Mason, Alan never got along with Petitioner, and Mr. Skaggs thus never directed her to interview Alan. [Doc. 263, p. 39 lines 2-21; Exhibit 220-94].

> Q. All right. And this is the 10-day hospitalization that we were discussing as a result of Dr. Langsley's report. And Judy Mason had told you that Alan and Dale had never gotten along; correct?
> A. That's what she said.
> Q. And you passed that information along to Mr. Skaggs; correct?
> A. Yes.
> Q. And so without any further investigation of that issue, no effort was made subsequently to interview Alan Eaton; correct?
> A. Right.

[Doc. 263, p. 46 lines 22-25; p. 47 lines 1-7].

A reasonably thorough mitigation investigation would have established Alan was a potentially significant mitigation witness. The trial team, if it had obtained the records of Petitioner's ten-day hospitalization at University of Colorado State Hospital, Exhibit 169-59, would have learned Dr. R. T. Dean, reviewing Petitioner's siblings in order of birth, wrote in his report, "Next is a **[*165]** nine-year-old boy, in the fourth grade, who was born after a six months' pregnancy and has suffered from cerebral palsy since birth. . . . This child was born during Dale's first year in school. Dale reports that he has always tried to help and take care of this brother. The parents confirm this." [Doc. 263, p. Hrg. Tr. Vol. 3, p. 524, *quoting* Exhibit 169-4, p. 516].[17] Ms. Moree, when asked if this was sufficient reason to go talk to Mr. Eaton's brother, answered in the affirmative.

> Q. And so is that a reason to go interview Alan Eaton?
> A. Oh, yes.
> Q. Even assuming being a sibling wasn't reason enough --
> A. Yes.
> Q. -- this gives you additional reason. Does this give you reason to disbelieve or discount the information you were given by Judy Mason?
> A. Yes.
> Q. And so had you obtained the records, this would advise you that here's some information that would be helpful; correct?
> A. Oh, I wish I'd had this.
> Q. And, in fact, this is the kind of evidence that would be positive mitigation evidence to present --
> A. Absolutely.

[17] The University of Colorado State Hospital records also state: "One of the patient's (Petitioner's) younger siblings is a nine year old boy, who suffers from cerebral palsy which dates to birth after a six month gestation. The patient has always felt rather close to this sibling, and has tried to help and take care of him." [Exhibit 169-4, p. 504].

Q. -- on behalf of your client. And so you have no idea as you sit here today what Alan Eaton would have provided in the way of information or mitigation about his brother Dale, **[*166]** do you?
A. No, I, I was relying on, uh, false information.
Q. Is this the only example of misinformation you obtained from Judy Mason?
A. No.
[Doc. 263, p. 48 lines 2-23].

The trial team, in addition, if they had thoroughly researched the possibility of mitigation evidence in the Meeker, Colorado area, would have interviewed Brian Conrado and Margie Jackson, both of whom stated Petitioner pulled Alan to school and around town in a wagon. [Doc. 268, p. 47 lines 13-24; Exhibit 35, p. 2; Exhibit 195].

Mr. Burr recalls Mr. Skaggs' proffered reason for not interviewing Alan Eaton was "one of Mr. Eaton's other siblings, a sister, Judy I think, told the defense team that Alan and Dale didn't get along with each other." [Doc. 266, p. 48 lines 19-21]. He points out, however, competent capital counsel does not rely on a sister's assertion to forgo any sort **[*167]** of investigation. "Not at all. You take that information for -- at face value, and, you know, you -- when you're making contact with Alan, you know, you may exercise some caution or particular care in approaching him if that happens to be true. If it is true, you want to know why they're estranged from each other. If it's not true, then obviously you're going to talk with Alan about everything he can tell you about his brother." [Doc. 266, p. 48 line 25; p. 49 lines 1-6].

The trial team had a clear responsibility to interview Alan Eaton. He was a sibling of Petitioner, and information from at least two sources indicated interviewing Alan could produce helpful mitigating evidence.[18]

Family History

Mr. Skaggs, even though he did not know how many generations back a competent psychosocial history should cover, acknowledged family history is important because it "can bear upon how he was raised, how an individual is raised as a child. It can bear upon how they react as an adult. It can also furnish mitigation because it sometimes furnishes a reason for **[*168]** them acting out in the way that they did. So family history is critical. And I can't under --I can't underemphasize how critical that is." [Doc. 261, p. 121 lines 4-9, 10-15]. He was also aware the mental health history of other members of the family is relevant to his client's predisposition to inherit a mental disease.[Doc. 261, p. 121 lines 14-21]. Mr. Skaggs and trial team, nevertheless, did very little to unearth the extensive history of mental disease in Petitioner's family, apparently because, according to Mr. Skaggs, Petitioner didn't understand the importance of family history, or "didn't want to understand it." [Doc. 261, p. 121 lines 22-25; p. 122 lines 1-21].

Petitioner's reluctance to discuss his family history is not unusual. As Russell Stetler testified, family mental health history is often a closely guarded family secret. [Doc. 264, p. 116 lines 8-19]. "Sometimes the family members that one member will tell you not to talk to are going to be the ones who are ultimately most informative or most willing to reveal the family secrets." [Doc. 264, p. 127 lines 2-5]. Some family secrets are, in fact, so successfully kept the client or his siblings may not even be aware of **[*169]** significant information, just as Richard Eaton "had never heard anything about" the involuntary hospitalization of his Aunt, Zelma Eaton Smith. [Doc. 266, p. 225 lines 14-19].

It is fairly clear the trial team failed to use some of the most basic tools for uncovering mitigation evidence. *i.e*. a thorough psychosocial history, a chronology, and a genogram. Each of these tools has multiple uses, and one important purpose is to guide the life history/mental health investigation. Mr. Skaggs agreed all capital defense trainings have a heavy focus on the psychosocial history, [Doc. 261, p. 36 lines 9-23], and the mitigation specialist should be providing mental health experts with such a history of the client. [Doc. 261, p. 78 lines 19-23]. No such report, however, was prepared or attempted on behalf of Petitioner. [Doc. 261, p. 84 lines 16-23; p. 85 lines 1-3].

Mr. Skaggs likewise acknowledged a genogram to be an important, "very helpful" tool in preparing the defense of a capital case, yet again no such tool was brought to bear on behalf of Petitioner. [Doc. 261, p. 84 lines 3-25; p. 85 lines 1-

[18] Alan Eaton was alive at the time of Petitioner's trial, however, he died in November, 2008. [Exhibit 292, Death Certificate of Alan Lee Eaton].

3]. These two tools used together provide a template which guides the family history investigation **[*170]** by indicating relatives who are easily identified and located. A reasonable psychosocial history investigation, with or without specific notice of family members, will identify, locate and interview aunts, uncles, parents, cousins and living grandparents, as well as spouses and offspring of each generation. Mr. Stetler explained the genogram is a standard capital defense tool.

> Well, a genogram is just, you know, what we called in school the family tree, who are the parents, who are the children, who are the grandparents, the cousins. And you want to, in the context of a capital case, you want to map out all of those family members, and it's for a couple of reasons. It's a working document just to keep track of everybody in the family as your investigation proceeds, but then ultimately it may be an important piece of demonstrative evidence that you'll present if you want to show that something is running in the family.

[Doc. 264, p. 106 lines 1-10].

Petitioner's family members advised the trial team there were hereditary issues contributing to Petitioner's impairments. Loren Ferrins told Ms. Moree "Merle's father had at one time hit the gas man on his head, knocking him out, and Loren **[*171]** said, 'it was just handed down in the family.'" [Exhibit171-25]. The trial team was on notice there could be mental health issues on the Ferrins' side of the family as well. Marilu O'Malley, the sister of Petitioner's mother, advised Ms. Moree she and Marian (Petitioner's mother) had grown up on a homestead "about seven miles southeast of Moneta, and 'our house was dysfunctional.'" Exhibit 171-28. Equally significant was the suicide of Petitioner's brother, Daryl, on October 10, 1988, of which trial team was directly on notice since their mental health experts testified to it's the importance. [Doc. 262, p. 48 lines 17-25; p. 49 lines 1-22].

There was, however, no attempt to follow up on any of this information, apparently and primarily based on the fact Petitioner's trial team lacked a full-time mitigation specialist with the skills, acquired through training and experience, as outlined by Mr. Stetler and Mr. Burr, necessary to obtain an accurate and complete psychosocial history. A capital defense team must include someone, as explained by Mr. Stetler, who

> is experienced at gathering and analyzing life history records, multigenerationally, for all the family members, who is just going **[*172]** to do that automatically, and is going to have the skills to extract from records significant themes to formulate hypotheses about what may be going on based on what we see in the records, and also scrutinize records for what else to follow up, what other records does this particular document allude to, who are the people that I should interview based on finding their names in these records.

[Doc. 265, p. 62 lines 4-14].

> Mr. Burr offered his thoughts as well?
>
> Q. So what efforts does competent capital counsel make to obtain an accurate and complete psychosocial history, um, in a case?
>
> A. We need to have at least a full-time mitigation specialist working with us who is trained and experienced. The work of the mitigation specialist is expert work. Most lawyers are not capable of doing that kind of investigation because it requires the ability to -- much of the information we seek or look for is information that people don't easily disclose because it's about hard things. It's about, it's about abuse and malevolence and dysfunction. And, you know, all of us like to be perceived as competent and fully functioning, and the evidence that we suspect is there and almost always is there is the opposite, **[*173]** and people don't willingly talk about that. So it requires some real skill at getting to that information with people. * * * Most laypeople will -- I mean, they'll know if a relative has a mental health problem or has been sent to a doctor or has been hospitalized involuntarily, and they can describe their behavior, but if you simply go in and say, um, do any of your relatives have schizophrenia, they'll say no, and yet there are. And so you have to learn how to ask these questions in a way that will help people connect to the information they know and have and are willing to talk about. So part of it is overcoming a reluctance to disclose information. Part of it is helping people understand what kind of information you're looking for if it's there. And that requires some real skill. It is not something -- it's very different from so-called fact investigation, which is looking more at, you know, what happened and who did it, um, and that kind of evidence. This is a very different form of investigation. It requires patience and, uh, gaining the trust of people that you are talking with.

[Doc. 265, p. 139 lines 22-25; p. 140 lines 1-25; p. 141 lines 1-7]. The trial team did not include **[*174]** such a person, and even though Mr. Skaggs was actually aware of potential multi-generational mental impairments, no attempt was made to investigate them.

The trial team, with respect to pursuit of relevant family history evidence, even though Petitioner lived a good portion of his early years and young adulthood in Riverton, chose not to interview Petitioner's cousins who lived on nearby farms. "I just don't know if it would be helpful to talk to cousins." [Doc. 261, p. 213 lines 7-8]. Mr. Skaggs deliberately narrow scope of investigation thus automatically excluded three of Petitioner's cousins, Darlene Pursel, the daughter of Merle Eaton's sister Zelma, [Doc. 261, p. 215 lines 3-8], as well as Sandra Andrae and Lorena Altman, the twin daughters of Loren Ferrins. [Doc. 261, p. 213 lines 17-25].

Mr. Burr explained how mitigation investigation is much like "a series of concentric circles," beginning with the nuclear family but by no means ending there.

> I think of it as a series of concentric circles. You start working with the nuclear family, whoever's around. You know, and then you work out to, to paternal and maternal aunts and uncles and their children. And then you work out -- then **[*175]** at some place in these probably first two concentric circles are the grandparents on either side and the siblings of the parents, you know, your aunts and uncles.
>
> And in the course of that you're always looking for generational problems. So we've learned that you can't just look at your client's generation of, you know, himself or herself and the siblings, but the parental generation and their siblings and their parents, so it's the grandparents and their siblings, and try to understand mental health problems at all those generational levels and how they have seemed to sort of track through family lines, straight or, you know, not straight, but there often is some tracking. And we know, you know -- we've known for a long time, but now we know more and more that there is a genetic handing down at least of vulnerabilities to various kinds of mental illness through the genes that people inherit and even trauma. Trauma in previous generations can change the genetic pool enough that it gets passed down even though I, as a child, don't experience the primary trauma. You know, if I were a Native American, my parents might have traveled the Trail of Tears, but I didn't, but the trauma they **[*176]** experienced and the changes in their lives that the Trail of Tears brought could be passed down to me. And so it's very important to understand even the trauma that previous generations have been exposed to . . . .

[Doc. 261, p. 141 lines 10-25; p. 142 lines 1-13].

Mr. Burr also pointed out the decision by Mr. Skaggs not to locate and interview the three cousins of Petitioner, Darlene Pursel, Sandra Andrae, Lorena Altman, and his proffered excuse therefore he "just didn't know if it would be helpful to talk to cousins," is ***not*** a characteristic of reasonably competent capital counsel performance.

> No. You can't make that judgment without investigating, because you don't know whether a cousin . . . may be the client's best playmate. The cousin may be a frequent visitor at the client's home. The cousin may have the client over at his house where the client says to his parents, could I stay with you, I feel so bad when I'm at home. The cousins are people uniquely situated as age peers and as already having a relationship by virtue of blood and who often have the opportunity to have genuine insight and perspective and know about things that have gone on.

[Doc. 265, p. 204 lines 11-20]. Those **[*177]** same cousins might well have also witnessed severe abuse by a parent. [Doc. 265, p. 204 lines 21-23].

Mr. Skaggs and the trial team also ignored the possible relevance of the suicide of Daryl Eaton to a reliable assessment of Petitioner's mental condition. They did nothing to investigate Daryl's background or the circumstances leading up to and surrounding his death. They thus overlooked the opportunity to shed light on Petitioner's mental condition by investigating the suicide of his brother. No one from the trial team spoke to Daryl's ex-wife, Elizabeth Pryor, nor did they attempt to interview Daryl's widow, Terry Lerseth. [Doc. 263, p. 70 lines 15-25; p. 71 lines 1-19].

The trial team was also on notice, based on a phone call by Ms. Moree with Petitioner's son, Ed Eaton, in June, 2003, that he, Ed, had been a patient at the Wyoming State Hospital and had been diagnosed with Post Traumatic Stress Disorder and bipolar disorder. [Exhibit 169-103, pp. 1, 2; Exhibit 237, p. 4]. Ed indicated while he was a patient at the Wyoming State Hospital, he "was given Mellaril, Thioridazine, Desipramine and a host of others " he could not remember. [Exhibit 237, p. 2]. Dr. Ash testified Mellaril **[*178]** is "used as a mood stabilizer often in the manic state of bipolar disorder," and Desipramine "is a tricyclic antidepressant." [Doc. 267, p. 85 lines 16-22]. Both medications are consistent with a diagnosis of bipolar disorder. [Doc. 267, p. 85 lines 23-25; p. 86 lines 1-3]. Dr. Ash testified if this information regarding to bipolar

disorder in Petitioner's relatives had been available to him prior to trial, it would have altered his view of Petitioner's vulnerability to such disorder.

> Q. How would this information about Ed Eaton help your assessment of his father, Dale?
> A. Again, profound. A first-degree relative diagnosed with bipolar disorder in a man who shows symptoms of bipolar disorder.
> Q. So at this point we've identified two first-degree relatives -
> A. That's correct.
> Q. -- diagnosed with or who have bipolar disorder, one diagnosed, one not --
> A. In my opinion.
> Q. Yes. And the aunt diagnosed with bipolar disorder.
> A. Yes.
> Q. Does that alter the view of Mr. Eaton's genetic vulnerability to bipolar disorder that you had at the time of trial?
> A. Tremendously so, of course.

[Doc. 267, p. 86 lines 2-20].

Sweetwater County

The trial team had in their possession the Sweetwater County case file, **[*179]** including a presentence report, from Petitioner's conviction arising from his 1997 encounter with Scott and Shannon Breeden. This document as well offered mitigation investigative leads. [Doc. 262, p. 12 lines 16-25; p. 13 lines 1-12]. The report quoted Petitioner:

> He stated, "I can't remember a lot and don't really know when I worked or where. I do know the best job I had was with West Hills and Mark was my boss and he was just too nice. You need to remember I'd go through these spells and take off and not know what I was doing."

[Doc. 262, p. 13 lines 13-24, *quoting* Exhibit 171-7, p. 5]. Mr. Burr testified the trial team should have made an attempt to find "Mark with West Hills," "[a]nd to see if there are any employment records associated with it." [Doc. 265, p. 197 lines 19-25; p. 198 lines 1-16]. Mr. Skaggs agreed there are sufficient investigative leads in the paragraph from the Sweetwater County Presentence Report to find and interview Mark Dotson, an employer who was "just too nice" to his client. Those leads, however, were not followed, and no attempt was made to contact Mark Dotson. [Doc. 262, p. 13 lines 10-25; p. 14 lines 1-23].

Mr. Burr cited another opportunity for possible mitigation **[*180]** evidence in the quoted statement from the Sweetwater County presentence report, Exhibit 171-7, one which suggests a mental impairment which competent capital defense attorney would need to investigate further.

> That, that is yet another symptom that hasn't been recounted in the materials we've talked about, that it's -- when people sort of lose periods of their life in the sense that they recount it this way, "I'd go through spells and take off and not know what I was doing," this, you know -- something is happening. As far as we know, he's not an alcoholic, he doesn't go through blackout periods, but he is going through some sort of what mental health experts call a dissociative state which is you were unconnected from your experience, your realizing what you are doing, your laying down memories about what you are doing, your ability to recall later what you did. That in general is thought of as a dissociative experience, and that is . . . to me, it's a red flag to look into that as well.

[Doc. 265, p. 197 lines 24-25; p. 198 lines 1-12].

The Sweetwater County Presentence Report contained other possible mitigation evidence leads, for example, Kerry Rose.

> In 1993, the Defendant began dating **[*181]** Kerry Rose who was 45 years old. She had a six month old child at the time this relationship began and the Defendant reported that he loved the child as his own. Presently, the Defendant has no idea if he and Kerry still have a relationship. Kerry Rose presently resides in Kaliante [*sic*], Nevada (702) 726-3289.

[Exhibit 171-7, p. 5].

Ms. Moree did in fact talk to Ms. Rose by telephone, and after a brief conversation came away with the impression "Kerry sounds like a very nice person and she is willing to help Dale in any way she can." [Exhibit 171-36]. Ms. Moree wanted

Mr. Skaggs to bring Ms. Rose to trial because "she would be very, a very good witness for Dale Wayne." [Doc. 263, p. 56 lines 2-13]. Even Ms. Rose parents, Ron and Sally Rose, approved of her relationship with Petitioner, and would have provided positive information about him at his trial.

> I met Dale in Milford because he was working for Mark Dotson and also seeing Kerry Lynn. Kerry Lynn and her young daughter, Angela, were living with my wife and me at the time. Dale was a likeable guy. He never gaves us any reason to think different. He was polite and good to Kerry Lynn.
>
> . . .
>
> We had Dale over for dinner several times while **[*182]** he and Kerry Lynn were seeing each other. He was always polite and a good guy to talk to. It was clear he thought a lot of Kerry Lynn and Angela. I know Dale helped Kerry Lynn out with money from time to time even after they stopped seeing each other.

[Exhibit 200 - Declaration of Ron Rose].

> Ron and I met Dale when he was working for Mark Dotson in Milford, Utah. Kerry Lynn and Angela were living with us at the time, but Dale and Kerry Lynn met prior to that in Elko, Nevada. I don't remember why Kerry Lynn and Angela were staying with us.
>
> I liked Dale and he was good to my daughter. Dale thought a lot of Kerry Lynn and Angela, you could tell by the way he treated them. He was always kind and polite. He often had surprises for Angela, such as candy, toys and games. Dale helped out Kerry Lynn with money sometimes. Kerry Lynn told me Dale was always sending her money.
>
> We had Dale over to our home often while he worked for Mark Dotson. He came for dinner or to visit with us. He was polite and kind. He noticed our walk needed repair so he fixed it himself and also built us a new driveway. It was so good of him to do that for us, he didn't have to do such a thing. He did the work in his extra **[*183]** time and he worked hard to get it right. It was generous of Dale and we appreciated it. We liked Dale.

[Exhibit 201, p. 1 - Declaration of Sally Rose].

Kerry Rose was also an important direct lead to mitigation witness Mark Dotson. Ron Rose "met Dale in Milford because he was working for Mark Dotson and also seeing Kerry Lynn." [Exhibit 200]. Ron recalled Petitioner lived in his camper on Mark Dotson's property, and got pretty upset with co-workers who were stealing from Mark. [Exhibit 200]. The trial team thus had a second lead to Mark Dotson and the mitigation evidence he might be able to provide, yet he was not contacted. [Doc. 262, p. 13 lines 10-25; p. 14 lines 1-23].

Mr. Stetler stated, in addition to the above-referenced leads for Mr. Dotson, he would also show up on the Social Security Administration retained earnings report, which is one of the documents a life history investigator will go after "on Day One." [Doc. 264, p. 151 lines 8-19]. He further stated if the trial team, as reasonably competent counsel, had used the standard mitigation tool of creating an adequate life history chronology, Mark Dotson, through Kerry Rose, would "absolutely" have shown up on the chronology **[*184]** as well, so there were at least three different reasonable paths of investigation which led to Mark Dotson. [Doc. 264, p. 151 lines 19-24; p. 152 lines 1-8].

Mr. Stetler also noted Mr. Skaggs, in the *Calene* remand hearing, asserted he did not want to investigate Petitioner's work history because "[h]e seemed to think that he - -that Mr. Eaton lost all of this jobs because of assaultive behavior," a conclusion Mr. Stetler indicated, based upon his review of the material gathered for the Petition to this Court, was not correct. [Doc. 264, p. 152 lines 9-23]. The failure of the trial team to interview any of Petitioner's employers was neither reasonable or appropriate nor was it an informed conclusion in light of the fact there was no investigation at all of Petitioner's work history. A reasonable capital defense team would investigate before reaching such conclusions, and, in this matter, a reasonable investigation, before reaching any conclusions concerning Petitioner's work history, would have interviewed former employers and co-employees Jim Hoopes, Sandy Hoopes, Steve DuBry, Mark Dotson, and Daniel Dotson. Those interviews would have revealed the conclusion Petitioner had lost each of **[*185]** his jobs as the result of assaultive behavior was simply invalid speculation. [Doc. 264, p. 152 lines 21-25; p. 153 lines 1-25; p. 154 line 1]. Mr. Burr stated:

> a part of mitigation investigation is always reinvestigating prior offenses, either adjudicated or unadjudicated offenses, because you're always going to face negative stuff in your client's life. I mean, we all - every human being has done negative things. Our clients are the same way. They've done one, at least one horrendously negative thing which is what they're on trial for their life for, but they've also done a lot of really bad things generally. And you have to understand that because if you can't come to understand that and help the jury understand that, chances are your

> client is going to get sentenced to death. If you do understand it and help the jury understand it as fully as it can be understood, chances are your client will not get death. That's just -- we've learned that over the years.

[Doc. 265, p. 131 lines 21-25; p. 132 lines 1-10]. The trial team did not know what evidence they were sacrificing by failing to do a search for Mark Dotson, nor did they even know what evidence might result from an interview with **[*186]** him. The decision to not attempt to contact Mark Dotson can not be considered a strategic one as "[i]t was not informed." [Doc. 264, p. 153 lines 2-4].

Another valuable mitigation evidence lead apparent in the Sweetwater County Presentence Report, Exhibit 171-7, is Probation & Parole Officer Kimberly Bramwell's interview of Petitioner's brother, Richard Eaton, in which he displayed remarkable insight into his brother's life history and impaired mental condition.

> We don't want mom to be told about this because of her health. My dad was really abusive to Dale when he was a child. Dale is 10 years older than me so all I hear I hear from my sisters. I still notice my dad doesn't care for him still. Dale is doing better now that he is on this medicine. My other brother died because of suicide and Dale blames himself because my brother had asked him for some money and he did not get it to him before he killed himself. He is a kindhearted guy but he has a temper but the medicine has helped. He lived like a hermit after his divorce and then when my brother killed himself he just went on and on til he popped. He had said he had plans to go to the woods and take his life and when he saw this family **[*187]** he wanted them to kill him so they could have his van. He has always been there for me all my life so I try to be there for him. I was so young when he was growing up so I don't know much about him. I have got a pretty good relationship with him. My son was shot and killed here in Green River and Dale has a hard time with it. I don't think prison would be an answer for him. He is staying busy now with his job and when he's busy he's happy and when he couldn't find a job he got down and another problem he has is that he doesn't talk, 'he holds everything in. He needs to work and go to some counseling. When I heard about this I was totally amazed. He has taken off before so when I didn't see him for a while I didn't think nothing of it. I can never remember him consuming large amounts of alcohol he just has some depression problems.

[Exhibit 171-7, p. 4].

Mr. Stetler testified Richard should definitely have been interviewed in person."Q. The trial team dropped their pursuit of him as a witness because of one negative phone call. First of all, would you have started your investigation with a telephone call? A. No, I would have gone to see him." [Doc. 264, p. 155 lines 5-8]. "He's a full **[*188]** sibling, has a lot of information." [Doc. 264, p. 150 lines 15-20]. Richard Eaton described in a declaration the first contact he had with the trial team.

> Dale's crime and his prosecution have been very difficult for my family. We all have our issues about it. The high publicity and the facts surrounding the crime added to the trauma. Judy and Sharon are hurt by what Dale did because *their* images were tarnished. I was hurt by his crime because it is my image of Dale that is tarnished. I really looked up to Dale and respected him. It was in the middle of all that when I got a telephone call from Priscilla Moree, the investigator who worked for Wyatt Skaggs, asking me some very personal questions. I had never met this woman, and her approach really turned me off. On top of that, I then got a nasty letter from Wyatt Skaggs telling me that my brother's death would be on my head, and that really made me mad. No one ever came to talk to me in a way that reflected some understanding of what we were going through as a family. No one explained the legal process to us, no one ever talked to us about the evidence in the case, and no one attempted to explain to us what happened or why it might **[*189]** have happened. They started right in talking about personal, embarrassing things and I had no idea why that was necessary. It turned me off. If Mr. Skaggs had approached us with some sensitivity to what we were going through, things might have been different.

[Exhibit 40, p. 1].

Mr. Stetler described this investigative technique as "a textbook for how not to do it."

> Q. (BY MR. O'BRIEN) And here's the declaration of Richard Eaton that we have talked about in which Richard expresses his experience with the trial team, the phone call followed by a nasty letter from Mr. Skaggs, and really no communication with him. Is this a formula for failure of a capital trial team?
>
> A. Yes. This is, this is a textbook for how not to do it.

[Doc. 264, p. 156 lines 12-17].

The Sweetwater County Presentence Report contains a further mitigation evidence lead, as discussed *infra*, when it references Petitioner's decades of employment through the Operating Engineers Union.

> The Defendant has been a member of the Operating Engineers Union, Local 326 since 1972. In 1980 the union split and regathered [*sic*] as operating Engineers Union, Local 800 in Casper, Wyoming.

[Exhibit 171-7, p. 5].

Sandy and Jim Hoopes

Investigative **[*190]** leads for mitigation witnesses were also contained in the investigative reports of the Natrona County Sheriff's Office. One example is the interviews of Jim and Sandy Hoopes conducted in October, 2002, by Natrona County Deputies Lynn Cohee and Dan Tholson.

Ms. Moree, in a memo to Mr. Skaggs, related the fact Mrs. Hoopes told the deputies on October 10, 2002, she had known Petitioner for about 27 years, and her husband had known him even longer. Petitioner did welding work for them and had lived on their property. [Exhibit 220-97, p. 1]. Mrs. Hoopes had positive things to say about Petitioner, and perhaps had some mental health perspective as well. She described Petitioner as "'highly intelligent with his hands and with welding...I don't think he was coordinated to think a lot of things through...if he was working with something, he'd work with it until he got it done.' [She] ... 'thought Dale was a little slow' in his thinking." "Dale never lost his temper when he was around Sandy, and she says Dale was always nice and polite around her. Dale stayed with them for 3 or 4 months, but he wouldn't eat with them 'because he didn't want to put us out.'"[Exhibit 220-97, p. 1]. The statements **[*191]** by Mrs. Hoopes were clearly sufficient to put Mr. Skaggs on notice she was potentially a valuable mitigation witness who should be interviewed.

Ms. Moree also wrote a memo to Mr. Skaggs addressing the interview by Deputies Cohee and Tholson of James Hoopes on October 10, 2002, which also identified him as a possible valuable mitigation witness. Mr. Hoopes had worked with Petitioner for many years, and had positive things to say about him. [Exhibit 220-98, p. 1]. "Hell, he seemed real good to us...it was always the same old Dale around me all the time." [Exhibit 220-98, p. 2]. Mr. Hoopes also made several comments about Petitioner's hygiene, a possible characteristic of his mental impairments. "[O]nly thing I see was he didn't bathe often enough . . . a lot of times when he'd ride with me, you'd have to have the window down."[Exhibit 220-98, p. 2]. Mr. and Mrs. Hoopes lived in Lyman, Wyoming. [Exhibit 220-97, p. 1].

Mr. Hoopes was not interviewed by trial team. Mr. Skaggs, in fact, did not "know who Jim Hoopes is," did not know he had been friends with Petitioner for 30 years, and apparently did not know Mr. Hoopes had been interviewed by the Natrona County Sheriff's Department. Mr. Skaggs, **[*192]** even when made aware of this information, still did not think it would be productive to interview him because he "didn't know what the door would open."

> Q. Well, the police already knew about Jimmy Hoopes; correct?
> A. Pardon me?
> Q. The police already knew about Jim Hoopes; correct?
> . . .
> A. I don't know who Jim Hoopes is.
> Q. All right. So you don't know --A. I don't know.
> Q. -- that he is a good friend of Mr. Eaton who Mr. Eaton knew for 30 years? You don't know that?
> A. Don't know that.
> Q. All right. Although you did have an interview with Mr. Hoopes by Detective Tholson in which Mr. Hoopes told him that very thing, didn't you?
> A. I have no doubt that there's probably an interview of that, like that in there, and there's probably other witnesses who would probably say the same thing, sir.
> Q. And having an interview by the police of a person who says I've known Dale Eaton for 30 years would indicate that he has some relevant information about Mr. Eaton, wouldn't it?
> A. Well, I thought we were talking about his work history.
> Q. We're talking about witnesses. We're talking about people who knew Mr. Eaton who could come to court and testify and provide mitigating evidence on his behalf. Correct?

A. **[*193]** Okay. The mere fact that he knew him for 30 years, no, that's not helpful.
Q. And so you would want to put more with that, wouldn't you?
A. I'd want to know more.
Q. All right. And you didn't bother to learn more, did you?
A. With respect to him?
Q. With respect to Jim Hoopes.
A. With respect to who?
Q. Jim Hoopes.
A. No.
Q. All right. So you don't know what he says, what he would add to the mitigation case.
A. No.
Q. All right.
A. I didn't know what the door would open.

[Doc. 261, p. 225 lines 20-25; p. 226 lines 1-25; p. 227 lines 1-12].

Mr. Burr pointed out for Mr. Skaggs to have sealed himself off from the information Jim Hoopes could have provided, and to make judgments with regard thereto without having done an investigation, is the very kind of mistake the United States Supreme Court said in *Strickland v. Washington* doesn't get deference. [Doc. 265, p. 203 lines 6-10]. Mr. Burr explained:

Q. Would the same apply to Mr. Skaggs' statement that he didn't want to interview Jim Hoopes because opening the door to evidence that he got fired for assaultive behavior, that's something he wanted to stay away from?
A. No, again --
Q. Is that reasonably competent performance -

A. - - it's the same thing I've **[*194]** talked about with, with - and anybody, truly, anybody who knows Mr. Eaton at all for any period of time or in any, you know, strong relationship is going to have mixed information. And, you know, that's, that's true about most of our clients. It's true about all of our clients. It's true about all of us. I mean, none of us has lived pristine lives of virtue. And to want to stay away from those parts of the life that are not virtuous means that you don't understand that you have to understand that to understand that person.

[Doc. 265, p. 203 lines 11-25; p. 204 line 1]. Mr. Burr even described the reasons proffered by Mr. Skaggs for not having located and interviewed Jim Hoopes as nonsensical. "That makes no sense to me. Somebody who's known somebody 30 years who might be a parental-like figure who loved the person is one of the first people I'd want to go see or have my mitigation specialist go see." [Doc. 265, p. 205 lines 18-21].

Mr. Burr stated his opinion the decision by Mr. Skaggs to *not* investigate Petitioner's work history was neither based upon a reasonable investigation, nor consistent with a reasonable performance of capital counsel.

Q. So did that decision Mr. Skaggs made not **[*195]** to investigate appear to have been based upon a reasonable investigation having been done?
A. No.
Q. And does it appear to have consisted of reasonable performance of capital counsel?
A. No. You cannot avoid the bad things in your client's history and purport to understand your client and, therefore, get others to understand him.

[Doc. 265, p. 201 lines 12-20].

Mr. Burr pointed out:

[T]he court has been very clear that . . . counsel can make strategic decisions about the presentation of evidence . . . that . . . if they are reasonable, will be deferred to, but that counsel cannot refrain to investigate evidence simply because there may be a double-edged quality to it or . . . may appear to be only aggravating. The court has said you just can't make judgments about that effectively unless you know what the facts are, unless you've investigated. . . . You . . . can't know what's out there until you go look for it. * * * [T] the rule of thumb, I think, drawn from these cases [*Williams, Wiggins, Rompilla, Upton, Porter*, and *Sears*], and just as the standard of practice has evolved through, you know -- from really the late '80s and through the '90s and since, is that you've got to conduct the

most **[*196]** thorough investigation possible of anything that might be mitigating. Your client's life is the primary subject.

[Doc. 265, p. 129 lines 23-25; p. 130 lines 1-16, 25; p. 131 lines 1-5].

Mr. Burr suggested, with regard to the testimony by Mr. Skaggs he felt it would be too hard to find some of Petitioner's former co-employees and employers, "sounds like a lame excuse."

Q. Do you recall Mr. Skaggs also testifying here that he thought it would be too hard to find them, some of those co employees, some of those employers?

A. I do remember that.

Q. What's your perspective on that? Is that reasonable performance?

A. It sounds like a lame excuse to me. It's easy to find people. It was as easy then as it is today with all the computer databases that exist. And it sounds like he didn't want to find people because he didn't, he didn't want to learn what they had to say.

[Doc. 265, p. 201 lines 21-25; p. 202 lines 1-6].

The concern by Mr. Skaggs about "opening the door" to employment history, if it had any validity at all, would not preclude interviewing Sandy Hoopes, who did not know Petitioner in an employment context. The decision by Mr. Skaggs to not investigate or interview investigate Jim and Sandy **[*197]** Hoopes was not an informed decision.

Operating Engineers Local 800

A number of documents which could have been useful to reconstruct Petitioner's life history were provided to the trial team by the Natrona County Sheriff's Department. [Doc. 262, p. 15 lines 8-22]. The documents included a letter from the business manager of the Operating Engineers Union Local 800 Chapter, Steve DuBry. [Doc. 262, p. 16 lines 2-24; Exhibit 318, p. 55.[19] Ms. Moree also had developed an investigative lead for "Steve DuBay," whom she could not locate, but who was described as a friend and fellow worker of Petitioner. [Doc. 262, p. 17 lines 3-25; p. 18 lines 1-4; Exhibit 220-49, p. 1]. Mr. Skaggs noted DuBay and DuBry were located in Mills, Wyoming, "so it might be the same." [Doc. 262, p. 18 lines 6, 7]. Steve DuBry was thus apparently identified twice as a good friend of Petitioner having very possibly valuable mitigation evidence and was easily located through the address and phone number on the Operating Engineers Union letterhead. [Exhibit 318, p. 55]. No one from the trial team ever interviewed Mr. DuBry, thus the team had no idea what he could add to Petitioner's mitigation case. [Doc. 262, p. 18 lines **[*198]** 8-19].

Mr. Burr again points out, with reference to Mr. Skaggs' proffered concerns about "opening the door" to employment history, a reasonably competent investigation "absolutely" would include attempts to locate and interview employers, particularly since Petitioner, in fact, had such a history.

Q. Would reasonably competent investigation attempt to locate and interview employers?

A. Absolutely.

Q. Would reasonable -

A. You know, many of our clients don't have employers because they're young and they haven't had work, or they've just been on the margins of society for however long they've lived and, you know, they don't have Social Security records and they don't have employment records. This guy had some employment records, and he had a, not a conventional employment history but a real employment history. He had worked at a lot of things. And so there was, there was a body of information to tap into there.

[Doc. 265, p. 205 lines 22-25; p. 206 lines 1-9].

The Operating Engineers Union, Jim Hoopes, and Steve DuBry were **[*199]** resources for identifying other possible witnesses such as Johnny Miller [Exhibit 45], who knew Petitioner through his employment which was an important part of his life, yet no effort was made by the trial team to develop those resources. [Doc. 262, pp. 21, 22].

[19] The reference to Petitioner's numerous years of work through the Operating Engineer's Union also appears in the Sweetwater County Presentence Report. [Exhibit 171-7, p. 5].

Doris Buchta's Journal

Doris Buchta was acquainted with Petitioner when they were neighbors in Moneta, Wyoming. She kept a rather detailed journal containing numerous entries regarding the interaction between herself and her husband, and Petitioner. [Doc. 266, p. 33 lines 19-17; Exhibit 233]. She was listed by Ms. Moree as a potential mitigation witness based on her journal entries. [Doc. 220-91, p. 1]. Mr. Skaggs acknowledged Mrs. Buchta's journal contained entries regarding Petitioner helping her husband fix the brakes on his truck, and also install a new starter which Petitioner supplied. [Doc. 261, p. 186 lines 21-25; p. 187 lines 1-15; Exhibit 233, p. 2 - April 22; p. 3 - July 29]. Petitioner, on many occasions, also brought Mrs. Buchta gifts, including boxes of her favorite candy, jellybeans, ice cream, baskets of fruits and vegetables, as well as fish he caught. [Exhibit 235, p. 1 - May 14th, May 23rd, June 9th; p. 2 **[*200]** - April 20th and April 23rd; p. 3 - July 4th and December 25th]. It also appears he ate meals with them on a number of occasions, and simply "visited" on others [Exhibit 233, 1989 - September 24th, October 7th, December 15th; 1988- March 8th, 16th, 22nd, April 1st, 25th, May 14th, 23rd, June 23rd, August 16th, September 17th, 16th, October 3rd, 21st, 31st, November 15th, 29th, December 2; 1989 - April 20th, 21st, 22nd, 25th, May 9th, 11th, 17th, 18th, 20th, June 13th, July 19th, August 5th, and December 8th].

The prosecution took Doris Buchta's deposition to preserve her testimony against Petitioner at trial. She was, however, never interviewed as a mitigation witness, thus no attempt whatsoever was made to learn and develop what helpful mitigation testimony she might have been able to provide even though the trial team knew she was in very poor health. [Doc. 263, p. 53 lines 3-20].

Riverton Witnesses

Petitioner spent a significant portion of his life in the Riverton area, both as a young child and young adult. He and his wife, Melody, moved in with his family after their marriage. [Doc. 266, p. 112 lines 11-23]. Ms. Moree interviewed Marilu O'Malley, and Loren and Betty Ferrins, at their **[*201]** homes in Riverton. There were other potential mitigation witnesses in the Riverton area, including "Keith and Irba (Jeannie) Lange," identified as "friends of Dale's." [Exhibit 220-91]. The Langes, who Ms. Moree interviewed by telephone, had a positive impression of Petitioner. [Exhibit 253-48]. They stated Petitioner was always helpful and polite, and one time stopped to help them round up livestock (hogs) after they got loose. [Exhibit 253-48, p. 1; Doc. 261, p. 184 lines 14-20; p. 185 lines 11-17]. Mr. Skaggs discounted them as potential mitigation witnesses based on the fact "they wouldn't talk about Merle," Petitioner's father. [Doc. 261, p. 184 lines 13-17]. Keith Lange, however, did state "if they went over to Merle's house while he and Marion and the kids were having dinner, that Merle would make Dale get up from the table and stand eating in the corner so whoever was visiting could have Dale's chair at the table, and 'that didn't sit well with me.'" [Exhibit 253-48, p. 1; Doc. 261, p. 184 lines 23-25; p. 185 lines 1-3]. Mr. Skaggs admitted the statements by the Langes were not hurtful, yet then gratuitously added, "but I can imagine the cross." [Doc. 261, p. 188 lines 5-13]. **[*202]** He also admitted he could think of nothing which would render the Langes a bad avenue of investigation. [Doc. 261, p. 188 lines 5-13]. Mr. Skaggs further acknowledged "it's reasonable to ask a witness who knows your client if he or she knows other witnesses who might also know your client.: .... "Sure...just an investigation technique." [Doc. 261, p. 187 lines 16-23]. He, nevertheless, did not utilize this "investigation technique." He did not ask Ms. Moree to conduct an in-person interview with the Langes. [Doc. 261, p. 188 lines 14-19].

Mr. Skaggs also suggested they, the Langes, "don't know him (Petitioner) well enough, for number one, and number two, they simply don't know him." [Doc. 261, p. 186 lines 1-3]. Mr. Burr expressed his opinion such a suggestion was not a reasonable conclusion.

No[this was not a reasonable conclusion]. You know, a life lived as long as Mr. Eaton's has thousands of grains of sand in it, and each grain has the potential of helping somebody have some understanding about a person. And if you've got a report of just a generous incident like that, it does -- you know, however - whatever their relationship was, it's worth that grain of sand being known about **[*203]** and put into the jar. And, you know, you may not decide to call that fellow, but it may be something that a mental health expert learns about and the mental health expert can recount as part of the social history, because mental health experts can rely on hearsay because that's a part of what their profession allows them to do. So there are many ways in which information can come in short -- you may want to call that witness because if you went

> and talked to him you may have decided they're good people to call. But to seal yourself off from information and make judgments about it without knowing enough about it, without having investigated it, is the very kind of mistake that the Supreme Court said in *Strickland* doesn't get deference.

[Doc. 265, p. 202 lines 17-25; p. 203 lines 1-10].

Mr. Skaggs believed the lead to Keith and Irva Lange probably came from "Farrens, but that's just a guess." [Doc. 261, p. 188 lines 14-25]. Information leading to neighbors and friends of Petitioner in the Riverton area would not, however, have been hard to develop through Petitioner himself, Keith and Irva Lange, Marilu O'Malley, and Loren and Betty Ferrins, all of whom lived in Riverton at the time. A **[*204]** reasonable investigation would have identified Irva Lange, who lived more than 90 years on the farm next to the Eaton family farm; Terry and Donna Schmuck, who still work a farm nearby; and other good friends such as Tanis Manning and David Brewbaker. None of these witnesses were ever interviewed by Ms. Moree or anyone else on the trial team. [Doc. 261, p. 189 lines 23-25; p. 190 lines 1-25; p. 191 lines 1-21. S*ee also* Exhibits 37, 192, 197, 203, 239].

Jim and Sandy Hoopes, Steve DuBry, Tanis Manning, David Brewbaker, and possibly many others would have been interviewed by competent capital defense counsel.

> Q. Does that universe of people to be interviewed include coworkers, employers?
>
> A. Oh, yeah, once you get past relatives then you look for peer-aged friends, you look for teachers, you know, during, during preschool and school years, healthcare providers, pastors if people went to churches, social service agencies if they were helping the family in any fashion at all and, if your client's old enough to have worked, work situations or failures of work, military service. You -- those circles keep expanding outward to -- you're looking for people who have, either by relation and proximity, **[*205]** familiarity, friendship, professional relationships or work relationships, have had some unique opportunity to learn something real about this person, you know, not just ephemeral, not just an impression, but have had some real experience with this person. It doesn't have to be over years. It might be, but it could be over a significant period of time where something significant happened.

[Doc. 265, p. 142 lines 16-25; p. 143 lines 1-8].

The mitigation evidence investigation by Mr. Skaggs and the trial team lacks both scope and depth. The witnesses and evidence previously discussed, with the possible exception of Richard Eaton, involve evidence which trial team did not even attempt to pursue. The trial team performance shares similarities with the mitigation investigation found to be ineffective in *Ferrell v. Hall, 640 F.3d 1199 (11th Cir. 2011)*, although the lawyers who defended Mr. Ferrell interviewed 40-45 witnesses, *Ferrell v. Hall, 640 F.3d at 1229*, twice as many witnesses as interviewed by Petitioner's trial team.

The other similarity involves the mental health of the defendant. Mr. Ferrell's attorneys were found ineffective in part because, "despite Ferrell's obvious mental disabilities," defense counsel never asked "any of Ferrell's family -- the ones who **[*206]** were called to testify anyway -- about any topics related to Ferrell's mental health." *Ferrell v. Hall, 640 F.3d at 1228*. The performance of counsel for Mr. Ferrell, even under the deferential standard of review of the AEDPA, was found to be deficient.

> In the face of these obvious indicators that Ferrell had substantial mental health issues, we cannot say it was reasonable for the Georgia Supreme Court to conclude that trial counsel performed adequately and effectively in limiting their mental health mitigation investigation in the way that they did, or in failing to follow up on Ferrell's mental health as their representation proceeded.

Ferrell v. Hall, 640 F.3d at 1228.

The trial team, in addition, failed to perform competent interviews of the persons they did interview. Those interviews, for the most part, ignored family mental health history, and apparently operated on the flawed assumption expressed by Mr. Skaggs that family members should be willing to talk about mental illness and domestic violence. The more commonly accepted and understood wisdom, based on research in capital defense cases, is such issues are typically closely guarded family secrets. Mr. Skaggs, however, testified, "My experience has been that they're not. I know that I've heard **[*207]** that before, but my experience has been not." [Doc. 261, p. 212 lines 11-14]. His "experience," however, is not consistent with the experience of persons dealing with mental health issues in capital cases.

> Keep in mind that most people consider mental handicaps shameful and may be reluctant to reveal any signs of mental trouble. Like the client, they may think they are being helpful by minimizing, normalizing or rationalizing signs of mental illness in the defendant and his family. . . . Recognize that the tendency of a client's family and friends to minimize, normalize or deny mental illness is a barrier to achieving a reliable. social history. The necessity of overcoming this hurdle is the main reason you must carefully select a social history investigator who has the ability to probe these matters with sensitivity and respectful perseverance. It also makes it critical to interview people such as neighbors, ministers and teachers who are outside the client's intimate circle of family and friends, so you get a picture of the client's life that is both broad and richly detailed.

John H. Blume & Pamela Blume Leonard, *Principles of Developing and Presenting Mental Health Evidence in Criminal* ***[*208]*** *Cases*, Mental Health & Experts Manual, 8th Edition, Chapter 6, pp. 6-2, 6-3 (Kentucky Department of Public Advocacy, 2005).

Mr. Stetler offered a similar insight.

> Q. (BY MR. O'BRIEN) In paragraph 15 you mention barriers to disclosure of sensitive shameful information and how clients, their family members, and other witnesses often don't give you complete or even candid information the first time you talk to them. How common is it to encounter such barriers in the investigation of a capital case?
>
> A. Well, I think barriers are always there. Just as human beings we have psychological defenses that make it difficult to share sensitive information with total strangers. And then on top of that all of these kind of badges of social identity which define who we are also establish differences between members of the defense team and the, and the client or family members. You know, we have differences in terms of our backgrounds, our education, our jobs, our training, religion, politics, you name it. All of these things that help define who we are may become further barriers between ourselves and, and clients. And so those are things that we -- you know, you can't just wish them to go away. You **[*209]** have to acknowledge that they're going to be there, differences in education, differences in social values, politics, of course, race and culture in many cases. And by culture I don't just mean foreign nationals and, you know, the obvious cultural differences, but everybody comes from some sort of subcultural group within our society, and you need to, you know, recognize that that's gonna make it difficult for them to share some information. They're gonna view you as a stranger. They'll view you, Professor O'Brien, as the college professor, you know, that gives you a certain identity, as well as the lawyer. And so all of those are things that we potentially have to be aware of and find ways to bridge.
>
> Q. Does the fact that these barriers exist in virtually every case affect the staffing and performance of capital defense teams?
>
> A. Yeah, absolutely.

[Doc. 264, p. 44 lines 13-25; p. 45 lines 1-21].

Mr. Skaggs' failure to recognize the fact he and the trial team were probing very sensitive, emotionally charged subjects significantly impeded the mitigation investigation, preparation and presentation. Mr. Skaggs and the trial team failed to appreciate the fact natural barriers to discussing **[*210]** family issues might explain Petitioner's reticence in discussing his family life. Ms. Moree testified how Petitioner, during her first meeting with him, stopped cooperating with her, which she readily admitted was her fault.

> The -- your first meeting with Mr. Eaton didn't go very well, did it?
>
> A. No, it didn't, and that was my fault.
>
> Q. Why do you say that?
>
> A. Uh, because I went in rather cold. And as we talked before, my other cases with Brian Collins and Justin Sincock, they were, they were young, willing guys. And I really walked in with Mr. Eaton not knowing who I was dealing with, and I started off on absolutely the wrong foot. And, um, I've since kicked myself over that. I mentioned his sister Judy, and not knowing that he detested his sister Judy. And once I mentioned her name, it was as though a curtain came down. And I, I felt so, so bad after that because I, I really screwed that one up.
>
> Q. All right. There was a point at which Mr. Skaggs left the room and you were left alone with Mr. Eaton. Do you -- was that during this visit?
>
> A. Yes, and I had asked him to leave because I wanted to talk to Mr. Eaton. And I was using the same approach I had with these other two young guys who **[*211]** were very willing to tell me anything I wanted to know, and then I run up against someone like Mr. Eaton, and, uh, he was not receptive to me at all because of the way that I approached the meeting.

Q. Did you ask Mr. Skaggs to leave?
A. Yes, I did.
Q. Why did you do that?
. . .
A. Because I wanted to talk one on one with Mr. Eaton and to get a sense. And I went into this like I would like for you to tell me something about your background and, and if you could take some time, uh, and write down family members, where I might locate them, and employment history and the things that I usually said to these, these other clients in order to do the mitigation. And once I mentioned his sister Judy, it was really all over, and I take the blame.
Q. So there's some heavy emotional loading around that particular family member; is that true?
A. Yes.

[Doc. 262, p. 244 lines 10-25; p. 245 lines 1-23]. Mr. Neubauer attempted to engage Petitioner in discussion of his family, however, his efforts were as well not successful. "He just... never wanted to talk to about it. It just, it seemed like something unpleasant to him that he just didn't want to talk about." [Doc. 262, p. 164 lines 9-12].

Mr. Skaggs and **[*212]** the trial team also ignored the fact they were actually encountering those barriers with specific potential mitigation witnesses. Ms. Moree advised Mr. Skaggs in a memo Petitioner's sister, Sharon, "is a police dispatcher and although she told me she would like to be helpful, she is concerned that her neighbors and friends not know about her relationship to Dale because of her standing in the community." [Exhibit 253-59, p. 1 ¶ 2]. Ms. Moree, in another memo describing her interview with Petitioner's Aunt Marilu O'Malley, cautioned Mr. Skaggs "Marilu would like to testify before the other witnesses are allowed in the courtroom, because of the family dynamics. She would feel better about her testimony if it were not in front of the other family members." [Exhibit 213-47, p. 2].

The mitigation presentation by Mr. Skaggs and the trial team, as related by both Mr. Neubauer and Mr. Skaggs, did not turn out as expected. Mr. Neubauer testified to say the case "tanked" was "an understatement." It "completely tanked." [Doc. 262, p. 168 lines 24-25; p. 169 lines 1-4]. Mr. Skaggs stated "the abuse thing was a complete dud." The testimony of two family mitigation witnesses "was different from what **[*213]** they had told you before." [Doc, 262, p. 100 lines 16-20]. And as confirmed by Mr. Neubauer "we didn't plan on that, and no, I don't think there was a backup plan." [Doc. 262, p. 169 lines 5-8]. The shallow mitigation investigation was clearly a factor contributing to the implosion of the mitigation presentation which left Mr. Skaggs and the trial team without an alternative and reliable means to establish a pattern of childhood maltreatment as a mitigation theme.

The telephone contact by Ms. Moree of Richard Eaton, followed by a letter from Mr. Skaggs is a further example of the substandard approach used by the trial team to contact mitigation witnesses, and its resultant effect.

Do you know who Priscilla Moree is?
A. Yes, I, I remember a phone call from her. And, uh, I don't remember exactly where I was when I got that call, but I wasn't very happy with the phone call, with the insensitivity of the matter and not showing enough, you know, respect or anything to come person to person and talk about something like this, not over the phone. That's not a way to do that.
Q. You talked about the insensitivity of it. What was -- tell me more about the call. What was she asking you about?

A. **[*214]** She was asking things about our family that, you know, I'm not gonna talk to anybody over the phone about.
Q. All right. Personal things?
. . . .
Q. Embarrassing things?
A. Yeah. Asking about my mom, you know, and different parts of our life.
Q. Embarrassing things about your mother?
A. Yes.
Q. Had you ever met this woman before?
A. No. I have no clue what -- who she is or if it was even her that called, you know, because I had no, no clue who it was.
Q. How do you feel about being approached like that?
A. Well, I had a few calls from reporters, and I wasn't happy with that either, you know. You know, and somebody just calling me up out of the blue and, uh, start asking me stuff about our family, they have no business to know it.
Q. Did you have any way of knowing who she actually was other than what she said on the phone?
A. No.
Q. So in terms of your willingness to cooperate with her, were you gonna cooperate with somebody who -

A. No.
Q. -- approached you like that? Did you later receive a letter from a lawyer named Wyatt Skaggs?
A. Yes. . . . .

Q. (BY MR. O'BRIEN) I'm showing you what has been marked as Exhibit 173-4, a letter to you dated October 10th, 2003 from Wyatt Skaggs. Do you remember receiving **[*215]** this letter from Mr. Skaggs?
A. Yes, I do.
Q. And do you remember how you reacted to this letter?
A. I felt like he was putting the blame on me for not being a part of it.
. . . .
A. You know, that he was just pointing out and saying that I, I was putting Dale to death. And I've never met that man either, you know.
Q. How did that make you feel?
A. Made me mad.
Q. All right. Did it help at all toward your willingness to cooperate?
A. No. That even pushed me further away.
Q. Did anybody representing your brother at trial ever come and talk to you about the legal process?
A. I never seen anybody.
Q. Did they talk to you about, um -- well, I guess I don't have to ask that next question 'cause nobody talked to you is what I hear you say. Was there a time in which -- well, when -- let me back up and ask a question How did you feel about the fact that nobody involved in the case came to talk to you about the legal process?
A. I felt like they really didn't care.

[Doc. 266, p. 208 lines 12-25; p. 209 lines 1-25; p. 210 lines 1-25; p. 211 lines 1-3; *See also*, Doc. 68-10, p. 1].

Any attempt to interview a family member over the telephone about the subjects which must be broached in the investigation of a **[*216]** capital case invites failure.

The experience of Petitioner's former wife, Melody Cline, in her five-minute interview in Mr. Skaggs' office is also revealing.
Q. [BY MR. O'BRIEN] Did you ever meet with Mr. Skaggs?
A. [MRS. CLINE] I did.
Q. Where did you meet him?
A. Priscilla drove me to Laramie to Mr. Skaggs' office.
Q. And how long did that meeting last?
A. Maybe five minutes or so.
Q. All right. How were you treated by Mr. Skaggs?
A. Rudely.
Q. What makes you say that?
A. Apparently I didn't have anything to say that he wanted to hear.
Q. How did you feel after your meeting with Mr. Skaggs?
A. Dirty.
Q. Do you recall either Priscilla Moree or Mr. Skaggs asking you about your confrontation with Dale in March of 1988?
A. No. I . . .
Q. Looking back, when do you think that was in relation to the homicide of Miss Kimmell?
A. Looking back, I think it was same day.

[Doc. 266, p. 134 lines 23-25; p. 135 lines 1-16]. Mrs. Cline, when interviewed more thoroughly, and in a less hurried manner, was able to provide helpful and insightful information on many different mitigation subjects. She helped establish Petitioner's emotional state and stressors near the time of the homicide, and provided important information **[*217]** and investigative leads regarding Petitioner's family mental health history covering several generations, including their children. [Doc. 266, pp. 112 - 122].

Ed Eaton, Petitioner's son, was also contacted by the trial team, and had an experience similar to Richard Eaton's.

> The Natrona County investigators contacted me before my dad's trial. They wanted me to testify against him and I left for California so I wouldn't have to testify against him. I was contacted once by telephone by an investigator on my dad's defense team before his trial. The conversation was brief and much like the Natrona County investigators, she wanted to know whether my father was abusive to me and the rest of our family. I was angry and confused over what my father was accused of and the brief telephone conversation did not make me feel comfortable being forthcoming with a total stranger about myself, my father, or our troubled family history. Had she spent time with me and gained my trust, I might have talked with her and told her what I have told his current attorneys. I would have testified on my father's behalf.

[Exhibit 237, p. 4].

The performance of Mr. Skaggs and the trial team was, as observed by Mr. Stetler, **[*218]** based on the number of witnesses who were in fact interview either by phone or in person [Exhibit 322], narrow and limited.

> Q. (BY MR. O'BRIEN) In this slide, based on Ms. Moree's time records and her testimony, we've identified the number of witnesses -- or not the number of witnesses, rather we've identified by names the mitigation witnesses that she interviewed, on the right-hand column by telephone, on the left-hand column in person. Did you find any indication that any other members of the defense team interviewed any witnesses who aren't on this list?
> A. I didn't see anything supporting that, no.
> Q. Does this raise concerns about Mr. Skaggs' performance with respect to the mitigation investigation in this case?
> A. Yes. It's a narrow set of sources, and particularly when you consider that against the, you know, the potential universe of witnesses out there, including people who were identified in records.

[Doc. 264, p. 75 lines 13-25; p. 76 lines 1-3].

The mitigation investigation by Mr. Skaggs and the trial team resulted in only a "rudimentary knowledge . . . from a narrow set of sources," and as a result was "fell short of the standards for capital defense work," and was therefore **[*219]** deficient as measured against the ABA Guidelines.

> Counsel's conduct similarly fell short of the standards for capital defense work articulated by the American Bar Association (ABA)-standards to which we long have referred as "guides to determining what is reasonable." *Strickland, supra, at 688, 104 S.Ct. 2052*; *Williams v. Taylor, supra, at 396, 120 S.Ct. 1495*. The ABA Guidelines provide that investigations into mitigating evidence "should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989) (emphasis added). Despite these well-defined norms, however, counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources. Cf. *id*., 11.8.6, p. 133 (noting that among the topics counsel should consider presenting are medical history, educational history, employment and training history, *family and social history*, prior adult and juvenile correctional experience, and religious and cultural influences (emphasis added)); 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. **[*220]** 4-55 (2d ed.1982) ("The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing .... Investigation is essential to fulfillment of these functions").

Wiggins v. Smith, 539 U.S. at 524.

The trial team clearly did not adequately perform a thorough mitigation investigation.

> **Counsel must conduct a "thorough investigation—in particular, of mental health evidence—in preparation for the sentencing phase of a capital trial**." *Wilson, 536 F.3d at 1083*. "We recently had occasion to expound on this principle, drawing on a trilogy of Supreme Court cases— *Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)*, *Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)*, and *Rompilla v. Beard, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005)*—involving ineffective assistance at capital-sentencing proceedings." *Victor Hooks, 689 F.3d at 1201* (referring to the discussion in *Wilson, 536 F.3d at 1084-85*). We set forth "three important principles" that are derived from these cases:
>
> > First, the question is not whether counsel did *something*; **counsel must conduct a full investigation and pursue reasonable leads when they become evident**. Second, to determine what is reasonable investigation, courts must look first to the ABA guidelines, which serve as reference points for what is acceptable preparation for the mitigation

> phase of a capital case. **Finally, because of the crucial mitigating role that evidence [*221] of a poor upbringing or *mental health problems* can have in the sentencing phase, defense counsel must pursue this avenue of investigation with due diligence**.

Wilson, 536 F.3d at 1084-85 (emphasis added) (internal quotation marks omitted) (citations omitted); *see id. at 1085* (noting that "[o]ur own Circuit has emphasized this [due-diligence] guiding principle").

Littlejohn v. Trammell, 704 F.3d at 859, 860(emphasis added).

Mr. Stetler and Mr. Burr offered similar opinions.

> Q. You were brought into this case by Mr. Eaton's appellate counsel; correct?
> A. Correct.
> Q. Did they give you materials to review?
> A. Yes.
> Q. Based on those materials, were you able to form an opinion to a reasonable degree of certainty as to whether trial counsel's mitigation investigation was deficient?
> A. Yes. That was my conclusion.
> Q. All right. You anticipated my next question. You did reach that conclusion that it was, in fact, deficient?
> A. Yes, by the standards of 2003, 2004.
> Q. Did the appellate lawyers provide you with any new data pertaining to the mitigation case? A. I don't think they did.

[Doc. 264, p. 154 lines 2-16 (Russell Stetler)].

> Q. (BY MR. HARRIS) Okay. Do you have an opinion today, Mr. Burr, based on the standards of performance that applied to the mitigation function of capital defense **[*222]** teams during 2003 and 2004, whether the trial team here performed competently with respect to the investigation of Mr. Eaton's background and character?
> A. Yes, I do.
> Q. And what is that opinion?
>
> A. And that is that their performance was far below a reasonable performance. It was deficient under *Strickland*.

[Doc. 266, p. 77 lines 14-23 (Richard Burr)].

ABA Guideline 10.11

An additional ABA Guideline to consider when analyzing the performance of Petitioner's trial team mandates discussions by counsel with the defendant concerning the substance and purpose of the mitigation evidence to be presented during the trial penalty phase, and how to strengthen such presentation. The Guideline indicates counsel should consider witnesses familiar with defendant's entire life, from conception to sentencing, and use expert witnesses and supporting documentation to present medical, psychological, sociological, cultural, and other insights with regard to a defendant's mental and emotional state and life history which would help to explain or lessen defendant's culpability for the underlying offense. [ABA Guideline, 10.11, p. 104].

The Commentary to Guideline 10.11 indicates "areas of mitigation are extremely **[*223]** broad and encompass any evidence that tends to lessen the defendant's moral culpability for the offense or otherwise supports a sentence less than death." [ABA Guideline, 10.11, p. 107]. Counsel should thus construct a persuasive narrative outlining a defendant's extended, multigenerational history by presentation of evidence of defendant's complete social history from before conception to the present. [ABA Guideline, 10.11, pp. 107, 108].

Petitioner's trial team failed to fulfill their responsibility under this Guideline, primarily based on a chronology approved by Mr. Skaggs and presented by Dr. Gummow which was deficient and incorrect; their failure to provide Dr. Ash with an adequate and reliable life history; and their failure to offer evidence of Petitioner's remorse.

Incorrect and Deficient Chronology

Dr. Linda Gummow is a neuropsychologist who administered a number of neuropsychological tests on Petitioner. [Doc. 85-11, pp. 6, 11]. Her testimony at Petitioner's state court trial enumerated a number of stressors in his life at the time of the homicide, which included the suicide of his brother, Daryl. She utilized a chronology of stressors on a PowerPoint slide, which erroneously **[*224]** placed Daryl Eaton's suicide prior to the homicide of Ms. Kimmell. Mr. Skaggs had reviewed and approved the PowerPoint slide, and acknowledged it was incorrect.

Q. Did you prepare Dr. Gummow for her testimony?'

A. I certainly did.

Q. Did you discuss that issue with her?

A. You know, she prepared that chronology and gave it to me. And in all fairness to Dr. Gummow, she said, Review it for accuracy. I think I may have talked to her about some other issues in the chronology. We changed some things. But I just flat didn't catch that. I knew -- I knew that he died after the homicide, and I just didn't catch it, frankly.

[Doc. 85, p. 9 lines 14-25].

Q. Okay. So you may have had the death certificate?

A. Not may have. I did have the death certificate.

Q. You did have it. So you knew that chronology was wrong when you put it up, didn't you?

A. No, I did not know it was wrong. I just didn't catch it, as I've testified before.

[Doc. 262, p. 50 lines 9-16].

This was no small mistake by Mr. Skaggs, particularly in light of the fact he represented to the trial court jury the chronology had been well-researched.

Q. [BY MR. SKAGGS] Okay. What do you rely on for putting together the chronology for court?

A. [BY **[*225]** DR. GUMMOW] Usually written documents.

Q. Okay. And, also, statements and that sort of thing that have been written down?

A. Yes.

Q. Okay. And you also review background family records and also do that sort of thing to verify the information?

A. Yes. In this case, I reviewed the psychiatric records of Mr. Eaton's mother.

Q. Okay. And were you able to prepare a chronology -- I think I already asked you this. I apologize. Were you able to prepare a chronology for him?

A. Yes, again.

Q. Okay. Okay. Without showing this to the jury quite yet, was this basically what you did?

A. Yes.

Q. Okay. And is that the chronology you prepared?

A. Yes.

[Doc. 85-11, p. 13 lines 19-25; p. 14 lines 1-15]. Mr. Skaggs then asked Dr. Gummow to tell the jury "what this chronology entails," and she described it as "marker events in Mr. Eaton's life." [Doc. 85-11, p. 16 lines 5, 6]. Dr. Gummow reviewed in summary form various dates and events, until she got to 1987, the year prior to the homicide.

This was another very significant date. That's why I put it on here. Dale's brother asphyxiated himself with carbon monoxide sometime in 1987. I don't know the exact date. Dale blamed himself for this, because he believed that **[*226]** if he had loaned his brother some money that he had asked for, that his brother wouldn't have committed suicide. Whether or not that's an accurate understanding, I don't know. And then, of course, significant date here for our purposes is April 2, 1988, was when the body of Lisa Marie Kimmell was found in the North Platte River.

[Doc. 85-11, p. 25 lines 4-16].

The prosecuting attorney took advantage of the inaccurate chronology.

Q. [BY MR. BLONIGEN] Actually, from what he reported to you, the suicide of his brother wasn't having much impact on him at the time that he committed this crime, was it?

A. [BY DR. GUMMOW] I never specifically discussed that with him. I don't know whether it was still bothering him or not. MR. SKAGGS: Well, Your Honor -- excuse me -- actually, suicide of his brother I don't think happened until after --

Q. [BY MR. BLONIGEN] That's not what her chart says.

A. It was '87, is my understanding.

MR. SKAGGS: When was Torrington?

MR. BLONIGEN: '86.

THE WITNESS: '86.
MR. SKAGGS: Okay. So it happened afterward.
MR. BLONIGEN: After Torrington, yes, but before the homicide.
MR. SKAGGS: Oh, okay. I missed where you were at.

Q. [BY MR. BLONIGEN] Did you consider the suicide of his **[*227]** brother a significant event in his life?
A. I have no way to evaluate that.
Q. Did you do anything to confirm whether that information was accurate?
A. Just -- it was mentioned in reports. That's where I got the date from. I didn't get it from Mr. Eaton. Mr. Eaton didn't recall the date.
Q. Now, then we go back to 1988. And almost everything about what you saw happening in 1988 came from Mr. Eaton,' didn't it, specifically what was happening in 1988?
A. In terms of his self report of the situation, I did take that. And then like I said, I had the 1986 hospital report. That's all I had.

[Doc. 85-12, p. 32 lines 2-25; p. 33 lines 1-14].

Q. And one of the -- you said, when you were standing up here with this time chart, that one of the most significant events in Dale's life before the homicide was the suicide of his brother Darrel; is that correct?
A. That was my statement, yes.
Q. And that was listed as occurring on January 1, 1987; is that correct?
A. That's an approximate date. I only had the year. So when I have something like 1/1/87, it means that I don't know the exact date; and I put the year.

Q. Well, both you and Dr. Ash talked about this being an event that was affecting him at the time **[*228]** of the homicide, as part of his depression; isn't that true?
A. No, I didn't testify to that.
Q. [BY MR. BLONIGEN] Well, Doctor, did you ever bother to get a death certificate?
A. No.
Q. I would like to show you 1003, a simple thing to check on, a very simple thing to check on.
A. Not for me. I'm not an investigator. I wouldn't even be able to get the authorization to do this.
Q. Doctor, what day did Mr. Eaton's brother commit suicide, from that document?
A. October 10, 1988.
Q. So well after the Kimmell homicide; isn't that true?
A. That's true.

[Doc. 85-12, p. 46 lines 3-25; p. 47 lines 1-8]. The prosecuting attorney addressed this issue and the credibility of Dr. Gummow in his closing argument.

And perhaps the best indication of how Dr. Gummow testifies is the suicide of Mr. Eaton's brother. She made a big point with that board in front of this jury saying, Now, look at this; this is a really important thing. Then when she finds out there's a problem with it, Oh, that's not such an important thing; that doesn't really count.

[Doc. 85-13, p. 26 lines 9-15].

Mr. Skaggs has previously admitted "Dr. Gummow prepared that chronology and gave it to me,... But I just flat didn't catch that. I knew - **[*229]** I knew that he died after the homicide, and I just didn't catch it, frankly." [Doc. 86-5, p. 9 lines 18-25]. He then, however, speculated maybe his client was the source of the error. "I think that came from Mr. Eaton himself, from what he had told Dr. Gummow."[Doc. 86-5, p. 9 line 25; p. line 1]. His speculation is clearly inaccurate. Dr. Gummow testified she did not get the date from Petitioner. [Doc. 85-12, p. 32 lines 24-25; p. 33, lines 1-7].

Mr. Stetler explained a chronology is an important mitigation tool, however, the one compiled by the trial team was deficient, in part because it was incomplete, but also because events were not connected with a source. He examined the pretrial chronology, Exhibit 259, and observed "there are no sources. It's missing that crucial third column," which can create problems. [Doc. 264, p. 103 lines 17-25; p. 104 lines 1-5]. The chronology developed by the trial team was "short and incomplete and totally unsourced." [Doc. 264, p. 105 lines 14-18]. Mr. Stetler stated, in his experience, the mistake with regard to the date of the suicide of Petitioner's brother "makes the expert look incompetent. Very damaging. It looks sloppy. It makes you look **[*230]** like the facts that you're relying on are just not accurate." [Doc. 264, p. 105 lines 8-14].

The lack of a detailed and thorough investigation in Petitioner's mental health also made Dr. Gummow's diagnoses of depression and brain damage easily susceptible to cross-examination challenging both diagnoses.

Q. [BY MR. BLONIGEN] And you were saying that the depression is a common disability, isn't it?
A. [BY DR. GUMMOW] Yes, it is.
Q. Now, many people suffer from depression?
A. That's right.
Q. And they don't kill people, do they?
A. That's right.
Q. Now, many people suffer from minimal or minor organic brain damage. They don't kill people, do they?
A. That's right.

[Doc. 85-12, p. 37 lines 21-25; p. 38 lines 1-6].

A competent, thorough investigation and preparation of a psychosocial history would arguably have negated the challenges to the testimony by Dr. Gummow. Mr. Burr offered his insight into the problem.

Q. Again, do we have a similar problem with Dr. Gummow being exposed based on the fact that she's obtaining her psychosocial history from Mr. Eaton?

A. Well, and it's not just that, but -- because the, the brain damage is based on her testing, her neuropsychological testing and that's not something **[*231]** Mr. Eaton can malinger, but it's -- the larger question here is the absence of the psychosocial history that is now known made, made the two diagnoses that Dr. Gummow had reached easily attackable as, look, a lot of people have depression but they don't kill anybody, a lot of people have this kind of brain damage and they don't kill anybody, and she acknowledged it. So she was putting forward those, those disorders as reasons to mitigate, and in those simple questions the prosecution took the reasons for mitigation away.

Had she known this history, at least we will know from Dr. Ash and Dr. Woods when they testify, and I have looked at what they, you know, what they've reported in the wake of the new information and the new history, the diagnosis of Mr. Eaton would have been far different and would have involved disorders that are much more associated with people losing control and committing very violent acts . . . .

[Doc. 266, p. 76 lines 11-25; p. 77 lines 1-7].

Failure to Provide Dr. Ash With an Adequate and Reliable History

The inadequate investigation of Petitioner's background and life history also impacted the testimony of Dr. Ash, a defense mitigation witness at Petitioner's trial. **[*232]** [Doc. 85-8, p. 8 et seq.][20] He testified Petitioner had a life-long history of depression [Doc. 85-8, p. 25 lines 6-11]. He related the conditions in which Petitioner was living in March and April, 1988, which aggravated his depression.[Doc. 85-8, p. 26 lines 19-25; p. 27 lines 1-4].

Q. Okay. Now, did you have occasion to talk to him about his -- his environmental circumstances, his surrounding circumstances, the way that he lived in March and April of 1988?
A. Yes, I did.
Q. Okay. And, basically, how was he living at that particular time?
A. Mr. Eaton was living in the most abject of circumstances. He had lost his marriage, lost his family. He had lost his welding business. He had lost his job. He had lost his home, because he could not afford it. He had a home that would take 2- or $300 a month in Cheyenne. He lost that and was living in a -- a bus by himself. He was isolated, essentially, from friends; and he was isolated from family. He was in poverty. He was able to manage to feed himself, essentially, by scavenging cans out of dumps and selling them for money for groceries.

[Doc. 85-8, p. 25 lines 17-25; p. 26 lines 1-5].

Dr. Ash described an additional "stressor" which he believed, at the time of trial, occurred on the night Petitioner encountered Ms. Kimmell. Petitioner's ex-wife, Melody Cline, told him, in a phone call, he could not have their children over the Easter holiday, and she laughed when she told him he was not their biological father. [Doc. 85-8, p. 29 lines 18-25; p. 30 lines 1-17].

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[20] Dr. Ash is a board-certified psychiatrist [Doc. 267, p. 35 line **[*233]** 5] who testified as an expert before this Court.

Dr. Ash, on cross-examination, admitted, however, he had not talked with Melody Cline to confirm Petitioner's statement or history regarding the phone call which Dr. Ash viewed as "triggering" event for Petitioner's emotional crisis. [Doc. 85-8, p. 55 lines 1-6; Doc. 85-9, p. 21 lines 5-10]. The inadequate chronology was also an issue on cross-examination.

Q. [BY MR. BLONIGEN] And he told you when this confinement first began, the thing that really, really had him going was that phone call?
A. Yes.
Q. And that it was Thursday or Friday before Easter?
A. Yes.
Q. I'm going to show you what's been introduced as a calendar from 1988. Can you tell me what date Easter was in 1988.
* * *
A. That would be the 3rd of April.

Q. So Easter was April 3. Did you know Lisa Marie Kimmell **[*234]** disappeared on March 25?
A. I'm -- I'm not aware of that.

[Doc. 85-9, p. 25 lines 13-25; p. 26 lines 1-3].

The failure by the trial team to perform an in-depth mitigation investigation allowed the prosecuting attorney to challenge Dr. Ash's credibility in a manner similar to his challenge of Dr. Gummow. He argued to the jury, "[t]here is no way that that call could have been made around the time that Lisa was first taken. He was very insistent on that, though. That was the critical fact, is that phone call." [Doc. 85-13, p. 32 lines 15-18]. He stated "Dr. Ash is quite candid with you he didn't have all of the information. He has one source of information, Dale Eaton, who has given multiple stories now, who is a convicted felon, who has been through the mental health system innumerable times; and he's supposed to be our source of information." [Doc. 85-13, p. 31 lines 3-8].

The inadequate mitigation investigation by the trial team also exposed Dr. Ash to a challenge on cross-examination concerning his observation Petitioner was socially isolated and withdrawn at the time of the homicide. It is fairly clear the trial team did not provide Petitioner's experts with a number of significant mitigation **[*235]** documents, in particular the journal of Mrs. Buchta. This failure left Dr. Ash at a distinct disadvantage during cross-examination.

Q. [BY MR. BLONIGEN] Now, Mr. Eaton, when he spoke to you, describes a fairly miserable life at the time of early 1988; fair statement?
A. Yes.
Q. Okay. Were you aware that he was, on a frequent basis, visiting his neighbors?
A. At the time in the spring?
Q. Yes.
A. No.
Q. Okay. For instance, did you know there was a little old lady across the way that kept a diary?
A. I was aware of the people across the way. I had thought that they were getting involved with each other after this happened.
Q. Okay. Well, let's talk about that, then; because Mr. Eaton basically told you he holed up and didn't leave unless he just had to?
A. Yes.
Q. That's not an overstatement, is it?
A. That is not an overstatement.
Q. Okay. And so things that happened in March would be relevant, wouldn't they, March of 1988?
A. Yes.
Q. Okay. And, for instance, he also reported that he had a very poor economic status; is that true?
A. That's correct.

Q. Okay. So if she has a note that Dale visited on March 8 and paid the taxes on an adjoining property, that would seem somewhat inconsistent with what he **[*236]** told you, wouldn't it?
A. How much were the taxes?
Q. Well, I mean, I guess that's inconsistent two ways. He was going out and seeing people, that would indicate, wouldn't it?
A. He -- he had a hard time getting out seeing people, he said. That's correct.

Q. Okay. Were you aware there's another entry on March 16 that he had visited the Buchtas? Were you aware of that?
A. No.
Q. Were you aware that on March 22, he visited the Buchtas for two hours? Were you aware of that?
A. No.
Q. On March 24, were you aware that he had gone over and helped Mr. Buchta work on a car?
A. No.
Q. And this persisted after March 24, did it not, the depression, this period of horrible isolation?
A. In my opinion and from what I've been told, yes.
Q. Were you aware that he visited the Buchtas again on April 1?
A. No.
Q. Were you aware on April 11 that he wanted to visit, and he went over and visited them for six hours? Does that sound like he's keeping himself in isolation?
A. No, it does not.
Q. Finally -- there's a lot of these, but I think this is a relevant time period. April 25, were you aware that he went over and visited the Buchtas, again, for chicken dinner?
A. No.

Q. So he's maybe not quite as isolated as he led you **[*237]** to believe?
A. Those are more visits than I was aware of.
Q. Did they ever give you that to look at?
A. No.

[Doc. 85-9, p. 13 lines 5-25; p. 14 lines 1-25; p. 15 lines 1-24].

Dr. Ash expected Mr. Skaggs knew he would talk about Petitioner's isolation from other people around the time of the homicide. [Doc. 267, p. 70 lines 24-25; p. 71 line 1]. He has since reviewed Mrs. Buchta's journal, and notes there were eight contacts between Petitioner and the Buchtas in the seven or eight months from September, 1987, when Petitioner moved the bus onto the Moneta property, and the time of the homicide at the end of March, 1988. [Doc. 267, p. 71 lines 6-12]. He indicated this limited minimal contact did not affect his opinion with regard to Petitioner's isolation. [Doc. 267, p. 71 lines 13-15].

Dr. Ash also found Petitioner's extreme poverty relevant to his mental and emotional condition at the time of the homicide. The lack of an adequate life history investigation by the trial team again left Dr. Ash vulnerable to a cross-examination.

Q. [BY MR. BLONIGEN] Okay. He talked about employment. And you indicated that employment was a real problem for him at this time?
A. Yes.

Q. And I should say "at this **[*238]** time," I should say March of 1988, so we know which time we're talking about.
A. Yes.
Q. Were you aware that in job applications, he lists himself as sole proprietor of the business of Eaton and Sons during this time period?
A. I'm not aware of that.
Q. Okay. That's a little different than what he told you, isn't it?
A. What he had told me was that he had a business and that he lost it.
Q. Did he indicate he had that business until 1991?
A. No.
Q. Did he indicate that business was working and welding on equipment at mines and oil fields?
A. I was aware that he had a welding truck and was working -- and working in oil fields. I also was under the impression that he had lost that truck.
Q. Okay. That he had lost it completely; didn't own it anymore?
A. Correct.
Q. Would you be surprised to find that he owns several vehicles in 1988?
A. I would be surprised.
* * * *
Q. Were you aware that he had a welding truck that was still running?

A. No, I was not.
Q. Were you aware that he bought another welding truck shortly after that?
A. Shortly after?
Q. After March of 1988.
A. No.
Q. Were you aware that in May or June of 1988, he had the money to have the electricity hooked up to the trailer?
A. No.

[Doc. 85-9, p. **[*239]** 15 line 25; p. 16 lines 1-25; p. 17 lines 1-24].

Dr. Ash, because of the inadequate life history investigation, was also forced to admit Petitioner was capable of making choices about what he was doing with respect to the crimes involving Ms. Kimmell.

Q. [BY MR. BLONIGEN] Now, specifically, the State Hospital found that he did not have any mental condition that grossly and demonstrably impaired his perception or understanding of reality. Do you agree with that?
A. [BY DR. ASH] I do.
Q. Okay. So Mr. Eaton knew what he was doing at all times that evening, did he not?
A. At all times the evening of?
Q. Of the homicide -- or the - or the evening that he made contact with Ms. Kimmell and the following days.
A. He knew what he was doing, yes.
Q. Okay. And he was also able to make choices about his conduct - what his conduct would be, was he not?
A. Yes.

[Doc. 85-9, p. 5 lines 17-25; p. 6 lines 1-6].

Mr. Burr points out Dr. Ash was vulnerable based on the fact the trial team did not conduct a thorough psychosocial history. Such a history would have enabled Dr. Ash to respond effectively to the cross-examination. He could have, with adequate preparation, explained how Petitioner's choices were significantly **[*240]** undermined by his impairments.

Well, he's, he's vulnerable because he's providing -- he's agreeing with the prosecutor about critical issues, that is, that during the course of this crime he was able to make choices about what he was doing. And given all of the history that has been developed, the psychosocial history that has been developed since trial that your team has developed and that Dr. Woods has assessed and that, indeed, Dr. Ash has now assessed, that answer that he gave to the prosecutor was inaccurate because he did not have the information that in multiple ways says that Mr. Eaton's ability to decide what he was doing and to make choices was not impaired.

[Doc. 266, p. 69 lines 23-25; p. 70 lines 1-8]. Mr. Burr points to the following exchange as a further example of an inadequate investigation leaving Dr. Ash vulnerable to cross-examination suggesting Petitioner is a malingerer.

Q. [BY MR. BLONIGEN] Now, in addition to that - my associate makes a good point. By 'malingering,' we obviously mean that an individual is reporting symptomatology that may not be genuine?
A. [BY DR. ASH] That's correct.

Q. And in legal situations, that's particularly a problem if the person who is **[*241]** in the legal problem exaggerates their symptomatology?
A. That's correct.
Q. Or exaggerates the report on their history?
A. That's correct.
Q. And wouldn't it be a fair conclusion from this evaluation that those folks didn't find Mr. Eaton to be a very accurate historian?
* * *
A. There are two parts to the answer. One, that they found him malingering in terms of the dementia. They did not find him malingering in terms of the depression.

[Doc. 85-9, p. 6 lines 7-25; p. 7 lines 1-8].

Mr. Burr once again offers his perspective.

[T]he whole question of malingering arises when an expert bases his or her opinion entirely or almost entirely on the reporting of the client or the patient, of the defendant in this case, not only reporting to him but reporting to previous mental health experts. And in the previous evaluations that were being referenced here . . . of Mr. Eaton he was the

> primary historian. You know, he was the primary provider of information that then the experts used to make a diagnosis or reach conclusions.
>
> So any, any time an expert relies on that person as the primary source of information, the question of malingering naturally arises because malingering is exaggerating symptoms in order **[*242]** to gain something, and here in criminal proceedings we know what you're trying to gain. So there's no way for an expert to refute malingering or even know whether there is malingering unless he or she has a much larger history. * * * That's what was happening here with Dr. Ash.

[Doc. 266, p. 72 lines 10-25; p. 73 lines 1-3].

Dr. Ash, prior to his testimony before this Court, was provided Petitioner's life-long Social Security Administration record of earnings. [Exhibit 267].

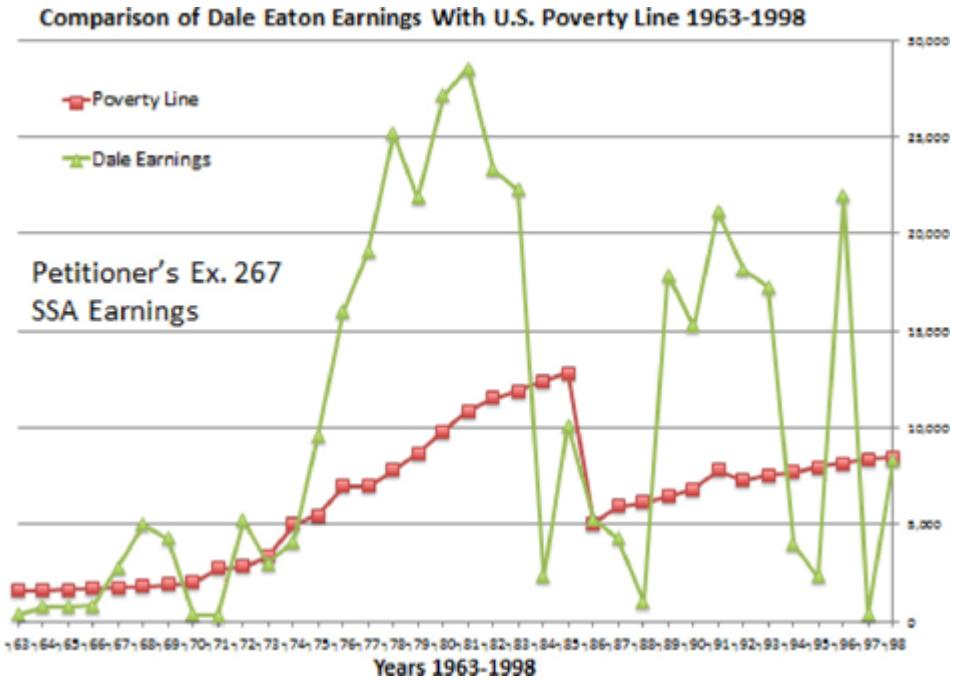

Exhibit 328, Slide 24, compares Petitioner's SSA earnings and the U.S.D.A. poverty level year-by-year. Dr. Ash explained the significance of this data to his findings.

> I think it helps to, to give us a picture of his ups and downs with his moods. It I think is quite dramatic that in 1988 it's very close to zero. I believe the figure actually is like $900 and something for the year. And also in 1997 that it is at zero.

[Doc. 267, p. 107 lines 21-25]. The income low points correspond with both the homicide of Ms. Kimmell, and the rather strange assaultive encounter with Scott and Shannon Breeden. This information "would have been of great help" in explaining to the jury the depth of Petitioner's depression. [Doc. 267, **[*243]** p. 108 lines 1-24].

Evidence of Petitioner's Remorse

Dr. Ash, at the request of Mr. Skaggs, interviewed Petitioner concerning the circumstances of the homicide of Ms. Kimmell. Dr. Ash, in his May 17, 2003, report to Mr. Skaggs, included this description of Petitioner as he described the homicide of Ms. Kimmell, and the death of the man he killed in prison.

> As he talked about this, as well as a man that he had killed in prison. He was filled with horrendous agony and remorse. He teared up on a number of occasions, his face was held in and he clenched his teeth and his hands.

[Doc. 66-6, p. 2]. Dr. Ash stated his opinion Petitioner was displaying "[g]enuine, deep, powerful remorse." [Doc. 267, p. 66 lines 16-21]. Dr. Ash, at trial, at the request of Mr. Skaggs, recounted what Petitioner had told him with regard to the homicide

of Ms. Kimmell. [Doc. 85-8, p. 38 lines 12-25; p. 39-41; p. 42 lines 1-8]. Mr. Skaggs, however, failed to ask Dr. Ash anything about his observations of Petitioner's remorse when recounting the homicide. [Doc. 267, p. 67 lines 10-12].

Deficient Performance - Conclusion

The United States Supreme Court, in 2011, in *Harrington v. Richter, 562 U.S. 86, 131 S.Ct. 770, 178 L. Ed. 2d 624 (2011)*, reiterated its philosophy on deficient performance . . . first **[*244]** set out in *Strickland v. Washington*.

> To establish deficient performance, a person challenging a conviction must show that "counsel's representation fell below an objective standard of reasonableness." *466 U.S. at 688, 104 S.Ct. 2052*.
> . . .
>
> The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Strickland, 466 U.S., at 690, 104 S.Ct. 2052*.

Harrington v. Richter, 562 U.S. 86, 131 S.Ct. at 787, 788, 789, 790, 791. *See also, United States v. Rushin, 642 F.3d 1299, 1306, 1307, 1308 (10th Cir. 2011)*.

The Court has also offered this explanation of the "deficient performance" . . . and its relationship to the AEDPA:

> The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom. *Strickland, 466 U.S., at 690, 104 S.Ct. 2052*.

Premo v. Moore, 562 U.S. 115, 131 S.Ct 733, 739-740, 178 L. Ed. 2d 649 (2011)(quoting *Harrington v. Richter, 562 U.S. 86, 131 S. Ct. at 788*).

The Supreme Court has further concluded, the American Bar Association guidelines in effect at the time of the representation identify the appropriate "prevailing norms" which reasonably diligent attorneys would follow.

> The first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id., at 688, 104 S.Ct. 2052*. We long have recognized that "[p]revailing norms **[*245]** of practice as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable ... ." *Ibid.*;

Padilla v. Kentucky, 559 U.S. 356, 366, 367, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010). *See also, Hinton v. Alabama, U.S. , , 134 S.Ct. 1081, 1088, 188 L. Ed. 2d 1 (2014)*(quoting *Padilla v. Kentucky, 559 U.S. at 366*), and *Heard v. Addison, 728 F.3d 1170, 1180 (10th Cir. 2013)*.

> Counsel's conduct similarly fell short of the standards for capital defense work articulated by the American Bar Association (ABA)-standards to which we long have referred as "guides to determining what is reasonable." *Strickland, supra, at 688, 104 S.Ct. 2052*; *Williams v. Taylor, supra, at 396, 120 S.Ct. 1495*.

Wiggins v. Smith, 539 U.S. 510, 524, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003). *See also, Young v. Sirmons, 551 F.3d 942, 957 (10th Cir. 2008)*(quoting *Wiggins v. Smith, 539 U.S. at 524*); and *Littlejohn v. Trammell, 704 F.3d 817, 859, 860 (10th Cir. 2013)*. *See also, Cole v. Trammell, 755 F.3d 1142, 1160 (10th Cir. 2014)*.

Petitioner's state court trial resulted in a sentence of death imposed on June 3, 2004. *Eaton v. State, 192 P.3d at 49*. The American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Revised Edition, February, 2003, thus represent the "guides to determining what is reasonable" in considering the deficient performance aspect of the ineffective assistance of counsel allegations. *Bobby v. Van Hook, 558 U.S. at 6*.

The representation of Petitioner by his trial team, and in particular Mr. Skaggs, fell well below the applicable "prevailing professional norms" as outlined by the American Bar Association Guidelines. Mr. Skaggs, as lead counsel, failed to assemble an acceptable trial team. The team, of which he was the leader, did not include two qualified attorneys, nor did it **[*246]**

include a qualified mitigation specialist. It also lacked at least one member qualified to detect the presence of mental or psychological disorders. [ABA Guideline 4.1].

Mr. Skaggs also failed to fulfill his responsibility of demanding and acquiring "on behalf of the client all resources necessary to provide high quality legal representation," and make an adequate record for post-conviction review if such resources are not provided. [ABA Guideline, 10.4].

Mr. Skaggs and the trial team further failed to "make every appropriate effort to establish a relationship of trust" with a defendant, including "a continuing interactive dialogue" concerning all materials which might well impact the defendant's case. [ABA Guideline 10.5].

Mr. Skaggs, and the trial team, probably most significantly, failed to pursue, in preparation for the penalty phase of his trial, an "extensive and generally unparalleled investigation into personal and family history," including medical records, family and social history, educational history, military service, employment and training history, as well as prior juvenile and adult correctional experiences. [ABA Guideline, 10.7]. This failure was particularly significant **[*247]** concerning Petitioner's mental health, with regard to which the team "acquired only rudimentary knowledge of his history from a narrow set of sources." *Wiggins v. Smith, 539 U.S. at 524*.

Finally, Petitioner's trial team was expected to construct a persuasive narrative outlining Petitioner's extended, multigenerational history by presentation of evidence of defendant's's complete social history from before conception to the present. [ABA Guideline, 10.11]. It failed to fulfill their responsibility under this Guideline, primarily based on a chronology approved by Mr. Skaggs and presented by Dr. Gummow which was deficient and incorrect; their failure to provide Dr. Ash with an adequate and reliable life history; and the failure to offer evidence of Petitioner's remorse.

It is further apparent Petitioner's trial team did not actually function as a "team," which is the accepted standard of performance in capital cases. [Doc. 264, p. 77 lines 1-4]. The time records kept by Ms. Moree for her billings reflect she, Mr. Skaggs and Mr. Neubauer met together as a group for one hour (.183%) of the 544.6 hours she billed for her work as part of Petitioner's trial team. [Exhibit 328, p. 11]. Mr. Stetler testified "this picture tells **[*248]** me it was not really a team. It met once with all three people for an hour, but otherwise it was three people working relatively independently . . . with one another, all reporting back to Mr. Skaggs, but not really functioning collectively." [Doc. 264, p. 79 lines 24, 25; p. 80 lines 1-3]. The trial team was so disconnected Mr. Neubauer discovered for first the time only the night before his testimony to this Court Ms. Moree had visited Petitioner only twice in the Natrona County jail. [Doc. 262, p. 198 lines 18-25; p. 199 lines 1,2].

One can surmise, from the testimony presented to this Court, two possible underlying reasons for the failure by Mr. Skaggs and the trial team to adhere to the then prevailing professional standards. The first is a concern with regard to reducing expenses. Mr. Skaggs professed to be a "frugal person" when "it comes to public money," even if it meant economizing on an indigent defense. [Doc. 261, pp. 64, 65]. He felt keeping costs down was always a consideration, [Doc. 261, p. 80], and economizing was important, [Doc. 261, p. 81], a philosophy which impacted, in particular, the development of mitigation evidence. [Doc. 65-2, p. 2; Doc. 261, 65 lines 12-25, **[*249]** p. 66 lines 1-12; p. 80; p. 89 lines 11-22; p. 197 lines 9-15; Doc. 262, p. 233 lines 19-25, p. 234 lines 1-13, 19-23; pp. 240, 241; Doc. 267, p. 13 lines 17-22]. The second reason was a desire to proceed to trial as quickly as possible.

Q. You have described your capital clients as getting ratty in the county jail?
A. Pardon me?

Q. **In the Calene proceeding you described your capital clients as tending to get ratty in the county jail**.

A. **Oh, they do tend to get ratty in jail**.

Q. **Tell me what you mean by ratty**.

A. **You know, they start doing -- the longer they're in there, and that's why you can't let these cases sit around for a long period of time, but the longer they're in there the more, the more dumb stuff they do**. They talk to other inmates in jail about their case. They forget what you ask them. They get, you know, their mind set on certain things in the case that aren't going well, uh, and they, um, they just get ratty. I don't know how to describe it, but they do the longer they sit in county jail.

[Doc. 261, p. 124 lines 22-25; p. 125 lines 1-12][emphasis added].

> But overall, the client doesn't do well when he's sitting around the jail cell waiting for a trial. They get ratty. They **[*250]** get hard to handle. And they don't do well sitting around in a jail cell, waiting months on end for a trial, because they don't think you're doing anything, for one thing; and they don't have anything to do themselves. And it is hard to deal with clients. **And so for that, particular reason, I like to have a little bit faster trial maybe than some other lawyers would**.

[Doc. 86-4, p. 12 lines 11-21][emphasis added].

PREJUDICE

The performance of Petitioner's trial counsel was constitutionally deficient as it fell below "an objective standard of reasonableness," even recognizing the fact such performance is entitled to the strong presumption it was within the wide range of reasonable professional assistance. Counsels' representation amounted to "incompetence under prevailing professional norms.'" *Harrington v. Richter, 562 U.S. 86, 131 S.Ct. 787-791, 178 L. Ed. 2d 624*. *See also, United States v. Rushin, 642 F.3d at 1306-1308*.

The question now for consideration is whether the deficient performance by Petitioner's trial counsel was prejudicial. Is there "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would be different." *Strickland v. Washington, 466 U.S. at 694*. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Harrington v. Richter, 562 U.S. 86, 131 S.Ct. 787-788*. *See also, United States v. Rushin, 642 F.3d at 1309-1310*.

There are, as previously **[*251]** noted, no ABA Guidelines for determining whether a deficient performance by either trial counsel or appellate counsel resulted in actual prejudice. The United States Supreme Court has, however, outlined the proper prejudice inquiry for evaluating a claim of ineffective assistance of counsel in the context of a penalty phase mitigation investigation.

A court, when considering the question of prejudice in the context of a capital sentence, must "reweigh the evidence of aggravation against the totality of available mitigating evidence." *Wiggins v. Smith, 539 U.S. at 534*. *See also, Sears v. Upton, 561 U.S. 945, 130 S.Ct. 3259, 3266-3267, 177 L. Ed. 2d 1025 (2010)*; *Porter v. McCollum, 558 U.S. 30, 41, 130 S. Ct. 447, 175 L. Ed. 2d 398 (2009)*; *Rompilla v. Beard, 545 U.S. 374, 393, 125 S. Ct. 2456, 162 L. Ed. 2d 360*; *Littlejohn v. Trammell, 704 F.3d at 864* (quoting *Sears v. Upton, 561 U.S. 945, 130 S.Ct. at 3266*). The critical question is thus whether "there is a reasonable probability that at least one juror would have struck a different balance" in considering the evidence presented for and against a death sentence. *Wiggins v. Smith, 539 U.S. at 537*.

The penalty phase of Petitioner's trial commenced immediately after return of a jury verdict of guilty of all charges. [Doc. 85-6, pp. 11, 12]. The jury was then advised all evidence admitted during the prior guilt phase of trial was also admitted for purposes of sentencing. [Doc. 85-7, pp. 53, 54].

The prosecution, in the penalty phase, relied upon three statutory aggravating factors:

> (1) The murder was especially **[*252]** atrocious or cruel, being unnecessarily torturous to the victim;
> (2) the murder was premeditated and committed purposely while Eaton was engaged in the crimes of kidnaping, robbery, and sexual assault; and
> (3) Eaton was previously convicted of a felony involving the use or threat of violence to the person.

Eaton v. State, 192 P.3d at 93. The prosecution argued the evidence from the guilt stage of the trial supported the first two aggravating circumstances, focusing on the physical evidence of bruising, ligature marks, stab wounds, and evidence of sexual assault. [Doc. 85-13, pp. 16-22].

The prosecution, to support the third aggravating circumstance of prior violent convictions, introduced evidence of Petitioner's aggravated assault conviction based on his September 12, 1997, encounter with Scott and Shannon Breeden. It presented, in addition to the conviction record, the testimony of Shannon Breeden, the testimony of the investigating deputy sheriff, and the

testimony of the prosecuting attorney to confirm the basic facts set forth in the Information, Judgment and Sentence. [Doc. 85-7, pp. 54-60; Doc. 85-8, pp. 1-5]. The prosecution was precluded from presenting more detail of the crime. [Doc. 85-5, pp. 40-45].

Petitioner's **[*253]** trial counsel attempted to establish four mitigating circumstances:

(1) The murder was committed while Eaton was under the influence of an extreme mental or emotional disturbance;
(2) Eaton acted under extreme duress;
(3) the capacity of Eaton to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and
(4) any other fact or circumstance of Eaton's character or prior record or matter surrounding his offense which serves to mitigate his culpability.

Eaton v. State, 192 P.3d at 93, 94.

Mr. Skaggs, in his opening statement of the penalty phase of Petitioner's trial, set out the mitigation themes the defense hoped to establish. He told the jury one major theme would be the abuse which Petitioner suffered as a child. "The evidence will show that Dale Eaton was abused virtually from the time he was born." [Doc. 85-7, p. 43 lines 6, 7].The next theme was mental health. "We're going to be talking about a diagnosis, basically, of depression." [Doc. 85-7, p. 47 lines 19, 20]. The final theme would include evidence from lay witnesses who "have known him for a long time, like the Schifferns, like the Widmers. And they have known him. They like Dale." [Doc. 85-7, p. **[*254]** 52 lines 11-5]. Mr. Skaggs, in his penalty phase closing argument, added a fourth theme, *i.e.*, Petitioner was remorseful for his crime. [Doc. 85-13, pp. 46, 47].

Dr. Ash testified during the penalty phase of Petitioner's trial, and described Petitioner's social and financial condition in March and April, 1988. He concluded Petitioner suffered from chronic, life-long depression and a related brain dysfunction. [Doc. 85-8, pp. 22, 23, 24]. He further opined Petitioner's depression was compounded by situational stressors in his life around the time of the murder, including the break-up of his family and his poverty. Dr. Ash spoke of Petitioner's recent confrontation with his ex-wife concerning visitation with his children over Easter, and her statement to him "these aren't even your kids. And she laughed. And then she let him know that she was with another man. So it was a particularly stressful area." [Doc. 85-8, pp. 25-29]. Petitioner told Dr. Ash this conversation with his ex-wife was the night he met Ms. Kimmell. [Doc. 85-8, pp. 29, 30].

Dr. Ash, based on Petitioner's depression, brain dysfunction and life stressors, offered his opinion Petitioner had acted under "extreme duress" at **[*255]** time of crime. [Doc. 85-8, p. 52].

The cross-examination by the prosecution was aggressive. [Doc. 85-8, pp. 54-60; Doc. 85-9, pp. 1-33]. The final cross-examination question challenged Dr. Ash's opinions based on a deficiency of the background information provided to him.

Q. [BY MR. BLONIGEN] Doctor, a diagnosis is only as good as the information it's based on, isn't it
A. [BY DR. ASH] That's correct.
MR. BLONIGEN: That's all the questions I have.

[Doc. 85-9, p. 33 lines 15-17].

The presentation of lay witness testimony by Petitioner's trial team was, as noted by Judge Park, sparse. [Exhibit 32, p. 10 ¶ 12]. Petitioner's maternal Uncle, Loren Ferrins, testified Petitioner's father, Merle Eaton, abused Petitioner's mother Marian, and Petitioner's relationship with his father, Merle, was not good. Mr. Ferrins and his first wife wanted to adopt Petitioner, however, they never pursued the idea. He also testified Petitioner's father "picked on" Petitioner, although he admitted he didn't know what that really entailed. [Doc. 85-9, pp. 42-50]. Betty Ferrins testified she has known Petitioner since she had married Loren. She likes Petitioner, and does not want him to die "[b]ecause I don't think he was in **[*256]** his right mind when he did this." [Doc. 85-9, p. 55 line 25; p. 56 line 1].

Marilu O'Malley, Petitioner's maternal aunt, testified Merle was abusive, and Petitioner was singled out for the worst of it. She admitted, however, she did not observe abuse on a lot of occasions, and although she felt sorry for Petitioner, she never looked into adopting him. [Doc. 85-9, pp. 57-60. Petitioner's mother, Marian, "didn't seem to dare show too much affection or stand up for the kids at all; but she loved them, because she expressed her concern for them all the time to my parents. And . . . I knew she expressed a lot of concern about the kids and about [Dale] Eaton specifically sometimes." [Doc. 85-10, p. 2 lines 17-25].

Virginia and Lodine Schifferns lived in Glenrock, Wyoming. Mr. Schifferns testified, "We was very good friends. Well, we are very good friends."[Doc. 85-10, p. 15 lines 16-19]. He also testified, "I still like him and everything. I just -- like my wife, I just can't believe, like, anything like that could happen to him." [Doc. 85-10, p. 16 lines 2-8].

The trial team also called Shirley and Floyd Widmer who lived in Waltman, Wyoming. Shirley had known Petitioner for "quite a few years." **[*257]** The Widmers came to know Petitioner because "he used to come in and eat there, eat at our place." [Doc. 85-18, p. 18 lines 10-22]. She always gotten along "real good" with Petitioner, and at one point he lived behind their place in a motor home. She "really got to know him when Menters were paving the highway over there." [Doc. 85-10, p. 19 lines 9-25; p. 20 lines 1-5].

The mitigation presentation of Petitioner's family and friends, including cross-examination by the prosecution, took less than one hour. [Doc. 85-9, p. 34; Doc. 85-10, p. 28].[21]

Linda Gummow, Ph.D. testified on behalf of Petitioner during the penalty phase of his trial. She had met with Petitioner and had administered neuropsychological test to him. [Doc. 85-11, pp. 11, 29-33, 44, 59]. She testified concerning Petitioner's history of altercations at work,[Doc. 85-11, p. 22], and his exposure to heavy metals through his work as a welder. [Doc. 85-11, p. 48]. She noted the Wyoming State Hospital in 1997 "found elevated zinc, and they found elevated arsenic." [Doc. 85-12, p. 35]. She diagnosed Petitioner as suffering from Depressive Disorder **[*258]** NOS (Not Otherwise Specified). [Doc. 85-11, p. 39 lines 11-14]. Dr. Gummow, in addition to depression, diagnosed Petitioner as having "[m]oderate brain damage,"[Doc. 85-12, pp. 8, 9], which "substantially impairs his ability to conform his conduct to the requirements of the law." [Doc. 85-12, p.13 lines 17-19]. Dr. Gummow also testified Petitioner was under extreme duress at the time of the crime. [Doc. 85-12, pp. 14, 15]. Dr. Gummow was aggressively cross-examined by the prosecution with regard to the chronology approved by Mr. Skaggs, which erroneously placed the suicide of Daryl Eaton before the homicide of Ms. Kimmell. [Doc. 85-12, pp. 46, 47].

The final mitigation witness called to testify for Petitioner during the penalty phase of his trial was Natrona County Sheriff Deputy Lynn Cohee. She testified Petitioner's sister, Sharon Slagowski, had told her their father had broken a beer bottle over Petitioner's head. [Doc. 85-12, p. 55 lines 2-6; Exhibit 225-2, p. 5]. Mr. Skaggs, although this conversation had been tape-recorded, used a partial transcript of the conversation in an attempt to prevent disclosure of some negative things Ms. Slagowski said about Petitioner. [Doc. 262, p. 95 line **[*259]** 6-25; p. 96 lines 1-7]. The negative information on the tape was nevertheless elicited by the prosecution cross-examination. Ms. Slagowski had also said Petitioner once became upset and physically attacked her.[Doc. 85-12, p. 56 lines 13-24; Exhibit 225-2, p. 6].

The jury, after deliberating approximately four hours, unanimously found the aggravating circumstances presented by the prosecution, unanimously rejected each and every mitigating circumstance submitted by the defense, and assessed the death penalty. [Doc. 85-14, pp. 11, 15, 19, 20; Exhibit 1].[22]

The trial court judge reported on August 19, 2004, "There was strong evidence of aggravating circumstances and sparse evidence of mitigating factors." [Exhibit 32, p. 10 ¶ 12]. Mr. Skaggs agreed it was fair to say his case "blew up" on him. [Doc. 261, p. 167. Mr. Neubauer agreed. To say the case "essentially tanked" is "an understatement," and there was no "backup plan or strategy for that occurrence." [Doc. 262, p. 168 lines 24, 25; p. 169 lines 1-8]. Hrg. Tr. Vol. 2, p. 398].

The depth and scope of the mitigation presentation **[*260]** on behalf of Petitioner would most assuredly have been much different had Mr. Skaggs and the trial team performed up to prevailing professional standards.

The mitigation evidence which the trial team should have developed and presented during the penalty phase of Petitioner's trial is best considered within the same thematic outline which Mr. Skaggs attempted to develop at trial, *i.e.*, abuse, mental impairment, remorse, and likeability. [Doc. 85-7, p. 43 lines 6, 7; Doc. 85-7, p. 47 lines 19, 20; Doc. 85-7, p. 52 lines 11-5; Doc. 85-13, pp. 46, 47]. This somewhat compartmentalized approach to examining the mitigation evidence available to the trial team does not negate the fact those themes are intricately interrelated. The violence and abuse Petitioner experienced during his childhood very likely had a profound and permanent effect on his intellectual and emotional development. His psychiatric disabilities permeate every other part of his life.

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[21] The mitigation presentation began at 2:53 p.m., and ended at 3:52 p.m. on the same day.

[22] Jury deliberations commenced at 11:05 a.m., and ended at 3:48 p.m. on the same day. [Doc. 85-14, pp. 11, 15].

Abuse

Mr. Skaggs, when asked if the physical maltreatment and abuse of Petitioner by his father was a significant element of the penalty phase defense, went one step further, stating, "It was, in my belief, the key to the mitigation case." [Doc. **[*261]** 261, p. 166 lines 23-25; p. 167 line 1]. He explained, "that was one issue that I was focused on. It was a safe issue, and I would have liked to have developed it, yes." [Doc. 261, p. 214 lines 3-5]. He "tried to introduce some evidence of child abuse in the mitigation phase," but "[w]e didn't have much of it." [Doc. 86-5, p. 3 lines 12-18]. What little he had "didn't come out nearly as well in the actual testimony." [Doc. 86-5, p. 8 lines 8-11]. Mr. Skaggs, because he had relied on a narrow set of witnesses, had no additional evidence to present. "So consequently, I decided just to live with - with their testimony. But it - it wasn't nearly as good as what I had been led to believe it would be by my personal conversations with them." [Doc. 86-8, p. 42 lines 8-12].

The trial team, notwithstanding the fact its mitigation investigation was basically narrow and shallow, did identify witnesses who knew Petitioner had suffered physical maltreatment and abuse by his father. Mr. Skaggs unfortunately, however, deemed the interviews with Loren Ferrins and Marilu O'Malley sufficient to establish the abuse theme during the trial penalty phase. Mr. Ferrins and Ms. O'Malley were not emotionally able **[*262]** to provide in a public courtroom their mitigation evidence with an intensity equal to their prior discussions with the trial team. Mr. Skaggs blamed their lack of intensity in the courtroom on the fact Petitioners sister, Judy Mason, who had been, according to Mr. Skaggs, disrupting the mitigation investigation, was present in the courtroom when both Mr. Ferrins and Ms. O'Malley testified.

> Q. And so -- but why do you think they went in the tank on you?
>
> A. Uh, Judy Mason had been -- and Judy Mason is the sister of Dale Eaton -- she had been since the beginning of this case very disruptive to the defense. She contacted available witnesses. Uh, she talked to available witnesses. She knew that we were focusing on Merle because Sharon Slagowski had told the deputies that. And, uh, and, in fact, in our -- Priscilla's discussions with her, Priscilla I think told her that. And so she was extremely disruptive. Come trial time she developed a relationship or had developed a relationship with Sheila Kimmell. Not that that's bad. Sheila's here in the courtroom. But she had developed a relationship with Sheila Kimmell. She was, she was continuing to be entirely uncooperative with us. And during the **[*263]** time that she testified -- or during the time that the Farrens testified she was kind of on the edge of the bench, and it was in a direct line of view with Mr. Farrens. And so when he testified, this merely had to do -- all he had to do was look down at Judy Mason. And I'm not saying she is a bad person. I am just saying she was disruptive, very disruptive to the defense. And she would look down, and, uh, I think that that's where he lost his nerve, so to speak, to testify about how abusive Merle was.

[Doc. 261, p. 168 lines 11-25; p. 169 lines 1-9].

Ms. Mason herself, however, described her father's violence against her brother, Petitioner, which Ms. Moree related in a memo to Mr. Skaggs.

> Judy described their childhood as being chaotic and dysfunctional. She tells a story about Dale when he was 4 years old being woken early in the mornings by his father and made to go by himself out to milk cows while the dad returned to bed. She says Dale was the child who was beaten from an early age by his father, and the beatings were severe and often included beatings to Dale's head.
>
> . . .
>
> Judy describes her father as being a liar who fabricates stories and will deny any abusive treatment given to **[*264]** the children, especially Dale. She says that when Dale was being beaten, if the mother tried to stop him or interfere in the beatings, she would be beaten by the father.

[Exhibit 253-59, p. 1]. Ms. Mason's comments corroborate Petitioner's statement in the Sweetwater County presentence investigation.

> The Defendant described his childhood as one full of abuse. He stated, 'If something didn't hit dad right he'd take it out on me. I would get beat with whatever he could reach. He never seemed to touch the other kids, in fact the other kids found out that if they did something they could blame me and I'd get beat. My mom would try and pull dad off of me and then she'd get beat.

[Doc. 267, p. 75 lines 11-17; Exhibit 171-52, p. 4]. Dr. Ash found it "very poignant that, as vulnerable and fragile as she was with her mental illness, that she tried to step in and protect him. It also says a lot about Dale, too, because he has always held himself responsible for his mother developing psychosis." [Doc. 267, p. 76 lines 6-10].

The memo by Ms. Moree, or even her testimony relating Ms. Mason's disclosures, would arguably have been admissible under Wyoming law,[23] and Dr. Ash could have testified about having **[*265]** the same information from Petitioner and documented by other sources. Mr. Skaggs nonetheless chose not to use the statements by Ms. Mason as independent proof Petitioner had suffered abuse by his father.

Ms. O'Malley and Mr. Ferrins have died since testifying at Petitioner's trial.[24] Ms. O'Malley, however, provided a declaration behalf of Petitioner, her nephew, before her death in January, 2013.

> Dale Wayne got the brunt of everything from his father. Merle was always on him for something. Nothing was ever good enough. There was nothing Dale Wayne could **[*266]** do to make his father happy. Merle had a wide, thick belt that he would whip off and beat Dale. This continued even until Dale Wayne was in his 20s. All the kids would be rough housing and Merle would go after Dale Wayne. He got the worst of it by far.
> . . .
>
> Dale was a quiet child. He was beat down. I never thought he had a very high IQ because of the way he talked and the way he acted. I don't know how to describe it, but I just felt he probably wasn't very smart, but kids need attention and encouragement to grow and Dale Wayne certainly never received that. I kept him for a week or so when he was around twelve years old. I asked if he could come and stay with me because I felt so sorry for him. While he was staying with us my husband, Bill, took Dale Wayne fishing. Dale Wayne idolized Bill because of that one incident. I'm sure it was the only time anyone took him fishing. Merle never did anything with those kids. I never saw Merle show any affection or say a kind word to anyone, especially Dale Wayne. Years later, Dale Wayne still commented on Bill taking him fishing when he was a boy. It was only one time and it had such an impact on Dale Wayne. Bill and I divorced and Dale Wayne **[*267]** still talked about it. He bought Bill a fishing rod years later to thank him for taking him fishing. Dale Wayne had an appreciative heart and he could recognize when someone showed him kindness. After he had been with me for a week, I called Marian and asked if Dale Wayne could stay longer. She told me, "No," because Merle had work for him. He left and that was the only time he stayed with me for an extended time. I wanted to keep Dale Wayne. Usually, the eldest son has a special closeness with their father. That certainly wasn't the case between Merle and Dale Wayne. There was no relationship, no closeness and certainly no love. There wasn't anything Dale Wayne could have done to change the way his father thought about him. It was really sad.

[Exhibit 39, pp. 1-3]. Ms. O'Malley's testimony would have been strong mitigation evidence to confirm the abuse suffered by Petitioner.

Mr. Skaggs admitted eyewitnesses to the abuse Petitioner suffered as a child would be very significant to him, yet no one from the trial team apparently ever interviewed Loren Ferrins' daughters, **[*268]** Sandra Andrae or Lorena Altman, who played with their cousin, Petitioner, when they were children. [Doc. 261, p. 214]. Lorena indicated, "We were like shadows,...there was the one following the other somewhere."

> Q. Do you remember Dale Wayne as a child?
> A. Yes.
> Q. When you lived in Riverton, did you play together?
> A. We were all like shadows, you know.
> Q. Like shadows?
> A. Mm-hmm. There was the one following the other somewhere.
> . . .
> Q. All right. And what did you think of, of Merle Eaton? A. Didn't like him.
> Q. Why not? What did you not like about him?

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[23] The judge or jury shall hear evidence as to any matter that the court deems relevant to a determination of the sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections *(h)* and *(j)* of this section. Any evidence which the court deems to have probative value may be received regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements, and provided further that only such evidence in aggravation as the state has made known to the defendant or his counsel prior to his trial shall be admissible. *Wyo. Stat. § 6-2-102(c)*.

[24] Loren Ferrins and his wife, Betty, died in an automobile accident on December 7, 2007. [Doc. 268, p. 66 lines 13-22].

A. Well, it was like with Dale Wayne he would whop him side of the head, you know, make him do things. He was just always batting at him.
Q. When you said he'd bop him on the side of the head, can you describe that?
A. (Indicating.) I don't know how you do it, but -
Q. You're doing a motion.
A. Yeah. You can't follow a motion. Just come up and backhand him or whatever on the side of the head. He was always slapping him.
Q. Did those blows ever knock Dale to the ground?
A. Yeah.

[Doc. 268, p. 70 lines 27-, 11-24].

Lorena's twin sister, Sandra Andrae, also recalls:

From the time he was born, Dale Wayne seemed to be the one that he wanted to pick on. No **[*269]** matter what Dale Wayne did, whether he was being good or not, all my Uncle Merle had to do was look at him and he would hit him or yell at him, just always on his case, you know, for no reason at all. He would slap him for him crying. And even when he was a baby and older, he cried all the time, and I think it was because he was colicky. We didn't know at that time exactly what it was, but I think that's what it was. And he was around four years old or older before he even learned how to walk.

[Doc. 286, p. 107 lines 8-17].

Ms. Andrae could have given vivid mitigation testimony of two instances of the extreme violence by Merle, his father, toward Petitioner. The first involved an incident with a child's bow and arrow set their grandfather, Elmer Ferrins, bought Petitioner as a young child. Ms. Andrae was hit in the back by an arrow shot by Petitioner, which prompted a severe beating by Merle.

Q. [BY MS. RUNNELS] And did Dale get in some trouble over this?

A. Uncle Merle grabbed a hold of him and beat him to a pulp. I mean, he hit him, kicked him, beat him, slapped him, threw him up against the wall. And then he told all of us to stay away from him when he came out, and we didn't hear anything **[*270]** from Dale Wayne.
Q. Did you think that Merle had killed Dale?
A. Yes, because Dale Wayne would scream out, "Someone help me, please help me," and nobody did. Everybody just stood there and watched because Uncle Merle said no one come in there.
Q. How did Merle look when he got finished beating Dale?
A. He was sweating really bad, red in the face, and he was still mad, and he come walking out, and he says, "Nobody goes in there and leave him alone," and he got in his -- I guess he got in his pickup and took off, or he went behind the trees anyway, because we never saw him after that.

[Doc. 268, p. 106 lines 15-25; p. 107 lines 1-6].

Ms. Andrae was asked whether Merle drank.

Q. Okay. Did Merle drink?
A. All the time.
Q. What was he like when he was drinking?
A. I, since I never saw him probably sober that much, he was just belligerent, uh, hateful, uh, always yelling at somebody, uh, just unfriendly.

[Doc. 268, p. 108 lines 7-12]. She recalled another violent episode at a family picnic when Richard (Petitioner's brother) was just a baby, so Petitioner would have been a little over ten years old. Merle told Petitioner to get him another beer, and Petitioner was slow to comply.

A. -- and Mary Louise **[*271]** on that side. Dale Wayne was on the end. And then next to Granddad was my dad, my stepmother Betty, Lorena, Judy, me, and Sharon. And we were eating, and -- but Uncle Merle had been drinking all this time, and he had about five or six bottles of beer around his table or his plate, and he was getting kind of mouthy and kind of swearing once in a while, and I remember my dad telling him to shut up, and he -- and so he just kept drinking instead of eating. And he looks down at Dale Wayne, and he says, "You go and get me a beer." And Dale Wayne wasn't paying any attention to him because he was eating. And he could have picked one of the girls, you know, because they were closer to that side and stuff, but he went right to Dale Wayne and said, "Go get me a beer," and Dale didn't even look up at

> him. And Uncle Merle said, "Get up Dale, and get me a beer now." And Dale Wayne says, "I don't want to. I want to eat." And Uncle Merle yelled at him and swore at him. So Dale Wayne gets up. Instead of, you know, hurrying off there, he just kind of scuffled off towards the house to go to get the beer. And he wasn't going fast enough for Uncle Merle, so Uncle Merle took a beer bottle and he threw **[*272]** it, and it landed right next to the door just as Dale Wayne got to the door, and it shattered, and it split his head open. Q. And then what happened to Merle? Did he -- A. Uh, well, he lost his balance when he threw the bottle, and he fell back, and he hit his head up against the swing set that the kids had back there with them heavy iron posts, and it knocked him out. And they just left him there. Q. And what about Dale Wayne? What happened? A. Uh, my mom and my dad and Aunt Marian wrapped a towel around his head, and they took him in to town to the hospital. And then my dad went to the police, had them come out and get Uncle Merle.

[Doc. 268, p. 109 lines 4-25; p. 110 lines 1-11].

This most likely is not the same incident described by Petitioner's sister, Sharon Slagowski, to Deputy Cohee, in her tape-recorded phone call. She told the police, "I remember when [Merle] used to hit [Dale] with a belt and hit him with his fist and I remember one time when I don't remember how old I was he broke a beer bottle over his head." [Exhibit 225-2, p. 4]. Ms. Slagowski stated "we had to be real young" when this happened, "I'm thinking early grade school." [[Exhibit 225-2, p. 4]. Whether there were **[*273]** one or two assaults with a beer bottle is not the relevant issue, as explained by Dr. George Woods, a psychiatrist.

> Frankly, the part that I considered to be the most relevant, whether he was hit over the head or whether -- with a beer bottle or whether someone threw a beer bottle at him and it shattered next to him and cut him on, on the forehead, certainly getting hit directly over the head at four could cause some neurological damage, but the internal consistency is a beer bottle. Right? It's not, it's not like one time he threw a cup. Each story, no matter what the specific circumstances of the story are, the stories that we've heard have all included somehow Mr. Eaton having a beer bottle available and using it in an inappropriate way. And this reinforces what is said about him being an alcoholic and that impairing his ability to effectively take care of his family.

[Doc. 269, p. 89 lines 1-13].

The documentary record which the trial team had, or could have easily obtained, contains numerous other indications of the violence Petitioner suffered as a child. The nightmares which troubled him, according to Mr. Stetler, are consistent with a trauma history, and could be corroborative **[*274]** of maltreatment. [Doc. 264, p. 138 lines 3-19; p. 143 lines 7-12]. The record of Petitioner's hospitalization for psychiatric examination in 1961 contained additional indications of his maltreatment in the home. A physician wrote, "He expressed considerable unhappiness with his home situation and said 'I hope I get sentenced to a reform school so I won't have to go home.'" [Doc. 264, p. 143 line 22-25; p. 144 lines 1-4; Exhibit 169-4, p. 11]. Mr. Stetler pointed out hoping to go the reform school rather than home -"that's a pretty extreme statement." [Doc. 264, p. 134 lines 1-6].

Dr. Woods also found passages in Mrs. Eaton's psychiatric hospital records, which the trial team could easily have obtained, which contain corroborative evidence of the violence in the Eaton home. Dr. Woods testified these documentary clues are "very relevant" to the issue of trauma in Petitioner's life and family. They indicate "this is a family that lived with significant trauma...Merle Eaton was described as a heavy alcoholic, a man that was prone to physical abuse, and it seems as though Dale Eaton was one of his prime targets." [Doc. 269, p. 66 lines 6-10].

The issues of abuse and mental health are not **[*275]** separate and distinct. They are intricately related. Violence against a child, as Dr. Woods explained, "can have a direct impact" on the child's growth and development, including neurologically.

> Q. (BY MR. O'BRIEN) And before we move on to this, Doctor, what kind of damaging effects can the type of abuse described by Ms. Andrae, by Lorena Altman, by Sharon Slagowski, and by others, what kind of impact can that have on a human being's growth and development?
>
> A. It can have a direct impact. Um, you know, we, um -- there's a wonderful book out, if any of you choose to take the time. The name of the book is Formative Experiences, and it's a book on developmental psychology. And what it talks about is how much of the baby's brain is developed compared to other species. A baby's brain is only about 40 percent developed when it's born. A cat's brain is about 65 percent developed. An ant's brain is about 90 percent developed. And the reason it's thought that a human's brain is only developed about 40 percent is because environment has so much to do with who that human becomes. Language, education, so many other things shape that brain and shape it directly. So the idea that the brain is just **[*276]** there and environment is just air and global warming, it's not really true. That brain is shaped -- the brain of that child is shaped by the experiences that they undergo. And if those experiences are traumatic, it's

not just a psychiatric issue. If you have a child that is being constantly traumatized, their autonomic system is being overamped all the time. Their autonomic nervous system is being heightened. They have anticipatory anxiety. It changes their brain, and we know that now, particularly in the right parietal lobe. So it's very important to take into consideration the environment when you look at these issues, not just the brain itself.

[Doc. 269, p. 91 lines 5-25; p. 92 lines 1-9].

Dr. Ash also found the evidence of abuse presented to this Court, but not at Petitioner's trial, to be probative of many issues, including Petitioner's strained relationship with Mr. Skaggs.

Q. You had dealings with Mr. Skaggs?
A. Yes.
Q. How would you describe his tone and approach?
A. Wyatt is brusque.
Q. Is that approach, without some substantial modification effort on Mr. Skaggs' part, conducive to building the kind of trust and rapport with a client like Mr. Eaton?

A. With Mr. Eaton especially, **[*277]** he was so nervous and so paranoid around men and especially aggressive men that it would -- again, it would be like the gasoline and fire sort of thing, that the more brusque that Wyatt might become the more angry and agitated and defensive Mr. Eaton would become, I would suspect.
Q. We're going to talk more about this later, but generally where do you think that comes from with Mr. Eaton?
A. That's an important question. I think it's a complicated question. He was paranoid by genetics. There is paranoia that comes with bipolar condition. There's tremendous paranoia that can come when there's been a great deal of physical abuse. And I believe in Mr. Eaton all of those things came together. Especially, you know, Mr. Eaton was bullied substantially in the home and outside of the home growing up, and his nervousness, his tension, his wish to avoid that, his attempts to avoid that all are, are factors in terms of this.

[Doc. 267, p. 60 lines 16-25; p. 61 lines 1-13].

Another significant chapter in Petitioner's life, and another dimension to his childhood trauma, is the treatment he received from the bullies in Meeker, Colorado, in his early teens. Brian Conrado, who could have been identified **[*278]** as a potential mitigation witness if the trial team had contacted his friend, Phyllis Lake, explained why Petitioner was singled out for abuse and ridicule by his peers. Meeker was a very homogenous community, whose long-time inhabitants could trace their roots to the English settlers, so that "if you weren't of the right pedigree, so to speak, it was rough." [Doc. 268, p. 39 lines 13, 14]. It was even worse for Petitioner, who stood out because he was overweight, poor and not very smart. The other children nicknamed him "Always Eating" because he was overweight and was often seen eating candy bars. [Doc. 268, p. 42 lines 19-25; p. 43 line 1]. The other children belittled Dale because he wasn't very smart. [Doc. 268, p. 43 lines 8-15]. Mr. Conrado remembers Petitioner working very hard mowing lawns and helping the janitor after school to earn money. [Doc. 268, p. 44, 45]. Sometimes the older kids would wait for Petitioner and take his money.

Dale, when he mowed lawns, wow, he -- you know, you could see him, it might be 6:00, 7 o'clock at night when he was pushing his mower down the street heading home. And I can remember -- I wasn't involved 'cause, I mean, I was just -- I wasn't as **[*279]** big as these guys by any means, and -- but I was in the car when it happened several times. And they'd pull over, and they would, pardon my language, threaten to beat the shit out of Dale if he didn't give them his money or his candy bars.

[Doc. 268, p. 45 lines 22-25; p. 46 lines 1-8]. Mr. Conrado remembered Petitioner did not fight back as "he was outnumbered. These guys were high school kids." [Doc. 268, p. 46 lines 11-13]. Petitioner simply withdrew in the face of constant bullying. "[H]e didn't socialize...I can only imagine what went through his mind, but he didn't retaliate. I think about what could he do?" There were no adults who stood up for him, either. [Doc. 268, p. 46 lines 21-25; p. 47 lines 1-3].

Mr. Conrado remembers the only extracurricular activity in which Petitioner participated in Meeker was the 4-H Club electrical program. The children would car pool to the meetings at a ranch outside of town, and while they were waiting for their rides Petitioner would be "harassed and belittled" by the other children. The other kids, on one occasion, forcibly removed Petitioner's pants, and rubbed Canadian thistles over his genitals. [Doc. 268, p. 41 lines 15-25; p. 42 line 1].

Dr. **[*280]** Ash found the declaration by Mr. Conrado [Exhibit 68-5] provided some very significant history. The constant, severe bullying, and the one episode of "taking his clothes off and rubbing thistles on his genitals must have been really

humiliating and frightening." [Doc. 267, p. 136 lines 5-9]. Dr. Ash testified this information "would have been helpful for mitigation. It would have been helpful in terms of, again, the overall understanding. There's so much posttraumatic stress disorder kind of symptoms in Dale's presentation, along with everything else." [Doc. 267, p. 136 lines 12-15]. Dr. Ash also found very probative and significant the testimony given by Sandra Andrae "that Merle was punching him to the head and body. This was when he was just a boy. That Dale fell to the ground, and his father drug him into the house and continued to beat him, and Dale cried for help, but nobody came." [Doc. 267, p. 137 lines 18-21]. Mr. Skaggs, prior to Petitioner's trial, had not provided Dr. Ash with any evidence of physical maltreatment which came anywhere close to the nature and quality of the abuse of which he had been subsequently informed. [Doc. 267, p. 137 lines 22-25]. This new evidence **[*281]** of the trauma endured by Petitioner is significant to Dr. Ash's psychiatric evaluation.

> With... the history that's been, been given, the picture of posttraumatic stress disorder has got to be considered as a compounding condition. The essence of it is that when you're exposed to ...what is considered a life-threatening situation or you feel your life is being threatened, that whenever you are reexposed to that that it fills you with intense psychological distress. So that's the picture that you see with Dale Eaton whenever he goes off to work with other men and when he feels threatened. It helps explain, I believe, his difficulties that he had with his attorney Wyatt Skaggs. So that, that extreme anxiety, tension that starts coming up, and you try to avoid it, you try to stay away from it, that's another part of PTSD, but if you can't avoid it then ... another symptom of PTSD is explosive anger that comes... Dale exhibited a lot of symptoms of PTSD, and they talk about it can reach psychotic proportions when severe enough, when the stress is severe enough.

[Doc. 267, p. 138 lines 1-22].

Dr. Ash also found another symptom of PTSD, "hypervigilance," which is apparent throughout Petitioner's **[*282]** life history.

> That's another one of the symptoms. And the hypervigilance I think is so well described by his employers talking about Dale painted all his windows black. He didn't want anyone to be able to look into them. When he, again, when he hid parts and didn't want people to look at them. When he booby-trapped his, his place where he lived where -- when he told the kids be on the lookout for anybody coming to rob our place and get the gun. Hypervigilance is very strong.
>
> And he also had another symptom of PTSD, increased startle. Somebody walk up behind him and touch him, and he would swing.
>
> So he has all those symptoms, and they would be very connected with the kind of physical trauma, whether it's from his father or from the bullying that he received or both.

[Doc. 267, p. 138 line 25; p. 139 lines 1-14].

Dr. Ash recognized, prior to trial, he needed more data for his assessment of Petitioner, yet when he asked Mr. Skaggs, none was provided. Mr. Skaggs actually discouraged him from talking to other family members. [Doc. 267, p. 62 lines 12-25; p. 63 lines 1-14].

A social history, in Dr. Ash's field of expertise, is investigated and prepared by forensic social workers, or in the case **[*283]** of capital defendants, mitigation specialists. Psychiatrists spend most of their time talking with the patient and reviewing reports, while the forensic social worker or mitigation specialist "would be gathering...the collateral information from the family, from friends, from legal circumstances and so on." Dr. Ash, in Petitioner's case, had nothing available to him which was equivalent to the psychosocial history he was used to getting from a forensic social worker. [Doc. 267, p. 64 lines 20-25; p. 65 lines 1-15].

The impact of the deficient mitigation investigation into Petitioner's social history on the reliability of the findings by Dr. Ash was addressed by Mr. Burr, a capitol defense expert.

> Q. Who bears, in capital litigation, who bears responsibility for an accurate and complete psychosocial history being obtained? A. The lawyer. Q. Why is that?
>
> A. Well, you know, as much as I tried after *Ake* to say it's the expert, you know, got to have competent mental health experts, the courts quickly disposed of that and said it's the lawyers who are responsible for this. The investigation that goes into it and the working with experts is a lawyer's task. And there's not ineffective assistance **[*284]** of expert. There's ineffective assistance and a guarantee of effective assistance in the Constitution by counsel. And so it's the lawyer's duty to assure that...an adequate mental health history is presented to the mental health expert.

[Doc. 265, p. 138 line 25; p. 139 lines 1-14].

Mental impairment

There is a "critical interrelation between expert psychiatric assistance and minimally effective assistance of counsel." *Blake v. Kemp, 758 F.2d 523, 531 (11th Cir. 1985)* (quoting *United States v. Edwards, 488 F.2d 1154, 1163 (5th Cir. 1974))*. Dr. Ash, as previously discussed, explained psychiatrists are not investigators. They routinely depend on forensic social workers or mitigation specialists working for capital defense attorneys to provide a thorough and reliable bio-psychosocial history, which is critical to an accurate assessment. Dr. Ash did not received such an assessment from Petitioner's trial team prior to trial. [Doc. 267, p. 64 lines 20-25; p. 65 lines 1-15].

Richard Burr explained the danger of failing to provide a complete psychosocial history to a forensic mental health expert. It's "pretty simple -- you know, the less complete your history is going in, the less accurate, reliable, and persuasive and meaningful the opinion is coming out. It's very, a very direct relationship." [Doc. **[*285]** 265, p. 139 lines 18-21]. He explained the reasons a thorough investigation conducted by a capital defense team with mental health knowledge and related interview skills is critical to a capital case.

> Q. So what efforts does competent capital counsel make to obtain an accurate and complete psychosocial history, um, in a case?
>
> A. We need to have at least a full-time mitigation specialist working with us who is trained and experienced. The work of the mitigation specialist is expert work. Most lawyers are not capable of doing that kind of investigation because ... much of the information we seek or look for is information that people don't easily disclose because it's about hard things. It's about, it's about abuse and malevolence and dysfunction. And, you know, all of us like to be perceived as competent and fully functioning, and the evidence that we suspect is there and almost always is there is the opposite, and people don't willingly talk about that. So it requires some real skill at getting to that information with people.
>
> And the other thing is that most of us as laypeople don't know what you mean. I mean, Mr. Hoopes didn't know what a declaration was, but he knew he'd signed a statement. **[*286]** Most laypeople will ... know if a relative has a mental health problem or has been sent to a doctor or has been hospitalized involuntarily, and they can describe their behavior, but if you simply go in and say, um, do any of your relatives have schizophrenia, they'll say no, and yet there are. And so you have to learn how to ask these questions in a way that will help people connect to the information they know and have and are willing to talk about. So part of it is overcoming a reluctance to disclose information. Part of it is helping people understand what kind of information you're looking for if it's there. And that requires some real skill. It is ... very different from so-called fact investigation, which is looking more at, you know, what happened and who did it, and that kind of evidence. This is a very different form of investigation. It requires patience and gaining the trust of people that you are talking with.

[Doc. 265, p. 139 lines 22-25; p. 140 lines 1-25; p. 141 lines 1-7]. The process described by Mr. Burr is clearly not the process utilized by Petitioner's trial team.

A complete psychosocial history, once it is prepared and provided to the expert, allows them to develop **[*287]** a thorough and reliable assessment. Mr. Burr explained the psychosocial life history report is used by the expert

> [a]t least in a couple of ways. [Y]ou will often provide it to the mental health expert... George Woods' declaration is a good example. Most of that declaration I would venture to say was not originally written by Dr. Woods, and that's okay. I suspect that the mitigation specialist and the team had a lot to do with crafting the life history that he has in his report. I may be wrong...I don't have inside information, but I know how I work, and oftentimes the ... psychosocial history we put together finds its way into the expert's report. It should. It's ... a critical piece of the report. It's information the expert is relying on. And whether the expert actually writes those words or not, the expert is embracing that ... report and relying on it and using it as the platform upon which to, to ... develop impressions, to interview and do a clinical interview of the client. It will inform the medical and neurological exam. It will inform what other diagnostic studies are done. So it's ... the critical piece of evaluation that we provide for the expert.

[Doc. 265, p. 180 lines 3-21].

The **[*288]** foregoing discussion with regard to the relationship between a lawyer's performance and an expert's findings clearly identifies the causal link between the trial team's deficient performance, and the incomplete mental health assessments and opinions presented to the trial court jury, through no fault of the conscientious experts who testified on behalf of Petitioner.

The expert assessments of Petitioner's mental condition were undermined by the trial team's substandard performance in two ways. First, as a result of the lack of a complete family history, the mental health experts who testified for Petitioner were logically and ethically unable to consider conditions known to have a genetic component, such as bipolar disorder. Second, because no one on the trial team had any real knowledge of Petitioner's mental health conditions and issues, they were unable to provide the mental health experts with a thorough personal history of Petitioner which should have included evidence of his delayed development and prominent symptoms of his mental and emotional impairments which were reasonably necessary to a reliable assessment. A discussion of the prejudice caused by the failure to conduct a **[*289]** thorough and competent mental health investigation of Petitioner's own symptoms of impairments and disabilities is thus appropriate.

Family History

The investigation of Petitioner's family history by his trial team discovered basically only two relevant pieces of information. One was the eleven-page admission and discharge summary from the Colorado State Hospital for Petitioner's mother, Marion Eaton. The second was the fact Petitioner's brother had committed suicide, although the date provided was incorrect. These two bits of family history information were the only evidence provided to Petitioner's mental health experts. The mental health experts did not know there was additional reliable and probative information available.

Petitioner, through his genetics, is heavily loaded for mental illness from both sides of the family. Dr. Woods, a neuropsychiatrist, indicated "family history is most important because we've come to understand that many, many not only medical diseases but psychiatric diseases are familial if not genetic." [Doc. 269, p. 29 lines 13-16]. He further explained how and why a family history is reasonably necessary to a thorough and reliable assessment. Symptoms are hereditary, **[*290]** and the symptoms Petitioner displays can be seen throughout his extended family.

> [W]hat you inherit are symptoms. You don't inherit a constellation. You inherit symptoms, and so in the same way that you inherit diabetes. And in this family you see a lot of diabetes . . .. The same is true with psychiatric disorders. In psychiatric disorders you may inherit pressured speech and flight of ideas, but that doesn't necessarily mean that you will be psychotic. You may inherit impaired judgment involved with your frontal lobe. So it doesn't mean that you inherit all of the symptoms.
>
> What we see in the Eaton family, however, is that this is an affectively laden family. This is a family that from generation to generation you see multiple symptoms being inherited, passed down from generation to generation.

[Doc. 269, p. 44 lines 10-25; p. 45 lines 1-4].

The pattern of symptoms throughout the Eaton and Ferrins families are set out in Exhibits 336, 337, 339.[25] The following discussion will concentrate on the family members who share specific symptoms which have been observed and documented in Petitioner.

The symptoms and mental condition of Zelma Eaton Smith, the sister of Petitioner's father, Merle Eaton, and thus Petitioner's aunt, are well documented in her hospitalization records, [Exhibit 178], and most closely resemble Petitioner's symptoms. Dr. Woods described the similarities.

> She is described as having a chronic mental illness. And as we look back, what we see is that about every decade, about 10 or every 15 years, she has a significant psychotic what we describe as an exacerbation. The symptoms just become out of control and require hospitalization. And what are the symptoms that we see with her? Well, if you look at the genogram, you see that she becomes psychotic. You see that she has depression or elation. You see that she here at 71 has developed what they described as dementia. And yet, you know, over her life this is someone that wrote children's books, wrote an

[25] Exhibit 336 and Exhibit 337 are color-coded (Exhibit 339) genograms of the Eaton and Ferrins families according **[*291]** to confirmed symptoms observed in various family members. The social history section of the report by Dr. Woods of his neuropsychiatric examination of Petitioner, Exhibit 168, provides sources for each individual's symptoms represented in the genograms.

> opera for children,[26] had extremely high functioning, and yet **[*292]** in the midst of that was assaultive, was noncompliant with medication, was grossly psychotic.
>
> So you see numbers of symptoms. She's treated ... both with antipsychotic medication as well as with medication to try to help control her mood.
>
> You also see that she had compulsive behavior. And she illustrates the compulsive behavior that was really even more rampant in the Eaton ... Eaton side of the family than in the Farrens side of the family. She hoarded. She -- in the hospital records they talk about her ... repeatedly stacking things in her room. Her clothes, wearing layers of clothes. And so you really see these core symptoms of the Eaton family: aggressiveness, assaultiveness, mood lability, compulsive behavior, reactivity, and a single area often of relatively good functioning.

[Doc. 269, p. 45 lines 17-25; p. 46 lines 1-18]. These are some of the same symptoms, as described *infra*, which have been observed in Petitioner.

Another characteristic Petitioner shares **[*293]** with his Aunt Zelma is "this deterioration over time. You know, when they're younger, they seem to be able to bounce back from these symptoms much more effectively, but as time goes by these symptoms tend to, to bring them down and to impact them cognitively as well as behaviorally as well as psychiatrically." [Doc. 269, p. 47 lines 3-8].

Another symptom they shared is one "that appears to be a core symptom when we're talking about this family, and that is altered sexual behavior or unusual hypersexuality. She was in the times that she was hospitalized, there's no other way to put it but a flirt. She was described as seductive. So that's another symptom that one sees." [Doc. 269, p. 47 lines 13-18]. Aunt Zelma's diagnosis was "bipolar disorder, manic episode." [Doc. 269, p. 48 lines 3-5; Exhibit 178, p. 21].

Dr. Ash agreed with Dr. Woods, and explained why the information concerning Zelma Eaton Smith would have made a significant difference in his findings and testimony at Petitioner's trial.

> [I]t was extremely important that there's the genetic history of bipolar disorder in, in a very close relative, but also the, the form of the bipolar disorder. There were two things that were very powerful. **[*294]** One, here is a 70-year-old woman barricading herself and fighting off the people working in the hospital. And then also in the record is this 70-year-old woman trying to seduce her doctor.

[Doc.267, p. 78 line 25; p. 79 lines 1-7]. Her aggressiveness and hypersexuality are behaviors "which you come to expect with bipolar disorder." Indeed, hypersexuality is "one of the diagnostic criteria." [Doc. 267, p. 79 lines 8-13]. Dr. Ash saw parallels between Zelma Eaton Smith and Petitioner's conditions.

> Dale, when he would get into a tense situation, and again a tense situation was primarily when he was around other men that he saw potentially combative, he would get nervous, tense, paranoid, and then he would have very limited abilities to respond. It was either to take off, to avoid, to flee, or to fight. And he often would explode and fight with his coworkers. Where at the same time, as one fellow, Mr. Hoopes, described, 90 percent of the time he was calm. As Mr. DuBry described, he was good if he went out and worked ... by himself, but you could expect trouble if he was out there with other men.

[Doc. 267, p. 79 line 25; p. 80 lines 1-11]. Dr. Ash, before Petitioner's trial, received no information **[*295]** with regard to Zelma Eaton Smith. He, in fact, did not even know she existed. [Doc. 267, p. 119 lines 19-24].

An equally important element of Petitioner's family history concerns his brother, Daryl Eaton. Daryl's ex-wife, Elizabeth Pryor, in a declaration, described behaviors and mood swings which, according to Dr. Woods, "one sees in bipolar disorder." [Doc. 269, p. 78 lines 6, 7; Exhibit 210]. Ms. Pryor, in her declaration, stated,

> (w)e divorced because Daryl fell apart and I could not take anymore. Daryl was a good man but he could not cope. His anxiety and depression would overtake him and he could not function when he really fell apart. The heavy debts that he incurred were a major part of it.

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[26] *www.amazon.co.uk/Gallant-childrens-operetta-arranged-Rothrock/dp/B0000D3FLC* The Gallant Tailor or, Seven at one Blow. A children's operetta in three acts. Music adapted and arranged by Z. Smith. Book and lyrics by Edith Rothrock.

[Doc. 269, p. 77 lines 5-9; Exhibit 210, p. 1]. Dr. Woods, in reviewing Ms. Pryor's description of her ex-husband's symptoms, observed, "(y)ou could in many cases substitute Mr. Eaton's name there." [Doc. 269, p. 77 lines 11, 12]. Dr. Woods pointed out in Petitioner's life, as early as age 16,

> we see this reactivity, we see this kind of inability to weigh and deliberate, this kind of inability to structure, effectively structure, and his anxiety and depression would overwhelm him. We see in **[*296]** multiple cases, in the Torrington records for example, where he fell apart and went in because he was suicidal. We see him in jail situations where he is treated with medication because he's falling apart.

[Doc. 269, p. 77 lines 14-21].

Daryl Eaton also shared Petitioner's symptoms of hypersomnia, multiple episodes of suicidal ideation, mood swings between depression and irritability, and out-of-control behavior which can often accompany bipolar disorder. Daryl, like Petitioner, was paranoid, concerned his wife was cheating on him. His spending got out of control. He started a construction business and started hiring people even though "there was no way he could ever pay those men." Daryl's grandiosity and excessive spending are also symptoms commonly seen with bipolar disorder. Daryl, once again as did Petitioner, would lose control, behave aggressively, and then immediately express remorse, which is unusual, although "it's not unusual within this family." [Doc. 269, p. 78 lines 1-25; p. 79 lines 1-25; p. 80 lines 1-18].

Daryl Eaton also started a construction business with his second wife, Terry Lerseth, and followed hail storms to repair and replace roofs and do painting, [Doc. 265, **[*297]** p. 10 lines 14-20]. Ms. Lerseth described one time when business was so slow she had to go to a food bank to get food. [Doc. 265, p. 10 lines 21-25; p. 11 lines 1-6].

Daryl's energy level was high. "His mind wouldn't stop." He didn't sleep much; maybe a few hours a night. [Doc. 265, p. 11 lines 20-25; p. 12 lines 1-3].

Daryl did not save money. "He spent it on tools, and he just -- as soon as he got it, he spent it." [Doc. 265, p. 15 lines 21-25]. Ms. Lerseth realized in January, 1988, they were having serious money trouble when their phone was shut off. [Doc. 265, p. 12 lines 22-25; p. 13 lines 1, 2]. She took a job as a waitress to help cope with the financial stress, however, Daryl disapproved and in March, 1988, they argued. Daryl got real angry and went outside and "kind of exploded...he took one of his pickups and rammed another one and then got his gun out and shot the windshield out." He owned three trucks at the time, and ended up wrecking all of them that night. Ms. Lerseth doesn't know how many shots Daryl fired into his truck, however, it was "(a) lot." She "thought he was crazy." She was "kind of scared. I was hoping he wouldn't come in the house after me." Daryl, afterward, **[*298]** "was very apologetic, sorry he did it. It's like he couldn't control himself." [Doc. 265, p. 13 lines 3-25; p. 14 lines 1-14]. Ms. Pryor described both manic and depressive episodes for Daryl. Ms. Lerseth, however, "described mainly the high energy." Dr. Ash found significant the fact "she described a very sweet, caring fellow, but she also described an episode where this, again, generally very gentle, caring man suddenly lost it and was overwhelmed with rage and was shooting cars in the back and ramming them into each other and, ... unexplicable." [Doc. 267, p. 83 lines 23-25; p. 84 lines 1-3]. Dr. Ash indicated the experiences Ms. Lerseth described with Daryl Eaton would be significant with regard to diagnosis of Petitioner.

> Q. What is the significance of these experiences that Terry Lerseth had with Daryl Eaton in your diagnostic picture of Dale Eaton?
>
> A. Well, they're just very significant because it would be -- there's so much evidence that his brother had bipolar disorder, and in the bipolar disorder part of the manifestation was in terms of rage that became out of control.

[Doc. 267, p. 84 lines 7-13].

Dr. Ash concurred with the conclusion by Dr. Woods that Daryl Eaton was an undiagnosed **[*299]** case of bipolar disorder. His symptoms were classic.

> And the information that Elizabeth Pryor described ... classic descriptions where Daryl would become depressed and lay around, have a hard time getting out of bed, do nothing for periods of time. And then there would be other times when he had extremely high energy, would need very little sleep, and during that time he would have what really sounded like grandiose ideas of hiring and developing a construction company to the point that he got himself into very significant financial problems, which is what you often see with someone with bipolar disorder. In the high-energy grandiose period they start overreaching and get themselves into significant problems. So she described these classic mood swings that you see with bipolar disorder.

[Doc. 267, p. 81 lines 22-25; p. 82 lines 1-9]. The information provided by Ms. Pryor was extremely important information to Dr. Ash. "Whenever there is a first-degree relative, that is, a mother, father, brother, sister, daughter, son, first-degree relative with bipolar disorder, one immediately has to be concerned about bipolar disorder being there when depression is also present." [Doc. 267, p. 81 **[*300]** lines 16-22].

Dr. Ash pointed to other significant family history which had not been provided to him prior to Petitioner's trial. Petitioner's son, Ed, was diagnosed with bipolar disorder at the Wyoming State Hospital, and medicated with Mellaril, an antipsychotic, and Desipramine, a tricyclic antidepressant. [Doc. 267, p. 85 lines 14-25; p. 86 lines 1-3]. This information would have had a "profound" effect on Dr. Ash's assessment of Petitioner. "A first-degree relative diagnosed with bipolar disorder in a man who shows symptoms of bipolar disorder." [Doc. 267, p. 86 lines 4-8]. Dr. Ash stated identifying two first-degree relatives with bipolar disorder, plus a maternal aunt, "tremendously" alters his view of Petitioner's genetic vulnerability to bipolar disorder from the view he held at the time of trial. [Doc. 267, p. 86 lines 9-20].

Other family history added to the likelihood of Petitioner suffered from a major psychosis. His niece's daughter was apparently diagnosed with bipolar disorder, and a nephew committed suicide, which is often associated with the disorder. [Doc. 267, p. 87, 88]. The failure by the trial team to provide Dr. Ash with any information indicating Petitioner had **[*301]** multiple relatives diagnosed with bipolar disease significantly altered the mitigation evidentiary landscape of Petitioner's trial. Dr. Ash testified without a family history of genetic vulnerability to bipolar disorder, "it's extremely tenuous" to make such a diagnosis, and the trial team fail to provide Dr. Ash with any information about this family history. Dr. Ash, without this history, could not reach the conclusion Petitioner suffered from bipolar disorder. Dr. Ash, when asked what trial counsel had failed to provide him, simply replied, "What was missing was the genetic history and evidence of hypomanic reactions." [Doc. 267, p. 74 lines 4-15].

The trial team also failed to provide Dr. Ash with Exhibit 176, the Weld County General Hospital records of Marian Eaton's psychiatric treatment in the 1960's. [Doc. 267, p. 76 lines 18-24]. Dr. Ash testified the information contained in these records shed considerable light on Mrs. Eaton's lack of ability to be an effective buffer between her children and her husband's violence.

> Dr. Mark Farrell in Greeley diagnosed Marian Eaton as having paranoid schizophrenia, and when she was hospitalized by Dr. Farrell and then she was treated ... **[*302]** at the state hospital in Pueblo she described very severe delusional materials, one of them being that her family had been essentially replaced by somebody else so that her children were really not her own children, they were other people... -- the profound effect that that would have before going in the hospital, during the hospital, and after returning from the hospital on ... her ability to be able to be with her children would be very powerful.

[Doc. 267, p. 72 lines 6-17]. Dr. Woods testified this particular delusion is called Capgras syndrome, a disorder of the right temporal lobe. This delusion first appeared in 1961, around the time of Petitioner's first major criminal episode, when he stabbed a woman in an argument over melons as he was trying to get money to run away from home. [Doc. 269, p. 74 lines 12-25; p. 75 lines 1-9]. Dr. Ash, in light of these delusions, believed "it would be virtually impossible" for Mrs. Eaton to nurture, love and care for her children, [Doc. 267, p. 77 lines 18-20], and Dr. Woods agreed.

> Q. And in the -- you've explained the diagnostic significance and the significance with respect to Mrs. Eaton, but what would be the effect of such a delusion on **[*303]** her children?
> A. Well, you're living with a mother who doesn't believe that you are her child. You're living with a mother that is acting in a very psychotic way who is unable to do the basics in terms of taking care of you. And what happens in these situations is that roles get reversed and you find the children in many way taking the responsibility of the parent because the parent's no longer able to do that. In many cases there is another parent that provides that type of support. In this case Mr. Eaton, himself an alcoholic, was probably less able to do that than in many families.

[Doc. 269, p. 75 lines 10-22].

Dr. Woods testified life is very difficult for the children of mothers with psychotic illnesses. "They often do not have the level of support. They don't have the level of resources. She was in the hospital ... for years at a time. I believe from 1961 through perhaps 1964 she was hospitalized. These were pivotal years in Mr. Eaton's life. 1961 was when he had his first difficult, real difficulty with the law." [Doc. 269, p. 60 lines 8-13; p. 75 lines 4-9]. The hospitalization records for Petitioner's mother thus have both genetic and environmental significance in assessing **[*304]** his condition. [Doc. 269, p. 75 lines 23-25].

The existence of major disorders on both sides of Petitioner's family tree, and bipolar disorder in a sibling and a child, indicate Petitioner's chance of inheriting psychotic symptoms to be "very high." [Doc. 269, p. 43 lines 21-25; p. 44 lines 1-12]. Dr. Woods testified although Mrs. Eaton's diagnosis was "a bit different than Zelma's in that she was diagnosed with schizophrenia over the years," Mrs. Eaton had "these consistent core symptoms. She was much more consistently psychotic than Miss Smith and over time was treated fairly regularly with antipsychotic medication." Mrs. Eaton "obviously had a mood problem as well. She had tremendous problems with hygiene. She had tremendous problems with being able to organize her environment." [Doc. 269, p. 59 lines 2-19]. The nursing notes from her hospitalizations also specifically describe her auditory and visual hallucinations, including "voices of people I've known but I can't identify them," [Doc. 269, p. 63 lines 10-25, quoting Mrs. Eaton, Exhibit 176, p. 28]; the paranoid sense (dementia) people were removing her undergarments while she slept, [Doc. 269, p. 64 lines 6-16; Exhibit 176, p. **[*305]** 29]; and she talked about seeing transparent people. [Doc. 269, p. 58 line 3; Exhibit 176, p. 61]. The hospital records also reflect Mrs. Eaton "continues to have flight of ideas," [Exhibit 176, p. 62[, which "really sounds manic" rather than schizophrenic. Doc. 269, p. 68 lines 5-25; p. 69 lines 1-20]. Other places in the records describe her as aggressive, "hostile and ... threatening to shoot family and neighborhood children." She had broken most of the windows of her home, exhibiting "anger and threatening behavior that can be part of a mental illness." Dr. Woods described Mrs. Eaton as "underwater." She was not able to function as "a mother that can actually provide the resources to raise her child." [Doc. 269, p. 72 lines 2-25; p. 73 lines 1-22]. Dr. Woods summarized the disadvantage of growing up in the Eaton home.

> What you really see here is the genetics are the foundation. The environment is the next level. And when we have -- if the genetics are bad, if the genetics are, in fact, impaired, then you have a foundation that is very, very difficult to build a good environmental home on, and that's what happened here.

[Doc. 269, p. 76 lines 10-15].

Other symptoms and disorders appear **[*306]** throughout the Eaton family history. Impulsive behavior is common. One story related by Petitioner's brother, Richard, involved their grandfather, Elmer Ferrins, who fought with his neighbor and killed his sheep.

> [T]his neighbor ... kept letting his sheep run on my grandfather's property, and my grandfather kept telling him to keep his sheep off his property, and the guy just kept ignoring, ignoring him. And finally my grandfather ... put a table outside and a chair, put his rifles out there, and just started shooting sheep. And that neighbor came over and was gonna whip my grandfather, and my grandfather -- I think the neighbor was 40, my grandfather was in his 60s, and he whooped him.

[Doc. 266, p. 223 lines 6-15]. Dr. Woods viewed this piece of family lore as a good example of the impulsivity which runs through this family. [Doc. 269, p. 38 lines 9-23]. Dr. Ash observed Elmer also ate nails, adding to the "strangeness, weirdness in the family history." [Doc. 267, p. 115 lines 19-22]. Dr. Woods testified Elmer's eating disorder, called feromania or pica, is "a subset of obsessive-compulsive disorders." [Doc. 269, p. 37 lines 12-25; p. 38 lines 1-8].

Other members of the Eaton-Ferrins family **[*307]** exhibited similar behavior. Petitioner's paternal grandfather, Harvey Eaton, "was a real ornery old pup. He was a little man, but boy did he get himself into trouble. He had a temper too." Mrs. Lange recalled "Harvey hit the gas deliveryman over the head with a hammer. He went and turned himself in straight away, but he was known for doing things like that. He got into fights pretty regular and he was always causing trouble. He could not get along with any of his neighbors and he had an awful stubborn streak." [Doc. 68-7, p. 2]. Harvey's granddaughter and Petitioner's first cousin, Darlene Pursel, stated when she and her mother, Zelma Eaton Smith, would try to visit Harvey, he would sometimes literally shoot them off his property. [Doc. 68-8, p. 1]. Dr. Woods noted Uncle Loren Ferrins was a particularly colorful character.

> The declarations of his daughters, twin daughters, Sandra and Lorena, describe him as both impulsive, compulsive, and quite a ladies' man. If I recall one of the declarations, his daughter described him as chasing high school girls when she was in high school while her mother or stepmother was home crying. So he was a pretty hypersexual person, married several times. **[*308]** Married Wynona, and married Betty. Divorced Betty. Broke his back. Betty was the... emergency room nurse. They got back together. And after reading through his history, I'll never look at a skunk the same way again.

[Doc. 269, p. 39 lines 5-15].

The Ferrins and Eaton families both have a history of late onset dementia. Zelma Eaton Smith, Merle Eaton, and virtually all of the men in the Ferrins family apparently suffered from Alzheimer's disease, or some other form of late onset dementia. Loren Ferrins' daughter, Lorena Ferrins Altman testified her grandfather, Elmer Ferrins, and all of her paternal uncles (Petitioner's maternal uncles) "all died from Alzheimer's...Gus, Ross, Dale, and then wound up Elmer, my granddad. And my dad was

paranoid of everybody, didn't trust nobody for nothing." [Doc. 268, p. 83 lines 17-25]. Dr. Woods explained the probative value of this pattern.

> And so what we're really seeing here is another type of dementia form process that not only goes through his paternal family, but we see it going through the maternal family as well. And this often occurs with people that have chronic psychiatric disorder. We now know that ... psychiatric disorder is a brain disorder, **[*309]** and people that have these kinds of disorders often become increasingly impaired cognitively, not only psychiatrically, as time goes by.

[Doc. 269, p. 40 lines 10-18]. The men in the Ferrins family were affected by Alzheimer's. Diabetes seems to plague the women in the Ferrins family. Confirmed cases of diabetes in the family include Marian Ferrins Eaton, Marilu Ferrins O'Malley, Mirabel Ferrins Thomison, and Sharon Eaton Slagowski. [Doc. 268, p. 85 lines 6-25]. Diabetes is another disease which "can have psychiatric manifestations." [Doc. 269, p. 12 lines 22-24].

Dr. Woods explained why obsessive-compulsive behaviors are another important symptom to track through the family tree.

> [C]ompulsive behavior reflects a lack of mental flexibility. Compulsive behavior reflects an inability to effectively weigh and deliberate. You get stuck.
>
> Now, when compulsive behavior occurs along with another psychiatric disorder, it decreases the potential of that person's ability to function. ... [A] person that has bipolar disorder and obsessive-compulsive disorder or schizophrenia and obsessive-compulsive disorder has a worst potential in terms of functioning than a person that does not have the compulsive disorder. **[*310]** ... [W]e call those comorbid disorders. And we see comorbid disorders, we see that in truth psychiatric disorders occur in clumps. They don't occur singularly. They occur in clumps. And if one of your clumps is a compulsive behavior, it really undermines your ability to function.

[Doc. 269, p. 31 lines 24, 25; p. 32 lines 1-16].

Dr. Woods identified a variety of obsessive-compulsive behaviors such as eating disorders and hoarding in the Eaton and Ferrins families.

> Compulsive behavior. Compulsive behavior is very, very important. And compulsive behavior is, um, what we see with Mr. Eaton and the trichotillomania. We see hoarding behavior again with Mr. Eaton. We see hoarding behavior with aunts, with uncles, um, with his mother. Um, we see compulsive eating behavior with other family members, his sisters, for example.

[Doc. 269, p. 31 lines 18-24].

Marian Eaton was known to eat an entire five-gallon tub of ice-cream in the middle of the night. Petitioner's sisters were all obese as a result of eating disorders, and all have had intestinal bypass surgery to control their weight. [Doc. 268, p. 74 lines 21-25; p. 25 lines 1-23]. Denise Heinz describes an example of the obsessive-compulsive eating-disordered **[*311]** behavior of her mother, Judy Mason.

> I have little contact with my mother, Judy. She is very controlling and she likes the spotlight. I am certain that she is mentally ill because she has the same kinds of mood swings and she is very weird about food. At restaurants she will interrogate the waiter about the recipe and method of preparing the food, and when the food comes exactly as she ordered, she will make a huge scene. She did that once in my favorite Chinese restaurant in Greeley, and I was so humiliated that I won't go back....

[Exhibit 194, p. 2].

Hoarding is another form of obsessive-compulsive behavior seen on both sides of the Eaton family, usually accompanied by obvious paranoia. The hospital records for Aunt Zelma Eaton Smith document she hoarded items in her room such as shoes, books, and multiple layers of clothing, and she repetitively sorted them. [Doc. 269, p. 56 lines 24, 25; p. 57 lines 1-21]. Sandra Andrae described the paranoid hoarding-like storage of personal belongings by her father, Loren Ferrins.

> [H]e had an imagination, but he would take all of his vehicles, his lawnmowers, anything that had a motor on it, and he would make switches or backups of some kind that he **[*312]** would fix them so if someone tried to start them, it might start, but then it would die, and they'd never get it started again, and they wouldn't be able to know it that it was a fake starter that he would put on it for them to start. And on his guns, because if they stole the gun, you know, they could sell it and stuff, so he would take ... the bolts off of the rifles, and he would go and put them all over, out in the garage, all over,

> in his toolbox. He'd put them in sacks. He'd put them in corners, in his chains, under the furniture, in the back of the furniture, he would tape it to the furniture, so people couldn't find it.

[Doc. 268, p. 113 lines 13-25; p. 114 lines 1-4]. He had equally bizarre rituals for storing his important papers.

> He would take and he'd either stuff it into a box or a piece of paper or in a sack, a plastic bag, and he'd hide them in between books. He would go and stick them up in the closets and his drawers. He would never put the same thing together. He would go -- everything had to be somewhere else so that you had to look for it. Even when he died I had to go through every piece of paper because we didn't know if it was junk or not.

[Doc. 268, p. 114 lines **[*313]** 1-14].

Dr. Woods described Petitioner's family as "an affectively laden family. This is a family that from generation to generation you see multiple symptoms being inherited, passed down from generation to generation." [Doc. 269, p. 45 lines 1-4].

Petitioner's Life History

The trial team, in addition to failing to investigate the mental health history of Petitioner's extended family, also failed to conduct an adequate investigation of Petitioner's own developmental and mental health history. They, as well, failed to make competent observations of their client's symptoms of mental impairment which they observed in their dealings with him. Mr. Stetler explained what a psychosocial history of the client entails, and why it is important.

> Q. First is the psychosocial history. What is a psychosocial history?
> A. Well, that's, that's the ultimate kind of finished product. That's the narrative account of who this client is in the context of the family, community, and historical period in which he grew up. So that's a kind of comprehensive summary of all the information that you've distilled out of your records and client interviews.
>
> Q. Are they often divided into aspects of the client's life, like **[*314]** employment --
> A. Yes.
> Q. -- education --
> A. Of course, yeah.
> Q. -- family history?
> A. Yeah, and they're called biopsychosocial histories sometimes because, you know, what's in the DNA, what's running in this family, what's the story of his developmental period, what's his educational experience, did he have problems in school, what's his work life been like, what relationships did he have, what romantic relationships, marriages, children, so forth.
> Q. Why is this important?
> A. Well, again, it's gonna be a part of the story that humanizes the client. You want to convey to the trier of fact, the jurors who are making decisions about the reasoned moral decision about whether this person should live and die, you want to convey his humanity. And so that's a big part of what you're trying to discover in producing this psychosocial history. But it's also going to be the, you know, the building block of a reliable mental health assessment. It's the information that you want to give your mental health experts when they're doing their evaluations.

[Doc. 264, p. 96 lines 18-25; p. 97 lines 1-25; p. 98 lines 1, 2].

The mental health assessment by the forensic mental health experts who testified at trial **[*315]** on behalf of Petitioner, in particular Dr. Ash,[27] was adversely impacted by the paucity of documentation and instructions provided to them prior to Petitioner's trial; the failure of the trial team to apprise Dr. Ash of their observations and interactions with Petitioner prior to, and during trial; and their failure to investigate and provide to Dr. Ash important aspects of Petitioner's developmental, psychiatric, and life history.

[27] Dr. Linda J. Gummow testified on behalf of Petitioner at trial. She was, however, not available to be interviewed by Petitioner's counsel in this proceeding due to an incapacitating illness. Dr. Gummow did testify at the *Calene* Remand Hearing. [Doc. 86-13, pp. 25-55; Doc. 86-14, pp. 1-55].

Documentation and Instructions Provided

The trial team, in May, 2003, retained Dr. Ash, a forensic psychiatrist, to assess Petitioner for competency to proceed, and responsibility at the time of the homicide of Ms. Kimmell. Dr. Ash, when he visited Petitioner for the first time on May 17, 2003, had not been provided any life history information for him. [Doc. 267, p. 41 lines 11-25; p. 43 lines 12-19]. Garri Gemelli, who was listed by the Public Defender's Office on its letterhead **[*316]** as a "Mitigation Specialist," sent Dr. Ash, on November 13, 2003, a packet of materials accompanied by a cover letter which read in its entirety:

> Enclosed please find:
> 1. Natrona County Sheriffs Office Chronology of the case;
> 2. FBI Analysis;
> 3. Our chronology updated as of 9/18/03;
> 4. Pre-sentence Investigation Report and Addendum dated 10/7/03;
> 5. Weld County, Colorado court records 1961commitment;
> 6. Mental Health records from Torrington, WY 1986;
> 7. Wyoming State Hospital mental evaluation 9/17/97 & 11/24/97;
> 8. Wyoming State Penitentiary Incident Report 1998;
> 9. Lo-Fu Tan, MD mental health notes 1998;
> 10. Forensic Report for periods June 17 to August 5, 1999 and addendum; and
> 11. Medical records from Federal Bureau of Prisons June, 1999-March, 2003.
>
> If you have any questions, please do not hesitate to give me a call.

[Doc. 267, p. 43 lines 21-25; p. 44 lines 1-25; p. 45 lines 1-17; Doc. 66-3]. Item number 5, the Weld County juvenile court reports, consisted solely of the two-page report of Dr. Donald Langsley to the Weld County District Court. [Doc. 267, p. 44 lines 4-17].

The next communication to Dr. Ash was a December 10, 2003, fax from Mr. Skaggs telling Dr. Ash, "Focus on the three underlined **[*317]** mitigators and see if any fit. Talk to you Thursday." [Doc. 267, p. 45 lines 19-25; p. 46 lines 1-6; Doc. 66-4; Exhibit 15 (highlighted *W.S. § 6-2-102* statutory mitigators, attached to December 10, 2003 fax)].

Dr. Ash, when asked if he received any further guidance from the trial team, testified, "This essentially was the extent of it." [Doc. 267, p. 46 lines 7-9]. He did find, based on what he was given, "deep depression is throughout all of the records that were sent to me." [Doc. 267, p. 61 lines 20-25]. He could not, however, go further, and diagnose a bipolar disorder.

> Q. (BY MR. O'BRIEN) Were there some things missing from Mr. Eaton's history that excluded at this particular time bipolar disorder as a diagnosis?
> A. Yes, there were.
> Q. What was missing?
>
> A. There were two major things missing. Bipolar is a genetic brain condition fundamentally. It has a lot of things that are added to that, but fundamentally it's a genetic bipolar condition -- or organic condition. When there is nothing in the genetic tree that I could find that was bipolar disorder, I was left, uh, nervous about making that diagnosis. It can be done if there's a classical clinical picture, but that then led to the second area. **[*318]** With bipolar disorder you have to have the profound depressions, and he unquestionably in my mind had those, but you also have to have hypomanic or manic episodes, and I could not gather that from the information that I had either directly from Mr. Eaton, which is not unusual -- a person with bipolar disorder often has very little insight into that themselves -- but I also did not have it from any of the other information that was in front of me.

[Doc. 267, p. 62 lines 12-25; p. 63 lines 1-7].

Observations and Interactions

Mr. Skaggs and the other members of the trial team failed to relate to Dr. Ash any of their observations and interactions with regard to Petitioner's mental health or his ability to assist with his own defense. They did not tell Dr. Ash, for example, Petitioner was refusing to cooperate in his defense, or that Ms. Moree could not get Petitioner to provide a chronology of schools or jobs. Mr. Skaggs did not tell Dr. Ash Petitioner was getting "ratty" in the county jail, or that he was irritable,

unkempt, agitated or uncooperative. Dr. Ash did have some records from the Natrona County Jail describing Petitioner's feelings of persecution by other inmates, however, he had **[*319]** no idea these issues might have been spilling over into the attorney-client relationship. [Doc. 267, p. 50 lines 5-25; p. 51 lines 1-15]. Dr. Ash was able to form a trusting relationship with Petitioner in which information flowed freely. He thus anticipated, in the absence of information to the contrary, Petitioner was doing the same with his attorney. [Doc. 267, p. 51 lines 16-25; p. 52 lines 1-5].

Petitioner's inability to provide a chronology of schools and work was important to the assessment by Dr. Ash as it might indicate he "is becoming increasingly paranoid" under stress which, coupled with his limited intelligence, could make it "very difficult for him to remember and give accurate data." [Doc. 267, p. 53 lines 18-25; p. 54 lines 1-9]. Petitioner's deteriorating physical appearance and hygiene would be of concern, and is consistent with his mother's poor physical hygiene which accompanied her chronic undifferentiated schizophrenia, "and that's something you see often with people with chronic mental illness." [Doc. 267, p. 54 lines 10-25; p. 55 lines 1-3]. Dr. Ash indicated Petitioner's irritability and agitation "has progressed into a direction of paranoia and at times delusional." **[*320]** [Doc. 257, p. 55 lines 4-13].

Dr. Ash was also apparently not aware of Petitioner's outbursts during the guilt or innocence stage of the trial, which was important for similar reasons: "under duress, when he gets tense and the agitation and the anger builds, that he can become psychotic." [Doc. 267, p. 58 lines 11-19].

Developmental, Psychiatric, and Life History

The failure by the trial team to develop a thorough and comprehensive developmental, psychiatric, and life history for Petitioner had perhaps the most significant effect on the forensic mental health assessment presented on behalf of Petitioner at trial.

Petitioner, in the proceedings before this Court, has presented voluminous records which the trial team could have obtained through a reasonable investigation. He has also provided information derived from interviews by his present counsel of witnesses whose identity and relevance were known to the trial team, but whom they did not interview. These documents and witness interviews provide information concerning Petitioner's personal growth, development, and symptomology which was reasonably necessary for a reliable mental health assessment as part of the development of mental **[*321]** health defense for Petitioner.

Early childhood development

The mitigation investigation by the trial team produced virtually no information concerning Petitioner's early years, and only very sketchy information with regard to his adolescence and young adulthood. Mr. Skaggs agreed the first sentence of the October 31, 1961, report by Dr. Donald Langsley raised the possibility of patient records being available in 2003, since they were available in 2013, documenting Petitioner's ten-day hospitalization at the Colorado University Hospital from October 16 through 26, 1961. [Doc.261, p. 217 lines 9-23; Exhibit 223-14]. An investigation into the possible existence of such records would have produced the day-to-day records of Petitioner's hospitalization and related psychiatric assessment. [Exhibit 169-4]. Those records contained the only known data concerning Petitioner's developmental milestones in the first five years of life.[28] Both of Petitioner's parents are now deceased, thus no information exists with regard to Petitioner's early childhood except the hospitalization records.

Petitioner's parents, in 1961, told the physicians examining Petitioner he experienced significant developmental delays.

> The mother recalls that the patient had difficulty learning to talk and had some trouble with pronunciation. She said that he walked at age fourteen months. She said in general he has always been a little slower than the other children. She related that the patient went to a special speech class in his second year of school. However, the patient denied this. She said that

[28] Merle Eaton, Petitioner's father, was living at the time of trial, yet he was never asked him any questions about **[*322]** Petitioner's early development. As Mr. Stetler pointed out, "Merle may not have been forthcoming about the physical violence in the home but could still have been a reliable informant about the developmental milestones,...[e]specially if he is shown records like that that would refresh his recollection." [Doc. 264, p. 136 lines 13-25; p. 137 lines 1, 2].

> he was a little slow in learning toilet training and that he did not achieve bowel control until he was beyond the age of three. Also the patient was enuretic until after starting school.

[Doc. 264, p. 137 lines 12-25; Exhibit 169-4, p. 17]. Mr. and Mrs. Eaton also told Dr. Langsley Petitioner spent two years in the first grade. [Exhibit 169-4, p. 17]. The trial **[*323]** team never obtained these records, thus Dr. Ash did not see them before trial. He indicated he would have found these records "very helpful because it talks in terms of Dale Eaton was having trouble right from the beginning. . . . He was, he was slow to walk, slow to talk, slow to potty train, and had difficulty with school right from the beginning, couldn't even complete the first grade, had to have speech help, had major problems throughout." [Doc. 267, p. 126 lines 7-12]. Dr. Woods noted additional evidence of Petitioner's delayed development and cognitive impairment in this same file. Examiners noted Petitioner's speech was described as "slowed," and his "[i]ntelligence was estimated as dull normal, and he had a poor grasp of general information. Judgment and insight were felt to be poor." [Doc. 269, p. 97 lines 14-25]. The records indicate Petitioner is "lagging behind" and, in addition to the factors in his life which are holding him back, "there are other...cognitive things that are going on." [Doc. 269, p. 98 lines 3-8].

Petitioner's Aunt, Marilu O'Malley, was also available to the trial team to provide relevant information about Petitioner's home life and intellectual functioning. He had **[*324]** one extended stay with Ms. O'Malley and her husband, Bill, a visit about which no one from the trial team made any inquiry. She indicated, in her experience, in a declaration admitted as an exhibit in this matter, "Dale was a quiet child. He was beat down. I never thought he had a very high IQ because of the way he talked and the way he acted." She felt Petitioner "probably wasn't very smart, but kids need attention and encouragement to grow and Dale Wayne certainly never received that." When Petitioner was around twelve years old, Ms. O'Malley asked if he could stay with her "because I felt so sorry for him." Petitioner was so needy. Her husband, Bill, took Petitioner fishing, and he talked about it for years afterward. Petitioner bought Bill a fishing rod years later to thank him for taking him fishing. Ms. O'Malley said between Petitioner and his father, Merle, there was "no relationship, no closeness and certainly no love. There wasn't anything Dale Wayne could have done to change the way his father thought about him. It was really sad."[Doc. 68-9, p. 2].

Meeker, Colorado

Other probative evidence of Petitioner's delayed development can be found in the records of the Meeker, Colorado **[*325]** school district, [Exhibit 169-82] and Petitioner's age-peers from Meeker. These materials, which provide relevant data including standardized testing, were also not available to Dr. Ash. [Doc. 267, p. 129 lines 24, 24; p. 130 lines 1-4; p. 131 lines 22-25]. The enrollment forms completed by Petitioner are even important. Dr. Ash stated the form is "very significant" as it shows "a 13-year-old boy who can't spell his father's name," which "reflects such...a low development in terms of academics." [Doc. 267, p. 130 lines 5-15]. He did no better with the enrollment form at age 15. "He's again trying to spell his dad's name and can't do it." [Doc. 267, p. 130 lines 18-23]. The school records reveal Petitioner failed the first grade, and failed the seventh grade twice. He was, nonetheless, socially promoted to the eighth grade. Dr. Ash noted Petitioner's younger sister, Sharon, was also held back so she would not surpass her older brother in school. [Doc. 267, p. 131 lines 2-19].[29] Dr. Woods noted Petitioner's obsessive-compulsive hair-pulling (trichotillomania) is captured in his seventh grade picture which shows an odd bald patch on the right side of Petitioner's head. [Doc. 269, p. 94 **[*326]** lines 10-24; Exhibit 169-82, p. 1].

The Meeker school records also contain standardized test results which reveal significant impairments in Petitioner's verbal and reasoning abilities. Dr. Woods found it fascinating there was such a spread in Petitioner's test scores. He is in the bottom one and two percent of the population in arithmetic reasoning (story problems) and language comprehension, however, he was in the 88th percentile in applied science and mechanics. "[T]his is the basis of what we look at 20 years later when he may be working as a welder but he can't keep track of his checkbook, or he lets his ex-wife handle his money even though he knows that she's taking -- he assumes that she's taking money from him. He is still able to do this welding to a degree. It's not inconsistent with the kinds of strengths and weaknesses that we see in him." [Doc. 269, p. 92 lines 19-25; p .93 lines 1-24]. Dr. Ash found it remarkable "his scores are just so low, such low percentiles. It was -- I **[*327]** had written these down that he's in the 1st, 2nd, 4th, 7th, 7th, 12th, and 16th percentiles except for one thing and that was mechanics, and he was up to 88th

[29] Sharon Slagowski told Natrona County Deputy Lynn Cohee, "my folks held me back a year because they thought it would help Dale want to finish school. So, it had to be 7th or 8th grade." [Doc. 199-8, p. 8].

percentile with that. Everything else was extremely low." [Doc. 267, p. 132 lines 5-9]. Dr. Ash, when asked what this says about Petitioner's general intellectual capacity, simply replied, "so limited." [Doc. 267, p. 132 lines 10-12].

Interviews with Petitioner's peers conducted in support of his petition herein also provide information important to a reliable mental health assessment. Phyllis Lake, the daughter of John and Syble Barney, who knew Petitioner in junior high school and when he worked for her parents, is quite articulate in describing Petitioner's limitations. Dr. Ash found her description of Petitioner "was really sad. ... [H]er statement he was overweight, socially awkward, poor self-esteem, tries to draw attention to himself, even negative attention. He's poor. He's troubled. Odd, a misfit. Other kids picked on him." [Doc. 267, p. 132 lines 23-25; p. 133 lines 1-4]. Margie Jackson recalled Petitioner was perceived as "different in the head," and "Dale never really fit in at Meeker; he was an outsider." [Exhibit 195]. **[*328]** Jacque Duzik remembers "Dale had very bad hygiene and wore dirty clothes to school...He was invisible." [Exhibit 191]. The person Brian Conrado knew as Petitioner "was the brunt of all kinds of harassment and belittling." [Doc. 268, p. 40 lines 18-20]. "He was belittled. He, . . . from what I remember, . . . he wasn't real smart. Of course, . . . you know, if you took a test in school, then a lot of times you passed your test and your classmate graded it, so your classmates knew how you were doing, whether you liked it or not, 'cause they were grading your paper, you were grading theirs, you know, or getting the answers. And, . . . Dale just wasn't -- he didn't have it." [Doc. 268, p. 43 lines -15].

Petitioner was so needy Phyllis Lake's brother, Lyn, stirred a fly into a bowl of beans and fed it to Petitioner, then laughed at him, and "he was okay with that." [Doc. 267, p. 133 lines 5-11; Doc. 268, p. 12 lines 23-25; p. 13 lines 1-8]. Dr. Ash found her observations to be important.

> Q. What other aspects of Mr. Eaton are significant from Mrs. Lake's declaration in terms of his socialization with his peers?
>
> A. You know, the one thing that I felt was really important and said a lot about **[*329]** Dale was that, that she wanted to avoid him because she was afraid if she let him get close to her that he was so needy that he would stick to her like glue. So he [sic] tried to, to stay back.

[Doc. 267, p. 133 lines 12-19].

Ms. Lake observed Petitioner's "ability to learn was limited." [Doc. 268, p. 13 lines 18-24]. He had a "very difficult time in taking directions," and "you weren't quite sure where he was coming from with his lack of social skills." [Doc. 268, p. 13 lines 18-24; p. 14 lines 1-4]. He ate meals with the Barney family on occasion, and Ms. Lake saw Petitioner "[d]idn't know how to hold a fork. Did not have good manners. He was just hungry." [Doc. 268, p. 16 lines 10-19]. Even simple farm tasks were very difficult. "He couldn't learn simple things like how to -- if a gate was twisted, a wire gate was twisted, he couldn't understand how to retwist it to make it stand up or to work." Petitioner was not allowed to drive any vehicles or tractors. [Doc. 268, p. 14 lines 22-25; p. 15 lines 1-6]. Ms. Lake, when asked if her father accepted Petitioner's work, related:

> My dad would just fix it, because he knew -- I don't know how to term this because when I was growing up we didn't **[*330]** have ODC and all the other words that were -- bipolar, whatever you would want to say, so we would think of Dale as possibly retarded or mentally -- we knew he was mentally challenged. Um, what we weren't sure if it was because of his father's abuse or whether it was retardation in the family. We didn't ever try to analyze him. We just accepted him. But ... he couldn't do step 1-2-3. You'd have to tell him 3-2-1 again and again and 2-1-3 and -- to try to get it -- so someone worked with him most of the time.

[Doc. 268, p. 15 lines 7-22]. Dr. Woods found it significant the instructions have to be repeated for Petitioner.

> Q. (BY MR. O'BRIEN) Let's scroll down a little further and see if that provides you more detail. And what did she observe that caused her to conclude he was mentally slow?
> A. That instructions had to be repeated. When you do a neurological examination or a neuropsychiatric examination, you try to do one-step, two-step, and three-step instructions.
> And you do one-step, two-step, you do multistep instructions, you're testing for a couple of things. You're testing for working memory, can a person really hold it into their mind.
>
> Okay, George, get up, go to the door, you know, **[*331]** turn left, um, go to the --where your cell phone is, put in your key, get your cell phone out, multisteps. It takes working memory for
> you to remember that and to go do it. It also takes processing speed. You have to be able to listen, as time goes by, to be able to hold all that in your basket. So you have to have both working memory and processing speed. When you cannot do multistep instructions, often one or the other is not working, either your memory, you can't hold it all in, or you're not

> catching ... it quickly enough to really be able to make sense of it. And here she's talking about really having to go over instructions over and over. Now, that doesn't mean that he couldn't do the task. Right? Because if he stuck long enough, he might be able to do the task. It's just that he needed this prompting in order to get it up and running.

[Doc. 269, p. 96 lines 2-25; p. 97 line 1].

Ms. Lake did not believe Petitioner would ever be able to keep a job. "He didn't have the ability to work with people. His social skills, unless he really matured or found someone to guide him his whole life, we didn't know that he could sit, that he could listen, that he could communicate, that he could **[*332]** respond even with love." [Doc. 268, p. 17 lines 8-16]. Dr. Ash acknowledged the observations by Ms. Lake offered insight into Petitioner's development and social skills.

> Q. (BY MR. O'BRIEN) Does that paragraph or that information provided by
> Mrs. Lake provide you some additional insight into Mr. Eaton's developmental stage or adaptive skills?
> A. Well, she was a very good observer, and she talked about the very same thing actually that a number of his coworkers and employers talked about and his family, that he had a temper, that he was easily frustrated, and he was mentally slow. And if he had a chore to do, he couldn't do it very well, but he had a hard time understanding it. Instructions had to be repeated. And he at times like that gets very angry, very frustrated, and has a tendency to lose his temper.

[Doc. 267, p. 135 lines 6-16].

The comments by Ms. Lake also confirmed the testimony of Brian Conrado indicating Petitioner was tormented and ridiculed by his peers, and her observations corroborates the abuse Petitioner suffered in his home. These traumatic experiences add posttraumatic stress disorder "as a compounding condition" in Petitioner's compromised mental and emotional impairments. **[*333]** [Doc. 267, p. 138 lines 1-7].

A significant crossroads in Petitioner's life occurred when his father, Merle, moved the family to Greeley, Colorado. Petitioner, notwithstanding the fact he was badly tormented and belittled by his peers, still wanted to stay in Meeker, particularly on the Barney farm, arguably to avoid further violence by his father. [Doc. 267, p. 134 lines 10-17; Doc. 267, p. 127 lines 3-17].

Greeley, Colorado

The Colorado University Hospital records contain information helpful to establishing a meaningful chronology of Petitioner's first significant contact with the law enforcement as part of a very disorganized, poorly planned attempt to run away from home in Greeley, Colorado, a few months after the family moved there from Meeker. Petitioner, at age 16, stabbed a woman in an argument over melons he was trying to sell her, and stole a truck in his attempt to run away. He told the police "he thought he would become a hermit and was going to go to the mountains." [Exhibit 169-119, p. 14]. He broke into a business in Greeley, stole a rifle, ammunition, and a truck, and drove off looking for the mountains, but he could not find them, and was arrested in Morgan County. [Exhibit **[*334]** 169-119, p. 14]. Dr. Woods found this episode provided significant insight into Petitioner's frontal lobe neurological deficits.

> [T]here's no real effective organization. He jumps in, and then he has to figure out how to swim. And you see this happen over and over. And, more importantly, you see it happen in situations that some of them have criminal underpinnings, others don't. You see this happen on his job where someone touches him and he hits the person or someone says something to him and he, um, you know, he goes after them.
> So you see this reactivity, which is frontal lobe, this kind of inability to weigh and deliberate, and I don't want to put it all in neurological terms, but then the parietal lobe, which allows you to see the big picture, doesn't seem to click in. And that's certainly what the neuropsychological testing reinforces.

[Doc. 269, p. 101 lines 2-15].

Dr. Ash also found the Colorado University Hospital records important as they provide insight into Petitioner's life in Greeley. Those records describing Petitioner's 1961 arrest and subsequent evaluation reveal a time line in relation to his mother's mental health issues which is significant. "During the *latter part of August **[*335]** and early September* of this year [1961], Mrs. Eaton had been a patient at the Greeley Hospital because of a mental breakdown and had been seen in consultation at that time by Dr. Mark Farrell of Greeley and is still under Dr. Farrell's care." [Doc. 267, p. 127 line 25; p. 128 lines 1-4 (emphasis added)]. Dr. Farrell confirmed Mrs. Eaton was suffering from a paranoid delusional disorder involving a belief her in-laws "were trying to harm her in some way." [Doc. 267, p. 128 lines 4-9]. Petitioner's frantic attempt to runaway in October, 1961, thus came

immediately after his mother's psychotic episode and first hospitalization. Mr. Stetler pointed out this information, in context, was important.

> Q. And so would that cause you -- and so that robbery and an assault of a woman with a, with a knife --
> A. Yes.
> Q. -- and a runaway attempt and getting a truck and running to try to find the mountains, and you've read those documents as well.
> A. Yes, I have.
> Q. And that occurred on September 29th, 1961?
> A. Yes.
> Q. And so follows very closely Mrs. Eaton's psychiatric hospitalization?
>
> A. Yeah, that context is very important. You want to know more about what was happening in the family at that time. Where **[*336]** was the father? Was he the only caretaker in the home? Were there other relatives who were attempting to fill in during the mother's hospitalization? What were the children told about the mother's illness? Did they know whether she was coming back? Lots of things to discuss.
> Q. All right. And if you also had information, evidence, witness testimony that the father was particularly abusive toward Dale, you know, beat him rather severely, does this have additional implications even beyond that? A. Of course. It means that the mother with all her problems was, nonetheless, a potential protector from the father's violence.

[Doc. 264, p. 130 lines 18-25; p. 131 lines 1-17]. Dr. Ash did not have this document, which places Mrs. Eaton's psychiatric hospitalization in meaningful proximity to Petitioner's first significant criminal episode, prior to his trial. [Doc. 264, p. 128 lines 10-12]. He felt it would have helped the mitigation presentation.

> I think it would have been very helpful for the jury to understand that the very first difficulty with the law -- up till then he had always gone to school, up till then he had worked, up until then he had not had encounters with the law, and it was **[*337]** after his mother went to the hospital that he had a violent episode and was trying to get away. Being able to see the connection between that and his first legal offense would have been helpful, I think.

[Doc. 267, p. 128 lines 17-25; p. 129 lines 1, 2]. Petitioner's statements to Dr. Dean, "I hope I get sentenced to reform school so I won't have to go home," [Exhibit 169-4, p. 117] shows home "was a dangerous place for him." [Doc. 267, p. 129 lines 10-21]. Dr. Woods agrees, "It's a very sad statement. It really says something about the quality of his home life." [Doc. 269, p. 98 lines 9-16].

Young Adulthood

The next ten years of Petitioner's life, following his juvenile court adjudication, were spent struggling to earn a living while being in and out of jail. He was arrested July 9, 1964, for taking $81 from the cash register of the gas station where he worked. A mental evaluation conducted in connection with this charge, although finding no indication the theft was motivated by psychosis, noted "[t]his boy is demonstrating some symptoms of rather severe traits of angriness, depression and a masochistic self-destructive attitude. He speaks in an extremely angry way about his father and mother **[*338]** and vows that he is going to be a bigger disgrace to them...He is a severely emotionally disturbed boy who would profit from long term psychiatric treatment in an institutional setting." The examiner reported Petitioner was competent to proceed, but noted he "considers himself to be the object of a great deal of anger and abuse at the hands of his parents, particularly his father." [Exhibit 168, p. 26, Report of Dr. George Woods].

The records of the Buena Vista (Colorado) Correctional Center reflect Petitioner's first months in prison, based on the July, 1964, theft were difficult. Staff followed up with him about his concerns for his mother and his distress over his girlfriend ending their relationship. He was written up in November for fighting in Cell Block B, and thus moved to Cell Block C. He became angry in the dining room on December 12, 1964, and threw a glass of milk in the face of the server, which caused a fight. He was moved to Cell Block D on January 16, 1965. His medical file reflects on January 8, 1965, he was "extremely nervous from fight with inmates," and 2ccs of Nembutal were administered. He was brought into the Hospital on February 16, 1965, "for a shot to quiet **[*339]** him down. He was to the point of becoming hysterical." He was again sedated with Nembutal. [Exhibit 169-41, p. 42; Doc. 168, p. 27]. Dr. Woods explained Nembutal is a phenobarbital, a short-acting barbiturate, which was "the only thing available at that time" to calm him down. [Doc. 269, p. 105 lines 19-25; p. 106 lines 1-2]. Dr. Woods commented on this event in his declaration.

> Dale's inability to function in new, novel, and stressful circumstances has been lifelong. This life long trait is, again, consistent the brain dysfunction, particularly in the frontal and temporal lobes.(Godefroy 2003, Anderson, Barrash et al. 2006) Similar to children with structural brain damage, Dale's cognitive impairments undermined his desires to function normally. He easily became overwhelmed and unable to develop adequate coping mechanisms, even as a child.

[Exhibit 168, p. 27].

Petitioner was released on parole in early 1966. He subsequently he wrote approximately $100 in insufficient funds check in August, 1966, mostly for cigarettes, gas, soda pop and candy. He made restitution for some of the checks, however, authorities did not believe his assertion he thought he had sufficient funds in his account, **[*340]** and he was returned to prison. [Exhibit 168, p. 28; Exhibit 169-41, p. 30]. Dr. Woods found an "internal consistency" in this incident.

> A. My understanding is that the checks totaled to about $81, that the checks --there were several checks. Um, there were checks of $10, $5, um, that added up to less than a hundred dollars. Mr. Eaton stated that he thought that he had the funds to cover the checks at the time that he wrote them. It's not clear whether that's accurate or not, but he obviously did not have the funds to cover them?
>
> Q. So is this an example of his ability to manage a checkbook?
>
> A. It's this kind of internal consistency, Mr. O'Brien. You know we go back and we look at his Iowa basic test, and they say, you know, this guy's gonna have problems with these kinds of numerical situations. We go to this, and he has problems writing checks. And, you know, well, let's say that they didn't really have to do with his ability, that maybe he just wrote the checks fraudulently, um, but then we've got his wife saying, oh, he couldn't write checks, he couldn't handle his money....Mr. Hoopes said one of the great problems with this kind of work is that you made money at one time, but then **[*341]** you didn't make money at other times, and you had to manage your money in order to be able to be successful. This is not something that Mr. Eaton was able to do. Miss Cline talks about him going to ... swap meets and coming back with more junk and less money ...and so ... you don't see him as being able to handle money very effectively.

[Doc. 269, p. 102 lines 20-25; p. 103 lines 1-25; p. 104 lines 1-9]. Petitioner was returned to Buena Vista, where he was trained to be welder. [Exhibit 169-41, pp. 20, 23].

Petitioner, after he was released from Buena Vista, returned to Riverton and became friends with David Brewbaker, who was then a young boy with a background very similar to Petitioner's. Dave's father "beat the hell out of [him]" and was sexually abusive as well. Petitioner took Dave fishing and hunting to get him away from his abusive father. [Exhibit 239, p. 1].

Dave Brewbaker also had valuable insight into Petitioner's frame of mind since Dave himself had some years earlier been diagnosed with bipolar disorder for which he now takes medication. He has some insight into his own symptoms, and by comparison, he has insight into Petitioner's as well. Dave is very uneasy around people, **[*342]** so, like Petitioner, he keeps to himself "except for a handful of people who know me very well." He and Petitioner discussed the fact they shared a "sixth sense" which enables them to know just by looking people are out to get them. "I can see them judging me, and they don't even know me. I know Dale had the same feeling." [Exhibit 239, p. 1]. Dave also witnessed Petitioner's temper.

> It was like he had a split personality. At times he would spontaneously get mad, and his ears would turn white, and his eyes would get red, and he would just have a fit. When he was uncertain about something, he would stand with his arms extended by his side, palms forward, and just open and close his fists. At other times, he would sit and frown, and look off in the distance for a long time like he wasn't seeing anything, and if I would ask him what he was doing he would eventually snap out of it and say, "I'm just thinking."

[Exhibit 239, p. 2]. Petitioner's brother, Richard Eaton, also described this very behavior. Petitioner, when frustrated, would open and close his fist rapidly, "[a]nd the more agitated he got, the faster ... he'd do it." [Doc. 266, p. 213 lines 2-6].

Adulthood/Symptomology

There were many **[*343]** potential mitigation witnesses who knew Petitioner, and could have testified and presented additional information with regard to his behaviors, impairments and symptoms which Dr. Ash and Dr. Woods both deemed essential to a

reliable assessment.[30] Dr. Ash, as previously discussed, testified one of the reasons he could not find Petitioner suffered from a psychosis, such as bipolar disorder, was the absence of any evidence of key symptoms, such as hypomania and grandiosity. The evidence presented to this Court clearly establishes such a history existed, however, the inadequate mitigation investigation by Mr. Skaggs and the trial team simply failed to uncover it.

Dr. Ash explained hypomania exists "when there's a great deal of increased energy, a decreased need for sleep, impulsive, hypersexual, angry, frustrated behavior, grandiose thinking, and there are some others." [Doc. 267, p. 88 lines 10-13]. Richard, Petitioner's brother, indicated at times when Petitioner **[*344]** stayed with him and his wife, Bobbie, he "often wondered if he (Petitioner) got more than three or four hours of sleep." Petitioner would, at times, "just work around the clock on trucks," or read the Bible or watch movies through the night. Richard related one incident when he was watching a comet with his binoculars in the middle of the night, and went to find Petitioner to show it to him. He found Petitioner in his shop under a truck. "I was standing there, and here he was all black and greasy, and the only thing he had on was his underwear." [Doc. 266, p. 226 lines 21-25; p. 227 lines 1-25; p. 228 lines 1-9].

Sandy Hoopes also noted Petitioner did not sleep much, "cause he would work way into the night. He'd be out there with a light, and then ... when we would get up in the morning, he'd be already out there working." [Doc. 265, p. 30 lines 1-9]. Petitioner, at the other end of the cycle, would lay in bed, "[h]e couldn't move. He could not get out of bed." [Doc. 267, p. 83 lines 6-9].

Another characteristic of bipolar disease is grandiosity, and there are ample examples with Petitioner. Melody Cline testified Petitioner "liked to imagine himself a lot better than he was." He exaggerated **[*345]** his achievements and had unrealistic goals. [Doc. 264, p. 139 lines 19-25; p. 140 lines 1-7]. Dr. Woods noted several examples, including his unrealistic view of his relationship with Alice Kardonowy and "the idea that he was going to be able to build a truck stop in Moneta, Wyoming." [Doc. 269, pl 129 lines 12-25; p. 130 lines 1-20]. Petitioner talked about his dream of a truck stop with a number of people, including his son Billy, his brother Richard, his cousin Lorena Altman[31] and his neighbor, Doris Buchta, who mentioned it in her journal in an entry on June 9, 1988. [Doc. 267, pp. 83, 91; Exhibit 235, p. 1] Many truck stops do, in fact, get built, however, Dr. Ash testified clinically, it was grandiose for Petitioner to think he could because "Mr. Eaton just simply was unable to follow through in a consistent way. And in my opinion it's so much connected with his bipolar disorder." [Doc. 267, p. 83 lines 10-15]. Petitioner's image of himself as a ladies' man was, as well, unrealistic and grandiose, considering "what's been described to me by woman after woman in all the declarations that you gave me was that, you know, he was physically so repugnant because of his personal hygiene." **[*346]** [Doc. 267, p. 92 lines 5-8].

Deteriorating hygiene is another classic sign of mental illness.

> Q. If he is becoming -- Mr. Eaton is becoming physically unkempt in his appearance as he progresses toward the trial, is that something that's potentially relevant to your assessment both as to competency and mental health generally?
> A. Yes, it is.
> Q. And how is that relevant?
> A. Well, first of all, Dale Eaton's hygiene overall was really poor, and it's commented over and over by friends, by relatives, by employers that he had very little interest, very little concern, very little awareness of his awful physical hygiene. If that was progressing even more so and becoming worse, that would be of concern.
>
> Dale Eaton's **[*347]** mother, who was diagnosed with paranoid schizophrenia and chronic undifferentiated schizophrenia, depending on the doctor, had those very same issues of a very poor physical hygiene, very poor awareness of her physical presentation. And that is something that I feel Dale carried forward with him. And that's also something you see often with people with chronic mental illness.

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[30] The declaration by Dr. Woods also sets out, with citation to evidentiary material which was not presented at trial, Petitioner's life history in some detail, until his arrest for the homicide of Ms. Kimmell. [Exhibit 168, pp. 7-53].

[31] "Dale Wayne was a dreamer, and he thought he could fix the property up to be a trailer park where labor and construction crews could stay when they were working away from home. . . He showed me a trailer that he moved onto the property and was planning to fix up. He had big plans to move more trailers onto the property to rent to people. The one I looked at needed a lot of work before anyone would want to stay there. It had been in a fire so he had a lot to clean up." [Exhibit 315, p. 2].

[Doc. 267, p. 54 lines 10-25; p. 55 lines 1-3].

Richard Eaton, Petitioner's brother, and his wife, Bobbie, are among the many witnesses who could attest to Petitioner's failure to bathe and intense body odor. Petitioner, when he was arrested in Yellowstone Park, told the park ranger he was hoping to get mauled to death by a bear. The ranger told Bobbie and Richard "Dale smelled so bad the bear actually ran away from him." [Doc. 266, p. 182 lines 6-21]. Petitioner, at times, smelled so bad Bobbie would make him take a shower. He would not, however, come in the house and use the shower. He told Bobbie he did not "want to leave a ring in my tub." [Doc. 266, p. 179 lines 22-25]. Richard testified "sometimes he went to the car wash with a bottle of Dawn soap, and he'd spray himself down, soap himself up, and spray himself **[*348]** off [with the car wash wand]... and do the same with his work clothes. And another incident that when he was staying with us, walked outside, and he was doing it in our front yard in his underwear." [Doc. 266, p. 229 lines 10-24].

Dr. Woods commented on a similar incident related by Steve DuBry about finding Petitioner in a car wash. "Mr. Eaton had hooked up one of the drive-in automobile ... car washes, he had driven in there, taken the washer, somehow gerrymandered it to the back of his truck so that the water was shooting straight up, and was buck naked in his truck, in the back of his truck, taking a shower. Now, he's out in the middle of town. ...it's just a totally bizarre story." [Doc. 269, p. 122 lines 10-25]. This incident, and another in which Petitioner served spaghetti to Steve DuBry and his son by pulling it out of the pot with his bare, dirty, unwashed hands, are evidence of his impaired mental condition. "These are, these are recognitions, descriptions of impairment of social context. These are noncriminal situations where most of us would know a better way to do this. And we see these situations over and over again in Mr. Eaton's life." [Doc. 269, lines 16-20].

Petitioner's **[*349]** lack of hygiene extended to his personal surroundings. Bobbie Eaton recalled Petitioner's trailer in Moneta was "dirty, nasty. There was old food still all over the counters. It was -- had stuff growing on it. It was just messy, and you couldn't stand to be in there for a second. I had to hurry up and turn around and go out before I threw up. It was pretty nasty, pretty bad." [Doc. 266, p. 182 lines 12-16].

The condition of Petitioner's vehicles and trailer was only made worse by the fact he was a "hoarder." Sandy Hoopes testified Petitioner "hoarded everything," and was definitely a hoarder "cause ... he doesn't away throw anything. And he has ... old grocery sacks and stuff that were just there." [Doc. 265, p. 31 lines 19-25; p. 32 lines 1-6; p. 36 lines 14-18]. Other people who knew Petitioner recognized the same behavior, including Sandy's husband Jim Hoopes, [Doc. 215, p. 84 lines 7-19], and Bobbie Eaton, [Doc. 266, p. 182 lines 17-20]. Steve DuBry, according to Dr. Woods, also described hoarding behavior. [Doc. 269, p. 123 lines 1-2]. Dr. Woods found this behavior to be significant.

> Compulsive behavior. Compulsive behavior is very, very important. And compulsive behavior is, um, **[*350]** what we see with Mr. Eaton and the trichotillomania. We see hoarding behavior again with Mr. Eaton. We see hoarding behavior with aunts, with uncles, um, with his mother. Um, we see compulsive eating behavior with other family members, his sisters, for example. And the reason why compulsive behavior is important is because compulsive behavior reflects a lack of mental flexibility. Compulsive behavior reflects an inability to effectively weigh and deliberate. You get stuck.
>
> Now, when compulsive behavior occurs along with another psychiatric disorder, it decreases the potential of that person's ability to function. So when you have obsessive-compulsive disorder and bipolar disorder together, there's a greater -- I should say, a person that has bipolar disorder and obsessive-compulsive disorder or schizophrenia and obsessive-compulsive disorder has a worst potential in terms of functioning than a person that does not have the compulsive disorder. If you only have -- we call those comorbid disorders. And we see comorbid disorders, we see that in truth psychiatric disorders occur in clumps. They don't occur singularly. They occur in clumps. And if one of your clumps is a compulsive behavior, **[*351]** it really undermines your ability to function.

[Doc. 269, p. 31 lines 18-25; p. 32 lines 1-16].

Work was an important aspect of Petitioner's life, one which the trial team and Mr. Skaggs completely ignored, and thus failed to contact or interview Mark Dotson, a potential mitigation witness who had employed Petitioner.

Mark Dotson suffers from significant health problems, and thus could not attend the hearing before this Court. He did, however, provide a written declaration which outlines significant mitigating facts which could have been presented at trial with regard to Petitioner's severe mental impairments. [Exhibit 69-7].

Mr. Dotson is the former President and CEO of Copper King Mining Corporation, and in 1996, owned West Hills Excavating in Milford, Utah, where Petitioner worked for him, and lived in his trailer behind Mr. Dotson's shop. [Doc. 69-7, p. 1]. Mr. Dotson recalls Petitioner was afraid of people, and didn't trust them. Mr. Dotson has serious mental illness within his own family, thus he had credible insight into Petitioner's mental health.

> He was visibly paranoid, and did weird things. He was constantly looking over his shoulder. He blacked out every single window in his **[*352]** trailer; not a drop of daylight could get through. I mean he was *really* weird. My brother has schizophrenia, Dale absolutely, no question in my mind, is a schizophrenic of the highest order. I have no doubt about it. Dale would hold parts in his hand like they were hidden treasures. He would hide them and cover up his work so no one could see. He wouldn't let anyone see what was in his hands or what he was doing with the parts. It was almost comical. He behaved very strangely.

[Doc. 69-7, p. 1].

Petitioner, in spite of his obvious mental illness, was "ninety percent of the time, . . . pleasant to be around. He's a likeable guy. He was a weird guy, but I liked Dale." [Doc. 69-7, p. 2]. Petitioner, however, was easy to anger, and would act out, "but then his remorse was a lot more than the incident warranted. He would get angry too easily, and then he'd feel too bad about it. It wasn't that big of a deal usually and he would mope around for a couple of days over it." [Doc. 69-7, p. 2].[32]

The testimony of Mark Dotson provided Dr. Ash with a useful example of Petitioner's paranoia, which is significant **[*353]** to the psychiatric assessment.

> His employers, his coworkers described his always looking over his shoulder, always scared, always paranoid. One example was where he ... had a part that he was working on that he would hide and shield from letting anybody else see it. People described about his windows being blackened so that nobody could look in. There's just example after example after example of paranoia.

[Doc. 267, p. 93 lines 2-8]. The paranoia reported by Mr. Dotson is consistent with what others have observed.

> Q. All right. I also want to talk to you about paranoia. What is paranoia in a psychiatric setting?
> A. Paranoia is a stance that the world out there is dangerous and is out to get you.
> Q. Did you find examples of paranoia in Mr. Eaton's personal and family history?
> A. Yes.
> Q. First of all, beginning with his mother Marian Eaton, did you see examples there in her files?
> A. Yes.
> Q. And what about Mr. Eaton himself?
>
> A. With, with Mr. Eaton the one story that, that Richard gave was that his dad told all of the kids to always be ready to protect their place from being attacked and people coming in and stealing things. That they all knew where to get the gun and to get it. That he put hidden **[*354]** barricades with nails in them to prevent people from coming in. The, the -- that was family members describing his paranoia.

[Doc. 267, p. 92 lines 9-25; p. 93 lines 1].

Dr. Woods also found Mr. Dotson's insight with regard to Petitioner remarkable, perhaps stemming from the fact Mr. Dotson had a brother with schizophrenia. [Doc. 269, p. 118 lines 14-25]. Mr. Dotson, in spite of Petitioner's mental impairments, "saw him as an effective worker ... Mr. Dotson felt comfortable with him being around his son particularly, yet he had real problems on the job. It wasn't doing the job. It was the socialization, being able to work around other people, being able to focus." [Doc. 269, p. 117 lines 20-25; p. 118 lines 1-4]. Mr. Dotson took extraordinary steps to accommodate, on the job, Petitioner's illness, even allowing him to work a midnight shift when there were no other employees around. "But the other part was he was just not able to make it in the day-to-day work world in spite of his skills." [Doc. 269, p. 118 lines 5-25; p. 119 lines 1-2].

Dr. Woods also benefitted from the observations of Jim and Sandy Hoopes. Jim Hoopes provided useful information concerning Petitioner's reactivity on **[*355]** the job, such as when a man would "come up and tap him on the shoulder and he would hit the guy, just this hyper reactive response." Mr. Hoopes identified both positive qualities and significant symptoms. "He was a friend to their family, friend to their children, but a very, very paranoid, withdrawn, socially isolated, reactive man." [Doc. 269, p. 120 lines 20-25; p. 121 lines 1-4].

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[32] Daniel Dotson, Mark's son, has very similar observations with regard to Petitioner. [Exhibit 46].

Petitioner's former wife, Melody Cline, was also a potential source of mitigation evidence with regard to Petitioner's impaired functioning. There were many episodes in their marriage when Petitioner abused her. Petitioner would hit her with his fist, and then collapse into tears. He was "very sorry, very contrite... he cried, and I just tried to comfort him and tell him, you know, we're both stressed, it's okay." It was always the same. Petitioner, after hitting Melody, cried and begged forgiveness. Melody, even though she was angry and hurt, "always felt sorry for him...[because] I think he just couldn't control it." [Doc. 266, p. 108 lines 1-25; p. 109 lines 1-22].

Melody also describes Petitioner's impaired functioning. There were a number of things Petitioner could not do for himself. "[H]ygiene would be on **[*356]** the top of the list." He could not manage the checkbook. [Doc. 266, p. 121 lines 7-16]. He could not keep a job because "he didn't play well with others." [Doc. 266, p. 122 lines 1-4]. Petitioner, when he was unemployed, tried to make money at swap meets, however "that was never a living...Can't believe anybody would call it that." Petitioner was a big talker sometimes, however, he "never understood that he didn't make money doing this." Melody indicated Petitioner would spend money to buy things to sell, and pay, for example, $200 for an item which some guy with "a gift of gab" would talk him out of for $150. "You know, that's not how you make money. If he wasn't giving the product away, he was putting money back into bringing more product to sell... that's not how you make money." It would be fair to say that Petitioner would go to a swap meet with a pile of junk and some money, and come back with less money and more junk. Petitioner did not make money at swap meets. "There'd be no money for food or housing." [Doc. 266, p. 122 lines 8-25; p. 123 lines 1-13].

There has been some suggestion, albeit, incorrect, Petitioner and his family were not living in poverty during these times. **[*357]** Melody testified when Petitioner was trying to support the family with his swap meet activities, the family lived

> in like a...dealership-type place, you know, where you've got the nice front room and the back is where you do the mechanics and that kind of thing. There was never a kitchen in that place...my stove was a microwave. I didn't have running water to wash dishes as in a kitchen sink. I used the bathroom that was for -- in the back area of the mechanical part of the shop. Yeah, it was pretty gross. For walls, we hung up sheets... The boys were in bunk beds, and Valetha was in the sheeted room next door. And then we had a bathtub, I had a bed wetter at the time, for which you filled with a garden hose and emptied the same way. But when you filled it with the cold water, you put a tank heater, a engine tank heater into the tub to heat the water so that my bed wetter could have a bath before, before going to school the next morning.

[Doc. 266, p. 123 lines 14-25; p. 124 lines 1-10]. There were no laundry facilities or stove. This was how the family lived when Petitioner was trying to make money at swap meets. [Doc. 266, p. 124 lines 11-14].

The physicians at the Wyoming State Hospital **[*358]** who evaluated Petitioner in 1997, after his encounter with the Breeden family, related their observations with regard to the state of Petitioner's mental health.

> His mental state at the time of admission was apparently abnormal. He appeared perplexed by many questions, appeared genuinely unable to remember details for recent and remote events...and appeared genuinely apologetic that he could not remember these details. His mood alternated between profuse frequent crying, and irritable verbal lashing out. He admitted suicidal ideation at the time of admission and stated he wants someone to shoot him. He...appeared to show little understanding of the reasons for his current mental state.

[Doc. 269, p. 108 lines 4-19; Exhibit 223-33, p. 3].

The remainder of the Wyoming State Hospital examination, as discussed by Dr. Woods, was distorted by Petitioner's score on the Test of Memory Malingering (TOMM), which suggested he was malingering, effectively truncating the exploration of other possible mental health issues. The author of the TOMM, Thomas Tombaugh, cautions it should not be administered to patients with dementia. [Doc. 269, p. 108 lines 20-25; p. 109 lines 1-16]. Petitioner's performance **[*359]** on the TOMM, which should either have never been given or the results disregarded, seemed to temper the diagnosis which included "pseudodementia."[33]

The lab tests conducted by the Wyoming State Hospital showed high levels of zinc and arsenic in Petitioner's system, which is "not really associated with dementia, it's associated with brain problems." [Doc. 269, p. 110 lines 29]. Dr. Woods, based on Petitioner's welding and exposure to manganese fumes, observed:

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[33] Dr. Woods explained, "Pseudodementia is the cognitive impairment that one sees in depression. It's a slowing of brain function. It's not a dementia, ... it's not malingering. It's a slowing of brain function. True vegetative depression, depression of the body, slows the brain down. A person's thinking may be slower. Their reactivity can be slower. And so when that is of such a severe degree, that's the term that's used, pseudodementia." [Doc. 269, p. 110 lines 15-25; p. 111 lines 1-2].

> There are some central nervous system effects. There are autonomic nervous system effects as well that one sees with inhaling manganese as well as the fact, uh -- it's not exactly the same as black lung, but manganese is a metal, and so it does tend **[*360]** to impair your lung function as well. So there are, there are some central nervous effects, really more autonomic nervous effects and pulmonary effects.

[Doc. 269, p. 113 lines 9-17]. Dr. Woods observed Petitioner had been a welder "for a significant period of time." [Doc. 269, p. 114 lines 21-25; p. 115 line 1].What Dr. Woods found even more probative of Petitioner's employment history was "his reactivity, his isolation, his bizarre behavior forced not only him to move from job to job but forced his employers to create work for him, create special circumstances for him in order to keep him employed, and even then they often were not able to do so." [Doc. 269, p. 115 lines 1-5].

Mr. Skaggs and the trial team avoided any investigation, and thus full knowledge of, Petitioner's work and family life, apparently based on a concern such an investigation would "open doors" to certain issues, primarily violence and sexuality. Such an investigation would arguably have been protected under the umbrella of attorney-client and work-product privileges, and could have yielded relevant mitigation evidence. Dr. Ash explained hypersexuality, such as seen in Petitioner's Aunt Zelma and in Petitioner's **[*361]** own conduct toward his wife, is not just a characteristic of bipolar disorder, "it's one of the diagnostic criteria." Clinically, hypersexuality describes when "a person is filled with intense sexual feelings to the point that a person who normally would have good control over their behavior ends up, a loyal wife, going out and having a number of affairs, doing things impulsively sexually, with painful, harmful consequences, which is exactly the way it's written in the DSM-IV. [Doc. 267, p. 79 lines 10-21]. "Hypersexuality is something you come to expect with bipolar disorder." [Doc. 267, p. 80 lines 19-22]. Dr. Woods agrees.

> [T]rue bipolar disorder is a difficult disease. It is reflected by irritability, it is reflected by hostility, it is reflected by reactivity, it's reflected by hypersexuality, and it's reflected by a lack of social understanding and impaired understanding of context. So mood lability, mood swings, are just a small part of what bipolar disorder really is.

[Doc. 269, p. 50 lines 15-21].

Dr. Ash explained testimony with regard to Petitioner's workplace and family, including his occasional altercations with co-workers and violence toward his wife and children, significantly **[*362]** contributes to an accurate, mitigating psychiatric assessment.

> It's important from the standpoint that he clearly would get very anxious and nervous. Each person that he worked with described he would get scared, he would get nervous, he would become afraid, he would be looking over his shoulder, and then when he was forced to go out and work with some of these people in that stance, if something happened he would be reading attack and would respond as such.

[Doc. 267, p. 94 lines 18-24]. This behavior "can certainly be a part of bipolar disorder. Again, in the DSM-IV the diagnostic criteria is, you know, periods of increased irritability, anger, frustration is part of the, the description of hypomanic or manic episodes." [Doc. 267, p. 95 lines 2-5]. Dr. Ash, with a complete psychosocial history, could very well have considered and explored a much broader range of mitigating mental health conditions than he could with the narrow and limited information he was provided prior to trial. [Doc. 267, p. 138 lines 1-22]. He described the contrast between the information with regard to Petitioner's life history he was provided prior to trial, and the material he received in preparation for his **[*363]** testimony before this Court.

> It's ... a really dramatic difference. The ...the original trial I really felt essentially it was myself, the hospital records, the criminal records investigations, and Dale Eaton, and that left us with a very, very limited picture. With your current team it has felt from the very beginning that I was being provided all the information that I could possibly ask for, more than I thought I could possibly read, and a lot of help interpreting that so that I feel like I can much more confidently either make a diagnosis or know areas that should have been explored to further clarify diagnoses. So it's a, it's been a very enlightening and a very good experience.

[Doc. 267, p. 141 lines 14-25; p. 142 lines 1-5].

The impact of the newly obtained psychosocial history data is very clear throughout Dr. Ash's testimony. Dr. Woods agreed with Dr. Ash the clinical picture of Petitioner involves multiple, compounded impairments.

> Yes. What I would suggest to you, however, is that we would not see Aunt Zelma's down cycle go as far down as his. What takes Mr. Eaton's down cycle so far down is his brain impairments. If it were just his bipolar disorder, then he might have gone **[*364]** down, but he may have figured out another way to make some money. He may have figured out how to

stay on the job longer. He may have -- when I talk about perseveration, getting stuck, this is a man, if you recall, Your Honor, this is a man who we looked at having multiple jobs, welding jobs. That's what the other PowerPoint really reflected. He had multiple jobs. What was it that kept him from saying I need to keep this job, I can't hit this guy again, or I need to keep this job, maybe I will work the day shift, I think I can get along with this person, you know, maybe I can learn how to, you know, be more social, but he was never able to do that. And that's the combination of the brain impairment and the mood disorder that, in my opinion, took him so low.

[Doc. 269, p. 150 lines 8-25].

There was a direct relationship between Petitioner's disease processes, such as paranoia, and his social withdrawal.

Q. And did he suffer from bipolar disorder in 1988? A. Yes?

Q. Doctor, I notice that you also made note in your report of Mr. Eaton's paranoid ideation and isolation and withdrawal. What role do those characteristics play in the clinical picture of Mr. Eaton?

A. These are compensatory mechanisms **[*365]** that Mr. Eaton himself attempted in order to control his, um, behavior. He recognized his behavior as inappropriate. He told people he wanted help for his anger. When you look at his prison records, he talks to the jails and the prisons about I want help for my anger, I need to be able to control this. When Dr. Ash, for example, thought it might be useful to have him off his medication to see if he would look the way he did in 1988, Mr. Eaton was frightened because he saw the medication as being able to control his anger in the prison where he was and refused to come off of it.

So he consistently has asked for help around these anger issues when help has been available. When it hasn't been available, he's become increasingly isolated, withdrawn, and tries to stay out of people's way because he knew that he had these vulnerabilities.

[Doc. 269, p. 152 lines 9-25; p. 153 lines 1-5]. Petitioner's retreat to his life of isolation, and his pattern of abruptly leaving jobs and friends after staying for a period of a few months, reflects his anxiety about his potential for losing control.

Petitioner's psychological disorder and brain disorder cause both impulsivity and disinhibition, which are **[*366]** "actions without thinking." [Doc. 269, p. 153 lines 9-12].

What does that mean in the real world? That means reacting and saying I'm sorry, reacting and realizing I shouldn't have acted, reacting or not reacting and realizing that you should have. So that's a neurological condition. And I'm not saying that in each and every instance that's true, but we know that that's a part of his neurological condition.

[Doc. 269, p. 153 line 25; p. 154 lines 1-6].

This dynamic becomes even more disabling in persons with obsessive-compulsive disorders (OCD), such as Petitioner's trichotillomania and hoarding. OCD which drives ritualistic or repetitive behavior will "start to impair your ability to function, to actually weigh and deliberate....that's when they start to impair your ability to effectively be mentally flexible. . . So if you have a disorder like bipolar disorder which impairs mental flexibility, and then you have perseveration on top of that, an obsessive-compulsive disorder on top of that, you really are locked in." [Doc. 269, p. 154 lines 7-24]. Petitioner could not, under stress, generate any of alternative courses of action. His deficits in processing speed, working memory, obsessive-compulsive **[*367]** disorder, disinhibition, impulsivity, all affect the act, and the quality of the act. Each of these factors affected Petitioner's ability to function properly, and were compounded by his paranoia. "Paranoia is you don't understand exactly what's going on, ... because you don't have your working memory working effectively. And that's where problems with ... being able to effectively weigh and deliberate. You don't have all the data because your brain isn't working properly." [Doc. 269, p. 155 lines 2-25; p. 156 lines 1-18]. Dr. Woods, based on his examination and a thorough psychosocial history, concluded Petitioner has bipolar disorder.

Mr. Eaton, in my professional opinion, Your Honor, has bipolar disorder. He's had it all of his life. He got it honestly, as they say. He has a family history that's consistent with bipolar disorder. Mr. Eaton also has a brain that doesn't work well, and we see that this has been a brain that hasn't worked well most of his life if not all of his life. The 1961 [interview] that his mother gave to ... Dr. Langsley noted difficulties in early developmental stages, in talking, in walking, in language. We see that he failed the first grade ... once. ....Seventh **[*368]** grade twice. And eventually dropped out in the ninth grade. So we see academic and problems early in life. That speaks to cognitive problems. ...

> And so I see bipolar disorder. We haven't talked about posttraumatic stress disorder, but obviously he's had significant trauma as well. I see a brain that doesn't work effectively. And I see, tragically, all of those acting synergistically particularly in new, novel, and stressful circumstances.

[Doc. 269, p. 159 lines 7-25; p. 160 lines 1-12].

Dr. Woods explained all of Petitioner's diseases, trauma, and limitations were very much a part of his actions in March, 1988, when Ms. Kimmell was killed.

> The brain factors were always there. It may be that they were to a greater or lesser degree, but they are always there because it's like having your arm or your leg.
>
> The mood factors were heightened during this time in March [1988]. By all indications, he had just left his ... ex-wife who at a minimum did not agree to let him have his children for this time. [T]here's ... some indication that she may have said these aren't your children. It's also clear that she also introduced her new boyfriend and now husband, Mike Cline, to him at the same time. And he **[*369]** describes himself as coming back and being profoundly depressed and being stressed. When we look at the other information from that time, ... [Ms. Buchta is] journaling how poorly he's living. He has a stove. He has no running water. He has no electricity. His place is like a pigsty. His children are running around without a toilet and facilities. And we've looked at his income which that year was less than a thousand dollars. I believe it was about $900. This was clearly the low point of Mr. Eaton's life. That does not in any way excuse the terrible thing that occurred, but it does give me some understanding of what his mental functioning was at that time.

[Doc. 269, p. 160 lines 13-25; p. 161 lines 1-16]. Dr. Woods stated his opinion, to a reasonable degree of neuropsychiatric certainty, Petitioner was acting under extreme mental and emotional disturbance and his ability to conform his conduct to the requirements of the law was substantially impaired at the time of Ms. Kimmel's death. [Doc. 269, p. 161 lines 17-24].

The well-qualified, well-supported, and well-reasoned opinions of Dr. Ash and Dr. Woods as mental health experts, corroborated by the life histories of Petitioner and his **[*370]** family, set forth a complex, mitigating, and humanizing picture of Petitioner which, if those opinions had been presented at Petitioner's trial, very probably would have persuaded at least one juror to decline to impose a death penalty.

Remorse

The evidence Mr. Skaggs used to argue remorse was minimal at best. He argued remorse was established by the Stringfellow Hawke letter, which Petitioner repudiated in the presence of the jury, and by the fact Petitioner drove Ms. Kimmell's body eighty miles and dropped it in a river where it was sure to be found. Mr. Skaggs, when asked if this was the best evidence he could present, replied, "it's the evidence I used." [Doc. 262, p. 32 lines 5-25; p. 33 lines 1-25; p. 34 lines 1-5].

There was, however, additional evidence which the trial team could have discovered through a reasonable investigation which would have enabled Mr. Skaggs to clearly characterize Petitioner as a sincerely remorseful person who was tormented by the fact he does not have the wherewithal or ability to control his conduct. Dr. Ash saw first-hand Petitioner's "genuine, deep, powerful remorse."

> Q. (By Mr. O'Brien) In your May 17th, 2003 interview did you inquire of Mr. Eaton **[*371]** of the circumstances of the crime?
> A. Yes, I did. And this was at the direct request of Mr. Skaggs.
> Q. All right. And as you're looking at Exhibit 16 and recalling your trial testimony, is this substantially what you told the jury that you learned from Mr. Eaton about the crime?
> A. Yes.
> Q. And that was at Mr. Skaggs' request that you did so?
> A. Yes.
> Q. All right. Could you read for the Court the following paragraph about Mr. Eaton's condition as he was relating this to you?
> A. "As he talked about this, as well as a man that he had killed in prison. He was filled with horrendous agony and remorse. He teared up on a number of occasions, his face was held in and he clenched his teeth and his hands."

Q. How did you interpret his response?
A. Genuine, deep, powerful remorse.
[Doc. 267, p. 66 lines 3-21; Doc. 66-6, p. 2].

Mr. Pepin, Petitioner's attorney in the Colorado manslaughter case, "thought that he had a genuine deep sense of remorse about what had happened to Mr. Palmer. And all of that led to just a basic, a positive feel I had being around Dale." [Doc. 263, p. 119 lines 10-24]. Mr. Pepin described the honest emotion which the manslaughter jury saw from Petitioner.

> Dale was expressing deep **[*372]** remorse over having a part in the death of Clay Palmer... he had expressed that openly during the actual trial. When I was giving my opening statement, I made reference to Mr. Palmer being dead, and from behind me came a noise that I don't know that I have ever heard from any source. It sounded like a wounded big animal, and it was in essence a sob, an involuntary minor sort of muffled explosion from Dale. He was so distraught ...about having been part of Mr. Palmer's death. ... And I had hoped that to some degree Dale would perhaps have his pain about having been involved in Mr. Palmer's death lessened by having more neutral people say this is bad and we understand ... how you feel, but ... the law is not finding you accountable. He was not consoled at all. When I went back to see him, it was not the celebratory mood that one often finds with a not guilty verdict.

[Doc. 263, p. 126 lines 8-25; p. 127 lines 1-5]. Mr. Skaggs, without ever speaking to Mr. Pepin or reviewing the file, decided to keep the Clay Palmer incident and all related evidence out of Petitioner's trial. Mr. Pepin told Ms. Moree "that I would be willing to testify, if necessary, that I thought that his remorse was **[*373]** palpable as it applied to Clay Palmer, that I thought those were human qualities that I could help communicate." [Doc. 263, p. 135 lines 16-19].

The issue of remorse in Petitioner's case goes much deeper than simply his reaction of "horrendous agony and remorse" to his own conduct in this crime. [Doc. 267, p. 66 lines 16-19]. It reveals a deeper level of agony and suffering which has been a part of Petitioner's life. It arguably softens the impact of his conduct on previous instances when he abruptly lost control. Dr. Ash found similar feelings documented in the records of the 1961 Colorado University Hospital examination. The examiners noted, "Subjectively, he said he felt hopeless and sad. He expressed concern over what happened to the woman whom he had apparently stabbed." [Doc. 267, p. 124 lines 18-22; Exhibit 169-4, p. 11]. Dr. Ash found this an important insight into Petitioner's impairments and character because "[i]t expresses both depression, which I think was there probably before, but also since, and it expresses, you know, the sadness, the remorse." [Doc. 267, p. 124 lines 22-25; p. 125 line 1]. Evidence of sincere remorse, in addition to being a humanizing aspect of Petitioner's **[*374]** character, and illustrative of his positive character which lies beneath his ability to control his frustration, can be diagnostically important as well. Dr. Ash, when cross-examined during the hearing before this Court with regard to narcissistic personality disorder, quickly discounted it based on Petitioner's remorse. "[Narcissistic Personality Disorder] boils down to a person uses other people, doesn't have much in the way of feelings about other people. If they do something to another person, there's very little in the way of remorse." [Doc. 267, p. 148 lines 12-22]. This was not the case with Petitioner.

Mark Dotson described the way Petitioner's remorse would overwhelm him.

> But then there were times that he would get angry over something so small, and then he'd sulk around for a couple of days. He was always sorry for acting like that, but then his remorse was a lot more than the incident warranted. He would get angry too easily, and then he'd feel too bad about it. It wasn't that big of a deal usually and he would mope around for a couple of days over it.

[Doc. 69-7, p. 2].

Another relevant episode indicating Petitioner's remorse were his statements to a fellow prisoner, Brett **[*375]** Hudson, in the fall of 2002. Inmate Hudson told Natrona County Deputy Lynn Cohee that Petitioner had told him in 2001, "I did something so bad I don't know if Jesus will forgive me for it." Petitioner, later the same day told Hudson, "It happened a long time ago. I killed somebody young about 16 years ago." Hudson related Petitioner then began crying and said, "I can only hope Jesus forgives me for it." [Doc. 35-1, p. 3]. The jury never heard this information provided by Inmate Hudson.

Petitioner's sister-in-law, Bobbie Eaton, had an experience similar to one by Inmate Hudson. She was trying to persuade Petitioner to go to church with her, but he resisted, saying "he would like to go but ... he had done something that he didn't think he'd ever be forgiven for." [Doc. 266, p. 186 lines 15-19].

The mental health experts who examined him found Petitioner's sincere remorse to be powerful evidence of how little control he had over his neurological and emotional impairments. Dr. Ash indicated Petitioner had "stated emphatically that he wished he never would get angry with anybody." [Doc. 267, p. 70 lines 2-3]. This evidence is "extremely important," according to Dr. Ash, because "it shows **[*376]** how he struggled with this part of him. He tried to avoid this in a number of ways. He would try to avoid situations that would bring up his anger. And when he would get angry, he would have a great deal of difficulty controlling it and would do things that he would regret." [Doc. 267, p. 70 lines 7-11]. Mr. Burr pointed out Petitioner's sincere regret for his outbursts temper the potential negative impact of such evidence in a meaningful way, therefore, in spite of his getting fired from jobs, Petitioner's work history is a rich environment for evidence which fosters an understanding of both his impairments and his good qualities.

> [T]he workplace is a very rich environment for understanding Dale Eaton. It's not the only environment, but it's an extremely rich environment with the observations of ... some people who were kind of like Dale, some people who were probably smarter and have more ability but who cared about Dale and saw a lot of good qualities in him, saw him struggling, saw him trying to, trying to avoid situations where he'd lose control, when he did lose control, ... saw him being very apologetic and sorrowful for what he had done, more so than he needed to be most of the time. **[*377]** And so ... it's far from being an environment in which you would only see bad stuff about Dale Eaton. You'd see a lot of information that helped you understand him fully as a human being, as one of us and not the other ..., as Mr. Skaggs was afraid it would be.

[Doc. 266, p. 31 lines 6-20].

A portion of the evidence of Petitioner's deep and sincere remorse which was available to the trial team, and should have been presented, was directly connected to his crimes against Ms. Kimmell, such as Dr. Ash's eyewitness account of Petitioner's "horrendous agony and remorse." [Doc. 267, p. 66 lines 16-19]. Other evidence of remorse arises from Petitioner's reaction to his prior violent outbursts which invariably reduced him to tears of regret. [Doc. 266, p. 108 lines 1-25]. Mr. Skaggs and the trial team steered away from the evidence of remorse in the latter category, apparently out of a concern over Petitioner's history of violence associated with his various employments. Mr. Skaggs and the trial team, however, without investigating those prior instances, could not make a reasonable strategic decision not to use those prior incidents to help humanize Petitioner. Mr. Burr explained. "This is a **[*378]** man who is on trial for an unspeakable act of violence, and for most people who are on trial for similar occurrences this is not the first time in their lives that they have been violent." [Doc. 265, p. 199 lines 8-11]. A competent defense attorney would perceive there was nothing to fear in Petitioner's work history, rather only opportunities for a deeper level of understanding of his actions. Mr. Burr explained.

> [I]f we don't come to understand that and why those incidents happen, then we can't begin to explain credibly why this murder happened. And so we have to, we have to embrace and not hide from and try to understand as fully as we can every incident like this that happens throughout a client's life.

[Doc. 265, p. 199 lines 22-25; p. 200 lines 1-2].

Remorse, if perceived as sincere and genuine, moves jurors away from the death penalty. John H. Blume, Sheri Lynn Johnson, & Scott E. Sundby, *Competent Capital Representation: Heeding What Jurors Tell Us About Mitigation*, *36 Hofstra L. Rev. 1035, 1037, 1038, 1049, 1050. (2008)* (noting that remorse is a factor which can lead jurors to choose life over death). There can be little doubt one or more jurors might well have been persuaded Petitioner was truly remorseful for his crime. The failure **[*379]** of Mr. Skaggs and the trial team to investigate the depth of Petitioner's feelings of remorse, and, therefore, offer a fuller and more complete presentation to the jury with regards thereto, was prejudicial to Petitioner.

Likeability - Humanizing Qualities

The previous discussion of Petitioner's life and social history relates to what Professor Gary Goodpaster emphasized in 1983, twenty years before Mr. Skaggs and the trial team represented Petitioner, concerning the standard of defense performance in capital cases, and the necessity of presenting mitigating evidence which indicates the crimes by the defendant are "humanly understandable in light of his past history and the unique circumstances affecting his formative development, that he is not solely responsible for what he is." Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, *58 N.Y.U. L. Rev. 299, 335 (1983)*.

This mitigating evidence, in and of itself, is often, however, not sufficient to counter the prosecution's characterization of a defendant.

> First, counsel must portray the defendant as a human being with positive qualities. The prosecution will have selectively presented the judge or jury with evidence of defendant's **[*380]** criminal side, portraying him as evil and inhuman, perhaps monstrous. Defense counsel must make use of the fact that few people are thoroughly and one-sidedly evil. Every individual possesses some good qualities and has performed some kind deeds. Defense counsel must, therefore, by presenting positive evidence of the defendant's character and acts, attempt to convince the sentencer that the defendant has redeeming qualities. A true advocate cannot permit a capital case to go to the sentencer on the prosecution's one-sided portrayal alone and claim to be rendering effective assistance.

Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, *58 N.Y.U. L. Rev. 299, 335 (1983)*(footnotes omitted).

Mr. Skaggs apparently did not agree with Professor Goodpaster with regard to the need to "portray the defendant as a human being with positive qualities." He, in fact, prepared a memo for each of the witnesses telling them what not to say on behalf of Petitioner.

> Things you **CANNOT** say while testifying:
> 1. "Mr. Eaton is a good guy" ("good man", "good father", "hard worker").
> 2. Mr. Eaton tried to commit suicide.
>
> 3. Mr. Eaton doesn't have a big criminal record - **NOTHING** about his criminal record.
>
> **[*381]** 4. Mr. Eaton would do well in prison if given a life sentence.

[Exhibit 220-9 (bold and double underlining in original)]. The jury thus did not hear any evidence of Petitioner's positive qualities, nothing about his suicide attempts, and nothing about his institutional history. Mr. Skaggs and the trial team failed to discover and present any substantial humanizing evidence of Petitioner's strong work ethic, his acts of kindness and acts of generosity.

Petitioner's work ethic is an integral part of his identity, beginning from a very early age. Natrona County Deputy Lynn Cohee uncovered his work ethic in one of her earliest pieces of investigation, a tape-recorded interview of Petitioner's sister, Sharon Slagowski.

> SS [Sharon Slagowski] He, he's very good at his welding. He's very good at work, but just a minute?
> LC [Lynn Cohee] Ok. Take your time.
> SS He's very, he'd give his, give me his last dollar. He was always so good.
> LC Uhhuh.
> SS He just had a rough life.
> LC How did he do in school, do you know?
>
> SS Well, he never had a chance to be in school. We moved around a lot and that really affected him. And he never got to be a little boy, cuz he had to work so hard. And he was always up so early, **[*382]** uh, you know milking cows
> LC Uhhuh.
> SS and doing the (inaudible) farm work and everything. He never got a chance to be a kid.

[Doc. 199-8, p. 7].

Petitioner's parents expressed the same sentiment in their interview with Dr. Robert Dean and Dr. Donald Langsley, indicating Petitioner "has always been interested in working and has liked to work since early childhood." [Exhibit 169-4, p. 19]. Petitioner, at the age of sixteen [Doc. 169-4, p. 17] had already compiled quite a work history.

> For example, doing farm work, milking cows, etc. In the past few years the patient has done varies of odd jobs; for example, lawn work, cleaning up debris on construction jobs. This past summer the patient had started working on a ranch near Meeker where he had worked before. However, this was terminated on the move to Greeley. After moving to Greeley, the patient worked for his father in the gravel pits. The father reports that he was to pay the patient a dollar an

> hour; however, the patient says that he never really was paid anything. Also, this past summer the patient had worked doing general cleanup for construction companies. A year ago the patient had worked the summer months on a ranch near Meeker and **[*383]** when the family moved from Meeker to Greeley, the patient had expressed that he wanted to stay with the family on the ranch and live there and work there. It is the patient's hope that he will be placed on probation in the custody of these people."

[Exhibit 169-4, p. 19].

Petitioner's work ethic was one of the first qualities his childhood friend, Brian Conrado, noted about him.

> Dale was always a hard worker. He worked for the Barneys on their ranch, but when he was still just a kid he was constantly mowing people's yards for money. He would use the money to buy candy bars. I believe that the candy bars he bought were the only meals he was getting. I remember seeing Dale walk all over town pushing a Toro lawn mower, that Dale financed himself from Gamble's Store, and carrying a can of gas as he went around mowing grass.

[Doc. 68-5, p. 1].

Mr. Conrado and Petitioner were both about junior high school age, and earned money by mowing lawns. Mr. Conrado indicated many times his grandfather would haul his lawnmower to the job, "but Dale had no one, so he would push this lawnmower up miles probably during the week to lawns wherever they were." [Doc. 268, p. 43 lines 23-25; p. 44 line 1]. They **[*384]** would meet on the streets and talk as each of them was pushing his lawnmower to the next job. [Doc. 268, p. 44 line 1-6]. Mr. Odin Harris owned a hardware store in Meeker. He sold Petitioner a red Toro lawnmower and trusted him enough to finance it. [Doc. 268, p. 44 lines 9-19; p. 56 lines 19-125; p. 57 lines 1-22].

Mr. Conrado also remembers Petitioner's younger brother, Alan Eaton, who was born with cerebral palsy. Alan had a wheelchair, but "Dale would pull him around in a wagon," usually headed toward school. [Doc. 268, p. 47 lines 13-24]. Margie Jackson also remembers Petitioner pulling Alan around in a little wagon. [Exhibit 195, p. 1]. Alan was also mentioned in Dr. Dean's interview with Petitioner and his parents in 1961. Alan was the "nine year old boy, in the fourth grade, who was born after a six months' pregnancy and has suffered from cerebral palsy since birth." Alan was born when Petitioner first started school. Dr. Dean wrote, "Dale reports that he has always tried to help and take care of this brother. The parents confirm this." [Exhibit 169-4, p. 21]. David Brewbaker, a friend of Petitioner and Alan, stated "I know Alan loved Dale very much. Dale watched out for Alan **[*385]** better than any of Alan's other brothers and sisters. Alan said that Dale argued with his brothers and sisters so that Alan could have money." [Exhibit 239, p. 2].

Terry Schmuck, who knew Petitioner and his family in Riverton, recalls when Alan got old enough to drive, "Dale fixed Alan's vehicles so that he could operate the breaks (*sic*) and the accelerator with hand levers. Dale modified the vehicles so that Alan could get around and go places like everyone else. Like I said, Dale was a good mechanic." [Exhibit 192, p. 2]. Alan died in 2008. [Exhibit 292].

Petitioner, when he was a young man in Riverton, became friends with David Brewbaker. Mr. Brewbaker is medicated for bipolar disorder, and comes from a family in which he was badly beaten and sexually abused by his father. He "didn't have much of a dad, and Dale tried to fill that role for me." Petitioner took him hunting and fishing, but "(p)erhaps the most valuable thing I learned about Dale was the importance of hard work. He was a hard man to follow on the job because he would work so hard it made everyone else seem lazy." Petitioner got Dave a job cutting hay with him one summer. "He stressed the importance of moving quickly **[*386]** to get the job done. The work was available only for brief times when the season was right. . . Dale was a good person and a good friend to me. He was tender and loving and generous. I loved him like a father or a big brother, and he was always good to me." [Exhibit 239, pp. 1,2].

Jim and Sandy Hoopes have perhaps known Petitioner longer than anyone, ever since the early 1970s. Jim knows Petitioner through work, and his wife, Sandy, considers Petitioner a friend. [Doc. 265, p. 22 lines 13-25; p. 23 lines 1-4]. Petitioner had significant, positive interaction with their children and grandchildren. He took old bicycles and tricycles and welded them together and painted them up so they were like new, and their children rode them. One Christmas he played Santa Claus for their grandchildren and great-grandchildren, and brought them oranges and candy. One great-granddaughter, Belinda, made Santa a gift of feminine napkins, "and Dale was embarrassed, and he pushed it down inside the couch." Petitioner was a very good, jolly Santa. He was also kind and thoughtful. He bought Mrs. Hoopes gifts, such as flower vases, he found at swap meets. [Doc. 265, pp. 22, 23, 29, 81]. Mrs. Hoopes described **[*387]** Petitioner as "intelligent with his hands." [Doc. 265, p.

29].[34] He performed mechanical work for Mr. and Mrs. Hoopes, such as putting new brakes on Mr. Hoopes' truck. [Doc. 265, p. 29 lines 8-25; p. 59 lines 7-15]. He welded a gooseneck hitch and metal frame onto their sheep shearing plant so they could tow it behind their truck. [Doc. 265, p. 24 lines 12-22; p. 60 lines 6-17; Exhibit 269]. Petitioner did the work from November through January when it was cold outside, however, he pitched a tent around the trailer and worked on it around the clock. It is still in use thirty years later. Petitioner was such a good welder "he could even weld with bailing wire." [Doc. 265, p. 25 lines 24-25; p. 26 lines 1-15]. Mrs. Hoopes stated "(h)e worked. I mean, he worked hard. Anybody who could work out there in the cold and just keep working, he was doing a -- well, you know, and he worked with Jimmy a lot..." [Doc. 265, p. 27 lines 2-6].

Jim Hoopes, who is over eighty-four years old, had worked with Petitioner at various jobs beginning in 1972. [Doc. 265, p. 55 lines 1-3]. He reviewed his work history with Petitioner as best he could, given his age and circumstances. [Doc. 265, pp. 60-80]. He "always thought he (Petitioner) was a real good worker, but I had to keep an eye on him cause he had such a wicked temper." [Doc. 265, p. 55 lines 4-8].[35] Petitioner was, nevertheless, such a good worker, Mr. Hoopes requested him for his crew whenever he had the opportunity. [Doc. 265, p. 54 lines 10-24].

Mark Dotson, owner-operator of West Hills Excavation, valued Petitioner's job skills and work ethic. Mr. Dotson, although his health prevented him from attending the hearing before this Court, executed a declaration attesting to Petitioner's valuable job skills and work ethic.

> Dale never disappointed me on the job. He's an exceptional mechanic. One of the best I've ever seen, and I've seen a lot. There's no question that he's a master mechanic, and one of the best. I'm a master mechanic and he's better than me. There wasn't anything **[*389]** he couldn't fix or do on the job. I had zero doubt about his abilities. He got mad a few times and told me he was leaving. I convinced him to stay because he was such a good worker and mechanic. But then one day he just disappeared. He was mad at another employee the day before, or a couple days before, I don't remember about what exactly and I'm sure that's why he left. I hated to see him go. He was the best mechanic I've ever worked with.

[Doc. 69-7, p. 2].

Other employers and co-workers had similar opinions with regard to Petitioner's work ethic. Steve DuBry, of Casper, described Petitioner as "a hard worker, a good mechanic, and a great welder." He also witnessed Petitioner's difficulty with other people. "Dale could not work with other people, he just couldn't handle it. If a contractor needed one mechanic, or one welder, Dale was your man. If the job called for several mechanics then I would not send Dale unless I absolutely had to because I knew there would be problems." He admits "Dale was a skilled worker and I could depend on him to do a job right, but his inability to get along with others often worked against Dale and he lost jobs over it." [Doc. 69-4, p. 1].

Johnny Miller, **[*390]** a construction worker, valued Dale as a good friend and good employee.

> Dale was a good employee, he was better than good. He was a heavy equipment operator on most of the jobs we worked together. He was also a pretty good mechanic and sometimes he would do repair work on jobs too, but mostly he operated equipment like cranes, dozers, and the like. I can't remember Dale ever getting fired. I don't know why he would have; he was a good worker and a good employee. He did his job and he was good at it.

[Doc. 69-5, p. 1]. He indicated Petitioner "would do anything for you. If you needed something and he could help, he was your man. He never thought twice about helping me with my work. He was a good friend to me, I still consider him my friend." [Doc. 69-5, p. 2].

People who knew Petitioner outside the workplace valued him for his kindness and generosity. Petitioner, while working for Mark Dotson in Utah, was dating Kerry Lynn Rose. Ms. Rose is now deceased, although she was alive at the time of Petitioner's trial, and actually offered her assistance. [Exhibit 171-36]. Her parents, Ron and Sally Rose, remember Petitioner as someone who was good to their daughter and granddaughter. He also poured **[*391]** a new driveway and sidewalk for Mr. and Mrs. Rose. He helped Kerry Lynn financially, even when they were no longer dating. He often had surprises for Kerry Lynn's daughter, Angela, such as candy, toys or games. [Exhibit 200, p. 1; Exhibit 201, p. 1].

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[34] She also described him as "slow" in other areas. He had no social skills, had difficulty communicating with people, and he had very few friends, and he could not keep himself or his surroundings clean. [Doc. 265, p. 30 lines 2-25; p. 31 lines 1-25; p. 32 lines 1-25]. **[*388]**

[35] Dr. Ash found Petitioner's temper to be a significant symptom of his overall clinical picture. *Supra*.

Shirley Widmer remembered Petitioner was always helping her husband, Floyd, fix cars, played with their children, and regularly took them out to dinner. [Exhibit 204, p. 1]. Their daughter, Thea Smith, recalls Petitioner picking her up when her motorcycle broke down and driving her home. Petitioner "was very protective of my brother and me and I know he would have done anything for us." [Exhibit 205, p. 1].

Floyd Widmer, though now deceased, testified as a mitigation witness. Shirley stated Floyd "couldn't hear the attorney's questions," and they "didn't practice or go over our testimony with Dale's attorney that I remember." Floyd Widmer, after the trial, was very upset. [Exhibit 204, p. 2]. Thea Smith has the same recollection.

> After my father testified and Dale had received a death sentence, he said to me, "Thea I know I must have said the wrong thing. I couldn't hear the lawyer's questions so I just nodded yes. I couldn't understand him **[*392]** and I know I said something wrong." My dad was really tom up about all of it.

[Exhibit 205, p. 1].

Bobbie and Richard Eaton were also beneficiaries of Petitioner's kindness and generosity. "He was a good man to my point. He was generous. If you ever needed anything, he would try to get it for you or help you." [Doc. 266, p. 180 line 25; p. 181 lines 1-4]. Bobbie and Richard were having financial problems, and Petitioner would "give us money for food and for gas and just to try to help out." [Doc. 266, p. 181 lines 15-20].[36] Petitioner, when he went to flea markets, always brought home a gift for Bobbie and Richard. He knew Richard collected marbles, and liked oil lamps, so he would bring them an oil lamp and fill it with marbles. He would bring Bobbie Coca-Cola items and little knickknack horses. [Doc. 266, p. 181 lines 23-23; p. 182 lines 1-6]. Petitioner was especially kind to Bobbie's son by a prior marriage, Bennie, whom they called JR, and would take him hunting and fishing. The Eaton sisters did not accept JR as part of the family, so it was important to Bobbie that Petitioner "welcomed him like he was just part -- one of his other nephews and nieces, treated him really well." [Doc. **[*393]** 266, p. 175 lines 20-25; p. 176 lines 1-19]. Sadly, JR was shot to death at age 16, and Petitioner "was very, very emotional about it." He was very supportive of Bobbie, and bought her little gifts to make her feel better. [Doc. 266, p. 177 lines 2-22]. Richard stated if he liked you, "Dale would give you the shirt off of his back, and ... I've seen him give stuff to people ... when he was doing without." [Doc. 266, p. 232 lines 1-10].

Richard also stated Petitioner went to stay with his niece, Denise Heinz, in July and August, 1997, to protect her from an abusive ex-husband who had been threatening and stalking her. [Doc. 266, p. 232 lines 11-24; Exhibit 194, p. 1].

One characteristic exhibited by Petitioner which would possibly have been significant mitigation evidence for the jury to consider was the fact he would never pass up a person in need of help. What Donna Schmuck "remember[s] most about Dale is that he was always willing **[*394]** to help. Whenever he came by, if Terry was working on something, Dale would stop and pitch in. Dale was good at welding, and he fixed equipment around the farm for us on a number of occasions. He never took any money for it." [Exhibit 203, p. 1]. Donna's husband, Terry Schmuck, has the same memories of Petitioner. "Dale was generous with his time. Whenever I was outside working on something when Dale drove by, he would always stop and help." [Exhibit 192, p. 1]. Priscilla Moree was provided the same type of evidence when she interviewed Keith Lange by telephone. He, too, talked of Petitioner's helpfulness, and told her of a time when his hogs got loose and Petitioner stopped to help him round them up. [Exhibit 171-22, p.1].

Mr. Burr explain why the evidence which would have shown the jury Petitioner's positive qualities is just as important in the penalty phase of a capital trial as the evidence of his substantial mental and emotional impairments.

> The constant duality about Dale Eaton is very, very important and should have become a centerpiece of both investigation and presentation, but this fellow who's got great difficulties in relating to other people and being around other people **[*395]** and can, can just un -- you know, without much provocation go off, and coupled with this very same man is very kind to people and very generous, you know, described as having a good heart, those -- that duality, which, you know, seems contradictory but, you know, is -- it's much like all of us who have contradictory qualities, and it, it not only suggests investigation for mental health but suggests a very powerful set of themes for humanizing Mr. Eaton and helping the jury understand him as a fellow human being.

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[36] Financial generosity by Petitioner apparently was apparent at an early age. "The patient's main interest, according to the parents, is working and earning money. . . . They say that he is quite unselfish with the money that he earns ... . [Exhibit 169-4, pp. 19, 21].

[Doc. 266, p. 12 lines 17-25; p. 13 lines 1-4]. Mr. Skaggs and the trial team failed to produce mitigation evidence and testimony which would have offered the jury insight into Petitioner's innate humanity.

Defense counsel, when the only genuine question is whether the jury will impose the death penalty, cannot afford to overlook any opportunity draw out admissible evidence of the client's intrinsic human dignity. These opportunities will often arise on the cross-examination of prosecution witnesses who know the client. The practice among capital defense lawyers of taking proper steps to humanize the client during the guilt or innocence stage of the trial is called "frontloading **[*396]** mitigation." Mr. Burr explained why it is so crucial in a death penalty case.

> Front-loading, the concept of front-loading has come about because of the bifurcated nature of a capital trial. In the first, first half of the trial is all about guilt or innocence and not about mitigation or even aggravation and not about the sentence. It's about whether the person is guilty of what he's been charged with. And over time and certainly by the, by the late '90s, early 2000s we had realized that if we, as the defense, waited to begin mitigating our client, that is, beginning to put some human flesh on the bones of the skeleton that was apparent in the guilt phase, we might be too late, that we needed to start helping the jury to understand our client as fully human as early as possible and find ways of doing that in the guilt/innocence phase.
>
> And so the notion of front-loading mitigation has developed, that's just the term of art for it, but what it simply means is looking for opportunities in the guilt phase witness testimony and their relationships to your client, the relationships of those witnesses to your client, to be able, within the proper scope of cross-examination, to be able to ask **[*397]** questions about the person who is the defendant.

[Doc. 266, p. 32 lines 10-25; p. 33 lines 1-5]. The ABA Guidelines as well provide "(c)ounsel at every stage of the case should take advantage of all appropriate opportunities to argue why death is not suitable punishment for their particular client." [ABA Guideline 10.11.L].

There is no indication in the trial record Mr. Skaggs or the trial team gave any thought to "front-loading" mitigation evidence. This apparent failure to consider "front-loading" is particularly perplexing in light of the fact the law review article by Professor Garvey, which Mr. Skaggs testified he read before trial, and even brought to the hearing before this Court, [Doc. 261, p. 36 lines 1-8], cautions capital defense lawyers that "a number of jurors make up their minds about the defendant's punishment even before they hear any evidence in the penalty phase." Stephen Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* 98 Colum. L. Rev. 1538, 1543 (October 1998). Jurors tend to make up their minds early, thus "(i)ntroducing mitigating evidence early adds an additional humanizing dimension to the image of the defendant as a two-dimensional, cold-hearted killer - an image the jurors **[*398]** are otherwise likely to form prior to the penalty phase." Scott Sundby, *The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 Cornell L. Rev. 1557, 1595 (September, 1998). Professor Craig Haney, a lawyer and psychologist who specializes in capital punishment issues, explains the necessity to frontload mitigating evidence in the guilt or innocence stage of trial.

> The poor timing of the defense case in mitigation, the fact that it would require most jurors to perform the difficult work of essentially changing their minds about the defendant, and the heavy crime-focus of the penalty instructions that follow may help to explain why the Capital Jury Project found that the penalty trial was the least well-remembered stage of the entire process for capital jurors. Half of the jurors studied had actually made up their minds about the appropriate penalty once they had convicted the defendant of the guilt phase crime.

Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 Stan. L. Rev. 1447, 1457, 1458 (1997). In other words, if the jury knows nothing about the defendant other than the facts of the crime when it renders its verdict finding him guilty, the defense bears a very heavy burden to win them **[*399]** over to life in the second stage of trial.

There were a number of witnesses who testified for the prosecution at the guilt or innocence stage of Petitioner's trial who presented opportunities, through informed and proper cross-examination, to begin to paint a humanizing picture of Petitioner. Doris Buchta is one example of a missed opportunity to "frontload" mitigation—to humanize the defendant as early as possible in the proceedings by drawing out evidence of his relationships with witnesses, whether they testify for the State or for the defense. Mr. Burr explained the missed opportunities with respect to Mrs. Buchta.

> Q. Was front-loading available to Mr. Skaggs in Dale Eaton's trial? A. I believe it was, yes?

Q. I want to talk to you about four of the witnesses who testified or actually three -- yeah, four of the witnesses who testified. One was a woman named Doris Buchta who was a neighbor of Dale Eaton's out at Moneta, Wyoming, out in the middle of the country. She kept a journal, but she also testified at the, at the guilt phase of the trial as a prosecution witness. You've had an opportunity to review her journal?
A. I have.

Q. Was there information in that journal that indicated **[*400]** that -- to a reasonably competent capital attorney that front-loading was available through Miss Buchta?
A. Yes. Ms. Buchta had a number of entries about contacts with Dale Eaton. She was a very good journal keeper, and ... there were a number of entries that whenever he came by to say hello or to have some interaction with her or her husband, she made a note about it. And there were a number of times where Dale brought her simple gifts, candy or, you know, other confections that she was appreciative of, and there were things that she noted that Dale had helped her husband, Buck, do with respect to a vehicle or some chore that needed to be done that he needed help with, and just notes about him visiting. And ... those are the kinds of things ... you could very easily within the scope of cross ask some simple questions of Ms. Buchta that would evoke information about that.

And generally when a witness who's been talking about sort of hard facts, ... that is, ... did you see him here, there, or wherever at certain times, that's what I mean by hard facts, when a witness who's been talking about that is asked some more sort of human emotional facts, they'll brighten up and ... they'll express **[*401]** some emotion and talk about Dale ... as a person who's a friend. And that's the kind of testimony that is gold in terms of front-loading, because you're not just talking about a stick figure at that point ... who is seen here or there at certain times, but you're talking about a person who acts like other human beings and ... is kind and generous and, and so that would have been a golden opportunity.

[Doc. 266, p. 33 lines 6-25; p. 34 lines 1-24; *See also* Exhibit 235, a verbatim compilation of Doris Buchta's journal entries which mention Petitioner].

Mr. Skaggs and the trial team missed similar opportunities with other prosecution witnesses. Mary Follette could have testified Petitioner "bought gifts for me and my son as tokens of his affection. Sometimes I would come home to find a huge bouquet of flowers waiting for me. Another time he gave my son, Brian, a pick-up truck. He was generous and I'm sure he would have done anything for me." She also had some sympathy for Petitioner. "When I think of Dale and his situation I am saddened. I always knew there was something wrong with Dale and I don't believe he deserves to be put to death." [Exhibit 313, pp. 1, 2]. Mr. Burr explained this **[*402]** was a wasted opportunity.

These two paragraphs again sort of capture the contradictory human being that Dale Eaton was. In the first paragraph she's talking about his, his sweetness to her, his kindness, his gifts, his tokens of affection. He was obviously, you know, interested in her as a female friend. And, you know, he didn't overstep any boundaries. He was just -- you know, he was being very sweet to her. And she appreciated that, but she wasn't interested. She didn't reciprocate in any sort of romantic sense.

And she explains in part why in the next paragraph. He was weird, and he smelled terrible. And his hygiene was disgusting. And he was strange and physically repulsive because of his poor hygiene. And his vehicles were a mess. And, you know, there's the Dale Eaton that is very dysfunctional in that sphere of his life. And, again, it's sort of if a theme of mental retardation emerged, it could begin to introduce that theme of social ineptitudes, the limitations in his social adaptive behavior. You know, that's, that third paragraph is quite an extraordinary capsulation of those problems.

[Doc. 266, p. 36 lines 24-25; p. 37 lines 1-18]. Mr. Burr pointed out the seventh paragraph **[*403]** of Mary Follette's declaration reflects the availability of even more front-loading. "Yeah, I mean, you could begin to introduce the theme of his being -- his good work ethic and his considerable skills as a welder." [Doc. 266, p. 47 lines 23-25; p. 38 lines 1-2].

Mr. Skaggs and the trial team had the opportunity as well to front-load mitigation evidence through prosecution witness Paul Follette. Mr. Burr points out the declaration by Mr. Follette [Exhibit 314] reflects the "contradictions about people that tend to humanize them and us" and allow the jury to "begin to start resonating with him as a fellow human being." [Doc. 266, p. 38 lines 22-25; p. 39 lines 1-10]. Mr. Follette testified for the prosecution, and could have been cross-examined about his knowledge of Petitioner. His declaration states: "I know Dale cared a lot for his children and even when he had very little he thought of them first. Whatever he had, he made sure they were fed and taken care of. It was obvious to me that he loved his children and tried to care for them the best he knew how." [Exhibit 314, p. 1].

Mr. Burr observed Mr. Follette could also have begun laying the foundation for the mental health case, in **[*404]** addition to elucidating Petitioner's positive human qualities and frailties.

> (T)his is an interesting observation about Dale because he talks about him, again, in praiseworthy ways about his skill as a welder and his ability to make a lot of money at times, but then sort of goes to the flip side of his limitations in managing the money, not having knowledge or education to plan for hard times. Then he goes on to say he sees that pretty often in people in what he calls "among a certain group of workers in Wyoming." So that limitation on Dale's part didn't set him apart in this -- in Mr. Follette's mind. But, again, it could begin to open up a window into the complexity of Dale as a human being. He's both skilled and able to be a good provider at some level and a disaster at other levels within his life.
>
> And, again, it's the contradictions about people that tend to humanize them and us. I mean, it's -- when we tell stories about each other, you know, we -- at funerals I guess we tend to tell only good stories about people, but every other time we talk about people in an honest way we talk about them and each other as contradictory characters. I mean, we are all people who are a mix of **[*405]** strengths and weaknesses and heroic acts and dastardly cowardly acts and everything in between, and all of us know that intuitively. And so when you begin to introduce a person in that fashion to a jury, they begin to start resonating with him as a fellow human being. And that ultimately is the mission of, of capital defense mitigation work is to, is to connect people together as human beings, the jurors and the client.

[Doc. 266, p. 38 lines 9-25; p. 39 lines 1-10].

James Raney presented yet another opportunity to begin laying the foundation for Petitioner's penalty stage defense. Mr. Burr noted Mr. Raney's declaration, [Exhibit 285], beginning with paragraph four, reflects

> observations about Dale's behavior that suggested some mental health problems and, you know, not, not -- the first paragraph we looked at having the memory problems, that he loses train of thought, stare into space, sort of his face would go blank . . . I mean, it's important for an investigative sense for mitigation, but also knowing that, knowing that your themes when you get to full-blown presentation of mitigation are going to have a lot to do with presenting the mental health difficulties and disorders that inflict **[*406]** -- that afflicted Dale, you can begin to get the jury thinking about that by bringing out, uh, the problems noted in the memory paragraph and in the next paragraph about his fearfulness about being around other people.

[Doc. 266, p. 35 lines 13-25; p. 36 lines 1-2]. A competent capital defense attorney, through James Raney, would be able to begin presenting the mitigation case-in-chief during the prosecution's case in chief. Mr. Burr explained further.

> That's exactly right. The themes -- there are important themes here in these two paragraphs [of Raney's declaration] that are gonna be -- become full-blown themes in the penalty phase, and you can do a lot to introduce the jury to those themes through a witness like this who's testifying in the guilt phase.

[Doc. 266, p. 36 lines 3-10].

The failure by Mr. Skaggs and the trial team to conduct a reasonable mitigation investigation caused them to miss these front-loading opportunities. "I don't know which it was, ignoring or failing to see, but he missed these opportunities, you know, in part because they had not done the kind of interviewing with these witnesses that, that would have evoked this information." [Doc. 266, p. 39 lines 11-17]. **[*407]** It is even apparent from the declaration by James Raney he appears to know the Steve DuBry story about Dale reaching into the pot of spaghetti with the greasy hand. "Yeah, that's right. So there are a lot of connections that were there and were unknown to the defense because of the superficiality of their work." Mr. Burr opines competent capital counsel would not have performed this way. [Doc. 266, p. 39 lines 21-25].

The mitigation investigation and presentation on behalf of Petitioner by Mr. Skaggs and the trial team was fundamentally flawed, and failed to show the jury Petitioner, in spite of his severe impairments, was a unique, complex human being with positive qualities. This failure inevitably prejudiced the outcome of Petitioner's capital trial.

Prejudice - Conclusion

A *§ 2254* petitioner, in order to establish an ineffective assistance of counsel claim, "must show both deficient performance by counsel and prejudice." *Knowles v. Mirzayance, 556 U.S. 111, 122, 129 S.Ct. 1411, 1419, 173 L. Ed. 2d 251 (2009)*.

"To establish a claim for ineffective assistance of counsel, a defendant must show that . . . . (2) counsel's deficient performance was prejudicial." *United States v. Cook, 45 F.3d 388, 392 (10th Cir. 1995)* (citing *Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984))*; *Harrington v. Richter, 562 U.S. 86, 131 S. Ct. at 787-792*. Prejudice entails "a reasonable probability that, but for counsel's unprofessional errors, the result of the **[*408]** proceeding would have been different." *Strickland v. Washington, 466 U.S. at 694*. *See also, United States v. Challoner, 583 F.3d 745, 749 (10th Cir. 2009)*(quoting *Strickland v. Washington, 466 U.S. at 688, 694)*.

The United States Supreme Court, in 2011, in *Harrington v. Richter, 562 U.S. 86, 131 S.Ct. 770, 178 L. Ed. 2d 624 (2011)*, reiterated its philosophy on deficient performance and prejudice first set out in *Strickland v. Washington*. The Supreme Court, with regard to prejudice, stated:

> With respect to prejudice, a challenger must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id., at 694, 104 S.Ct. 2052*. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." *Id., at 693, 104 S.Ct. 2052*. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id., at 687, 104 S.Ct. 2052*.
> . . .
>
> In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. See *Wong v. Belmontes, 558 U.S. 15, 26, 130 S.Ct. 383, 390, 175 L.Ed.2d 328 (2009) (per curiam)*; *Strickland, 466 U.S., at 693, 104 S.Ct. 2052*. Instead, *Strickland* asks whether it is "reasonably likely" the result would have been different. *Id., at 696, 104 S.Ct. 2052*. This does not require a showing that counsel's actions **[*409]** "more likely than not altered the outcome," but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." *Id., at 693, 697, 104 S.Ct. 2052*. The likelihood of a different result must be substantial, not just conceivable. *Id., at 693, 104 S.Ct. 2052*.

Harrington v. Richter, 562 U.S. 86, 131 S.Ct. at 787-788, 791-792. *See also, United States v. Rushin, 642 F.3d at 1309-1310*.

The United States Supreme Court has outlined the proper prejudice inquiry for evaluating a claim of ineffective assistance of counsel in the context of a penalty phase mitigation investigation.

> We certainly have never held that counsel's effort to present *some* mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant. To the contrary, we have consistently explained that the *Strickland* inquiry requires precisely the type of probing and fact-specific analysis that the state trial court failed to undertake below. [footnote omitted] In the *Williams* decision, for instance, we categorically rejected the type of truncated prejudice inquiry undertaken by the state court in this case. *529 U.S., at 397-398, 120 S.Ct. 1495*. And, in *Porter*, we recently explained:
>
> "To assess [the] probability [of a different outcome under *Strickland*], we consider the totality of the available **[*410]** mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweig [h] it against the evidence in aggravation." *558 U.S., at 39-41[, 130 S.Ct., at 453-54]* (internal quotation marks omitted; third alteration in original).
>
> That same standard applies—and will necessarily require a court to "speculate" as to the effect of the new evidence—regardless of how much or how little mitigation evidence was presented during the initial penalty phase.

Sears v. Upton, 561 U.S. 945, 130 S.Ct. 3259, 3266-3267, 177 L. Ed. 2d 1025 (2010). *See also, Littlejohn v. Trammell, 704 F.3d at 864* (quoting *Sears v. Upton Sears v. Upton, 561 U.S. 945, 130 S.Ct. at 3266*).

The significant mitigation evidence presented to this Court, through lay and expert testimony, was not discovered, and if discovered, not utilized by Mr, Skaggs and the trial team. This lack of discovery and/or lack of use was apparently based on a concern an in-depth investigation might "open the door" to presentation of adverse information, arguably through the *possible*

cross-examination of the potential mitigation witnesses.[37] This type of mitigation investigation is inevitably ineffective as a judgement as to whether potential mitigation evidence will be helpful or harmful is not possible when there is absolutely no knowledge or understanding, based on a reasonable investigation, of the nature and character of the **[*411]** potential evidence. This is why a "counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision to focus on Williams' voluntary confessions, because counsel had not 'fulfill[ed] their obligation to conduct a thorough investigation of the defendant's background.'" *Wiggins v. Smith, 539 U.S. at 522*, quoting *Williams v. Taylor, 529 U.S. 362, 396, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)*. In other words, a "failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment." *Wiggins v. Smith, 539 U.S. at 526*. It has long been recognized "strategy resulting from lack of diligence in preparation and investigation is not protected by the presumption in favor of counsel." *Kenley v. Armontrout, 937 F.2d 1298, 1304 (8th Cir. 1991)*. Any claims by the trial team of "strategy" carry little weight since "counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when s/he has not yet obtained the facts on which such a decision could be made."*Kenley v. Armontrout, 937 F.2d at 1308*. A strategic decision is an informed choice between alternative courses of action, which does not describe the choices by Mr. Skaggs and the trial team with respect to the mitigation case. Trial counsel's claim of uninvestigated trial strategy, in similar circumstances, have been rejected.

> The other potentially damaging information **[*412]** consists principally of Kenley's antisocial behavior, violence and arrests (not convictions) when he was a minor. His sole conviction was already in evidence. Had all the reports been introduced into evidence and had all affiants and doctors testified, we do not deny the jury would have heard aggravating information. After conducting a reasonable investigation, counsel may conclude that the introduction of the mitigating evidence "would barely have altered the sentencing profile presented", *Strickland, 466 U.S. at 700*, or that harmful information is greater than potential helpful information, and choose not to present certain evidence. *Burger v. Kemp, 483 U.S. 776, 789-91, 107 S. Ct. 3114, 97 L. Ed. 2d 638 (1987)*; *Guinan, 909 F.2d at 1231*. In this case we have concluded counsel did not conduct a reasonable investigation. But even if he had, in the context of what the jury had already heard at trial about Kenley's crazed and violent actions on the night of the crimes, *we are doubtful that much of the additional aggravating information would have had any significant incremental aggravating effect on the jury*. Furthermore, the aggravating information was mostly cumulative.

Kenley v. Armontrout, 937 F.2d at 1309 (emphasis added).

The Court has concluded, for a number of reasons, including for failing to investigate reasonably available and potentially mitigating evidence, the performance of Petitioner's trial counsel was constitutionally defective. The remaining question is whether the deficient performance by trial counsel prejudiced Petitioner.

The standard by which a court must judge prejudice is whether there is a reasonable probability the outcome of the sentencing phase of Petitioner's trial would have been different "but for" trial counsel's deficient representation. A reasonable probability is one sufficient to undermine a court's confidence in the outcome of the trial proceeding. An assessment of the probability of a different outcome must "consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweig[h] it against **[*414]** the evidence in aggravation." *Sears v. Upton, 561 U.S. 945, 130 S.Ct. at 3266-3267*.

It is the conclusion of this Court there is, at a minimum, a reasonable probability Petitioner would not have received a sentence of death if the mitigating evidence presented this Court had been presented to the trial court jury. Petitioner has suffered prejudice as the result of the constitutionally deficient performance of his trial counsel.

CLAIM FOUR

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[37] "A. Well, you can talk about helpfulness, but it's pretty mild in comparison to **the cross-examination you might get** about how **[*413]** helpful he's been to other people." [Doc. 261, p. 186 lines 15-17]. "A. No, but he's certainly going to be cross-examined."[Doc. 261, p. 186 line 21]. "A. It could **if you don't have to deal with cross**." [Doc. 261, p. 187 line 13]. "A. No, it isn't, **but I can imagine cross**."[Doc. 261, p. 188 line 8]. (Emphasis added).

> The Wyoming State Public Defender appellate counsel representing Petitioner were burdened by a conflict of interest based on their professional affiliation with trial counsel, Wyatt Skaggs, and State Public Defender Ken Koski, whose personal and professional interests were adverse to Petitioner's interests, and who actively undermined the ability of appellate counsel to investigate and pursue legitimate claims of ineffective assistance of trial counsel.

The "conflict of interest" which Petitioner alleges in this, his fourth claim, is not one in the traditional sense in which an attorney has "abandoned his 'duty of loyalty' to his client" through a conflict. *Osborn v. Shillinger, 861 F.2d 612, 625 (10th Cir. 1988)*; *Wood v. Georgia, 450 U.S. 261, 267, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981)*; *Fisher v. Gibson, 282 F.3d 1283, 1291 (10th Cir. 2002)*. His claim rather asserts his Wyoming State Public Defender appellate counsel was constitutionally deficient based, once again, on a failure to **[*415]** adequately investigate his background, character, and mental health, which failure was caused by an internal conflict within the Wyoming State Public Defender Office between his appellate counsel and his trial counsel which undermined the investigative efforts of appellate counsel. The Court will address Petitioner's claim from this perspective.

Petitioner was represented on appeal by an evolving team of attorneys from the Wyoming State Public Defender Office. The initial team included Tina Kerin (now "Olson"), Donna Domonkos, Ryan Roden, and Diane Lozano. [Doc. 263, p. 165 line 25; p. 166 lines 1-8]. Ms. Olson, Ms. Domonkos, and Mr. Roden were, at that time, the entire Wyoming State Public Defender Office Appellate Division. [Doc. 263, p. 148 lines 18-22]. Petitioner's appellate team eventually included Marion Yoder, following the departure of both Ms. Domonkos and Ms. Lozano. [Doc. 263, p. 166 lines 9-25; p. 167 lines 1-21]. Mr. Kenneth Koski was the State Public Defender at the time of Petitioner's trial and appeal, and Mr. Skaggs was the capital trial "unit." [Doc. 86-3, p. 18 lines 13-18].

Appellate counsel obtained the files of Mr. Skaggs and Ms. Moree. Ms. Olson testified as part **[*416]** of her record review in Petitioner's case, she reviewed the combined fact investigation/mitigation investigation billings of Ms. Moree, and determined "it was like $21,000, and I think most of that or a good chunk of that was sitting through the trial." This caused the appellate team concern - it both was significantly lower than, for example, what had been spent in the *Harlow* case, and "the scope of the work that needed to be done could not have been done in that amount of time certainly." [Doc. 263, p. 198 lines 20-25; p. 199 lines 1-17]. Ms. Olson, based upon her file review and the state court record, along with the files of Petitioner's trial attorneys which had been gathered in connection with the appellate team's efforts, offered her impression the scope or breadth of the mitigation case or investigation which had been done

> was extremely limited, and it appeared to me to be inadequate. . . . And then when, you know -- a lot of things were going on, you know. Certainly reading the penalty phase and seeing what was produced at the penalty phase and then seeing this box of materials and then seeing the sorts of communications that were made to the family members, for example, it **[*417]** all seemed not to be what we had been told it needed to be?
> Q. In your training and experience?
> A. In our training and our reading and our consultations.
> Q. And the ABA Guidelines?
> A. Correct.

[Doc. 263, p. 199 lines 18-25; p. 200 lines 1-21].

Ms. Moree's engagement letter to Mr. Skaggs, [Exhibit 4], along with the failure by Mr. Skaggs to make any funding requests for "sending Priscilla to places where Dale Eaton had lived," caused concerns. [Doc. 263, p. 201 lines 7-24]. The appellate team also recognized interviews by Ms Moree were "largely by phone," and "did not seem to be productive. * * * [F]or example, if you compared police interviews with Miss Moree's interviews, the police interviews were more replete with information than the mitigation person's, Miss Moree's, interviews." The police interviews largely were in-person. Ms. Moree's witness interviews, by contrast, "were brief." Ms. Moree did not follow-up with personal visits. Ms. Olson indicated "Priscilla did not proceed in a manner that was commensurate with the guidelines or the [mitigation] training that I had received." [Doc. 263, p. 201 line 25; p. 202 lines 1-20]. The appellate team was further concerned the necessary mitigation **[*418]** investigation had not been done, and Ms. Moree simply "was not going out. Priscilla was not traveling. Priscilla was not on the scene, so to speak. That's what you do. You have to go to the towns. You have to do all those things." [Doc. 264, p. 201 lines 1-5].

Petitioner's appellate counsel, in fact, knew competent representation of him would require additional investigation.

> We were, however, extremely concerned about what we've been talking about here, the preparation for the sentencing phase, the mitigation phase of the case. And with regard to that, we were not at all comfortable with what all we had done, what we had now learned we needed to do, the types of people we needed to be speaking with, and so that was not in a good posture at that point.

[Doc. 264, p. 169 lines 20-25; p. 170 lines 1-7]. The required investigation was never conducted.

> We have this limited amount of time, and then we're preparing for the *Calene* hearing which is granted. And the second prong of *Strickland* and the one that our court frequently analyzes first, of course, is the prejudice component, and in order to show that there was prejudice from this deficient investigation you have to show what the evidence **[*419]** would have been had it been done. So you have to do it, and we didn't do it.
>
> We tried to do it. Um, you know, again, Dale, if you sat down and listened to him, he'd tell you where he went to school. I got school records for Dale that showed he was in school here, for two months I was in school here, you know, odds between the grade level and how old Dale is. I got two or three sets of those things. Um, I got a form showing that mental health records in Kemmerer had been destroyed. Those would have been very significant information. But, you know, we could not, dealing with preparation for the hearing, dealing with the briefing of the many legal issues, not being trained mitigation specialists ourselves at that point in time, you know, this was our first capital case, we could not redo the mitigation in terms of time, in terms of resources. We needed a mitigation specialist to get those interviews, to get those kinds of declarations, to establish the prejudice that we needed to show.
>
> Q. And at that time did the team have a qualified mitigation specialist on board?
>
> A. The appellate team?
>
> Q. Yes.
>
> A. No.

[Doc. 264, p. 204 lines 7-25; p. 205 lines 1-11].

The appellate team consulted Russell Stetler, **[*420]** the National Mitigation Coordinator for the Federal Public Defender System, and Richard Burr, Federal Death Penalty Resource Counsel and an experienced death penalty trial attorney. Both confirmed significant avenues of mitigation and mental health evidence remained unexplored in Petitioner's case. [Doc. 264, p. 206 lines 13-25; p. 207 lines 1-12; Doc. 87-6, pp. 35-48; Doc. 87-7, pp. 1-18]. The appellate team learned from Mr. Stetler it

> had layer upon layer of problem. We didn't have this kind of social history investigation. The experts who testified at trial didn't have this kind of social history investigation. And so I'm getting ready to ask for a hearing at which I don't even have all those things that I need because I've already had multiple extensions of time.

[Doc. 264, p. 207 lines 23-25; p. 208 lines 1-10]. The appellate team similarly learned from Mr. Burr

> without the information, without the social history, without knowing the levels of abuse and trauma and all those things that we reasonably, as it turns out, suspected would be there, we couldn't, we couldn't get an expert who would be able to thoroughly and completely assist us, that we needed those things so we'd know if **[*421]** he'd even been competent to stand trial, because I had serious concerns about the competence at the time of the trial.
>
> * * *
>
> That we need to get the new information so that it can be provided to the mental health experts so that Mr. Eaton can then be accurately, accurately and with a good history, evaluated by those people. Because, for example, you know, Dr. Ash and Dr. Gummow did not have everything. Um, I don't even know everything you have now, but what you have shown me that you have now, they didn't have those things.

[Doc. 264, p. 209 lines 2-25]. The appellate team obtained the affidavit by Mr. Burr, [Doc. 71-1], just three days prior to the start of the *Calene* remand evidentiary hearing. [Doc. 264, p. 208 lines 22-25; p. 209 line 1]. The appellate team then fully realized it needed a thorough, accurate, and complete psychosocial history. [Doc. 264, p. 209 lines 17-25; p. 210 lines 1-4]. Mr. Stetler and Mr. Burr both confirmed Ms. Olson's earlier concerns the appellate team was not doing the mitigation investigation which needed to be done. Both "were assuring me that my concerns were extremely well-founded and that we were in some hot water. They were educating me about the scope **[*422]** of what still needed to be done. Um, and, uh, and it wasn't just at this moment in time. I had many, many, many conversations with Russ Stetler." [Doc. 264, p. 210 lines 9018]. The appellate team was ultimately not able to perform the life history or mitigation investigation which needed to be done on behalf of Petitioner. [Doc. 264, p. 222 lines 20-24; p. 229 lines 23-25; p. 230 lines 1-6]. The appellate team was never able to provide their mental health expert, Dr. William Logan, a proper psychosocial history concerning Petitioner.[Doc. 264, p. 230 lines 7-9].

The Wyoming Supreme Court observed, based upon its application of the *Strickland v. Washington* ineffective assistance of counsel doctrine, "opportunity to the defendant for a favorable conclusion has been noticeably confined." *Calene v. State, 846 P.2d 679, 693 (Wyo. 1993)*.

> Ineffectiveness of counsel issues have not provided a major ingredient in the Wyoming Supreme Court appellate activities. Among opinions published since January 1, 1986, only thirty-six decisions rendered by written opinion of this court have included clearly stated ineffectiveness of counsel, trial court and appeal, appellate contentions. Most significant within that number have been procedural access **[*423]** rehearing of some kind and not substantive review of issues of ineffectiveness themselves. Within approximately 330 criminal opinion appeals, and those thirty-six which in some way alleged ineffectiveness, only three have been reversed by this court as substantively meritorious.

Calene v. State, 846 P.2d at 693, n.5. The three cases in which the Supreme Court found the trial counsel to be ineffective all have one thing in common. "It is quickly apparent that the only successful avenue has related to investigation and obtaining witnesses, e.g. *Frias [v. State, 722 P.2d 135 (Wyo. 1986)]*, *Gist [v. State, 737 P.2d 336 (Wyo. 1987)]*, and *King [v. State, 810 P.2d 119 (Wyo. 1991)]*." *Calene v. State, 846 P.2d 679, 693, n.5 (Wyo. 1993)*. Petitioner's appellate team, when they began work on Petitioner's appeal, recognized any *Calene* remand required investigation outside of the state court record. [Doc. 263, p. 162 lines 8-25; p. 163 lines 1-16].

There was, however, in the view of Petitioner's appellate team, a hostility within the Wyoming Public Defender Office with regard to ineffective assistance of counsel claims.

> The Wyoming Public Defender System has a culture of hostility toward ineffective assistance of counsel claims, regardless of how meritorious it is. Such claims are discouraged, no doubt about it. Mr. Koski would have to be consulted before any ineffective assistance **[*424]** of counsel claim could be made, and while he would not say "no" to what appeared to be a well-founded claim, he consistently would respond rather derisively that "we eat our own."

[Doc. 70-3, p. 3]. Mr. Koski was the person responsible for staffing and funding Petitioner's appeal, and thus had the ultimate authority over resources, both time and money, to be allocated thereto. Mr. Koski, on at least one occasion, made his feelings clear as to the expenses which can be associated with capital defense within the Wyoming Public Defender System - they drain the system's resources.[Doc. 263, p. 216 lines 2-20; Doc. 70-3, p. 4].

The appellate team, given its lack of capital experience or training, met with expert state and federal capital defenders in Colorado on October 26, 2004. [Doc. 263, pp. 188-190; Exhibit 247-3]. David Wymore, during the meeting, "was very emphatic and vocal about the fact that implicit in our system that we have here in Wyoming is an inherent conflict of interest in raising ineffective assistance of counsel claims on our fellow employee attorneys. * * * [T]hey thought that it was a very big issue. I said huge in my contemporaneous note." [Doc. 263, p. 190 lines 10-19]. The **[*425]** Colorado meeting included a discussion as to whether there would be documentation in support of any conflict claim, and Ms. Olson knew coming away from the meeting the appellate team had a challenging task ahead of it. It needed more assistance, needed more resources, and "[t]hat we would need to continue to confer with people more experienced in capital case litigation and appellate work." [Doc. 263, p. 194 lines 10-25]. Ms. Olson was concerned "we not accommodate the machinery of death [by not raising conflict issue], as Mr. Wymore phrased it." [Doc. 263, p. 195 lines 20-24]. Donna Domonkos, following the appellate team Colorado meeting, first approached Mr. Koski with regard to the conflict issue. The meeting "did not go well. * * * Mr. Koski was not receptive to the idea of the conflict motion initially." [Doc. 263, p. 196 lines 4-22]. He "took the suggestion of a conflict that we would be, you know, wanting to get out of the case, not having to do the representation in the case, was his initial reaction to Donna approaching him." [Doc. 263, p. 197 lines 16-22].

The appellate team, following the adverse reaction by Mr. Koski to the suggestion a conflict existed, continued to make efforts **[*426]** to meet with him and keep him informed regarding their work on the conflict motion to withdraw. [Doc. 263, p. 203 lines 5-25; p. 204 lines 1-21]. Petitioner's appellate defense team meet with Mr. Koski in December, 2004.

> In a meeting with Mr. Koski on December 29, 2004, he made it clear to us that he strongly disapproved of our allegation that Wyatt Skaggs was ineffective. He said that our motion that we were filing on Mr. Eaton's behalf was a "cheap shot" at Mr. Skaggs, and he angrily scolded us for having filed it. He personally and professionally insulted me, accusing me of "half truths" in an affidavit I had executed in another post-conviction case involving a Mr. McKinney. Things got real ugly with Mr. Koski at this point in Mr. Eaton's representation.

[Doc. 70-3, p. 4].

The day after the appellate team met with Mr. Koski, December 30, 2004, Andy Fraser, the investigator the appellate team had chosen to assist them in Petitioner's appeal, telephoned Diane Lozano, and declined to work further on Petitioner's appeal. The reason he gave was the fact "Mr. Skaggs is not happy with the fact that I have been working on the Eaton appeal." [Doc. 67-5, pp. 12, 13; Doc. 67-6, pp. 3, 4]. The **[*427]** loss of Mr. Fraser as their investigator put the appeal team "in a serious bind. We lost valuable time as we scrambled to find another investigator who would have to review a large volume of transcripts and other documents to get up to speed on the case. As all of this was going on, the clock was ticking on our time to pursue the appeal, and we were having to request extensions of time from the Wyoming Supreme Court." [Doc. 66-7, p. 6].

Ms. Olson also recalls a personal confrontation she had with Mr. Koski after the December 29th meeting and just prior to the appellate team filing the motion to withdraw with the Wyoming Supreme Court based on a conflict of interest.

> [W]e had been keeping Ken in the loop that we were filing the motion and so forth, and we expected that he would be upset by that. And he approached me in the copy room in our office. At that point in time all of us were together on the third floor of the U.S. Bank building here. The administration, the appellate division, and the Laramie County trial division, we were all together. And he approached me in the copy room of that office and said, uh, you know, "Are you filing that affidavit?" And he was talking about Donna's affidavit **[*428]** about her interactions with Wyatt Skaggs. And he told me it was horse manure and half-truths. And I said, "Tell me what is a half-truth in there? I asked you that before." And he backed off, but he was very, uh, unhappy with the situation of the conflict motion.

[Doc. 263, p. 207 lines 19-25; p. 208 lines 1-8].

The Wyoming Supreme Court denied, without conducting a hearing or further inquiry, the motion to withdraw by Petitioner's appellate team. [Doc. 67-8].

Ms. Olson, when asked by Deputy Attorney General David Delicath whether Ken Koski actively undermined appellate team's case, candidly replied:

> Did he actively undermine my case? Actively, but not knowingly. Not purposefully. Actively, but not purposefully. * * * I'm sorry. I'm not trying to be evasive. I feel that my case was undermined.

[Doc. 264, p. 252 lines 20-25].

Petitioner's trial record was one of the largest Ms. Olson had encountered, and even prior to reviewing the complete record the appellate team had a concern as to what mitigation had been done in preparation for, and presentation at trial.

> This meeting was before we had reviewed the entire record, and we did not yet have access to or had not reviewed everything or have **[*429]** access to all the things that we needed. I think at that point in time we were concerned . . . about what little we knew about the mitigation, the sentencing phase of the case. And Priscilla had operated as the mitigation investigator in the case, and . . . we needed to start looking at - talking to Priscilla and looking at whether that was going to be a component of what we needed to do.

[Doc. 263, p. 159 lines 3-12].

The composition of the appellate team, as previously noted, changed over time, however, the most problematic result for the appellate team was the loss of their two chosen investigators, which directly impacted the team's ability to perform the necessary mitigation investigation.

> This was in the fall and early winter of 2004, 2005. And then most problematic in terms of the composition of our team, well, most problematic up to that point, Andy, uh, Fraser and Roy Holiday could not assist us in the investigation anymore. Andy had been working on the investigation; Roy not so much. I believe Roy left the team because of the Grady case. I'm not positive. I'd have to check the dates on that, too, but it seems to me that the Floyd Grady case, which was also a capital trial-level **[*430]** case and ended up getting tried twice, I think Roy got attached to that because he's a very, a very good investigator. So Andy and Roy left the team, and we did not have an investigator.

[Doc.263, p. 167 lines 21-25; p. 168 lines 1-7]. The appellate team attorneys, as of February or March, 2005, were Ryan Roden, Marion Yoder, and Tina Olson. [Doc. 263, p. 168 lines 21-25]. Richard Webb was hired as an investigator sometime in February or March, 2005. [Doc. 263, p. 181 lines 2-13]. Ms. Olson described the adverse impact replacing Andy Fraser and Roy Holiday with Richard Webb had on the representation of Petitioner.

> [Andy Fraser] is a very good investigator. * * * Very quick, very much a people person, very likable, very smart. I had worked with him on one or two other matters, very impressed with him. * * * He's a very, very good person to have on

> your case. * * * Likewise, I would say nothing but good things about Roy [Holiday], very smart, . . . people person, likes being an investigator, and does a really good job at it. * * * Would have been a real asset to the team, either or both of them.

[Doc. 263, p. 179 lines 13-25; p. 180 lines 1-4]. Richard Webb, in contrast, was not what the **[*431]** appellate team needed to adequately prepare and ultimately present an effective mitigation case for Petitioner.

> (B)y that point in time we were well immersed in the fact that our, our biggest investigatory problems lay in the sentencing phase of the trial, and he was not, uh, as it turned out, the person I would have chosen for that job.

[Doc. 263, p. 181 lines 18-25; p. 182 lines 1-2]. Andy Fraser and Roy Holiday being replaced by Mr. Webb

was very problematic. And it's not just a matter of timing, although the timing was very bad because now all this time had elapsed. We'd had apparently three extensions of time at that point -- one, two, three -- and it was problematic from the standpoint we then had to find a different investigator. And then when we found the outside investigator as Ken instructed us we had to do, he did not . . . turn out to be an investigator who was as helpful as we would have liked for that part of the case.

[Doc. 264, p. 170 lines 12-23]. Mr. Neubauer is more blunt, describing Mr. Webb as "very demanding . . . very rude." [Doc. 262, p. 206 lines 18-25]. Mr. Neubauer describes Mr. Webb as having approached him like a

> bull in a china closet. He, you know, he was **[*432]** so rude to me. I had some kind of meeting, and he was telling me, well, that's just gonna have to get moved 'cause I'm gonna be here at this place and time. And so I called up Wyatt and said, Hey, who's this guy, Wyatt? And I told him, you know, He's gonna be here. You want to be here? And so Wyatt was there. * * * Um, the very first thing this guy, the very first thing out of his mouth is that we could've gotten Wyatt [sic] acquitted on the murder count. Do tell. And, boy, I mean, he was just rude and insulting every step of the way. He was a total bull in a china closet. * * * And I realize my responsibilities to this case to cooperate with the people involved, but I mean, this guy was over the top. I am a very tolerant person. I've had defendants accuse me of everything under the - I don't -- that stuff usually doesn't bother me. This guy was over the top, I mean, big time. I essentially kicked him out of my office, and I don't do that, you know.

[Doc. 262, p. 207 lines 7-25; p. 208 line 1].

The appellate team, as previously discussed, consulted Russell Stetler, who confirmed significant avenues of mitigation and mental health evidence remain unexplored in Petitioner's case. [Doc. **[*433]** 87-6, pp. 35-48; Doc. 87-7, pp. 1-18]. The appellate team also learned from Mr. Stetler the performance by Mr. Skaggs and the trial team was definitely deficient, however, the appellate team had done little or nothing to establish Petitioner was prejudiced thereby. Mr. Stetler testified "some of the stuff was just so basic. I mean, there were all these family members who had never been interviewed. There were lots of places to start." [Doc. 264, p. 154 lines 22-25; p. 155 line 1]. The team similarly learned from Mr. Burr

> without the information, without the social history, without knowing the levels of abuse and trauma and all those things that we reasonably, as it turns out, suspected would be there, we couldn't, we couldn't get an expert who would be able to thoroughly and completely assist us, that we needed those things so we'd know if he'd even been competent to stand trial, because I had serious concerns about the competence at the time of the trial.
> * * *
>
> That we need to get the new information so that it can be provided to the mental health experts so that Mr. Eaton can then be accurately, accurately and with a good history, evaluated by those people. Because, for example, you **[*434]** know, Dr. Ash and Dr. Gummow did not have everything. Um, I don't even know everything you have now, but what you have shown me that you have now, they didn't have those things.

[Doc. 264, p. 209 lines 2-25].

The appellate team specifically sought approval by Mr. Ken Koski to employ a mitigation specialist to perform the mitigation investigation which had never been done in preparation for Petitioner's trial. [Doc. 264, p. 204 line 25; p. 205 lines 1-4]. Ms. Olson understood the critical role and function of a mitigation specialist.

> (A) mitigation specialist should be . . . a person who's able to . . . compile a good social history, a good familial history . . . . Really it's everything. It's the medical history of the person, the educational history of the person, the family history of the person. And it has to be multigenerational, and it has to be in depth. And the person who has the skill set has to . . . be

> able to do those things, to do the records collection, to do the interviews, to recognize the signs and symptoms of mental illness both in the client, in the family, in the extended family, patterns of substance abuse, uh, all of those types of things.

[Doc. 264, p. 202 lines 15-25; **[*435]** p. 203 lines 1-6]. Mr. Koski denied the team's request.

> I mean, we got to the place where I just, you know, said to him very straight out we need a mitigation specialist to redo this mitigation, and Ken said no. And Ken said we have been spending money on this case, you've gotten this person and that person and the other person. And I had had people, you know, at that point, um, who were assisting us, some of whom were assisting us and we were having to pay them, and some of whom were assisting us out of the goodness of their hearts who we were not paying. Um, and in terms of experts. * * * I call it redo, but it was to do the mitigation. The mitigation was not done.

[Doc. 264, p. 198 lines 1-17]. The appellate team discussions with Mr. Koski included informing him, with respect to the ABA Guidelines, of the required composition of a capital defense team, and what a mitigation specialist should have by way of qualifications, experience, and abilities. It did no good. Mr. Koski was "familiar with Mary [Goody] and the kind of work she had done, and he knew how much it costs and what that person would do. So he had that knowledge, and that's what he was telling me I couldn't do from his **[*436]** perspective, I can't do that." [Doc. 264, p. 198 lines 18-25; p. 199 lines 1-8].

Those appellate team discussions with Mr. Koski also included discussing with him the deficient trial team mitigation investigation and representation at Petitioner's sentencing. Ms. Olson made an effort to explain by example the need for a mitigation investigation, an investigation which had not been done prior to trial.

> [I remember] providing him with some specific examples of things from the *Guidelines* and comparing it with what was done. Like . . . family members, for example. Um, the *Guidelines*, the commentary, various things that we read and talk about, lots of times family members don't immediately say, hey, I want to talk about my horrible family history. Because Ken was very much like, well, Wyatt wrote a letter to this sister, Wyatt tried to call this sister, Priscilla tried to call that sister. And I said no, you have to go to see these people, and you have to sometimes not even talk about the case with them at all at first, just say I'm so-and-so and I just want to know you or whatever. And I tried to explain specifically those kinds of things, and he said no, that, you know, having sent the **[*437]** letter, they tried to contact them, that was that, and so what would the point be of hiring somebody to compile this social history when we already knew the family wasn't gonna cooperate. * * * So and, again, I feel bad talking for Ken when Ken is not here to talk because he cared very much about our clients, but, uh -- so those kinds of things when I would provide that example that, you know, the mitigation specialist needs to be somebody who goes to -- and we knew about the significant amount of time in Meeker, and we knew from what we had that, you know, that Marian Eaton had had significant problems there, and so I said, you know, for example, this person would go there and this person -- but it was so long ago, he would say. And I would say it doesn't matter that it's so long ago, there are still going to be people that remember. And so those are some specific examples of how, um, I was trying to educate him.

[Doc. 264, p. 199 lines 15-25; p. 200 lines 1-22]. Those discussions by the appellate team with Mr. Koski concerning the critical need for a mitigation specialist included the most current United States Supreme Court cases with respect to the mitigation investigation which **[*438]** should be done by competent counsel, such as *Wiggins v. Smith*, and *Williams v. Taylor*. [Doc. 264, p. 202 lines 2-14]. Mr. Koski nevertheless seemed to be of the "opinion that having sent the letters to certain family members and so forth * * * was the adequate effort, and if the family member said I'm not talking to you, that's that." [Doc. 264, p. 203 lines 13-20]. Mr. Koski did not seem to understand what Ms. Olson or her team were discussing with him with respect to the need for a mitigation specialist. His reason given for denying the mitigation specialist request - "[t]he money." [Doc. 264, p. 203 lines 7-12].

Ms. Olson stated the appellate team did not "obtain the resources [the] team felt were necessary to represent Dale Eaton on his appeal and his associated *Calene* remand proceeding. * * * Ken Koski's refusal to consider and approve [the] team's request for a . . . mitigation specialist[] impact[ed the team's] representation of Dale Eaton." [Doc. 264, p.203 lines 21-25; p. 204 lines 1-4].

The Wyoming Supreme Court, in its *Calene* decision, suggested any successful ineffective assistance of counsel claim must be based on new facts and evidence not discovered by trial counsel. Mr. Burr, **[*439]** in his affidavit submitted to Petitioner's appellate team and filed with the *Calene* court, explained in detail the work required to enable appellate counsel to develop the facts supporting Petitioner's claim the representation at trial by Mr. Skaggs and the trial team was constitutionally deficient.

> For current counsel for Mr. Eaton to show prejudice, they must be have the time and resources necessary to:
> (a) conduct in-depth interviews with all of Mr. Eaton's siblings and children, his former wife, and his father concerning Mr. Eaton's expression of anger, abusive behavior, and redeeming qualities, in keeping with the goals discussed herein;
> (b) conduct in-depth interviews with Mr. Eaton's father concerning his abusive treatment of Mr. Eaton during childhood;
> (c) identify, locate, and interview in-depth as many former co-workers of Mr. Eaton as can now be found;
> (d) obtain all medical records pertaining to the pregnancy of Marion Eaton with Dale Eaton, and to the birth of Dale Eaton;
>
> (e) interview Merle Eaton and all of Marion Eaton's and Merle Eaton's siblings concerning Marion Eaton's health during her pregnancy with Dale Eaton, including any maternal ingestion of alcohol, drugs, and **[*440]** prescription medications, and exposure to environmental toxins and trauma, and concerning the conditions of Dale Eaton's birth;
> (f) work intensively with Mr. Eaton to help him disclose all that he can now remember about his actions, thoughts, and feelings during the entire course of the crime against Ms. Kimmell;
> (g) provide all new information that is discovered in connection with the foregoing tasks to mental health experts, ask those experts to interview Mr. Eaton extensively concerning the crime against Ms. Kimmell, ask those experts to redetermine the nature of Mr. Eaton's mental illness and brain dysfunction, and ask those experts to examine how Mr. Eaton's mental disorders, together with his experience of childhood abuse and trauma, impacted him during the entire course of the crime against Ms. Kimmell; and
> (h) in light of all the new information about and evaluation of Mr. Eaton, ask the mental health experts to examine to the extent possible retrospectively whether Mr. Eaton was competent to stand trial.

[Doc. 71-1, pp. 14, 15]. The required work described by Mr. Burr is well-supported by United States Supreme Court death penalty jurisprudence. *Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)*, *Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003)*; *Rompilla v. Beard, 545 U.S. 374, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2006)*; and the *ABA Guidelines on* ***[*441]*** *the Appointment and Performance of Defense Counsel in Death Penalty Cases*, *31 Hofstra L. Rev. 913 (Summer, 2003)*. Mr. Burr advised Petitioner's appellate team of their duty to investigate Petitioner's life history, prepare an accurate, and thorough psychosocial history, and then in turn present it to the mental health expert. [Doc. 265, p. 186 lines 23-25; p. 187 lines 1-2]. Mr. Burr alerted the appellate team to a number of

> red flags . . . for investigation . . . that showed that somebody who might have been thought to be an adverse witness or somebody that had nothing helpful . . . might, in fact, have information that was very helpful. So there were a number of red flags I pointed out. And then towards the end I think I did kind of a laundry list of tasks that they needed to accomplish. And really those tasks are for the second half of an ineffective assistance claim, which is the prejudice showing. You have to show what, had a reasonably effective investigation been done, what would have been produced * * * and whether that could have had a reasonable likelihood of affecting the outcome of the proceeding.
>
> And so all of that was more of a . . . suggestion for what they needed to do to develop evidence that might satisfy **[*442]** the prejudice prong of *Strickland versus Washington*.

[Doc. 265, p. 187 lines 7-25]. Mr. Burr advised the appellate team, in essence, to develop the psychosocial history and then present it to the experts.

> To go back -- I thought particularly to go back to these two experts, because their testimony seemed to me to be from experts who were trying, you know, who were -- I've read a lot of expert testimony over the years, and these experts seemed to care about Mr. Eaton. They seemed to, to be trying to use every shred of information they could discern to help understand him, and they fell short.
> In my view, they fell very short. You know, having a diagnosis of severe depression has very little weight with juries, almost none, and, and you knew based on the red flags that there was a lot more there than they knew about. And so I recommended that they, they do this and then go back to the experts.

[Doc. 265, p. 188 lines 5-16]. Mr. Burr does not believe the appellate team was able to conduct the investigation he recommended, basically because of a lack "of time and lack of resources." [Doc. 265, p. 188 lines 17-20]. It is also likely a reasonable investigation and effective performance by the **[*443]** appellate team would have produced the same workplace mitigation declarations presented to this Court.

> Oh, yeah. If any team of lawyers and mitigation specialists had had enough time and enough resources, they could have done exactly what you've done. I mean, that's -- you know, you've got to have a mitigation specialist and lawyers who

> know how important this is, you know, as the standards of care guide us to know they are, and the skills to do it, but after that it's a matter of time and, and resources.

[Doc. 266, p. 31 lines 24, 24; p. 32 lines 1-9]. Mr. Burr stated his opinion, based on the standards of performance which applied to the mitigation function of capital defense teams during 2003 and 2004, the performance by Petitioner's appellate team with respect to the investigation of Petitioner's background and character "was well below reasonable and was deficient under *Strickland*, for different reasons, but it was." [Doc. 266, p. 78 lines 24, 25; p. 79 lines 1-8]. Mr. Burr also offered his opinion, based upon his training, experience, and research in the field of capital litigation, there is a reasonable likelihood at least one juror would have voted for a life sentence based upon **[*444]** the information now available as a result of the mitigation investigation which had been done by Petitioner's capital habeas team. "Yes, there is at least a reasonable likelihood, in my opinion probably a greater likelihood of that." [Doc. 266, p. 78 lines 9-25].

Petitioner's appellate team was deprived of arguably the most critical tool for developing Petitioner's claim of ineffective assistance of counsel, *i.e.*, a mitigation specialist with the specialized skills necessary to handle a case like Petitioner's.

> I explained the deficiencies of the original investigation to Mr. Koski. He had approved various funding requests as I and others on the team consulted with capital case experts. Because the trial team's investigation into Mr. Eaton's life history was deficient (no inquiries into the circumstances of his birth, incomplete educational records, incomplete mental health records, failure to interview numerous people, etc.), we knew that our representation of him would require the assistance of a mitigation specialist. We knew that the mitigation phase of the investigation needed to be entirely redone, so that we could establish prejudice to Mr. Eaton at the remand hearing and on argument **[*445]** of the appeal. I told Mr. Koski that we would need a mitigation specialist because the trial team's investigation was completely inadequate. I had discussed the issue with a couple different people, and knew it would be expensive, but it needed to be done. Mr. Koski firmly refused to consider that, and advised that no such funds would be forthcoming. This was my first death penalty case, and the same was true of Mr. Roden. Although Ms. Yoder had worked on the *Harlow* case, and had received capital training, she had no real experience in capital defense. We were all learning, but knew that all the lawyers and mitigation specialists we had consulted advised us that such assistance was critical, and prior to Mr. Eaton's trial, the ABA Guidelines had been amended to explicitly provide that the defense team consist of no fewer than two attorneys, an investigator and a mitigation specialist. Nevertheless, Mr. Koski refused to provide funds to enable us to conduct a mitigation investigation in this case. As a result, our ability to conduct such an investigation, and to meet the deadlines imposed by the district court upon remand and the Wyoming Supreme Court, was significantly impaired by **[*446]** Mr. Koski's decision.

[Doc. 66-7, pp. 6, 7 ¶ 23].

The Wyoming Supreme Court, in its April 5, 2005, order remanding Petitioner's appeal to the trial court for a *Calene* hearing to allow appellate counsel to develop and prove Petitioner's claim of ineffective assistance of trial counsel, required the *Calene* hearing be completed, and findings of fact and conclusions of law be issued within ninety (90) days. [Doc. 264, p. 210 lines 19-25; p. 211 lines 1-11]. The trial court, following entry of the remand order, held a scheduling conference on April 12, 2005, during which the court allowed the appellate team ten days within which to designate, with reports, their expert witnesses who would testify at the *Calene* hearing. The court also set an evidentiary hearing date which allowed the appellate team was less than two months to prepare. [Doc. 264, p. 218 lines 15-25; p. 219 lines 1-21].

Appellate counsel advised the trial court and the Wyoming Supreme Court on multiple occasions additional time was necessary to investigate Petitioner's claims for relief. Appellate counsel objected to the "speedy schedule," and moved for a continuance in order to investigate Mr. Eaton's claims for relief. Appellate **[*447]** counsel advised the trial court their investigation was "incomplete" because of the Wyoming Supreme Court deadline, and Petitioner's due process rights were violated by "being forced to maintain that schedule." [Doc. 86-2, pp. 21, 22]. Appellate counsel further stated Petitioner was occasionally unable to assist them in their investigation. [Doc. 86-2, p. 23]. The trial court denied the motion to continue the *Calene* hearing, and thereafter denied Petitioner's claims of ineffective assistance of counsel.

Ms. Olson concedes Petitioner's appellate team was not adequately prepared to present their claims of ineffective assistance of counsel at the *Calene* remand hearing. [Doc. 264, p. 229 lines 23-25; p. 230 lines 1-25; p. 231 lines 1-4]. The appellate team was basically not able to adequately fulfill the recommendations received from both Mr. Stetler and Mr. Burr:

> We attempted to ourselves, but we did not have the time . . . to do it . . . . And, again, you're supposed to be trained to do it. You're supposed to travel to do it. You're supposed to do it in person. So we tried to initiate some contacts. We tried to locate some people, uh, which was very frustrating that Wyatt hadn't done it. **[*448]** I remember contacting one of the schoolteachers that Dale named for me, and I got his wife, and he had died a couple weeks before, seriously, a couple weeks before. I forget whether it was before my hearing or before I called him or whatever it was, but he was alive during the time frame. * * * So we attempted to do some of those things, but we did not have the qualifications at that time or the time, you know.

[Doc. 264, p. 232 lines 8-25].

Claim Four - Conclusion

A *§ 2254* petitioner, as previously noted, in order to establish an ineffective assistance of counsel claim, "must show both deficient performance by counsel and prejudice." *Knowles v. Mirzayance, 556 U.S. at 122, 129 S.Ct. at 1419*.

An inquiry into an allegation of deficient performance by appellate counsel and resulting prejudice is guided, the same as it is with such an assertion with regard to trial counsel, by the ABA Guidelines for the Appointment and Performance of Counsel in Capital Penalty Cases, which outline the "prevailing professional norms" by which the performance by death penalty counsel is to be measured. *Padilla v. Kentucky, 559 U.S. at 366, 367*; *Heard v. Addison, 728 F. 3d at 1180*; *Wiggins v. Smith, 539 U.S. at 524*; *Littlejohn v. Trammell, 704 F.3d at 859, 860*; *Bobby v. Van Hook, 558 U.S. at 6*; ABA Guidelines 1.1, pp. 1, 10, 11.

Petitioner's appellate team, as is clearly apparent from the foregoing discussion in which members of his team basically admitted **[*449]** as much, failed to perform to the "prevailing professional norms," primarily for one of the same reasons Petitioner's trial counsel was deficient, *i.e.*, the failure to perform and present to the court a through and detailed mitigation investigation. [ABA Guideline 10.7]. The fact the failure by the appellate team to conduct the required investigation was obviously impeded by the culture of the Wyoming Public Defender Office with regard to ineffective assistance claims, as well as the concrete fact Mr. Koski, as the head of the Wyoming Public Defender Office, refused to allow the appellate team to hire a mitigation specialist, cannot excuse the fact the performance by the appellate team was constitutionally deficient. The appellate team, as evidenced by the testimony of Ms. Olson and Ms. Domonkos, was well aware of what was required to provide effective representation of Petitioner at the *Calene* hearing and on appeal. The fact said team, despite its clearly diligent effort, could not provide the required constitutional appellate representation of Petitioner also prejudices him for the same reasons he was prejudiced by the failure of the trial team to conduct the required in-depth mitigation **[*450]** investigation. A full and complete psychosocial history for Petitioner was not presented to either the *Calene* court, nor to the Wyoming Supreme Court.

CONCLUSION

Respondent has not challenged the ability of this Court to consider Petitioner's allegations of ineffective assistance of counsel based on the fact such claims were considered and rejected in the state court proceedings, particularly Petitioner's appeal to the Wyoming Supreme Court. Petitioner's allegations of a conflict of interest provide an opportunity for the Court, perhaps out of an abundance of caution, to address the propriety of its consideration of Petitioner's ineffective assistance claims.

The law of the Tenth Circuit, based upon the United State Supreme Court decision in *Kimmelman v. Morrison, 477 U.S. 365, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986)*, indicates a state procedure requiring ineffective assistance of counsel claims to be raised on direct appeal will not bar *de novo* federal review of a claim of ineffective assistance of trial counsel unless it satisfies two conditions. The state procedure must "(1) allow[ ] petitioner an opportunity to consult with **separate counsel on appeal** in order to obtain an objective assessment of trial counsel's performance and (2) provid[e] a procedural mechanism **[*451]** [on direct appeal] whereby petitioner can **adequately develop the factual basis of his claims** of ineffectiveness." *English v. Cody, 146 F.3d 1257, 1263 (10th Cir. 1998)*(Emphasis added).

The Tenth Circuit Court of Appeals has also provided guidance as to what would constitute "separate counsel on appeal."

> In our view, whether trial and appellate attorneys from the same "office" should be deemed "separate" counsel will turn on the specific circumstances. A statewide public defender's office with independent local offices, and perhaps even a distinct appellate office, would not raise the same concerns as when trial and appellate counsel work in adjacent rooms. *Cf.* *Restatement § 123 & cmt. e* (for conflict-of-interest purposes, lawyers who share office space may be considered conflicted). The culture of an office can also make a substantial difference.

Cannon v. Mullin, 383 F.3d 1152, 1173, 1174 (10th Cir. 2004).

The previous discussion of the financial and logistical difficulties faced by Petitioner's appellate team in asserting an ineffective assistance claim on direct appeal to the Wyoming Supreme Court, including the fact trial counsel and appellate counsel shared the same office space, clearly reveal a "culture" in the Wyoming Public Defender Office during the time frame of Petitioner's appeal which, at best, discouraged, **[*452]** and, at worst, substantially impeded, the ability of his appellate counsel to make an "objective assessment of trial counsel's performance."

The second requirement set out by the Tenth Circuit in *English v. Cody* was also not fulfilled. The *Calene* remand procedure established by the Wyoming Supreme Court, which allowed appellate counsel, in actual effect, less than ninety (90) days in which to "adequately develop the factual basis of his claims of ineffectiveness" was, as well, in light of the expert testimony of Mr. Stetler and Mr. Burr, obviously an unrealistic time frame.[38]

The requirements set out by the Tenth Circuit in *English v. Cody* were, as pertains to Petitioner's ineffective assistance claims, not fulfilled, thus this Court has the ability to consider such claims *de novo*.

The representation **[*453]** of Petitioner by Mr. Skaggs and the trial team, as outlined in detail by the evidence presented to this Court, failed to fulfill the then applicable "prevailing professional norms," as outlined by United States Supreme Court precedent and the applicable ABA Guidelines for the Appointment and Performance of Counsel in Capital Penalty Cases, and was thus constitutionally deficient to the prejudice of Petitioner. The same conclusion is mandated by the evidence presented to this Court with regard to the representation of Petitioner by his appellate team from the Wyoming Public Defender Office. The writ of *habeas corpus* sought by Petitioner pursuant to *28 U.S.C. § 2254* will be conditionally granted.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED the Petition for Writ of Habeas Corpus pursuant to *28 U.S.C. § 2254* by Dale W. Eaton, Petitioner, is **GRANTED**, and the sentence of death of the Petitioner, Dale W. Eaton is **VACATED**, provided, however, the State of Wyoming may within one-hundred twenty (120) days from the date hereof grant Petitioner a new sentencing proceeding in the Seventh Judicial District Court, Natrona County, Wyoming.

IT IS FURTHER HEREBY ORDERED the Seventh Judicial District Court, Natrona County, Wyoming, shall **[*454]** promptly appointed experienced death penalty counsel not associated with the Office of the Wyoming Public Defender to represent Petitioner in any further proceedings before the Seventh Judicial District Court.

IT IS FURTHER HEREBY ORDERED in the event the State of Wyoming concludes not to grant Petitioner a new sentencing proceeding, he shall remain incarcerated by the State of Wyoming under a sentence of life without parole pursuant to *Wyo. Stat. § 6-2-101(b)*, and *Wyo. Stat. § 6-10-301*.

IT IS FINALLY HEREBY ORDERED Respondent shall have a continuing duty to notify this Court concerning proceedings in the Seventh Judicial District Court with respect to Petitioner.

Dated this 20th day of November, 2014.

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[38] The Wyoming Supreme Court codified the *Calene* remand procedure in Rule 21, Wyoming Rules of Appellate Procedure, effective September 1, 2007. Rule 21 establishes ninety (90) days from entry by the Wyoming Supreme Court of an order of remand as the time frame for completion of any hearing and the filing of findings of fact and conclusions of law "absent a finding by the trial court of good cause for a delay of reasonable length."

/s/ ALAN B. JOHNSON

ALAN B. JOHNSON

UNITED STATES DISTRICT JUDGE

JUDGMENT

This matter came before the Court upon a "Petition for a Writ of Habeas Corpus Pursuant to *28 U.S.C. § 2254*" filed, through counsel, by Dale W. Eaton, Petitioner. [Doc. 64]. The Court, having reviewed the Petition and subsequent pleadings, as well as the file herein, and being otherwise fully advised, has entered an Order Granting Conditional Writ of Habeas Corpus.

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED the Petition Under *28 U.S.C. § 2254* for Writ of Habeas Corpus shall be, and the same **[*455]** is **GRANTED** subject to the conditions set forth in the Order Granting Conditional Writ of Habeas Corpus.

Dated this 20th day of November, 2014.

/s/ Alan B. Johnson

ALAN B. JOHNSON

UNITED STATES DISTRICT JUDGE

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2008 WY 97, *; 192 P.3d 36, **;
2008 Wyo. LEXIS 103, ***

DALE WAYNE EATON, Appellant (Defendant), v. THE STATE OF WYOMING, Appellee (Plaintiff).

Nos. 04-180 & 06-255

SUPREME COURT OF WYOMING

2008 WY 97*; *192 P.3d 36*; *2008 Wyo. LEXIS 103

August 18, 2008, Decided

SUBSEQUENT HISTORY: Rehearing denied by *Eaton v. State, 2008 Wyo. LEXIS 114 (Wyo., Sept. 15, 2008)*
Petition granted by, Stay granted by *Eaton v. State, 2008 WY 133, 196 P.3d 773, 2008 Wyo. LEXIS 140 (Wyo., 2008)*
US Supreme Court certiorari denied by *Eaton v. Wyoming, 129 S. Ct. 1346, 173 L. Ed. 2d 613, 2009 U.S. LEXIS 1251 (U.S., 2009)*
Stay granted by *Eaton v. State, 2009 WY 36, 202 P.3d 1076, 2009 Wyo. LEXIS 36 (Wyo., 2009)*
Stay lifted by *Eaton v. State, 2009 WY 145, 2009 Wyo. LEXIS 157 (Wyo., 2009)*
Post-conviction relief denied at, Remanded by *Eaton v. State, 2009 WY 144, 2009 Wyo. LEXIS 158 (Wyo., 2009)*

PRIOR HISTORY: [*1]**

Appeal from the District Court of Natrona County. The Honorable David B. Park, Judge.

COUNSEL: Representing Appellant: Kenneth M. Koski, Public Defender; Tina N. Kerin, Senior Assistant Appellate Counsel; Marion Yoder, Senior Assistant Public Defender; Ryan R. Roden, Senior Assistant Appellate Counsel; and Donna D. Domonkos, Appellate Counsel. Argument by Tina N. Kerin.

Representing Appellee: Patrick J. Crank, Wyoming Attorney General; Paul S. Rehurek, Deputy Attorney General; D. Michael Pauling; David L. Delicath; and Melissa M. Swearingen, Senior Assistant Attorneys General. Argument by David L. Delicath.

JUDGES: Before VOIGT, C.J., and GOLDEN, HILL, KITE, and BURKE, JJ.

OPINION BY: HILL

OPINION

[47]** [EDITOR'S NOTE: TEXT WITHIN THESE SYMBOLS [O> <O] IS OVERSTRUCK IN THE SOURCE.]

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HILL, **[**48]** **[***2]** Justice.

INTRODUCTION

[*P1] Appellant, Dale Wayne Eaton (Eaton), seeks review of his conviction for the crime of first degree murder, as well as for other crimes, [1] and the sentence of death which was imposed on June 3, 2004. We will affirm the Judgment as to all convictions. We will affirm both the convictions and the death sentence.

1 Eaton was convicted of one count of first degree premeditated murder, three counts of felony murder, aggravated kidnapping, aggravated robbery, and first degree sexual assault.

ISSUES

[*P2] Eaton raises these issues:

I. The trial court committed reversible error and violated the *Ex Post Facto* Clause by applying post-1989 amendments to *Wyo. Stat. Ann. § 6-2-102* (1982) to Eaton's case.

[49]** II. Eaton received ineffective assistance of counsel.

A. Eaton's counsel were ineffective for stipulating to the use of the entire 2001 amended version of *Wyo. Stat. Ann. § 6-2-102* (1982), excluding "future dangerousness." Amended portions were more disadvantageous to Eaton and violated the *Ex Post Facto* Clause of the United States and *Wyoming* constitutions.

B. Defense counsel were ineffective by failing to comply in substantive ways with the ABA guidelines which establish specific standards **[***3]** for both experience and performance in trying death penalty cases.

C. Failure to know the law.

D. Concession of Eaton's guilt without valid consent from him.

E. Eaton was unable to assist in his defense and thus not competent to be tried. Counsel's failure to address this fundamental problem and election to allow the case to proceed under these circumstances rendered trial patently unfair.

F. Trial counsel were ineffective for waiving objection to venue.

G. The oversights, errors and decisions to forego (i.e., the sorts of things set out above) amounted to an abandonment of Eaton's defense by his own counsel.

H. Defense counsel were ineffective in failing to adequately investigate potential mitigation evidence, failing to offer appropriate mitigation evidence, and failing to provide necessary information to mitigation experts.

I. Counsel's failure to object to the given instructions which were substantively different than those proposed by the defense constituted substandard performance and substantially prejudiced Eaton.

J. Counsel did not assure that Eaton's jury was given a constitutionally adequate sentencing form.

III. The jury was not properly instructed on the law as intended by Wyoming's **[***4]** death penalty statute.

[50]** IV. An unconstitutional and fatally defective voir dire deprived Eaton of a fair and impartial jury to determine his guilt or innocence and to decide on life or death.

V. The trial court was biased at trial and in limiting the remand, showing such hostility to his claims that Eaton was deprived of due process and prejudiced as a result.

VI. Prosecutorial misconduct occurred, violating Eaton's due process rights and warranting reversal.

VII. Eaton was unable to assist in his own defense and thus was not competent to be tried.

VIII. The trial court erred in denying defense counsel's motion for mistrial, where a juror conducted his own investigation and discussed his investigation during deliberations.

[51]** IX. The trial court erred in the admission and presentation of evidence.

X. The trial court erred in permitting the testimony of Dr. Ash without Eaton's express waiver of privilege, and without insuring the protection of Eaton's *Fifth Amendment* right against self-incrimination.

XI. Is the record below reversibly incomplete?

XII. Cumulative error occurred, warranting reversal of Eaton's convictions and death sentence.

The State phrases its issues as follows:

I. The trial court **[***5]** did not abuse its discretion when it applied the 2001 version of *Wyo. Stat. Ann. § 6-2-102* rather than the 1983 version.

II. [Eaton] received effective assistance of counsel from his defense attorneys.

A. [Eaton's] trial counsel were not ineffective for stipulating to the 2001 version of *Wyo. Stat. Ann. § 6-2-102*.

B. Trial counsel provided effective assistance in substantial compliance with the ABA Guidelines.

C. Trial counsel provided effective assistance through their demonstrated knowledge, citation and application of the law relevant to the case.

D. Trial counsel provided effective assistance by employing a defense strategy that allowed counsel, with [Eaton's] express consent, to present a single, cohesive defense theory both at the guilt phase and the punishment phase.

E. Trial counsel provided effective assistance by having [Eaton] evaluated for competency prior to and during trial; the parameters for evaluating competency are much more specific than a client's unwillingness to assist or cooperate with his own defense.

F. Trial counsel [were] not ineffective for waiving [their] objection to venue.

G. Trial counsel provided effective assistance through tactical and strategic decisions **[***6]** which were reasonably calculated to assist in [Eaton's] defense.

H. Trial counsel provided effective assistance in the investigation and presentation of mitigating evidence.

I. Trial counsel provided effective assistance in proposing, evaluating and stipulating to jury instructions.

J. Counsel were not ineffective in approving the sentencing phase verdict form.

III. [Eaton] has failed to establish that any portion of the jury instructions constituted plain error.

IV. Trial counsel's voir dire ensured that none of the seated jurors held views that would prevent or substantially impair the performance of their duties as jurors.

V. The trial judge was not biased against [Eaton], nor did [it] abuse its discretion in voir dire, jury selection, or evidentiary rulings.

VI. No reversible prosecutorial misconduct. occurred in this case.

VII. [Eaton] was capable of assisting in his own defense and competent to stand trial.

VIII. The trial court did not abuse its discretion when it denied [Eaton's] motion for a mistrial after finding that [Eaton] was not prejudiced by a juror's admittedly improper conduct.

IX. The trial court did not abuse its discretion when it allowed testimony from Joe Dax, Dr. Thorpen, **[***7]** Mary Follette, Shannon Breeden, and Richard Haskell, and allowed the admission of State's Exhibit 1000 during the sentencing phase.

X. The trial court did not err by allowing [Eaton's] trial counsel to question his own expert witness about information provided to the witness by [Eaton].

XI. The record on appeal contains a complete and accurate record of all trial proceedings as required by law.

XII. Cumulative error does not exist in this case.

FACTS AND PROCEEDINGS

[*P3] At about noon on April 2, 1988, a fisherman found the murdered corpse of eighteen-year-old Lisa Marie Kimmell in the North Platte River southwest of Casper, near what is called Government Bridge. The victim had last been seen alive at 9:08 p.m., on March 25, 1988, in Douglas when she was stopped for a traffic violation. The clime was not solved until 2002, when a DNA match linked Eaton, who was incarcerated in Colorado on a felony conviction, [2] to her murder. On April 17, 2003, an information was filed charging Eaton with the crimes enumerated above, and on June 3, 2003, the State gave notice that it would seek the death penalty.

2 Wyoming and many other states now require DNA testing of all convicted felons, and it was this **[***8]** process that led to Eaton's arrest and conviction. *Wyo. Stat. Ann. § 7-19-401, et seq.* (LexisNexis 2007)(enacted in 1997).

[*P4] Ms. Kimmell was last seen alive at approximately 9:08 p.m., on March 25, 1988, just east of Douglas, Wyoming, when she was issued a speeding ticket by a Wyoming State Trooper. That event occurred when she was en route from Denver, Colorado, to Billings, Montana, with a planned intermediate stop in Cody. When she did not arrive in Cody or Billings as scheduled, her mother reported her missing and a search for her began on March 26, 1988.

[*P5] An autopsy was performed shortly after her body was found. It revealed that Ms. Kimmell had been dead for 36 hours or more, although it was conceded that death may have occurred as much as three to seven days earlier. Because Kimmell's body was in the cold water of the North Platte River, the time of death was difficult to estimate accurately. Ms. Kimmell died of sanguination (internal bleeding) and exsanguination (external bleeding), secondary to multiple stab wounds to her chest and abdomen. In addition, a lethal blow was delivered to Kimmell's head shortly before she was stabbed. That blow would have proved fatal had she not **[***9]** first bled to death.

[*P6] Semen was found in her vagina and on the panties she was wearing, which was the only clothing she had on when her body was found. Samples were taken and preserved. DNA extracted from the semen found on her panties eventually led the authorities to Eaton. Eaton had once lived near Moneta, Wyoming, and a search of that property uncovered various parts from Ms. Kimmell's automobile, as well as the remainder of the automobile itself, buried in the ground.

[*P7] At trial, two theories emerged as to how Eaton and his victim came to be together. One, reported by a fellow inmate of Eaton's at the Natrona County Jail, was that Ms. Kimmell gave Eaton a ride to help him out. Eaton

made sexual advances toward her and Kimmell slammed on the brakes and was going to make him get out of the car "in the middle of nowhere." Things spun out of control and Eaton ended up subduing her, raping her, killing her, etc. This theory was presented to the jury during the guilt/innocence phase of the trial.

[*P8] The second theory was presented by Eaton during the sentencing phase. It came into evidence through a physician who had examined Eaton for the purpose of preparing a mental evaluation. Eaton reported, **[***10]** that he returned to his home late on March 25, 1988 and observed Ms. Kimmell's car parked on his land. He thought there were two people there and that he was being robbed. Eaton was in an angry state of mind to begin with, and upon finding her there, he got even more angry. He approached her with a gun and **[**52]** took her to his makeshift home. The further details of this version suggested that circumstances then spun out of control, and Eaton ended up raping and killing her after keeping her on his property for several days so that he would not be alone at Easter.

[*P9] The guilt/innocence phase of this case was tried to a jury on February 23, 2004 through March 15, 2004. The penalty phase lasted from March 18, 2004 until March. 20, 2004. A sentencing hearing was held on May 20, 2004, and a warrant of execution was entered of record on that date. The judgment and sentence were entered of record on June 3, 2004. The death sentence has been stayed since June 22, 2004.

[*P10] This Court ordered a partial remand to the district court on April 5, 2005. The purpose of that hearing was to conduct an inquiry into whether or not Eaton's defense counsel rendered ineffective assistance of counsel during his trial. **[***11]** That hearing was held June 6-10, 2005. After briefing, the case was argued to this Court and taken under advisement on September 14, 2006.

DISCUSSION

Introduction

[*P11] This brief introduction will serve to explain how and why we divided our opinion into three parts. Our first task was to put the issues raised in this appeal into a logical order. This was necessary because some of the issues pose threshold questions which would necessarily obviate the need for exhaustive and/or dispositive consideration of some of the other issues that follow, if those threshold issues were resolved in Eaton's favor. Part I will deal with those asserted errors that occurred in the guilt/innocence phase of the trial that would require reversal of Eaton's conviction(s). Part II will deal with whether or not there were errors in the sentencing phase of trial that would require reversal of the sentence of death. Part III of the opinion deals with the issues raised in Eaton's appeal of the district court's denial of his motion for a new trial.

[*P12] We also take note here that in all of our modern cases dealing with the death penalty, we have acknowledged the now venerated proposition that "death is different," and we **[***12]** give due deference to that concept in our opinion. See *Hopkinson v. State, 632 P.2d 79, 190 (Wyo. 1981)*; *Hopkinson v. State, 798 P.2d 1186, 1189 (Wyo. 1990)*; *Olsen v. State, 2003 WY 46, P 3, 67 P.3d 536, 547 (Wyo. 2003)*; *Harlow v. State, 2003 WY 47, P 6, 70 P.3d 179, 184 (Wyo. 2003)*.

PART I. Guilt/Innocence Phase

A. Was Eaton Incompetent During Trial and the Proceedings in this Court

(i) Competency as a medical/mental issue.

[*P13] The discussion of this issue ranges far and wide in the briefs, but at this juncture we intend only to address the initial premise, i.e., that Eaton was not competent to stand trial. Our discussion of this issue pertains to both the guilt/innocence phase and the sentencing phase of the trial. Other aspects of this subject will be discussed in the other matters that involve the status of Eaton's mental heath, such as mitigation of penalty. Although the facts relating to Eaton's mental state must be reviewed in light of the applicable law, not unlike the question of whether or not a search is unreasonable, whether or not a set of facts demonstrate that a defendant is or is not competent to stand trial is a question of law that we review *de novo. deShazer v. State, 2003 WY 98, PP 12-13, 74 P.3d 1240, 1244-45 (Wyo. 2003)*.

[*P14] **[***13]** The test of trial competence is whether or not a defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and whether or not he has a rational as well as a factual understanding of the proceedings against him. *Wyo. Stat. Ann. § 7-11-302* (LexisNexis 2007) provides:

> (a) No person shall be tried, sentenced or punished for the commission of an offense while, as a result of mental illness or deficiency, he lacks the capacity, to:
>
> (i) Comprehend his position;
>
> (ii) Understand the nature and object of the proceedings against him;
>
> (iii) Conduct, his defense in a rational manner; and

> **[**53]** (iv) Cooperate with his counsel to the end that any available defense may be interposed.

[*P15] This statutory directive captures a constitutional imperative established by the United States Supreme Court and adopted, as well, by this Court. *Hayes v. State, 599 P.2d 558, 563 (Wyo. 1979)*. Eaton contends that he has been incompetent throughout the proceedings to date, including this appeal. Indeed, we considered this issue as raised in a motion by Eaton pending argument of this appeal. By order entered on July 11, 2006, we denied Eaton's motion that this appeal be **[***14]** stayed because he was not competent to assist in the appeal. However, our more immediate concern is whether or not Eaton was competent during the time he actually stood trial. If he was not, then we would be compelled to reverse and remand and direct that proceedings could only commence anew once Eaton was declared competent.

[*P16] *Wyo. Stat. Ann. § 7-11-303* (LexisNexis 2007) provides:

> (a) If it appears at any stage of a criminal proceeding, by motion or upon the court's own motion, that there is reasonable cause to believe that the accused has a mental illness or deficiency making him unfit to proceed, all further, proceedings shall be suspended.
>
> (b) The court shall order an examination of the accused by a designated examiner. The order may include, but is not limited to, an examination of the accused at the Wyoming state hospital on an inpatient or outpatient basis, at a local mental health center on an inpatient or outpatient basis, or at his place of detention. In selecting the examination site, the court may consider proximity to the court, availability of an examiner, and the necessity for security precautions. If the order provides for commitment of the accused to a designated facility, **[***15]** the commitment shall continue no longer than a thirty (30) day period for the study of the mental condition of the accused.
>
> (c). Written reports of the pretrial examination shall be filed with the clerk of court. The report shall include:
>
> (i) Detailed findings;
>
> (ii) An opinion as to whether the accused has a mental illness or deficiency, and its probable duration;
>
> (iii) An opinion as to whether the accused, as a result of mental illness or deficiency, lacks capacity to comprehend his position, to understand the nature and object of the proceedings against him, to conduct his defense in a rational manner, and to cooperate with his counsel to the end that any available defense may be interposed;
>
> (iv) An opinion as to whether at the time of the alleged criminal conduct the accused, as a result of mental illness or deficiency, lacked substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law;
>
> (v) A recommendation as to whether the accused should be held in a designated facility for treatment pending determination by the court of the issue of mental fitness to proceed; and
>
> (vi) A recommendation as to whether the accused, if found by **[***16]** the court to be mentally fit to proceed, should be detained in a designated facility pending further proceedings.
>
> (d) The clerk of court shall deliver copies of the report to the district attorney

and to the accused or his counsel. The report is not a public record or open to the public. After receiving a copy of the report, both the accused and the state may, upon written request and for good cause shown, obtain an order granting them an examination of the accused by a designated examiner of their own choosing. For each examination ordered, a report conforming to the requirements of subsection (c) of this section shall be furnished to the court and the opposing party.

(e) If the initial report contains the recommendation that the accused should be held in a designated facility pending determination of the issue of mental fitness to proceed, the court may order that the accused be committed to or held in a designated facility pending determination of mental fitness to proceed.

[54]** (f) If neither the state, nor the accused or his counsel contests the opinion referred to in paragraph (c)(iii) of this section relative to fitness to proceed, the court may make a determination and finding of record **[***17]** on this issue on the basis of the report filed or the court may hold a hearing on its own motion. If the opinion relative to fitness to proceed is contested the court shall hold a hearing on the issue. The report or reports may be received in evidence at any hearing on the issue. The party contesting any opinion relative to fitness to proceed has the right to summon and cross-examine the persons who rendered the opinion and to offer evidence upon the issue.

(g) If the court determines that the accused is mentally fit to proceed, the court may order that the accused be held in confinement, be committed to a designated facility pending further proceedings, or be released on bail or other conditions. If the court determines that the accused lacks mental fitness to proceed, the proceedings against him shall be suspended and the court shall commit him to a designated facility for such period as the court may order but not to exceed the time reasonably necessary to determine whether there is substantial probability that the accused will regain his fitness to proceed:

(i) If it is determined that there is no substantial probability that the accused will regain his fitness to proceed, the accused **[***18]** shall not be retained in a designated facility unless proper civil commitment proceedings have been instituted and held as provided in title 25 of the Wyoming statutes. The continued retention, hospitalization and discharge of the accused shall be the same as for other patients. However, if the accused is discharged, the criminal proceedings shall be resumed, unless the court determines that so much time has elapsed since the commitment of the accused that it would not be appropriate to resume the criminal proceeding;

(ii) If it is determined that there is substantial probability that the accused will regain his fitness to proceed, the commitment of the accused at a designated facility shall continue until the head of the facility reports to the court that in his opinion the accused is fit to proceed as provided in paragraph (iii) of subsection (c) of this section. If this opinion is not contested by the state, the accused or his counsel the criminal proceeding shall be resumed. If the opinion is contested, the court shall hold a hearing as provided in subsection (f) of this section. While the accused remains at a designated facility under this subsection, the head of the facility shall **[***19]** report at least once every three (3) months on the progress the accused is

> making towards regaining his fitness to proceed.

> (h) A finding by the court that the accused is mentally fit to proceed shall not prejudice the accused in a defense to the crime charged on the ground that at the time of the act he was afflicted with a mental illness or deficiency excluding responsibility. Nor shall the finding be introduced in evidence on that issue or otherwise brought to the notice of the jury. No statement made by the accused in the course of any examination or treatment pursuant to this section and no information received by any person in the course of the examination or treatment shall be admitted in evidence in any criminal proceeding then or thereafter pending on any issue other than that of the mental condition of the accused.
>
> (j) Notwithstanding any provision of this section, counsel for the accused may make any and all legal objections which are susceptible of a fair determination prior to trial without the personal participation of the accused.

W.R.Cr.P. 12 (c) embraces this statute: "If it appears at any stage of a criminal proceeding by motion or upon the court's own motion, that there **[***20]** is reasonable cause to believe that the defendant has a mental illness or deficiency making the defendant unfit to proceed, all further proceedings shall be suspended and an examination ordered as required by *W.S. 7-11-301 et. seq.*"

[55]** **[*P17]** At his arraignment on June 6, 2003, Eaton was asked if he suffered from any "mental disability or learning disorder." His attorney answered on his behalf, stating:

> I'll respond to that particular question, Your Honor. We -- as of this particular point we do believe that he understands sufficiently enough to be arraigned. We are having him examined by mental health professionals. We've not got the results of those examinations yet. And so we're not able to totally answer that particular question. But we do desire to go forward with the arraignment at least today, reserving the right, of course, to change the plea later on.

In all other respects, the record on appeal most strongly suggests that Eaton understood the arraignment proceedings and responded appropriately to all of the questions asked of him.

[*P18] At a motions conference on October 2, 2003, this exchange occurred:

> THE COURT: All right. Mr. Skaggs, one last point. There was a discussion that Mr. Eaton, **[***21]** for lack of a better word, was being interviewed for possible consideration of a not guilty by reason of mental illness or deficiency. Is there any -- are you still evaluating that prospect?
>
> [DEFENSE COUNSEL]: Well, Your Honor, the question that you asked is improper. We didn't -- we didn't necessarily have him interviewed for purposes of not guilty by reason of mental deficiency or illness. We did have him interviewed for a number of different reasons, competency being number one, of course; and second thing, to develop possible mitigating circumstances in the penalty phase. At this particular point, we have no -- we have no inclination to enter a plea of not guilty by reason of mental illness or deficiency; and at this particular point, we have no interest in continuing the case by doing that sort of thing.

[*P19] At trial, Eaton did not contend that he was incompetent to stand trial nor did he enter a plea asserting a defense of "mental illness or deficiency at the time of the alleged offense." W.R.Cr.P. 12.2(a); and see *Wyo. Stat. Ann. §§ 7-11-304* and *7-11-305* (LexisNexis 2007). It was defense counsel's view that the mental health professional who examined Eaton determined that he was **[***22]** competent and did not suffer from a mental illness' or deficiency at the time of the offense. Moreover, as a part of the defense strategy, defense counsel did not want Eaton sent to a state-appointed examiner because he felt certain that would produce expert testimony that was contrary to Eaton's, defense posture in this case. However, both the statute and the rule mandate that the district court be attentive to this matter, even if counsel are not. In this case, the district court was first to broach this matter:

> THE COURT: All right. I have one other comment, then, one other concern that's come up that I was not aware of. And I don't think it has been raised before in that

it's troubling, and it arises because of the case out of Gillette where the Supreme Court ruled that the judge should have ordered an evaluation of the ... client.

[PROSECUTOR]: I recall the case, Your Honor.

THE COURT: Now, there's testimony that Mr. Eaton has troubles with his memory. So I guess I want the counsel -- both of you just to inquire of him to his memory problems. He's indicated he has some memory concerns.

[Defense Counsel]: He indicated that he remembered this incident quite well.

THE COURT: Okay. You know, **[***23]** I -- I'm concerned that that's going to come back to haunt us at some later date. So I guess -- I'm not asking for submittals at this time, but I want the parties to be prepared to address that, whether the Court now has an obligation to order an evaluation of Mr. Eaton, given those difficulties that have surfaced.

[PROSECUTOR]: Your Honor, I don't believe they do. Even if he had a complete lack of memory, that would not be a lack of competency under the case law.

THE COURT: Might be inability to assist his defense.

[**[**56]** PROSECUTOR]: The courts have ruled on this specifically, Your Honor. In fact, Mr. Short had a client on vehicular homicide some years ago that complained -- and probably appropriately so -- that because of the accident, he couldn't remember anything that had happened. And Mr. Short raised exactly that issue. And it was litigated -- our research at that time indicated that that does not qualify as the competency that the courts refer to. So I think even a claim of complete lack of memory would not make him incompetent, much less a claim of some memory difficulty. And that's my review of that case law. And I have had occasion to look at that.

....

[DEFENSE COUNSEL]: Absolutely. **[***24]** I totally agree. I totally oppose any attempt to have his competency looked at, because I can assure the Court I've done that.

THE COURT: Yeah. And I do not mean to suggest that. But that case is troublesome, because they place the onus on the Court, even though [defense counsel] indicated he had no intention' of seeking an evaluation. My recollection is that the Supreme Court said that the District Court nonetheless had that obligation. So I guess I would like the parties to submit any case law in advance and be prepared to discuss that more fully at the December hearing.

[*P20] The district court concluded that hearing with the admonition that he wanted to make a "complete record on this issue." The case discussed in the above exchange is *deShazer*. It is important that it be very clear in any discussion of this issue that it is not this Court that mandates the district court's role in competency matters, it is the statute and the rule, as well as the underlying constitutional case law which generated that statute and accompanying rule, that mandates the district court's role in that arena. It is also important to carefully read *deShazer*, because its reach is considerably narrower than that **[***25]** assumed by many who have cited it to us since its publication, and that was most certainly true here.

[*P21] In *deShazer*, the defendant was evaluated for dangerousness to himself or others, and both counsel and the trial court appeared to consider that as satisfying the need for examination with respect to competence. Moreover, in *deShazer* there were a number of warning signs suggesting that deShazer was incompetent, even before the time came that deShazer was about to testify:

> As the prosecution was about to rest on the last day of trial, the defense attorney asked for an in-chambers conference. As that proceeding got underway, the defense attorney told the district court that based upon his observations, deShazer had "continued to improve" during the pretrial process. Defense counsel iterated that he had had mental examinations done and the examinations established that deShazer knew right from wrong and "that a competency defense was not appropriate." As defense counsel began to prepare deShazer for trial, he observed that deShazer was "extremely depressed," and was unable to concentrate or do the things necessary to get ready for trial. Through contacts the deShazer family had with a psychiatrist **[***26]** in Casper,

an arrangement was made during the weekend break in the trial for deShazer to be evaluated by psychiatrist Bruce Kahn, M.D. Both defense counsel and the district court noted that deShazer had appeared to do well on the first day of trial, both in the courtroom and in chambers. Defense counsel's concern was that deShazer was not "capable" of assisting counsel in his defense nor was he "capable" of testifying in his own defense if he chose to do so. Defense counsel's indication was that, in any event, he did not intend to have deShazer testify. Defense counsel indicated that deShazer's testimony would not be material and that after consultation with counsel, as well as with his family, a decision was made to go ahead with the proceedings. Defense counsel also conceded that he "never had a case like this, and I don't have experience with mental health people--or mentally ill people that has provided me any kind of background to do this. I'm prepared to proceed, but I thought the court needed to **[**57]** be aware." The district court then asked that deShazer be brought into chambers because it needed to "make some advisements and inquiry." The following advisement/inquiry was made:

> THE **[***27]** COURT: I am informed that the State is close to the end of their case. So you and Mr. Goddard will be given an opportunity to put on a case of your own if you want to. Mr. Goddard has explained to me that there's a couple of witnesses that he thinks that you all will probably want to call, and that's fine.
>
> The critical thing, though, that I want to be sure of is that you understand your personal right to either testify or to remain silent. The Court has absolutely no preference over which choice you make; it just wants to be sure that you understand the choice and that whatever choice you make along those lines is done of your own free will.
>
> So you understand that as a matter of law you're not required to testify, correct?
>
> THE DEFENDANT: Correct. But--
>
> THE COURT: Also, at this stage of the game you absolutely have the right to testify if you want to. The choice that you make may be very important to you. And I suggest that you not make any choice like that without consulting with your counsel. But I need to know kind of ahead of time what you think you personally want to do. Not what somebody else thinks you ought to do, but what you want to do.
>
> THE DEFENDANT: I want to, but I'm wrestling **[***28]** with whether or not I'm prepared for it (indicating) mentally. And I've been talking with Greg about that.
>
> THE COURT: So you haven't made up your mind yet what you want to do?
>
> THE DEFENDANT: Correct. I was hoping to talk to Greg here over this lunch break.

When defense counsel called Dr. Kahn as a witness, a conference was held out of the hearing of the jury. The purpose of that hearing, as articulated by the district court, was, "[i]n this case the Defendant has not entered a plea of not guilty by reason of mental illness or deficiency and has represented to the Court that he will not tender any evidence regarding that type of defense." At the outset it was agreed that Dr. Kahn would not offer an opinion that deShazer met the statutory definition for

incompetency due to mental illness or deficiency. Dr. Kahn was asked, and he responded to, a question regarding deShazer's mental state at the time of the crime. He opined:

> DR. KAHN: Yes, I do have an opinion, in that he was psychotically depressed at the time of the offense and I think that his illness contributed substantially and materially to the commission of acts of which he's accused. I think that the mental illness contributed substantially **[***29]** and materially to loss of impulse control.
>
> And it would be my further opinion, if I were asked, Your Honor, and allowed the opportunity to answer, that it meets the threshold criteria of the volitional prong of the mental illness statute, *7-11-301, et se[q]*. as the lack of substantial capacity to refrain from conduct which doesn't conform to the requirements of [the] law.

When the district court asked about deShazer's competency to stand trial, Dr. Kahn responded:

> DR. KAHN: With all due respect, Your Honor, I think that he lacks [the] mental capacity to assist in some respects with his defense; but I think it would be your decision, Your Honor, if he did not--if he was not competent by virtue of the means--or, rather, the way in which he did not have mental capacity.
>
> Let me explain it. I'm not being very clear, and I'm aware of that.
>
> Capacity is a function of his mental wherewithal. Competency is a judicial construct, and it's not for me to tell the Court how relevant or significant his ability to testify might be. I do not **[**58]** think he has the mental capacity to testify in his own behalf. But, if the Court were to decide that that's a relatively insignificant issue, for example, because counsel **[***30]** says we don't want him to testify regardless of how healthy he is mentally, then he probably is competent.
>
> And regardless of how incapacitated he is mentally in that respect, in all other respects I think he has mental capacity to understand the nature of the proceedings and to assist counsel. The narrow exception is I don't think he can testify on his own behalf in his current frame of mind.

After considerable further discussion, the district court determined that Dr. Kahn would be allowed to testify, so long as his testimony was precisely limited to "the Defendant's state of mind, some of the processes that go on with people if they do get involved in what we commonly refer to as an obsession, perhaps, arguably, the Defendant, you know, would have the right to offer that sort of explanation to the jury, since the contra inferences will obviously be made." Following Dr. Kahn's testimony, a very brief conference was held wherein deShazer stated that he had decided not to testify.

Thus, we are confronted with determining whether, in light of all the information available to the district court, it should have sua sponte suspended the proceedings, declared a mistrial, excused the jury, and **[***31]** ordered a mental examination of deShazer before a new trial could be held. *Wyo. Stat. Ann. § 7-11-303* does not make it entirely clear what procedure should be followed in an instance

> such as this where the problem does not come fully to light until the middle of a jury trial. However, in this regard, the statute plainly contemplates that it might arise "at any stage of a criminal proceeding." As future events bear out, it took several months for a mental examination to be completed at the Wyoming State Hospital for purposes of sentencing and a motion for new trial, and many more months yet for a second examination to be completed at the request of the prosecution. As a practical matter, the jury could not be held in waiting for a period of over one year. In such a circumstance, we conclude that the only practical, solution was to declare a mistrial and re-initiate proceedings, if that was the appropriate thing to do in light of the mental examination(s). As a predicate to that, we must also conclude that the district court was obligated to suspend the proceedings given the information that slowly accumulated before it, from the date of the crime until the ultimate bridge had to be **[***32]** crossed in the midst of trial.

deShazer, PP 21-25, 74 P.3d at 1249-51.

[*P22] In short, the *deShazer* case has no apparent application to the circumstances of Eaton's case. Likewise, Eaton's reliance on *Keats v. State, 2005 WY 81, 115 P.3d 1110 (Wyo. 2005)*, is misplaced. Although it may have some tangential pertinence to the effective assistance of counsel issue we will discuss later, it has no pertinence in the context of whether or not Eaton was competent to stand trial.

[*P23] The issue of Eaton's competence is addressed in a memorandum submitted by defense counsel (under seal) on January 13, 2004. In that memo, the defense submitted authority, to the effect that Eaton's memory problems did not constitute incompetence to stand trial. Expert witness Kenneth H. Ash, M.D., a psychiatrist, testified that his conclusion was that Eaton was competent to stand trial and that he had no mental illness or deficiency that rose to the level of a defense. Based upon that evaluation and the other evaluations subsumed into Dr. Ash's opinion, as well as the observations made by defense counsel, the matter of Eaton's competency was not further pursued by the defense.

(ii) Competency as suggested by events at trial.

[*P24] **[***33]** Although the record does not suggest that Eaton was incompetent based upon medical examinations, Eaton also contends that several incidents/outbursts by him, during trial, evidenced the fact that he was incompetent and, therefore, called into play the district court's responsibility to inquire further into Eaton's competence, as identified by the *deShazer* case. As background **[**59]** for these outbursts, Eaton contends that: (1) There was a profound lack of communication between him and his lead defense attorney and the mitigation specialist; (2) that his principal defense counsel and mitigation specialist were afraid of him; and (3) that counsel did not sufficiently consult with him concerning the defense mustered on his behalf. Against this background, Eaton claims that he became so frustrated and so unable to refrain from making audible and visible outbursts at the defense table (making layman's "objections"), that he irreparably prejudiced his own case in the eyes of the jury with his "unseemly" behavior.

[*P25] The first such outburst occurred during the testimony of Joseph Francis Dax, a man who was in the Natrona County Jail for a few days with Eaton and who claimed to have had conversations **[***34]** with Eaton in which Eaton admitted to having killed a woman. Dax's testimony served as the primary basis for the prosecution's theory that Ms. Kimmel had picked up Eaton alongside the road and given him a ride. Dax was relating some of the conversations he had with Eaton and, in the course of that testimony, identified (pointing at) Eaton as the man he talked with in the Natrona County Jail. Eaton exclaimed, "You don't me [sic]. Why in the hell are you talking and pointing to me [!]" [3]

> 3 In the transcript the punctuation is a question mark. However, it is our sense that an exclamation point better captures the apparent tone of Eaton's rhetorical question.

[*P26] The examination of Dax continued after this incident and nothing was said about it at the time. However, later that same day, the district court did have an in-chambers meeting with Eaton and his defense team because the trial judge was able to hear Eaton's "grumblings," in addition to the more overt outburst immediately at issue. The trial court inquired about Eaton's apparent dissatisfaction with his attorneys. Eaton replied:

> THE DEFENDANT: I was mad because of the fact that this morning, the guy I didn't even know, I'm supposed to **[***35]** have talked to; then everybody that has come in so far sat there and lied about me. And they haven't done nothing about it. It's -- I mean, my own son come in; and you can tell someone taught -- led him along about it, because all of a sudden he knows what is all in a CRX. And the only Honda

> that he had, I had after he had done left and went back. I had a Honda back there three or four years ago. Pardon me. Before I got in trouble, I had a Honda in that Moneta.
>
> And I -- they keep telling me to write stuff down. I write -- as I remember something, I write it down. And they never use any of it.

In later discussion, Eaton added that he was upset over a witness who claimed to have bought a chainsaw from him at a garage sale he supposedly had at his Moneta residence.

[*P27] The district court explained in detail what the limitations are for examination and cross-examination of witnesses, and Eaton expressed his understanding of that and conceded that his attorneys had explained "some of it" to him. Eaton was asked if he wanted a different attorney and he declined, although he qualified it with the statement, "Let's just go on with it." The principal defense attorney then made a further explanation **[***36]** of his representation to Eaton, as well as to the trial court, emphasizing that he controlled the cross-examination to the end that it would only serve to benefit Eaton, and not so as to benefit the prosecution. Furthermore, defense counsel explained that he did not want to get into a problem with Eaton at the counsel table because that was not a good thing to do in front of the jury. At the conclusion of this session, Eaton indicated that he was ready to go back into the courtroom.

[*P28] The final such episode occurred when a witness, Jim Broz, was testifying about a note that was found on the headstone of Ms. Kimmel's gravesite. The note said: "Lisa, there aren't words to say how much you're missed. The pain never leaves. It's so hard without you. You'll always be alive in me. Your death is my painful loss but heaven's sweet gain. Love always, Stringfellow Hawke." Broz analyzed the handwriting on the note in the light of writing **[**60]** samples given by Eaton. In Broz's opinion, Eaton was the likely writer of the note. Eaton vehemently denied that he wrote the note, but defense counsel declined to cross-examine Broz. Eaton then made this outburst in front of the jury: "I can prove where the fuck **[***37]** I was that day, and you guys won't do nothing." It was decided that a recess would be in order and during that recess, defense counsel explained to the trial court and to Eaton why he chose not to challenge the testimony. Defense counsel related that he was not able to get an expert handwriting analyst to state that it was not Eaton's handwriting. Eaton did not want to testify and try to explain where he was that day because that opened a door the defense did not want opened. The record suggests that exactly what day the note was left on the tombstone was not known (exact only within a week or more length of time). Moreover, in defense counsel's opinion the note connoted remorse for the crime at issue, and that was positive for the defense's overall trial strategy.

[*P29] We will note at this juncture that defense counsel frequently took breaks in the proceedings to ask the trial court to allow him to explain his trial strategy on the record. It is apparent that this was done in part to protect the record for appeal and post-conviction relief, but also for the apparent reason of ensuring that Eaton knew what was going on and reassuring him that counsel knew what he was doing.

[*P30] We have carefully **[***38]** examined the record with respect to Eaton's apparent understanding of the trial strategy adopted by his defense team, the outbursts Eaton made during his trial in front of the jury, and the fact that the record demonstrates that Eaton was, in general, an uncooperative client. We conclude that those materials do not suggest that Eaton was incompetent as contemplated by *§ 7-11-302*, *supra*, at P 14. This conclusion applies to both the guilt/innocence phase and to the sentencing phase.

B. Voir Dire as Predisposing Jury to Find Eaton Guilty

[*P31] This argument was not clearly raised below and is not well developed in Eaton's brief However, because the argument presented appears to posit this issue for our consideration, we are duty bound to consider it. Since the advent of modern death penalty litigation, one perennial issue is the assertion that "death-qualified" juries are biased toward conviction and, hence, unconstitutional. See 2 Elissa Krauss, General Editor, *Jury Work(R), Systematic Techniques* § 23:1 at 23-2 and § 23:3 at 23-4 through -10 (National Jury Project), (Thomson-West 2d ed. 2006). However, the status of the law is still that articulated by the United States Supreme Court in *Lockhart v. McCree, 476 U.S. 162, 106 S. Ct. 1758, 1764-70, 90 L. Ed. 2d 137 (1986)*. **[***39]** Although that decision accepted for the sake of discussion that "death qualification" produces juries that are somewhat more "conviction-prone" than "non-death-qualified" juries, it nonetheless held that the Constitution does not prohibit the states from "death qualifying" juries in capital cases. Continuing, it held that excluding jurors from the guilt phase, who could not apply the law in the penalty phase of capital case trials, serves a legitimate state interest. *Id. at 1764, 1768-70*; also see *Witherspoon v. Illinois, 391 U.S. 510, 517 88 S. Ct. 1770, 1774, 20 L. Ed. 2d 776 (1968)*("The data adduced by the petitioner, however, are too tentative and fragmentary to establish that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt.").

[*P32] Based on the record on appeal in these proceedings, we conclude that Eaton has not demonstrated anything new or different about his case that would cause us to reconsider the established law in this area.

C. Ineffective Assistance of Counsel

[*P33] Eaton was represented in these proceedings by the Capital Case Attorney of the Wyoming Public Defender System, as well as by a second attorney from the Public. Defender's staff in the **[***40]** Second Judicial District. They were assisted by an experienced legal investigator, who served several functions on the team but was primarily charged with putting together the mitigation evidence for the penalty phase. The principal defense attorney had considerable experience in handling **[**61]** death penalty cases, as well as murder cases in general, and the investigator had some experience doing mitigation investigations in death penalty cases. The second-chair defense attorney did not have experience in death penalty cases or, for that matter, major felony trials. Eaton contends that his defense team was ineffective on several bases: Some of those assertions pertain only to the guilt/innocence phase and some pertain only to the sentencing phase. We separate them out accordingly and will discuss each of those that pertain to the guilt/innocence phase in this section of the opinion. Of course, we will aggregate them in our final analysis.

[*P34] This matter was remanded to the district court for the purpose of conducting a hearing, in accordance with our decision in *Calene v. State, 846 P.2d 679 (Wyo. 1993)*, so as to develop a record on the issue of ineffective assistance of counsel. See W.R.A.P. 21. **[***41]** That hearing was conducted over the course of five days, June 6-10, 2005, producing a transcript of 1,178 pages. On July 1, 2005, the district court issued a 47-page 'decision letter discussing the evidence developed during that hearing and concluding that counsel had not been ineffective.

[*P35] We apply this standard of review in these circumstances. Where the trial court has heard and decided the issue, we will not disturb that court's findings of fact unless they are clearly erroneous or against the great weight of the evidence. We will, on the other hand, conduct a *de novo* review of the trial court's conclusions of law, which include the question of whether or not counsel's conduct was deficient and the question of whether or not the appellant was prejudiced by that deficient conduct. *Barker v. State, 2005 WY 20, P 9, 106 P.3d 297, 299 (Wyo. 2005)*(citing *Robinson v. State, 2003 WY 32, PP 16, 64 P.3d 743, 748 (Wyo. 2003))*.

[*P36] We have espoused this analytical framework for addressing ineffective assistance of counsel issues:

> [O]ur paramount consideration is whether, in light of all the circumstances, trial counsels' acts or omissions were outside the wide range of professionally competent **[***42]** assistance. *Gleason v. State, 2002 WY 161, P 44, 57 P.3d 332, P 44 (Wyo.2002)*. An appellant claiming ineffective assistance of counsel must demonstrate on the record that counsel's performance was deficient. *Id.* (citing *Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984))*. Ordinarily, he must also demonstrate that prejudice resulted. Under this test, the inquiry is whether or not counsel rendered the assistance a reasonably competent attorney would have offered and, if not, whether his failure to do so prejudiced the defense of the case. *Id.* This two-part test, the *Strickland* test, is the test we normally apply in reviewing ineffectiveness claims ....
>
> We examine the conduct of defense counsel in light of all the circumstances in determining whether the identified acts or omissions fall outside the ambit of professionally competent assistance, bearing in mind the function of counsel is to make the adversarial testing process work in every case. *Dickeson v. State, 843 P.2d 606, 609 (Wyo.1992)*. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot **[***43]** be relied upon as having produced a just result. *Gleason, 2002 WY 161, 57 P.3d 332*. We do not evaluate the efforts of counsel from a perspective of hindsight but endeavor to reconstruct the circumstances surrounding the challenged conduct and evaluate the professional efforts from the perspective of counsel at the time. *Dickeson, 843 P.2d at 609*. We invoke a strong presumption that counsel rendered adequate and reasonable assistance making all decisions within the bounds of reasonable professional judgment. *Id.* The burden is on the defendant to overcome this presumption that, in light of the circumstances, the challenged action or failure of the attorney might be considered sound trial strategy. *Id.*

Harlow v. State, 2005 WY 12, P 45, 105 P.3d 1049, 1069 (Wyo. 2005)(quoting *Sincock v. State, 2003 WY 115, PP 34-35, 76 P.3d 323, 336 (Wyo. 2003))*.*

[*P37] Also of pertinence in this matter is the following:

> **[**62]** Before we address Harlow's separate allegations of trial counsel ineffectiveness, we must first address his contention that, in capital cases, the Strickland test has been substantially modified by *Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)*, in that the American Bar **[***44]** Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases are now the benchmark for determining the objective reasonableness of counsel's performance. We have read *Wiggins* and we do not see that it represents any significant amendment of the *Strickland* standard. In *Wiggins*, the United States Supreme Court reviewed the conduct of two trial attorneys in a death penalty case. In the process of finding counsel's performance both deficient and prejudicial, the United States Supreme Court reiterated the applicable standard of review. First, the United States Supreme Court repeated that ineffectiveness claims are tested under the two-part *Strickland* test, with "objective reasonableness" defined in terms of prevailing professional norms. *Id. at 521, 123 S.Ct. 2527*. Next, the United States Supreme Court defined those "prevailing professional norms" as the professional standards prevailing in Maryland in 1989. *Id. at 524, 123 S.Ct. 2527*. After concluding that counsels' performance fell short of those standards, the United States Supreme Court stated that "[c]ounsels' conduct similarly fell short of the standards for capital defense work articulated by the American **[***45]** Bar Association (ABA)--standards to which we long have referred as 'guides to determining what is reasonable.'" *Id.* (quoting *Strickland, 466 U.S. at 688, 104 S.Ct. 2052*). Clearly, these passages do not indicate any substantive departure from the test. Furthermore, the inexperience of counsel in handling death penalty cases, standing alone, does not establish ineffectiveness (citations omitted).

Harlow, P 46, 105 P.3d at 1069-70. We will include references to the *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (February 2003) in our analysis of the ineffective assistance of counsel issues raised in this appeal because, while they do not set black-letter rules, they are guidelines of significance that we consider in our review of this case.

(i) Did the theory-of-the-case defense chosen by defense counsel meet the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (February 2003).

[*P38] We approach the arguments, and many of those that follow, with this observation derived from *Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)*:

> [S]trategic choices made after thorough **[***46]** investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitation on investigation ... applying a heavy measure of deference to counsel's judgments.

Id. at *104 S.Ct. at 2066*; *Sanchez v. State, 2002 WY 31, PP 11-16, 41 P.3d 531, 534-35 (Wyo. 2002)*.

[*P39] In this case, defense counsel chose a strategy that included the admission that Eaton bore some responsibility for Ms. Kimmell's homicide. Eaton was charged with murder in the first degree based upon the theory of premeditation. However, he was also charged with three counts of first degree murder based on felony murder, i.e., that the homicide was committed in the perpetration of (1) kidnapping, (2) robbery, and (3) sexual assault. This, of course, made that strategy very tenuous, at best. The express goal of the defense team was to save Eaton's life, and the first step in that process was to avoid a verdict of first degree murder. The path to that goal included Eaton's admission of some guilt, so as to avoid the "I didn't do it, but if I did I am very **[***47]** sorry I did it" defense. Having admitted some guilt, the defense anticipated that it would next present mitigating evidence persuasive enough to convince at least one juror to spare his life. We **[**63]** describe this part of strategy at Part II (C)(ii)(PP 128-133, *infra*).

[*P40] In an argument that comprehends much of the defense team's performance in the guilt/innocence phase, Eaton contends that the public defender did not

have a plan to provide high quality service in death penalty cases. Guideline 2.1 provides:

> A. Each jurisdiction should adopt and implement a plan formalizing the means by which high quality legal representation in death penalty cases is to be provided in accordance with these Guidelines (the "Legal Representation Plan").
>
> B. The Legal Representation Plan should set forth how the jurisdiction will conform to each of these Guidelines.
>
> C. All elements of the Legal Representation Plan should be structured to ensure that counsel defending death penalty cases are able to do so free from political influence and under conditions that enable them to provide zealous advocacy in accordance with professional standards.

ABA Guidelines, *supra*, at 18.

[*P41] The commentary to the guidelines recommends **[***48]** that the plan be embodied in a statute and that it be funded on a jurisdiction-wide basis. Wyoming does not have such a statute. The attorney who represented Eaton is the death penalty defense unit in Wyoming, and he conceded that he had not adopted such a formalized plan. What the budgetary provisions are for the death penalty unit is not revealed by the record. The lead defense attorney conceded that there was no such formalized plan, but that there is "a plan." We will not dwell on this issue too long because we conclude that it does not have a dispositive effect on this case. It would be better to have, a written plan that conforms to the ABA Guidelines and, of course, it would be better yet if the plan were fully funded and staffed.

[*P42] Guideline 10.5 advises on the subject of counsel maintaining an appropriate relationship with the client:

> A. Counsel at all stages of the case should make every appropriate effort to establish a relationship of trust with the client, and should maintain close contact with the client.
>
> B. 1. Barring exceptional circumstances, an interview of the client should be conducted within 24 hours of initial counsel's entry into the case.
>
> 2. Promptly upon entry into **[***49]** the case, initial counsel should communicate in an appropriate manner with both the client and the government regarding the protection of the client's rights against self-incrimination, to the effective assistance of counsel, and to the preservation of the attorney-client privilege and similar safeguards.
>
> 3. Counsel at all stages of the case should re-advise the client and the government regarding these matters as appropriate.
>
> C. Counsel at all stages of the case should engage in a continuing interactive dialogue with the client concerning all matters that might reasonably be expected to have a material impact on the case, such as:
>
> 1. the progress of and prospects for the factual investigation, and what assistance the client might provide to it;
>
> 2. current or potential legal issues;
>
> 3. the development of a defense theory;
>
> 4. presentation of the defense case;
>
> 5. potential agreed-upon dispositions of the case;
>
> 6. litigation deadlines and the projected schedule of case-related events; and
>
> 7. relevant aspects of the client's relationship with correctional, parole, or other governmental agents (e.g., prison medical providers or state psychiatrists).

ABA Guidelines, *supra*, at 68.

[*P43] Eaton's principal **[***50]** defense attorney conceded that he was unable to develop a working relationship with Eaton, and that was also true of the mitigation specialist. Indeed, the mitigation specialist (a woman) was afraid of Eaton and after her initial contact with him (at which time he frightened her), she thereafter declined to see him in person. The assistant defense attorney eventually developed a working relationship with Eaton. All three testified at the remand **[**64]** hearing to the difficulties they had with Eaton and that he was extremely uncooperative (characterized by them as ineffective assistance of client). The *Guidelines* have this to say about that subject in the commentary:

Counsel's Duties Respecting Uncooperative Clients

> Some clients will initially insist that they want to be executed -- as punishment or because they believe they would rather die than spend the rest of their lives in prison; some clients will want to contest their guilt but not present mitigation. It is ineffective assistance for counsel to simply acquiesce to such wishes, which usually reflect overwhelming feelings of guilt or despair rather than a rational decision. Counsel should initially try to identify the source of the client's **[***51]** hopelessness. Counsel should consult lawyers, clergy or others who have worked with similarly situated death row inmates. Counsel should try to obtain treatment for the client's mental and/or emotional problems, which may become worse over time. One or more members of the defense team should always be available to talk to the client; members of the client's family, friends, or clergy might also be enlisted, to talk to the client about the reasons for living; inmates who have accepted pleas or been on death row and later received a life sentence (or now wish they had), may also be a valuable source of information about the possibility of making a constructive life in prison. A client who insists on his innocence, should be reminded that a waiver of mitigation will not persuade an appellate court of his innocence and securing a life sentence may bar the state from seeking the death penalty in the event of a new trial.
>
> Counsel **[***52]** in any event should be familiar enough with the client's mental condition to make a reasoned decision -- fully documented, for the benefit of actors at later stages of the case -- whether to assert the position that the client is not competent to waive further proceedings.

ABA Guidelines, *supra*, at 71-72

[*P44] Eaton is especially critical of the theory of defense that was chosen. The record reveals that Eaton agreed to this defense theory:

> I, Dale Wayne Eaton, do hereby give permission for my counsel to pursue, as a trial strategy, the lesser included offense of second degree murder in the Lisa Marie Kimmel case. I understand that by doing so, my counsel will admit to the jury that I face some criminal responsibility in this case, but not for first degree murder."

This strategy required the defense to fit Eaton's actions into the elements found in *Wyo. Stat. Ann. § 6-2-104* (LexisNexis 2007): "Whoever purposely and maliciously, but without premeditation, kills any human being is guilty of murder in the second degree[.]"

[*P45] In this regard, *ABA Guideline* 10.10.1 provides: "A. As the investigations mandated by Guideline 10.7 produce information, trial counsel should formulate a defense theory. Counsel **[***53]** should seek a theory that will be effective in connection with both guilt and penalty, and should seek to minimize any inconsistencies." *Id.* at 99. Defense counsel decided that the second degree murder theory would segue into the mitigation theory that Eaton acted without premeditation and in the face of acute mental and emotional disturbance, as well as that he was remorseful about what he' had done. The successful pursuit of this theory also required defense counsel to convince the jury that the kidnapping, sexual assault, and robbery of Ms. Kimmel were so attenuated from the killing so as to not implicate the felony murder doctrine.

[*P46] In this appeal, it is contended that this theory was unrealistic, and that it really conceded guilt to first degree murder, and most especially felony murder, hence virtually eliminating any realistic chance of success. Eaton contends that this is compounded by Dr. Ash's testimony (which we will discuss in more detail, *infra*, at PP 207-210) that indicated that he did premeditate the killing. The flaw in that reasoning is that the jury did not hear that evidence during the guilt/innocence phase and so did not take it into account in determining guilt. **[***54]** Moreover, to the extent it then became an inconsistency **[**65]** in the penalty phase, that testimony was tempered by Dr. Ash's additional testimony that Eaton acted in a state of extreme emotional disturbance. We think it evident that defense counsel could not have established a plausible episode of extreme mental disturbance without at least as much detail as Dr. Ash did provide. Our experience tells us that juries have minds of their own, and a theory such as that propounded by the defense team was as good as anything we can think of, given the circumstances of this case. Appellate counsel offer no more compelling theory that might have been pursued. As required by the ABA Guidelines, the theory did provide consistency between the guilt/innocence and penalty phases. That is, Eaton conceded that he had committed the homicide, but did not premeditate it or commit it in the perpetration of the kidnapping, robbery, or sexual assault. In the penalty phase,

he could then point to his admission of wrongdoing, in conjunction with his remorse and severe emotional distress, as mitigating factors that suggested either life, or life without parole, would be appropriate punishments.

[*P47] We have carefully **[***55]** examined the record in this regard, and we conclude that the defense team's choice of a trial strategy does not constitute ineffective assistance of counsel during the trial phase. E.g., *Olsen, PP 70-76, 67 P.3d at 563-66*.

(ii) No challenge to DNA.

[*P48] In analyzing this issue, as well as several others that appear later in this opinion, Eaton looks to the ABA Guidelines with respect to the investigation of the case in order to bolster his contentions. Guideline 10.7 provides:

> A. Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty.
>
> 1. The investigation regarding guilt should be conducted regardless of any admission or statement by the client concerning the facts of the alleged crime, or overwhelming evidence of guilt, or any statement by the client that evidence bearing upon guilt is not to be collected or presented.
>
> 2. The investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented.
>
> B. 1. Counsel at every stage have an obligation to conduct a full examination of the defense provided to the client at **[***56]** all prior phases of the case. This obligation includes at minimum interviewing prior counsel and members of the defense team and examining the files of prior counsel.
>
> 2. Counsel at every stage have an obligation to satisfy themselves independently that the official record of the proceedings is complete and to supplement it as appropriate.

ABC Guidelines, *supra*, at 76

[*P49] Eaton contends that defense counsel erred in failing to more meaningfully challenge the DNA evidence during the guilt/innocence phase, in particular in failing to hire an independent expert to testify on behalf of the defense. See ABA Guidelines, *supra*, at 80 (Physical Evidence: Assistance of appropriate experts to re-examine forensic evidence). Defense counsel did make some challenge to the DNA evidence, in the sense that he brought to the fore that it is not infallible, and that, perhaps, could have left the jury with some residual doubt at least about imposing death as the penalty. However, that effort was tempered by the reality that the DNA was checked and double-checked and it pointed only to Eaton as the individual who deposited semen on Ms. Kimmel's clothing. In this appeal, it is postulated that it could have been **[***57]** Eaton's son, or his brother and, with the assistance of DNA experts, additional inroads could have been made in rebutting the DNA juggernaut.

[*P50] Once again, we have carefully examined the record with respect to the presentation- of the DNA evidence to the jury, and we conclude that defense counsel were not ineffective in handling that aspect of the case. It was established that the evidence had been handled carefully and in conformance with the applicable chain-of-custody standard. Moreover, the record on appeal, **[**66]** including the record of the remand hearing, contains no information that suggests the DNA evidence was not reliable or that Eaton was not accurately identified as the perpetrator of the crimes at issue here.

(iii) Failure to know the applicable law.

[*P51] For purposes of the guilt/innocence phase, this issue asserts that the defense team did not sufficiently know the law applicable to death penalty cases and, furthermore, did not understand the applicable law to the extent that they were aware of it. However, the precedents pertinent to this argument are overstated in Eaton's brief. While counsel may be unaware of certain aspects of the "law," that circumstance does not necessarily **[***58]** equate with deficient performance. Indeed, counsel may be unaware of applicable law and his performance can still meet the *Strickland* standard. *Bullock v. Carver, 297 F.3d 1036, 1048-50 (10th Cir. 2002)*.

[*P52] Eaton contends that the defense team's lack of knowledge of the law is demonstrated by its agreement to the application of a "hybrid" statute to govern this case. We discuss that issue in Part II B of this opinion. He also claims that lacking is demonstrated by: (1) Defense counsel's failure to adhere to or meet the ABA Guidelines applicable to death, penalty cases (PP 40-49, *supra*); conceding Eaton's guilt without his valid consent (PP 55-61, *infra*); and the failure of defense counsel to object to the trial court's failure to give the instructions that it initially offered (PP 66-73, *infra*).

[*P53] In addition, Eaton contends that defense counsel demonstrated a lack of knowledge of the law because it solicited testimony from Kenneth Ash, M.D., about the details of Eaton's admission to Dr. Ash about his commission of the actual crime. Appellate counsel flesh out this contention by reasoning that the lead defense attorney elicited that testimony for the purpose of furthering his theory that **[***59]** extreme emotional disturbance mitigated the enormity of Eaton's crime. Continuing, this theory relies on some of the lead defense attorney's testimony at the remand hearing that suggested he believed the law required the mitigation evidence to be related to the circumstances of the crime. We have carefully reviewed that testimony, and defense counsel's answers only suggest that his understanding of the law was that the extreme emotional disturbance had to be in place at the time the crime was committed. That appears to be correct.

[*P54] In summary, we have thoroughly examined this general area of argument and conclude that the record on appeal will not support a conclusion that the defense team had such an inadequate knowledge of the pertinent law, so as to render their representation of Eaton ineffective.

(iv) Concession of guilt without Eaton's consent.

[*P55] Eaton signed a very brief statement entitled, "Consent to Trial Strategy." Although it previously was set out herein, we repeat it here for the sake of convenience:

> I, Dale Wayne Eaton, do hereby give permission for my counsel to pursue, as a trial strategy, the lesser included offense of second degree murder in the Lisa Marie Kimmel case. **[***60]** I understand that by doing so, my counsel will admit to the jury that I face some criminal responsibility in this case, but not for first degree murder.

[*P56] Eaton contends that defense counsel went well beyond the reach of the consent he signed. In the process of presenting his case to the jury, defense counsel also conceded that Eaton committed kidnapping, robbery, and sexual assault. This contention is supported by a reference to defense counsel's closing argument during the penalty phase, during which Eaton's admissions from the guilt/innocence phase were iterated. In opening statements during the guilt/innocence phase, defense counsel also made certain "admissions" about Eaton's conduct, but stressed that Eaton had been greatly overcharged. The admissions there were limited to these: (1) Eaton committed one homicide (not four as charged), and that was either second degree murder or voluntary manslaughter; (2) that homicide was not committed during a larceny (of Ms. Kimmel's car and other property) because the theft was an **[**67]** afterthought and not within the contemplation of the felony murder doctrine; (3) the homicide did not occur during a kidnapping, because the kidnapping occurred long **[***61]** before Ms. Kimmel's death and, therefore, not within the contemplation of the felony murder doctrine; and, (4) defense counsel theorized that the homicide did not occur in the commission of a sexual assault because that was "somewhere in the middle of the black hole of the State's circumstantial evidence."

[*P57] Defense counsel's strategy was to bring Eaton's conduct within this Court's jurisprudence governing felony murder which we have described in considerable detail in some of our recent decisions:

> The court gave the following instruction:
>
> INSTRUCTION 15
>
> > For the purposes of establishing the crime of felony murder, a killing which occurred in the perpetration of a robbery, the sequence of events is unimportant and the killing may precede, coincide with or follow the robbery and still be committed in its perpetration.
>
> Bouwkamp argues that this instruction should not have been given and should no longer be the rule of law in Wyoming. He reasons it does not further the felony murder rationale, it led to an incorrect verdict against Bouwkamp, and its effect is to impose punishment disproportionate to a defendant's culpability. We disagree. The instruction as given accurately states the law, and **[***62]** Bouwkamp has not demonstrated the dire consequences that he alleges' flowed from its use.
>
> > Felony-murder is an unusual offense in that the death arising out of the robbery is purely an incident of the basic offense. It makes no difference whether or not there was intent to kill. The statutory law implies all of the malevolence found and necessary in the crime of first degree murder alone.

Richmond v. State, 554 P.2d 1217, 1232 (Wyo.1976). Consequently, a defendant convicted under this language faces the same penalties as one convicted of premeditated, that is, coolly calculated murder. The element of, deliberation is established by the defendant's presumed consideration of the high degree of risk of causing death involved in the commission of one of the inherently dangerous felonies expressly incorporated into our first degree statute. *Richmond, 554 P.2d at 1232*.

In its brief the state acknowledges there may be merit in Bouwkamp's claim that the felony murder rule should not be applied in the instance where the felony arises as an afterthought and is committed subsequent to the murder. The rationale underlying, this claim is that the purpose of the rule is to deter homicides in the course **[***63]** of felonies, including those resulting from negligence or accident, by holding the perpetrators strictly responsible. *Richmond, 554 P.2d at 1232*. This purpose does not logically reach the circumstance where the felony is conceived of and executed after the killing has occurred. However, the state then argues that the issue of misapplication of the felony murder rule does not arise from the trial court's giving of Instruction 15 in this case. We agree with both contentions.

The key phrase in the instruction, "in the perpetration of," relied on by the state is found in *Cloman v. State, 574 P.2d 410, 418-21 .(Wyo.1978)*. "Perpetration," as used here, is the act or process of commission of a specified crime. *Webster's Third New International Dictionary* 1684 (1971). To occur in the perpetration of a felony the killing must occur in the unbroken chain of events comprising the felony. *See Cloman, 574 P.2d at 419-22*. In *Cloman* we framed the concept in this way: "the time sequence is not important as long as the evidence, including the inferences, point to one continuous transaction." *Cloman, at 420*. This means that, for a finding of felony murder, the killing must occur as part of the res gestae **[***64]** or "things done to commit" the felony. If the felony was not conceived of before the victim's death but occurs after the murder, the chain is broken, and the murder is a separate act which cannot have occurred "in the perpetration of the underlying felony. *See United States v. Mack, 151 U.S. App. D.C. 162, 466 F.2d 333, 338 (D.C.Cir.1972) cert. denied sub nom.* **[**68]** *Johnson v. United States, 409 U.S. 952, 93 S.Ct. 297, 34 L.Ed.2d 223*; *see also Grigsby v. State, 260 Ark. 499, 542 S.W.2d 275, 280 (1976)*.

While the sequence of events is not significant, their interrelationship is. A specific connection is required: the murder must occur in the performance of the felony for conviction of felony murder under *Wyo. Stat. § 6-2-101* (June 1988).

Instruction 15 requires that, before Bouwkamp could be found guilty of felony murder, the murder must be proved to have occurred in the perpetration of, or during transaction of, the robbery of Millox. Consequently, it does not dictate application of the felony murder rule where both the intent to commit the felony and the act itself follow the murder as a separate transaction, as Bouwkamp contended happened here.

Whether the killing and the felony were part and parcel of one transaction **[***65]** is a jury question. Annotation, *What Constitutes Termination of Felony for Purpose of Felony Murder Rule*, 58 A.L.R.3d 851 § 5 (1974). Without doubt it may be difficult to persuade a jury on facts such as these that there were two separate criminal transactions. The jury is not bound to accept a defendant's version of events, *Grigsby, 260 Ark. at 508, 542 S.W.2d at 280*. This jury chose not to believe Bouwkamp's story. We note that the evidence and inferences satisfy the one continuous transaction test imposed by the directive that the murder occur "in the perpetration of the felony.

We expressly reject the suggestion that *Cloman* may be read to permit a conviction for felony murder where intent to commit the felony cannot be inferred before the murder and the chain of events is apparently broken. When a reasonable doubt remains as to whether the felony may have occurred as an afterthought that followed the killing, the killing cannot have been "in the perpetration of the fel-

> ony," and the homicide may not be elevated to murder in the first degree by application of the felony murder rule. This is our understanding of the legislature's intent. Although the proposition of law may perhaps **[***66]** be stated more plainly, Instruction 15 presents a correct statement of the law, and the trial court did not err in giving it.

Bouwkamp v. State, 833 P.2d 486, 491-92 (Wyo. 1992).

[*P58] The theory espoused by the defense in this case was a plausible defense to both first degree murder and felony murder. If there were better theories, they have not been called to our attention nor have any occurred to us.

[*P59] In *Olsen, PP 74-76, 67 P.3d at 565-66*, we addressed this same subject:

> Our independent review requires that we examine whether trial counsel's admission of guilt to the shootings violates the rule that "the admission by counsel of his client's guilt to the jury[ ] represents a paradigmatic example of the sort of breakdown in the adversarial process that triggers a presumption of prejudice." *United States v. Williamson, 53 F.3d 1500, 1511 (10th Cir.1995)*. Wyoming recognizes that there are cases of deficient performances where prejudice is presumed. *Herdt v. State, 816 P.2d 1299, 1301-02 (Wyo.1991)*. *Williamson's* holding is based on the following rationale:
>
> > The *Sixth Amendment* provides "[i]n all criminal prosecutions, the accused shall ... have the assistance of counsel for his defense." *U.S. Const. amend. VI.* **[***67]** While a defendant must ordinarily prove deficient performance by counsel coupled with a showing of prejudice in order to prevail on an ineffective assistance of counsel claim, *Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)*, there is a narrow class, of cases where the particular circumstances "are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *United States v. Cronic, 466 U.S. 648, 658, 104 S.Ct. 2039, 2046, 80 L.Ed.2d 657 (1984)*(footnote omitted). If a defendant can prove such circumstances actually existed, prejudice will be presumed. *Id. at 659-62, 104 S.Ct. at 2047-49*.
>
> **[**69]** There is no question but that the sort of conduct alleged here, i.e., the admission by counsel of his client's guilt to the jury, represents a paradigmatic example of the sort of breakdown in the adversarial process that triggers a presumption of prejudice. *See, e.g., United States v. Swanson, 943 F.2d 1070, 1074 (9th Cir.1991)*; *Jones v. State, 110 Nev. 730, 877 P.2d 1052, 1056-57 (1994)* (quoting *Brown v. Rice, 693 F.Supp. 381, 396 (W.D.N.C.1988)*, cert. denied, *495 U.S. 953, 110 S. Ct. 2220, 109 L. Ed. 2d 545 (1990))*. **[***68]** Whether such an admission actually occurred is necessarily fact-intensive. The focus must be on whether, in light of the entire record, the attorney remained a legal advocate of the defendant who acted with "'undivided allegiance and faithful, devoted service'" to the defendant. *See Osborn v. Shillinger, 861 F.2d 612, 624 (10th Cir.1988)* (quoting *Von Moltke v. Gillies, 332 U.S. 708, 725, 68 S.Ct. 316, 324, 92 L.Ed. 309 (1948))*.

Williamson, 53 F.3d at 1510-11. Usually, concession of guilt issues involves a failure of defense counsel to secure the client's consent to employ this particular strategy because:

> When counsel concedes a client's guilt during the guilt-innocence phase of trial in spite of the client's earlier plea of not guilty and without the defendant's consent, counsel provides ineffective assistance of counsel regardless of the weight of evidence against the defendant or the wisdom of counsel's "honest approach" strategy. *Francis v. Spraggins, 720 F.2d 1190 (11th Cir.1983)*; *Wiley v. Sowders, 647 F.2d 642 (6th Cir.1981)*; *State v. Harbison, 315 N.C. 175, 337 S.E.2d 504 (N.C.1985)*. The gravity of the consequences of a decision to plead guilty or to admit one's guilt demands **[***69]** that the decision remain in the defendant's hand. An attorney cannot deprive his or her client of the right to have the issue of guilt or innocence presented to the jury as an adversarial issue on which the state bears 'the burden of proof without committing ineffective assistance of counsel. "The adversarial process protected by the *Sixth Amendment* requires that the accused have 'counsel acting in the role of an advocate'. The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." *U.S. v. Cronic, 466 U.S. 648, 656, 104 S.Ct. 2039, 2045, 80 L.Ed.2d 657 (1984)*. A lawyer may make a tactical determination of how to run a trial, but the *due process clause* does not permit the attorney to enter a guilty plea or admit facts that amount to a guilty plea without the client's consent.

Jones v. State, 110 Nev. 730, 877 P.2d 1052, 1056 (1994)(quoting *Brown v. Rice, 693 F.Supp. 381, 396 (W.D.N.C.1988)*, rev'd on other grounds, *Brown v. Dixon, 891 F.2d 490 (4th Cir.1989))*(some citations omitted). *See Grainey v. State, 997 P.2d 1035, 1040 (Wyo.2000)*.

> The Eighth Circuit has considered **[***70]** similar facts and concluded that admitting the act but denying the requisite mental state by an intoxication defense to first degree murder charges is not the functional equivalent of a guilty plea. *Nielsen v. Hopkins, 58 F.3d 1331, 1335 (8th Cir.1995)*; *Parker v. Lockhart, 907 F.2d 859, 861 (8th Cir.1990)*.

Also see *Sincock v. State, 2003 WY 115, PP 45-59, 76 P.3d 323, 339-342 (Wyo. 2003)*; *Sanchez v. State, 2002 WY 31, PP 10-16, 41 P.3d 531, 533-35 (Wyo. 2002)*.

[*P60] Although the circumstances here are different from those in *Olsen*, defense counsel did obtain Eaton's consent to an admission of the homicide. Moreover, the United States Supreme Court recently held that defense counsel's failure to obtain the defendant's express consent to a strategy of conceding guilt at the guilt phase of a capital case does not automatically render counsel's performance deficient. *Florida v. Nixon, 543 U.S. 175, 125 S.Ct. 551, 560-63, 160 L.Ed. 2d 565 (2004)*.

[*P61] In light of that decision, as well as our holding in *Olsen*, we conclude that defense counsel's use of that consent did not encompass admissions to the crimes of kidnapping, **[**70]** sexual assault, or theft. Defense counsel's strategy was not such a leap beyond **[***71]** what was contemplated by the concession of some guilt, so as to make defense counsel's strategy the functional

equivalent of a guilty plea and to render counsel's assistance ineffective.

(v) Defense counsel's election to allow the trial to proceed when Eaton was not competent to stand trial constitutes ineffective assistance of counsel.

[*P62] We considered this issue as a substantive matter in Part I A, above (PP 13-30, *supra*). We have concluded that the record on appeal does not indicate that Eaton was not competent to be tried. Hence, we also conclude that defense counsel were not ineffective for permitting the trial to go forward.

(vi) Waiver of venue.

[*P63] Defense counsel initially sought a change of venue. It was the defense's goal to have venue changed to Albany County. Albany County was home to the lead defense counsel and the mitigation expert, providing a sort of home court advantage as well as the comfort level in working out of one's own office, etc. Moreover, we take notice that Laramie is perceived in many quarters as a unique venue in Wyoming, in terms of the demographics of its population and because it is the home of the University of Wyoming. That certainly was the view of the **[***72]** defense, and it was also the view of the defense that, although Natrona County was not a favorable venue because of the enormous amount of pretrial publicity generated by Wyoming's only newspaper of state-wide distribution, the *Casper Star-Tribune*, there were no other venues in the state that were particularly more favorable, or if there were venues somewhat more favorable, no courtroom was available for a trial in the applicable time frame. The effort to obtain a change of venue was abandoned when it became clear that a courtroom would not be available in Albany County.

[*P64] Two factors to be considered in whether or not to grant a change of venue are the nature and extent of the publicity surrounding the case and the difficulty or ease in selecting a' jury. As was the case in *Olsen*, here we do not perceive that publicity made the selection of an unbiased or "untainted" jury especially difficult. *Olsen, P84, 67 P.3d at 568*; also *see Barnes v. State, 2004 WY 146, PP 7-12, 100 P.3d 1256, 1258-60 (Wyo. 2004)*.

[*P65] It is conceded that no scientific studies of any sort were done by the defense to verify its view that Natrona County was as good a venue as any other, under the circumstances of this **[***73]** case (including that this case had a high profile in Wyoming and Montana, as well as a considerable profile nationally). However, we are cited no authority that the defense is required to make such studies, or that the failure to do such studies is reversible error, at least insofar as the guilt/innocence phase of trial is concerned. Likewise, we take note that the argument presented by Eaton in support of this issue was not especially persuasive. Appellate counsel go so far as to say that defense counsel simply "abandoned" Eaton with respect to this matter, as well as several others. We find no support for such a view in the record on appeal. Perhaps, we too often tend to look at Wyoming as a "unique" place, or at least an "out of the ordinary" state. It is said that Wyoming's highways make up Wyoming's "Main Street." There is at least a kernel of truth in that supposition, and we conclude that, based upon the record on appeal extant, defense counsel were not ineffective for not more vigorously seeking an alternative venue for Eaton's trial.

(vii) Failure to object to instructions.

[*P66] Defense counsel offered a comprehensive set of instructions for the trial court's consideration. The **[***74]** essence of this contention is that although good instructions were offered by the defense team, many of them were not used by the district court, and defense counsel failed to defend them or to object to the fact that they were not used. Ultimately, defense counsel accepted all the instructions used in the guilt/innocence phase after they were agreed to in an unreported instructions conference.

[*P67] **[**71]** Jury instructions should inform the jurors concerning the applicable law so that they can apply that law to their findings with respect to the material facts. Instructions should be written with the particular facts and legal theories of each case in mind and often differ from case to case since any one of several instructional options may be legally correct. A failure to give an instruction on an essential element of a criminal offense is fundamental error, as is a confusing or misleading instruction, and the test of whether or not a jury has been properly instructed on the necessary elements of a crime is whether or not the instructions leave no doubt as to the circumstances under which the crime can be found to have been committed. We analyze jury instructions as a whole and do not single **[***75]** out individual instructions or parts thereof. We give trial courts great latitude in instructing juries and will not find reversible error in the jury instructions as long as the instructions correctly state the law and the entire set of instructions sufficiently covers the issues which were presented at the trial. *Harlow, P 31, 105 P.3d at 1065-66*.

[*P68] In addition, we have said this about the presentation of a defendant's theory of the case or defense in an instruction:

> Our analysis at this level looks to the reasoning behind the refusal of the requested instruction by the trial judge. We begin by looking to ensure that the requested instruction "contain[s] a proper enunciation of the law in Wyoming" as it relates to the

theory of the case or defense advanced by the defendant. *Phillips, 760 P.2d at 391*. *See United States v. Coin, 753 F.2d 1510 (9th Cir.1985)*. It is critical that instructions correctly articulate Wyoming law because it is from the instructions that a jury decides if someone is to be found guilty or not guilty. "If part of an instruction is erroneous, a trial court may properly reject the entire instruction." *Griffin, 749 P.2d at 256*. Although the trial court has "no duty **[***76]** to excise objectionable portions of an instruction and rephrase it to properly state the law of the case," the defense counsel is not foreclosed from doing so. *Evans v. State, 655 P.2d 1214, 1218 (Wyo.1982)*. An instruction can also be refused without offending the defendant's due process guarantee if it is patently argumentative or unduly emphasizes one aspect of the case. *Thomas, 784 P.2d at 240*. *See State v. Johns, 112 Idaho 873, 736 P.2d 1327 (1987)*. The form of the instruction remains within the discretion of the trial court provided the substance of the requested theory of defense is otherwise given. *United States v. Meyer, 808 F.2d 1304 (8th Cir.1987)*.

It is also possible for an instruction to articulate Wyoming law properly and yet be incomplete such that the instruction "may be properly refused." *Stapleman v. State, 680 P.2d 73, 76 (Wyo.1984)*. If this does occur, it becomes "incumbent upon the court to either give the instruction or to otherwise properly instruct upon the accused's theory of the case," *id. at 76*, even "if the instruction, although not entirely correct, is at least sufficient to apprise the court of the theory of defense" advanced by the person accused. *Id. at 76*. **[***77]** *See People v. Moya, 182 Colo. 290, 512 P.2d 1155 (1973)*.

We next look to see if the refusal of the requested instruction was based upon the perception by the trial judge that the principle embodied in the requested instruction was equally presented to the jury through another instruction. "A trial court may refuse a proposed instruction if the principle embodied in the requested instruction is covered by other instructions." *Griffin, 749 P.2d at 256* (*accord Summers v. State, 725 P.2d 1033, 1044 (Wyo.1986)* and *Britton v. State, 643 P.2d 935, 938 (Wyo.1982)*). The given instruction must affirmatively present the defendant's theory of the case or defense before such substitution satisfies due process. Once the defendant requests an instruction be given which correctly articulates Wyoming law after. an offering of substantial evidence to underpin that request, the "court's failure to cause [defendant's] main defense to be affirmatively presented to the jury [constitutes] a denial of due process." *Blakely, 474 P.2d at 130* (emphasis added)(*accord* **[**72]** *State v. Hickenbottom, 63 Wyo. 41, 178 P.2d 119, 131 (1947)*).

Oien v. State, 797 P.2d 544, .548 (Wyo. 1990).

[*P69] With respect to the guilt/innocence phase, **[***78]** Eaton contends that Instruction No. 6 amounted to a comment on Eaton's right to remain silent:

INSTRUCTION NO. 6

> YOU ARE INSTRUCTED that a defendant in a criminal trial has a constitutional right not to testify. The reason the defendant need not testify is that he must be presumed innocent. The State carries the burden of proving the defendant's guilt beyond a reasonable doubt. You must not draw any inference from the fact that the defendant has chosen not to testify in this case. Further, you must neither discuss this matter nor permit it to enter into your deliberations in any way.

[*P70] This instruction was given exactly as requested by Eaton. In this appeal it is contended that it was error for counsel to request it and it was error for the district court to give it. This contention is simply not supported by cogent argument or pertinent authority. We have given the assertion a full measure of consideration and conclude that it is not an error under any standard that we can ascertain.

[*P71] Instruction No. 11 set out the eight counts contained in the criminal information filed in Eaton's case. Eaton contends that this unduly emphasized the crimes charged, misled and prejudiced the jury, and **[***79]** that reversal is required. The contention is not supported by cogent argument or pertinent authority and, while we have given it a full measure of consideration as well, we conclude that no error occurred in this regard.

[*P72] Finally, Eaton contends that defense counsel were deficient in their performance by offering Instruction No. 27 (in conjunction with No. 26), and the trial court erred by giving it:

> INSTRUCTION NO. 27
>
> YOU ARE INSTRUCTED that to occur "in the perpetration of" a felony the killing must occur in the unbroken chain of events comprising the felony. The time sequence is not important as long as the evidence, including the inferences, point to one continuous transaction. This means that, for a finding of felony murder, the killing must occur as part of the "things done to commit" the felony. While the sequence of events is not significant, their interrelationship is. A specific connection is required; the murder must occur in the performance of the felony for conviction of felony murder.
>
> In order for the defendant to be found guilty of felony murder, something more than a mere coincidence of time and place between the wrongful act and the death is necessary. It must appear that **[***80]** there was such actual relation between the killing and the crime committed or attempted that the killing can be said to have occurred as a part of the perpetration of the crime.

This instruction comprehends the instructions offered by the defense in a more compact form, i.e., in one comprehensive instruction rather than in four separate instructions. In combination with defense counsel's argument, this instruction fully presented Eaton's theory of his defense to' the jury and we do not perceive any error in it.

[*P73] Defense counsel were not ineffective with respect to the instructions used in the guilt/innocence phase.

(viii) The foregoing arguments, in combination, demonstrate that Eaton was abandoned by defense counsel.

[*P74] We made brief mention of this issue earlier. Eaton contends that because he was depressed, uncooperative, and a difficult client to manage, defense counsel simply abandoned him to his fate, rather than employing alternative methods or alternative counsel to overcome those obstacles. We view this contention as akin to a cumulative error argument. We have held that an accumulation of errors, although none may be reversible individually, may operate so as to deprive a defendant **[***81]** in a criminal case of a **[**73]** fair trial. *Wilde v. State, 2003 WY 93, P 31, 74 P.3d 699, 711-12 (Wyo. 2003)*(citing *Schmunk v. State, 714 P.2d 724, 745 (Wyo. 1986))*.

[*P75] In addition to the contention associated with (1) the motion for a change of venue, Eaton enumerates these matters in constructing his abandonment contention: (2). That he was not competent to stand trial and defense counsel failed to recognize that; (3) an insufficient effort was made to seat a qualified jury; (4) defense counsel failed to develop a unified theory of defense; (5) failed to challenge the DNA evidence with a counter-expert; (6) conceded the client's guilt to first degree murder; (7) failed to learn the applicable law for death penalty cases; (8) failed to object to instructions offered but refused; and (9) failed to act as his client's loyal advocate.

[*P76] As set out more fully above, we conclude that these matters were not errors at all, thus their cumulative effect could not have deprived Eaton of a fair trial, nor do they constitute an abandonment of Eaton by the defense team.

D. Hostility/Prejudice/Bias Toward Eaton at Guilt/Innocence Phase; Additional Remand

[*P77] The bulk of this issue addresses hostility that Eaton **[***82]** contends evidenced itself during the penalty phase and the remand hearing. To the extent this assertion is directed to the guilt/innocence phase, we will address that here. **We will also address here Eaton's contention that the remand hearing was unnecessarily abbreviated and that a second remand is required to more fully develop Eaton's ineffective assistance of counsel claims. We will address the penalty phase aspects of this issue in Part II of this opinion.**

[*P78] Only very recently we said this about the subject of judicial bias in a criminal trial:

> Marshall next argues he was deprived of a fair trial because the trial judge was biased against him and his trial counsel. As proof of this bias, Marshall alleges that the judge rebuked defense counsel, agreed with the State when it made objections, sustained objections before they were fully stated and interfered with counsel's examination of the witnesses. Marshall claims the judge's actions impeded his ability to present a defense and implied to the jury that the judge thought defense counsel was incompetent, thereby prejudicing the jury against him.

Marshall's argument consists solely of factually and legally unsupported allegations of judicial **[***83]** bias. In construing the word "bias," this Court has stated:

> Bias is a leaning of the mind or an inclination toward one person over another. The "bias" ... must be personal, and it must be such a condition of the mind which sways judgment and renders the judge unable to exercise his functions impartially in a given case or which is inconsistent with a state of mind fully open to the conviction which evidence might produce.

Pearson v. State, 866 P.2d 1297, 1300 (Wyo.1994) (citing *Hopkinson v. State, 679 P.2d 1008, 1031 (Wyo.1984)*; *see also TZ Land & Cattle Co. v. Condict, 795 P.2d 1204, 1211 (Wyo.1990)*. In condemning the trial judge, Marshall has not pointed to any evidence that the judge was predisposed to rule against him or that the judge's rulings were based on anything other than the law and the facts before him. Nor has Marshall cited to any authority that the alleged judicial improprieties he has identified, in and of themselves, legally constitute judicial bias. Instead, Marshall has merely provided a list of adverse rulings from the trial transcript and a bald assertion that the trial court was biased against him. An appellant must show more than the fact that a trial court ruled **[***84]** against him on any particular matter to demonstrate judicial bias. *Brown v. Avery, 850 P.2d 612, 616-17 (Wyo.1993)*. Marshall has failed to carry that burden.

Marshall v. State, 2005 WY 164, PP 6-7, 125 P.3d 269, 273 (Wyo. 2005).

[*P79] As was the case in *Marshall*, here Eaton failed to carry his burden. In the course of our review, we have comprehensively **[**74]** reviewed the transcripts of the voir dire and the guilt/innocence phase of the trial, and we find no evidence of the trial court being biased against Eaton, or in favor of the State, or that the district court showed favoritism to either party.

(i) Guilt/innocence phase prejudice/bias/hostility.

[*P80] Eaton contends that there were at least twelve instances wherein the district court evidenced a prejudice against him and his case. We enumerate those below. Eaton asserts that during the guilt/innocence phase, the trial court told the jury on several occasions that the penalty phase (1) "may require the jury to determine whether the death penalty must be imposed." On one occasion (2) the district court indicated that the jury would be called upon to determine if the death penalty "should be imposed." No objections were interposed. In addition, it is **[***85]** asserted that the district court instructed the jury that Eaton must prove mitigating factors by a preponderance of the evidence. No objections were interposed. During voir dire (3) the trial court would not allow Eaton to inquire into a juror's understanding of depression. With respect to two jurors, (4) the district court would not allow the defense to further inquire of jurors about their feelings concerning child abuse. With respect to three other jurors, (5) the district court entered into the voir dire to rehabilitate them when they expressed questionable views about the death penalty. The district court (6) excused a juror who indicated that she could not follow the instructions because she knew two of the defense witnesses. The district court (7) refused to excuse a juror for cause when he directly indicated that he considered. Eaton to be guilty, but was rehabilitated by the prosecution (it was also evident that this juror was not very anxious to serve because of business matters). When a juror indicated that he had heard about the case for over 16 years (but also stated that he was a "black and white guy," i.e., "I have to be shown things before I lean either way"), and expressed **[***86]** a view that he would impose the death penalty only under some circumstances (but also said he believed in "an eye for an eye" but agreed that application of the view might make everyone blind), the district court (8) erred in denying Eaton's motion to excuse that juror for cause. When the State persisted in asking a juror what types of cases were appropriate for the death penalty, the district court (9) overruled Eaton's objections to that line of questioning. The district court (10) instructed a potential juror that he did not have to call defense counsel "sir" (after the juror had used "sir" in eight consecutive answers, the district court said, "... I appreciate you're trying to be polite, but it isn't necessary to call him 'sir.'"). The district court (11) stated to one juror that "this trial will have two phases" (but qualified that with a further explanation that that was only so if the defendant was found guilty of first degree murder). Eaton contends that the district court showed its bias (12) when it told him, in front of the jury, to "calm down" when he had one of his outbursts.

[*P81] In summary, Eaton contends that just about every ruling the district court made during voir dire **[***87]** and the guilt/innocence phase that was adverse to him, demonstrated a prejudice against Eaton. Likewise, it is contended that just about every ruling that the district court made that was favorable to the State demonstrated a bias in favor of the State. We have examined the transcripts of Eaton's trial with great care and conclude that the district court did not demonstrate prejudice against Eaton, nor did it demonstrate a bias in favor of the State.

(ii) Need for additional remand.

[*P82] ***Eaton floats a contention that the remand hearing was unnecessarily abbreviated and that an additional remand is required. We do not agree that the district court failed to allow enough time for the remand hearing. This is borne out by our careful examination of the record, as well as by Eaton's failure to describe with some level of precision what could be accomplished by an additional remand.***

E. Juror Misconduct

[*P83] Eaton contends that a juror's misconduct requires reversal of his convictions. **[**75]** The juror in question went to the Government Bridge crime scene to take a look for himself and then relayed his findings during the jury's deliberations. Unquestionably, the juror's conduct was improper and remedial action **[***88]** of some sort was required. Any independent inquiry by a juror about the evidence violates the juror's duty to limit his consideration to the evidence, arguments, and law presented in open court. 89 C.J.S. *Trial*, §§ 775, 776, 780 (2001). However, it also is necessary for a defendant to demonstrate that a juror's misconduct operates in such a manner so as to prejudice his right to a fair trial. Jimmie E. Tinsley, *Jury Misconduct Warranting New Trial*, 24 Am.Jur. POF2d 633, 651-53 (§ 5. Independent investigations, tests, or experiments by jurors) (1980 and Supp. 2006); and see, e.g., *Guess v. State, 264 Ga. 335, 443 S.E.2d 477, 481 (Ga. 1994)*(in murder trial two jurors read newspaper article that related that the defendant had previously been found guilty of the crime; trial court did not abuse its discretion in denying motion for new trial or in denying motion to excuse the two jurors where they said they would not consider that in their deliberations); also see generally *Skinner v. State, 2001 WY 102, PP 10-15, 33 P.3d 758, 762-64 (Wyo. 2001)*.

[*P84] Here, the juror who conducted the investigation was excused and an alternate was seated in his place. The district court denied the motion for mistrial. The **[***89]** decision to grant a mistrial rests within the sound discretion of the trial court. Granting a mistrial is an extreme and drastic remedy that should be resorted to only in the face of an error so prejudicial that justice could not be served by proceeding with trial. E.g., *Allen v. State, 2002 WY 48, P 75, 43 P.3d 551, 575 (Wyo. 2002)*.

[*P85] It is evident that the juror misconduct created a significant crisis in these proceedings. We will give the "death is different" axiom its full measure of importance in this context. However, that axiom is tempered by the equally important concept that, even in a death penalty case, a defendant is entitled to a fair trial, but not a perfect trial.. The misconduct did create a crisis, but the district court ably surmounted that crisis by doing all that could have been done to salvage the hard work that had already been accomplished, while at the same time ensuring Eaton's right to a fair trial.

[*P86] The jury began its deliberations in the guilt/innocence phase in the early afternoon on Monday, March 15, 2004. At 9:55 a.m., on Tuesday, March 16, 2004, the district court called all attorneys and parties to the courtroom to consider a question raised by the jury. **[***90]** The question was this: "The jury members have a serious concern about one jury person that openly admitted going out to Government Bridge [where, according to the testimony at trial, Ms. Kimmel's body was thrown into the North Platte River], to investigate and form an opinion about the tire track evidence presented during the case."

[*P87] The district court called the juror who created this problem (hereafter referred to as JJC) into the courtroom, in order to make a discreet further inquiry. JJC conceded that he had done his own investigation, but that his comments were not a matter of substantial discussion. In order to explore the matter further, the jury foreperson was called into the courtroom. The foreperson related that the matter had been a matter of substantial discussion and that nine out of the eleven other jurors expressed serious concern.

[*P88] It was decided that replacing JJC with an alternate was essential, but the lead defense counsel also indicated that he needed time to consider a mistrial motion. The trial court heard argument on the mistrial motion later that morning and decided that further inquiry of the jury was appropriate under these circumstances. Before that inquiry **[***91]** was commenced, the parties agreed to the general time lines leading up to this incident. On March 15, 2004, the jury began its deliberations at 2:05 p.m., and retired for the day at 5:00 p.m. The jury. resumed deliberation at 9:00 a.m. on March 16, 2004, and the note came to the trial judge at about 9:45 a.m. that same day. At that time, the trial court told the jury to cease its deliberations. The admonition to cease deliberations was given again when the jury was informed that JJC had been excused from the jury.

[76]** **[*P89]** The eleven remaining jurors were then brought into the courtroom for further inquiry. We

will summarize their responses to the district court's questions (which the parties agreed to), numbering the juror's (1) - (11) as their responses appear in the record:

(1) Juror (1) said she could put aside JJC's comments and begin deliberations anew, with a new juror, relying only on the evidence presented at trial.

(2) Juror (2) said the same.

(3) Juror (3) was more of a problem. Initially he did not think he would be able to put the errant comments of JJC aside and that it would influence him in further deliberation. Eventually, the district court clarified the crux of the question **[***92]** Juror (3) was being asked, and he changed his mind (i.e., once the juror understood that JJC would no longer be on the jury). Although it took up over six pages of the transcript to straighten this out, the juror eventually agreed that he could start deliberations over from scratch with a clean slate.

(4)(5)(6)(7)(8)(9)(10)(11). The remainder of the jurors said they could put aside JJC's comments and begin deliberations anew, with a new juror, relying only on the evidence presented at trial.

[*P90] Defense counsel then renewed his motion for mistrial and, failing that, that Juror (3), discussed above, also be replaced with an alternate juror. The district court denied both motions.

[*P91] We conclude that Eaton was not prejudiced by JJC's misconduct and that the district court adequately addressed all of the concerns raised by that misconduct.

F. Admission of Evidence

[*P92] Eaton contends that the district court erred in several respects with regard to the admission of evidence. Evidentiary rulings are within the sound discretion of the trial court. This Court will generally accede to the trial court's determination of the admissibility of evidence unless that court clearly abused its discretion. We have **[***93]** described the standard of an abuse of discretion as reaching the question of the reasonableness of the trial court's choice. Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria. It also means exercising sound judgment with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. In the absence of an abuse of discretion, we will not disturb the trial court's determination. The burden is on the defendant to establish such abuse. *Trevino v. State, 2006 WY 113,P 10, 142 P.3d 214, 217 (Wyo. 2006)*.

(i) Testimony of Joe Dax.

[*P93] Joe Dax was incarcerated in the Natrona County Detention Center in a cell near that in which Eaton was housed during the time April 3, 2003 through April 8, 2003. Eaton objected to Dax's testimony for many reasons. For one thing, Eaton maintained through his attorneys that he had never spoken with Dax (and Dax's appearance in the courtroom produced one of Eaton's outbursts). In addition, Eaton's attorneys claimed that Dax's proposed testimony was patently false and was being given only in the hope that it would help Dax with mitigating the sentences to be imposed for his pending **[***94]** crimes.

[*P94] Of even greater importance, Dax's testimony included an admission on Eaton's part that he had made a pass at Ms. Kimmell, who had helped him out by giving him a ride, and that she became angry and stopped her car and ordered him to get out. Eaton did not get out, but instead grabbed her and sexually assaulted her. It took a considerable amount of leading questioning by the prosecutor to get Dax to state why he knew Eaton had had sexual contact with Ms. Kimmel, but eventually he said that Eaton commented that she was "a lousy lay." The district court overruled the defense attorney's objections, but admonished the jury "Ladies and gentlemen, that statement is offered to you solely for the purpose of Mr. Blonigen's question, which was to indicate whether or not -- and again, it's up to you to evaluate this testimony -- Mr. Eaton had any sexual contact with Ms. Kimmell." After the admonishment, the prosecutor repeated Dax's comment word for word, and Dax agreed that was what Eaton had said to him.

[77]** [*P95]** The essence of Eaton's contention in this regard is that this evidence was so inflammatory and prejudicial that its admission was error that requires reversal of his conviction. We have **[***95]** said in several contexts that allowing the admission of such testimony will be viewed as reversible error only if the defendant can demonstrate that the evidence had little or no probative value and that it was extremely inflammatory or introduced for the purpose of inflaming the jury. E.g., *Dike v. State, 990 P.2d 1012, 1019-20 (Wyo. 1999)*; *Law v. State, 2004 WY 111, PP 16-29, 98 P.3d 181, 187-91 (Wyo. 2004)*; compare *Perritt v. State, 2005 WY 121, PP 26-29, 120 P.3d 181, 193 (Wyo. 2005)*.

[*P96] Evidence that points to guilt is, by its very nature, prejudicial. Here, Dax's testimony went to the heart of the crime: that Eaton was with Ms. Kimmell, and that he kidnapped her, sexually assaulted her, and murdered her. However, we agree that the prosecutor used poor judgment in allowing it to be a part of his case, a crucial case for the Kimmell family, for the citizens of this State, and for Eaton. The district court might well have disallowed its admission because all parties knew it was coming and the objections were made well in advance of its telling. However, the district court admonished the jury that it was admissible only as proof of Eaton's having sex-

ually assaulted his victim. Under **[***96]** these circumstances, we conclude that the district court did not abuse its discretion in allowing its admission, and the probative value of the evidence, as limited by the trial court's instruction, was not outweighed by its prejudicial or inflammatory qualities.

(ii) Dr. Thorpen in the jury box.

[*P97] This issue arose as the jury was being shown Exhibits 632 and 633. These exhibits are quite grisly, as they are color photographs of Ms. Kimmell's chest cavity, essentially looking from the inside out. They are basically blood red in color, and depict the stab wounds as they enter the chest cavity through the ribs from the outside of her body. Defense counsel objected to their admission, but that objection was overruled. The issue raised in this appeal with respect to those exhibits results, in part, from their admission and, in part, because Dr. Thorpen went into the jury box with them and personally showed them to jurors, pointing out the wounds in more detail because some jurors were not able to make out the details shown by those photographs. The defense made no objection to this incident. Because there was no objection, we consider this under the plain error standard: (1) The record must **[***97]** clearly present the incident alleged to be error; (2) Eaton must demonstrate that a clear and unequivocal rule of law was violated in a clear and obvious, not merely arguable, way; and (3) Eaton must demonstrate that he was denied a substantial right resulting in material prejudice to him. *Lopez v. State, 2006 WY 97, P 18, 139 P.3d 445, 453 (Wyo. 2006)*.

[*P98] Eaton's contention is that this caused some jurors to view the evidence in a different light than other jurors, and that it gave undue weight to those photographs. Neither party has cited authority directly in point, and our own research effort did not uncover such a case. While it certainly may be the preferred practice not to allow a witness to mingle in such a manner with the jurors, we are unable to categorize it as plain error meriting reversal of Eaton's convictions.

(iii) Mary Follette.

[*P99] Mary Follette testified that she had a conversation with Eaton in 1991. In that conversation Eaton advised her: "He said that - he made me promise him that I would not stop at any of the rest areas, because that's where rape - women got raped and killed." Eaton's contention is that the evidence was not relevant and that its relevance, if any, was **[***98]** outweighed by its prejudice to Eaton and because it tended to inflame the jury as well. The district court overruled the objection. The admission of circumstantial evidence is extremely liberal, allowing for the admission of any circumstances that shed light on the matter being investigated. See *Wentworth v. State, 975 P.2d 22, 27 (Wyo. 1999)*.

[*P100] We conclude that the district court committed no errors with respect to **[**78]** the admission or exclusion of evidence that would require reversal of Eaton's seven convictions.

G. Record Incomplete

[*P101] Eaton contends that the record of the proceedings during the guilt/innocence phase is not complete. Under the authority of *Bearpaw v. State, 803 P.2d 70, 78-79 (Wyo. 1990)*, which requires that the record on appeal be at least sufficient and complete enough for this Court to give the central issues meaningful review, and W.R.A.P. 3.02(a), which requires, that transcripts in criminal cases consist of **all proceedings**, he claims his convictions must be reversed. Eaton contends that the record is deficient. The focus of this argument is the instructions conference that preceded the charge to the jury in the guilt/innocence phase, but includes a few other nonspecific **[***99]** instances where the transcripts suggest that court and counsel conferred off-the-record. However, no effort was made below to augment the record on appeal under the auspices of W.R.A.P. 3.03 or 3.04. **[***100]** Defense counsel's reasons for not insisting that the in-chambers conference on the guilt/innocence phase instructions be recorded by a court reporter was explored during the remand hearing on the ineffective assistance of counsel issues. In this appeal, appellate counsel note that, in the initial proceedings in Eaton's case, defense counsel insisted that the instructions conference be reported, and that defense counsel's testimony at the remand hearing was merely self-serving, after-the-fact justification for the failure to insure that this portion of the proceedings was properly reported. Appellate counsel also note that a request was made to this Court for a stay of the briefing schedule so that off-the-record discussions could be reconstructed, and this Court denied that request. However, we take note that our order denied the motion, but with the admonition that such a reconstruction could readily take place within the generous briefing schedule and without a stay of the proceedings.

[*P102] Whatever efforts may have been made by appellate counsel to augment the record, beyond those found in the transcript of the remand hearing, are not called to our attention. Our perusal of the remand **[***101]** hearing transcripts, as well as the transcripts of the trial itself, leaves us well satisfied that the failure to have a reporter present at the instructions conference, and the instances where court and counsel parleyed off the record (most often over "house-keeping" matters), do not constitute an error that requires the reversal of Eaton's convictions.

H. Prosecutorial Misconduct

[*P103] Eaton contends that the prosecutor engaged in misconduct during the guilt/innocence phase of the trial

in only one instance. Before we will hold that an error in the nature of prosecutorial misconduct has affected an accused's substantial rights, thus requiring reversal of a conviction, we must conclude that based upon the entire record, a reasonable possibility exists that in the absence of the error the verdict might have been more favorable to the accused. *Harlow, P 25, 105 P.3d at 1063*; *Williams v. State, 2006 WY 131,P 37, 143 P.3d 924, 934 (Wyo. 2006)*(and cases cited therein). Moreover, a decision to reverse on such a basis hinges on whether or not a defendant's case has been so prejudiced as to constitute denial of a fair trial. The propriety of any comment within a closing argument is measured in the **[***102]** context of the entire argument. *Dysthe v. State, 2003 WY 20, P22, 63 P.3d 875, 884 (Wyo. 2003)*. If there is no objection to instances of alleged misconduct, we review under the plain error rule. *Id. at P 23*.

[*P104] Eaton contends that there was no evidence to support the inference argued for by the prosecutor that Ms. Kimmell must have known from the time she was first abducted by Eaton what her fate was going to be. We deem this to be fair argument premised on evidence that Kimmell was held captive for a period that could have been two days, but more probably lasted seven days. Kimmell was handled roughly, bound, and raped 'during her captivity. Her killing involved a massive skull fracture and methodical, multiple stabbings. The prosecutor's argument was within the bounds set by our precedents on this subject.

[79] I. Cumulative Error**

[*P105] Eaton contends that if the cumulative effect of the errors outlined above is considered, then Eaton's convictions must be reversed and this matter remanded for a new trial. We have said that the purpose of the cumulative error rule is to address whether or not the cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant **[***103]** to the same extent as a single reversible error. In that equation, we only consider matters determined to be errors, not matters asserted- to be errors but determined **not** to be erroneous. Moreover, a series of harmless or nonprejudicial errors will only be cause for reversal where the accumulated effect constitutes prejudice and the conduct of the trial is other than fair and impartial. *McClelland v. State, 2007 WY 57, P 27, 155 P.3d 1013, 1022 (Wyo. 2007)*; *Luedtke v. State, 2005 WY 98, P 36, 117 P.3d 1227, 1234 (Wyo. 2005)*. For the most part, we have found no errors in the guilt/innocence phase. To the extent some harmless error has been identified herein, or to the extent we have opined that a different approach may be preferable to that adopted by the trial court, we are compelled to conclude that cumulative error is not a factor in the guilt/innocence phase of this case, and we will not reverse Eaton's convictions on that basis.

CONCLUSION

[*P106] We have examined the briefs of the parties and the record on appeal with the utmost care, and we hold that no error occurred during the guilt/innocence phase of Eaton's trial that would require reversal of his seven convictions. Therefore, the **[***104]** judgment of the district court is affirmed in all respects.

PART II: Sentencing Phase

[*P107] We begin this part of the opinion with an acknowledgment that some of the errors asserted in Part I of the opinion may have an effect on our analysis of the issues that relate to the penalty imposed in this case. By this we do not suggest cumulative error, because we will deal with that separately. Although the asserted errors that occurred during the guilt/innocence phase did not operate to invalidate Eaton's convictions, the errors we considered and rejected with respect to the guilt/innocence phase may affect our view of the validity of the sentence imposed. Where that is the case, we will be direct in including those matters in the equation.

A. Voir Dire

[*P108] Eaton contends that the voir dire of the jury was so poorly done by the defense team that the penalty imposed must be remanded for a new sentencing trial. This issue is presented principally in the context of ineffective assistance of counsel, with a more generalized failure of the voir dire process woven into it. We treat ineffective assistance of counsel in the next section of this Part of our opinion, but with respect to voir dire, and especially **[***105]** the death qualifying process, we will dispose of all issues raised here. The trial court has an affirmative duty to ensure that a jury of competent, fair, and impartial persons is impaneled; however, the conduct of voir dire and the impaneling of a jury are functions committed to the discretion of the trial court, and we do not reverse the exercise of that discretion by a trial court absent clear abuse. *Olsen,P 196, 67 P.3d at 604*.

[*P109] We set out the standards for a proper, death-qualifying voir dire in *Harlow, PP 15-24, 70 P.3d at 187-89*:

> In presenting this argument, Harlow seeks to tease out of the opinions of the United States Supreme Court in *Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985)*, and *Morgan v. Illinois, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992)*, talismanic

language for conducting voir dire in a capital case. In *Witt*, the United States Supreme Court adopted as the appropriate standard for excluding a prospective juror from a capital case because of his or her views on capital punishment the proposition of whether the individual's views would "prevent or substantially impair the performance of his duties as a juror in accordance with **[***106]** his instructions and his oath." *Witt, 469 U.S. at 424, 105 S.Ct. at 852*. Subsequently, **[**80]** the United States Supreme Court clarified the *Witt* opinion in *Morgan*. In the *Morgan* case, the United States Supreme Court reversed a capital sentence because the trial court had refused to ask potential jurors, "If you found [the defendant] guilty, would you automatically vote to impose the death penalty no matter what the facts are?" *Morgan, 504 U.S. at 723, 112 S.Ct. at 2226*. Instead, the trial court had posed this question to the venire, "Would you follow my instructions on the law even though you may not agree?" The United States Supreme Court held the question asked to be inadequate to reveal potential jurors who had refused to consider mitigating circumstances. The United States Supreme Court explained

> 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 do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror. Therefore, **[***107]** based on the requirement of impartiality embodied in the *Due Process Clause of the Fourteenth Amendment*, a capital defendant may challenge for cause any prospective juror who maintains such views. If even one such juror is empanelled and the death sentence is imposed, the State is disentitled to execute the sentence.
>
> *Id. at 729, 112 S.Ct. at 2229-30*. Subsequently, the United States Supreme Court articulated the goal, saying, "[p]etitioner was entitled, upon his request, to inquiry' discerning those jurors who, even prior to the State's case in chief, had predetermined the terminating issue of his trial, that being whether to impose the death penalty." *Id. at 736, 112 S.Ct. at 2233*.

In Wyoming, the legislature clearly has adopted the *Witt* proposition in *Wyo. Stat. Ann. § 7-11-105 (a)(iii)*(Michie 1997), which states:

> (a) The following is good cause for challenge to any person called as a juror in a criminal case:
>
> * * *
>
> (iii) In a case in which the death penalty may be imposed, he states that his views on capital punishment would prevent or substantially impair performance of his duties as a juror in accordance with his oath or affirmation and the instructions of the court[.]

The gravamen of **[***108]** Harlow's contentions relative to the voir dire examination of the jury is that the trial court did not ask prospective jurors whether they held views that would "prevent or substantially impair" them from sentencing him to life imprisonment in the event of a conviction. Harlow presented the issue several months before trial in a "Motion for Legal Standard/Definition by Court of Death Qualification." In that motion, Harlow invoked *Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968)*, which he contended recognized error for the dismissal of veniremen mainly because they do not believe in capital punishment and acknowledged that they have conscientious or religious scruples against the infliction of the death penalty. On the same day, Harlow submitted a motion to remove for cause jurors who will automatically vote for death in which he invoked *Morgan* to support an argument that jurors also should be asked whether they automatically vote for the

death penalty in every case. In substance, Harlow was asking for the question that the trial court posed using substantially the language from *Morgan*.

Subsequently, at a pretrial motion hearing, Harlow's counsel contended **[***109]** that the law did not deny to the prosecution the ability to challenge for cause those who say they would never vote to impose the death penalty, but that the prosecution could not dismiss veniremen merely because they did not believe in capital punishment. The response was that Harlow simply was demanding that the State be ordered to comply with *§ 7-11-105(a)(iii)*. At the continuation of the hearing, Harlow also requested that the trial court enter an **[**81]** order stating that anybody who automatically would vote for the death penalty under these particular sets of circumstances is not qualified to serve.

When jury selection for Harlow's trial began, defense counsel repeatedly violated W.R.Cr.P. 24 and also a prior order of the trial court by asking questions that the trial court deemed inappropriate. Counsel persisted despite repeated warnings; and after counsel refused to stop talking while making his presentation despite caution from the trial court to stop, the trial court announced that it would conduct voir dire. The trial court then denied Harlow's motion for a mistrial and noted that the jurors were questioned specifically about attitudes regarding the death penalty and were asked **[***110]** about their inclination to automatically impose the death penalty in accordance with the question approved in *Morgan*. The trial court also pointed out that jurors were asked the *Witt* question ascertaining whether the jury would never vote for the death penalty.

We review the trial court's conduct of jury voir dire under an abuse of discretion standard. *Vit v. State, 909 P.2d 953, 960 (Wyo.1996)*. We have said with respect to our examination of judicial discretion that "[w]e perceive the core of our inquiry as reaching the question of reasonableness of the choice made by the trial court." *Vaughn v. State, 962 P.2d 149, 151. (Wyo.1998)*. In *Vaughn*, we reaffirmed our adoption in *Martin v. State, 720 P.2d 894, 897 (Wyo.1986)*, of the following standard:

> Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. *Byerly v. Madsen, 41 Wash.App. 495, 704 P.2d 1236 (1985)*.

Vaughn, 962 P.2d at 151.

In analyzing Harlow's contentions, we are persuaded that the goal of the voir dire with respect to establishing a challenge **[***111]** for cause as it is articulated in *§ 7-11-105(a)(iii)* is to identify those jurors at both ends of the spectrum. According to the *Witt* standard, those jurors who would never impose a death penalty presumably would insert "yes" to the question captured in the statute. The effort also would be made to eliminate jurors who would always vote for the death penalty in accordance with the *Morgan* standard. Harlow contends that in making the latter endeavor, the trial court should invoke the "prevent or substantially impair" language even though the question is more direct than the statute or Witt requires. Harlow contends that *Morgan* demands that his position be adopted, but in our view that claim misses the essential point found in *Morgan*. We prefer a more pragmatic analysis that is articulated in opinions from two United States Courts of Appeal.

In *McQueen v. Scroggy, 99 F.3d 1302, 1329-30 (6th Cir.1996)*, the United States Court of Appeals for the Sixth Circuit upheld a capital sentence in an instance in which the appellant claimed he had not been allowed to question potential jurors adequately on whether they would impose the death sentence in every circumstance. *McQueen* determined that error **[***112]** occurred when the trial court refused to ask questions proposed by the trial counsel for his co-defendant: "Would you inflict the death penalty in all murders?"; "In what kinds of cases do you think the death penalty is warranted?"; and "Do you believe the death penalty is a deterrent?" *Id. at 1329*. The trial court instead asked each juror whether the juror could accept and impose any penalty within the statutorily specified range in the event of conviction. The United States Court of Appeals for the Sixth Circuit said:

> A person who answers that he will consider every possible penalty ... is by virtue of that answer disclaiming the intent to impose the death penalty in every case. There are no magic words in these circumstances. Here the questions and answers disclose that the jurors were ready to consider each of the penalties that could be imposed, and that they were not predisposed to give only death or to act with leniency. It would be a game of semantics, not law, to **[**82]** conclude that the failure to phrase a question in a specific way is fatal where other questions are equally illuminating.

Id. at 1330.

Subsequently, the United States Court of Appeals for the Tenth Circuit arrived at a **[***113]** similar conclusion

in *United States v. McVeigh, 153 F.3d 1166, 1205-06 (10th Cir.1998)*. McVeigh argued that the trial court unconstitutionally constrained him in examining the venire and prevented him from learning whether individual jurors automatically would vote for death upon a conviction. The United States Court of Appeals for the Tenth Circuit held that the trial judge properly excluded this question:

> If the allegations did--if you served on the jury and heard all the evidence in the guilty/innocence part of the trial and the jury voted that Mr. McVeigh was guilty, would you feel in that instance that the death penalty automatically should apply?

The court reasoned that "*Morgan* does not require courts to permit improperly phrased questions, such as questions that misstate the law or confuse the jurors." *Id. at 1207*. The court went on to say:

> Further, the question is susceptible of an interpretation asking the juror how she would vote on the evidence presented at trial. That is a question broader than the scope of inquiry *Morgan* requires. The question approved in *Morgan* was the following: "If you found [the defendant] guilty, would you automatically vote to impose the death penalty **[***114]** no matter what the facts are?" *Morgan, 504 U.S. at 723, 112 S.Ct. 2222, 119 L.Ed.2d 492* (emphasis added). The Supreme Court felt such a question was necessary to identify jurors who would always impose the death penalty upon conviction of a capital offense "regardless of the facts and circumstances of conviction." *Id. at 735, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492*.

McVeigh, 153 F.3d at 1207.

> The record in this case demonstrates that the trial court asked prospective jurors whether their views would "always require" them to impose the death penalty following a conviction for murder. The question asked is calculated to elicit the same information as the question required by the United States Supreme Court in *Morgan*, "If you found [the defendant] guilty, would you automatically vote to impose the death penalty no matter what the facts are?" Furthermore, the trial court complied with the requirements of the Wyoming statute that adopts the rule of *Wilt*. We hold that the voir dire questions posed by the trial court were sufficiently similar to the question approved in *Morgan* as to be "equally illuminating." We do not perceive that it is necessary to fetter the discretion of the trial **[***115]** court by structuring any further mandatory phrasing of questions of the veniremen. Certainly, in the exercise of its discretion, the trial court is able to form a conclusion as to how effective the communication is between counsel or the court and the potential jurors being questioned, and we perceive no abuse of discretion in what was accomplished in this case.

Also see *Olsen, PP 64-69, 67 P.3d at 561-63*.

[*P110] Eaton makes arguments similar to those propounded by Harlow. He contends that the biases of his jury were neither adequately explored nor objected to, even when obvious. Furthermore, he asserts that his attorney's conduct "was not 'strategic' but instead a failure 'to exercise the customary skill and diligence that a reasonably competent attorney would provide.'" Continuing, Eaton contends that the trial court also had a duty to ensure that the jurors' biases and attitudes were adequately explored, which the trial court failed to do.

[*P111] As we begin our analysis of the voir dire as it pertained to the death qualifying process, we note that the district court conducted the voir dire in several large groups (approximately 27-33 to a group). The district court made comments at the opening **[***116]** of each of these sessions as did the prosecutor and the defense attorney. The comments made by the district court and counsel were agreed to prior to beginning of voir dire. Although the comments varied a bit from group to group, they could be most accurately characterized as "scripted." Prior **[**83]** to the beginning of the first session, counsel for both sides agreed that they had no objections to the district court's planned comments or to the comments of each other.

[*P112] In analyzing this case, we have, of course, examined the entire voir dire which consumed six full days, and part of a seventh (February 23-27, 2004, and March 1-2, 2004). We have most carefully examined the transcript regarding the specific jurors to whom Eaton directs our attention. We will not set out the questioning of each of the jurors mentioned by Eaton in detail in this opinion, because to do so would make it unnecessarily long. With respect to the voir dire, we are satisfied to make these observations. The district court did a creditable and evenhanded job of overseeing the process and established

clear guidelines prior to the beginning of that difficult process. The parties agreed to the sorts of questions that could **[***117]** be asked under the then prevailing standards set out in the cases of the United States Supreme Court, the appellate courts of many of our sister states, as well as the guidance provided in opinions within our own jurisprudence. We are satisfied, in particular, that the district court was unerring in its granting excusals for cause where a juror expressed a view that suggested he/she would always or almost always impose the death penalty, and, hence, would be "prevented or substantially impaired" from properly applying the law in that regard. Although the opposite circumstance did not arise quite so often, the district court was likewise unerring in excusing jurors who said they could "never" impose the death penalty. However, such excusals for cause were not granted until the juror had made it clear beyond cavil that he/she could not impose the death penalty under any circumstances and could not put that view aside and follow the law as given to the jury by the court.

[*P113] In the lengthy portion of his brief wherein Eaton challenges aspects of the voir dire, his contentions are based primarily on selected passages taken out of ten or twelve pages (per juror) of questioning. Indeed, if those **[***118]** passages had been representative of the jurors' responses to questioning, some serious problems would have existed. However, in each and every instance, when the entirety of the questioning process is considered, it was then revealed that jurors who were fully qualified under the applicable test were passed to the jury, just as when the juror was not so qualified he/she was excused.

[*P114] Although this case faced its fair share of problems, the voir dire is one area where we commend all the participants for their commitment to doing the voir dire in accordance with the prevailing standards, and to the very best of their respective abilities. See *Uttecht v. Brown, 551 U.S. 1, 127 S.Ct. 2218, 2222-2231, 167 L.Ed. 2d 1014 (2007)*.

B. Application of the 2003 Statute to this Case

[*P115] This issue arises under Article 1, § 10 of the United States Constitution which prohibits a state from passing any ex post facto law, as well as *Wyo. Const. art. 1, § 35* ("No ex post facto law...shall ever be made."). "Ex post facto law" is a phrase of art in the law. It is defined as "[a] law that impermissibly applies retroactively, esp. in a way that negatively affects a person's rights, as by criminalizing an action **[***119]** that was legal when it was committed." Black's Law Dictionary, 620 (8th ed. 2004). Its more precise contours are given substance by "an accretion of case law." As articulated by this nation's highest court in *Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 2298, 53 L.Ed.2d 344 (1977)* (quoting *Beazell v. Ohio, 269 U.S. 167, 169-70, 46 S.Ct. 68, 70 L.Ed. 216 (1925))*:

> It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*.

Also see *Carmell v. Texas, 529 U.S. 513, 120 S.Ct. 1620, 1626-31, 146 L.Ed.2d 577 (2000)*; *Collins v. Youngblood, 497 U.S. 37, 110 S.Ct.* **[**84]** *2715, 111 L.Ed.2d 30 (1990)* (clarifying "confusions" in the meaning of "ex post facto"); *In re Wright, 3 Wyo. 478, 480-81, 27 P. 565, 29 L.R.A. 748. (Wyo. 1891)*; *Snyder v. State, 912 P.2d 1127, 1130-31 (Wyo. 1996)*. The analysis is the same whether considered under **[***120]** the United States Constitution or the Wyoming Constitution.

[*P116] Eaton contends that the district court erred in allowing him to stipulate that portions of the 2003 death penalty statute would apply to his case, instead of the statute that was in place at the time the crime was committed in 1988 (not using the 1989, 1999, and 2001 amendments). In essence, he contends that the 2003 version of the death penalty statute made "more burdensome the punishment for a crime after its commission." Defense counsel entered into that stipulation with the prosecutor (and the district court condoned it), because all three agreed that the 2003 version included some advantages for Eaton, but no disadvantages, and Eaton should be entitled to the benefit of those advantages. However, this came after defense counsel had championed strict application of the law, *Wyo. Stat. Ann. § 6-2-102* (Michie 1983), in effect at the time of the crime (1988), and opposed application of the 2003 version of *§ 6-2-102*. Initially, the district court agreed that the version of the statute in place in 1988 had to be applied. On appeal, Eaton now contends that some of the amendments were disadvantageous to him.

[*P117] In the proceedings **[***121]** below, and in the briefs filed in this Court, there are a variety of references to various years of the statutes at issue. In some cases, only the term "current" is used (in years 2003 and 2004). On remand for the *Calene* hearing, it is not made clear exactly what statutes were applied, or at least what statutes the prosecution and defense agreed to apply. Initially, the district court granted Eaton's motion to apply only the law as it stood in 1988. On January 13, 2004, an

order was entered that acknowledged that the district court granted the earlier motion, but went on to say that it is "understood between the parties that the order shall be limited to exclude the aggravator of 'future dangerousness' and it is further stipulated that in all other respects the current statutory scheme shall govern this case including, but not limited to, the penalty option of life without parole." The briefs are not entirely clear in this regard either. However, we are satisfied that the 2001 and 2003 versions are the same, and that by "current," everyone agreed to apply the statutes as they appeared in the 2003 statutes. The analysis set out below will compare the statute as it stood at the time **[***122]** of the crime (1988), and as it appeared in the 2003 version of the Wyoming Statutes.

[*P118] Appellate counsel appear to suggest that perhaps trial counsel yielded to pressure from the district court which had apparently changed its mind to apply the then current version of the first degree murder statute, in any event. Thus, as a matter of "strategy," defense counsel entered into the stipulation so as to get "future dangerousness" off the table and to appease the district court. This subject is also a part of the "ineffective assistance of counsel" issues which come up later in this Part of our opinion.

[*P119] At the time Eaton committed these crimes, *Wyo. Stat. Ann. § 6-2-102*. (Michie 1983) provided:

> ***§ 6-2-102.*** **Presentence hearing for murder in the first degree; mitigating and aggravating circumstances; effect of error in hearing.**
>
> (a) Upon conviction of a person for murder in the first degree the judge shall conduct a separate sentencing hearing to determine whether the defendant should be sentenced to death or life imprisonment. The hearing shall be conducted before the judge alone if:
>
> > (i) The defendant was convicted by a judge sitting without a jury;
> >
> > (ii) The defendant has pled guilty; or
> >
> > (iii) The **[***123]** defendant waives a jury with respect to the sentence.
>
> (b) In all other cases the sentencing hearing shall be conducted before the jury which determined the defendant's guilt or, if the judge for good cause shown discharges that jury, with a new jury impaneled for that purpose.
>
> **[**85]** (c) The judge or jury shall hear evidence as to any matter that the court deems relevant to a determination of the sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (h) and (j) of this section. Any evidence which the court deems to have probative value may be received regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements, and provided further that only such evidence in aggravation as the state has made known to the defendant or his counsel prior to his trial shall be admissible.
>
> (d) Upon conclusion of the evidence and arguments the judge shall give the jury appropriate instructions, including instructions as to any aggravating or mitigating circumstances, as defined in subsections (h) and (j) of this section, or proceed as provided by **[***124]** paragraph (ii) of this subsection:
>
> (i) After hearing all the evidence, the jury shall deliberate and render a recommendation of sentence to the judge, based upon the following:
>
> (A) Whether one (1) or more sufficient aggravating circumstances exist as set forth in subsection (h) of this section;
>
> (B) Whether sufficient mitigating circumstances exist as set forth in subsection (j) of this section which outweigh the aggravating circumstances found to exist; and
>
> (C) Based upon these considerations, whether the defendant should be sentenced to death or life imprisonment.
>
> (ii) In nonjury cases, the judge shall determine if any aggravating or mitigating circumstances exist and impose sentence within the limits prescribed by law, based upon the considerations enumerated in subparagraphs (A), (B), and (C) of this subsection.

(e) The death penalty shall not be imposed unless at least one (1) of the aggravating circumstances set forth in subsection (h) of this section is found. The jury, if its verdict is a recommendation of death, shall designate in writing signed by the foreman of the jury the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In nonjury cases the **[***125]** judge shall make such designation. If the jury cannot, within a reasonable time, agree on the punishment to be imposed, the judge shall impose a life sentence.

(f) Unless the jury trying the case recommends the death sentence in its verdict, the judge shall not sentence the defendant to death but shall sentence the defendant to life imprisonment as provided by law. Where a recommendation of death is made, the court shall sentence the defendant to death. [4]

(g) If the trial court is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment.

(h) Aggravated circumstances are limited to the following:

(i) The murder was committed by a person under sentence of imprisonment;

(ii) The defendant was previously convicted of another murder in the first degree or a felony involving the use or threat of violence to the person;

(iii) The defendant knowingly created a great risk of death to two (2) or more persons;

(iv) The murder was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual **[***126]** assault, arson, burglary, kidnapping or aircraft piracy or the unlawful throwing, placing or discharging of a destructive device or bomb;

(v) The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(vi) The murder was committed for pecuniary gain;

[86] (vii) The murder was especially heinous, atrocious or cruel;**

(viii) The murder of a judicial officer, former judicial officer, district attorney, former district attorney or former county and prosecuting attorney, during or because of the exercise of his official duty.

(j) Mitigating circumstances shall be the following:

(i) The defendant has no significant history of prior criminal activity;

(ii) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(iii) The victim was a participant in the defendant's conduct or consented to the act;

(iv) The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor;

(v) The defendant acted under extreme duress or under the substantial domination of another person;

(vi) The capacity of the defendant to appreciate the criminality **[***127]** of his conduct or to conform his conduct to the requirements of the law was substantially impaired;

(vii) The age of the defendant at the time of the crime. [Emphasis added.]

4 This subsection was repealed in 2001. 2001 Wyo. Sess. Laws ch. 96 § 3.

[*P120] At the time of Eaton's trial, *Wyo. Stat. Ann. § 6-2-102* (LexisNexis 2003) provided that (Additional material and reorganized material are indicated by **boldface** type. Material deleted is shown in strike out, although in a few cases it has merely been moved elsewhere in the statute.):

***§ 6-2-102*. Presentence hearing for murder in the first degree; mitigating**

and aggravating circumstances; effect of error in hearing. [Bold in both versions.]

(a) Upon conviction of a person for murder in the first degree **in a case in which the state seeks the death penalty**, the judge shall conduct a separate sentencing hearing to determine whether the defendant should be sentenced to death, **life imprisonment without parole** or life imprisonment. The hearing shall be conducted before the judge alone if:

> (i) The defendant was convicted by a judge sitting without a jury;
>
> (ii) The defendant has pled guilty; or
>
> (iii) The defendant waives a jury with respect to the sentence.

(b) **[***128]** In all other cases the sentencing hearing shall be conducted before the jury which determined the defendant's guilt or, if the judge for good cause shown discharges that jury, with a new jury impaneled for that purpose. **The jury shall be instructed that if the jury does not unanimously determine that the defendant should be sentenced to death, then the defendant shall be sentenced to life imprisonment without parole or life imprisonment.**

(c) The judge or jury shall hear evidence as to any matter that the court deems relevant to a determination of the sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (h) and (j) of this section. Any evidence which the court deems to have probative value may be received regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements, and provided further that only such evidence in aggravation as the state has made known to the defendant or his counsel prior to his trial shall be admissible.

(d) Upon conclusion of the evidence and arguments the judge shall give the jury appropriate instructions, **[***129]** including instructions as to any aggravating or mitigating circumstances, as defined in subsections (h) and (j) of this section, or proceed as provided by paragraph (iii) of this subsection:

(i) After hearing all the evidence, the jury shall deliberate and render a recommendation of sentence to the judge, based upon the following:

(A) Whether one (1) or more [O>sufficient<O] aggravating circumstances exist **[**87] beyond a reasonable doubt** as set forth in subsection (h) of this section;

(B) Whether [O>sufficient<O], **by a preponderance of the evidence**, mitigating circumstances exist as set forth in subsection (j) of this section [O>which outweigh the aggravating circumstances found to exist<O]; and

(C) [O>Based upon these considerations, whether the defendant should be senteneed to death or life imprisonment.<O] **The mere number of aggravating or mitigating circumstances found shall have no independent significance.**

(ii) The jury shall consider aggravating and mitigating circumstances unanimously found to exist, and each individual juror may also consider any mitigating circumstances found by that juror to exist. If the jury reports unanimous agreement to impose the sentence of death, the court shall [*130] discharge the jury and shall impose the sentence of death. If the jury is unable to reach a unanimous verdict imposing the sentence of death within a reasonable time, the court shall instruct the jury to determine by a unanimous vote whether the penalty of life imprisonment without parole shall be imposed. If the jury is unable to reach a unanimous verdict imposing the penalty of life imprisonment without parole within a reasonable time, the court shall discharge the jury and impose the sentence of life imprisonment;**

(**iii**) In nonjury cases, the judge shall determine if any aggravating or mitigating circumstances exist and impose sentence within the limits prescribed by law, based

upon the considerations enumerated in subparagraphs (A), (B), and (C) **of paragraph (i)** of this subsection.

(e) The death penalty shall not be imposed unless at least one (1) of the aggravating circumstances set forth in subsection (h) of this section is found. In nonjury cases the judge shall make such designation. The jury, if its verdict is a **sentence** [O>recommendation<O] of death, shall designate in writing signed by the foreman of the jury: [O>the aggravating circumstance or circumstances which it found **[***131]** beyond a reasomable doubt. In nonjury eases the judge shall make such designation. If the jury cannot, with a reasonable time, agree on the punishment to be imposed, the judge shall impose a life sentence.<O]

(i) The aggravating circumstance or circumstances which it unanimously found beyond a reasonable doubt;

(ii) The mitigating circumstance or circumstances which it unanimously found by a preponderance of the evidence; and

(iii) The mitigating circumstance or circumstances which any individual juror found by a preponderance of the evidence.

(f) [O>Unless the jury trying the case recommends the death sentence in its verdict, the judge shall not sentence the defendant to death shall sentence the defendant to life imprisonment as provide by law. Where a recommendation of death is made, the court shall sentence the defendant to death.<O] **Repealed by Laws 2001, ch. 96, § 3.**

(g) If the trial court is reversed on appeal because of error only in the presentence hearing, the new trial which may be ordered shall apply only to the issue of punishment.

(h) Aggravated circumstances are limited to the following:

(i) The murder was committed by a person [O>under sentence of imprisonment;<O]

(A) Confined [*132] in a jail or correctional facility;**

(B) On parole or on probation for a felony;

(C) After escaping detention or incarceration; or

(D) Released on bail pending appeal of his conviction.

(ii) The defendant was previously convicted of another murder in the first degree or a felony involving the use or threat of violence to the person;

[88]** (iii) The defendant knowingly created a great risk of death to two (2) or more persons;

(iv) The murder was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, [O>any robbery, sexual assault, arson, burglary, kidnapping or<O] aircraft piracy or the unlawful throwing, placing or discharging of a destructive device or bomb;

(v) The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(vi) The murder was committed **for compensation, the collection of insurance benefits or other similar** pecuniary gain;

(vii) The murder was especially [O>heinous<O] atrocious or cruel, being unnecessarily torturous to the victim;

(viii) The murder of a judicial officer, former judicial officer, district attorney, former **[***133]** district attorney, **defending attorney, peace officer, juror or witness** [O>or former county and prosecuting attorney<O], during or because of the exercise of his official duty **or because of the victim's former or present official status.**

(ix) The defendant knew or reasonably should have known the victim was less that seventeen (17) years of age or older than sixty-five (65) years of age;

(x) The defendant knew or reasonably should have known the victim was especially vulnerable due to significant mental or physical disability;

(xi) The defendant poses a substantial risk and continuing threat of future dangerousness or is likely to commit continued acts of criminal violence;

(xii) The defendant killed another human being purposely and with premeditated malice and while engaged in, or as an accomplice in the commission of, or attempt to commit, or flight after committing or attempting to commit, any robbery, sexual assault, arson, burglary, kidnapping or abuse of a child under the age of sixteen (16) years.

(j) Mitigating circumstances shall [O>be<O]**include** the following:

(i) The defendant has no significant history of prior criminal activity;

(ii) The murder was committed while the defendant **[***134]** was under the influence of extreme mental or emotional disturbance;

(iii) The victim was a participant in the defendant's conduct or consented to the act;

(iv) The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor;

(v) The defendant acted under extreme duress or under the substantial domination of another person;

(vi) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired;

(vii) The age of the defendant at the time of the crime;

(viii) Any other fact or circumstance of the defendant's character or prior record or matter surrounding his offense which serves to mitigate his culpability.

[*P121] An important feature of this discussion is that, while defense counsel originally insisted that Eaton be tried under the death penalty law in effect at the time the crime was committed, defense counsel eventually stipulated that the then current version of the death penalty statute (with some modifications) be applied instead. In this appeal it is contended that that stipulation had the effect of placing Eaton at a disadvantage **[***135]** because the older statute provided for no burden of proof with respect to mitigating evidence, and the potential issue concerning the unconstitutionality of the "atrocious, heinous, and cruel" aggravator (which was modified in the 2003 version of the statute to eliminate the unconstitutionality argument) **[**89]** was taken off the table. However, defense counsel believed that he reaped a couple of advantages from the stipulation: (1) The provision for a burden of proof as to aggravators (beyond a reasonable doubt) and mitigators (by a preponderance of the evidence) aided his case; and (2) because the new statute provided a third alternative sentence, "life without parole [LWOP]." To the extent the newer statute could be said to be disadvantageous, it was pretty much agreed that those aspects of it would not be applied ("future dangerousness" could not be used as an aggravator).

[*P122] Of course, we must begin our discussion of this issue with a recognition that Eaton did not object to the district court's application of the 2003 version of the statute, and the Ex Post Facto argument that we are called upon to consider here was not considered in the district court. We will assume for purposes of resolving **[***136]** this issue that the district. court determined that Ex Post Facto concerns were not present, and now that this issue is laid at our doorstep, we are called upon to review it *de novo.*

[*P123] As another threshold matter, we note that Eaton points out that *Wyo. Stat. Ann § 6-1-101* (Michie 1983 and LexisNexis 2003) provides:

> ***§ 6-1-101*. Short title; applicability of provisions; conflicting penalties.**
>
> (a) This act may be cited as the Wyoming Criminal. Code of 1982.
>
> (b) This act does not apply to crimes committed prior to the effective date of this act. Prosecutions for a crime shall be governed by the law in effect on the date when the crime occurred. A crime was committed prior to the effective date of this act if any of the elements of the crime occurred prior to the effective date of this act.
>
> (c) In a case pending on or after the effective date of this act, involving a crime committed prior to the effective date, if the penalty under this act for the crime is different from the penalty under prior law, the court shall impose the lesser sentence.

[*P124] For the most part, this language is now of no import whatsoever. This was the opening statute in a general revision of the criminal code that became effective **[***137]** on July 1, 1983. It does not govern the question we are called upon to answer here. *See Attletweedt v. State, 684 P.2d 812, 814-15 (Wyo. 1984)*.

[*P125] Where the changes in a death penalty statute are procedural, and on the whole ameliorative, the Ex Post Facto clause is not violated. *Dobbert, 432 U.S. 282, 97 S.Ct. 2290 at 2298, 53 L. Ed. 2d 344*. We have carefully, examined the 2003 version of the statute and conclude, as did the district court, that the changes that were applied to Eaton's case did not impose any additional burdens on him and that the procedural changes were, in their totality and as applied, salutary for his case. Hence, the Ex Post Facto Clause was not violated.

C. Ineffective Assistance of Counsel

[*P126] We will apply the same standard of review here as we did in Part I. See PP 35-37, *supra.*

(i) 2003 statute.

[*P127] Because we have determined immediately above that the district court did not err in applying the 2003 version of the statute, we also conclude that the defense's strategy in this respect did not constitute ineffective assistance of counsel.

(ii) Whether Trial Counsel Provided Ineffective Assistance in the Investigation and Presentation in the Sentencing Phase of Mitigating Evidence.

[*P128] Eaton's **[***138]** criticisms of his trial counsels' performance in investigation and presentation of mitigating evidence proceed on two lines. On the first line, he claims that, although trial counsel did investigate and present some "life history" mitigating evidence, trial counsel failed to sufficiently investigate and obtain for presentation more "life history" mitigating evidence from various sources, such as Eaton's father, siblings, children, former wife, other relatives, former employers and co-workers, former teachers and schoolmates, welfare service providers, **[**90]** health care providers, mental health care providers, school records, birth records, medical records, and, so on. Eaton argues that these failures "resulted in a thin, virtually non-existent mitigation case."

[*P129] On the second line of criticism, Eaton claims that his trial counsel's performance in his preparation and presentation of mitigating evidence through two expert witnesses, Dr. Kenneth Ash and Dr. Linda Gummow, was deficient. With regard to trial counsel's preparation and presentation of Dr. Ash's testimony, Eaton asserts that trial counsel's failure to alert Dr. Ash about certain notations in a journal kept by Doris Buchta, one of **[***139]** Eaton's neighbors, which suggested that Eaton may not have been as socially isolated as Dr. Ash believed, exposed Dr. Ash to the prosecutor's damaging cross-examination. With regard to trial counsel's preparation and presentation of Dr. Gummow's testimony, Eaton points to three matters. First, Eaton claims that trial counsel's failure to provide Dr. Gummow with the correct date of the suicide death of Eaton's brother (which Dr. Gummow mistakenly thought was before the Kimmell homicide) damaged Dr. Gummow's credibility. Second, Eaton claims that trial counsel's deletion of three particular slides from Dr. Gummow's thirty-slide PowerPoint presentation during her testimony devalued her testimony. Third, Eaton presents Dr. Gummow's post-trial criticisms that in her association with trial counsel several days before her testimony and during her testimony there seemed to be confusion; meetings were not conducted in private areas; trial counsel was not organized and helpful; and trial counsel was irritable, shaky, and not in good health. Eaton argues that trial counsel's "overreliance on two ill-prepared doctors, mixed in with the family members who 'tanked,' gave the jury no coherent mitigation **[***140]** story, and so not a single mitigating factor was found by a single member of the jury."

[*P130] The State asserts that on the full record before us, Eaton has failed to show trial counsel's deficient performance in any respect, let alone prejudice. According to the State, the record shows that trial counsel's investigation included, among other things, revealing interviews with Eaton himself as well as with numerous family members and friends; acquisition of pertinent mental health records of both Eaton and his deceased mother; and mental health examinations of Eaton by two experienced, well-qualified mental health experts. The State asserts that, based on trial counsel's investigation, trial counsel presented significant mitigating evidence of Eaton's "life history" encompassing his childhood poverty and abuse, disadvantaged background, limited educational opportunities, and lifelong mental health problems, all of which was relevant to the jury's assessing his moral culpability. The State also points out that--aside from a few unilluminating school records, a former schoolmate's report that a young Eaton was a victim of school bullies' taunts and physical abuse, and a one-page document (Disposal **[***141]** of Client Record Form from the Lincoln County Mental Health Association) showing that Eaton sought counseling in 1986 shortly following similar documented counseling in the Community Hospital in Torrington, Wyoming, that same year--Eaton did not present any additional mitigating evidence at the remand evidentiary hearing or with his motion for a new trial as required by the applicable legal precedent. As for these few items of additional evidence, the State argues that they are cumulative of similar mitigating evidence that was presented at trial and they are of such minimal evidentiary value that,

had they been considered by the jury, no reasonable probability exists that the jury would have reached a different verdict. Finally, the State also rejects Eaton's criticisms of trial counsel's preparation and examination of Dr. Ash and Dr. Gummow.

[*P131] As we noted earlier in this opinion, under our remand order the trial court held a five-day evidentiary hearing during which Eaton's appellate counsel and the prosecutor developed a record covering, among other issues, Eaton's contentions and criticisms of his trial counsel's performance. As previously noted, the trial court issued a 47-page **[***142]** decision letter in which it discussed the record developed during that hearing, considered the applicable legal precedent, and concluded that Eaton's trial counsel had not rendered ineffective assistance in representation of **[**91]** Eaton. With respect to Eaton's contentions of ineffective assistance in investigation and presentation of mitigating evidence, the trial court's treatment of those contentions appears in pages 21-33 of its decision letter. We reiterate our standard of review: we do not disturb the trial court's findings of fact unless they are clearly erroneous or against the great weight of the evidence; we review *de novo* the trial court's conclusions of law, which in this instance concern whether or not trial counsel's performance was deficient and, if it was, whether Eaton was prejudiced by that deficient performance. As we shall now explain, we hold that Eaton's trial counsel did not provide ineffective assistance in the investigation and presentation of mitigating evidence in the sentencing phase of the trial.

[*P132] We have reviewed Eaton's contentions and criticisms and the State's responses in the light of the legal standards [5] and analytical **[**92]** model set forth in *Strickland, supra* **[***143]** (reviewing both the performance component and the prejudice component, the Court found neither deficient performance nor prejudice) and the line of United States Supreme Court decisions following that seminal decision, namely, in ascending order, *Burger v. Kemp, 483 U.S. 776, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987)* (because the Court did not find deficient performance, it did not need to address prejudice); *Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)* (the Court found deficient performance and prejudice); *Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003)* (the Court found deficient performance and prejudice); and *Rompilla v. Beard, 545 U.S. 374, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005)* (the Court found, deficient performance and prejudice). We have also taken note of two recent decisions of the Tenth Circuit Court of Appeals, namely, *Anderson v. Sirmons, 476 F.3d 1131 (10th Cir. 2007)* (the court panel found deficient performance and prejudice); and *Smith v. Mullin, 379 F.3d 919 (10th Cir. 2004)* (the court panel found - deficient performance and prejudice). All of these decisions are helpful particularly because they precisely focus on the discrete **[***144]** issue of alleged ineffectiveness of counsel in investigating and presenting mitigating evidence in the sentencing phase of a capital trial. These decisions instruct:

> . An ineffective assistance claim has a performance component and a prejudice component. The components are mixed questions of fact and law. A court does not have to approach the inquiry by addressing performance first and prejudice second. A court does not have to address both components if the appellant makes an insufficient showing on one. If a court determines it is easier to dispose of the claim because sufficient prejudice is lacking, the court may do so.
>
> . The performance component
>
> -- to show that trial counsel's performance was deficient, the appellant must show that counsel made errors so serious that counsel was not functioning at an objective standard of reasonableness under prevailing professional norms, considering all the circumstances as of the time of counsel's conduct;
>
> -- judicial scrutiny of trial counsel's performance must be highly deferential. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance;
>
> -- trial counsel has a duty to **[***145]** make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. A court must directly assess a particular decision not to investigate for reasonableness under all the circumstances, applying a heavy

measure of deference to counsel's judgments.

. The prejudice component

-- a court shall not set aside the sentence if trial counsel's deficient performance had no effect on the sentence. The appellant must affirmatively show that counsel's deficient performance actually had an adverse effect on the defense;

-- when an appellant challenges a death sentence, the question is whether there is a reasonable probability -- which is less than a preponderance of the evidence but sufficient to undermine confidence in the outcome -- that, absent the errors, the sentencer -- including an appellate court, to the extent it independently reweighs the evidence -- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. In **[**93]** making this determination, the court must evaluate the totality of the available mitigating evidence -- both that presented in the sentencing phase of the trial and that presented in the post-trial **[***146]** evidentiary hearing -- in reweighing all the mitigating evidence against the aggravating evidence.

-- the ultimate focus of the inquiry must be on the fundamental fairness of the proceeding. A court must be concerned with whether, despite the strong presumption of reliability, the result is unreliable because of a breakdown in the adversarial process.

5 In *Strickland*, the Court noted:

> In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like, *e.g.*, ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.

Strickland, 466 U.S. 668, 688-89, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); see also, *Rompilla v. Beard, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005)*; and **[***147]** *Wiggins v. Smith, 539 U.S. 510, 524, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)* ("we long have referred [to these ABA Standards] as 'guides to determining what is reasonable'").

We note that the new ABA Guidelines adopted in 2003 explain in detail the obligations of defense counsel to investigate mitigating evidence. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases P 10.7, at 80-83 (2003) describe defense counsel's obligation to investigate mitigating evidence for the trial's sentencing phase (omitting quotation marks and lengthy footnotes):

> Counsel's duty to investigate and present mitigating evidence is now well established. The duty to investigate exists regardless of the expressed desires of a client. Nor may

counsel sit idly by, thinking that investigation would be futile. Counsel cannot responsibly advise a client about the merits of different courses of action, the client cannot make informed decisions, and counsel cannot be sure of the client's competency to make such decisions, unless counsel has first conducted a thorough investigation with respect to both phases of the case.

Because the sentencers in a capital case must consider in mitigation, **[***148]** anything in the life of a defendant which might militate against the appropriateness of the death penalty for that defendant, penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history. At least in the case of the client, this begins with the moment of conception [*i.e.*, undertaking representation of the capital defendant]. Counsel needs to explore:

(1) Medical history (including hospitalizations, mental and physical illness or injury, alcohol and drug use, pre-natal and birth trauma, malnutrition, developmental delays, and neurological damage);

(2) Family and social history (including physical, sexual, or emotional abuse; family history of mental illness, cognitive impairments, substance abuse, or domestic violence; poverty, familial instability, neighborhood environment, and peer influence); other traumatic events such as exposure to criminal violence, the loss of a loved one, or a natural disaster; experiences of racism or other social or ethnic bias; cultural or religious influences; failures of government or social intervention (e.g., failure to intervene or provide necessary services, placement in poor quality foster care **[***149]** or juvenile detention facilities);

(3) Educational history (including achievement, performance, behavior, and activities), special educational needs (including cognitive limitations and learning disabilities) and opportunity or lack thereof, and activities;

(4) Military service, (including length and type of service, conduct, special training, combat exposure, health and mental health services);

(5) Employment and training history (including skills and performance, and barriers to employability);

(6) Prior juvenile and adult correctional experience (including conduct while under supervision, in institutions of education or training, and regarding clinical services).

The mitigation investigation should begin as quickly as possible, because it may affect the investigation of first phase defenses (e.g., by suggesting additional areas for questioning police officers or other witnesses), decisions about the need for expert evaluations (including competency, mental retardation, or insanity), motion practice, and plea negotiations.

It is necessary to locate and interview the client's family members (who may suffer from some of the same impairments as the client), and virtually everyone else who **[***150]** knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation, or parole officers, and others. Records--from courts, government agencies, the military, employers, etc.--can contain a wealth of mitigating evidence, documenting or providing clues to childhood abuse, retardation, brain damage, and/or mental illness, and corroborating witnesses' recollections. Records should be requested concerning not only the client, but also his parents, grand-

> parents, siblings, cousins, and children. A multi-generational investigation extending as far as possible vertically and horizontally frequently discloses significant patterns of family dysfunction and may help establish or strengthen a diagnosis or underscore the hereditary nature of a particular impairment. The collection of corroborating information from multiple sources--a time-consuming task--is important wherever possible to ensure the reliability and thus the persuasiveness of the evidence.

[*P133] In order to provide context to trial counsel's presentation of "life history" mitigating evidence in the sentencing phase of the trial, we shall briefly recount the parties' opening statements and **[***151]** the prosecution's evidentiary submission which preceded trial counsel's evidentiary submission. Following that, we shall recount in some detail the "life history" mitigating evidence that trial counsel presented in the sentencing phase.

[*P134] In the prosecution's opening statement, the prosecutor stated that he would offer into evidence all of the guilt phase evidence and would ask the jury to return the death sentence. He listed the statutory aggravating circumstances in the case: (1) The murder was especially atrocious or cruel, being unnecessarily torturous to the victim; (2) the murder was premeditated and committed purposely while Eaton was engaged in the crimes of kidnapping, robbery, and sexual assault; and (3) Eaton was previously convicted of a felony involving the use or threat of violence to the person. The prosecutor declared that all three aggravating circumstances would be proved beyond any reasonable doubt, and the jury would need to find only one of them before deciding whether the death penalty was appropriate. Turning to Eaton's mitigation case, the prosecutor said he expected it would center around evidence of Eaton's background and history of depression, but that such **[***152]** evidence, even if believed, could not overcome the State's strong aggravating circumstances.

[*P135] In defense counsel's opening statement, he said that Eaton accepted and respected the jury's verdict in the guilt phase. He then stated that Eaton's life had value and trial counsel would give the jury reasons to take the road to life for Eaton. He alerted the jury that he would review Eaton's life, presenting witnesses who knew him from his youngest days and witnesses who had observed and evaluated him concerning his present situation, and would show that Eaton's life had not been a pretty picture. Trial counsel stated that Eaton, unlike most persons in the courtroom, did not have a nuclear family, but had a father who beat him. Trial counsel said that Eaton never had a chance in his life, unlike the others in the courtroom. He told the jury that it alone had the decision whether Eaton would die of natural causes in a penitentiary cell or would be executed. Trial counsel then briefly reviewed the expected evidence of Eaton's troubled childhood: an alcoholic and selfish father who was a transient laborer and was good at abusing young Eaton; a poor family that moved many times; a mother who **[***153]** was severely abused and hospitalized with schizophrenia; a young Eaton who was forced to work long hours at the farm and who dropped out of school to work to support the family; a young Eaton who did not do well when he attended school and who had, a low IQ; a 16-year old Eaton who was diagnosed at a psychiatric hospital as disturbed and depressed. Trial counsel also reviewed briefly the evidence of Eaton's troubled adult life, including his failed marriage, his difficulty holding steady employment, his continuing depression, and his isolated and poor living conditions. Trial counsel also reviewed the evidence of Eaton's mental health evaluations by, and expert opinions of, neuropsychologist Dr. Linda Gummow and psychiatrist Dr. Kenneth Ash.

[*P136] Turning to the applicable statutory mitigating circumstances and reasons for life, trial counsel identified: (1) The murder was committed while Eaton was under the influence of an extreme mental or emotional disturbance; (2) Eaton acted under extreme duress; (3) the capacity of Eaton to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and (4) any other **[**94]** fact or circumstance **[***154]** of Eaton's character or prior record or matter surrounding his offense which serves to mitigate his culpability. Concluding his opening remarks, trial counsel submitted that the only logical, right, fair, and ethical choice was for Eaton to serve the rest of his life in the state penitentiary.

[*P137] Before calling its first witness, the prosecution formally moved for the introduction into evidence of all of the guilt-phase testimony and exhibits previously introduced and received. Eaton's trial counsel added that that applied as well to all defense guilt-phase evidence. The district court judge ruled that all such evidence was received. The prosecution next examined in quick succession three witnesses to establish Eaton's previous conviction of aggravated assault and battery in Sweetwater County. Those witnesses were Shannon Breeden, the victim, Richard Haskell, from the Sheriff's department, and Tony Howard, a prosecuting attorney. The prosecution rested.

"Life History" Mitigating Evidence

[*P138] We review Eaton's first line of criticisms of trial counsel's performance by first considering the "life history" mitigating evidence that trial counsel presented at the sentencing phase. Following that, **[***155]** we shall consider the additional "life history" mitigating evidence that Eaton presented at the remand evidentiary hearing and in his motion for a new trial. Having in mind the sentencing phase record, the remand evidentiary hearing record, and the motion for new trial record, we will then be in the best position to judge Eaton's contentions and the State's responses on this appellate issue.

[*P139] The sentencing phase record reveals that trial counsel presented "life history" mitigating evidence through two expert witnesses who had interviewed and evaluated Eaton before trial and who had reviewed a number of records and statements containing "life history" information, several family members of Eaton's, and several friends and acquaintances of Eaton's. Dr. Kenneth Ash, psychiatrist, described his expert qualifications and his general evaluation procedure, including a review of medical records; conversation with Eaton's trial counsel; meeting with Eaton to explore his life history and present circumstances; and personal observation of Eaton's thinking, moods, and behavior. Dr. Ash described that he met with Eaton in jail on four separate occasions for a total of about twelve and a half hours, **[***156]** during which he observed him as he asked questions about his life history and present circumstances. In considering Eaton's growth from childhood forward, Dr. Ash examined Eaton's available medical evaluation records including those from the Colorado Psychiatric Hospital when he was sixteen years old and from the hospital in Torrington, Wyoming, when Eaton was there in 1986. From these records of mental health evaluations, Dr. Ash noted a consistent finding of depression. Dr. Ash then explained the effect of depression on the brain and differentiated mild depression from Eaton's lifelong significant clinical depression which causes brain damage. Dr. Ash saw evidence of this clinical depression as he talked to Eaton. Dr. Ash related that Eaton told him about his failed marriage, family, and welding work, and his living in a bus in Moneta, Wyoming, in poverty and isolated from family and friends. Dr. Ash testified how Eaton's psychosocial and environmental problems related to his depression diagnosis. Dr. Ash identified the numerous stressors in Eaton's life. Dr. Ash also testified about Eaton's past significant problems in schooling and failure to get a general education certificate **[***157]** from a secondary school. Dr. Ash learned that Eaton had no access to health care. Dr. Ash evaluated Eaton as a person with major impairments in the areas of work, school, family relationships, judgment, thinking, and mood. Trial counsel examined Dr. Ash about his review of Eaton's 1986 Torrington hospital records which revealed his depression and suicidal ideation. Dr. Ash testified that Eaton's IQ was in the 80s to low 90s, in the low range of normal.

[*P140] Dr. Ash expressed these opinions about Eaton with supporting testimony:

1. A consistent finding of significant clinical depression, after considering his growth from childhood to manhood, the Colorado Psychiatric Hospital record when Eaton was sixteen years old, and the 1986 **[**95]** record at the Community Hospital at Torrington; and

2. Eaton committed the Kimmell homicide when under the influence of extreme emotional disturbance and extreme distress.

[*P141] Dr. Linda Gummow, neuropsychologist, testified about her expert qualifications, experience, and evaluation procedure. She spent two days with Eaton, estimating that twenty-five percent of that time was interview and the rest was test administration. She testified about her background evaluation of **[***158]** Eaton, which entailed getting as many documents as possible about his past life, such as medical records, educational records, psychiatric records, and police records. She testified that she also reviewed information obtained from persons in Eaton's life, including Eaton's sisters, Sharon Slagowski and Judy Mason, and Eaton's father, Merle. She testified about her preparation of a background chronology of Eaton's life using the various records and interview statements. She also had obtained and used the psychiatric records of Eaton's mother as part of the background chronology of Eaton's life. Trial counsel introduced into evidence, without objection, Dr. Gummow's background chronology of Eaton's life. In some detail, Dr. Gummow's testimony follows:

> This chronology basically just gives some marker events in Mr. Eaton's life. The first line is his birth on February 10, 1945. He's the second oldest of eight children and the oldest son.
>
> He was raised by his natural parents. His father was the primary support of the family, who -- he did a number of occupations, but he basically had an eighth-grade education and did a lot of manual occupations: mining, ranching, farming. The family moved **[***159]** fairly frequently. There's some testimony indicating that the father drank heavily, regularly. There's some family information indicating that there was physical abuse in the family, the mother and Mr. Eaton; some testimony indicating that the abuse to Mr. Eaton was more significant, perhaps, than that to

other siblings. And that fits with the research which suggests that the oldest son sometimes takes the heaviest brunt.

. . .

Mr. Eaton -- this is his report, now -- had a strong emotional attachment to his mother, who was reported to be a good mother, who cared for the family and did the best she could until she started to have mental health problems -- and we don't know the exact onset, but sometime around 1961.

There's supposedly some fights between the parents.

Due to the frequent moves and Mr. Eaton's personality style, he had few friends. He was a slow developer. He seemed immature for his years. And he had very heavy responsibility as the oldest son, because his father sometimes couldn't find work locally and had to leave the -- the home for extended periods of time; and during that time, he was basically responsible for whatever farm animals they had and so on.

There is some suggestion **[***160]** that -- well, it's fairly well documented the family was economically struggling throughout most of their -- most of his childhood, with difficulty providing basic medical services. Sometimes children did not get medical problems treated until they were quite severe or other people intervened.

This is Mr. Eaton's report. Mr. Eaton reported that he started running away in third grade. Documents suggest that he started running away sometime around fifth grade. This was reported to be due to fear of punishment, being struck by his father.

In 1960 -- he would be approximately 16 years old, 15 years old -- he was identified as having poor attention. He was held back in school.

Now, this is where I'm not sure of these dates. The earliest hospitalization date I have is this -- definite is 1962, when Mrs. Eaton was hospitalized in the Colorado State Hospital in Pueblo. There's an indirect reference in the evaluation that Mr. Eaton, when he was 16, stating that she had had a nervous breakdown previous to 1961. So somewhere in '60, '61, Mrs. Eaton started developing symptoms of what **[**96]** was diagnosed consistently as schizophrenia.

He was identified as having some learning problems in the Greeley School **[***161]** District, and he was at some point held back. It's very confusing -- his academic record is very confusing. We don't have many documents. We just have Meeker and Greeley, when he was 16. We don't have the earlier documents. We were unable to obtain them.

Q. (By Mr. Skaggs) Doctor, is that common in cases that have this kind of age?

A. They are common in older -- older defendants. It's easier to get records now, with computers and so on. And, also, when the person moves frequently and there's a lot of schools, sometimes the school doesn't have a record if the student is only there for six months.

. . . .

He was diagnosed -- this is his first known psychiatric diagnosis. He was diagnosed as being a depressed youngster, had been depressed for a long time, having serious emotional problems and being unable to relate.

This was the physician who noted that Mr. Eaton had difficulty relating to -- to others, particularly adults; had very poor peer relationships. He had no friends. He was a fairly unappealing youngster who seemed to be immature.

He was treated at Colorado Psychopathic Hospital for -- primarily for diagnosis, and then he was referred to several facilities outside of his family, including **[***162]** Lookout Mountain School for Boys and then the Buena Vista Correctional Center. It was in the Buena Vista Correctional Center that he learned to weld.

. . . .

So -- and welding became his primary occupation throughout his life. He joined several unions.

And I've got the diagnosis stating '66 for the schizophrenia, but it was actually '62. I just didn't want to put it two places.

Q. Was she hospitalized more than once --

A. Yes.

Q. -- according to the records?

A. Multiple --

Q. Okay.

A. -- several times in one year.

And her hospitalization -- her first hospitalization date and Mr. Eaton's hospitalization date are very close in time. And Mr. Eaton believed that he was responsible for his mother's mental health problems.

Q. Is that a self-reported thing?

A. That's his self report. There's no indication that anyone else blamed him, but he felt that he was responsible.

He lived and worked, after he was released from the correctional center, primarily as a welder. He contributed financially to his family, both as a child, as an adult, contributing a lot of his earnings. He was active in a church, helped build a church in 1972. He became a member of the Operating Engineers Union in approximately 1972.

Most **[***163]** important event occurred in his life and was in 1971, where he married Melody St. John. He was 26 years old at the time. I believe she was 18. And it was the first significant and long-term relationship that he had had. He had not had any long-term relationships before. He reported a few date-or-two-type relationships. They had three children, two sons and a daughter. And the marriage was not a happy one. His happiness with the marriage, according to his report, ended on his wedding night, when his wife said she wanted a divorce. There was a lot of acrimony and difficulty in the marriage, mutual accusations, and, I think, a considerable bitterness on both parties. They were separated, we know, at least once, in 1979, when Melody filed for a divorce; and then they then reconciled.

Early in the relationship, Mr. Eaton was the primary source of support. His work history is worth mentioning. He worked, like I said, primarily as a welder. His longest job was -- according to his report, was about a year or year and a half. That was a long time for him. He changed jobs frequently. He had difficulty getting along with coworkers, got in altercations, **[**97]** sometimes left for - for no apparent reason. **[***164]** Same work pattern that his father had, very short employments here and there.

So toward the end of the marriage, Mrs. -- Melody became more the primary support of the family. She undertook more of the responsibility. She became very disenchanted with the conflict in the family and the instability of his work history. And she started basically supporting the family. He, at this point in time, was doing occasional welding jobs, as I understand it, and was also doing some sort of a junk business, going -- trading materials, you know, salvaging and going to junk shows and things, so -- kind of flea markets and so on.

Sometimes their living conditions were quite rough, sometimes living in a trailer without amenities.

And so she filed for divorce in 1986. She left him, and that was the end of the marriage. His wife left him, and he was hospitalized for depression at that time. He was hospitalized for a few days. He went to the hospital -- he actually went to the police department. They were concerned about him. They took him to the community hospital, where they admitted him and diagnosed him with a depression and thought disorder.

Sometime -- and this is an approximate date. Sometime in 1986, **[***165]** Mr. Eaton lived on the property -- is it Moneta?

Q. Right.

A. He -- this property was given to him, I believe, by a family member. And he -- his reason was that he needed to get away from people. So he started living out here. And he called it "to hide out." The property didn't have any water. It had no facilities. Mr. Eaton basically was given an

old bus which he put on the property and lived in it.

And by multiple reports, his lifestyle was extremely marginal. His diet was poor. His uncle told me that he would always bring a sandwich whenever he visited Dale because he didn't want to eat in the kitchen. And Dale would always offer him a meal. And Dale's meal consisted of taking a -- pieces of frozen venison, which he hunted and caught, and throwing it into a skillet, which was indescribably dirty, and then eating that with his hands. And so Mr. Eaton's uncle told me that he always brought a sandwich so he could say, well, my wife would get

So his lifestyle was very marginal, frequently described during this time frame and later as not -- not having good hygiene. No evidence of that earlier; but later on, didn't bathe. Sometimes would go wash his car and get in the carwash with the car **[***166]** and bathe himself there; sometimes went to the neighbors. Had no water on the property, so he had to go to various places to get water.

So his behavior became bizarre and somewhat -- and his grooming and hygiene were marginal during that phase, as well as his dietary habits.

Medication was recommended, I should mention, when he was in the community hospital, but he never followed up with mental health care afterward. They wanted him to, but he didn't do it.

This was another very significant date. That's why I put it on here. Dale's brother asphyxiated himself with carbon monoxide sometime in 1987. I don't know the exact date. Dale blamed himself for this, because he believed that if he had loaned his brother some money that he had asked for, that his brother wouldn't have committed suicide. Whether or not that's an accurate understanding, I don't know.

And then, of course, significant date here for our purposes is April 2, 1988, was when the body of Lisa Marie Kimmell was found in the North Platte River.

Shortly after Ms. Kimmell's death, his son, William, spent some time with him. And by interview, he indicated that Mr. Eaton was very unstable in the sense his lifestyle was unstable. I **[***167]** think they lived four or five different places in a year, and he was attending different schools during this period of time. He was also said to be very controlling and didn't want to live **[**98]** with him and left, and they had no more contact after that.

I should mention that I forgot to put it on -- I mentioned in here, one of their children was removed from the home. And I'm not sure when that occurred, because I haven't seen the documents; but one of the sons was removed from the home.

Q. Now, whose home was that?

A. From Melody and Dale's home.

Q. Okay.

A. Okay. And Mr. Eaton had no stable, long-term relationships with any other woman after this time. His best -- his strongest relationship was with a woman in Nevada that he visited periodically, might stay a few months. And that woman described Dale, again, as having very poor grooming and called him junkyard Dale, because apparently his -- his car was -- his van was a jumble.

I should mention, during this time period, Mr. Eaton at one point in time had put together a welding truck and equipment; and he used that to kind of be a freelance welder, doing jobs all over the place. During this time frame before Ms. Kimmell's death, he lost that **[***168]** welding truck. He -- his credit rating went down. And he basically really never worked more than 90 days at a time anywhere after that. He seemed to express it to me 90 days was a long time. When I interviewed him, he couldn't even recall his major employers. We got -- I got five or six names, but he was just from one job to another job to another job to another job. And he remembered the longer jobs, but not the many, many others that he had had.

He's had a lot of psychiatric treatment from 1997 on, at least the evaluation and medication. He was diagnosed with depressive disorder, some issues with cognitive compliance -- that is, some of the people that examined him were concerned that he wasn't being completely truthful with

> them. He was diagnosed with multiple suicide ideation, lifetime depression, PTSD. There's one not on here that should be on here. It was an occasional -- couple diagnoses of explosive disorder, dysthymia, depression, major depression, anxiety, and post-traumatic stress disorder, which someone diagnosed based on his reported history of childhood abuse.
>
> And then the last date here is in May -- I mean April of 2003. He was transported to Natrona County jail to stand **[***169]** trial for the death of Ms. Kimmell.

[*P142] Dr. Gummow expressed these opinions about Eaton with supporting testimony:

1. There was a 95% probability that Eaton was responding honestly during her testing and evaluating for his psychiatric symptoms, and there was no malingering on Eaton's part.

2. At age 16, Eaton was diagnosed at the Colorado Psychiatric Hospital with depression, suicidal ideation, disturbed sleep disorder, low self-esteem, and inability to relate.

3. Eaton's depressive disorder is called depressive disorder NOS because of psychotic features and brain damage. It is of long-standing existence dating to his adolescence and was present in an exacerbated or severe form in 1988.

4. Eaton has had a long-standing learning disorder, with an IQ range from 76, which is borderline, to high 80s to 90s.

5. Eaton's depression is probably genetic and his family members' mental conditions bear this out; his major depressive disorder is considered to be a brain disease and it has been exacerbated by the social factors in his life, including his documented child abuse.

6. Eaton's academic skills in reading, math, and spelling "are far below average."

7. Eaton has moderate to severe brain damage.

8. **[***170]** Eaton's depression is linked to his behavior. Eaton never learned any coping styles to help him deal with the irrational feelings associated with his depression illness.

9. Eaton's significant lifelong psychiatric disorder caused extreme emotional disturbance and extreme duress at the time of the Kimmell homicide.

[*P143] **[**99]** Corroborating the "life history" mitigating evidence presented by Drs. Ash and Gummow, four family members of Eaton's testified on Eaton's behalf Loren Ferrin, whose deceased older sister was Eaton's mother, testified that he had known Eaton since Eaton's birth. Through Mr. Ferrin, trial counsel introduced into evidence several photographs of Eaton and his family members taken in the mid-1950s when Eaton was ten to twelve years old. Mr. Ferrin testified that Eaton's mother had told him that Eaton's father, Merle, had kicked her and "broke her tailbone." Mr. Ferrin said he was going to confront Merle Eaton about the matter, but his sister (Eaton's mother) told him not to because Merle Eaton "would just come back and pick on her then." Mr. Ferrin testified that Eaton's father drank to excess, had several jobs, and moved the family from a half dozen to a dozen times. There were **[***171]** eight children in the family, but one died at birth. Mr. Ferrin stated that, although he had not seen Eaton hit by his father, Eaton did not have a good relationship with his father -- Eaton was afraid of him. Mr. Ferrin said that Eaton, the oldest boy in the family, "wasn't treated good" and "had to do a lot that he shouldn't have had to do." Mr. Ferrin recounted how he and his late wife had tried to adopt the young Eaton because Eaton's father "was picking on him too much." Mr. Ferrin also said that later on Eaton's father was going to "adopt all of the kids out," but it did not happen. Mr. Ferrin described Eaton's father as selfish, testifying "when the rest of the family would be out starving to death sometimes, he would go down to the cafe and have big steaks." He recounted an incident when he and his late wife visited the Eaton family and "they didn't have anything to eat." Mr. Ferrin's father bought lunch meat so they could have dinner; but Eaton's father "figured he didn't get enough to eat, so he went down to the cafe and had a big steak dinner after that.", Mr. Ferrin described another occasion when Eaton's mother was in the hospital and Mr. Ferrin was riding home with Eaton's **[***172]** father. Eaton's father had a box of candy and told Mr. Ferrin, "Let's eat it up before we get home ... [t]he kids will just eat it up." Mr. Ferrin mentioned a later time when Eaton had bought his father a welding truck so they could work together; Eaton's father bought new tires for the truck, charged the purchase to Eaton, and then left. Mr. Ferrin recalled that Eaton's parents' argued all the time. Mr. Ferrin said that Eaton had a good relationship with his mother. Mr. Ferrin also testified that he was the person who had given Eaton the Moneta property where Eaton lived.

[*P144] Loren Ferrin's wife, Betty, testified that she had known Eaton since 1951. At the beginning of her testimony, she became emotional and stated, "I can't do this." The trial judge offered her a glass of water to calm her. She then testified that she liked Eaton and did not want him to die because "I don't think he was in his right mind when he did this."

[*P145] Marilyn O'Malley, Eaton's aunt, testified that she has known Eaton since his birth. Eaton's mother was Ms. O'Malley's sister. Ms. O'Malley testified that she never saw Eaton's father hit Eaton's mother, "but he ridiculed her all the time." She said that Eaton's mother **[***173]** was a patient at a mental hospital for two or three years. Commenting on what Eaton's mother had to put up with from Eaton's father, Ms. O'Malley testified, "well, the ridicule; and then he abused the children, and . . . she couldn't stand up for them in any way. And that was back in the days when wives and children had no protection or no place to go when they were in trouble." She recounted a particular incident between Eaton and his father:

> Well, I was there one time when the children were playing around. And when there's several children, there's bound to be a little noise. And Merle didn't -- when he came home, he expected everything to be quiet. And the children were playing. And all of a sudden, he jumps out of his chair and grabs his belt up -- you know, took it off his body, had a big wide belt with a buckle on it, and started beating on Dale Wayne. And Dale Wayne -- I mean, he beat all of the kids to some extent, but I think Dale Wayne got the brunt of it. He seemed to be always the one that got first and most.

[100]** She added that she never saw Eaton's father hit Eaton's sisters, saying, "I don't think they were affected as much as Dale. Wayne was, by a long shot." She had seen **[***174]** other occasions of Eaton's father abusing Eaton. She also testified:

> But I felt so sorry for him one time. I was a young wife with a little child, about a year and a half old. And I just felt so sorry for him that I wanted to get him away from that home for awhile. So I asked if I could keep him. And as I recall -- I don't remember the exact number of days, but it was, like ten days or two weeks. He stayed with my husband and I. And my husband taught him how to fish, and they would go fishing. We would cook them. He had a great time with us....
>
> And then I wanted to keep him longer, but his mother said that his dad had work for him to do.

Ms. O'Malley also remembered an occasion when she and her mother visited the Eaton family in Meeker, Colorado. Ms. O'Malley rode into town with Eaton's father and, as he had done with Mr. Ferrin, Eaton's father was eating from a box of candy and told her if he took it home the kids would eat it. At the time, the rest of the family did not have much food. Eaton's father did not like to eat the vegetable stew that Eaton's mother made for the family, so he would eat in town. Ms. O'Malley testified that Eaton had "always been very sweet to me." She stated that **[***175]** Eaton's mother expressed concern for her children all the time, but "didn't seem to dare show too much affection or stand up for the kids at all; but she loved them." When Eaton's mother had her mental breakdown, she could no longer care for her children. Eaton's father had a lot of different jobs and the family moved around quite a bit -- at least eight. Eaton's paternal grandmother "was not a very pleasant person to be around" and "was rather ornery to" Eaton's mother. Ms. O'Malley identified several photographs of Eaton as a young boy and of Eaton and his then-wife and two of his children. Ms. O'Malley testified that Eaton left home at the age of fourteen or fifteen because of his relationship with his father.

[*P146] Trial counsel also presented "life history" mitigating evidence from Eaton's sister, Sharon Slagowski, by way of Lynn Cohee, a Natrona County Deputy Sheriff. Through Deputy Cohee, trial counsel introduced into evidence excerpts of Ms. Slagowski's interview by Deputy Cohee. These excerpts contained evidence of Eaton's mental and physical abuse as a child and limited education. In these excerpts her testimony was as follows:

> SS: He just uh, as being older, I see that dad just **[***176]** kind of picked on him and he was, when he was growing up, he was mean to him and made him work when he was really young, you know and .... Uh, as I look at it now, he was child abused when he was little. ... Getting hit around and the, not, not only the mental but the physical abuse.
>
> . . . .
>
> SS: Yeah, I remember when he used to hit him with a belt and uh, hit him with his fist and uh, I remember one time when but I don't remember how old I was he broke a beer bottle over his head. ... You know, other than that, the, just that kind of physical abuse.
>
> LC: Ok. When he broke the beer bottle over his head, do you remember how Dale, how old Dale was then?
>
> SS: We lived in, down in [Riverton], so in Riverton, we had to be real young. ...

Probably, I was in school. Dale and I was both in school, so we had to be in the uh, oh man, I'm thinking early grade school.

LC: Ok. Uh, how about any head injuries? Did that cause any head injuries?

SS: I don't know. He was never taken to the doctor for it. ... But he was hit around. It wasn't just on the, it wasn't on his butt, every time he got hit it was where ever dad decided to hit him. He just had a rough life.

LC: How did he do in school, do you know?

SS: Well, he **[***177]** never, had a chance to be in school. We moved around a lot and that really effected [sic] him. And he never got to be a little boy, cuz he had to work so hard. And he was always up so early, uh, **[**101]** you know milking cows ... and doing the (inaudible) farm work and everything. He never got a chance to be a kid.

LC: Ok. Do you remember how far he -- he did get to go in school?

SS: He had, he made it through, let's see, we went, we lived in Meeker and that's the last time he attended school that I know of. And let me see, I was in the, probably 7th or 8th grade is all the way he went.

[*P147] Trial counsel also presented "life history" mitigating evidence from four of Eaton's friends and acquaintances. Virginia Schiffern testified that she and her husband, Lodine, had known Eaton since 1972, and he had stayed with them a few times in the past. She stated that they liked Eaton and she could not believe that he would ever do anything violent. She said that she and her husband attend church regularly and she believes that people make mistakes. Lodine Schiffern testified that he met Eaton shortly before Eaton was married, they were good friends, and he still likes him. He added that he "just can't believe **[***178]** ... anything like that could happen to him."

[*P148] Trial counsel presented testimony from Shirley and Floyd Widmer, owners of the store at Waltman. Mrs. Widmer testified that they are among the very few people who live in the Waltman-Moneta area. She testified that she has known Eaton for quite a few years as he used to eat at their store. She "has always gotten along real good with" Eaton. She testified that when Eaton's son, Billy, was quite young, Eaton and he would stop in the store. She said that Eaton never had a bad temper around her. Floyd Widmer testified that he has known Eaton for a lot of years, likes him, and always got along with him.

[*P149] In connection with our review of trial counsel's mitigation case in the sentencing phase of the trial, we have also considered trial counsel's closing argument to the jury. His dominant themes were the power of a single juror to vote for a life sentence, the existence by a preponderance of the evidence of both statutory and non-statutory mitigating circumstances, Eaton's acceptance of responsibility for his crimes, and the jury's power to spare Eaton's life as a matter of mercy. Trial counsel emphasized that each juror must make a personal decision, **[***179]** and that one juror's vote can "stop this march into madness." He stressed that the only power Eaton had was through that juror who would choose life; an individual juror had the right to vote for life and was not answerable to anyone for that vote; and each juror was free to write on the verdict form any mitigating circumstance that particular juror believed existed. Trial counsel asserted that Dr. Ash's testimony and Dr. Gummow's testimony clearly proved that, at the time of the homicide and otherwise, Eaton suffered from extreme emotional or mental disturbance and duress and life-long depression, brain damage, and substantial mental impairment. Trial counsel recounted the uncontroverted evidence, from Dr. Gummow and Eaton's sister, Sharon Slagowski, and other witnesses, about Eaton's childhood abuse, uneven schooling, and hard work. He emphasized Eaton's very troubled life of poverty and extreme hopelessness. He stated that Eaton was remorseful for what he had done. Reviewing several of the jury instructions, trial counsel cautioned that the jury could consider only the three aggravating circumstances listed on the verdict form, but stressed that even if the jury found the existence **[***180]** of one or more of them, it could still vote for life. He also noted that even if the jury found no mitigating circumstances, it could still vote for life and it could vote for life solely on the basis of mercy or sympathy. In conclusion, trial counsel asked the jury to choose life.

[*P150] With the above and foregoing sentencing phase "life history" mitigating evidence in mind, we now turn to the records of the remand evidentiary hearing and the motion for new trial based on newly discovered evidence to identify what additional "life history" mitigating evidence Eaton presented in those post-trial proceedings. At the remand hearing Eaton presented a one-page Disposal of Client Record Form from the Lincoln County Mental Health Association, Kemmerer, Wyoming, pertaining to Eaton, and trial counsel's testimony that, after Eaton's trial, trial counsel had received a telephone call from a man who had known Eaton **[**102]** when they

were kids in Meeker, Colorado. According to this man, Eaton had suffered mental and physical abuse from schoolmates. In Eaton's motion for new trial, Eaton again presented the one-page Disposal of Record Form, an affidavit from Eaton's childhood friend from Meeker, who had called **[***181]** trial counsel after the trial had concluded, and several old school records pertaining to Eaton. The one-page Disposal of Record Form indicates that Eaton received service at the mental health facility in the period March 11, 1986 to July 7, 1986, which was after his discharge on March 7, 1986 from the Community Hospital in Torrington, Wyoming. The form indicates that the Lincoln County record was destroyed on May 29, 1996, well before Eaton was charged in the Kimmell homicide and, therefore, well before trial counsel entered his appearance in this case, which was in April 2003. The admitting and discharge diagnosis was similar to that obtained earlier in the Torrington facility, and the medication and dosage information was the same as obtained in the Torrington facility. The form listed the surnames of two therapists. In Eaton's appellate brief addressing the order denying his motion for new trial, Eaton informs the Court that one of the therapists had retired, moved out of state, and could not be located, and the other therapist had been contacted but did not recall Eaton. To the extent that this one-page disposal form is "life history" mitigating evidence, we find it is cumulative **[***182]** to similar evidence that trial counsel presented in the sentencing phase. We note also the underlying record referred to on the form was apparently destroyed before Eaton was charged and trial counsel entered the case, and we note the two therapists were not sources of information available to trial counsel. Trial counsel's failure to discover the one-page disposal form is not deficient performance.

[*P151] With respect to the "life history" mitigating evidence from the man in Meeker, Colorado, who knew Eaton when they were school mates, his affidavit contains information that he knew Eaton at the age of 12 or 13; Eaton was teased, ridiculed and continually picked on by other children; a group of boys jumped him and rubbed Canadian thistles over his groin area; other children threatened to beat him badly if he did not give them money he earned from mowing lawns; Eaton's family was poor; Eaton wore the same clothing all the time; and Eaton was "a good kid, and a hard worker." Eaton contends that trial counsel's investigation was deficient for failing to find witnesses like this childhood friend; that had the trial defense team gone to Meeker, Colorado, and interviewed townspeople, it would **[***183]** have uncovered similar "life history" mitigating evidence. Considering this new evidence in the light of the substantial "life history" mitigating evidence that trial counsel did find, develop, and present at the sentencing phase, we cannot say that trial counsel's failure to investigate townspeople in Meeker or the other towns where Eaton once lived constitutes deficient performance. Such widespread investigations "can promise less than looking for a needle in a haystack, when a lawyer truly has reason to doubt there is-any needle there." *Rompilla, 545 U.S. at 389, 125 S.Ct. at 2467*.

[*P152] With respect to the old school records that Eaton presented in his motion for new trial, Eaton identifies them as follows:

> . school records from Tulsa, Oklahoma, which indicated that Eaton attended Lowell Elementary School (4th grade) for thirty half days (fifteen full days) in the 1956-57 school year;
>
> . a single document from a school district in Scottsbluff, Nebraska;
>
> . a school record from an Ely, Nevada, school district which indicated that Eaton had attended school there in 1955-56 for thirty-five days of the first term and ninety-two days of the second term, was eleven years old when he completed third **[***184]** grade, and scored below the class median average on the Stanford Achievement test; and
>
> . a school record from the Washakie County, Wyoming, school district that Eaton started second grade in 1954 and was dropped from school on March 24, 1955.

Eaton contends that these school records demonstrate the chaos and disorder that attended **[**103]** Eaton's early education and are not cumulative of any of the trial evidence. We find, however, that trial counsel presented substantial evidence of that chaos and disorder that attended Eaton's education in the sentencing phase of the trial through evidence from Dr. Gummow and Eaton's sister, Sharon Slagowski. We do not find that trial counsel's failure to obtain the above-identified school records constituted deficient performance.

[*P153] Although we hold that trial counsel's performance was not deficient for failing to obtain the one page Disposal of Record form and interview therapists whose names were listed on the form (one could not be located by Eaton's new counsel and the one who was located did not remember Eaton), for failing to look for people in Meeker, Colorado, and for failing to obtain additional school records, we shall proceed as the *Strickland* court **[***185]** did and assume arguendo that, in these three instances, trial counsel was deficient. Under that as-

sumption, we shall consider the prejudice component, applying those elements of that component which we listed at the outset of our review of the mitigation issue. The *Strickland* line of cases instructs that:

> . attorney errors cannot be classified according to likelihood of causing prejudice;
>
> . not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceedings;
>
> . a court shall presume that the jury acted according to law;
>
> . the assessment of prejudice should proceed on the assumption that the decision maker is reasonably, conscientiously, and impartially applying the standards that govern the decision;
>
> . a verdict only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support;
>
> . some errors will have had a pervasive effect on the inferences to be drawn from the evidence, and some errors will have had an isolated, trivial effect;
>
> . taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, the court must ask if the **[***186]** appellant has met the affirmative burden of showing that the decision reached would reasonably likely have been different absent the errors; and
>
> . the ultimate focus of inquiry must be on the fundamental fairness of the proceeding and Whether, despite the strong presumption of reliability, the verdict is unreliable because of a breakdown in the adversarial process.

[*P154] ***Applying the elements of the prejudice component and the above-listed instructions, we hold that Eaton has failed to carry his affirmative burden. The evidence that Eaton says his trial counsel should have found and offered at the sentencing phase of the trial would not have altered the sentencing profile presented to the jury. At most, this evidence was cumulative to the substantial evidence that was found and presented to the jury by trial counsel. We have considered the totality of the evidence -- the mitigating evidence presented in the sentencing phase and the additional mitigating evidence submitted by Eaton in the post-trial proceedings and the evidence supporting the aggravating circumstances found by the jury. Upon that consideration, we hold that there is not a reasonable probability that, absent the errors, the [***187] jury, or even one juror, would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.***

[*P155] Having completed our discussion of the additional "life history" mitigating evidence that Eaton did present in the post-trial proceedings, we next discuss Eaton's complaint that trial counsel did not present more "life history" mitigating evidence from Eaton's family members and relatives, former employers and coworkers, and others. At the outset, it bears noting that at the remand evidentiary hearing Eaton did not call any witnesses from any of these categories to present more "life history" mitigating evidence. However, testimony from Mr. Skaggs, lead trial counsel, who testified in person at the hearing, and his investigator, **[**104]** Priscilla Moree, who testified by way of deposition which was submitted at the hearing, explained trial counsel's investigation and decisions concerning these potential sentencing phase witnesses. With respect to Eaton's father, Merle, Ms. Moree explained that she spent an afternoon visiting with him, and that he was not forthcoming in his answers to her questions about his deceased wife and his children, She realized that he was **[***188]** not going to admit that he had mistreated Eaton as a child. Ms. Moree discussed with Mr. Skaggs the results of her visit with Eaton's father. Mr. Skaggs was also aware that Eaton's father had made a statement to the sheriff's investigator that Eaton had a normal childhood. Because Mr. Skaggs had evidence from other Eaton relatives that Eaton's father had abused Eaton and that his childhood was not normal, he decided against calling Eaton's father as a witness in order to avoid any contradictory evidence. We find that trial counsel's decision was a product of reasonable professional judgment, and Eaton has failed to overcome the strong presumption that trial counsel's decision was within the wide range of professionally competent assistance.

[*P156] With respect to Eaton's younger sister, Judy Mason, Ms. Moree interviewed her and her husband at their home in Colorado. It is clear from Ms. Moree's report to trial counsel about that interview that Ms. Mason had the same information about the abusive, chaotic, and dysfunctional childhood of the Eaton children at the hands of their father Merle as Ms. Moree and trial counsel had found and had presented from those witnesses who testified in the **[***189]** sentencing phase. This same information included the father's physical abuse of young Eaton, the lack of medical care, the many family moves,

and the children's attending many different schools. As Ms. Moree's report shows, Ms. Mason also provided Ms. Moree and trial counsel with damaging information about Eaton, including Eaton's violent and abusive marriage to Melody Cline and their having lived in squalor, Eaton's son Eddie, had reported that Eaton had sexually molested and abused him, Eaton's bragging about stealing parts from vehicles in used car lots, Eaton's poor physical hygiene, and Eaton's explosive temper.

[*P157] Ms. Moree testified that, following this interview, Ms. Mason became uncooperative, would not return her telephone calls, and did not respond to letters seeking her cooperation. Ms. Moree testified that by the time of trial, she and Mr. Skaggs learned that Ms. Mason had made public statements denying there had been abuse in the family. Mr. Skaggs decided that Ms. Mason was not going to help her brother. Mr. Skaggs saw Ms. Mason at the trial, sitting with the Kimmell family. We note in Eaton's appellate brief that he inappropriately refers to several excerpts allegedly **[***190]** from a book written by Miss Kimmell's mother. The excerpts, purportedly information from Ms. Mason, concern stories about Eaton's deceased mother and a younger brother of Eaton's. Neither the book nor the excerpts were offered into evidence at either post-trial proceeding and are not evidence before this Court. [6] We shall not consider them.

> 6 Eaton referenced the book in his motion for new trial. The district court declined to consider the book's contents, stating:
>
> > Now, I understand that the defense has referenced Ms. Kimmell's book. I have not read that book. I don't think it is appropriate evidence. I don't know where Ms. Kimmell got her information. It may be valid; it may not. But I don't think I can consider a cite from a book as much in this case.

[*P158] We find that trial counsel's decision not to call Ms. Mason as a witness in order to avoid her potentially damaging and contradictory testimony, especially in light of her unwillingness to cooperate with trial counsel and her apparent association with the Kimmell family at trial, was a product of reasonable professional judgment, and Eaton has failed to overcome the strong presumption that trial counsel's decision was within the wide range **[***191]** of professionally competent assistance.

[*P159] With respect to Eaton's sister, Sharon Slagowski, Ms. Moree interviewed her and found that she, like Judy Mason, was initially cooperative but later became uncooperative and did not respond to telephone calls and letters seeking her help. **[**105]** Ms. Moree testified that Sharon Slagowski, who had been a dispatcher for the police department in Lyman, Wyoming, told her initially that she would like to be helpful but was concerned that her neighbors and friends not know about her relationship to Eaton because of her standing in the community. According to Mr. Skaggs, Sharon Slagowski would not confirm the parts of her statement to the sheriff's office that he wanted her to testify about in person. He believed that she did not want to testify. He decided to use, and he did use at trial, those excerpts from her statement to Sheriff's Deputy Lynn Cohee which were favorable. He said this decision avoided the risk that, if she testified in person, she would say that abuse never happened. We find that trial counsel's decision not to call Ms. Slagowski at trial, but to use the favorable excerpts from her interview statements, was a product of reasonable professional **[***192]** judgment, and Eaton has failed to overcome the strong presumption that trial counsel's decision was within the wide range of professionally competent assistance.

[*P160] With respect to Eaton's other sister, Mary Achziger, Ms. Moree testified that Judy Mason told her that she wanted nothing to do with Eaton or his case and "Mary will not be good to talk to." Mr. Skaggs testified that they had read Mary Achziger's negative statement given to the sheriff's office and decided not to interview her. We have assessed trial counsel's decision not to try to locate and interview Ms. Achziger for reasonableness under these circumstances, applying a heavy measure of deference to trial counsel's judgment. Given Ms. Mason's statement that her sister wanted nothing to do with Eaton or his case and that "Mary will not be good to talk to" and **[***193]** considering trial counsel's knowledge that she had made a negative statement to the sheriff's office, we find that trial counsel made a reasonable decision that contact with this family member was unnecessary. Eaton has failed to overcome the strong presumption in trial counsel's favor. Trial counsel's decision was within the wide range of professionally competent assistance.

[*P161] Ms. Moree had a telephone conversation with Eaton's brother, Richard, who is fifteen years younger than Eaton. He did not tell her much about Eaton, was "kind of vague," and said, "if that's what happened, my brother deserves whatever." Ms. Moree recalled that Richard and Eaton had been involved in some sort of an insurance scam at some time. She testified that when Richard returned her phone call, "he didn't really want anything to do with the case." Both Ms. Moree and Mr. Skaggs had read Richard's statement given to the sheriff's office which suggested that Richard suspected that Eaton was involved in another homicide. Mr. Skaggs decided not to use any part of that statement at trial because he

feared that the prosecution's rebuttal would reveal that suspicion. Although trial counsel sent several letters to **[***194]** Eaton's siblings -- Judy, Sharon, and Richard -- explaining the importance of family mitigation evidence and asking for their cooperation in the case, Mr. Skaggs testified that they did not respond. We find that trial counsel's decision not to call Eaton's brother, Richard, as a witness in order to avoid potentially damaging testimony, especially in light of his unwillingness to cooperate with trial counsel and his expressed feeling about what Eaton deserved, was a product of reasonable professional judgment. Eaton has failed to overcome the strong presumption in trial counsel's favor.

[*P162] With respect to Eaton's former wife, Melody Cline, both Ms. Moree and Mr. Skaggs testified about their conversations with her. Ms. Moree testified that, "I spent many hours with her and I think she wanted Dale to live just so he could die a miserable death in his cell." Ms. Moree's impression was that, in Melody Cline's marriage to Eaton, she was abused by him and she was abusive to him in return. Mr. Skaggs testified that he learned from Ms. Cline that the marital relationship "was so terribly violent, so ugly, not only to her but to the rest of the kids, as well, that she would have contributed absolutely **[***195]** nothing to our mitigation phase and would have contributed a great amount to [the prosecution's] aggravation phase." According to Mr. Skaggs, she described beatings and sexual assaults by **[**106]** Eaton; she described fearing for her life during these situations and right around the time of the Kimmell homicide. We find that trial counsel's decision not to call Eaton's former wife as a witness was a product of reasonable professional judgment. Eaton has failed to overcome the strong presumption that trial counsel's decision was within the wide range of professionally competent assistance.

[*P163] Mr. Skaggs also testified that they could not find the Eatons' son, Eddie, to interview him because Ms. Cline would not tell them where he lived. On the subject of trial counsel's not interviewing Eaton's son Eddie, trial counsel knew that Ms. Moree's report of her interview of Judy Mason revealed that Judy Mason "says that Eddie reported being sexually molested/abused by [Eaton] and that was when the State stepped in and Melody [Eaton's former wife] gave up custody of Eddie to the State of Wyoming when he was 10 years old." Trial counsel's decision not to further pursue Eaton's son given these circumstances **[***196]** was reasonable, especially in light of the heavy measure of deference to be accorded trial counsel's judgment.

[*P164] Ms. Moree interviewed Eaton's son, Billy, in person twice in Cheyenne, Wyoming, where he was living with his mother. Ms. Moree testified that Billy did not offer anything that she thought would have been good mitigation for Eaton. She asked Mr. Skaggs to accompany her on her second visit with Billy so he could get a feeling about Billy. In that second visit, Billy described Eaton as being violent and throwing wrenches at his head. Mr. Skaggs testified that in deciding not to use Billy as a witness, "I used what I talked to him about. Billy could have added nothing. Billy didn't like his dad. Billy didn't love his dad. Well, he didn't care about his dad. Even the fun times with his dad were, you know, mixed with the times of violence. And, you know, Billy would have just not added anything. Billy wanted him killed, is the bottom line." We find that trial counsel's decision not to call Eaton's son Billy as a witness was a product of reasonable professional judgment. Eaton has failed to overcome the strong presumption that trial counsel's decision was within the wide range of **[***197]** professionally competent assistance.

[*P165] Ms. Moree had a telephone conversation with Eaton's daughter, Valitha, who was attending a culinary school in Denver, Colorado. Valitha told her she loved Eaton, that he had been a good father and had not abused her. She was just a young girl when she stayed briefly with Eaton at his place in Moneta. Ms. Moree asked Valitha if they could meet in Denver, but Valitha said she could not spare the time because that would harm her education. Ms. Moree testified that, "[w]hat she related to me was she could not come to the trial, she could not testify, and she was not interested in testifying." Ms. Moree told Mr. Skaggs about her conversation with Valitha. Mr. Skaggs testified that he was aware of the unsanitary living conditions at Eaton's Moneta place as described in a deposition given by Eaton's neighbor, Doris Buchta. He was concerned that Valitha would have had to describe those conditions which were inappropriate for a girl of her age when she stayed with Eaton. Mr. Skaggs also testified that he had reviewed a sheriff's office report of an interview with Valitha in which she indicated that there was a lot of domestic abuse in the home and that Eaton **[***198]** had not been in her life for some considerable period of time. Mr. Skaggs stated he did not think she would have been a productive witness. We find that trial counsel's decision not to call Eaton's daughter as a witness was a product of reasonable professional judgment. Eaton has failed to overcome the strong presumption that trial counsel's decision was within the wide range of professionally competent assistance.

[*P166] Ms. Moree spoke on the telephone with another potential "life history" mitigation witness, Kerry Rose, who worked as a waitress in Nevada, had known Eaton, and had been contacted by the sheriff's office about Eaton and the charges against him. In Ms. Moree's written report to Mr. Skaggs informing him that Rose was willing to testify on Eaton's behalf, she said, among other things, that Rose and her family **[**107]** had been totally shocked and devastated to hear about the charges against

Eaton. Rose said. Eaton was not that type with her, was never mean to her, and brought her breakfast in bed and flowers. Rose told her that Eaton had worked with her father in Utah and the family liked him. Rose said her father told her that Eaton had a fight with a coworker. Rose said she and Eaton **[***199]** had an argument about a woman who had baby-sat Rose's daughter and that Eaton had been jealous of the woman. Ms. Moree testified that she was aware that Rose had told the police that Eaton had lived in a pigsty, she had had sex with him but did not really like him, and that Eaton had given her jewelry. Mr. Skaggs testified that he and Ms. Moree had a long discussion about the pros and cons of bringing Rose to Wyoming for the trial and that he decided against it. Mr. Skaggs' considerations included: Rose had not been around Eaton for years; in Rose's mind, they were not particularly close; Eaton had given her a diamond ring and that a diamond ring was missing from Miss Kimmell's property. Mr. Skaggs decided, "it didn't seem like she would help the defense at all. That diamond ring could have been real problematical." We find that trial counsel's decision not to call this potential witness was a product of reasonable professional judgment, especially in light of potentially damaging information. Eaton has failed to overcome the strong presumption in trial counsel's favor.

[*P167] Both. Ms. Moree and Mr. Skaggs spoke to Vince Horn, a federal public defender in Denver, Colorado, who had represented **[***200]** Eaton on a charge of felon in possession of a firearm. Mr. Horn provided his file to Ms. Moree. Mr. Skaggs learned from Mr. Horn and another close source that Eaton and Mr. Horn "didn't get along real well." Mr. Skaggs did not want to use Mr. Horn as a witness because, among other reasons, he did not want Eaton's lengthy criminal record before the jury; Eaton and Mr. Horn had not gotten along well; and Mr. Skaggs believed that the jury would view with distrust Mr. Horn's testimony about Eaton. We find that trial counsel's decision not to call Mr. Horn as a witness was a product of reasonable professional judgment. Eaton has failed to overcome the strong presumption that trial counsel's decision was within the wide range of professionally competent assistance.

[*P168] Ms. Moree interviewed by telephone Eaton's former friends, Joanne and Ed Walsh. Mr. Skaggs did not think they would be good witnesses because the friendship had soured over a borrowed item -- "something came up in Mr. Eaton's possession that shouldn't have been there," and Mrs. Walsh indicated that she was afraid of Eaton. We find that trial counsel's decision not to call Mr. and Mrs. Walsh as witnesses was a product of reasonable **[***201]** professional judgment. Eaton has failed to overcome the strong presumption that trial counsel's decision was within the wide range of professionally competent assistance.

[*P169] With respect to Eaton's employment history, Ms. Moree put together what she was able to find in various documents, but she characterized Eaton's employment history as sporadic as he did not stay in any one place for any length of time. She testified the records showed that Eaton had been fired from at least three jobs for assaulting coworkers. She also testified that for most of the past six or seven years Eaton had been incarcerated. Mr. Skaggs testified that it was difficult to obtain a thorough work history because Eaton frequently changed jobs, the jobs lasted a short time and ended somewhat disastrously, he was self-employed with his own welding truck, he had been fired several times for assaulting coworkers, and there was no work history for the seven years before the trial because Eaton had been incarcerated. We find that trial counsel's investigation and presentation of Eaton's employment history through several trial witnesses was a product of reasonable professional judgment that supported the limitations **[***202]** on investigation into that history. Eaton has failed to overcome the strong presumption that trial counsel's decision was within the wide range of professionally competent assistance.

[*P170] With respect to Eaton's medical history, Ms. Moree learned from Eaton's sister, Judy Mason, that Eaton and his **[**108]** siblings were not taken to be seen by doctors and were not given inoculations during their childhood. According to Dr. Ash's interview with Eaton, Eaton had no access to medical care. Ms. Moree did obtain and provide to Drs. Ash and Gummow the Colorado mental health records of both Eaton and Eaton's mother, about which they testified in the sentencing phase of the trial. And, of course, we note that Eaton's 1986 Torrington hospital record and his Wyoming State Hospital records were in evidence during the testimony given by those two doctors. We find that trial counsel's investigation and presentation of Eaton's medical and mental health history was a product of reasonable professional judgment that supported the limitations on investigation into that history. Eaton has not overcome the strong presumption in trial counsel's favor.

[*P171] Ms. Moree and Mr. Skaggs had records pertaining to his incarceration **[***203]** at the Wyoming State Penitentiary, his federal incarceration, and his juvenile action in Colorado. Mr. Skaggs testified that Eaton's criminal record was "the biggest aggravator of all," mentioning Eaton's prior record in the Natrona County jail, his bad conduct in jail and threats to go after inmates, his prior record in Florence, Colorado, where a fellow inmate was killed, his record of escape from CAC and his possession of a gun when he was caught, and his "perfectly atrocious juvenile court history," which included stabbing a woman over a watermelon. Mr. Skaggs testified that he wanted to avoid any of that history coming before the jury. We find that trial counsel's decision to avoid as much as possible

potentially damaging evidence of Eaton's criminal history was a product of reasonable professional judgment. Eaton has failed to overcome the strong presumption in trial counsel's favor.

[*P172] In our review of the record of the remand evidentiary hearing, we have also taken note that both Ms. Moree and Mr. Skaggs testified that they were not limited by financial considerations in their work on Eaton's case. Ms. Moree testified that Mr. Skaggs did not request that she keep her costs down **[***204]** because of the public defender's budget. Mr. Skaggs testified he was never denied resources. He stated that Mr. Ken Koski, the State Public Defender, "was very careful not to deny any resources."

[*P173] We now have a complete picture of the "life history" mitigating evidence that trial counsel and his investigator explored, developed, and presented in the sentencing phase of Eaton's trial; the additional but scant "life history" mitigating evidence that Eaton explored, developed, and presented at the remand evidentiary hearing and in his motion for a new trial based on newly discovered evidence; and the testimony of trial counsel and his investigator at the remand evidentiary hearing that informs us concerning trial counsel's decisions in the presentation of the "life history" mitigating evidence in the sentencing phase. We have analyzed this complete picture in the light of those legal standards and analytical model set forth in the *Strickland* line of cases earlier mentioned. We hold that, in light of all the circumstances and with application of a heavy measure of deference to trial counsel's judgments, trial counsel's decisions in the matters identified by Eaton were within the wide range **[***205]** of professionally competent assistance. Eaton has failed to show that trial counsel's performance was deficient.

[*P174] We begin our review of Eaton's second line of criticisms of trial- counsel's performance by first considering Eaton's claim that trial counsel's performance in his preparation and presentation of mitigating evidence through his expert witness, Dr. Ash, was deficient. Eaton asserts that trial counsel's failure to alert Dr. Ash about certain notations in a journal kept by Doris Buchta, one of Eaton's neighbors near his Moneta property, which notations suggested that Eaton may not have been as socially isolated as Dr. Ash believed, exposed Dr. Ash to the prosecutor's damaging cross-examination. It is important to view this claim in the context of trial counsel's direct examination of Dr. Ash on the subject, the prosecution's cross-examination, trial counsel's re-direct examination, and trial counsel's testimony at the remand hearing. In trial counsel's direct examination of Dr. Ash in the sentencing phase, Dr. Ash testified that **[**109]** he had talked to Eaton about the way Eaton was living in March and April of 1988:

> A. Mr. Eaton was living in the most abject of circumstances. He had **[***206]** lost his marriage, lost his family. He had lost his welding business. He had lost his job. He had lost his home, because he could not afford it. He had a home that would take 2- or $ 300 a month in Cheyenne. He lost that and was living in a -- a bus by himself. He was isolated, essentially, from friends; and he was isolated from family. He was in poverty. He was able to manage to feed himself, essentially, by scavenging cans out of dumps and selling them for money for groceries.

On cross-examination, the prosecution and Dr. Ash had the following exchange:

> Q. Now, Mr. Eaton, when he spoke to you, describes a fairly miserable life at the time of early 1988; fair statement?
>
> A. Yes.
>
> Q. Okay. Were you aware that he was, on a frequent basis, visiting his neighbors?
>
> A. At the time in the spring?
>
> Q. Yes.
>
> A. No.
>
> Q. Okay. For instance, did you know there was a little old lady across the way that kept a diary?
>
> A. I was aware of the people across the way. I had thought that they were getting involved with each other after this happened.
>
> Q. Okay. Well, let's talk about that, then; because Mr. Eaton basically told you he holed up and didn't leave unless he just had to?
>
> A. Yes.
>
> Q. That's not an overstatement, **[***207]** is it?
>
> A. That is not an overstatement.
>
> Q. Okay. And so things that happened inarch would be relevant, wouldn't they, March of 1988?
>
> A. Yes.

Q. Okay. And, for instance, he also reported that he had a very poor economic status; is that true?

A. That's correct.

Q. Okay. So if she has a note that Dale visited on March 8 and paid the taxes on an adjoining property, that would seem somewhat inconsistent with what he told you, wouldn't it?

A. How much were the taxes?

Q. Well, I mean, I guess that's inconsistent two ways. He was going out and seeing people, that would indicate, wouldn't it?

A. He -- he had a hard time getting out seeing people, he said. That's correct.

Q. Okay. Were you aware there's another entry on March 16 that he had visited the Buchtas? Were you aware of that?

A. No.

Q. Were you aware that on March 22, he visited the Buchtas for two hours? Were you aware of that?

A. No.

Q. On March 24, were you aware that he had gone over and helped Mr. Buchta work on a car?

A. No.

Q. And this persisted after March 24, did it not, the depression, this period of horrible isolation?

A. In my opinion and from what I've been told, yes.

Q. Were you aware that he visited the Buchtas again on April 1?

A. No.

Q. **[***208]** Were you aware on April 11 that he wanted to visit, and he went over and visited them for six hours? Does that sound like he's keeping himself in isolation?

A. No, it does not.

Q. Finally -- there's a lot of these, but I think this is a relevant time period. April 25, were you aware that he went over and visited the Buchtas, again, for chicken dinner?

A. No.

Q. So he's maybe not quite as isolated as he led you to believe?

A. There are more visits than I was aware of.

Q. Did they ever give you that to look at?

A. No.

[110]** During trial counsel's redirect examination of Dr. Ash on the subject, the following exchange occurred:

Q. Okay. Now, you heard questions from Mr. Blonigen which indicated that Dale would go across the road and visit with Doris Buchta --

A. Yes.

Q. -- Buchta? You heard those questions?

A. Yes.

Q. Would the fact that he would go, across the street and visit with Doris 'Buchta every couple of weeks -- would that cause you to change your mind that he's socially isolated?

A. A visit every couple of weeks is actually more visits than I had in mind that he was making. If that's all that he had contact with people during that time, that's still pretty isolated.

Q. Okay. Well, actually, he probably **[***209]** may have had contact with other people over in Waltman. Would that be inconsistent?

A. He -- he gave a picture of -- of being very isolated, very alone, and very depressed.

[*P175] At the remand evidentiary hearing, trial counsel explained that he had not given the Buchta journal to Dr. Ash because trial counsel believed it was not relevant "in terms of Dr. Ash's opinion that [Eaton] was living a life of social isolation out there." Trial counsel said that Mrs. Buchta's living three hundred yards across the high-

way did not mean Eaton was not in isolation. In trial counsel's opinion, the prosecution's cross-examination of Dr. Ash on the matter was not damaging. He said, "I think the jury understood that he was extremely isolated out there."

[*P176] In the district court's decision letter following the remand hearing, the court stated that the point could be argued either way, and that it was up to the jury to determine whether Eaton lived an isolated life and whether the fact was significant. In the court's opinion, the prosecution's cross-examination of Dr. Ash on the matter did not significantly impact Dr. Ash's opinion. After reviewing the full context of Eaton's claim, as well as the complete record **[***210]** of the sentencing phase of the trial, we do not find that trial counsel's not providing Dr. Ash with Mrs. Buchta's journal was deficient performance. Dr. Ash held his ground under the prosecution's cross-examination and testified that, even considering Mrs. Buchta's journal entries, "if that's all that he had contact with people during that time, that's still pretty isolated." We hold that Eaton has not established that, in light of this record, trial counsel's not providing Dr. Ash with Mrs. Buchta's journal was outside the wide range of professionally competent assistance.

[*P177] We continue our review of Eaton's second line of criticism of trial counsel's performance with consideration of his assertion that trial counsel's preparation and presentation of Dr. Gummow's testimony was deficient in three respects. First, Eaton claims that trial counsel's failure to provide Dr. Gummow with the correct date of the suicide death of Eaton's brother (which Dr. Gummow mistakenly thought was before the Kimmell homicide) exposed Dr. Gummow to the prosecution's "quite brutal" cross-examination. It is helpful to consider this claim in context. During trial counsel's direct examination of Dr. Gummow, **[***211]** she testified in narrative fashion with a chronology of Eaton's life. Among other information, she included, in her words, "another very significant date," which was the carbon monoxide asphyxiation of Eaton's brother "sometime in 1987. I don't know the exact date." She said that Eaton blamed himself for his brother's suicide because he had not loaned his brother some money. Midway through the prosecution's cross-examination of Dr. Gummow, there was this exchange:

> [Mr. Blonigan]: Actually, from what he reported to you, the suicide of his brother wasn't having much impact on him at the time that he committed this crime, was it?
>
> A. I never specifically discussed that with him. I don't know whether it was still bothering him or not.
>
> Mr. Skaggs: Well, Your Honor -- excuse me -- actually, suicide of his brother I don't think happened until after --
>
> **[**111]** Q. (By Mr. Blonigan): That's not what her chart says.
>
> A. It was '87, is my understanding.
>
> Mr. Skaggs: When was Torrington?
>
> Mr. Blonigan: '86.
>
> The Witness: '86.
>
> Mr. Skaggs: Okay. So it happened afterward.
>
> Mr. Blonigan: After Torrington, yes, but before the homicide.
>
> Mr. Skaggs: Oh, okay. I missed where you were at.
>
> Q. (By Mr. Blonigan): Did you consider the **[***212]** suicide of his brother a significant event in his life and in his mental state in 1988?
>
> A. I have no way to evaluate that.
>
> Q. Did you do anything to confirm whether that information was accurate?
>
> A. Just -- it was mentioned in reports. That's where I got the date from. I didn't get it from Mr. Eaton. Mr. Eaton didn't recall the date.

The prosecutor's cross-examination moved on to other matters, but then returned to the date of the brother's suicide toward the end when this exchange occurred:

> Q. And one of the -- you said, when you were standing up there with this time chart, that one of the most significant events in Dale's life before the homicide was the suicide of his brother Darrel; is that correct?
>
> A. That was my statement, yes.
>
> Q. And that was listed as occurring on January 1, 1987; is that correct?
>
> A. That's an approximate date. I only had the year. So when I have something like 1/1/87, it means that I don't know the exact date; and I put the year.
>
> Q. Well, both you and Dr. Ash talked about this being an event that was affecting him at the time of the homicide, as part of his depression; isn't that true?

A. No, I didn't testify to that.

Q. Well, Doctor, did you ever bother to get a death **[***213]** certificate?

A. No.

Q. I would like to show you 1003, a simple thing to check on, a very simple thing to check on.

A. Not for me. I'm not an investigator. I wouldn't even be able to get the authorization to do this.

Q. Doctor, what day did Mr. Eaton's brother commit suicide, from that document?

A. October 10, 1988.

Q. So, well after the Kimmell homicide; isn't that true?

A. That's true.

Mr. Blonigan: Move for the introduction of 1003, Your Honor.

Mr. Skaggs: Well, I object to that, Your Honor.

Mr. Blonigan: Well, Your Honor, I'm sure he does, but it directly impeaches and it is a certified copy of a regularly kept public record.

The Court: It may be a certified copy, but the doctor has not testified that this suicide was a factor that she weighed in -- to my knowledge, weighed in --

Mr. Blonigan: I --

The Court: -- her diagnosis.

Mr. Blonigan: I disagree. On her direct testimony, she testified it was a very significant event.

Mr. Skaggs: I disagree with that, Your Honor.

The Court: Not relating to the homicide.

Mr. Blonigan: Well, are they saying his suicide is not related to the homicide in any way, or his state of mind?

Mr. Skaggs: That's exactly what we're saying.

The Witness: I have no evidence that **[***214]** it was directly related. I think I testified to that.

The Court: I'm going to not receive 1003.

The prosecutor then moved to strike the chronology exhibit, but the court denied the motion. In trial counsel's redirect examination, Dr. Gummow testified that the date of the brother's suicide had no relation to Eaton's mental condition at the time of the Kimmell homicide. She did not consider it and it was not mentioned to her, and she **[**112]** thought she had gotten the date from a presentencing report.

[*P178] At the remand evidentiary hearing, called on direct examination by Eaton's new counsel, Dr. Gummow testified that the date of the brother's suicide was not significant to her sentencing phase testimony. Asked by Eaton's new counsel if she had felt "beat up" on the prosecutor's cross-examination on that subject, Dr. Gummow answered, "not particularly." In the district court's decision letter following the remand, evidentiary hearing, the court found that trial counsel's failure to correct Dr. Gummow's chronology of Eaton's life with the correct date of the brother's suicide was not significant. After reviewing the full context of Eaton's claim, as well as the complete record of the exchange among **[***215]** Dr. Gummow, trial counsel, the prosecutor, and the trial court on the point, we do not find that trial counsel's performance was deficient. Dr. Gummow's sentencing phase testimony on the import of the brother's suicide was clear: The date of the brother's suicide had no relation to Eaton's mental condition at the time of the Kimmell homicide; she did not consider it.

[*P179] The next specific criticism that Eaton lodged against trial counsel in his presentation of Dr. Gummow's sentencing phase testimony is trial counsel's deletion of three slides from Dr. Gummow's thirty-slide PowerPoint presentation during that testimony. In his appellate brief, Eaton states that, at the remand evidentiary hearing, Dr. Gummow "expressed concern about the substance of slides deleted from her testimony and presentation to the jury, as those went to Mr. Eaton's 'pretty well-documented history of depression and fairly strong history of genetic loading for mental illness....'" At the remand evidentiary hearing, Dr. Gummow testified that the three slides would have helped the jury understand how depression can turn into rage, and rage can turn into violence. She felt this would have helped the jury to understand **[***216]** what Eaton had done. The first slide, Remand Exhibit AA, was a summary of the research on depression and serotonin and transmitters; the second slide, Remand Exhibit BB, was a survey of the literature about anger and

depression among all people who suffer from that condition, and the third slide, Remand Exhibit CC, captioned "Genetics Brain Disease and Violence Facts," concerned the genetic component of depression, anger, and aggression. According to Dr. Gummow, trial counsel met with her for three days before her trial testimony and decided to delete these three slides. At that meeting, she told him she thought it was important to make the link that depressed people can be aggressive; she said trial counsel's response was that he thought the prosecutor would not like them. At the remand evidentiary hearing, trial counsel testified that one of the reasons he pared down Dr. Gummow's testimony "in a couple of different slides before we even started" was that they would expose the defense to rebuttal on past misconduct. He added that it was a "terrific concern" not to get into areas where "people have negatives in their background." During the hearing, trial counsel indicated that he **[***217]** wanted to avoid as much as possible evidence that Eaton had a bad temper, was violent, and unable to be rehabilitated. We have closely examined Dr. Gummow's PowerPoint slide testimony in the sentencing phase and are satisfied that her testimony, even without the three slides, sufficiently covered Eaton's strong and well-documented long-standing history of depression and genetic loading for the mental illness which Dr. Gummow, as well as Dr. Ash, found in their evaluations of Eaton. She testified about the impact of depression on the brain and that depression is thought to be a genetic disorder and "it is an inherited disorder in part. Usually, most depressed people have multiple family members who either have psychiatric conditions or depressive disorders ... the major depressive disorder is considered to be a brain disease that impacts brain transmitters and brain communication." Moreover, she stated, "it's exacerbated or worsened by social factors." She stated that Eaton had most of these factors including "early onset, he has childhood abuse ... and he has family members with significant history." She commented that Eaton's mother was diagnosed from 1962 to 1966 with the severe illness **[***218]** of schizophrenic reaction, chronic undifferentiated, and she confirmed Eaton's own 1986 hospitalization for mental health issues. She **[**113]** then testified on genetic research findings, including that individuals who have a predisposition to major depression are far more vulnerable to stressors. She then referred to the severe and significant psychiatric disorder of Eaton's mother, the reported display of explosive behavior of Eaton's father, Eaton's brother's suicide, and anger control issues of Eaton's brother. After testifying about many aspects of the brain, metabolism, antidepressant medication, Eaton's IQ and academic skills, through her slide presentation, Dr. Gummow stated her opinion that Eaton, who suffers from major depression, has moderate to severe brain damage and that depression is linked to his behavior. She then stated that a person with a milder form of depression is not going to lose control. Although some people have good family support that helps them develop techniques or coping styles to manage the difficult feelings associated with depression, she testified that Eaton did not have anyone to help him deal with the irrational feelings he had associated with his illness. **[***219]** She stated her opinion that Eaton's lifelong psychiatric disorder caused extreme emotional disturbance, inability to conform his conduct, and extreme duress in March and April 1988, the time of the Kimmell homicide. We note that during the prosecution's cross-examination, Dr. Gummow stated that, although her profession in the past had criticized linking certain mental illnesses and violent behavior, that linkage is not criticized nearly as much now with more objective methods. We also note that Dr. Gummow stated, in her remand evidentiary hearing testimony, that at Eaton's trial, she felt she had sufficient information to proceed with her evaluation and testimony in the case.

[*P180] Based upon our extensive review of Dr. Gummow's trial testimony, including her thirty-slide PowerPoint presentation, and the testimony at the remand evidentiary hearing from both Dr. Gummow and trial counsel, we conclude that Dr. Gummow's trial testimony about the linkage of depression, aggression, and genetic loading was ample; that trial counsel had made a reasonable decision to try to avoid to the extent possible evidence suggesting that Eaton had a bad temper, was violent, and unable to be rehabilitated. Under **[***220]** the circumstances, trial counsel found himself in a very difficult spot and, in our view, made a reasonable decision to delete the three slides in question. Consequently, we find no merit in Eaton's claim that trial counsel's performance in this regard was deficient.

[*P181] The final specific claim that Eaton aims at trial counsel in his preparation and presentation of Dr. Gummow's sentencing phase testimony arises from Dr. Gummow's post-trial criticisms that in her association with trial counsel several days before her testimony and during her testimony "there seemed to be confusion, meetings were not conducted in private areas, ... [trial counsel] was not behaving in the more organized, helpful fashion he had in the past ... [and was] irritable and shaky." This claim received attention during the remand evidentiary hearing, as both Dr. Gummow and trial counsel testified about the criticisms. Dr. Gummow testified that before the Eaton case, she and trial counsel had worked together on several other capital cases and she was working with him on another capital case at the time of the remand hearing. She said that trial counsel had first contacted her about the Eaton case weeks before May 20, **[***221]** 2003. Trial counsel entered the case in April 2003. We note that Eaton's trial was nine to ten months later. At trial counsel's request, she spoke to Dr. Ash, who was also working on the case, to get his views on Eaton's mental condition. We

note from her trial testimony that she met with Eaton for two days to converse with and evaluate him through various tests she administered. At the remand evidentiary hearing, she testified about meeting and having telephone conversations with trial counsel as her work on the case progressed. She developed a chronology of Eaton's life based upon the "life history" materials and information provided by trial counsel. She spent several days in Casper before her testimony was presented at trial. She spent time with trial counsel during those days. On three or four occasions, they met at breakfast and discussed her testimony. It was on those occasions that she felt their meetings, were not in private, and she felt uncomfortable, but she did not make **[**114]** her concerns known to trial counsel. She also met with trial counsel and others on the defense team at the public defender's office, where they discussed her testimony. She described the tone of the meeting **[***222]** as uncomfortable in the sense that it was a "very tense situation," and trial counsel was irritable and "very snappish." From our previous discussion about trial counsel's deletion of three slides from Dr. Gummow's PowerPoint presentation, we know that three days before her testimony, she and trial counsel, discussed that matter. Before her testimony, she and trial counsel had discussed her presentation in the courtroom with other members of the defense team, and court staff personnel were in and out on that occasion. She testified that she felt able to communicate with trial counsel, and he with her, about what her trial testimony would cover; but during particularly the second half of her testimony, she "began to wonder about that." In her remand hearing testimony, she elaborated on her observation of trial counsel's ill health during her trial testimony. She said that earlier trial counsel had mentioned to her that he had diabetes. She said that she had overheard him tell a court staff member that he was not feeling well and had passed out the night before. She said he was drinking lots of water. Under the prosecution's cross-examination, she stated that she had spent more than **[***223]** twenty hours preparing for the case and felt she had sufficient information to proceed with her evaluation and testimony in the case. Asked by the prosecutor why she did not share her concerns with trial counsel after the trial, she answered, "I like [trial counsel] and I -- I think it was more I didn't want to hurt his feelings."

[*P182] Trial counsel testified about his working with Dr. Gummow in preparation for the trial and in the presentation of her testimony. Early on, he had traveled to Salt Lake City, Utah, to discuss with her matters relating to the case. He said he talked to her before trial several times in depth about her testimony. He referred to meeting with her in the public defender's office and at breakfast. Commenting on the condition of his health at trial, he said he had a cold and was ill to the point that he was somewhat grumpy, adding he is grumpy even when he is not ill. Responding to Dr. Gummow's testimony that he told a court staff member that he had passed out, he testified "I went home and got some sleep. I use that term loosely, meaning I sleep well or pass out. I go to bed early and sleep all night, which I don't normally do." Concerning his diabetic condition, **[***224]** he said that at trial he was not having any trouble maintaining his blood glucose levels and was checking that regularly. He agreed that he was drinking a lot of water; he said:

> Well, my mother always said drink a lot of water if you have a cold. And [at] that particular point, I did have a cold. I was dehydrating to some extent with a cold, and so, yes, I was drinking ... I was drinking a lot of water. I drink a lot of water anyway.

He further testified that at no time did he feel that he was mentally and emotionally ill-prepared and confused.

[*P183] The trial court conducting the remand evidentiary hearing found that trial counsel's health was not an issue during trial; that his cold was relatively minor and had no impact on his ability to try the case. Eaton has made no showing that the trial court's finding of fact is clearly erroneous. Based upon our extensive review of Dr. Gummow's trial testimony and the testimony of trial counsel, we conclude that Eaton's final claim is without merit. We find no deficient performance in trial counsel's preparation and presentation of Dr. Gummow's trial testimony.

[*P184] To the extent that. Eaton has in his appellate briefs raised any other claim asserting trial **[***225]** counsel's deficient performance in his representation of Eaton in the investigation, preparation, and presentation of mitigating evidence in the sentencing phase of his trial, we find no merit in any such assertions and hold that trial counsel's performance as Eaton's counsel was not deficient.

[*P185] In conclusion, Eaton has made no showing that the justice of his sentence was rendered unreliable by a breakdown in the adversary process caused by deficiencies in **[**115]** trial counsel's assistance. Eaton's sentencing proceeding was not fundamentally unfair.

(iii) Instructions.

[*P186] We apply the same standard of review here as we did in Part I of this opinion. PP 67-68, *supra*.

[*P187] Once again, we are faced with an argument that boils down to this: The defense team offered good penalty phase instructions, but they did not vigorously pursue the use of those instructions. Eaton contends that the instructions offered by the defense team were better than those given by the district court, but in an unreported instructions conference, the defense did not fight to get

those instructions used. The defense made no objections to the instructions given. At the remand hearing, the district court would not take testimony **[***226]** on the matter of the unreported instructions conference (expert or otherwise), but an affidavit of an expert on the subject does appear in the record on appeal. [7] The essence of Eaton's position on this issue is that the instructions given did not set forth a comprehensible scheme for guiding the jurors' decisions. Moreover, it is claimed that the instructions were inconsistent and contradictory. Although Eaton makes mention of some specific instructions in this argument and compares offered instructions to given instructions to a limited extent, we will, limit our review process to a consideration of whether or not any of the instructions given in the penalty phase were erroneous under the plain error standard.

> 7 This argument depends in part upon an affidavit of Michael J. Heber, an attorney admitted to practice in Colorado and Hawaii, who appears to be an expert in matters such as this. He concludes that defense counsel did not render reasonably competent assistance of counsel because they did not pursue some of their offered instructions. We have considered the affidavit, but do not find it particularly persuasive in light of the applicable standard of review.

[*P188] We have carefully examined **[***227]** all of the instructions given, and we find none to be erroneous, much less erroneous under the plain error standard. The central. point that Eaton made in this segment of his brief is that the instructions could have been better and more favorable to him had his attorney fought more vigorously for those additional or different instructions. Instead, defense counsel made no objections whatsoever to the instructions given. Because none of the instructions given are erroneous, and because Eaton has not made a viable contention that an instruction not given was required, we conclude that no error occurred in the instructions to the jury during the penalty phase. Hence, counsel were not ineffective in this regard.

(iv) Sentencing form inadequate.

[*P189] We have also carefully examined the sentencing form and find that it is not erroneous in any respect. The principal objection made here was that the sentencing form stated that mitigating circumstances had to be proved by a preponderance of the evidence, when the 1983 statute stated no burden of proof for mitigating evidence. Aggravators had to be proved beyond a reasonable doubt, whereas mitigators only had to be proved by a preponderance of the **[***228]** evidence, the lowest burden of proof known to the law. We think it was advantageous to Eaton to have a much lesser burden described by the sentencing form, and so we do not identify this as a disadvantage.

D. Hostility of Judge

[*P190] We apply the same standard of review here as we did in Part I of this opinion. P 78, *supra*. Much as we did in Part I, we have carefully examined the transcripts of the penalty phase of the proceedings in this case, and we perceive no evidence that the district court demonstrated any prejudice against Eaton.

E. Prosecutorial Misconduct

[*P191] We apply the same standard of review here as we did in Part I, P 103, *supra*. We add here:

> The general rule in Wyoming is that a failure to interpose a timely objection to improper argument is treated as a waiver, unless the prosecutor's misconduct is so flagrant as to constitute plain error, requiring reversal. *Armstrong v. State, 826* **[**116]** *P.2d 1106, 1115 (Wyo.1992)*. A plain error analysis requires the appellant to demonstrate the violation of a clear and unequivocal rule of law, clearly reflected in the record, resulting in the abridgment of a substantial right of the party to his material prejudice. *Arevalo v. State, 939 P.2d 228, 232 (Wyo.1997)*. **[***229]** We are reluctant to find plain error in closing arguments "lest the trial court becomes required to control argument because opposing counsel does not object." *James v. State, 888 P.2d 200, 207 (Wyo.1994)* (quoting *Taul v. State, 862 P.2d 649, 659 (Wyo.1993))*.
>
> In analyzing claims of prosecutorial misconduct, we consider the prosecutor's argument in the context in which it was made and with regard to the evidence produced at trial. *Taul v. State, 862 P.2d 649, 659 (Wyo.1993)*. Although counsel are allowed great latitude in the argument of cases, argument must be kept within the evidence. *Dice v. State, 825 P.2d 379, 384 (Wyo.1992)*. Statements calculated to inflame, prejudice or mislead the jury are not permitted. *Taul, 862 P.2d at 659*.

Helm v. State, 1 P.3d 635, 639-40 (Wyo. 2000) (quoting *Montoya v. State, 971 P.2d 134, 136 (Wyo.1998))*.

(i) In closing argument.

[*P192] We embark upon this discussion, by taking note that no objections were made to any part of the closing argument. In Eaton's discussion of the closing argument made by the prosecutor, we are given brief passages of argument without there being a page number identified for our ready reference. Nonetheless, we have sought out these **[***230]** passages on our own and identified them in the course of analyzing this issue.

[*P193] Eaton contends that the prosecutor made "improper community outrage-type arguments and unduly prejudicial arguments." This contention is made without benefit of applicable authority. However, reference is made to the prosecutor saying that the "only" responsible verdict is death. Notably missing from the transcript is the word "only." Rather, the prosecutor says: "... [I]f we are to make a responsible, moral, reasonable judgment, as the judge stated in his instructions, some murders must be recognized to be different than others; ..." Eaton claims "[t]he DA blamed Mr. Eaton for placing the 'awesome burden' of determining the death penalty on the jury." However, the transcript reveals that the prosecutor commented on Eaton's conduct in committing the murder as the impetus for bringing to bear the death penalty and he emphasized that the decision to impose was "yours and yours alone." Eaton also asserts that this portion of the prosecutor's argument is plain error: "And your verdict will speak volumes as to what is to be said about this murder and what is the full measure of justice for what happened in this case **[***231]** to this young girl at the hands of Dale Eaton, because it is Dale Eaton's choices that bring us here -- no one else's -- his." We conclude this was not improper argument. *Sanchez v. State, 2002 WY 31, PP 17-23, 41 P.3d 531, 535-36 (Wyo. 2002)*.

[*P194] Eaton also objects to this excerpt from the closing argument; indeed it is the last paragraph of the State's closing argument:

> Death is not an easy choice for you like it was for Mr. Eaton. But if justice is to have its full measure, we must at some time speak and speak as a group, as a jury, and **state** that this murder goes far beyond those; that it is the worst of the worst; and that defendant should be convicted and that he should face the ultimate punishment. [Emphasis added.]

Eaton apparently misconstrues the word "state" emphasized above as an invocation for the jury to speak on behalf of all of the State of Wyoming. In context, however, it is clear that he is asking the jury to "state" (i.e., speak, assert, declare) that this was a murder that warranted application of the death penalty.

[*P195] When all of these excerpts are viewed in context, it is evident that the prosecutor was not seeking a decision based upon matters outside the evidence. The **[***232]** prosecutor acknowledged that the choice between life and death would not be an easy task and by reminding the jury that, in order to make a just, responsible, and reasoned moral decision to impose a death sentence, that some **[**117]** murders, those warranting the death penalty, are qualitatively different from others that do not warrant the ultimate sanction. We conclude that this line of argument was not error requiring reversal.

[*P196] Eaton also contends that the prosecutor urged the jury not to consider the mitigating evidence, a proposition contrary to the instructions given by the judge. The prosecutor referred to much of the mitigating evidence as an attempt to hide the enormity of Eaton's crime in "a veil of psychiatrists and tears." This was nothing more than a reminder to the jury to not allow intervening psychiatric and mercy witnesses to dull its memory about the aggravating circumstances proved by the State. The prosecutor's claim that the mitigating evidence was actually "aggravating," appears to be a comment on the details of the crime as presented in Dr. Ash's testimony. The prosecutor also characterized much of the mitigation as being "excuses," and in the context of this case, it **[***233]** was a fair argument for the prosecutor to characterize Eaton's evidence as, perhaps, "explaining" why the events happened, but that did not foreclose the State from contending that there may be only a very fine line between "explaining" and "excusing." This characterization is strengthened by the lack of a temporal connection between much of the mitigating evidence and the actual crime. There need not necessarily be a temporal connection, but the lack of that characteristic is a fair argument. The prosecutor's contention that three of the mitigators should be lumped together as only one was a comment on the close relationship between each of those mitigators and the evidence that supported them, and not an exhortation for the jury to ignore them or the instructions of the court.

[*P197] Eaton contends that the prosecutor attempted to insert "victim impact testimony" into his argument by saying that the State did not have "any pictures to show you of families and school boys, because we only have autopsy photos and missing person's reports." However, he fails to show that such argument itself constituted testimony or that it referred to any record testimony. Nor does he explain how such could **[***234]** be said to amount to information about the personal qualities of the victim or the emotional effect of the death on her family, or information about her family's opinions and characterizations of the crime or the defendant. *Harlow, P 48, 2003 WY 47, 70 P.3d 179 at 196*. Most importantly, he fails to suggest how the challenged comment -- in light of its brevity and the injunction in Instruction No. 12 to consider

only the proven aggravators as capable of warranting a death sentence -- might be said to be anything other than harmless. *Id. at PP 49-57, 70 P.3d at 196-99*.

[*P198] The prosecutor argued that "(p)erhaps he [Eaton] simply finds young women alongside the road a convenient target." Inmate Dax gave testimony from which it could be inferred that Eaton found a woman or women along the road, and Dr. Ash related that Eaton came upon Ms. Kimmell on the road into his property. Eaton also tries to spin this into an argument by the prosecution for the "future dangerousness" aggravator which was not a part of the case. However, we are unable to see that connection. The prosecutor is also scored for arguing that the mitigators must be directly connected with the crime in all cases (as opposed to having a connection **[***235]** with the crime **OR** the background of the criminal). That is not what the prosecutor appears to be suggesting. What he was doing was pointing out that the three mitigators in question, by their own language, all had a common feature: Eaton's mental or psychological state at the time he murdered Ms. Kimmell. Thus, he correctly noted that the mitigating facts to be proven -- his extreme mental or emotional disturbance, that he was under duress, or his diminished capacity to appreciate the criminality of his conduct or to conform it to the law -- had to be shown to have been operative at the time of the killing and, in that sense, connected to it. No plain error exists in this regard.

[*P199] Finally, Eaton contends that the prosecutor argued that Eaton attempted to "blame" the victim for the tragedies that befell her when there is no such evidence in the record. Once again, we view this as fair argument, given that Dr. Ash's rendition **[**118]** of Eaton's story suggested that once he found Kimmell on his land and confronted her with a gun, that set in motion the inevitable conclusion that Eaton would have to kill her. In addition, inmate Dax testified that it was Ms. Kimmell's rebuff and her "high **[***236]** and mighty" attitude that set the tragic events in motion and caused Eaton to spin out of control. It is a fair argument that Eaton attempted to lessen his responsibility for the crime by blaming the victim for initiating the events that led to her own rape and murder.

[*P200] In sum, we find no plain error in the prosecutor's closing argument.

(ii) During examination of witnesses.

[*P201] Eaton contends that the prosecutor's questioning of Dr. Ash with respect to Eaton's motivation to seek treatment with psychologists or psychiatrists was to reap secondary gain in "legal" situations. It is contended that this line of questioning implicated W.R.E. 404(b) and an attempt to bring prior bad acts to the jury's attention, as well as off-limits juvenile proceedings. We have scrutinized that cross-examination with care, and it cannot be said that prior bad acts were directly communicated to the jury, although it is possible that such a conclusion could be drawn. These circumstances wherein Eaton sought mental health services included juvenile proceedings and divorce, but also adult felony crimes. However, no crime or bad act was specified or identified and we decline to find plain error in these circumstances. **[***237]** In addition, the prosecutor did point out that some of the health care professionals suspected that Eaton was malingering and exaggerating his symptoms so as to improve his legal position. This appears to be an accurate reference to the evidence elicited from Dr. Ash and a proper method of testing the soundness of the underlying facts that supposedly supported Dr. Ash's testimony. We cannot point to it as an error requiring reversal of the penalty imposed.

[*P202] Eaton contends that the prosecutor acted improperly in his examination of Dr. Gummow as well. However, for the most part, this argument challenges only the prosecutor's right and duty to subject an expert's testimony to searching scrutiny in order to test her reliability as a witness, the soundness of her opinions and the information upon which they are based, as well as for any biases the witness may have. *Chrysler Corp. v. Todorovich, 580 P.2d 1123, 1133 (Wyo. 1978)*; *Pearson v. State, 811 P.2d 704, 707 (Wyo. 1991)*.

[*P203] As he began his cross-examination of Dr. Gummow, the prosecutor immediately began to challenge her testimony that Eaton suffered from organic brain damage that was caused by his severe, long-term depression. The prosecutor **[***238]** asked point blank and with no introduction: "Ma'am, I would like to begin first by talking about the brain damage issue. Based on your opinion and review, did Mr. Eaton suffer more or less brain damage than Ms. Kimmell suffered when she was killed." In all honesty, we can only characterize this as a "cheap shot" and unprofessional conduct. Dr. Gummow simply answered that she did not know, and that would have been consistent with the scope of her testimony that she examined Eaton, but had not made an inquiry into Ms. Kimmell's condition. While it demonstrated poor judgment in a death penalty case (death is different), it is a matter that could have easily been corrected had an objection been made. The trial judge could also have stricken the question and advised the jury to ignore it entirely.

[*P204] It cannot be gainsaid that the prosecutor was vigorous and aggressive in his cross-examination of Dr. Gummow; however, we are unable to conclude that the prosecutor's cross-examination amounted to misconduct. The prosecutor's questions included the number and types of cases in which she testified for defendants in death penalty cases, the thrust of her testimony, and her compensation in such cases. **[***239]** This line of questioning of opposing expert witnesses is standard fare and is not prohibited. Moreover, at the remand hearing, when asked by Eaton's appellate counsel whether she felt "beat

up" by the prosecutor's cross-examination on the subject of the date of the suicide death of Eaton's brother, Dr. Gummow **[**119]** answered, "not particularly." We have carefully and closely reviewed the prosecutor's cross-examination of Dr. Gummow and are satisfied that Eaton's claim has no merit.

[*P205] Finally, Eaton contends that the prosecutor's persistent characterization of some of Eaton's mitigation witnesses as "mercy" witnesses amounted to misconduct. We disagree. In *McLaughlin v. State, 780 P.2d 964, 969 (Wyo. 1989)*, we held that a prosecutor's remarks about the appellant's expert witness, which the appellant claimed was an expression of the prosecutor's opinion that the expert, witness was a "professional witness," was not misconduct. Similarly, we hold here that the prosecutor's characterization of some of Eaton's witnesses does not amount to misconduct.

(iii) Destruction of evidence.

[*P206] Eaton contends that the prosecution's decision to allow the bus, which it was suggested had been the bus in which Eaton **[***240]** lived and held Ms. Kimmell captive, to be destroyed constitutes misconduct. There is nothing in the record to support this assertion and no authority is cited to suggest it is a viable issue in any event. We decline to consider it further. At trial, it was very clear that the defense did not think the bus was that which had belonged to Eaton.

F. Allowing Dr. Ash to Testify

[*P207] Eaton contends that it was error for the district court to permit the defense to allow Dr. Ash to so comprehensively incriminate Eaton, without Eaton having first given his express written permission to waive doctor/patient privilege. In addition, he contends that the district court should have ensured that Eaton comprehended and knowingly and voluntarily relinquished his right to incriminate himself. Dr. Ash performed his examination for the specific purposes of determining Eaton's competency, whether he had a not guilty by reason of mental illness defense, and to develop material that might serve to mitigate the sentence in this case. We will not set out the details of that testimony further here, but we will agree with Eaton's characterization of it as most assuredly being a substantial factor in the jury's decision **[***241]** to impose the death penalty, although it is impossible to know whether or not the jury would have inferred facts equally condemnatory from all of the testimony elicited at trial.

[*P208] The State divides its response to this argument into three parts. First, *Wyo. Stat. Ann. § 33-38-113* (LexisNexis 2007) is not applicable. Second, the State contends that the statute was not violated by the instant circumstances. Finally, the State argues that any error, if indeed such occurred, was harmless. The harmless error standard calls on the Court to determine whether the error resulted in prejudice to Eaton, and "whether the circumstances manifested inherent unfairness and injustice or conduct which offends the public sense of fair play." *Cooper v. State, 2002 WY 78, P 15, 46 P.3d 884, 890 (Wyo. 2002)*.

[*P209] We set the statute out here for convenience of reference. *Wyo. Stat. Ann. § 33-38-113* (LexisNexis 2007) provides:

> ***§ 33-38-113*. Privileged communication.**
>
> (a) In judicial proceedings, whether civil, criminal, or juvenile, in administrative proceedings, and in proceedings preliminary and ancillary thereto, a patient or client, or his guardian or personal representative, may refuse to disclose and may prevent **[***242]** the disclosure of confidential information, including information contained in administrative records, communicated to a person licensed or otherwise authorized to practice under this act, and their agents, for the purpose of diagnosis, evaluation or treatment of any mental or emotional condition or disorder. A person licensed or otherwise authorized to practice under this act shall not disclose any information communicated as described above in the absence of an express waiver of the privilege except in the following circumstances:
>
> (i) Where abuse or harmful neglect of children, the elderly or disabled or incompetent individuals is known or reasonably suspected;
>
> (ii) Where the validity of a will of a former patient or client is contested;
>
> **[**120]** (iii) Where such information is necessary to defend against a malpractice action brought by the patient or client;
>
> (iv) Where an immediate threat of physical violence against a readily identifiable victim is disclosed to the person licensed or otherwise authorized to practice under this act;
>
> (v) In the context of civil commitment proceedings, where an immediate threat of self-inflicted damage is, disclosed to the person licensed or otherwise authorized **[***243]** to practice under this act;

> (vi) Where the patient or client alleges mental or emotional damages in civil litigation or otherwise places his mental or emotional state in issue in any judicial or administrative proceeding concerning child custody or visitation;
>
> (vii) Where the patient or client is examined pursuant to court order; or
>
> (viii) In the context of investigations and hearings brought by the patient or client and conducted by the board where violations of this act are at issue. Information that is deemed to be of sensitive nature shall be inspected by the board in camera and the board shall determine whether or not the information shall become a part of the record and subject to public disclosure.

Wyo. Stat. Ann. § 33-38-103(a)(i) (LexisNexis 2007) provides:

> ***§ 33-38-103*. Exemptions.**
>
> (a) Nothing in this act shall be construed to apply to the activities and services of:
>
> (i) Qualified members of other legally recognized professions who are otherwise licensed or certified by this state, such as physicians, psychologists or registered nurses, from performing services consistent with the laws of this state, their training and the code of ethics of their professions, provided they do not **[***244]** represent themselves to be practicing the professions regulated under this act and do not represent themselves to be professional counselors, clinical social workers, marriage and family therapists or addiction therapists, or certified social workers, certified addictions practitioners or certified mental health workers;

Because Dr. Ash is exempt, this Court should not look at *§ 33-38-113* in deciding whether or not it was error to allow Dr. Ash to testify. It appears that the error here, if any, cannot be premised on the statute because of the exemption.

[*P210] However, that is certainly not the end of the discussion. We conclude that it is readily evident that Wyoming recognizes the application of the physician-patient privilege in criminal cases. *Frias v. State, 722 P.2d 135, 140 (Wyo. 1986)*. There was no objection here, and to some extent that answers the question per *Frias*. It is also evident that Eaton's argument goes somewhat beyond that. He claims that defense counsel and the trial court had a duty to inquire about waiver of the privilege and to ensure that Eaton was making an informed and voluntary decision. We cannot disagree that that should be the case, and the record should be **[***245]** clearer in this regard than it is. However, we do view the error, to the extent it is error, as harmless in these circumstances. In hindsight, defense counsel's use of Dr. Ash arguably turned out to be more damaging than it was helpful. Nonetheless, it may have been Eaton's last best hope.

G. Instructions Improper

[*P211] We iterate the standard of review we applied in Part I of this opinion at PP 66-68.

[*P212] Although the district court, with no objection from defense counsel, declined to give an instruction that we recommended in our decision in *Olsen*, we find no error in that. In *Olsen* we said:

> We also do not find that the jury was appropriately instructed on the definitions of "aggravating" and "mitigating." In Instruction No. 3, these terms are defined as:
>
> > An aggravating factor is a specified fact or circumstance which might indicate, or tend to indicate, that the defendant should be sentenced to death. A mitigating factor is any aspect of a defendant's character or background, or any circumstance of the offense which might **[**121]** indicate or tend to indicate that the defendant should not be sentenced to death.
>
> A more useful instruction would be:
>
> > An aggravating factor is a specified circumstance attending **[***246]** the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event

> which does not justify or excuse the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.
>
> *See* California Jury Instructions, *supra*, at 517.
>
> We hold that the jury instructions about mitigating circumstances do not correctly state the law mandated by *§ 6-2-102(d)*, and this failure is reversible error. Upon remand for resentencing, jury instructions. should reflect the intended statutory process and clarify the jury's decision process in comparing the totality of aggravating and mitigating circumstances.

Olsen, PP 141-142, 67 P.3d at 588.

[*P213] The instructions given by the district court in the penalty phase of this case were adequate. We do not consider it error to give an instruction, or instructions, that are adequate, in place of one we may have recommended.

H. Record Incomplete

[*P214] Eaton contends that the record is incomplete because the instructions conference was not reported as a part of the record **[***247]** on appeal. He also contends that it is incomplete because it is possible to discern in the context of the transcript of the proceedings that the court and counsel held conferences/discussions off the record. In addition, he contends that the district court erroneously limited the scope of the remand hearing to such an extent that the record on appeal is still incomplete with respect to the issues that the remand hearing was intended to shed light upon.

(i) Instructions conference/other discussions.

[*P215] In this regard, W.R.Cr.P. 55 provides:

> (a) In the district court, the court reporter shall report all testimony and all proceedings held in open court including but not limited to voir dire, opening statements, motions and final arguments, as well as conferences with the presiding judge in open court and in chambers. Informal discussions, informal instruction conferences and pre-trial conferences shall be reported when requested by a party.
>
> (b) In circuit court and municipal court, all testimony and all proceedings held in open court including but not limited to voir dire, opening statements, motions and final arguments, as well as conferences with the presiding judge in open court and in chambers, **[***248]** shall be recorded by electronic means. Informal discussions, informal instruction conferences and pre-trial conferences shall be recorded when requested by a party. At their own expense, any party may have proceedings reported by a court reporter.

[*P216] In *Bearpaw* we discussed at length the need for a complete record so that this Court can meaningfully review the proceedings below. There is nothing in Eaton's brief to suggest that anything is missing from the record on appeal that prevents this Court from fully and faithfully performing its review function, even given that our review responsibilities are greater in the context of a death penalty case than it is in an ordinary criminal case. *Wyo. Stat. Ann. § 6-2-103* (LexisNexis 2007); and *see Dobbs v. Zant, 506 U.S. 357, 113 S.Ct. 835, 122 L.Ed. 2d 103 (1993)*.

(ii) Remand hearing too limited.

[*P217] Eaton contends that the district court unnecessarily restricted the remand hearing. We are not persuaded by the contentions contained in the brief that the five days devoted to the issue of ineffective assistance of counsel were inadequate. Moreover, Eaton has not called to our attention any new, relevant, and/or material evidence **[**122]** that should have been **[***249]** presented at the *Calene* hearing.

I. Error in Admission of Too Much Evidence About 1998 Conviction

[*P218] One of the aggravating factors brought forward by the State, which it asserted justified the imposition of the death penalty, was Eaton's 1998 conviction for aggravated assault and battery ("previously convicted of a felony involving the use or threat of violence to the person"). Eaton's contention is that it was reversible error for the district court to have allowed one of the victims of that crime, and the officer who investigated it, to testify in so much detail about its circumstances. Rather, only the fact of the conviction and that it was a "violent" crime as contemplated by the death penalty statute should have been called to the jury's attention. The core of this issue is that defense counsel were ineffective for not ensuring that the testimony about this crime was more limited. The district

court ruled that the testimony at issue and some documentation of that crime was admissible in furtherance of *Wyo. Stat. Ann. § 6-2-102(c)* (LexisNexis 2007):

> (c) The judge or jury shall hear evidence as to any matter that the court deems relevant to a determination of the sentence, and shall **[***250]** include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (h) and (j) of this section. Any evidence which the court deems to have probative value may be received regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements, and provided further that only such evidence in aggravation as the state has made known to the defendant or his counsel prior to his trial shall be admissible.

We conclude that the district court did not err in this regard.

CONCLUSION

[*P219] For the reasons set out above, we find no reversible error in the penalty phase and, therefore, we affirm the sentence of death which has been imposed.

PART III: Motion for New Trial

[*P220] On June 2, 2006, Eaton filed a motion for new trial based on newly discovered evidence pursuant to W.R.Cr.P. 33. [8] By order entered on August 18, 2006, the district court denied that motion. Eaton filed his notice of appeal on August 30, 2006. We will affirm the district court's order.

8 **Rule 33. New trial.**

(a) *In general*. -- The court on motion of a defendant may grant a new trial to that defendant if required in **[***251]** the interest of justice. If trial was by the court without a jury, the court, on motion of a defendant for a new trial, may vacate the judgment if entered, take additional testimony, and direct the entry of a new judgment.

(b) *Any grounds except newly discovered evidence*. -- A motion for a new trial based on any grounds, except newly discovered evidence, shall be made within 15 days after verdict or finding of guilty or within such further time as the court may fix during the 15 day period; but the time for filing the motion may not be extended to a day more than 30 days from the date the verdict or finding of guilty is returned. The motion shall be determined and a dispositive order entered within 15 days after the motion is filed and if not so entered shall be deemed denied, unless within that period the determination shall be continued by order of the court, but no continuance shall extend the time to a day more than 60 days from the date the verdict or finding of guilty is returned.

(c) *Newly discovered evidence*. -- A motion for a new trial based on the grounds of newly discovered evidence may be made only before or within two years after final judgment but if an appeal is pending, **[***252]** the court may grant the motion only on remand of the case. A motion for new trial based on the ground of newly discovered evidence shall be heard and determined and a dispositive order entered within 30 days after the motion is filed unless, within that time, the determination is continued by order of the court, but no continuance shall extend the time to a day more than 60 days from the date that the original motion was filed. When disposition of a motion for new trial based on newly discovered evidence is made without hearing, the order shall include a statement of the reason for determination without hearing.

DISCUSSION

[*P221] By order entered on May 1, 2007, we consolidated Case No. 06-255 with Case No. 04-180. Thus, we also set out our disposition of that appeal here.

[123]** **[*P222]** In his motion for new trial, Eaton describes several pieces of new evidence that he asserts require a new trial in his case:

> A motion for a new trial on the ground of newly discovered evidence is not favored by the courts and is viewed with great caution. *Hopkinson v. State, 679 P.2d 1008, 1012 (Wyo.)*, cert. denied, *469 U.S. 873, 105 S. Ct. 228, 83 L. Ed. 2d 157 (1984)*. In order to obtain a new trial on the basis of newly discovered **[***253]** evidence, an appellant must establish each of the following factors:
>
> > (1) That the evidence has come to his knowledge since the trial; (2) that it was not owing to the want of due diligence that it did not come sooner; (3) that it

> is so material that it would probably produce a different verdict, if the new trial were granted; and (4) that it is not cumulative, viz., speaking to facts in relation to which there was evidence at the trial.
>
> *Opie v. State, 422 P.2d 84, 85 (Wyo.1967)*. All four of these factors must be met for an appellant to be entitled to a new trial, and, if any one factor is not satisfied, there is no error in the denial of the new trial motion. *Grable, 664 P.2d at 535*. Therefore, it is not essential that we address each and every factor if an appellant fails in his burden to satisfy even one of the four factors.

Griswold v. State, 2001 WY 14, P 8, 17 P.3d 728, 731 (Wyo. 2001); also see *United States v. Herrera, 481 F.3d 1266, 1269-73 (10th Cir. 2007)* (evidence of incompetence resulting from diabetes may constitute new evidence where the condition was unknown at trial, but where it was known it is not).

[*P223] The first matter we will discuss is his contention that a new mental **[***254]** examination of Eaton reveals that he was not competent to stand trial. The district court made these findings with respect to Dr. William Logan's report:

> As to the report of Dr. William Logan, indicating his belief that Mr. Eaton was incompetent to stand trial during the original trial, the Court finds that this is not newly discovered evidence. Based upon the Court's evaluation of Dr. Gummow's testimony, trial testimony from Dr. Kenneth Ash and post-trial testimony from Mr. Eaton's trial counsel, who did not believe Mr. Eaton was incompetent to stand trial, the Court finds Dr. Logan's evidence is substantially outweighed by evidence concerning Mr. Eaton's competence at the time of trial....

We agree with the district court's observations, but we add that the record on appeal demonstrates that the defense diligently pursued the possibilities of whether or not Eaton was competent prior to and during trial, as well as whether or not Eaton should have pursued a not guilty by reason of mental illness defense. Well qualified mental health experts concluded that he was competent. The offered evidence is, thus, cumulative only and represents an opinion that merely differs from those expressed **[***255]** by Dr. Ash, Dr. Gummow, and defense counsel themselves.

[*P224] The district court also considered the school bus that Eaton allegedly used as his home. Testing of swabs taken from the bus showed there was human blood in a drain. However, the sample was so small that nothing definitive could be determined from it. In this appeal, it is claimed that had the bus not been destroyed, additional samples could have been taken and that such evidence might have strengthened the defense team's assertion that Eaton killed Ms. Kimmel at the bus, and not at Government Bridge, as contended by the State. In turn, this would have helped to establish that the homicide was not premeditated, but rather a second degree murder or a voluntary manslaughter. The district court made these findings about the bus:

> As to any evidence concerning a bus that was inspected by the defense during trial, and also by the prosecution, the Court finds that there was no suppression of evidence by the State in this case. The Court specifically finds that there was no *Brady* violation and that no *Brady* material has been suppressed in this instance. The Court finds that there is no evidence presented which would indicate that the bus **[***256]** constitutes material evidence.

[124]** **[*P225]** In this instance, we also agree with the district court and would add that Eaton's position is premised on the most blatant sort of speculation. The defense was first to have knowledge of the bus. They concluded, after their inspection of it, that it was not likely the bus that Eaton had used as his home. Moreover, we deem it a leap over a giant chasm to speculate that, even if it could be established that the bus was Eaton's, the presence of blood in the drain would result in a different verdict at the guilt/innocence stage.

[*P226] Finally, it is contended that several pieces of evidence located by appellate counsel demonstrate further the inadequacy of the mitigation investigation:

(1) The mental health treatment that Eaton received in Kemmerer in 1986.

(2) The affidavit of Brian Conrado that Eaton appeared to be very poor and was perhaps abused at home, and definitely tormented, teased, and perhaps robbed by his peer group of school boys.

(3) School records, which demonstrated that Eaton was moved from school to school, that his education was often disrupted, that he completed very little school, and that his childhood was probably chaotic.

[*P227] We conclude that **[***257]** the material does not serve to justify reversal of the district court's order denying Eaton's motion for a new trial.

CONCLUSION

[*P228] A constitutional death penalty sentencing scheme must ensure the availability of meaningful judicial review as a final safeguard that improves the reliability of the sentencing process. Throughout this opinion, we have applied the final safeguard as provided in *§ 6-2-103 (c) (d)* and *(e)*:

> ***§ 6-2-103*. Review of death sentences; notice from clerk of trial court; factors to be considered by supreme court; disposition of appeal.**
>
> ....
>
> (c) The supreme court of Wyoming shall consider the punishment as well as any errors enumerated by way of appeal.
>
> (d) With regard to the sentence, the court shall determine if:
>
> (i) The sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor;
>
> (ii) The evidence supports the jury's or judge's finding of an aggravating circumstance as enumerated in *W.S. 6-2-102* and mitigating circumstances.
>
> (iii) Repealed by Laws 1989, ch. 171, § 2.
>
> (e) In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, may:
>
> (i) Affirm the sentence of death;
>
> (ii) Set the sentence **[***258]** aside and impose a sentence of life imprisonment without parole, or life imprisonment; or
>
> (iii) Set the sentence aside and remand the case for resentencing.

See Olsen, P 219, 67 P.3d at 610-11; and *Harlow, PP 89-90, 70 P.3d at 206-07*.

[*P229] In this case the Court is satisfied that the evidence supports the jury's findings with respect to aggravating and mitigating circumstance. In addition, it is our determination that the sentence of death was not imposed under the influence of passion, prejudice or any other arbitrary factor.

[*P230] We affirm the judgment and sentence of the district court, as well as its order denying Eaton's motion for a new trial. The case is remanded to the district court for the purpose of vacating the suspension of the sentence of death and setting a specific date for the execution of that sentence.

FILED
United States Court of Appeals
Tenth Circuit

July 31, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DALE W. EATON,

Petitioner - Appellant,

v.

MIKE PACHECO, Warden, Wyoming Department of Corrections State Penitentiary,

Respondent - Appellee.

Nos. 15-8013 & 16-8086

ORDER

Before **HARTZ**, **MORITZ**, and **EID**, Circuit Judges.

This matter is before the court on Appellant's *Motion for Extension of Time Within Which to File Petitioner's Motion for Rehearing or Rehearing En Banc*. The motion is granted. Any Petition for Rehearing and/or Petition for Rehearing En Banc filed on behalf of the appellant shall be filed and served on or before September 3, 2019.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk

FILED
United States Court of Appeals
Tenth Circuit

September 27, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DALE W. EATON,

Petitioner - Appellant,

v.

MIKE PACHECO, Warden, Wyoming Department of Corrections State Penitentiary,

Respondent - Appellee.

Nos. 15-8013 & 16-8016

ORDER

Before **HARTZ**, **MORITZ**, and **EID**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution, which provides:

> 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 committed, which district shall have been previously ascertained by 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.

This case also involves Section 1 of the Fourteenth Amendment to the United States Constitution, which provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves 28 U.S.C. § 2254(a), which provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

This case also involves 28 U.S.C. § 2254(d), which provides:

> (d) An application for a 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 claim that was adjudicated on the merits in State court proceedings unless the adjudication of the 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; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

DECLARATION OF KENNETH ASH, M.D.

I am a psychiatrist with my primary practice in Windsor, Colorado. I was retained to evaluate Dale Eaton by Wyoming Public Defender Wyatt Skaggs in late 2003.

Currently my main focus is clinical practice, although I have substantial experience in conducting forensic mental health assessments. In the 1960's I was a staff psychiatrist at the U.S. Medical Center in Springfield, Missouri, where did forensic evaluations of federal prisoners for federal courts across the United States. A current copy of my CV setting forth my education, training and experience is attached.

I am very familiar with the essential components of a thorough mental health evaluation. Patient history is critically important in a forensic setting for many reasons. Expert testimony is far more credible if it is supported by the observations of lay witnesses. Further, symptoms of mental illness can wax and wane over time, and the mental health expert can only observe small segments of the patient's life. In the few hours spent in the patient's presence, it is likely that the examiner will not observe the full range of the client's symptoms of mental disorder. It is therefore important to obtain a history of the patient's behavior over time.

A thorough mental health evaluation must encompass many sources in addition to the patient, including the patient's schooling, medical treatment, criminal justice history, and hospitalizations. It should also include members of the patient's immediate and extended family, and other significant people in the patient's life such as teachers and employers. There are many reasons for considering multiple sources beyond the patient's self report. First and foremost, the patient may not be the best historian. When an opinion is based on the patient's self-report, the opposition will predictably argue that anything he says is questionable because he has a lot at stake in the outcome of the case. From my point of view as a clinician, if the patient indeed suffers from a mental disorder, such as psychosis or brain damage, his or her perception and memory is likely to be impaired, and therefore he may not be able to give a an accurate and thorough history. Further, a mentally ill patient often lacks judgment and insight, so he or she will not necessarily know what is relevant to my assessment. Even in a forensic setting, it is not unusual for a patient to want to appear normal and rational, and he or she may respond to questions accordingly. Further, because relevant family history is often shameful or embarrassing, significant historical and medical data may be a closely guarded secret within the family that the patient simply does not know, in which case it must be obtained from other sources. I certainly saw signs with Mr. Eaton that some of the above factors existed.

For all these reasons, my normal practice in such a case would be to meet with the family as part of my assessment. That did not occur in Mr. Eaton's case. All of my information came from my interview with the client, my discussions with his attorney, Mr. Skaggs, and from the following documents that I was provided by Mr. Skaggs on November 13, 2003:

1. Natrona County Sheriffs Office Chronology of the case;
2. FBI Analysis;
3. Our chronology updated as of 9/18/03;
4. Pre-sentence Investigation Report and Addendum dated 10/7/03;
5. Weld County, Colorado court records 1961commitment;
6. Mental Health records from Torrington, WY 1986;
7. Wyoming State Hospital mental evaluation 9/17/97 & 11124/97;
8. Wyoming State Penitentiary Incidcnt Repoli 1998;
9. Lo-Fu Tan, MD mental health notes 1998;
10. Forensic Report for periods June 17 toAugust 5, 1999 and addendum; and
11. Medical records from Federal Bureau of Prisons June, 1999-March, 2003.

See Exhibit A, letter of Wyatt Skaggs, Nov. 13, 2003.

In addition to the above, I received a fax from Mr. Skaggs with a copy of Wyoming statutes defining mitigating circumstances, with a cover page instructing me to "focus on the three underlined mitigators and see if any fit." In my opinion, all three applied to Mr. Eaton, so those three statutory mitigating factors became the central focus of my testimony. See Exhibit B, fax from Mr. Skaggs, Dec. 10, 2003.

I also communicated with a neuropsychologist, Dr. Linda Gummow, about her impressions and findings. In January, 2004, Dr. Gummow advised me that she had assessed the diagnosis of bipolar disorder. In most jurisdictions in which I have testified as an expert witness on the mental condition of the accused in a criminal case, bipolar disorder could qualify as a mental disease or defect excluding responsibility, or diminishing the mental capacity of the accused, depending on the circumstances of the individual case. On January 23, 2004, Dr. Gummow sent me a memo regarding the bi-polar disorder issue with some PowerPoint slides and an article about bipolar disorder attached. Her cover memo stated:

> Here are some PowerPoint materials regarding Dale Eaton. I am also sending a copy of the National Institutes of Mental Health description of Bipolar Disorder. I thought this might be a good handout/exhibit for the jury. The last part of the PowerPoint presentation is under construction. It relates to Bipolar and Violent Behavior. We need to talk to get the diagnostic impressions clear. I need to discuss the organic brain syndrome label, the type of bipolar disorder, and the issue of PTSD.

Exhibit C, January 23, 2004, memo of Linda Gummow.

I certainly found lots of information in the materials provided by Mr. Skaggs and in my assessment of Mr. Eaton to support the existence of a severe depression. One entry in the records of Mr. Eaton's treatment at Torrington hospital reflects an assessment of depression accompanied by a thought disorder, for which he was treated with Mellaril, an

anti-psychotic medication, so on at least one occasion he was diagnosed as having a psychosis. There was insufficient evidence in the information and documentation provided to me by Mr. Skaggs to enable me to ethically and honestly assess a diagnosis of bipolar disorder.

After consulting with an independent expert and long-time mentor in Denver, I rejected the diagnosis of bi-polar disorder because the history I was given for Mr. Eaton did not support it. The long periods of depression were certainly there, but there was no report of manic episodes—periods of high energy and productivity, often accompanied by feelings of euphoria or extreme irritability. Without such evidence, in my opinion I was unable to conclude to a reasonable degree of medical certainty that Mr. Eaton suffered from bipolar disorder or any similar psychosis. My testimony at trial therefore focused on the conditions which could be established to a reasonable degree of medical certainty, depression and brain dysfunction.

I have since had an opportunity to review the statements of Mr. Eaton's brother, Richard Eaton, and his wife, Bobbi, who describe observations that certainly qualify as high-energy periods in Mr. Eaton's life. Richard Eaton described two periods of high energy, one in the 1980's, before the crime, and one in the 1990's, after the crime:

> During those periods, Dale hardly ever slept. When I worked the graveyard shift, I would come home to find Dale wide awake, working on a truck, welding, or reading. Sometimes we would watch movies in the evening until bed time, and I would go to bed and Dale would stay up to watch more movies, and then I'd be up early the next day to go to work and Dale's bed would be made and he'd be long gone. He could not have slept more than three or four hours a night. Dale slept very little.

Richard Eaton described one night in particular in which he found Dale in his workshop in the middle of the night, underneath a truck, covered in grease, wearing only his underwear. According to Richard, Dale "was constantly working on his welding truck. He would literally work around the clock and never sleep." Mr. Eaton's sister-in-law, Bobbie Eaton, also observed periods "when his energy was very high, and it seemed like he never slept. When he lived in Lyman and had his shop, it didn't matter what time day or night that we stopped by, Dale would be up working on a truck or something. He might take a nap for twenty minutes, but he'd be right back up again, working very intensely." I have seen declarations from other witnesses describing periods of hard work and extreme irritability which certainly seems consistent with this history.

Mr. Eaton's lack of sleep over a protracted period of time, his focus on work, his high productivity, and his irritability are all significant aspects of his history that suggest a diagnosis of bi-polar disorder. If that history had been provided to me, I certainly would have to reconsider my findings and explored the possibility of bipolar disorder. Other history recently provided to me establishes other significant symptoms of mental

impairment. Many people, including former employers Steve DuBry and James Hoopes, relatives Richard and Bobbie Eaton, discuss Dale's poor hygiene. Dale "almost always smelled bad, and he seldom washed his hands." (James Hoopes) "He would go for long periods without a shower. Sometimes he would be so dirty that he would spray himself off in a car wash." (Richard Eaton) "Dale always had terrible hygiene. It was really bad, he smelled awful." (Bobbie Eaton) "Dale was always dirty and he didn't care too much about his appearance." (Steve DuBry) Dale's surroundings also reflected serious dysfunction. His home was filthy. Richard Eaton said that he "couldn't stand to be in it. The floor was covered with trash. There were dirty dishes on the table with food stuck to them. The sink was full of stuff, and dirty clothes were everywhere. It smelled terrible." Steve DuBry, Bobbie Eaton and James Hoopes make similar observations. Mr. Eaton's failure to exercise minimally adequate hygiene and cleanliness of both himself and his environment is consistent with major depression, but is also frequently found in patients with other severe illnesses, including bipolar disorder and schizophrenia.

The recent life history investigation establishes the existence of other potentially significant symptoms in Mr. Eaton. There are multiple examples of paranoid thinking and behavior, at times even delusional. Bobbie Eaton describes one episode that occurred at her church. Dale left in the middle of the service, and he told her that he became nervous and upset because the pastor was looking directly at Dale the whole time and was speaking only to him. Bobbie couldn't convince Dale that the pastor was talking to everyone. Richard Eaton also recalls this incident. James Hoopes states that Dale was afraid of people all the time, and virtually everyone who knows him corroborates the fact that he trusted very few people, and isolated himself from people as much as possible. Dale's current attorney, Sean O'Brien, has told me of another employer from Utah, Mr. Mark Dotson, who has a brother with schizophrenia. According to Mr. Dotson, Dale would crouch over his work to shield it from view of co-workers, and feared that his co-workers were constantly plotting to get him fired. Dale's paranoia made it difficult for him to work with other people, but his skills as a diesel mechanic were so good that Mr. Dotson put Dale on a night shift to accommodate Dale's fear of his coworkers. Mr. Dotson's observations are particularly insightful because he has a brother with schizophrenia, and observed some of the same behaviors and characteristics in Dale. The same is true of James Hoopes; he has diagnosed and institutionalized cases of mental illness in his own family, and has some awareness and insight into tell-tale symptoms of mental disease. These observations could support findings that Mr. Eaton is paranoid, and possibly delusional, which would be consistent with a number of major mental illnesses.

I understand that the background investigation of Mr. Eaton is still ongoing, but the new information I have viewed is far more thorough, detailed and probative than the information I was given prior to Mr. Eaton's trial. With the benefit of this investigation, I would have suggested to counsel that we explore issues well beyond the statutory mitigating factors which Mr. Skaggs asked me to consider. There is no question that Mr. Eaton is severely impaired mentally. A question that he was competent to proceed at the time of his trial certainly exists. Based on this new evidence, I would have recommended to trial counsel that this issue be thoroughly investigated and explored.

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Mr. Skaggs did ask me to assess Mr. Eaton's competence to proceed, but he did not advise me that his assistant, Priscilla Moree, refused to see him because she was intimidated by a display of anger during her very first visit with him. I also did not know that Mr. Skaggs, too, feared Mr. Eaton to the point that he asked a deputy sheriff to sit right behind Mr. Eaton at the counsel table. Mr. Skaggs also did not inform me of Mr. Eaton's repeated outbursts during the trial, or that Mr. Eaton did not trust his defense team. This information would have been relevant to my assessment of his competence to stand trial, including his ability to assist counsel. All of these behaviors and concerns—impulsiveness, irritability, inappropriate anger, paranoia--can be indications of mental illness, and can certainly undermine the defendant's ability to understand proceedings against him or assist counsel in his defense. Without knowledge of these factors, I could not accurately assess Mr. Eaton's competence to proceed.

Of course, exploring these issues would have helped, as I was cross-examined about several aspects of Mr. Eaton's history that took me by surprise. One of the noteworthy aspects of Mr. Eaton's behavior before, during and after the time of the offense is the degree to which he isolated himself from friends and family. He was living a hermit's lifestyle in a remote, sparsely populated desert. However, I was cross-examined by the prosecutor with passages from a journal of Doris Buchta, an elderly woman who lived on the other side of the highway from Mr. Eaton. Mr. Skaggs had not provided me with a copy of the journal; the first I learned of its existence was during cross-examination. The prosecutor used it to challenge my conclusion that Mr. Eaton was socially isolated and withdrawn:

> Q. (By Mr. Blonigen) Now, Mr. Eaton, when he spoke to you, describes a fairly miserable life at the time of early 1988; fair statement?
>
> A. Yes.
>
> Q. Okay. Were you aware that he was, on a frequent basis, visiting his neighbors?
>
> A. At the time in the spring?
>
> Q. Yes.
>
> A. No.
>
> Q. Okay. For instance, did you know there was a little old lady across the way that kept a diary?
>
> A. I was aware of the people across the way. I had thought that they were getting involved with each other after this happened.

Q. Okay. Well, let's talk about that, then; because Mr. Eaton basically told you he holed up and didn't leave unless he just had to?

A. Yes.

Q. That's not an overstatement, is it?

A. That is not an overstatement.

Q. Okay. And so things that happened in March would be relevant, wouldn't they, March of 1988?

A. Yes.

Q. Okay. And, for instance, he also reported that he had a very poor economic status; is that true?

A. That's correct.

Q. Okay. So if she has a note that Dale visited on March 8 and paid the taxes on an adjoining property, that would seem somewhat inconsistent with what he told you, wouldn't it?

A. How much were the taxes?

Q. Well, I mean, I guess that's inconsistent two ways. He was going out and seeing people, that would indicate, wouldn't it?

A. He -- he had a hard time getting out seeing people, he said. That's correct.

Q. Okay. Were you aware there's another entry on March 16 that he had visited the Buchtas? Were you aware of that?

A. No.

Q. Were you aware that on March 22, he visited the Buchtas for two hours? Were you aware of that?

A. No.

Q. On March 24, were you aware that he had gone over and helped Mr. Buchta work on a car?

A. No.

Q. And this persisted after March 24, did it not, the depression, this period of horrible isolation?

A. In my opinion and from what I've been told, yes.

Q. Were you aware that he visited the Buchtas again on April 1?

A. No.

Q. Were you aware on April 11 that he wanted to visit, and he went over and visited them for six hours? Does that sound like he's keeping himself in isolation?

A. No, it does not.

Q. Finally -- there's a lot of these, but I think this is a relevant time period. April 25, were you aware that he went over and visited the Buchtas, again, for chicken dinner?

A. No.

Q. So he's maybe not quite as isolated as he led you to believe?

A. Those are more visits than I was aware of.

Q. *Did they ever give you that to look at?*

A. *No.*

Trial transcript. Pp. 1314-1316. Interacting with his elderly neighbors six times over a two month period—one contact every ten days—does not invalidate my initial observation that Mr. Eaton had socially isolated himself. By any standard, Mrs. Buchta's journal reflects that Mr. Eaton was indeed living like a hermit in the desert, but because I had not been provided with this information prior to trial, I was unable to assess its clinical relevance and respond appropriately to the information. The failure to provide me with this information prior to trial allowed the prosecutor to ambush me on cross-examination.

I had also testified that Dale's extreme poverty was a stressor for him at the time of the crime in March, 1988. Again, the prosecuting attorney challenged the accuracy of the information on which I relied in making my assessment:

> Q. (By Mr. Blonigen) Okay. He talked about employment. And you indicated that employment was a real problem for him at this time.
>
> A. Yes.
>
> Q. And I should say "at this time," I should say March of 1988, so we know which time we're talking about.
>
> A. Yes.
>
> Q. Were you aware that in job applications, he lists himself as sole proprietor of the business of Eaton and Sons during this time period?
>
> A. I'm not aware of that.
>
> Q. Okay. That's a little different than what he told you, isn't it?
>
> A. What he had told me was that he had a business and that he lost it.
>
> Q. Did he indicate he had that business until 1991?
>
> A. No.
>
> Q. Did he indicate that business was working and welding on equipment at mines and oil fields?
>
> A. I was aware that he had a welding truck and was working -- and working in oil fields. I also was under the impression that he had lost that truck.
>
> Q. Okay. That he had lost it completely; didn't own it anymore?
>
> A. Correct.
>
> Q. Would you be surprised to find that he owns several vehicles in 1988?

A. I would be surprised.

* * * *

Q. (By MR. BLONIGEN) Were you aware that he had a welding truck that was still running?
A. No, I was not.

Q. Were you aware that he bought another welding truck shortly after that?

A. Shortly after?

Q. After March of 1988.

A. No.

Q. Were you aware that in Mayor June of 1988, he had the money to have the electricity hooked up to the trailer?

A. No.

Trial Trancript, 3516-3518. I had no way to know whether any of Mr. Blonigen's assertions were true, but I did not have reliable information to the contrary, so I could not respond effectively to his questions. I have since had the opportunity to see the record of Mr. Eaton's Social Security wages, which includes his earnings in 1988. These reflect that Mr. Eaton's wages in 1988 totaled $990.78, which is consistent with my description of Mr. Eaton's dire financial condition at the time. See Exhibit D, p. 15. Social Security Administration Certification of Extract from Records of Dale W. Eaton, p. 15. From all outward appearances, Mr. Eaton was living in extreme poverty, and this evidence confirms that fact. Again, a thorough social history investigation would have helped me prevent the jury from being misled about the true circumstances of Dale's life prior to and during the time of the homicide.

Another significant aspect of the recent social history investigation is the consistent description of Dale Eaton's positive qualities. The declarations of former employers and family members would help a jury to understand that underneath his serious impairments, Mr. Eaton has positive human qualities. Jim Hoopes and Steve DuBry understood Mr. Eaton's social limitations, but nevertheless valued him as an employee because he has a strong work ethic, and is a skilled welder and mechanic. Mr. Hoopes allowed Mr. Eaton to park his trailer on his property and allow him to live there while working jobs in the Lyman, Wyoming, area. Bobbie Eaton states that when Mr. Eaton was medicated after his treatment in Torrington, "He was mellow and calm and very sweet." She describes him as a "good man" who was a hard worker and generous. He brought her thoughtful gifts, and he welcomed her son, J.R., into the family when others in the family would not do so. Richard Eaton states that Dale "is one of the most

generous people I have ever known," and describes him as a "kind and loving man," even while acknowledging Dale's volatility when not on medication. Such information from family members and employers could help a jury decide that negative behaviors are the product of a mental illness, as opposed to a personality disorder.

Another noteworthy aspect of this case is that I was never asked in my testimony to discuss the issue of remorse, which in this case was very strong. I described it in my report of May 17, 2003. "As he talked about [the crime], as well as a man that he had killed in prison, he was filled with horrendous agony and remorse. He teared on a number of occasions, his face was held in and he clenched his teeth and hands." Exhibit E, Report of May 17, 2003, p. 2. On January 3, 2004, I observed, "There is a tremendous amount of emotion that he shows. Dale wondered why he was crying. I asked him what he was feeling, he said shame, guilt, and more. He apologizes and is embarrassed about crying." Exhibit F, Report of January 3, 2004. Bobbie Eaton also describes what appear to be genuine expressions of remorse. On one occasion he told her, "I can't go to church with you because I done something that I'll never be forgiven for," and "he started crying and carrying on about not being forgiven," then packed his van and went away by himself. I have also seen a report of an interview with Brett Hudson, a fellow prisoner of Mr. Eaton's, who reports a similar conversation with Dale, in which Dale tearfully admitted that he had killed someone, and that Jesus could never forgive him. These witnesses are consistent with my impression that Mr. Eaton is genuinely and deeply remorseful for his crime. Again, this information is helpful on many levels, and would help complete an accurate and humanizing clinical picture of Dale Eaton.

The social history investigation that has been conducted reveal episodes of impulsive, often unprovoked violence on Mr. Eaton's part, which can certainly be consistent with brain damage, paranoia, irritability and other signs of mental illness. It would have helped me explain to the jury Mr. Eaton's state of mind at the time of the crime. By hiding this information from the jury, they had only the homicide itself by which to determine Mr. Eaton's culpable state of mind. Mr. Eaton's history of assaultive behavior certainly pales in comparison with the crime for which he had been found guilty. In this case, a presentation based on the premise that Dale was non-violent up to the time of this crime would be misleading, and would lack credibility. A complete picture of Mr. Eaton would balance his positive character traits against his bad acts, and would balance his impairments against his abilities to create a truthful picture. Clinically, evidence that Mr. Eaton found it stressful to be around people, and that he occasionally lost his temper with people could be consistent with mental disorder. Such a history might have been consistent with a defense that Mr. Eaton acted impulsively and without deliberation or premeditation.

Based on the new evidence provided by Mr. O'Brien, particularly the observations of Mr. Eaton's family and former employers, I would have to reopen my assessment of his mental condition, and address a much broader range of issues than my previous evaluation. Based on a more complete history, I would do an evaluation to confirm or rule out a number of possible mental diseases suggested by this history, including, but not limited to, bipolar disorder, schizophrenia, schizo-affective disorder,

dementia, and post traumatic stress disorder. I would also want to do a physical examination of Mr. Eaton for conditions such as toxin exposure and diabetes, which can also contribute to his mental impairments. I would then want to examine a number of legal, medical and mental health issues, such as competence to proceed, and a wider array of potential mitigating circumstances. The bottom line is that it is a medical certainty that Mr. Eaton is a severely disturbed man, and it should be a serious concern that no jurors found the existence of a single mental-health related mitigating factor.

I declare under the penalty of perjury under the laws of the State of Colorado and the United States of America that the foregoing is true and correct to the best of my knowledge.

Dated this 9 day of August, 2010.

Kenneth Ash, MD

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sean D. O'Brien, a member of the Bar of this Court, hereby certify in accordance with Rule 29.5(b) of the Rules of the Supreme Court that on the 26th day of December, 2019, I served a true and correct copy of Mr. Eaton's PETITION FOR WRIT OF CERTIORARI, APPENDIX IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI, MOTION TO PROCEED IN FORMA PAUPERIS AND DECLARATION IN SUPPORT THEREOF by placing the same in the United States Mail, postage pre-paid, addressed as follows:

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