IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

MIGUEL VACA,	)	
APPELLANT,	)	
	)	
v.	)	**WD69004**
	)	
STATE OF MISSOURI,	)	**FILED: October 13, 2009**
RESPONDENT.	)	

DISSENTING OPINION

I concur in the majority's resolution of Appellant Miguel Vaca's second and third Points Relied On, which contend that he received ineffective assistance of counsel during the guilt phase of his trial. I respectfully dissent, however, from the majority's resolution of Vaca's first Point, in which he argues that his attorney failed to competently represent him in the sentencing phase. Based on my conclusion that Vaca's sentencing-phase claim has merit, I would reverse in part, and remand with directions that Vaca be given a new sentencing hearing.

I.

As the majority recounts, Vaca committed a series of aggravated offenses, and the evidence of his guilt (which included his confession, as well as physical evidence found in his home) was overwhelming. On the seven counts for which he was convicted, Vaca faced possible life sentences on five; moreover, by operation of §§ 558.019.3 and 556.061, he would be required to serve 85% of the sentences imposed for his convictions on at least the two first-degree robbery counts. The sentences actually imposed, which total life plus 102 years,

essentially mean that Vaca, who was forty-three at the time of the offenses, will spend most, if not all, of the rest of his life in jail.

The majority's analysis recognizes that Vaca was constitutionally entitled to the effective assistance of counsel at both the guilt and sentencing phases of his trial. During the sentencing proceeding, the State presented the testimony of five of the victims of Vaca's crimes, each of whom described the grave and lasting toll that his actions had taken on their lives.

Despite the stakes for Vaca, and the State's sentencing-phase presentation, the case presented by Vaca's counsel at the sentencing hearing can only be described as perfunctory. Counsel's entire opening statement in the sentencing phase was that "[t]he defense intends to call Mr. Vaca, Sr., for some brief history for your information. Thank you." In its entirety, the examination of Vaca's father – the defense's only sentencing-phase witness – consisted of the following:

> Q. For the record, sir, please state your name.
>
> A. Miguel Vaca.
>
> Q. And can you explain to the jury how long your son has been in the custody of the jail facility?
>
> A. Well, I say about 45 months.
>
> Q. Have you and your wife, Elaine, visited him on a regular basis?
>
> A. Well, ever since he's been here, about – on account of the weather maybe about two times.
>
> Q. Has your son ever been to a prison setting before?
>
> A. Never.
>
> Q. Has your son ever been convicted of a felony or a misdemeanor?
>
> A. Never.
>
> Q. Thank you, sir. That's all the questions I have.

Counsel's entire closing argument consisted of the following:

> Thank you, Judge. Ladies and gentlemen, I intend to be extremely brief. I would first tell you that Mr. Vaca accepts your verdicts and appreciates your total attention to both sides during the trial this week. I would indulge you if there is any actions that I took that offended you, I would ask that you – implore you not to take that out on Mr. Vaca.
>
> The punishment available for Counts I, III, and V are special charges under the law, and because one of the witnesses indicated their desire that Mr. Vaca not simply be returned to society within a year, that was their wish, I would explain to you that for the charges of the robbery and attempted robbery, the sentence you impose under the Missouri Department of Corrections scheme, Mr. Vaca would be required to serve 85 percent of the term that you impose before he would become first eligible for parole or release on those three charges only.
>
> I would just have one favor and comment, and ask that you avoid vengeance for vengeance[']s] sake and just seek fairness and please indulge him for his lack of prior criminal history. Thank you.

The majority opinion describes the report prepared by Dr. Bill Geis, which defense counsel had in his possession, and had reviewed, prior to the sentencing proceeding. Dr. Geis' report concluded that Vaca suffers from paranoid schizophrenia, dysthymia, Post-Traumatic Stress Disorder, and borderline intellectual functioning. Among other things, these conditions triggered auditory and visual hallucinations, nightmares, flashbacks to traumatic events, very poor sleep, dejection, low motivation, fatigue, interpersonal withdrawal, and "extremely poor social and occupational functioning." Dr. Geis reported that Vaca had a full-scale IQ of 73; "in terms of cognitive functioning" he operated at the level of "an 8-year-old boy," exhibiting "pretty limited functioning where a person probably couldn't hold a job." Confirming Dr. Geis' assessment, although Vaca was in his mid-40s at the time of his arrest, he had lived primarily with family members, had never held long-term employment, and "has never had a girlfriend or even dated." Dr. Geis' report indicates that Vaca had controlled the symptoms of his mental illness by taking various medications, but had ceased taking his medications approximately one week before the first of the offenses "because he was having trouble with his insurance."

Although Dr. Geis found Vaca competent to stand trial, his report noted that Vaca's mental health conditions could have played a significant role in his commission of the offenses at issue:

> The defendant has a serious mental disease – schizophrenia – that clearly could have had an impact on his ability to form rational thought and conform his behavior to the expectations of society at the time of the offense. This condition of schizophrenia is corroborated by other medical personnel and appears to have been in existence for most of his life. He also has a condition of low intelligence (borderline intellectual functioning) that could have affected his ability to understand the impact of his actions.

Dr. Geis testified at the post-conviction evidentiary hearing that he found no signs of malingering in Vaca's account of his symptoms and medical history.

The jury was clearly attuned to Vaca's potential mental-health issues. During their deliberations in the guilt phase, the jury asked the following questions:

> Was [Vaca] given psychological testing
> Had he been compliant with medications before arrest
> Is he currently on meds

The court refused to answer these questions.

Despite the specific evidence of Vaca's mental illness which was actually in defense counsel's possession at the time of trial, and the jury's evident interest in the issue, counsel did not call Dr. Geis to testify in the penalty phase. Counsel explained the reasons for this omission at the post-conviction evidentiary hearing. Counsel acknowledged that he had limited experience with criminal trials at which guilt and sentencing phases were bifurcated, and that Vaca's may have been his first such case involving a "significant crime." Vaca's counsel also admitted that "the strength of the [State's] case [against Vaca] was very high," and therefore he was "pretty certain that [he was] going to reach a sentencing phase." Nonetheless, defense counsel spent scarce time preparing for the penalty phase of the trial:

> The only – well, specifically, the only thing I can recall doing would be to think about family members that might testify perhaps to draw some type of sympathy whether or not Mr. Vaca himself would testify, the defendant. . . . I think that was the extent of the – the amount of consideration I gave that.

Vaca's counsel admitted that he gave no consideration to calling Dr. Geis in the sentencing phase: "I honestly didn't give that a thought"; "I didn't analyze it from that perspective at all." Defense counsel testified that "[t]here was no strategic reason that I can recall for not calling Dr. Geis at sentencing," and that Dr Geis' report "could have been utilized with an attempt to gain leniency or seek leniency from a jury." When asked whether he had an "intentional strategy" to "substitute those three witnesses [Vaca's father, brother, and sister, each of whom testified in the guilt phase] for Dr. Geis," counsel responded emphatically: "Of course not."

The motion court credited defense counsel's testimony concerning his trial strategy, and his reasons for failing to call Dr. Geis to testify at the sentencing hearing. The court determined, however, that counsel's testimony established a reasonable strategic basis for his failure to present Dr. Geis:

> During the evidentiary hearing, trial counsel testified that he presented evidence of movant's good character and his mental disability and previous bike accident through family members and movant himself. Trial counsel testified that he did not call Dr. Bill Geis as a witness during the sentencing phase because he did not analyze the case that way. He had presented all of this evidence during the guilt portion of the trial. Trial counsel pursued reasonable trial strategy regarding his concerns about the movant's mental competence.

In its Conclusions of Law, the motion court repeated its finding that defense counsel presented sufficient evidence of Vaca's mental health problems during the guilt phase; the court also emphasized that Dr. Geis' testimony would not have established Vaca's incompetence to stand trial, or a guilt-phase defense:

> Trial counsel, during the guilt phase of trial, established movant's mental problems from members of his family. Movant's brother and sister testified about movant's mental problems and disabilities, as did movant's father. Movant

himself testified about his own mental disability and that he was on Social Security disability.

The report trial counsel obtained from Dr. Geis concerning movant's mental status did not establish that movant was either incompetent or not guilty by reason of mental disease or defect. Movant did not suffer from a mental disease or defect that qualified as a defense under Chapter 552.

. . ..

As stated, the report trial counsel obtained from Dr. Geis did not provide any type of viable defense. Movant was neither incompetent to proceed [n]or was [he] not guilty by reason of mental disease or defect.

II.

Contrary to the majority and the motion court, I conclude that, in the circumstances of this case, defense counsel's acknowledgement that he "didn't give . . . a thought" to calling Dr. Geis establishes constitutionally ineffective representation. Further, in line with a series of Missouri Supreme Court cases addressing similar situations, I believe that there is a reasonable probability – while by no means a certainty – that presenting Dr. Geis' testimony would have led to a different outcome in Vaca's sentencing proceeding.[1]

A.

The findings and conclusions on which the motion court relied to reject Vaca's claim do not, in my view, provide a sufficient basis to deny relief: the motion court's findings are in important respects contrary to the record, and its legal conclusions misapprehend the nature of Vaca's claim.

First, the motion court ascribed a strategic motive to counsel's failure to call Dr. Geis by referencing counsel's testimony that "he did not analyze the case that way." But a review of the

[1] Because I believe Vaca is entitled to relief based on counsel's failure to call Dr. Geis, who had given counsel a detailed report concerning Vaca's mental health prior to trial, I find it unnecessary to address Vaca's claim that counsel should have further investigated his mental health to discover *additional* information for use in the sentencing proceeding.

post-conviction evidentiary hearing transcript reveals that counsel's testimony unambiguously establishes the *lack* of a strategic motive for failing to call Dr. Geis, not the *existence* of one. Counsel testified that his trial preparation and trial strategy focused on the guilt phase of the trial (where he intended to argue mis-identification and a false confession), even though he recognized that a sentencing phase was highly likely given the strength of the evidence against his client. Although counsel testified that he reviewed Dr. Geis' report, he admitted that he had given *no* consideration to calling Dr. Geis in the sentencing phase, and had no strategic basis for his failure to do so: "I honestly didn't give that a thought." Counsel's only "preparation" for the sentencing phase was to consider which family members could testify to generate sympathy for Vaca (and his brief questioning of Vaca's father, quoted in full above, did not do even that). In this context, counsel's further statement that "I didn't analyze [the issue of calling Dr. Geis] from that perspective at all" is an admission that he failed to develop a strategy or prepare for the sentencing phase, not that Dr. Geis' likely testimony was somehow inconsistent with a considered sentencing-phase strategy counsel had formulated.[2]

Second, as the majority opinion recognizes, in order to prove ineffective assistance for failure to call a witness, a Rule 29.15 movant must show that "(1) trial counsel knew or should have known of the existence of the witness; (2) the witness could be located through reasonable investigation; (3) the witness would testify; and (4) the witness's testimony would have produced a viable defense." *Hutchison v. State*, 150 S.W.3d 292, 304 (Mo. banc 2004). Here, the State does not dispute the first three elements; the only issue is whether Dr. Geis' testimony would have provided a "viable defense." In finding that Dr. Geis' testimony "did not provide any type

[2] Counsel's candid testimony (which the trial court credited) also belies the concurring opinion's suggestion that counsel may have relied on "instinct[ ]" or what he "sensed in the courtroom" in making a considered decision to omit Dr. Geis. Conc. Op. at 4.

of viable defense," the motion court observed that his testimony would neither have negated Vaca's competence to stand trial, nor established a basis for a finding that he was not guilty by reason of mental disease or defect. But this conclusion fundamentally misconstrues the nature of Vaca's claim. Vaca's claim is not that Dr. Geis' testimony should have been offered in the *guilt* phase to establish a basis for his acquittal; instead, Vaca argues only that Dr. Geis' testimony should have been presented in the *sentencing* phase, because it would have been relevant to the jury's assessment of his appropriate punishment. Whether the omitted witness would have established "a viable defense" *to Vaca's guilt* is simply irrelevant. *Cf. Eichelberger v. State*, 134 S.W.3d 790, 792 (Mo. App. W.D. 2004) ("Because the alleged error . . . occurred during sentencing, the prejudice prong requires [a movant] to show there is a reasonable probability he would have received a lesser sentence if his counsel had called the [ ] witness[ ].").

Third, the motion court's finding that "[t]rial counsel, during the guilt phase of trial, established movant's mental problems from members of his family," is also disproved by the record. Contrary to the motion court's finding, there was absolutely *no* reference during Vaca's trial to: schizophrenia; dysthymia; post-traumatic stress disorder; Vaca's limited intelligence and intellectual functioning; his auditory and visual hallucinations; or the fact that he was unmedicated at the time of the crimes in question due to difficulties with his insurance coverage. Indeed, it is more than a little ironic that the State now argues that Vaca's mental health was adequately presented during the guilt phase, when it repeatedly objected to the defense's presentation of any evidence during the guilt phase concerning Vaca's mental health, on the ground that it had not been properly pled as a defense. Thus, prior to the defense's opening statement, the prosecution made the following argument:

> Your Honor, I might, before [defense counsel] begins his opening statement, I know that he has advised the Court that at some point he intends to

> try to present evidence of the defendant's mental history or mental condition. Under [chapter] 552, the defendant has not complied with those sections. That is not relevant and should not be permitted into evidence by the Court. And I would ask also that the Court, because it's not likely to be admissible evidence, prohibit [defense counsel] from making any statements regarding that during his opening statement.
>
> . . . As the Court knows, Section 552 sets out, you know, the procedure for mental condition – history to come into evidence. And I know that the defendant in this case for many, many months sought psychological – at least one psychological evaluation that was provided to the Court, but at no point has he pled or followed any other requirements of 552 to plea or raise an issue of either not guilty by reason of insanity or diminished capacity.

In response, defense counsel explained that "I don't intend to go in that direction," but merely intended to present evidence concerning the knowing and voluntary nature of Vaca's waiver of his rights and pre-trial statement; "[m]y evidence will be aimed more towards whether or not this was a false confession." In light of this colloquy, and other objections made by the prosecution during the guilt phase, the State cannot now plausibly claim that Vaca presented the equivalent of Dr. Geis' testimony through other, guilt-phase witnesses.

In any event, the evidence regarding Vaca's mental condition admitted during the guilt phase was extremely limited. For example, Detective Todd Butler – who conducted the interrogation that led to Vaca's confession – testified that Vaca stated during his interrogation that "I have psychological problems and sometimes I do things wrong." No further details were provided. Both Detective Butler and Vaca's brother testified that Vaca had only completed an 8th or 9th grade education; but neither specifically addressed his intelligence or intellectual functioning. Vaca's sister testified that Vaca was on "disability," without elaboration. Vaca's brother testified that Vaca suffered a head injury in 1988 that required cranial surgery; however, when asked whether Vaca's behavior changed following the injury, his brother merely stated that "he seemed, you know, just to be sometimes just nervous, real, you know, kind of nervous, and that's about it."

Vaca himself testified that he was receiving Social Security disability payments; when asked to describe the nature of his disability, Vaca first described limitations in the functioning of his left shoulder, arm, neck, and right knee; he then stated without further elaboration that "I also have a lot of headaches off and on. And – I was taking some [medication] for mental disorder." Vaca listed the prescription medications he was taking at the time of his arrest, identifying Clonazepam, Trazodone, Naproxen, Paroxetine, Bupropion, and Zyprexa. No explanation was provided as to the conditions these medications were intended to treat. Vaca later explained that, when he was arrested, he had to ask the arresting officers to retrieve his prescription medications; he testified that, until the medications took effect, "I was really having like a – like a panic attack spell or something – something like a seizure." Vaca testified that "I have these [panic attacks] all the time." To the extent this testimony may have suggested that Vaca was taking medications for significant, wide-ranging mental health issues, however, he undercut any such speculation by testifying that "I'm always nervous. *That's why I take medication*."

Further, to the extent the motion court found that "*trial counsel testified* that he presented evidence of movant's good character and his mental disability . . . through family members and movant himself," that finding is contrary to counsel's own testimony: when asked whether he had an "intentional strategy" of using the testimony of Vaca's family members during the guilt phase as a "substitute" for Dr. Geis, counsel responded: "Of course not."

Thus, each of the considerations on which the motion court relied to reject Vaca's sentencing-phase claim is flawed, and cannot support the denial of relief on that claim.

B.

Without addressing the rationales offered by the motion court, the majority concludes that Vaca's sentencing-phase claim is meritless for a separate reason: that "[t]he mitigating

value of Dr. Geis's testimony is highly speculative," and that "[i]t is just as reasonable to assume Dr. Geis's testimony would have an aggravating effect rather than supply an argument for mitigation." Maj. Op. at 10. But the Missouri Supreme Court has addressed this precise issue in a number of cases, and held that the failure to present evidence of severe mental-health issues and intellectual deficits presents a reasonable probability of a different sentencing-phase outcome. I accordingly disagree with the majority's conclusion that Vaca failed to show he was prejudiced by counsel's failure to call Dr. Geis at sentencing.

At the outset, it bears emphasis that, to demonstrate prejudice, Vaca's burden is only to "show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Simmons*, 955 S.W.2d 729, 746 (Mo. banc 1997). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

> This standard is not met by showing that the errors "had some conceivable effect on the outcome of the proceeding" or that the errors "'impaired the presentation of the defense,'" as those standards are either unworkable or subject to being satisfied by every error. On the other hand, the Supreme Court specifically rejected the argument that a movant must meet an "outcome-determinative" test by showing that it is more likely than not that counsel's deficient conduct altered the outcome of the case, because "[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome."

Deck v. State, 68 S.W.3d 418, 426 (Mo. banc 2002) (quoting *Strickland*, 466 U.S. at 693).

In a series of death-penalty cases, the Missouri Supreme Court has held that defense counsel's failure to present evidence of a defendant's significant mental illness and intellectual deficits presents a reasonable probability of a different sentencing outcome.[3] Thus, the Court

[3] Like the majority, I recognize that the standards for *counsel's performance* in capital murder prosecutions may be heightened as compared to non-capital cases. *See Taylor v. State*, 262 S.W.3d 231, 249 (Mo. banc 2008) ("Because of the unique nature of capital sentencing – both the stakes

recently held that the failure to call a physician "who would have testified about [appellant's] impaired intellectual functioning can be prejudicial as such evidence can be inherently mitigating." *Glass v. State*, 227 S.W.3d 463, 469 (Mo. banc 2007); *see also id.* at 471 ("It is well-established that evidence of impaired intellectual functioning is valid mitigating evidence in the penalty phase of [a] capital case, regardless of whether defendant has established a nexus between his mental capacity and crime.").

In *Taylor v. State*, 262 S.W.3d 231 (Mo. banc 2008), the Supreme Court held that a defendant was entitled to a new sentencing proceding "where there was unutilized but abundant and compelling mitigation evidence regarding Mr. Taylor's abusive upbringing and lifelong struggles with mental illness," concluding that, "[h]ad trial counsel presented the available mitigation evidence, there is a reasonable likelihood that the outcome of the penalty phase proceeding may have been different." *Id.* at 237. The mental-health evidence omitted from the sentencing phase in *Taylor* was markedly similar to the evidence at issue here, involving the defendant's prior diagnoses with paranoid schizophrenia, antisocial personality disorder, Post-

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and the character of the evidence to be presented – capital defense counsel have a heightened duty to present mitigation evidence to the jury."). But I do not believe, as the majority contends, that Vaca's arguments would require this Court "to graft onto non-capital cases the enhanced responsibility imposed on counsel in capital cases." Maj. Op. at 9. Here, we deal with a witness known to defense counsel prior to trial, who had issued a detailed report which counsel had reviewed; there is no need in this case to address the scope of counsel's obligations in a non-capital case "to 'discover all reasonably available mitigating evidence.'" *Glass v. State*, 227 S.W.3d 463, 468-69 (Mo. banc 2007) (citation omitted). (The case cited by the majority, *Lambert v. Blodgett*, 393 F.3d 943 (9th Cir. 2004), refuses only to import from capital to non-capital cases the duty to investigate and discover potentially mitigating evidence.) I cite the death-penalty cases in the discussion which follows not for their performance standards, but instead for their analysis whether counsel's failure to present mitigation evidence involving a defendant's mental health and intellectual capacity prejudiced the defendant – *i.e.*, whether the omission of such evidence created a reasonable probability of a different outcome. As to this latter issue, the death-penalty cases, which also involve bifurcated guilt and sentencing proceedings, provide useful guidance. (Contrary to the majority, I also believe the "risk in introducing potentially mitigating evidence" (Maj. Op. at 10) in a case in which a defendant faces a death sentence is at least as great, if not greater, than in a non-capital case like this one.) This Court has previously recognized the important similarities between the bifurcated proceedings now authorized in non-capital cases pursuant to § 557.036, RSMo Cum. Supp. 2003, and those which have been conducted for many years in capital cases. *See, e.g.*, *Cardenas v. State*, 31 S.W.3d 835, 838 (Mo. App. W.D. 2007); *State v. Berry*, 168 S.W.3d 527, 539-40 (Mo. App. W.D. 2005).

Traumatic Stress Disorder, and depression. *Id.* at 237-38. Notably, in *Taylor* – and in sharp contrast to this case – the defendant had pursued a mental disease or defect defense during the guilt phase of his trial, and therefore the defense had already presented, in the guilt phase, the testimony of five separate mental health experts concerning Taylor's mental illnesses. *Id.* at 238. Despite the extensive guilt-phase evidence concerning Taylor's mental health, the Court nevertheless held that presentation of *additional* mental-health evidence during the wider-ranging sentencing-phase proceeding presented a reasonable probability of producing a different outcome. *Id.* at 252-53.

Similarly, the Court found ineffective assistance meriting a new sentencing proceeding in *Hutchison v. State*, 150 S.W.3d 292 (Mo. banc 2004), based on counsel's failure to investigate possible mitigating evidence, including evidence of Hutchison's mental health problems. The Court found that "[r]eadily available records that trial counsel admitted they did not attempt to obtain would have documented [appellant]'s troubled childhood, mental health problems [including bipolar disorder], drug and alcohol addiction, history of sex abuse, attention deficit hyperactivity disorder, learning disabilities, memory problems and social and emotional problems." *Id*. at 304. "The information about [appellant]'s troubled background and impaired intellectual ability [IQ of 76] contained in Dr. Parrish's records would have provided significant evidence for mitigation not heard by the jury." *Id*. at 305. Because "[t]he jury did not hear significant mitigating evidence about Hutchison's impaired mental functioning and did not have the opportunity to consider and give effect to all of the mitigating evidence in the penalty phase," the Court held that a new sentencing proceeding was warranted. *Id.* at 307; *see also, e.g., State v. Johnson*, 968 S.W.2d 686, 701-02 (Mo. banc 1998) (ordering new sentencing proceeding

where defense counsel failed to present testimony of psychiatrist as to defendant's "cocaine intoxication delirium" at time of murder).[4]

The conclusion that Dr. Geis' testimony raises a reasonably probability of a different outcome in *this* case follows inexorably from these Supreme Court decisions. In addition to borderline intelligence, Dr. Geis would have established that Vaca suffered from a severe psychosis (paranoid schizophrenia), post-traumatic stress disorder and dysthymia, conditions that went unmedicated at the time he committed the offenses based solely on insurance issues. As discussed above, none of this evidence was presented to the jury, in either the guilt or sentencing-phase proceedings. It also bears emphasis that each of the Supreme Court cases discussed above involved a deliberate, aggravated homicide. Despite the majority's reference to "the heinous acts Vaca committed," Maj. Op. at 11, the juries in the Supreme Court's cases had even greater reason than here to impose harsh punishments; yet the Court nevertheless found that the probable mitigating effect of omitted mental health evidence mandated new sentencing hearings.

The possible impact of Dr. Geis' testimony on the jury's assessment of appropriate punishment is confirmed by questions the jury asked during their deliberations on Vaca's guilt. Those questions included:

> Was [Vaca] given psychological testing
> Had he been compliant with medications before arrest
> Is he currently on meds

"While the court's denial of their requests was proper, the requests show that the jury was focusing on the issue of" Vaca's mental health, confirming that the presentation of further

[4] *Bucklew v. State*, 38 S.W.3d 395 (Mo. banc 2001), on which the State relies, does not require a different result. *Bucklew* found that an omitted psychologist's "findings were summarized – almost verbatim – by . . . an[other] expert who testified during the penalty phase," and was thus "cumulative." *Id.* at 398-99. Here, as discussed above, Dr. Geis' testimony would have presented *non*-cumulative evidence of Vaca's significant mental health problems and impaired intellectual functioning.

evidence on this issue raised a reasonable probability of influencing the jury's assessment of appropriate punishment. *Deck v. State*, 68 S.W.3d 418, 431 (Mo. banc 2002) (referencing similar jury questions in assessing prejudicial effect of counsel's ineffective representation); *see also Taylor*, 262 S.W.3d at 251 ("This failure at the penalty phase [to present certain mental health records] is particularly profound since the jury had asked to review these records during [their deliberations in] the guilt phase of the trial."). Particularly in light of the jury's evident interest in these matters, there is a reasonable probability that the jury would have found Vaca's circumstances mitigating, justifying a lesser sentence.[5]

The majority concludes that Dr. Geis' testimony could have achieved the opposite effect, and persuaded the jury that he was "too dangerous to be at-large and that a lengthy sentence was necessary for the safety of the community." Maj. Op. at 11. But Vaca's burden is only to show a "reasonable probability" of a different outcome. While it may not be sufficient for Vaca merely to identify "some conceivable effect" of the omitted evidence, by the same token he need not "show[ ] that it is more likely than not that counsel's deficient conduct altered the outcome of the case." *Deck*, 68 S.W.3d at 426. In *Taylor*, trial counsel testified at the post-conviction evidentiary hearing that he had chosen not to present additional mental health information at sentencing due to concerns similar to the majority's – that "they felt the records contained some harmful information." 262 S.W.3d at 251; *see also id.* at 256 (dissenting opinion, quoting trial counsel's testimony). (Here, of course, Vaca's trial counsel *failed to even consider* presenting Dr. Geis at sentencing.) Despite counsel's considered strategic decision not to introduce such

[5] Moreover, Vaca was *in fact* given a lengthy prison sentence, pursuant to the jury's recommendation; it seems unlikely that presentation of Dr. Geis' testimony would have led to a *heavier* sentence. Although the majority notes that Vaca "by no means received the maximum," Maj. Op. at 11, under statutory provisions governing parole eligibility for inmates 70 years of age or older, and inmates whose aggregate sentences exceed 75 years, *see* § 558.019.3, .4, it is not at all clear that any greater sentence would have any effect on the time Vaca actually serves.

evidence, the Supreme Court in *Taylor* nevertheless held that counsel's failure to present the mental health evidence was constitutionally deficient:

> While not all of the evidence in the records was favorable to Mr. Taylor, such records seldom are. Where the only basis of defense is that one's client has long had a mental illness that reduces his responsibility, the failure to introduce records that present not only support for his history of mental health evaluations and treatment beginning at the extremely young age of 7, but also a treasure trove of mitigation regarding Mr. Taylor's abusive childhood, simply is not a reasonable trial strategy. "Foregoing mitigation because it contains something harmful is not reasonable when its prejudicial effect may be outweighed by the mitigating value." *Hutchison v. State*, 150 S.W.3d 292, 304-05 (Mo. banc 2004). *See also Williams* [*v. Taylor*], 529 U.S. [362,] 396 [(2000)] (reversing death sentence where counsel failed to present mitigating evidence even though "not all of the additional evidence was favorable to [the defendant]").

262 S.W.3d at 251. Certainty that a different outcome would have resulted is not required. *State v. Johnson*, 968 S.W.2d 686, 702 (Mo. banc 1998) ("While this Court does not presume to know the precise effect [a mental health expert's] testimony would have had on the jurors who served on [the defendant's] trial, this Court is left with the definite and firm impression that the record before us demonstrates that [the expert's] testimony would have altered the jurors' deliberations to the extent that a reasonable probability exists that" defendant would have received a lesser sentence).[6]

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[6] The concurring opinion suggests that a post-conviction movant can only establish ineffective assistance in the sentence phase where "there is some obviously objective and quantitative result from counsel's ineffectiveness." Conc. Op. at 4. But given that Missouri does not have guidelines under which particular, discrete factors feed into a rigid sentencing formula, the concurring opinion's approach would essentially eliminate *all* claims of ineffective assistance in the sentencing phase, no matter how deficient counsel's performance. Nor can the concurrence's approach be squared with the Missouri Supreme Court's death-penalty decisions. Even though in such cases the jury may be instructed in some detail concerning the mitigating and aggravating circumstances they must consider, they jury ultimately must decide the relatively open-ended questions whether the mitigating evidence "is sufficient to outweigh the evidence in aggravation of punishment," and whether the death penalty is justified "under all the circumstances," and "the evidence as a whole." §§ 565.030.4(3), (4), 564.032.1(2) RSMo; *State v. McLaughlin*, 265 S.W.3d 257, 264-65 (Mo. banc 2008). *Taylor* and the other cited Supreme Court decisions did not find that counsel's failure to put on mental-health evidence in those cases produced "obviously objective and quantitative results"; instead, a "reasonable probability" of a different outcome, undermining the Court's confidence in the result, sufficed. (The lack of precedent concerning ineffectiveness of counsel in this context is likely explained not be the *sub silentio* application of the

III.

In this case Vaca faced a strong likelihood of conviction, and significant prison sentences if found guilty. Counsel had, in his possession, a detailed report by an available expert witness, which presented evidence of Vaca's severe mental health problems and borderline intelligence. The jury expressed its interest in just these issues during the guilt phase; yet Vaca's counsel "didn't give . . . a thought" to offering the mental health evidence during the sentencing phase, instead presenting only an anemic sentencing case based on minimal thought and preparation. In these circumstances, and given findings and conclusions by the motion court which are contrary to the record and misapprehend the nature of Vaca's claim, I would reverse in part, and remand with directions that Vaca be afforded a new sentencing hearing.

Alok Ahuja, Judge

concurrence's suggested standard, but by the General Assembly's relatively recent adoption of bifurcated sentencing proceedings in non-capital cases.)