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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas
Alexander S. Macaulay, Circuit Court Judge

Case No. 2000-CP-01-210
Appellate Case Number: 2010-170387

John Kennedy Hughey, Respondent/Petitioner

v.

The State, Petitioner/Respondent.

Respondent/Petitioner's Reply Brief

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In Reply

Issue II

A. Failure to Present Mental Health Evidence.

After Hughey filed his Brief of Petitioner, this Court decided *Weik v. State*, 409 S.C. 214, 761 S.E.2d 757(2014). Three aspects of *Weik* are applicable to Hughey's case: (a) the failure to present available mitigation evidence, (b) this failure resulting from inattention rather than a reasoned strategic decision, and (3) prejudice.

First, in *Weik* this Court held, "Though counsel introduced *psychological* testimony regarding Petitioner's mental illness, counsel failed to present even a skeletal version of Petitioner's *social history* even though there was abundant social history evidence available to them." *Weik*, 409 S.C. at ____, 761 S.E.2d at 768. In Hughey's case, trial counsel presented an incomplete social history and failed to present any psychiatric testimony about Post-Traumatic Stress Disorder (hereinafter "PTSD") and major depression.

Second, in *Weik*

> Despite counsel's delay in beginning the mitigation investigation, defense investigators were nevertheless able to uncover substantial mitigating information about [Weik's] social history and provided counsel with written reports detailing that information. Yet, counsel simply failed to present any of this mitigating evidence to the jury

Weik, 409 S.C. at ____, 761 S.E.2d at 768. In *Weik*, the failure to present this evidence resulted from inattention and not a reasoned, strategic choice. In Hughey's case the delay in beginning a mitigation investigation resulted from inattention due to lead trial

counsel's excessive caseload as public defender for two counties.[1] The delay in retaining a social worker led to a failure to discover significant social history records that could be relied on by a forensic psychiatrist. The delay in retaining a forensic psychiatrist prior to the call of Hughey's case for trial resulted in a complete failure to diagnose his PTSD and major depression.

Third, the omitted evidence in *Weik* "would have demonstrated [Weik's] genetic predisposition to schizophrenia and helped explain his auditory and visual hallucinations at the time of the shooting." *Weik*, 409 S.C. at ___, 761 S.E.2d at 769. Here, the available but undiscovered records were essential in determing Hughey's premorbid functioning and establishing patterns of behavior that were consistent with his diagnoses. The PTSD and major depression diagnoses help explain Hughey's actions at the time of the crimes. This additional evidence is more than a "'fancier' mitigation case," *id.*, because it would have required the trial court judge to instruct the jurors about an additional statutory mitigating circumstance, that Hughey's capacity "to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantiality impaired." S.C. Code Ann. 16-3-20(C)(b)(6).

B. Failure to Present Adaptability to Incarceration Evidence.

Additional available but undiscovered records demonstrated Hughey's adaptability to incarceration, which would have provided an additional reason for the jurors to impose a life sentence. "Even to the extent that [Billy Garrett's] decision was

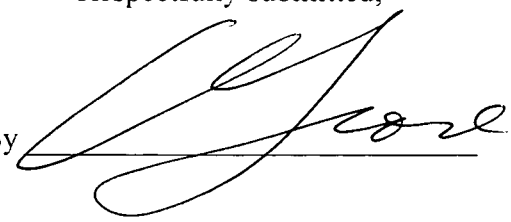
[1] Since Hughey's capital trial in 1997, the General Assembly has amended the Indigent Defense act twice. 2005 Act. No. 103; 2007 Act No. 108. Following the 2007 Act, the Commission on Indigent Defense created the Capital Trial Division. With its limited caseload, the Capital Trial Division is in a position to ensure capital cases receive the attention mandated by law.

based on a bad experience that he had had with [a correctional officer's testimony] in a capital case many years earlier, . . . a 'once burnt, twice shy' excuse simply is not good enough in the context of this case." *Johnson v. United States*, 860 F. Supp. 2d 663, 886 (N.D. Iowa 2012). These records, testimony of jailors presented at the PCR hearing, and Dr. Schwartz-Watts' opinion more than overcome trial counsel's explanation for not presenting this evidence.

Conclusion

This Court should order a new sentencing hearing.

Respectfully submitted,

By 

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I certify that I have served a copy of the Respondent/Petitioner's reply Brief [redacted] on the State of South Carolina by placing a copy in the United States Mail, postage prepaid, on date reflected below, addressed as follows:

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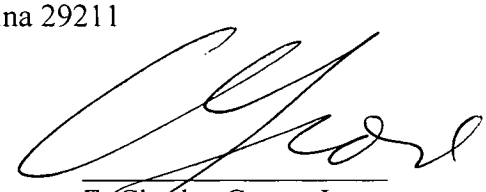

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