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MAR - 8 2010

S.C. SUPREME COURT

HENRY McMASTER
ATTORNEY GENERAL

March 8, 2010

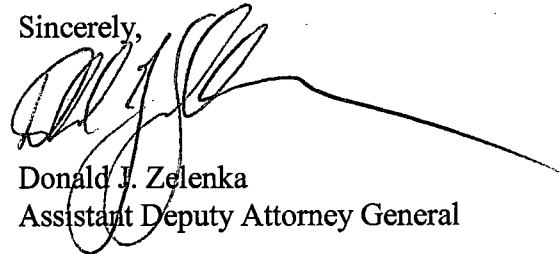
Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P. O. Box 11330
Columbia, SC 29211

Re: John Edward Weik v. State of South Carolina

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the *Return to Amended Petition for Writ of Certiorari* in the above-referenced case. By copy of this letter, I am serving opposing counsel with same.

Sincerely,



Donald J. Zelenka
Assistant Deputy Attorney General

DJZ/lbb
Enclosure

cc: Robert M. Dudek, Esquire
Elizabeth Franklin-Best, Esquire
Sandi Wofford, Victims Assistance

The Supreme Court of South Carolina

John Edward Weik,

Petitioner,

V.

State of South Carolina,

Respondent.

The Honorable Perry M. Buckner
Dorchester County
Trial Court Case No. 2003-CP-18-01070

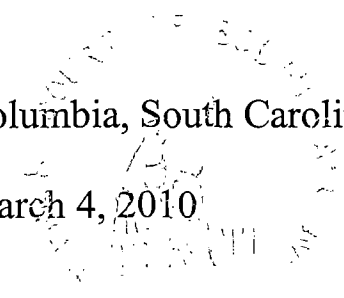
ORDER

Respondent seeks a fourth extension of time for an additional one week to serve and file the Return to Amended Petition for a Writ of Certiorari, and asserts that extraordinary circumstances justify this extension. The opposing party consents to the extension. The request for an extension is granted until March 8, 2010. Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what actions are being taken to insure that no further extension will be required, and be signed by the appropriate attorneys.

IT IS SO ORDERED.



For the Court



Columbia, South Carolina

March 4, 2010

cc: Chief Appellate Defender Robert M. Dudek
Assistant Deputy Attorney General Donald J. Zelenka



HENRY McMASTER
ATTORNEY GENERAL

March 1, 2010

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MAR 01 2010

S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: *John E. Weik, #5068 v. State of South Carolina*
Death Penalty PCR C/A No. 03-CP-18-1070

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the *Motion to Enlarge Time for Filing Return to Amended Petition for Writ of Certiorari One Week Until March 8, 2010*, dated March 1, 2010, along with proof of service, in the above-referenced case.

Thank you for your cooperation in this matter.

Sincerely,

Erin P. Jett, Legal Assistant to Donald J. Zelenka,
Assistant Deputy Attorney General

Enclosures

cc: Robert M. Dudek, Esquire
Elizabeth A. Franklin-Best, Esquire
Sandi Wofford, Victims' Services

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Certiorari from Dorchester County
Perry M. Buckner, Circuit Court Judge
2003-CP18-01070

RECEIVED

MAR 01 2010

JOHN EDWARD WEIK,

Petitioner, S.C. SUPREME COURT

v.

STATE OF SOUTH CAROLINA,

Respondent.

**MOTION TO ENLARGE TIME FOR FILING RETURN TO AMENDED PETITION
FOR WRIT OF CERTIORARI ONE WEEK UNTIL MARCH 8, 2010**

The Respondents, above-named, hereby make a third motion to this Court to extend the time for filing the Return to the Amended Petition for Writ of Certiorari from March 1, 2010 for a period of seven (7) days up to and including March 8, 2010.

EXTRAORDINARY CIRCUMSTANCES

This request is due to the "extraordinary circumstance" that volume six¹ of the Appendix was inadvertently lost by below-signed counsel which was not realized until after business hours on Friday February 27, 2010. The counsel has been able to acquire a new copy of the missing volume which included pages 2500- 3000 today from opposing counsel Robert Dudek. Because

¹Below-signed counsel had volume six previously. Included in the missing volume were counsel's notes. It must be noted that the missing volume was earlier discovered by below-signed counsel to be missing portions of the testimony which required the earlier remand. It appears that during that remand that this particular volume became misplaced.

of this error, counsel was unable to work on the matter this weekend since this volume included the bulk of the critical evidence from the state PCR hearing for three of the six issues in this matter. Counsel assures this Court that no further extensions will be requested and that he is actively working on this matter.

As stated previously the length of the appendix, the fact the petition consists of 66 pages addressing 6 specified issues in a death penalty PCR action, and intervening business events in state and federal court additional caused this extension requests.



Respondents have been involved in numerous litigation in both state and federal court during this time period which has prevented the completion of this brief in a sufficient and timely manner. The below-signed counsel participated in a death penalty PCR hearing in Orangeburg County February, 1,2,4, 2010 in Kenneth Simmons v. State, before Judge Early, made a Final Brief of Respondent on February 1, 2010 in State v. Raymondeze Rivera, made a death penalty oral argument on February 4, 2010, in State v. Finklea, made a Return to certiorari in the South Carolina Supreme Court in State v. Billy Cope on February 8, 2010, made a Brief of Appellant in the U.S. Court of Appeals in Donald Brandt v. Ozmint on February 10, 2010, made a posthearing death penalty memorandum in the death penalty PCR of Sammie Stokes v. State to Judge Manning on February 16, 2010, prepared an Amended Return in the death penalty PCR matter in Marion Lindsey v. State from Spartanburg County on February 21, 2010, argued a pat-conviction relief matter in Barnwell in a death penalty related state PCR proceeding before Judge Early on February 23, 2010 in David McClure v. State, filed a Return in the U.S. District Court in Reyes Cabrera Pena v. Ozmint on February 25, 2010, participated in the Criminal Law CLE on February 26, and filed an expedited response in the South Carolina Supreme Court in State v.

Billy Cope on concerning the earlier Return of February 8, 2010 on February 26, 2010.

ACTIONS TAKEN TO AVOIDS FURTHER EXTENSION

As stated above, the deficiency of the lost volume of the appendix has been remedied today by acquiring a replacement copy from the Office of Appellate Defense. Further, the hearing scheduled to be held on March 8 involving Marion Lindsey has been postponed until July 19 and will not interfere with completion of the Return. The other matters scheduled between this date and March 9, 2010, are three federal habeas corpus briefs involving Tommy Donerson (March 3, 2010), Mark Moyers (March 3, 2010), Kevin Harbin (March 5, 2010) and Winfred Benson (March 8, 2010). Although Donerson, Moyers and Harbin have been extended by the Courts previously, each take a lesser priority and extensions will be sought in those matters rather than the Weik brief to insure its completion. Simply put, Weik will be the sole priority until completion or through March 8 - whichever is first.

II.

Wherefore, Respondents respectfully request an extension of a period of time of seven (7) days up to and including March 8, 2010 to complete this Return of Respondent. Counsel has consulted with opposing counsel are advising opposing counsel Robert Dudek with this motion who has advised that he has no objection to the request.

Respectfully submitted,

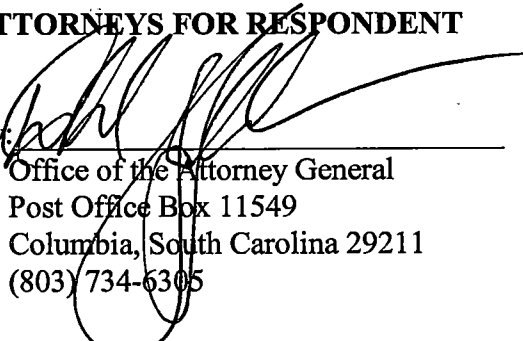
HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA

Assistant Deputy Attorney General

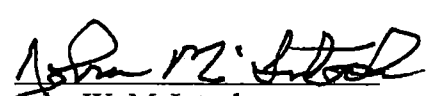
ATTORNEYS FOR RESPONDENT

By: 

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

March 8, 2010.

I have reviewed and approved that extraordinary circumstances exists and that actions have been taken to assure that no further request will be made for after March 8, 2010.


John W. McIntosh
Chief Deputy Attorney General.

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Certiorari From from Dorchester County
Perry M. Buckner, Circuit Court Judge
2003-CP18-01070

JOHN EDWARD WEIK,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

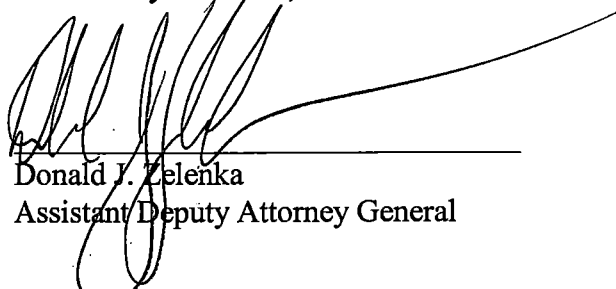
Respondent.

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served Respondents Motion to Enlarge
Time for Filing Return on

Robert M. Dudek and Elizabeth A. Franklin-Best, Esquires,
1330 Lady Street, Suite 401,
Columbia, South Carolina 29201

by depositing copies in the first class postage prepaid this 1st day of March, 2010.



Donald J. Zelenka
Assistant Deputy Attorney General

The Supreme Court of South Carolina

John Edward Weik, Petitioner,
v.
State of South Carolina, Respondent.

The Honorable Perry M. Buckner
Dorchester County
Trial Court Case No. 2003-CP-18-01070

ORDER

Respondent seeks a third extension of time to serve and file the Return to Amended Petition for a Writ of Certiorari in the above entitled matter. The request for an extension is granted and extended until March 1, 2010.

Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what actions are being taken to insure that no further extension will be required, and be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY Drenda L. Shealy
CLERK
Chief Deputy

Columbia, South Carolina

February 1, 2010

cc: Acting Chief Appellate Defender Robert M. Dudek
Assistant Deputy Attorney General Donald J. Zelenka



HENRY McMASTER
ATTORNEY GENERAL

January 29, 2010

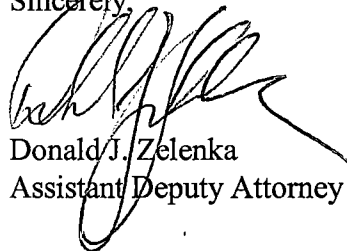
Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P. O. Box 11330
Columbia, SC 29211

Re: *John E. Weik v. State of South Carolina*

Dear Mr. Shearouse:

Enclosed please find Respondent's *Motion to Enlarge Time for Filing Return to Amended Petition for Writ of Certiorari* in the above-referenced case for filing. By copy of this letter, I am serving opposing counsel with same.

Sincerely,



Donald J. Zelenka
Assistant Deputy Attorney General

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FEB 01 2010

S.C. SUPREME COURT

DJZ/lbb
Enclosure

cc: Robert M. Dudek, Esquire

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Certiorari From from Dorchester County
Perry M. Buckner, Circuit Court Judge
2003-CP18-01070

RECEIVED

FEB 01 2010

S.C. SUPREME COURT

JOHN EDWARD WEIK,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

**MOTION TO ENLARGE TIME FOR
FILING RETURN TO AMENDED PETITION FOR WRIT OF CERTIORARI**

The Respondents, above-named, hereby make a third motion to this Court to extend the time for filing the Return to the Amended Petition for Writ of Certiorari from January 29, 2010 for a period of thirty (30) days up to and including February 28, 2010. This request is due to the extensive length of the appendix, the fact the petition consists of 66 pages addressing 6 specified issues in a death penalty PCR action, and intervening business events in state and federal court.

Respondents have been involved in numerous litigation in both state and federal court during this time period which has prevented the completion of this brief in a sufficient and timely manner. The Counsel has been working on a posthearing memorandum response in the death penalty PCR involving Sammie Stokes that was presently due on January 25, 2010, but has since

been extended. Counsel this past month prepared a motion to dismiss and extended response in David McClure, prepared a federal habeas brief in Brandon Brown, prepared for an oral argument in David D. Smith on January 21, 2010, participated in out of town depositions in Kenneth Simmons and has been traveling to Summerville, St. George and Charleston the past two weeks in witness preparation for the Simmons death penalty PCR hearing presently set for Monday February 1, 2010. Counsel is also involved in the preparation this week of a Joint Appendix in an appeal in the Fourth Court in Donald Brandt v. SCDC. Counsel also has an argument in the Supreme Court on February 4, 2010 in the death penalty appeal of Ron Finklea.

h
X
Wherefore Respondents respectfully request an extension of a period of time of thirty (30) days up to and including February 28, 2010 to complete this Return of Respondent. Counsel has consulted with opposing counsel are advising opposing counsel Robert Dudek with this motion who has advised that he has no objection to the request.

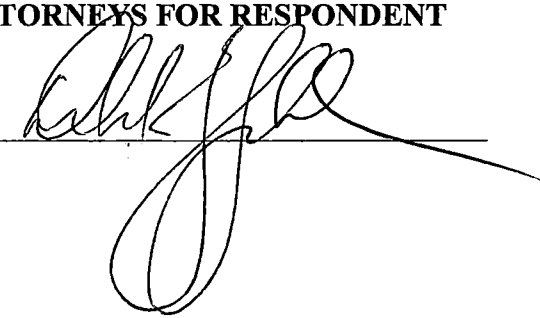
Respectfully submitted,

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

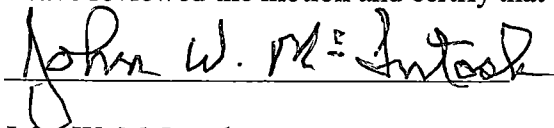
ATTORNEYS FOR RESPONDENT

By: 

January 29, 2010

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

I have reviewed the motion and certify that there is good cause for the request.

A handwritten signature in black ink, reading "John W. McIntosh". The signature is written in a cursive style and is positioned above a horizontal line.

John W. McIntosh
Chief Deputy Attorney General

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Certiorari From from Dorchester County
Perry M. Buckner, Circuit Court Judge
2003-CP18-01070

JOHN EDWARD WEIK,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

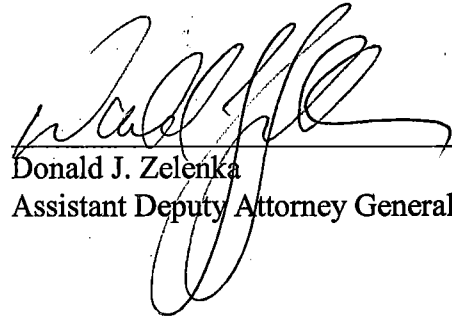
Respondent.

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served Respondents Motion to Enlarge
Time for Filing Return on

Robert M. Dudek and Elizabeth A. Franklin-Best, Esquires,
1330 Lady Street, Suite 401,
Columbia, South Carolina 29201

by depositing copies in the first class postage prepaid this 29th day of January, 2010.


Donald J. Zelenka
Assistant Deputy Attorney General

The Supreme Court of South Carolina

John Edward Weik, Petitioner,
v.
State of South Carolina, Respondent.

The Honorable Perry M. Buckner
Dorchester County
Trial Court Case No. 2003-CP-18-01070

ORDER

Respondent seeks a second extension of time to serve and file the Return to the Amended Petition for a Writ of Certiorari in the above entitled matter. The request for an extension is granted until January 29, 2010. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause and must be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY 
CLERK

Columbia, South Carolina

January 4, 2010

cc: Acting Chief Appellate Defender Robert M. Dudek
Assistant Deputy Attorney General Donald J. Zelenka



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DEC 30 2009
S.C. SUPREME COURT

HENRY McMASTER
ATTORNEY GENERAL

December 29, 2009

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: *John E. Weik, #5068 v. State of South Carolina*
Death Penalty PCR C/A No. 03-CP-18-1070

Dear Mr. Shearouse:

Enclosed please find Respondents "MOTION TO ENLARGE TIME FOR FILING RETURN TO AMENDED PETITION FOR WRIT OF CERTIORARI." I am serving opposing counsel this date.

Sincerely,

Donald J. Zelenka
Assistant Deputy Attorney General

DJZ:

cc:

Robert M. Dudek, Esq.
Elizabeth Franklin Best, Esq.

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Certiorari From from Dorchester County
Perry M. Buckner, Circuit Court Judge
2003-CP18-01070

RECEIVED
DEC 30 2009
S.C. SUPREME COURT

JOHN EDWARD WEIK,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

**MOTION TO ENLARGE TIME FOR
FILING RETURN TO AMENDED PETITION FOR WRIT OF CERTIORARI**

The Respondents, above-named, hereby make a second motion to this Court to extend the time for filing the Return to the Amended Petition for Writ of Certiorari from December 30, 2009 for a period of thirty (30) days up to and including January 29, 2010. This request is due to the extensive length of the appendix, the fact the petition consists of 66 pages addressing 6 specified issues in a death penalty PCR action, and intervening business events in state and federal court.

Respondents have been involved in numerous litigation in both state and federal court during this time period which has prevented the completion of this brief in a sufficient and timely manner. The Counsel is sorking on a posthearing memorandum response in the death penalty PCR involving Sammie Stokes that is presently due on January 5, 2010. Counsel this past month

prepared for a cancelled oral argument in Ron Finklea on Dec. 2, filed briefs and memorandum in the following federal habeas corpus actions - Lauren Morris (Dec. 1), Jeff Cromer, Winston Fields (Dec. 14), Ernest Battle (December 18), Charles Harmon (December 21), Donald Brandt (December 21) and worked on Amended Return in state court involving David McClure and Marion Lindsey, and traveled to Summerville on December 22 for depositions in the Kenneth Simmons death penalty PCR action.

Wherefore Respondents respectfully request an extension of a period of time of thirty (30) days up to and including January 29, 2010 to complete this Return of respondent. Counsel are advising opposing counsel Robert Dudek with this motion.

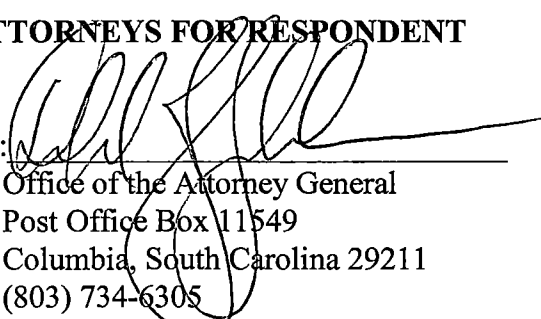
Respectfully submitted,

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

ATTORNEYS FOR RESPONDENT

By: 
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

December 29, 2009

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Certiorari From from Dorchester County
Perry M. Buckner, Circuit Court Judge
2003-CP18-01070

JOHN EDWARD WEIK,

Petitioner,

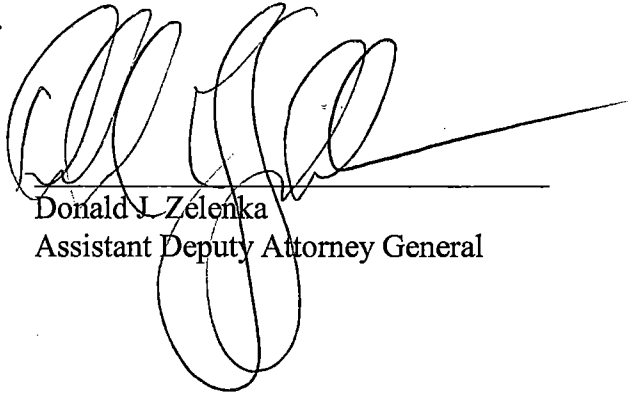
v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served Respondents Motion to Enlarge Time for Filing Return on Robert M. Dudek and Elizabeth A. Franklin-Best, Esquires, 1330 Lady Street, Suite 401, Columbia, South Carolina 29201 by depositing copies in the first class postage prepaid this 29th day of December , 2009.



Donald J. Zelenka
Assistant Deputy Attorney General

The Supreme Court of South Carolina

John Edward Weik,

Petitioner,

V.

State of South Carolina,

Respondent.

The Honorable Perry M. Buckner
Dorchester County
Trial Court Case No. 2003-CP-18-01070

ORDER

For good cause having been shown, the time for serving and filing the Return to the Petition for Writ of Certiorari and Appendix in the above entitled matter is hereby extended until December 30, 2009.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY

CLERK

Columbia, South Carolina

December 1, 2009

cc: Acting Chief Appellate Defender Robert M. Dudek
Assistant Deputy Attorney General Donald J. Zelenka



HENRY McMASTER
ATTORNEY GENERAL

November 29, 2009

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S.C. SUPREME COURT

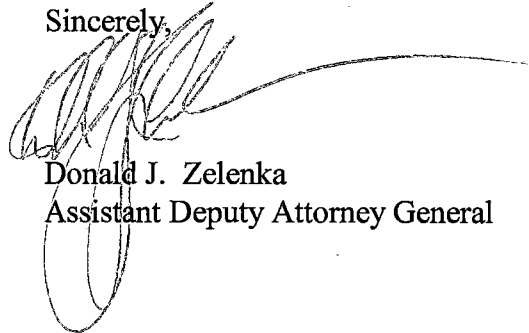
Honorable Daniel E. Shearouse
Clerk, The Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

Re: John Edward Weik v. State
Dorchester County Death Penalty PCR Appeal
Respondents First Request to Extend Return to Amended Petition.

Dear Mr. Shearouse:

The Return to the Amended Petition for Writ of Certiorari in the above-referenced case is due to be filed on today's date. Due to my heavy workload I have been unable to prepare the return in a timely manner. Therefore, I am requesting an extension of thirty (30) days to file and serve the Return. By copy of this letter I am informing opposing counsel of this request.

Sincerely,



Donald J. Zelenka
Assistant Deputy Attorney General

DJZ/

cc: Robert M. Dudek, Esquire

The Supreme Court of South Carolina

John Edward Weik, Petitioner,

v.

State of South Carolina, Respondent.

The Honorable Perry M. Buckner
Dorchester County
Trial Court Case No. 2003-CP-18-01070

ORDER

For good cause having been shown, the time for serving and filing the Amended Petition for Writ of Certiorari and Supplemental Appendix in the above entitled matter is hereby extended until October 14, 2009.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY

CLERK

Columbia, South Carolina

September 15, 2009

cc: Deputy Chief Appellate Defender for Capital Appeals
Robert M. Dudek
Assistant Deputy Attorney General Donald J. Zelenka

ORIGINAL



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Joseph L. Savitz, III, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

September 14, 2009

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SEP 14 2009

S.C. SUPREME COURT

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: John Weik v. The State (capital case)

Dear Mr. Shearouse:

The amended petition for writ of certiorari and supplemental appendix in the above referenced case are due to be served and filed today. However, because of my current caseload, I have been unable to complete this petition for service. For that reason, I would respectfully request a one and only extension of thirty days in which to serve and file this amended petition.

By copy of this letter, I am informing Donald J. Zelenka, Esquire, of the Attorney General's Office, of my request.

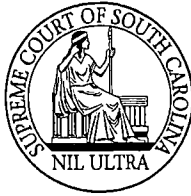
Thank you for your assistance in this matter. Should you have any questions, please do not hesitate to contact me.

Sincerely,

Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

RMD/mwl

cc: Donald J. Zelenka, Esquire



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

August 13, 2009

Deputy Chief Appellate Defender for Capital Appeals
Robert M. Dudek
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: Weik, John Edward v. State

Dear Counsel:

Enclosed is the order issued in the above entitled matter.

Very truly yours,

A handwritten signature in black ink, appearing to be "DES", followed by a long horizontal line extending to the right.

CLERK

DES/dmh

Enclosure

cc: Assistant Deputy Attorney General Donald J. Zelenka

The Supreme Court of South Carolina

John Edward Weik, Petitioner

v.

State of South Carolina, Respondent.

ORDER

Petitioner moves to amend the petition for a writ of certiorari in this matter. The State has not filed a return to the motion. The motion is granted. Petitioner shall serve and file his amendment to the petition within thirty days of the date of this order. The time for service and filing of the return to the petition for a writ of certiorari shall be held in abeyance pending service and filing of the amendment to the petition for a writ of certiorari.

IT IS SO ORDERED.



FOR THE COURT C.J.

Columbia, South Carolina

August 13, 2009

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Dorchester County
Perry M. Buckner, Circuit Court Judge

RECEIVED

JUL 23 2009

JOHN EDWARD WEIK,

S.C. SUPREME COURT

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

MOTION TO AMEND PETITION
FOR A WRIT OF CERTIORARI

The undersigned counsel would respectfully move to amend the petition for a writ of certiorari in the above-referenced case. In support of this motion, counsel would respectfully show the Court the following circumstances:

1. The Honorable Perry M. Buckner denied post-conviction relief in this capital case on March 12, 2007.
2. Court Reporter Harriet Bennett later transcribed the transcript of the post-conviction relief hearing after Court Reporter Robin Keil, who was the court reporter at the post-conviction relief hearing, resigned and moved out-of-state.
3. On October 24, 2008 petitioner, through Deputy Chief Appellate Defender for Capital Appeals Robert M. Dudek and Appellate Defender Elizabeth Franklin-Best, filed a petition for a writ of certiorari on behalf of petitioner with this Court. Neither counsel Dudek nor counsel

Best were involved or present for the post-conviction relief hearing that was held before Judge Buckner.

4. Subsequently, opposing counsel Donald J. Zelenka, who tried this capital post-conviction action for the state, discovered, as he was preparing his return to the petition for writ of certiorari that a portion of the testimony of Dr. Donald Morgan had not been transcribed by Ms. Bennett, and that the entire testimony of petitioner's brother-in-law, William "Bill" Gunter, had not been transcribed. Counsel Zelenka sent a letter to this Court notifying it of this problem.

5. Ms. Bennett, when notified of the situation, searched and found the tape of Dr. Morgan's testimony, and she transcribed the remainder of that testimony for the attorneys. This Court then remanded the matter to Judge Buckner for a reconstruction hearing on Bill Gunter's testimony. While preparing for the reconstruction hearing, counsel for petitioner was ultimately able to contact court reporter Robin Keil in California. Ms. Keil had maintained a copy of the post-conviction hearing on a "flash drive." Ms. Keil promptly transcribed the missing testimony of witness Bill Gunter, and she sent it to counsel for petitioner who then distributed to Judge Buckner and the other attorneys involved.

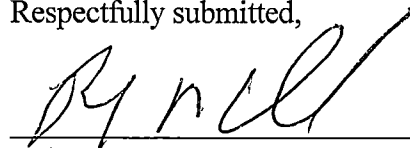
6. A reconstruction hearing was held at the Colleton County Courthouse on Monday, June 29, 2009 before Judge Buckner. Counsel Dudek represented petitioner and counsel Zelenka represented the state. Also present were petitioner's trial level post-conviction attorneys Michael O'Connell and counsel Lisa Kimbrough. All of the attorneys stipulated that the transcription of the testimony of Bill Gunter was accurate and complete.

7. Judge Buckner issued his consent order dated July 13, 2009 granting the motion to accept the transcription of Bill Gunter's testimony as complete and accurate. Judge Buckner forwarded that order to this Court.

8. Since the complete testimony of Dr. Donald Morgan and Bill Gunter was not available for counsel Dudek and counsel Franklin-Best at the time they filed the petition for writ of certiorari with this Court, counsel now moves this Court for an order allowing them to amend the petition for a writ of certiorari. Counsel intends to add an allegation of ineffective assistance of trial counsel, in violation of the Sixth Amendment to the United States Constitution, for the failure of trial counsel to call Bill Gunter as a mitigation witness during the penalty phase of petitioner's capital trial given his compelling post-conviction testimony on petitioner's background. Petitioner also requests leave to amend, in his discretion, based upon petitioner's counsel now having the complete testimony of Dr. Donald Morgan.

WHEREFORE, petitioner moves this Court for an order granting petitioner's motion to amend the petition for writ of certiorari originally filed with this Court on October 24, 2008.

Respectfully submitted,



Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

Elizabeth A. Franklin-Best
Assistant Appellate Defender

Attorneys for Petitioner

July 28, 2009

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Dorchester County
Perry M. Buckner, Circuit Court Judge

JOHN EDWARD WEIK,

PETITIONER,

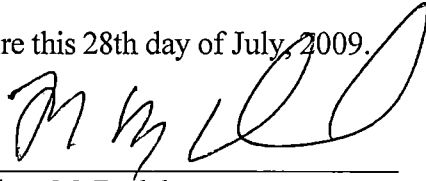
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the petition to amend the petition for a writ of certiorari in this case has been served on Donald J. Zelenka, Esquire this 28th day of July, 2009.

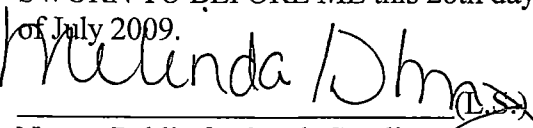


Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

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Appellate Defender

ATTORNEY FOR PETITIONERS

SWORN TO BEFORE ME this 28th day
of July 2009.



Notary Public for South Carolina
My Commission Expires: October 30, 2018

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

OCT 24 2003

Certiorari to Dorchester County

Perry M. Buckner, Circuit Court Judge

S.C. SUPREME COURT

JOHN EDWARD WEIK,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1.

Whether petitioner was denied his Sixth Amendment right to the effective assistance of counsel during the penalty phase where trial counsel did not object to a portion of the solicitor's cross-examination of petitioner's expert, Dr. Augustus Rodgers, and to the solicitor's argument that petitioner would have a job in prison, have canteen privileges, recreational facilities and other amenities since this evidence and argument invited the jury to speculate about irrelevant matters beyond petitioner's control and injected an arbitrary factor into the sentencing proceeding?

2.

Whether the court erred by refusing to allow petitioner to amend his PCR application to include this improper prison conditions evidence and argument issue since the trial transcript was a part of the post-conviction record, and Rule 15(a) &(b), SCRCRCP, provides that leave to amend shall be freely be given when justice so requires and it does not prejudice any other party since justice required that the PCR court consider this major issue in this death penalty case, and the state had ample notice of this issue from the transcript and other cases, and it would not have been prejudiced?

3.

Whether petitioner was denied his Sixth Amendment right to effective assistance of counsel throughout the trial when one attorney, presently suspended by Order of this Court, did not meaningfully participate in either the preparation for, or the course of the trial, and her actions denied petitioner his right to have two attorneys assist in his defense as required by S.C. Code Section §16-3-20(B)(1)?

4.

Whether petitioner was denied his Sixth Amendment right to effective assistance of counsel at the penalty phase where trial counsel did not timely hire an investigator and social work mitigation expert so that they would have had sufficient time prior to trial to investigate and gather pertinent information pertaining to petitioner's deprived and abusive personal and family background, since there was a reasonable likelihood petitioner would have been sentenced to life imprisonment by the jury if it had such accurate information?

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6.

Whether petitioner was denied his right to effective assistance of counsel where defense counsel withheld from the trial court, and failed to place on the record while moving for a continuance, that mitigation social worker Patricia Rickborn had sent a letter of resignation prior to trial outlining the incompetence and unprofessional conduct of trial counsel, since it was very likely the trial court would have granted a continuance had it not been misled about the gravity of trial counsel's failure to prepare for trial?

STATEMENT OF FACTS

Introduction

Lead counsel Percy Beauford, acknowledged that this was his first death penalty case, and that “looking back, I would have wanted a lot more time to actually put things out.” Beauford agreed that he should have begun to prepare more than three months prior to the trial. App. 3017, l. 25 – 3019, l. 6.

Beauford’s co-counsel was contract Dorchester County Public Defender Marva Hardee-Thomas. Beauford would later admit he felt “alone” in this case. App. 3040, ll. 6 – 17. Beauford lamented that “she [Hardee-Thomas] wasn’t helpful, I would say, at all during this matter . . . the entire case.” App. 3041, ll. 6 – 13. This Court can take judicial notice of the fact that Hardee-Thomas has been suspended from the practice of law by this Court. See In the Matter of Marva A. Hardee-Thomas, 377 S.C. 472, 661 S.E.2d 98 (2008).

Hardee-Thomas testified at the PCR hearing that she considered herself a “paper person,” and an “administrative person” only. App. 3094, l. 5 – 3096, l. 19. Hardee-Thomas admitted that Beauford asked her to question some of the witnesses during the trial. She asserted, “[I] said no because we hadn’t worked [with] regard to saying, well I would take this witness and I [you] will take this witness . . . I hadn’t been placed in that capacity.” Tr. 3092, l. 24 – 3093, l. 15.

Beauford confirmed that when he asked Hardee-Thomas to handle certain witnesses during the trial “she declined to do so.” App. 2967, ll. 2 – 16. Beauford said he thought the role of co-counsel was to examine, cross-examine, and make proper motions. Beauford testified that he was forced to handle this death penalty case by himself “by default.” App. 2967, l. 23- 2968, l. 20.

As will be see infra, Beauford admitted there was significant mitigating evidence pertaining to petitioner that never reached the defense experts or the jury based upon Hardee-Thomas' failure to cooperate with him or their expert witnesses. App. 3034, l. 4 – 3036, l. 15.

Patricia Rickborn was retained to research petitioner's social history on March 1, 1999, only about eleven weeks prior to the May, 1999 trial in the case. App. 3416, l. 18 – 3418, l. 15. Rickborn said she had never been retained so close to the trial, and "I was even more alarmed, because I wasn't getting any returned phone calls, and I did not know who to send the stuff I was getting to." App. 3416, l. 15 – 3418, l. 20.

On April 29, 1999, three and a half weeks before the trial, Rickborn left voice messages and wrote a letter confirming that she was resigning as the social history mitigation expert due to the failure of the defense attorneys to cooperate and give her what she needed to do her job. App. 3433, l. 13 – 3435, l. 9. Rickborn testified an order retaining her was never even signed by the judge, and that she was never paid for her work on the case. App. 3434, l. 11 – 3442, l. 7.

Rickborn related that she was "absolutely stunned" when Beauford telephoned her while they were in court to inform her that "the judge wants to know why you aren't in this case - - in court." Rickborn remembered she told Beauford during that phone call that she had sent him a registered letter notifying him and Hardee-Thomas that she was not involved in the case any longer, and that she would be glad to talk to the judge about what had occurred. App. 3443, l. 9 – 3444, l. 23. As will be seen infra, defense counsel was not forthcoming with the trial judge about why Rickborn resigned in disgust when they requested a much needed continuance, which was consequently denied. Rickborn said she did not attempt to get reimbursed for the work she did on

this case because defense counsel never bothered to have an order appointing her approved by the court. App. 3458, ll. 9 – 15.

Petitioner strongly asserts infra that had counsel been candid with the trial judge about their inept attempts at trial preparation – which led to Rickborn resigning – the judge likely would have granted the continuance motion since it would have been obvious trial counsel Beauford was not prepared for trial. Further, this Court’s opinion on direct appeal graphically illustrates counsel’s inability to even follow the statutory requirements for obtaining a guilty but mentally ill plea or jury instruction. See, State v. Weik, 356 S.C. 76, 587 S.E.2d 683 (2003).

ARGUMENT

1.

The PCR court erred by ruling petitioner was not denied the Sixth Amendment right to effective assistance of counsel where counsel failed to object to evidence and argument on the amenities and privileges petitioner would allegedly enjoy in prison. This evidence and argument were irrelevant, and the prison conditions were beyond petitioner's control. This injected an arbitrary factor into the sentencing proceeding. The PCR court erroneously ruled that trial counsel in 1999 had no reason to object to such evidence and closing argument on prison conditions since this Court, as early as *State v. Plath (Plath II)*, 281 S.C. 1, 313 S.E.2d 619, 627 (1984), had held such evidence and argument is irrelevant and improper. (Issues 1 and 2).

Relevant Facts

During the penalty phase the defense called Dr. Augustus Rodgers as a witness. Rodgers had a master's degree in social work from New York University, and a Ph.D in counseling services from the University of South Carolina. He also had a master of Divinity degree from the Lutheran Theological Seminary. App. 1925, l. 18 – 1926, l. 25.

Rodgers was qualified as an expert in social work over Solicitor Walter Bailey's objection that this was not a recognized expertise. App. 1928, l. 15 – 1929, l. 24.

Rodgers testified he had extensive experience as a consultant with the prison system. App. 1939, l. 25 – 1940, l. 4. Rodgers had also done training and teaching of inmates, and he testified that petitioner would “make a satisfactory adjustment to prison life . . .” App. 1939, l. 21 – 1940, l. 25.

On cross-examination, Solicitor Bailey would return to his common theme about prison conditions. Solicitor Bailey elicited from Dr. Rodgers that inmates serving a life sentence have educational opportunities, and they are able to work and at times get paid for their work. Tr. 1947, l. 21 – 1949, l. 1.

Rodgers noted that Commissioner Michael Moore had said he was going to discontinue paying inmates, but Rodgers admitted he did not know if that in fact occurred. Tr. 1947, l. 21 – 1949, l. 1. Rodgers observed that in the past some inmates got paid for their work but not all of them were paid. App. 1949, ll. 6 – 9.

The following exchange then occurred between Solicitor Bailey and Dr. Rodgers:

- Q. And they have canteens there where they can buy Coca-Colas, candy bars, popcorn, things like that with the money they make; do they not?
- A. Those inmates who have privileges do have access to those kinds of facilities.
- Q. All right. And as far as training, what type of training would be available for an inmate serving a life sentence?
- A. It would be job skill training related to the various activities that they would have to perform on a day-to-day basis.
- Q. They can get their GED, can't they?
- A. There again, now, I'm not really sure about that. That is a policy that has fluctuated somewhat in South Carolina from time to time.
- Q. All right.
- A. Generally that privilege may be afforded.
- Q. All right. And from time to time they can work on college courses, too, can't they?

A. Generally that privilege has been afforded in the past.

App. 1949, l. 10 – 1950, l. 14.

Solicitor Bailey also elicited that the inmates were fed “three square meals a day,” and they were provided clothing and necessary medical care. App. 1951, l. 8 – 1952, l. 24. Dr. Rodgers also acknowledged that some inmates were allowed to have radios, and that there was a visitation area. Dr. Rodgers admitted he had seen television sets in inmate’s cells, and he acknowledged that he understood they could watch movies or network television at times. App. 1953, l. 6 – 1954, l. 15. Defense counsel did not object to this cross-examination, or attempt any redirect examination.

Closing Argument

In his closing argument the solicitor argued petitioner “committed a cold-blooded murder.” He then asked the jurors to “look at life imprisonment.” App. 2135, ll. 11 – 21. The solicitor said petitioner would be “given a prison job, according to that witness sometimes they’ll pay them some money, he’s got canteen where they buy stuff, Cokes, candy bars, that kind of stuff, television to watch in their cells. In the meantime, Susan Karsae is dead and in her grave. And I ask you if life imprisonment is an acceptable alternative to somebody who’s done what he’s done. That’s a choice you all are going to have to make.” App. 2136, ll. 10 – 20. There was no objection to this argument.

At the conclusion of the PCR hearing the judge noted that the entire trial transcript was a part of the post-conviction record. PCR counsel O’Connell responded that in the proposed order

the judge was requesting: “I will point out parts of the transcript that didn’t get specifically referred to at this hearing . . .” Tr. 3145, l. 2 – 3146, l. 20.

The post-conviction relief hearing concluded on September 21, 2006. The PCR judge also left the record open for further testimony from Jeffrey Bloom regarding the *voir dire* issues. The judge noted he had already an opportunity to see Jeffrey Bloom testify live and to judge his credibility. However, the judge also he would be happy to see Bloom testify live again if that is what the parties desired. App. 3139, l. 5 – 3145, l. 12.

Following the post-conviction hearing petitioner, on February 8, 2007, filed a motion to amend his petition a fifth time. He amended to the add the present prison conditions issue. Petitioner noted that at the conclusion of the testimony he moved to amend the fourth time to add claims about ineffective assistance provided by trial counsel during jury selection. “The respondents did not object.” App. 2385 – 2387.

In the proposed order requested by the PCR judge petitioner noted Dr. Rodgers’ trial testimony regarding prison conditions and he cited specifically to the record. App. 3606. PCR counsel also referenced the solicitor’s closing argument on the good prison conditions issue. App. 3908 – 3909.

PCR counsel argued that trial counsel failed to provide effective assistance of counsel “when they failed to object to the portion of the solicitor’s cross-examination of Dr. Augustus Rodgers when he had Dr. Rodgers admit that inmates at the S.C. Department of Corrections have certain privileges and when they failed to object to the portion of the solicitor’s closing argument in which he urged the jury to consider the same privileges as a reason to sentence Applicant to death and compared his life as an inmate at the Department of Corrections to the victim in her

grave.” App. 3939 – 3941. The proposed order concluded with a request that petitioner’s death sentence be vacated on this improper prison condition evidence and argument also.

The state’s proposed order recognized that this issue was being raised by petitioner. App. 3955 – 3956; App. 4017 – 4022. The state wrote that the prison conditions amendment being raised by petitioner on February 6, 2007 was based on the intervening case of State v. Burkhart, 371 S.C. 482, 640 S.E.2d 450 (2007) which was decided on January 8, 2007. The state argued that this Court in State v. Burkhart was reiterating its admonition in State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (2005), where the prison conditions issue was procedurally barred, that this prison conditions evidence was inadmissible. The proposed order, for the first time, also stated the state opposed this additional amendment. The state also contended that “the record and amendments had been closed at the conclusion of the hearing on September 21, 2006.” App. 4018.

However, as seen above, the record was left open for a potential deposition or further testimony of jury consultant Jeffrey Bloom, and PCR counsel also stated his intention with no objection by the state “to refer to parts of the transcript that didn’t get specifically referred to at this hearing . . .” Tr. 3145, l. 2 – 3146, l. 20.

The state then urged that if the amendment was allowed the state maintained that petitioner had failed to show “that in 1999 a reasonable counsel was constitutionally required to object to this evidence and argument, particularly after Ivey¹ and the fact that the court in 2005 thought it needed to caution both parties about the use of such evidence of real prison life. He has failed to show deficient performance.” App. 4021.

In the order of dismissal the court accepted the position of the state in its proposed order that the amendment was untimely. App. 4097 – 4098. The PCR court wrote alternatively on the merits “that if the amendment was allowed the failure to object in this case was distinguishable (from Bowman).” App. 4098.

The PCR court ruled that this Court had rejected a similar argument in State v. Ivey, 325 S.C. 137, 481 S.E.2d 125 (1997) where Ivey argued the court erred by preventing the defense from ensuring the jury had a correct understanding of the term “life imprisonment,” where the solicitor introduced considerations of early release and “misled the jury about Ivey’s future dangerousness to society, *while depicting life imprisonment as a luxury vacation.*” App. 4098. (PCR court’s emphasis). The PCR court wrote that defense counsel was not ineffective “for failing to forecast changes in the law.” App. 4101.

To this order, petitioner filed a Rule 59(e), SCRCP motion. App. 4103 – 4110. This motion noted that motions to amend were governed by SCRCP 15(a) & (b), SCRCP. “None of the reasons of the Court gives as reasons for denying the amendment are mentioned in the Rule and are, therefore, irrelevant to whether the amendment should be allowed.” App. 4104.

The motion also noted that: SCRCP 15(a) provides that leave to amend “shall be freely given when justice so requires and does not prejudice any other party.”

“This Court also failed to make finding as to why allowing the proposed amendment would not be required by justice. *It is impossible to conceive of a case where justice is more required.* This is not a contractual dispute between two parties of equal stature when the worst that will happen is that of them would pay damages to the other. The consequences for Applicant are far beyond a contractual dispute because he is a death sentenced

¹ State v. Ivey, 325 S.C. 137, 481 S.E.2d 125 (1997).

prisoner. As the U.S. Supreme Court has said in several cases, 'death is different.'" App. 4104-4105.

The Court also failed to make a finding as to how the Respondents would be prejudiced by allowing the amendment. Of course, the Respondents would not be prejudiced by allowing the amendment for three reasons: First, the Respondents did not make a finding of prejudice in their proposed order so they did not even think they were prejudiced. Second, all of the evidence supporting the claim, i.e., the improper cross-examination of Dr. Rodgers by the Solicitor and the Solicitor's improper closing argument had been in the record since the first day of the PCR when the Court declared with the assent of the Respondent that the 1999 trial transcript was (and still is) a part of the PCR record. The Respondents, therefore, did not have to deal with new facts they had never heard previously. Third, the legal argument in support of the claim is not complicated so there cannot be nor is there a claim of prejudicial surprise. In fact, the Respondents dealt with the proposed amendment to their apparent satisfaction in their proposed order. The Respondents did not bother to file a Return or ask this Court to extend the time to submit the proposed orders because they needed time to deal with the Motion to Amend in their proposed order. App. 4105.

There is no prejudice to the Respondents and justice requires the Court to allow the amendment. Therefore, this Court should pursuant to SCRCP 15(a) allow the amendment." App. 4104 – 4105.

Petitioner also argued in his Rule 59(e), SCRCP motion that under SCRCP 15(b) that the state had agreed the 1999 trial transcript was part of the PCR record and that constituted the state's implied consent to litigate the issue in the proposed amendment. App. 4106. Defense counsel also noted that the reasoning that conditions of incarceration or execution are improper matters for evidence or argument went back to 1984 and State v. Plath (Plath II), 381 S.C. 1, 313 S.E.2d 619, 627 (1984). App. 4109.

Defense counsel wrote that this Court had held that Bowman was consistent with the Court's long standing rule that evidence in sentencing phase of capital trial must be relevant to the character of the defendant or the circumstances of the crime. This Court also stated that any prison conditions evidence must be narrowly tailored to demonstrate *the defendant's personal behavior and not prison conditions in general*. App. 4109 – 4112.

In the judge's order denying Rule 59(e), SCRCP relief the PCR court wrote that the prison conditions ground that was addressed in the order or motion to amend was implicitly denied. The court noted that the record had been closed "for a lengthy amount of time . . . this matter was under advisement at the time the Applicant requested another amendment to the application." The PCR court wrote that it was not persuaded to change its mind. App. 4011 – 4012.

Discussion

This Court in State v. Burkhardt, 371 S.C. 482, 640 S.E.2d 450 (2007), as PCR counsel correctly noted, wrote that it had "long held that evidence in the sentencing phase of a capital trial must be relevant to the character of the defendant or the circumstances of the crime." State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982). The jury's sole function is to make a sentencing determination based on these factors and not to legislate a plan of punishment. State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987). "Such determinations as to the time, place, manner, and conditions of execution **or incarceration** . . . are reserved . . . to agencies other than the jury." State v. Plath (Plath II), 281 S.C. 1, 15, 313 S.E.2d 619, 627 (1984). (emphasis added).

Further, as PCR counsel also argued, the state consented to an amendment regarding Jeffrey Bloom, the jury consultant. However, the state did not consent to the prison conditions amendment because it was apparent it would lead to petitioner's death sentence being vacated since there can be no strategic reason for failing to object to this prison conditions evidence which has been disapproved of since 1984.

In State v. Bowman, 326 S.C. 485, 623 S.E.2d 378 (2005), this Court procedurally barred the defendant's challenge on appeal to the admission of evidence regarding general prison conditions. This Court noted that in State v. Burkhart, although Burkhart was tried before the decision in Bowman, that this was not a new holding. This Court stated "because it is consistent with our long-standing rule that evidence in the sentencing phase the capital trial must be relevant to the character of the defendant or circumstances of the crime." State v. Burkhart, 371 S.C. 482, 640 S.E.2d 450 (2007). Therefore, since the defendant does not set prison rules and regulations, prison conditions are not relevant unless the state can directly link a prison condition to the defendant's behavior.

The state attempts to blur the distinction between evidence allowed under Skipper v. South Carolina, 476 U.S. 1 (1986) in response to the earlier State v. Koon, 278 S.C. 528, 298 S.E.2d 769 (1982), ban on evidence of adaptability to prison by attempting to argue that if the defendant offers evidence of his adaptability to prison that prison conditions in general are fair game. That is simply not true, and the state knows better.

In Skipper v. South Carolina the Court held that Skipper had a right to present evidence that he made a good adjustment to prison. State v. Koon had earlier held that such evidence was irrelevant and hence inadmissible. The Court in Skipper v. South Carolina held that exclusion of

evidence of a defendant's adaptability to prison violated his right to present mitigating evidence "as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982). In short, if the state can – and it does – offer evidence of a defendant's bad behavior, a defendant is entitled to offer evidence he can adapt to prison if the jury spares his life.

In State v. Plath II, in 1984, this Court clearly sent word to the bench and bar that evidence of the horrors of execution or the conditions of imprisonment are *equally inadmissible*. Neither the horrors of execution or the conditions of execution are relevant to the individual character of the defendant or the circumstances of the crime.

Here, further, the PCR judge's reliance on State v. Ivey, 331 S.C. 118, 502 S.E.2d 92 (1998) is misguided. In State v. Ivey, on direct appeal, appellate counsel tried to combine an argument on the jury not understanding Ivey would be sentenced to life imprisonment without parole, with an argument that the judge impermissibly admitted evidence and argument on good prison conditions. The obvious problem was there was not an objection in the trial court to the good prison conditions evidence and argument of Solicitor Bailey, and therefore the issue was procedurally barred and it was never reached on the merits by this Court.

When Ivey reached PCR, the prison conditions issue was overlooked by PCR counsel, and it was not raised as a PCR issue. That case is presently pending before this Court on a second PCR application on that issue. Ivey does not stand for anything on the merits because the good prison conditions issue was never properly raised, either on direct appeal, or on PCR.

There cannot be any legitimate reason under Strickland v. Washington, 466 U.S. 668 (1984) for failing to object to this good prison condition evidence. Evidence that petitioner can

work and get paid in prison, could go to school in prison, have recreational activities in prison, get three “square meals a day” in prison, and have canteen privileges in prison, was extremely prejudicial and irrelevant to the jury’s task at hand. The evidence and closing argument on good prison conditions was clearly intended to have the jury conclude that petitioner would have some of the pleasures of life behind the prison walls while the victim was forever dead in her grave.

Petitioner did not – and does not -- have any control over those prison conditions. In fact, as Dr. Rodgers noted, prison conditions are subject to change by the Commissioner of the South Carolina Department of Corrections. He specifically cited Michael Moore in that regard. Much of what Commissioner Moore did policy-wise has changed. However, no one can predict today what South Carolina Department of Corrections policies will be a year or ten years from now, and petitioner Weik is not in any condition or place to set policies for the prison system.

The salient point was and is that petitioner has no control over the prison conditions under which he lives, and, as such, evidence of the “good prison conditions” was not in response to petitioner’s specific behavior or his actions. Defense counsel was blatantly ineffective for failing to object to this evidence and argument, and petitioner is entitled to relief.

II. The PCR court erred by refusing to allow the good prison conditions amendment since justice obviously required it given that the death penalty was the prejudice if the amendment was not allowed. There was no prejudice to the state by allowing the amendment. Present PCR counsel for state has been well aware of this issue – for years – and it has been a matter of settled law since *State v. Plath* in 1984. (Issue Two)

As seen, petitioner moved to amend to add this good prison conditions issue following the PCR hearing. The trial transcript was part of the PCR record, and the PCR counsel for the

state was surely aware that the State v. Plath, State v. Bowman and State v. Burkhardt prison conditions issue was present in this case.

Rule 15(a), SCRCP, provides that “leave shall be freely given [to amend] when justice so requires and does not prejudice any other party.” Defense counsel correctly argued that here justice required that the amendment be allowed because petitioner’s life was at stake and because “death is different.” Petitioner also correctly argued there would be no prejudice to the state by allowing the amendment. The state is in no position to argue it should not have fully expected this amendment. It should be also noted that the state consented to the amendment involving *voir dire* and to the deposition of Jeff Bloom while opposing the present amendment.

Further, pursuant to Rule 15 (b), the PCR court erred by not allowing the amendment since the issue was tried by implied consent when the trial transcript was made a part of the record, and the amendment to the PCR application was necessary to cause the judgment to conform to the evidence. Again, there was no prejudice to the state. See Stanley v. Kirkpatrick, 357 S.C. 169, 592 S.E.2d 296 (2004); (“the party opposing the motion [to amend] has a burden of establishing prejudice).

Since justice required allowing this amendment, and the state was not prejudiced since both sides were allowed to address the issue in their proposed orders -- where those proposed orders served as post-hearing briefs -- the PCR judge erred by not allowing the amendment. In short, it would be an injustice to execute petitioner based on the disallowance of an amendment where the state did not establish prejudice or even argue it. The court’s order denying the amendment likewise made no such finding. The Court’s alternative ruling on the merits went in favor the state. The court should have allowed the amendment.

3.

Petitioner was denied his Sixth Amendment right to effective assistance of counsel throughout the trial when one attorney, presently suspended by Order of this Court, did not meaningfully participate in either the preparation for, or the course of the trial, and her actions denied petitioner his right to have two attorneys assist in his defense as required by S.C. Code Section §16-3-20(B)(1).

Marva Hardee-Thomas was appointed to this case on July 20, 1998. App. 3098, ll. 1 - 5. She was, at that time, a part-time public defender for Dorchester County. She had been admitted to practice in South Carolina since September, 1995 App. 3152, ll. 23 - 24. According to her co-counsel, and “lead attorney,” Percy Beauford, she was not death qualified at the time of her appointment, but became so prior to the commencement of the trial. App. 2949, ll. 12 - 19. In May 1999, the date of this trial, she would have had three and a half years experience as a part-time public defender.

During her deposition, on August 17, 2006 in preparation for the PCR hearing conducted in this case, she testified that she thought she had participated in three death penalty cases before Weik’s. App. 3165, ll. 20 - 23. She informed the judge at the time of trial that it was her second death penalty trial. App. 4, ll. 8 - 14; App. 3297, ll. 5 - 11. At the PCR deposition, she testified that she was *second chair* for the trial of Calvin Shuler App. 3297, ll. 21 – 24, but this Court can take judicial notice of the fact that was not the case.²

² She testified at the PCR hearing that she “may” have been involved in one death penalty case earlier, but she could not remember the name of the case. App. 3056, ll. 16 - 22.

During the PCR hearing, Hardee-Thomas testified that she did not review her case file either before the earlier deposition or before her appearance at the PCR hearing. App. 3058, ll. 17 - 25. She never read the appellate decision that was handed down in this case either. App. 3320, l. 8 - 3321, l. 20. Upon questioning by the PCR lawyers, she conceded that her involvement in the case began in early 1999, App. 3170, ll. 18 - 21, some five months after her appointment. She thought she was involved for a “little more than” three or four months in the case. App. 3171, ll. 9 - 12.

Hardee-Thomas did not engage in any duties, meaningful or otherwise, while appointed to this case. She conceived of her role as an “administrative staff person” App. 3183, ll. 14 - 22; p. 3187, l. 5; App. 3194, ll. 11 - 20; a “helper” or “worker bee” App. 3220, ll. 2 - 5; she was appointed “to help” App. 3223, ll. 4 - 6; her role was assisting Beauford, App. 3061, ll. 15 - 21; her role was to “help and “assist” Beauford, App. 3086, ll. 1 - 5; App. 3092, l. 17; she was the “paper person”, App. 3095, l. 14; her role was an “administrative position.” App. 3121, l. 19; App. 3126, ll. 6 - 8. In her letter to Patti Rickborn, responding to Rickborn’s complaints about lack of cooperation from the defense team, she stated: “Please note that Mr. Beauford is the lead attorney in this matter, I am obligated in giving him all information. He decides how, when and what is to be done. . . Mr. Beauford needs to make a decision on the issues, not me. I never knew you were waiting on an answer. If I had known, I would have referred you directly to Mr. Beauford.” App. 3331. Hardee-Thomas did not perform actions which would reasonably be expected to be undertaken by an attorney in a case of this importance, and her striking omissions in this case, supra, denied Weik of his right to have two attorneys appointed to represent him as required by S.C. Code Section 16-3-20(B)(1); State v. Diddlemeyer, 296 S.C. 235, 371 S.E.2d

793 (1988) and State v. Brown, 289 S.C. 583, 347 S.E.2d 882 (1986). In Diddlemeyer, one of the attorneys in that case did not meet the statutory requirements to be appointed to the case. In this case, both attorneys did meet the statutory requirements, but Hardee-Thomas, nevertheless, failed to function as one in this trial. Weik was denied the right to have two attorneys represent him on his case.

The following is a list of actions she did not take during her period of appointment on this case: (1) She did not direct any investigation. App. 3195, ll. 9 - 12, (2) She did not recall taking any actions on Rickborn's behalf, either requested by co-counsel or by Rickborn, App. 3208, ll. 1 - 14, (3) She did not recall if she made the decision to get mental health experts involved, App. 3210, ll. 7 - 22, (4) She did not discuss the guilt phase of Weik's trial with co-counsel, App. 3212, ll. 6 - 14; App. 3212, l. 20 - 3215, l. 3; App. 3288, ll. 8 - 14; (5) She did not discuss a possible penalty phase theory with co-counsel, App. 3215, ll. 4 - 10; p. 3226, ll. 17 - 23; App. 3228, ll. 18 - 22; (6) She did not discuss with co-counsel whether Weik should take the stand, App. 3215, l. 23 - 3216, l. 3; App. 3250, l. 22 - 3251, l. 4; (7) She did not help prepare Weik for his testimony, App. 3216, ll. 6 - 12; (8) She did not question any witnesses during the trial, App. 3218, ll. 19 - 21; (9) She did not conduct any *voir dire* of the jurors, App. 3218, ll. 22 - 24, (10) She did not have any authority in the defense of this case, App. 3255, ll. 5 - 16; (11) She never met Weik's father, who would have been a critical witnesses at trial (See supra Argument II) , App. 3230, ll. 8 - 20, (12) She never discussed the decision whether to place Weik's mother on the stand during the penalty phase, App. 2133, ll. 10 - 19; (12) She did not discuss a defense with their guilt phase investigator, App. 2417, ll. 2 - 12; (13) She declined to take any witnesses, App. 3093, ll. 5 - 15; (14) She never discussed any strategy because "Mr. Beauford was handling

the case.” App. 3094, ll. 7 - 15; App. 3112, ll. 2 - 25; (15) She did not help to handle any matters during the trial, App. 3096, ll. 12 - 19; (16) She did not discuss any witnesses with co-counsel, App. 3125, ll. 15 - 20; (17) She did not pass along materials that she was receiving from the investigators to Beauford, App. 2959, ll. 15 - 21; App. 3004, ll. 1 - 7; (18) She did not inform co-counsel of her purported exhaustive death penalty discussions with attorney John Delgado (“for thirty minutes to an hour.”) App. 3314, ll. 14 - 17, attorneys from Appellate Defense, App. 3315, l. 22 - 3316, l. 22, and Teresa Norris and John Blume. App. 3316, l. 22 - 3318, l. 9; App. 3021, ll. 22 - 25; and; (19) She did not remember hiring a mitigation investigator. App. 3188, ll. 3 - 16; App. 3190, l. 5 - 3191, l. 4; App. 3203, l. 19 - 3204, l. 1; App. 3206, ll. 6 - 8.

According to Weik’s former mitigation investigator, Patti Rickborn, Hardee-Thomas failed to secure a court order for Weik’s medical records or a court order for the medical and military records of Weik’s father, Russell Weik. She further failed to attempt to secure copies of the recent psychological evaluations on the victim’s children who were present at the time of the murder. She was delinquent in informing her who the mental health care experts were going to be. Hardee-Thomas never provided Rickborn with a court order approving her services. App. 3494 - 3496.

Co-counsel was not satisfied with Hardee-Thomas’s performance in this case. Regarding the division of labor between the two of them, he testified:

So I said, Marva, you handle all the experts, getting them signed up, and getting going as to what information they need to get started.

So initially she would be handling a lot of the experts and I was working on the case, working on theories, trying to work the case up.

App. 2952, ll. 18 - 23.

He envisioned a different role for her at trial:

Well, you know, basically when you are acting in this kind of role you want someone to handle something else so you can be looking at different areas, and while someone is testifying you can be looking for possible objections.

So you want to be concentrating on the entire Courtroom, and so I thought we would switch out basically so one could watch your back and you could watch their back.

But I think during that time and prior to trial, when I wanted to separate those and say, you handle these witnesses and I'll handle these witnesses, she declined to do so.

App. 2967, ll. 4 - 16.

He conceded that their relationship was obviously strained, since she was writing letters to him instead of actually speaking with him. App. 3001, ll. 21 - 25. She did not contribute “anything of substance, I would say, as a defense lawyer.” App. 3003, ll. 7 - 9. He felt absolutely alone in representing Weik. App. 3005, ll. 4 - 6. Beauford did not think that Hardee-Thomas was helpful at all during the trial. App. 3041, ll. 10 - 13.

Hardee-Thomas’s complete lack of participation in any phase of this trial was ineffective, and it denied Weik his right to have two attorneys appointed to his case. See also ABA Guidelines for Appointment and Performance of Counsel In Death Penalty Cases, 1989, Guideline 2.1: In cases where the death penalty is sought, two qualified trial attorneys should be assigned to represent the defendant.³ Given the complexity of a capital case and the standards

³ The Commentary notes: Because many of the duties of defense counsel in capital cases are definably different from those performed by counsel in criminal cases generally, because

for representation imposed by both this State and the ABA, Hardee-Thomas's inactions fell below professional norms.

Strickland v. Washington, 466 U.S. 668 (1984) recognizes "[t]hat a person who happens to be a lawyer is present . . . at trial alongside the accused . . . is not enough to satisfy the constitutional command" (of effective assistance of counsel). Id. at 685.

Representation of a criminal defendant entails basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest . . . From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.

Id. at 688. See also Powell v. Alabama, 282 U.S. 45 (1932).

Hardee-Thomas had an affirmative duty to actively assist in the representation of her client who was on trial for his life. Her lack of participation in the preparation and execution of this trial rendered her performance ineffective, and denied Weik his right to effective assistance of counsel.

Weik also received ineffective assistance of counsel from the attorney who, concededly, did participate as an attorney in his case. His performance, as discussed *infra*, fell well below

there are many rapid developments in the complex body of law affecting death penalty cases, and especially because of the harsh and irrevocable nature of the potential penalty, the responsibilities of trial counsel are sufficiently onerous to require the appointment of two attorneys as trial counsel in order to ensure that the capital defendant receives the best possible representation. The appointment of co-counsel at trial is not only meant to provide lead counsel with assistance in the preparation of both trial and penalty phases of the case, but also to provide lead counsel with different perspectives on the issues inherent in each stage of the proceedings.

prevailing professional norms in violation of Wiggins, supra and Strickland, supra, and Weik's convictions and sentence should be reversed. Respectfully, Weik asks this Court to grant his petition for writ of certiorari.

4.

Petitioner was denied his Sixth Amendment right to effective assistance of counsel at the penalty phase where trial counsel did not timely hire an investigator and social work mitigation expert so that they would have had sufficient time prior to trial to investigate and gather pertinent information pertaining to petitioner's deprived and abusive personal and family background, since there was a reasonable likelihood petitioner would have been sentenced to life imprisonment by the jury if it had such accurate information.

The mitigation case offered by the defense consisted of the following five witnesses: (1) Amy J. Weik-Maxwell, Weik's biological sister, (2) Dr. Augustus Rodgers; (3) Dr. Geoffery McKee, (4) Dr. Donna Schwartz-Watts, and (5) Dr. Donald Morgan.

A. *Defense Team Did Not Properly Use the Mitigation Specialist Who Briefly Worked on the Case*

This was Percy Beauford's first death penalty case. At the time of this trial, he had no formal death penalty training. App. 3026, ll. 11 - 13. He spoke to Norbert Cummings, and "someone" from Moncks Corner in preparation for the trial. He did not inquire as to anyone else who may have been able to help him. App. 3021, ll. 12 - 14.

The only mitigation professional who was hired during this case was Ms. Patti Rickborn. She was hired in March 1999. App. 3016, ll. 18 - 21, and resigned on April 29, 1999. App. 3494 - 3496. Earlier, in January 1999, Robert Minter was hired as an investigator, but his role was not to be the mitigation investigator, and they never discussed where they were heading with the defense. App. 2402, ll. 13 - 14; App. 2417, ll. 2 - 5. Scott Parker was also hired to function as

an investigator in this case, but he was hired after the trial had already started, he did not actually discuss the case with the attorneys, he did not have time to interview the witnesses he wanted to, and he was not asked to do anything during the trial.⁴ App. 2515, ll. 8 - 18; App. 2518, ll. 10 - 11; App. 2520, ll. 6 - 16; App. 2528, ll. 3 - 6; App. 2522, l. 12 - 2523, l. 15; App. 2531 - 2532; App. 2520, ll. 6 - 16; App. 2521, ll. 22 - 24. Beauford never actually met Parker, and does not even know what he looks like. App. 2980, ll. 16 - 20.

It was only after Rickborn had been hired and started conducting interviews that she was informed when the trial was scheduled to begin. App. 3417, ll. 8 - 22. She testified did not believe she was able to fulfill her function because of the lack of cooperation she received from Hardee-Thomas, whom she was informed would be the contact person in the case. App. 3418, l. 21 - 3419, l. 13. She asked Hardee-Thomas four or five times to get court orders for mental health and medical records. App. 3428, ll. 14 - 22. She repeatedly tried to find out who the mental health experts were so that she could correspond with them and get them necessary materials. App. 3432, l. 9 - 3434, l. 10. Rickborn testified that she gave the defense team an indication that she was intending to resign prior to the April 29, 1999 resignation letter that she sent, but obviously no corrective measures were undertaken. App. 2434, l. 22 - 2435, l. 23.

Even though there *was* a mitigation specialist working on the case, Beauford testified that he did not recall receiving any information from the experts or investigators, including Rickborn.

⁴ Another investigator, B.J. Johns signed an affidavit informing the attorneys that he did not have enough time to perform the mitigation investigation that was needed in this case. He was contacted on May 6th, 1999 by the defense team. App. 3088, l. 5 - 3089, l. 22. Trial counsel never informed the judge during the continuance motion that one of their potential investigators declined to take the case because of time pressures.

App. 2959, ll. 1 - 21; App. 2998 - 2999. He had no recollection of receiving Plaintiff's Exhibit 18, a collection of interview materials that Rickborn sent to the defense team. App. 3629 - 3668.

This case went to trial without a mitigation professional ever being meaningfully involved. Even though a mitigation specialist spent roughly a month and a half involved in the case, it is as though no one had ever been hired, since the materials Rickborn gathered were never provided to the one attorney who actually participated in the trial. Funds were provided to defense counsel for a mitigation investigator (even though the mitigation investigator never received an Order to this effect), but trial counsel did not use what was available to develop a mitigation case for their client. This was ineffective assistance of counsel. See Rompilla v. Beard, 545 U.S. 374 (2005) (holding counsel ineffective when they did not review a file of a prior conviction that was in the possession of the State). In Rompilla, the Court further held that trial counsel could not rely on their thorough interviewing of Rompilla and his family to excuse an unreasonable limitation on their investigation. Id. at 2466 - 2467. Defense counsel never offered an explanation why they failed to use Rickborn's services properly.

Additionally, had counsel even looked at the documents prepared by Rickborn, they would have been on notice that extreme dysfunction existed within the Weik family that warranted further investigation.

In assessing the reasonableness of an attorney's investigation, a court must consider 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. 510, 527 (2003). See also Haliym v. Mitchell, 492 F.3d 680 (6th Cir. 2007) (Court found counsel ineffective for failing to follow up with obvious avenues of investigation that would have produced valuable mitigating evidence).

In Haliym, the Court also found that petitioner's counsel did not conduct "even the most basic interviews with petitioner's siblings for the purpose of investigating petitioner's family background; doing so would have produced ample evidence that petitioner grew up in a deeply troubled home." Id. at 712. This same lack of care is present in this case.

It does not appear that the defense team had an appreciation of the role of a mitigation specialist. Hardee-Thomas testified during the deposition that:

Q. And what was the purpose in hiring her [Rickborn]?

A. She's a mitigating investigator.

Q. Okay. Why is that important? Why was that important?

A. Well, what we wanted her to do was basically get the social history with regards to Mr. Weik.

Q. And why was social history so important in this case?

A. To get a little bit of information regarding his background.

Q. Okay. Why would that have been important in the penalty phase of this case?

A. To give some defenses if any.

App. 3105, ll. 2 - 14.

And later,

Q. Okay. And what would you have done with that information to help defend Mr. Weik?

A. We used the information to defend him based on the information that you find.

Q. Okay. Well, perhaps I'm being too general but how did the information contained in the reports from the mitigation investigators—how could that have been used at trial? In your opinion?

A. To help defend him.

Q. But how? I mean, specifically what could you have done or what was the purpose of having the information in hand?

A. To help Mr. Beauford help defend Mr. Weik.

App. 3117, ll. 9 - 21.

It was ineffective assistance of counsel to not have used the mitigation specialist they had working on the case, and counsel never articulated a strategic reason for this failure. It appears that defense counsel simply was not organized, and failed to appreciate the function of that defense team member.

B. The Defense Team Did Not Present Available, and Substantial, Mitigating Material to the Jury

Trial counsel was also ineffective for failing to ensure that he was receiving mitigation materials that were being sent to co-counsel. A quick review of the materials that were prepared by Rickborn, and which were sent to Hardee-Thomas but were never forwarded to Beauford, illustrates the wealth of information that could have (and should have) been developed prior to trial. Instead, in the face of having received nothing from Hardee-Thomas, trial counsel simply went forward, apparently without even questioning co-counsel as to the absence of any materials.

He did not have Parker's interview with Chris Weik prior to trial. App. 3026, l. 20 - 3027, l. 25. He did not realize that Weik's reports of his father's bizarre account of being in the CIA were false. App. 3030, l. 1 – 3031, l. 12; he did not see Parker's interview with Lillie Weik prior to trial. App. 3032, ll. 3 - 19; he did not see Rickborn's report of the interview with Amy Maxwell prior to putting her on the stand. App. 3035, ll. 4 - 23. In short, though these materials were available, and in the possession of the defense, and even though Chris Weik was ready and willing to testify, trial counsel was completely unaware of the materials, and did not seek them out.

If trial counsel had secured these materials, compelling mitigation information could have been presented to the jury for their consideration. At the PCR hearing, attorneys presented the testimony of Amy Maxwell, Chris Weik (Weik's biological brother), Russell Weik (Weik's biological father), and Madalene Gunter (Weik's half-sister). At trial, only Amy Maxwell was called to testify; the others were not. Called to testify during Weik's mitigation case, they would have provided significant mitigating information:

Russell C. Weik ("Chris Weik")

Chris is approximately a year younger than his brother, Eddie Weik, the petitioner. App. 2420, ll. 13 - 17. He was raised with Eddie and their sister. App. 2424, ll. 4 - 7. During school, Weik was placed in learning facilities for the slower, special education, students. App. 2424, l. 25 - 2425, l. 7. Even though he completed the 11th grade, he still could not read. App. 2426, l. 23 – 2427, l. 3. Weik was slow, and could not count money. App. 2430, ll. 16 - 23.

According to Chris, and others, Weik was born with an abnormally large head. App. 2431, ll.14 - 22. He was teased about it as a child. App. 2431, ll. 23 - 2432, l. 8. The children were also otherwise socially ostracized and subject to violence. App. 2438, l. 6 – 2440, l.8.

The Weik family grew up very poor. App. 2433, ll.16 - 24.

Russell Weik, the children's father, was extremely volatile. The family lived in a cluttered home, but when family members moved things, he would "go crazy and start breaking up things." App. 2432, l. 23 - 2435, l. 4.

Chris's descriptions of his father paint a picture of bizarre and unpredictable behavior, strongly indicative of serious mental health problems. According to Chris, the father claimed to have been drafted into the Marine Corps, and was sent to Vietnam for the CIA. To his family, he claimed to have killed over 2000 people. App. 2441, ll. 1 - 21. He described to his children how he killed people. App. 2441, ll. 22 - 25. He explained to them the most effective ways to kill people. App. 2442, ll. 2 - 25. He taught them how to kill by performing a "heart grab" or "heart snatch," grabbing the groin, and how to tear a person's windpipe out of their body to kill them. App. 2442, l. 22 – 2443, l. 20. The father claimed to have used those methods to kill people in Vietnam, and he also claimed to have used garrotes on people to kill them. App. 2443, ll. 22 - 25.

Chris described a particularly disturbing episode when the kids were around eight or nine. During a camping trip, the father gave them a loaded .45 caliber gun and had them "stand guard." They were instructed to guard the family against the Viet Cong. If the children had seen any Viet Cong, they were told to shoot them. Chris wanted to shoot a couple of times, but the father insisted they wait until they actually see them, although "you probably won't see them because they sneak up on you in tennis shoes and cut your throat." App. 2444, l. 20 – 2445, l. 24.

The father believed that the Viet Cong were sneaking into America, to take over America. App. 2446, ll. 3 - 6. The family built bunkers, and the father would bring home bags of concrete, weapons, sea rations (sic), army helmets. The children had their own survival packs, bayonets, and cleaning kits. App. 2446, ll. 3 - 18.

The father was a very strict disciplinarian. He would not allow the children's friends to come over for fear that they would spy on the family. There was a rule in the house that they were not allowed to discuss what occurred in the house to outside people. If the children did, they believed they would be beaten. Chris recalls being beaten with rubber hoses, a switch from a rose bush, a car antenna, a coax cable, and a machete. App. 2448, l. 14 - 2449, l. 7. Chris described an incident where the father beat Weik with a machete, and then they were both locked in the attic. App. 2449, l. 18 - 2451, l. 15. In the attic, the windows were nailed down so there was no breeze, and sometimes the father would make them cover up in a blanket "to think about things." App. 2451, ll. 15 - 25.

When the father got angry, he would break things in the house. App. 2452, ll. 18 - 20. Chris described a particularly volatile moment when he sent the family to pick up an electronic part to fix a television as part of his pursuit of an electronics degree. When the part could not be found, he blamed it on the mother and accused her of wanting him to fail in his professional pursuits. He then destroyed the television, and another one, and then destroyed the china given to the mother by her first husband. All the children were grounded, and the children heard, while laying in bed, their father continuing to break things, and their mother screaming and begging for him to stop. App. 2452, l. 19 - 2454, l. 17.

The father also liked to handle guns and other weapons around the children. He had a .44 Magnum, a German Mauser, cap and ball pistols, hand grenades, dynamite, and blasting caps. One Christmas the children were not allowed to watch Charlie Brown's Christmas, but instead had to watch Apocalypse Now. Then the father would pull out his gun, put clips in it, cock and load it, and then he would sharpen his bayonets while he put his Army helmet on. The father exhibited this kind of behavior more than once a day. App. 2455, l. 10 – 2456, l. 3.

Once, the father thought that Amy was a young Vietnamese child, and he grabbed her by the throat and choked her. The mother could not make him stop, so she ended up grabbing a large iron frying pan and knocked him unconscious with it. App. 2456, ll. 7 - 16.

The father made bombs, and he showed the children how to make them, too. App. 2457 - 2458. It terrified Chris.

Chris also described other significant physical abuse. He testified that their father would choke them until they fell to the floor, and then would beat and kick the children. His favorite was to wear steel-toed boots and kick them. App. 2460, l. 13 – 2461, l. 1.

The father also set out tripwires in the yard. When the children tripped on them, he would come out of the house and tell them that they were “dead” and that the wire had just killed them and everyone behind them. App. 2462, l. 10 – 2463, l. 6.

Chris Weik testified that he related these events to Scott Parker. (App. 2461, ll. 18 - 21), but the defense did not ask him to testify. App. 2462, ll. 8 - 9. The only time he spoke with Percy Beauford was after the trial. App. 421, ll. 11 -19. Chris Weik was subpoenaed as a witness and was present at the courthouse, but no one ever spoke to him. App. 2421, l. 2 - 2422, l. 7.

Chris Weik could have provided this valuable testimony to the jury, but no one thought to utilize him during the trial. None of this information was before the jury for their consideration.

Amy Weik-Maxwell (Weik's sister)

Amy confirmed that Weik had some learning issues as a child. App. 2537, l. 6 - 2538, l. 7. She described the incident when her father choked her. App. 2538, l. 16 - 2540, l. 21. She remembers him making some reference to "Charlie." She also described violence in the home, and recounted an incident where the father threatened to rip the heart out of one of his sons. App. 2541, l. 11 - 2542, l. 24. She also knew about the father's supposed killing of Vietnamese. App. p. 2544, l. 13 - 2545, l. 2.

Amy recalls meeting with the defense attorneys once before trial. App. 2546, ll. 11 - 13. She did not know until later that Hardee-Thomas was involved in the case. App. 2548, ll. 1 - 5. On the day that she testified, she met again with Beauford, but they did not discuss anything that would be offered during her testimony. App. 2551, ll. 3 - 17.

Magdalena Sharon Farrer Gunter

Ms. Gunter is Weik's half-sister. App. 2564, ll. 1 - 2. She confirmed that he seemed to have developmental difficulties. App. 2565, ll. 18 - 25. He needed special books to help him speak, and he was slow in walking. Their mother would not take the children to doctors. App. 2566, l. 24 - 2567, l. 6. Ms. Gunter described living at the home:

It was hell. He [the father] had a very violent temper, and it was outrageous at times. He would break things in my mother's house. His temper was out of hand at times.

App. p. 2568, ll. 7 - 10.

She recalled that once her father made her sit and the kitchen table and she could not leave until her mother came home. She did not understand why, but he seemed to enjoy being in control of people. App. 2568, l. 15 – 2569, l. 4.

Russell Weik (Weik's father)

Weik's profoundly disturbed father also took the stand during the PCR hearing. He testified he did not come to the trial because he had to work. App. 2573, ll. 8 - 11. By counsel not calling Russell Weik to the stand during the trial, the jury was denied the opportunity to gauge, not only the content of Weik's testimony, but his recalcitrance when challenged on his assumptions. In other words, had the jury had the opportunity to view Russell Weik on the stand, they may have appreciated the extreme mental illness that Eddie Weik was exposed to throughout his childhood and adulthood. Russell Weik testified to the following facts at the PCR hearing:

He started his military career in the Navy. App. 2574, ll. 2 - 5. After boot camp, he met with some people who claimed to have a "new deal" for him, "some kind of little experimentation they [were] going to run." App. 2574, ll. 13 - 17. They were the CIA, and he signed papers for enlistment in the Marine Corps. App. 2574, ll. 22 - 25. He was informed that he was a Colonel. App. 2575, ll. 24 - 25. He testified that he trained at Parris Island, and at the train to get there, he met a drill instructor who told him that he was not to know his name, and that he was not to know Weik's name. Weik went through Parris Island training camp by himself. After he completed his one month training at Parris Island, which should have been a three month training period, but the military consolidated it for him, he was then stationed in

New London, Connecticut at the machinery repair shop. Then he was transferred to the Navy motion picture exchange. App. 2576, l. 1 – 2577, l. 25.

He claims that he was detached to Vietnam in 1964 and 1965. They “got to a place called Saigon.” App. 2597, ll. 1 - 13. From there, he parachuted into someplace in Vietnam. Weik described his rank as an “E3”, but he was also with “three LRP” teams and a contingent of Seals. App. 2581, ll. 8 - 19. He claims he was Colonel at the time, but no one knew it because he was an E3. App. 2581, ll. 20 - 25. No one was supposed to know he was a colonel because if anyone in Vietnam observed a salute, the snipers would kill the people who were saluted. App. 2582, ll. 1 - 5 .

Once in Vietnam, they set up a compound. He was involved in quite a bit of combat. He testified that the CIA told him to act like Gomer Pyle. App. 2583, ll. 1 - 18. Two people were with him—Smith and Jones. One week their names would be Smith and Jones, the next, they were to be called by the other name. App. 2583, ll. 20 - 25. They were with the CIA.

While Weik was in Scotland, he wore Seabee Greens, which were also Marine uniforms. In Vietnam, he wore his Greens. Their purpose in being in Vietnam was to counteract the Russian Advisors who were with the Vietcong and Vietnamese. App. 2584, ll. 5 - 24.

He was paid as an E3 so that no one would know he had the authority he possessed. By incanting “by the power invested in me by the President of the United States and Director of the CIA I now accept responsibility for your base and all that it contains” he could take over any phase or any plane, or anything. App. 2585, l. 15 - 2586, l. 8.

He accepted responsibility for a base on June 8th, 1955 (sic) and a large scale combat mission occurred. When he went around and counted the dead after the battle, he counted 3, 060 people dead. App. 2586, l. 12 - 2587, l. 7:

I didn't like what happened because we were in their country. I respected the Vietnamese. They had a wonderful beautification program. You threw (sic) something away in the jungle, down side the road, they would pick it up and down the road about a mile they throwed it back at you and it usually exploded.

App. p. 2587, ll. 18 - 23.

Weik claims that he was discharged, but then he entered the service about a month or two later. He did not inform the CIA that he was re-entering the military. App. 2588, ll. 2-12. When he reenlisted, he received medical care. He was told he was having "a nervous breakdown or something another" and he was transferred to Charleston. App. 2589, l. 18 -. 2590, l. 8. The CIA contacted him while he was in the hospital, and came and stayed with him. They needed to "re-write his history." App. 2590, ll. 16 - 25.

The records introduced at the PCR hearing did not reflect any Marine Corps service, or any time spent in Vietnam. App. 2593, ll. 5 - 10; App. 2594, ll. 3 - 12. Weik claimed that the records do not reflect his service because he was a "ghost warrior." App. 2594, l. 9 - 2595, l. 3. He testified that he was not supposed to talk about it because his duty was supposed to be "top secret." When he was in the mental hospital, they gave him a number of medications including Florazine, sodium pentothal, red capsules, and Valium. The purpose of this medication was to make him forget his experiences "because right then I was no longer an asset to the country." App. 2595, l. 5 - 2598, l. 25. Even though his records indicate that he suffered from chronic schizophrenia, no one ever informed him of that fact. App. 2599, ll. 1-12. He felt like he was

“incarcerated” at the mental hospital because of what he knew. Weik believed the medical records introduced at the PCR hearing were inaccurate. App. 2599, l. 23 - 2600, l. 19.

Weik tried to go back into the CIA when they performed a recruiting drive at the Pinehaven Shopping Center. They “check up” on him, and said they could not use him because he “had an existence with them, prior history.” App. 2603, l. 25 - 2604, l. 25. Later, according to Weik, they did want him to work for them again. App. 2605, ll. 5 - 25. This occurred in either 2003 or 2004. Weik testified that he continues to have Vietnam flashbacks. App. 2611, l. 21-2615, l. 9. He described reliving the Vietnam nightmare:

[A]lot of times you dream and you start out the same way it happened, and then it goes another twist and you are in a situation where you are not aware of what’s happening like you were aware of before, and you make mistakes and people die on account of your mistakes because you were the team leader out there in the jungle.

App. 2615, ll. 10 - 16.

Russell Weik testified that he has an extraordinarily impressive genealogy:

I’m related to Martha Custus (sic). I’m related to Pocahuntus (sic). I’m related to Thomas Jefferson’s wife. I’m related to Robert E. Lee’s wife, and I’m also related to Eugene Conroy Cordell, who used to be the Dean of Johns Hopkins University from 1900 to 1909 . . . I’m related to Andrew Jackson and Stonewall Jackson and a whole bunch of other people. Some people that went with Lewis and Clark.

App. 2617, l. 22 - 2618, l. 6.

Weik claims that he still has “top secret” security clearance. “I went to the nuclear place at Barnwell over here and they were real glad to know me. They said they never found anyone

with security clearance as well as mine. Only a few people they know” App. 2621, l. 18 - 2622,

l. 2.

At Johns Hopkins, he learned deviant medical theories:

If you are African-American, your heritage kind of gets thickened and it insulates your cranial cavity from the sun’s rays so you don’t suffer heat stroke as much as other people.

Your skin is darker pigmented, so it looks like the sun’s light, but these people have a part of the earth near the equator, either Central America or in Asia and parts of Africa, and they have different geographical hereditary characteristics.

It has nothing to do with their ability to think or anything. Their dietary changes, Chinese people, they have a different slant, or Japanese people, because Japanese people kind of flinch their eyes because they were fisherman. They were on an island.

Chinese people have poorer cooking facilities, and it caused the tear ducts to be enlarged.

App. 2625, l. 17- 2626, l. 7.

At this class at Johns Hopkins, he learned about the Tower of Babel, and the impact of that on cultural differentiation. App. 2627, ll. 2 - 22.

Beauford did not think much of Weik’s purported experiences in Vietnam with the CIA. He said he “didn’t think about it because I really didn’t know him like that and you never know what a person might have been involved in at any time in these covert operations. So I just left it alone . . . I mean, his behavior suggested something was wrong, but, again, I could read that to being in Vietnam or exposed to some chemical or something.” App. 3030, l. 24 - 3031, l. 9.

This information relating to Weik’s social history and family background was proper mitigating information that should have been presented to the jury for their consideration. *See*

Council v. State, ___ S.E.2d ___, 2008 WL4111335 (S.C.) (Op. No. 26543 (filed Sept. 8, 2008)); Von Dohlen v. State, 360 S.C. 598, 602 S.E 2d 738 (2004) cert. denied 544 U.S. 943 (2005); Clark v. Mitchell, 425 F.3d at 294 (“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.”); Williams v. Allen, ___ F.3d ___, 2008 WL4224720 (11th Cir. 2008); Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991); Austin v. Bell, 126 F.3d 843 (6th Cir. 1997); Haliym v. Mitchell, *supra*; Hartman v. Bagley, 492 F.3d 347 (6th Cir. Jul. 10, 2007). The omitted mitigation material was critical to providing the jury with some insight as to the real Weik family dynamic and would have provided compelling impeachment material for the cross examination of State’s witness, Dr. Shea, who largely painted a picture of an idyllic childhood. App. 2049, l. 16 - 2051, l. 24. Weik was prejudiced by his attorneys’ substandard performance.

Trial counsel’s actions fell well below the standards for effective assistance of counsel as established in Strickland and Wiggins.

[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigations are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all of the circumstances, applying a heavy measure of deference to counsel’s judgments.

Strickland at 688.

Trial counsel did not articulate any reason why they failed to present this information to the jury, except that the one attorney who was actively participating in the trial was not provided

the material by his co-counsel. Even so, the material that had been gathered was also incomplete. Trial counsel's performance was ineffective, and Weik was prejudiced by their performance. Respectfully, Weik asks this Court to grant his petition for writ of certiorari.

C. Counsel Failed to Prepare for Mitigation Case at a Reasonable Point in the Litigation

Even though Beauford knew in July 1998 that this was a death penalty trial, he testified that nothing substantive happened in the preparation of this case until March 1999, three months before trial. App. 3019, ll. 2 - 8. This unjustified and inexplicable procrastination falls shockingly below the standards of death penalty defense established in this state, and constitutes a violation of Weik's right to effective assistance of counsel. Beauford acknowledged that his procrastination hurt this case. App. 3023, ll. 11 - 24.

This Court noted recently in Council v. State, *supra*, that counsel in that case was "deficient in not beginning his investigation into Respondent's background once the state served its notice of intent to seek the death penalty." *Id.* at 7. In this case, there was simply never a mitigation investigator used at all, since trial counsel never secured what mitigation investigation had actually been undertaken. This Court in Council cited with approval the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, 11.4.1(2)(C) (1989) that "once counsel is appointed in any case in which the death penalty is a possible punishment, he or she should begin, among other things, collecting information relevant to the sentencing phase including, but not limited to: medical history, educational history, family and social history, and prior adult and juvenile record." *Id.* This Court may also take notice of 11.4.1(A) (counsel should conduct independent investigations relating to guilt/

innocence phase and to the penalty phase of a capital trial. Both investigations should begin immediately upon counsel's entry into the case and should be pursued expeditiously.).

Counsel did not begin to construct their mitigation case until the eleventh hour. It appears from the record that they had little understanding or appreciation of the kinds of material that needed to be secured, and how they were to be used. Instead, by their incompetence, they failed to even use materials which they had in their possession. They did not offer any strategic reason for limiting the case in this manner, and had the jury had this information for their consideration, there is a "reasonable probability that at least one juror would have struck a different balance." Wiggins at 2543. Their actions fell well below prevailing professional norms, and denied Weik his right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments, and South Carolina State law. See Strickland, supra, Wiggins, supra, and Williams, supra. Respectfully, Weik asks this Court to grant his petition for writ of certiorari.

Petitioner was denied his Sixth Amendment right to effective assistance of counsel during the penalty phase where trial counsel failed to properly prepare the mental health experts' testimony by not providing them with evidence of petitioner's background, and also failed to provide them pertinent documents, since there was a reasonable probability of a sentence of death would not have been imposed had these experts been properly prepared.

Counsel Beauford simply delegated the responsibility of experts and investigators to his co-counsel, Hardee-Thomas, and never oversaw the progress (or lack thereof) in the case. App. 2956, ll. 4 - 17; App. 2997, ll. 12 - 24. He never knew his experts were not receiving the information they needed. App. 2977, ll. 6 - 19. Defense witness Dr. Morgan testified *during the trial on direct examination* to never receiving documents that he requested be subpoenaed:

Q. Did you have the opportunity to read reports and different documents concerning Mr. Weik's condition?

A. Different documents?

Q. Medical records or reports.

A. Unfortunately, I've never had the opportunity to go through either of the hospitalizations that he had at the institute in any detail. I have read portions of that, but not in the kind of detail and the kind of study that one would like to do, although we asked that they be subpoenaed.

App. 2027, ll. 7 - 13.

And then, during cross-examination:

Q. Did you read the social history?

A. Not in detail, sir.

- Q. It's only about seven pages long, isn't it?
- A. I've only had access to the record briefly during the *Blair* hearing.
- Q. Yes, sir.
- A. And then briefly today. So, no, I have not read that record as I should have.
- Q. Okay. You would agree that record might provide important information, might help you give a better opinion.
- A. Yes, absolutely.

App. 2040, l. 20 - 2041, l. 7.

He testified during the PCR hearing that no materials were ever made available to him by the defense attorneys. App. 2501, ll. 3 - 14.

Dr. Donna Schwartz-Watts did not receive the materials she needed, either. She received the Hall Institute psychiatric report on the morning of her testimony. App. 2644, ll. 7 - 24, even though it had been completed on May 13, 1999. App. 3396. Apparently Weik had been hospitalized twice and prescribed a medication that she was unaware of, but she did not know that at the time of her testimony. App. 2646, l. 18 - 2647, l. 22. She did not have any records of prior hospitalizations App. p. 2648, ll. 19 - 22. She did not have any outpatient records because they were not subpoenaed. App. 2655, ll. 9 - 12. She never had any medical or psychiatric history relating to the father. App. p. 2663, ll. 1 - 13.

Dr. Augustus Rodgers was a defense expert called at trial, too. He first became involved in the case five days before trial. App. p. 2906, ll. 12 - 21. He testified he did not receive any

investigative materials from Minter. App.2865, ll. 11 - 13. He never received a chronology of events, although he usually does in cases in which he is involved. App. 2884, ll. 8 - 21. Margaret O'Shea provided a chronology at the PCR hearing. App. 2908, l. 10 - 2937, l. 8. The information she provided at the PCR hearing was exhaustive App. 2908, l. 10 - 2937, l. 8.

Jeff Bloom was called as a jury consultant expert in the case. He testified at PCR that he was retained a week before trial. App. 2736, ll. 10 - 14. Hardee-Thomas claimed that he was retained about a month before trial, and that he even helped to prepare the jury questionnaires. App. 3259, l. 22 - 3260, l. 8; App. 3268, ll. 22 - 24. Bloom also testified that Beauford was on his own, that Hardee-Thomas had no role in the case. App. 2738, l. 10 - 2739, l. 13. He did not think the team understood how important *voir dire* was to the case. App. 2753, ll. 15 - 17. Bloom believed that the defense team was in over their heads. App. 2737, l. 25 - 2738, l. 2. Bloom testified that he has never allowed himself to be retained as a jury consultant under these circumstances since this case. App. 2739, ll. 16 - 23.

The fact that these experts did not receive their information in a timely manner, if they received them *at all* -- relating to psychological issues is even more striking given Beauford's testimony that when he was first appointed to the case, his initial thoughts were that Weik had "snapped" and that he needed mental health expertise involved in the case. Still, he waited until February 4, 1999 before he contacted the first mental health professional. App. 2996, ll. 12 - 24; App. 2954, ll. 3 - 8. Even though he ostensibly delegated this responsibility to his co-counsel, he was completely unaware of the problems that existed. Surely, with a case of this importance, he should have been questioning his co-counsel about the materials he should have been receiving, but was not. Counsel simply turned a blind eye to the matters which were most relevant to the

case that he intended to put forward. Trial counsel rendered ineffective assistance of counsel because he did not ensure that his experts were receiving the documents they needed to perform their function.

If trial counsel—either of them—had undertaken necessary steps to prepare this case prior to trial, they would have had time to remedy other deficiencies in their performance. For example, if mental health care professionals had been involved at an earlier point, the defense team may have complied with the statute regarding a plea of guilty of mentally ill, which they but failed to do. See State v. Weik, 356 S.C. 76, 82, 587 S.E.2d 683, 686 (2002) (noting that “no attempt” was made to comply with S.C. Code Ann. §17-24-20(D) (Supp.2001)).

Also, earlier participation by mental health care professionals may have informed defense counsel at an earlier point they were not going to be able to pursue an insanity defense. Instead, pre-trial hearings were under way before defense counsel even realized they could not raise that defense. As late as May 18, 1999, the State had still been noticed with an insanity defense, and trial counsel informed the court that were “still in a testing mode and we hadn’t gotten there yet.” App.446, l. 12 – 447, l. 24.

Additionally, had the defense team started preparing the case at an earlier time, they would have realized that there was absolutely no legal authority to pursue the theory of defense that they tried to pursue at trial. At the PCR hearing, counsel testified that this was their theory of the case:

Q. And your theory of that was that voluntary manslaughter in this case would be the result of legal provocation, sufficient legal provocation, that Mr. Weik was denied access to his son by this woman?

A. That was reaching, and the jury may not have come to that verdict, but I thought there could have been some evidence because I was arguing pretty much you have a legal right to see your child.

Q. Okay.

A. And then when that legal right was taken away by a person who has the immediate opportunity to do so, I thought, you know, that was justification.

Did it rise to murder? The jury probably would not or may not have come back, but I thought the charge should be given.

Q. All right.

A. I argued pretty much that you have a legal right to see your child, and I felt that the mother through her action of saying you're never going to see your child again had the present ability to do so, to take that right away, and so based on that—whether that was sufficient provocation, that is another question.

But did it rise to the level—you should never want to kill someone but I thought possibly it could have been charged.

At this point in time at the trial, I am trying to get something else because I saw I was not getting anywhere with the other issues or theories.

App. 3006, l. 23 - 3007, l. 25.

Counsel realized that this “legal theory” had absolutely no support in the law, but was hoping that “maybe” he could use it as the basis of an appeal. App. 3009, l. 15 - 3010, l. 17. This was counsel’s defense for the case, despite claiming to have spent 145.75 hours on “research” alone between July 20, 1998 and May 23, 1999. App. 3838 - 3854.

Counsel also failed to appreciate the significance of Weik's experience of the Hag because he, in fact, subscribes to the same belief. App. 2964, l. 23 - 2966, l. 8. Dr. Schwartz-Watts and Dr. Morgan both predicated their diagnoses of schizophrenia, in part, on Weik's subscription to this particular belief. App. 316, l. 15 - 317, l. 17; App. 402, ll. 9 - 22; App. 404, ll. 9 - 24. Having a client who believes that a spirit called a Hag physically restrains his movements should have alerted Beauford that there were significant psychological issues that needed to be resolved prior to trial. Instead, he reasoned that since other black people have experiences with the hag, it was nothing to be concerned about: "So I didn't feel that that was a major component in the case because that is a phenomenon that if you ask, two out of four blacks will say, yes, I know what you're talking about." App. 2965, ll. 12 - 15.

Counsel was on notice at the beginning of this case that there was psychological component that needed to be explored. Their failure to meaningfully consult with mental health experts at an appropriate time, and their failure to provide those experts with materials they needed, falls well below standards for capital representation in this State. Weik was prejudiced by their performance, and he was denied his right to effective assistance of counsel under the Sixth and Fourteenth Amendments, and South Carolina state law. See supra Wiggins, Strickland. See also Williams v. Taylor, 529 U.S. 262 (2000) (counsel has an obligation to conduct a thorough investigation of a defendant's background). Respectfully, Weik asks this Court to grant his petition for writ of certiorari.

Petitioner was denied his right to effective assistance of counsel where defense counsel withheld from the trial court, and failed to place on the record while moving for a continuance, that mitigation social worker Patricia Rickborn had sent a letter of resignation prior to trial outlining the incompetence and unprofessional conduct of trial counsel, since it was very likely the trial court would have granted a continuance had it not been misled about the gravity of trial counsel's failure to prepare for trial.

After the parties had conducted a Jackson v. Denno hearing on May 5, 1999 and a competency hearing on May 18th, defense counsel brought to the court's attention their outstanding continuance motion. App. 442, ll. 7 - 17. Trial counsel, trivializing the significance of the motion, referred to it as "a little housekeeping." App. 442, ll. 7 - 8. Strangely, trial counsel did not wish to put the matter fully on the record:

Q. What did she jump ship for?

MR. BEAUFORD: Your Honor, we're on the record. Basically I said—

THE COURT: I don't want you to say anything---

MR. BEAUFORD: Communication problems.

THE COURT: Sir?

MR. BEAUFORD: I would think communication problems is a broad area we could use on the record.

App. 443, l. 23 - 444, l. 7.

The next day, he informed the court that:

Initially, Your Honor, when she said that she wasn't going to be a member of the team it was left as that. Then there was some response back and forth I think from Ms. Hardee-Thomas concerning I guess some communication situation. She said because you all have it this way I want to be paid.

App. 473, l. 20 - 474, l.1.

Then trial counsel left the judge with the impression that Rickborn had been delinquent in *her* duties:

Basically that is what it is with him coming aboard and a lot of things she hadn't done and he saying, well, definitely I need this and basically she hadn't done it.

App. 475, ll. 8 - 12.⁵

This presentation by counsel was extraordinarily misleading in light of the facts that have been developed in this case through the post-conviction proceeding, especially the fact that Beauford never actually spoke to Rickborn after their first initial contact. Beauford must have obtained this information from Hardee-Thomas, and it was inaccurate. Rickborn had performed a number of duties, and made repeated requests to have counsel assist her. They simply did not do so. Rickborn's letter to the attorneys on April 29, 1999 outlined the nature of the problems that existed, and had this letter been provided to the judge, he would have had an accurate understanding of what was occurring. The judge, however, did not know of the letter, App. 3203, ll. 1 - 2, and it is unclear that Beauford actually knew of the letter. Hardee-Thomas however, did, since she is the one who responded to it. Here is why she did not bring the letter to the judge's attention:

⁵ He also informed the judge that Rickborn had interviewed "a few lay witnesses" but of course he never actually reviewed those interviews prior to trial. App. 478, ll. 1 - 2.

- Q. You didn't, either.
- A. No, I didn't speak at all.
- Q. But that was Mr. Beauford's decision, not yours.
- A. He was lead counsel. . . .
- Q. Okay. Did you think that maybe it should have been done at the time? Did you think about it?
- A. Even if I thought if it should have been, I think that that was Mr. Beauford's way of handling the case would have override how he wanted to proceed.
- Q. But you don't even remember making the suggestion that it be communicated to the judge in an *ex parte* hearing.
- A. No. I don't remember, like, hitting him on the side and say, you know, "Maybe you should talk to the judge in an *ex parte* aspect." But if he didn't want to say anything like this on the record, I don't know why he didn't think of saying anything *in camera* with the judge. I think what stopped him was the fact that the judge said he wanted everything on the record.

App. 3200, l. 1 - 3201, l. 1.

Counsels' actions were completely inappropriate and they violated their duty of candor to the Court and their duty of loyalty to their client. Strickland, *supra*. Had Rickborn's letter to defense counsel been presented to the judge, clearly he would have realized that there was going to be a significant problem with the penalty phase in this case. The trial judge, of course, has the discretion to grant a continuance. State v. Livingston, 233 S.C. 400, 105 S.E.2d 75 (1958) *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). In State v. Livingston, this Court reversed because the trial judge refused to grant a continuance where

appointed trial counsel informed the court that he had not had sufficient time to obtain a witness who could testify regarding the defendant's mental condition.

Here, the judge would have been aware of the breakdown in communication, and the materials that had not been secured by defense counsel. He would have known that the defense team did not undertake any mitigation investigation until very late in the case. The judge would have realized that counsel had not secured an order for her services. App. 3494 - 3496. In short, the judge would have had an opportunity to decide whether they were in any position to continue forward with the case. See In re Broome, 356 S.C. 302, 589 S.E.2d 188 (2003):

An attorney's duty of candor is at it highest when opposing counsel is not present to disclose contrary facts or expose deficiencies in legal argument. Such a high level of candor is necessary to prevent judges from making decisions that differ from those they would reach in an adversarial proceeding

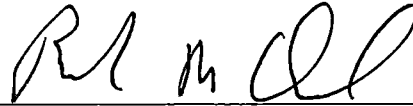
The judge did not have any other means by which this information was to be brought to his attention.

By not bringing the existence of the letter to the attention of the judge, the attorneys violated their duty of loyalty to their client because they placed their interests in self-protection over their client's interest in moving forward with a complete mitigation case. Respectfully, Weik asks this Court to grant his petition for writ of certiorari.

CONCLUSION

This case includes the following matters of significance: (1) Counsel failed to object to impermissible evidence and argument on prison conditions. (2) The PCR court erred by refusing the amendment on the prison conditions evidence and argument. (3) One attorney, since suspended by Order of this Court, failed to participate in his trial at all. (4) The other attorney failed to provide a legal defense to his case, despite his purported extensive research, hoping that “maybe” the defense he did intend to use might be addressed on appeal at some later date. (5) His attorneys failed to use a mitigation specialist on his behalf, even though funds were available. (6) His attorneys failed to review mitigation material that had been provided to them by the mitigation specialist who was briefly involved in the case, and ignored the existence of other significant mitigation material that they were on notice existed. (7) Counsel did not perform any substantive work on his case until three months before trial, and (8) Counsel failed to bring their shortcomings to the attention of the judge, out of a sense of self-preservation. This case does not represent the standards for capital representation that this Court has propounded for defendants in this State, and it fails to pass federal constitutional muster as well. This record should not be allowed to sustain a death sentence in South Carolina, and, petitioner Weik respectfully requests that this Court grant his petition for writ of certiorari to allow full briefing on the above six issues.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR PETITIONERS

This 24th day of October, 2008.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Dorchester County
Perry M. Buckner, Circuit Court Judge

JOHN EDWARD WEIK,

PETITIONER,

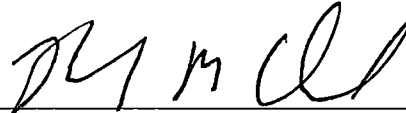
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Donald J. Zelenka, Esquire this 24th day of October, 2008.



Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR PETITIONERS

SWORN TO BEFORE ME this 24th day
of October, 2008.



(U.S.)

Notary Public for South Carolina

My Commission Expires: November 16, 2008.



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
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Joseph L. Savitz, III, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

RECEIVED

JUL 30 2009

S.C. SUPREME COURT

July 30, 2009

The Honorable Daniel E. Shearouse
Clerk of Court
The South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

Re: John Edward Weik v. The State

Dear Mr. Shearouse:

Enclosed is a copy of the Notice of Intent to Appeal from the post-conviction relief reconstruction consent order of Judge Buckner in the above-captioned case. This notice is filed only for any alleged jurisdictional purposes, and counsel for petitioner and the state have both stipulated that the transcription of witness Bill Gunter's testimony is accurate and complete.

Please let me know if you have any questions.

Sincerely,

Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

RMD/mwl

Enclosure

cc: Donald J. Zelenka, Esquire
The Honorable Cheryl Graham

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CCG/M

In the Court of Common Pleas
Certiorari to Dorchester County
Perry M. Buckner, Circuit Court Judge

RECEIVED

JUL 30 2009

S.C. SUPREME COURT

JOHN EDWARD WEIK,

PETITIONER,

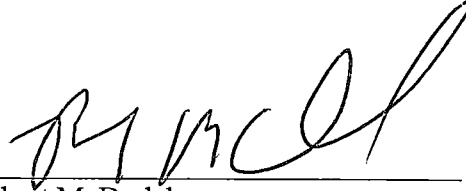
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

NOTICE OF INTENT TO APPEAL

John Edward Weik, by and through counsel, hereby appeals the attached consent order issued following the post-conviction relief reconstruction hearing of the Honorable Perry M. Buckner and dated July 13, 2009 and received by this office on July 22, 2009. Counsel does not appeal the contents of that attached consent order, and he merely files this notice of intent to appeal from the post-conviction relief reconstruction order out of an abundance of caution in the event it is argued that jurisdiction left this Court for post-conviction reconstruction hearing before Judge Buckner.



Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

ATTORNEY FOR PETITIONER

S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589
(803) 734-1343

July 30, 2009



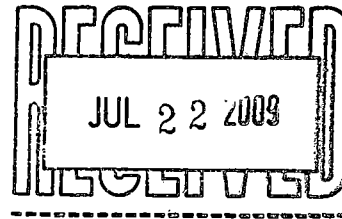
State of South Carolina
The Circuit Court of the Fourteenth Judicial Circuit

PERRY M. BUCKNER
JUDGE

101 HAMPTON STREET
POST OFFICE DRAWER 470
WALTERBORO, SOUTH CAROLINA 29488-0470
TELEPHONE: (843) 549-7878
FAX: (843) 549-9876
E-MAIL: pbucknerj@sccourts.org

July 20, 2009

The Honorable Daniel E. Shearouse
Clerk of The South Carolina Supreme Court
Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29201



Re: John Edward Weik v. State of South Carolina
2003-CP-18-1070

Dear Mr. Shearouse:

Pursuant to the orders of the Supreme Court dated May 8, 2009 and June 3, 2009 remanding the above referenced case to this court for possible reconstruction of the testimony of William "Bill" Gunter, you will please find enclosed an original Order signed by Judge Buckner, concerning the same.

By copy of this letter, I am sending copies of this Order to Robert M. Dudek, Esquire and Donald J. Zelenka, Esquire, Michael O'Connell, Esquire, and Melissa Kimbrough, Esquire.

Thank you for your attention to this matter and please do not hesitate to contact our office if you have any questions or concerns.

Sincerely,

A handwritten signature in black ink, appearing to read "Ryan M. Waller".

Ryan M. Waller

Law Clerk to the Honorable Perry M. Buckner, III

Enclosures: as stated

cc: Robert M. Dudek, Esquire
Donald J. Zelenka, Esquire
Michael O'Connell, Esquire
Melissa Kimbrough, Esquire

STATE OF SOUTH CAROLINA
IN THE COURT OF GENERAL SESSIONS

Certiorari to Dorchester County
Perry M. Buckner, Circuit Court Judge

JOHN EDWARD WEIK,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CONSENT ORDER

#1
P.B. This death penalty case originally came before me by way of an appointment from the Supreme Court to hold a post-conviction relief hearing after petitioner's murder conviction and death sentence were affirmed on direct appeal. See State v. Weik, 356 S.C. 76, 587 S.E.2d 834 (2003), *cert. denied*, Weik v. South Carolina, 539 U.S. 930 (2003). That post-conviction relief hearing was held from September 18–21, 2006. Michael O'Connell and Lisa Kimbrough represented petitioner. Donald J. Zelenka represented the state. Robin Keil was the court reporter.

In my order dated March 12, 2007 I denied the application for post-conviction relief. Petitioner filed a timely notice of intent to appeal.

Court reporter Harriet Bennett later transcribed the transcript of the post-conviction relief hearing after Robin Keil resigned and moved out-of-state. On September 24, 2008 petitioner, through Deputy Chief Appellate Defender for Capital Appeals Robert M. Dudek and Appellate

Defender Elizabeth Franklin-Best, filed a petition for a writ of certiorari on behalf of petitioner in the state Supreme Court. Neither counsel Dudek nor counsel Best were involved or present for the post-conviction relief hearing that was held before this Court.

Subsequently, as counsel Zelenka was preparing his return to the petition for writ of certiorari, he noticed that a portion of the testimony of Dr. Donald Morgan had not been transcribed by Ms. Bennett, and that the entire testimony of petitioner's brother-in-law, William "Bill" Gunter, had not been transcribed. Counsel Zelenka sent a letter to the Supreme Court notifying that Court of this problem. Desiree Allen of Court Administration and Ms. Bennett were also notified of the missing testimony. Ms. Allen notified counsel Zelenka that she did not have a forwarding address for Ms. Keil, and that Ms. Keil had not delivered the tapes of the post-conviction relief hearing to her agency.

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Ms. Bennett then notified counsel Zelenka that she had located the partially missing testimony of Dr. Morgan, and she transcribed it for record. However, Ms. Bennett notified counsel Zelenka that she had not been given a tape with the testimony of Bill Gunter on it by Ms. Keil, and that she was therefore unable to transcribe it.

The Supreme Court, in its order dated May 8, 2009, remanded this matter to this Court to reconstruct the record of the testimony of Bill Gunter within thirty days. The Court left this Court with discretion on how ultimately to reconstruct the record but it cited Whitehead v. State, 452 S.C. 215, 574 S.E.2d 200 (2002) and China v. Parrott, 251 S.C. 239, 162 S.E.2d 276 (1968) for guidance.

When this Court notified counsel Dudek and counsel Zelenka, through his law clerk, on June 1, 2009 that the Court desired to have a reconstruction hearing on June 5, 2009, counsel Dudek requested a continuance based on the fact Bill Gunter lived in Florida, and the difficulty of obtaining his presence for a deposition or live testimony with that deadline. This Court notified

the Supreme Court of the continuance request, and the Supreme Court then which issued a supplemental order giving this Court the authority to issue a "limited continuance," and reiterating that Mr. Gunter's testimony was to be reconstructed and that Gunter was not to re-testify.

A hearing was held before this Court on June 5, 2009 at the Colleton County Courthouse. Petitioner was represented by counsel Dudek. Counsel Zelenka represented the state. Counsel Dudek moved this Court for a ten day continuance in an effort to see if the parties could stipulate to the testimony of Bill Gunter. This Court granted the continuance until June 15, 2009 to allow the parties to attempt to stipulate to Gunter's testimony.

Although counsel Zelenka, counsel Dudek, counsel O'Connell, and counsel Kimbrough were apparently able to stipulate to almost all of Gunter's testimony by way of the Gunter affidavit during that time period, they could not stipulate to the entirety of his testimony, and this Court was so notified. Consequently, this Court scheduled a reconstruction hearing for June 29, 2009.

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P.B.
A reconstruction hearing was held at the Colleton County Courthouse on Monday, June 29, 2009. Counsel Dudek represented petitioner. Counsel Zelenka represented the state. Also present were PCR trial counsel O'Connell and counsel Kimbrough.

Counsel Dudek informed the Court that he had learned that Robin Keil, now Robin Herrera, the original court reporter at the post-conviction relief hearing, had relocated to California. Counsel Dudek had contacted court reporter Bennett to obtain an affidavit from her prior to the reconstruction hearing. Ms. Bennett provided counsel Dudek, with an "old" cell phone number and a prior email address for Ms. Herrera. Counsel Dudek was able to reach Ms. Herrera with the information provided by Ms. Bennett, and Ms. Herrera informed him, after returning his phone call and checking her records, that she still had a record of Gunter's

testimony from the post-conviction relief hearing. Counsel Dudek asked Ms. Herrera to transcribe that testimony.

Ms. Herrera consequently transcribed the testimony of Bill Gunter and emailed it to counsel Dudek. Counsel Dudek then sent the transcript by email to this Court, opposing counsel Zelenka and PCR counsel O'Connell and Kimbrough. Counsel O'Connell, counsel Kimbrough, counsel Dudek, and counsel Zelenka all stipulated at the reconstruction hearing that the transcript provided by Ms. Herrera was a full and accurate transcription of Gunter's post-conviction relief testimony. That transcript was then introduced into evidence.

Petitioner also introduced an affidavit from Ms. Desiree Allen of Court Administration which stated that agency had not been provided a tape of the post-conviction relief hearing by court reporter Robin Keil (Herrera), and that Court Administration did not know how to contact her.

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In addition, Petitioner introduced an affidavit from court reporter Harriet Bennett which stated that she informed counsel Dudek, when he contacted her about submitting an affidavit for the reconstruction hearing, that she had a "old" cell phone number and an "old" email address for Ms. Herrera. The cell phone number and email address turned out to be still active, Ms. Herrera was contacted by counsel, and she transcribed the testimony of Bill Gunter and sent it by email to counsel Dudek, who in turn provided it to all involved in this reconstruction effort.

Counsel Dudek also informed this Court that Ms. Herrera had sent him the transcript by overnight mail to his home on Friday, June 26, 2009 but that it had not arrived as of the reconstruction hearing on Monday morning, June 29, 2009. Counsel stated he would provide a copy of the signed certificate of Ms. Herrera for the transcript when it arrived, and counsel has since provided that signed certificate to this Court. Finally, counsel Zelenka informed this Court that he would provide this contact information for Ms. Herrera to other staff at the Attorney

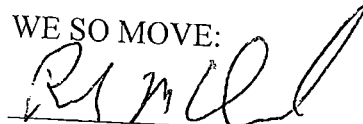
General's Office and South Carolina Court Administration since this is apparently not the only case involving unavailable records. *Petitioner was present at both the June 5, 2009 and the June 29, 2009 hearings*

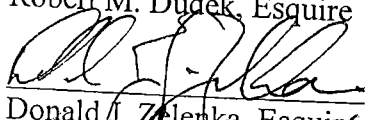
Since appellate counsel for the petitioner, counsel for the state, and trial post-conviction relief counsel all stipulate, and move, that the transcript of Gunter's testimony be accepted as an accurate and complete transcript of his testimony, this Court grants the motion, and accepts that transcript as fully reconstructing the record pursuant to the Supreme Court's order of May 8, 2009.

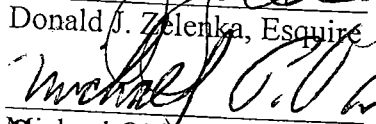
IT IS SO ORDERED.

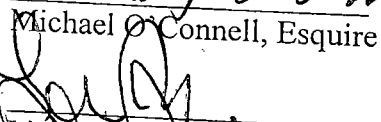

The Honorable Perry M. Buckner

WE SO MOVE:


Robert M. Dudek, Esquire


Donald J. Zelenka, Esquire


Michael O'Connell, Esquire


Lisa Kimbrough, Esquire

July 6, 2009
13

Walterboro, S.C.

Testimony of Gunter

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THE COURT: You may call your next
witness.

4

5

MR. O'CONNELL: William Gunter.

6

7

THE COURT: William Gunter. Right hand
on your Bible, raise your left hand for me.

8

9

10

(John William Gunter, called as a witness,
having first been duly sworn, is examined and
testified as follows:)

11

12

13

THE COURT: State your full name for the
record and spell your last name for the court
reporter.

14

15

16

THE WITNESS: Full name is John William
Gunter, I'm known as Bill. Last name is
G-u-n-t-e-r.

17

THE COURT: Your witness.

18

MR. O'CONNELL: Thank you, Judge.

19

DIRECT EXAMINATION

20

BY MR. O'CONNELL:

21

Q. Mr. Gunter, where do you reside, what state?

22

A. In Perry, Florida.

23

Q. What do you do for a living?

24

25

A. I'm a semi-retired engineer from the Florida
Department of Transportation. I do contract

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1 observation for a company called Jones Edmunds and
2 Associates engineering firm out of Gainesville,

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Testimony of Gunter

3 Florida.

4 Q. And your wife is Maggy Gunter?

5 A. Yes, she is.

6 Q. And how is she related to Eddy Weik?

7 A. She's his half-sister by Lily's first
8 marriage.

9 Q. Lily is her mother. Is your wife her oldest
10 child?

11 A. No, the second oldest.

12 Q. Who is the oldest?

13 A. The oldest is Larry, he resides in Rock Hill,
14 South Carolina. Excuse me, Fort Mill, South
15 Carolina.

16 Q. All right. When did you first meet Eddy
17 Weik's father Russel?

18 A. At the -- I think it was Berkeley County was
19 the name of it raceway the last weekend, the last
20 Saturday in February of 1966.

21 Q. And what was he doing at the time?

22 A. At the time I met him we were at a racetrack.

23 Q. I'm sorry, in the rest of his life what was
24 he doing?

25 A. Oh, he was in the U. S. Navy.

3

1 Q. And was he stationed in Charleston?

2 A. He had been on a, I mean, sweeper in
3 Charleston and had a, I believe he characterized it
4 as a nervous breakdown, and they had to take him out
5 in a straightjacket, he was in the mental ward in the
6 Naval Hospital in Charleston, South Carolina, and was
7 assigned to E Ward which is known in Navy language

Testimony of Gunter

8 as, you know, in the military as echo.

9 Q. All right. And your understanding from him
10 was what was that, a psychiatric ward?

11 A. It was the more -- I would call it the
12 convalescent ward after treatment, as such. He was
13 reassigned to that ward and they were allowed certain
14 liberties, some of them were allowed passes to go out
15 on the town, it was a lot more relaxed atmosphere. I
16 visited him once or twice that they had ping pong
17 tables there, pool tables and stuff.

18 Q. You met him at the racetrack in 1966. Is
19 that also when you met his sister who is now your
20 wife?

21 A. Right, that was his -- that was Lily's
22 daughter, yes. He had met Lily and we walked in,
23 myself and a friend of mine by the name of Jim
24 Daniels had walked in and had just went up to the
25 refreshment stand when he walked up and Jim knew

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1 Russel from an assignment at a barracks that Russel
2 was in or either at the hospital, I don't know which
3 it was, they had known each other, casual
4 acquaintance, hollered at each other. He said, Look,
5 I met a lady that has two daughters, would you like
6 to meet them? You're asking a single sailor on leave
7 if he wants to meet a young lady, it's like asking a
8 man in the desert if he's thirsty, if he wants a
9 drink of water. So I imagine I did.

10 Q. So that began your romantic relationship with
11 the lady who is now your wife?

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Testimony of Gunter

12 A. Right.

13 Q. How old was she at that time?

14 A. She was 15 at that time. I took her to be
15 about 17 or 18, she had led on to me like she was
16 older and I found out several weeks later how old she
17 was, at that time it was a little bit too late.

18 Q. All right. And you recall the occasion that
19 you next saw -- after Mr. Weik, Russel Weik was
20 released from the hospital, what was your
21 understanding about his status with the Navy when he
22 was released from the hospital?

23 A. My understanding was that he was released
24 because of his mental breakdown. That was my
25 understanding.

5

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1 Q. What I mean is when he got out of the
2 hospital, had he been released from the Navy,
3 discharged?

4 A. Oh, no, he was separated later after he --
5 well, he stayed in that, in that regard until
6 assigned to that ward until he was separated is my
7 understanding.

8 Q. All right. Was he then married to Lily?

9 A. He got married after, right after he got out.
10 He was separated shortly after I met him and then
11 they got married within a short, short period of
12 time.

13 Q. Okay. Then you began to -- you continued
14 your romantic relationship, I guess you courted
15 Maggy?

16 A. Right.

Testimony of Gunter

17 Q. And she was living with Lily and Russel after
18 they married?

19 A. Yes.

20 Q. Did Russel tell you about his service in the
21 Navy and the places he had been?

22 A. He told me he had been stationed during his
23 first tour, now, he had re-enlisted by the time he
24 was in Charleston, that was his second enlistment, I
25 don't know the period of time, maybe a year or less.

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1 He was in Holy Loch, Scotland. He was assigned to a
2 minesweeper out of Holy Loch, Scotland.

3 Q. Did he tell you anything about -- while he
4 was in Holy Loch, Scotland, anything about his
5 activities, some extraordinary activities that he got
6 involved in?

7 A. He started back in the late '70s, I think is
8 what you're referring to, as saying that he was doing
9 clandestine operations, I think you would call them,
10 in Vietnam, he would be flying out someplace -- flown
11 out someplace in France, join a team of commandos,
12 they would be inserted behind the lines in Vietnam.

13 Q. Did he explain to you what he did in Vietnam?

14 A. First supposedly he would go in and gather
15 intelligence and later on it become they would go on
16 search and seizure and they would kill people and all
17 sorts of stuff and such.

18 Q. Did he ever describe to you any negotiation
19 with the CIA?

20 A. He talked a lot about that, being a CIA

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Testimony of Gunter

21 operative.

22 Q. Did he ever describe to you that he was
23 employed by the CIA?

24 A. He put it in later years, yes, he was
25 employed by the CIA, he was actually an undercover

7

1 operative for the CIA later on in later life.

2 Q. Did he describe to you how many times he had
3 been to Vietnam?

4 A. Not exactly, but over the years it become a
5 large amount of time. Not in numbers, no.

6 Q. All right. When you started hearing these
7 tails from Russel, did he appear that he believed
8 what he was saying?

9 A. To begin it I don't know if he was just
10 embellishing a little bit, but he began to actually
11 believe these over the years. As time grew the more
12 he told and the more he actually believed them
13 himself.

14 Q. You continued to date your -- the lady who is
15 now your wife for some period of time after you met
16 her and then you got married. How long did you date
17 her before you all got married?

18 A. About three and a half years. And I do want
19 to explain our relationship was a lot long distance
20 through correspondence because shortly -- a few
21 months after I met her I was transferred back to
22 sonar school in Key West and we would see each other
23 once or twice a year.

24 Q. All right. When you got married how old was
25 your wife?

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1 A. She was 18 years old.

2 Q. And she was still living at home?

3 A. Still living at home.

4 Q. And when you got married did you all move out
5 of Charleston, or this area rather?

6 A. We left on September the 3rd, 1969, left her
7 home and was married in Orangeburg, South Carolina.

8 Q. And --

9 A. And we went from there to Florida and made
10 our home in Florida and we've been there for 37 years
11 this past September 3rd.

12 Q. During the time that you -- after you got
13 married and up until 1999, did you have contact from
14 time to time with the Weik family?

15 A. Yes, I did.

16 Q. And what kind of contact was that?

17 A. I would be granted -- I normally would save
18 my leave up to around Christmastime because I like to
19 be with my family at Christmas and I would get
20 sometimes up to three and four weeks leave at one
21 time. And I'd spend part of it at home and the other
22 half I would spend with Maggy up at Moncks Corner.

23 Q. All right. After you got married did you and
24 your wife visit the Weik household?

25 A. Yes, we did.

1 Q. What year were you married?

2 A. We were married in 1969.

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P-13

Testimony of Gunter

3 Q. All right, sir. What -- did you have an
4 opportunity to see the interaction between Russel,
5 the father, and his children?

6 A. Yes, I did.

7 Q. I want you to describe to the judge the sorts
8 of things that you observed about Russel and his
9 relationship to his children and what he was --
10 things that he was having them do.

11 A. Russel, if you're talking about what kind of
12 a father, Russel wasn't really in my terms that much
13 of a father figure per se. He -- the children were
14 there, he paid little attention to them other than
15 when they would come by he would reach out and thump
16 thumb, or what he called a ski jump. When he would
17 catch them he would take his fingers, run them down
18 his nose real hard. It really irritated the
19 children. He would do things, as he called it,
20 toughen them up.

21 Q. Like what?

22 A. The boys in particular. Amy was a very small
23 child at the time, just a baby, and I don't know so
24 much that he had Amy do it, but the two boys he used
25 to take outside in the yard at night at all hours of

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1 the night and sometime be real cold and they'd have
2 what we refer to in the Navy as a skivies, either
3 undershorts and a tee shirt and maybe barefoot or
4 maybe socks or something on their feet would be all.
5 He would make them stand at attention. Even in the
6 house when they would take a bath he would come in.
7 I want to do a personnel inspection. They would

#13
P.B.

Testimony of Gunter

8 stand at attention, let them give him a PI
9 inspection. Stand them in the yard at attention,
10 make them march around in formation and yell commands
11 at them and he called it toughening up.

12 Q. Were these things done in jest?

13 A. I think in his own mind --

14 Q. Well, what did it appear to you?

15 A. It appeared to me to be that he was serious
16 with what he was doing.

17 Q. Did you ever see him engage in any discipline
18 of his children, specifically his two sons?

19 A. He would -- if he chastised them, I think the
20 proper term is beat them or whip them with whatever
21 he could get in hand at the time.

22 Q. I'm interested in that, the beating or
23 whipping, whatever he could get his hands on. Would
24 you talk to the judge and tell the judge what you
25 observed.

11

1 THE WITNESS: Pardon me for not turning
2 too much, I've got a --

3 THE COURT: I can hear you just fine.

4 THE WITNESS: That's fine. Okay, thank
5 you.

6 If a flyswatter was handy he'd
7 whack them with that. And he kept one laying
8 around, he would whack them with that. He
9 had got hold of an antenna one time, tore an
10 antenna off a vehicle, his belt, he would
11 throw things in the house, he grabbed them

12 Testimony of Gunter
and beat on them. He's literally hit them in
13 the chest with his fist before, hit them in
14 the face.

15 Q. What sorts of things did he hit them for,
16 what were the reasons?

17 A. He had a very violent temper, the least thing
18 that would set him off or upset him, it just -- they
19 could walk in and be playing as children would do and
20 run through the living room when he was watching,
21 say, a favorite TV show of some type and run by his
22 chair, bump his chair, or he had a bad foot where he
23 had gotten it hurt in an industrial accident at a
24 sawmill, I believe, got a toe crushed, if they bumped
25 his foot or whatever, just anything that set him off,

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1 he could be set off at ease.

2 Q. Was -- in your view, based on what you saw,
3 was there any pattern to what would set him off or
4 any predictability?

5 A. No predictability really. He could be fine
6 one instant, the slightest thing if he was talking to
7 someone, the kids come through interrupted or
8 anything else, he would yell and scream shut the so
9 and so up I'm -- can't you see I'm busy or I'm
10 talking or something of that nature.

11 Q. Do you recall seeing firearms at the weik
12 household?

13 A. There were muzzle loaders hanging on the wall
14 and not just imitations, they were real guns hanging
15 on walls. He kept a .45 with him that he claimed at
16 one time was given to his father by general McArthur

Testimony of Gunter

17 in the Philippines. He carried guns with him
18 constantly, he collected guns, and he just bragged
19 about owning a mini 14 full automatic, he had
20 shotguns, rifles, military guns especially he really
21 liked.

22 Q. Did you understand why he had all these
23 firearms?

24 A. He would tell me it was for his protection.
25 He feared the government quite a bit, he was afraid

13

1 we're going to be invaded and we're going to need the
2 guns to defend ourselves and defend yourself against
3 your enemies.

4 Q. Did he ever describe to you who he thought
5 the enemies were?

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Pnd
6 A. He had a total dislike at that time
7 especially for blacks and Jews, especially blacks and
8 Jews. He just constantly talked about how that they
9 controlled everything and everything was being given
10 to the blacks and that the Jews controlled all the
11 money.

12 Q. Did you ever observe him giving any
13 instructions to his children about defending
14 themselves against other people?

15 A. At times I did, yes.

16 Q. What did you observe?

17 A. He taught them various methods and then again
18 about how to kill someone, how to grab them in their
19 hand and immobilize them with grips that they had
20 where you could take a man to his knees or a woman or

Testimony of Gunter

21 whatever to their knees and a quick way of killing
22 them where they wouldn't make any sounds.
23 Q. He would actually say to his children this is
24 how you kill someone silently or words to that
25 effect?

14

1 A. Words to that effect, yes.

2 Q. All right.

3 A. How to take an enemy out quickly so they
4 can't do you any harm and this is the way do you it.

5 Q. What was the condition -- did you ever see
6 him with any explosives?

7 A. Yes, several cases of dynamite he had at one
8 time stored in his garage. My wife and I were up on
9 a visit and he said, Look, and he had a real excited
10 just gleam look in his face. He said, I got
11 something to show you. And I walked out in the old
12 garage that he had and he had several cases stacked
13 up I'd say about that high (indicating). He opened
14 one of them up, and I know what dynamite is, I've
15 been in the construction business since 1974. He
16 pulled out, opened up, unwrapped from the waxy-like
17 paper that dynamite is wrapped in and pulled out a
18 stick of dynamite that was sweating.

19 Q. All right. What's the significance of
20 dynamite sweating?

21 A. It's in a very unstable state when it starts
22 to sweat, the sweat that's on there is not moisture,
23 it's nitroglycerin coming out in its natural form.
24 He wiped his finger -- picked it up, wiped his finger
25 down like this, shook it on the floor. When he did,

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1 it popped, it scared the be-Jesus out of me. Before
2 he done it again I said, Are you crazy? You're going
3 to blow us all up. Put the darn thing back. I said,
4 You're going to blow a hole in the ground. What have
5 you got this for? He said, I can boobie trap mines
6 around the house, if they come to get me I've got
7 something I can defend myself with.

8 Q. As far as his attitude towards African
9 Americans and Jewish people, was this something he
10 expressed in the presence of his children about how
11 much he hated them?

12 A. Yes, several times.

13 Q. Did he ever admit to you at any time that his
14 stories about his exploits in Vietnam and being part
15 of an elite unit and being flown from England to
16 France to Vietnam were untrue?

17 A. No, he just -- he actually believed them. He
18 never -- he told them for the truth and swears that
19 they're the truth to this day.

20 Q. Now I want to talk to you about Eddy.

21 THE COURT: Just a moment. Come on in.

22 (Mr. Weik enters the courtroom.)

23 Q. I want to talk to you about your
24 observations.

25 MR. ZELENKA: Your Honor, can we just

1 let the record reflect --

2 THE COURT: Let the record reflect the

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3 Testimony of Gunter
4 applicant is back in the courtroom after the
5 request of counsel being examined by an
6 expert witness for the applicant.

7 You may proceed with the
8 examination of Dr. Gunter or Mr. Gunter.

9 MR. O'CONNELL: Thank you, Judge.

10 Q. I want to talk -- I want you to talk about
11 your observations of Eddy. You actually knew your
12 wife and met the family prior to Eddy's birth; is
13 that correct?

14 A. That's correct.

15 Q. And he was the oldest child of your
16 mother-in-law's second set of children?

17 A. Yes.

18 Q. I want you to talk about what your
19 observations were of Eddy when he is a young child.

20 A. Excuse me. Can I get a cup of water, please?

21 Q. Sure.

22 THE COURT: Got it right here.

23 Q. Let's start with the day he was born. Were
24 you here?

25 A. Yes, I was home on leave from Key West,
 Florida, going to Seattle, Washington, and I come up

17

1 and spend a couple of weeks with my future wife or
2 girlfriend at the time.

3 Q. Did -- do you remember Eddy's father going to
4 the hospital when he was born?

5 A. No. As to my -- no, he was not there. I was
6 there with my wife and Lily when Eddy was born that
7 night.

Testimony of Gunter

8 Q. Do you know why he wasn't, Rus was not there?

9 I mean, did he know about it?

10 A. Yes, he knew about it.

11 Q. In advance?

12 A. In advance, yeah.

13 Q. All right. When you observed Eddy as a young
14 child, tell me what you observed that was -- if there
15 was anything different, what was different about Eddy
16 if there was?

17 A. Eddy had a little different look than most
18 children. His head was a little bit larger than a
19 normal child, he looked at birth I thought -- he was
20 as my first cousin was at home, had a cleft palate or
21 that we refer to as hair lip. And I asked Lily if he
22 had a cleft palate and she said, no, he's fine. But
23 he didn't look as a normal child looked because his
24 head seemed to be enlarged out.

25 Q. All right. What about as he grew older, did

18

1 you notice -- could you say whether or not he reached
2 the developmental milestones at appropriate ages? In
3 other words, did he walk, talk at appropriate ages?

4 A. Eddy seemed to develop slower than other
5 children did at his age. He walked at a much later
6 date, he began to talk very slowly, he didn't seem to
7 grasp things as quick as other children did.

8 Q. And you were present from time to time when
9 his younger brother was born and he was growing up
10 and his younger sister?

11 A. Yes, I was.

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Testimony of Gunter

12 Q. And how would you compare their development
13 to Eddy's in terms of talking and walking and those
14 sorts of developmental milestones?

15 A. They developed more along the lines of a
16 normal child. They walked at, you know, between nine
17 and ten months, begin to walk around ten months to a
18 year and where it took Eddy much longer than that.

19 Q. You have your own children? You have
20 children?

21 A. I have two sons.

22 Q. And they are how old?

23 A. The oldest one is in Columbus, Georgia, he's
24 34 1/2 years old, the youngest one lives in Moncks
25 Corner, South Carolina, and he will be 30 years old

19

1 December the 8th.

2 Q. So you had an opportunity to watch your own
3 children develop?

4 A. Yes.

5 Q. How would you compare their development to
6 Eddy's in terms of talking and walking?

7 A. My oldest son walked at nine months, my
8 youngest son started walking at about ten and a half
9 months. They both started talking about the same
10 time, expressing themselves in words and full
11 sentences very early, at a very early age and much
12 earlier than Eddy was.

13 Q. Do you know about how old Eddy was when he
14 started walking?

15 A. I don't remember exactly, but I remember
16 growing up it took longer. And I feel a little

11/12/1
2-23

Testimony of Gunter

17 uncomfortable talking about this in front of Eddy and
18 all because it's a little embarrassing.

19 Q. That's inherent in the situation and I
20 understand that.

21 A. But that's the reason I seem to stutter a
22 little bit with it, it's embarrassing, but Eddy was
23 slower being potty trained, much slower than other
24 children as far as, I mean, they were more along the
25 normal expected time, plus or minus a month just

20

1 given as an average that you need to look at if your
2 child's not talking or walking at a certain age you
3 need to be concerned, maybe consult a doctor about
4 it.

5 Q. What about his behavior as a young child,
6 what was that like?

7 A. Eddy appeared to do things to try to get
8 attention. He craved attention, he craves praise and
9 he got very little of either, especially with the
10 praise when would do something good his father seemed
11 to just take an indifferent approach to it.

12 Q. Did his father ever tease him for any purpose
13 when he was a young child?

14 A. Constantly.

15 Q. About what?

16 A. Called him eggy and it wasn't eggy because
17 just for any reason other than that he was an
18 egghead.

19 Q. You mean you're talking about the size of his
20 head?

Testimony of Gunter

23 Q. As Eddy developed into his late, you know,
24 seven, eight, nine, ten and into his adolescence,
25 what did you observe about his behavior, what kind of

21

1 guy was he, how did he relate it other people?

2 A. Didn't relate very well. Eddy and I got
3 along very well together, always have, but I took a
4 little extra time with him, but he didn't seem to
5 relate to other kids, other kids seemed to tease him
6 a lot because they could fluster him. And as
7 children, the cruelty of children in their teasing,
8 they're serious with it. And if they found
9 someone -- in growing up myself I know my cousin was
10 teased very, very hard because of his speech pattern
11 and his speech and he would do things to get
12 attention. I noticed a lot of that in Eddy.

13 Q. As he grew into his teenage years did you
14 observe whether he had regular friends that he
15 associated with?

16 A. Very, very few.

17 Q. Why did you think that was, what were your
18 observations?

19 A. Part of it was Eddy's actions his-self,
20 his -- trying to find a way to put this in words --
21 but it was just hard for Eddy to make friends. It
22 was very hard for him to make friends it seemed like
23 and he become somewhat of a loner, possibly because
24 of the teasing that he got when he was -- when he was
25 younger and going to school. He had a few friends

1 there in the neighborhood that they played with,
2 but....

3 Q. Do you remember ever seeing any problems that
4 Eddy had concentrating on tasks or on one particular
5 subject that he had to deal with?

6 A. It was very hard for him to keep attention in
7 one area very long. He would get a project started
8 and lose interest in it and start on something else.

9 Q. When he became into his -- when he got into
10 his 20s and early 30s, how would you describe his
11 personality?

12 A. I'm not trying to be humorous here, but which
13 one? Because Eddy seemed to have more than one to
14 me. I'm not an expert as such, but....

15 Q. Explain that.

16 A. He would go from a very caring, carefree
17 individual to an almost spooky individual like he was
18 being hunted and someone was after him. And he was
19 real self-conscious. When he would take him out
20 fishing or hunting he was totally relaxed in an
21 element he enjoyed in others, he felt like people
22 were getting. That's my impression.

23 Q. That's what I'm asking.

24 A. Yeah.

25 Q. That's what I'm interested in.

1 A. The least thing would upset him. Like at
2 Broyhill there was a man that constantly stayed after

#24
P.B.

Testimony of Gunter

3 him all the time and eventually made him lose his
4 temper to the point that he got fired for it. And
5 just the least thing could upset him and he just
6 couldn't turn it loose.

7 Q. I want to bring you up to -- were you in town
8 when Eddy was arrested for this?

9 A. No, I was in Florida.

10 Q. All right. When did you -- you came up here
11 for the trial?

12 A. Yes, we did.

13 Q. And do you recall when you first met Eddy's
14 lawyers?

15 A. Yeah, it was just a few days before the
16 trial. I would say no more than two weeks, it's been
17 eight years ago and I didn't write the dates down,
18 but I know we come up to do the interviews and just a
19 few days later they had the trial, trial started.

20 Q. Do you recall who interviewed you?

21 A. Scott Parker interviewed me and my wife
22 and --

23 Q. You met Scott Parker today?

24 A. Yes. I saw him when he come in today, we
25 spoke briefly.

24

1 Q. All right. And he interviewed you and your
2 wife. Was that interview together?

3 A. It was together, yes.

4 Q. All right. Do you recall about how long
5 before the trial that interview took place?

6 A. No more than two weeks before and I think it
7 was more like five or six days before.

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PnB

Testimony of Gunter

8 Q. All right. Did -- when was the first time
9 that you met with either Mr. Beauford or
10 Ms. Hardee-Thomas?

11 A. At that same time.

12 Q. About two weeks before the trial?

13 A. Within two weeks. I would say five or six
14 days possibly before the trial.

15 Q. What -- would you set that meeting for me?
16 Who was there and where was it?

17 A. Trying to remember exactly all of them that
18 was there. It was in Mr. Beauford's office, which I
19 believe if memory serves is close to the jail in
20 Moncks Corner. We went into the office, I know
21 Russel Weik was there, I think Amy was there, I'm
22 speaking of Amy as the younger of the siblings of
23 Russel's family, I don't recall whether Chris was
24 there or not, I want to say that he was but I can't
25 be absolutely sure, but I think he was.

25

1 Q. It's safe to say there are several family
2 members?

3 A. There were several family members there
4 because Lily had called us, gathered us all together,
5 said we need to do the interview, we're getting ready
6 for Eddy's trial. That was the first time I met the
7 attorney.

8 Q. And who -- were you interviewed at that
9 meeting?

10 A. Yes, my wife and I both were.

11 Q. By Scott Parker?

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PnB

Testimony of Gunter

12 A. By Scott Parker. Percy Beauford was in the
13 room for a short time, left, Scott Parker done the
14 interview.

15 Q. All right. Did -- do you recall what, if
16 anything, Mr. Beauford said to the group of you that
17 were at that meeting either before or after,
18 during -- in terms of what the meeting was about,
19 what he wanted to accomplish?

20 A. He was trying to see at that time and I
21 thought it rather a late date to find out who he
22 could use as witnesses for the trial. And he had
23 told us that he wanted to pursue not guilty by
24 reasons of insanity, I believe was the way he put it.
25 And at best maybe manslaughter or something like

26

#2?
PnB
1 that. But that was the purpose of the interview to
2 see if we could be a credible witness for the
3 defense.

4 Q. Did you then understand at the time of that
5 meeting that the State was seeking the death penalty
6 against him?

7 A. I do remember it seems like Mr. Beauford
8 saying that they were trying for death, the death
9 penalty in the murder case.

10 Q. Did either Mr. Beauford or Ms. Hardee-Thomas
11 describe to the group what the process, what the
12 structure of death penalty cases is?

13 A. Not to my knowledge, no.

14 Q. All right. Did you --

15 A. Let me rephrase that. Not that I recall he
16 did not.

Testimony of Gunter

17 Q. That's fine, that's all you can testify to.

18 A. Yeah.

19 Q. Did they -- aside from the things that you've
20 talked about, not guilty by reason of insanity and I
21 think you said voluntary manslaughter?

22 A. I think involuntary manslaughter. Was either
23 not guilty by reason of insanity or non-voluntary
24 manslaughter.

25 Q. Okay. Did Mr. Beauford talk to you at all

27

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2nB
1 about the death penalty and what he might present or
2 what -- ask you what was available to try to convince
3 the jury not to sentence to death? Did he suggest or
4 ask you information about that that was relevant to
5 that?

6 A. No. The only thing that I can recall
7 Mr. Beauford saying when we questioned him at
8 recesses in the court at various times, that when we,
9 especially I would question him about challenging
10 some of the testimony, that he wasn't worried too
11 much because all of this would come up in the appeal
12 because all death penalty cases were appealed
13 automatically and he would get a, I believe the way
14 he phrased it, he would get another trial at that
15 point and all of this could be brought out then.

16 Q. What was the context of those remarks by
17 Mr. Beauford, what was being talked about with him
18 when he would say those sorts of things?

19 A. It was after we'd have a round in court and
20 at each round he went in, he started out with on an

Testimony of Gunter

21 upbeat note that I'm going to, I think we've got a
22 good chance to get not guilty by reasons of insanity
23 and he'll get three or four years in a mental
24 institution and once he's cured he'll be, he'll be
25 out. And Lily grabbed ahold of that, his mother.

28

1 And then he come back in after he
2 would -- and say he was in over his head he began to
3 realize, that he came in started saying, changing we
4 probably will go for manslaughter, probably get a
5 manslaughter, and he kept going more and more into,
6 well, he's going to be found guilty of murder, but
7 don't worry, it will be appealed and everything will
8 be done over again, he'll have another attorney at
9 that point.

10 Q. He'll have another attorney?

11 A. Yeah, that was the basis -- that was what I
12 assumed from what he said that I recall.

13 Q. Okay.

14 A. That's what I recall, that they had attorneys
15 that handled these appeals, when they went before the
16 Supreme Court it would be handed back down and they
17 have, you know, good attorneys up there that handles
18 appeals, not to worry.

19 Q. All right. And did he -- in terms of a new
20 trial, what did he say about that?

21 A. The impression that I got, the best I recall
22 is -- just a moment -- that he would -- that once it
23 went before the Supreme Court that it would
24 automatically be appealed. And the impression he
25 left upon the family was that and at the new trial

#29
PAB

1 that, you know, some things could be brought out,
2 or....

3 Q. What did you understand that he meant by
4 bringing something out?

5 A. He was confusing quite a bit, but it was
6 almost as if don't worry, it will be appealed, and
7 the sentencing will be changed and everything will be
8 okay.

9 Q. Do you recall that part of the discussion
10 where he began to tell you that it will be appealed
11 and he'll -- everything will be okay? What stage of
12 the trial was that discussed during?

13 A. We were probably halfway through the case.
14 That was in the second or third day when he began
15 talking each day, it got -- he got more and more
16 downbeat, not upset, he wasn't upbeat about the
17 trial, he just got more and more down and more and
18 more defeated.

19 Q. Were you ever asked to testify?

20 A. I was told when I was interviewed I was being
21 interviewed as a potential witness and that I would
22 be a witness. And when we got to the court he said
23 you can just come on in, we're not going to use your
24 testimony.

25 Q. Did you ask him any questions about why that

1 was?

2 A. I asked him why, because I had known the

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PAB

Testimony of Gunter

3 family so many years, I knew them as long as -- you
4 know, within a few moments as long as he knew them
5 and was exposed quite a bit to the family and noticed
6 the changes from being away for four or five, three,
7 four, five months at a time and coming back and see
8 the deterioration of the family and the family group
9 per se and was never -- he never did explain to me
10 other than we don't need your testimony, that was all
11 he would tell us, my wife and I both.

12 Q. Tell me about the condition of the weik house
13 when these children were growing up. How would you
14 describe that?

15 A. Filth piled up with junk, magazines that were
16 from back in the early '70s piled up, roaches
17 everywhere, absolutely filthy. That's the only way I
18 know to put it. The house was in a state of repair
19 [sic]. I asked Russel several times, asked him to
20 make repairs on the house. He said, I won't do it
21 because my name's not on the deed and Lily won't put
22 it on so I'm not going to make any changes to the
23 house. I don't give a so and so if the whole so and
24 so place falls down. I don't want to use that
25 language in court, I don't want to use it anyway.

31

1 Q. I think you made your point.

2 A. Thank you.

3 Q. You mentioned something about the children
4 walking by Rus and getting poked and jabbed and hit.
5 would you just explain that a little bit more than
6 you previously did and what reaction the children had
7 to it.

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2ab

Testimony of Gunter

8 A. He did it -- the children didn't like it. It
9 was -- he would say that, well, I'm trying to make
10 them aware of their surroundings, but he would laugh
11 quite a bit and just he used to call himself -- he
12 was known as Gomer Pyle because he resembled Gomer
13 Pyle off the TV show. He would say, Old Gomer's got
14 you again, you got to be on your toes, you can't --
15 you never know when somebody's going to be there to
16 get you, you got to be watching yourself every
17 moment.

18 Q. I want to get back a moment, just for a
19 moment to the lawyers. Did you ever have any
20 conversations with Marva Hardee-Thomas?

21 A. Other than very brief conversation in the
22 room to the left just outside those doors, very
23 brief.

24 Q. Outside this courtroom?

25 A. Outside the courtroom.

32

1 Q. Was that during the trial?

2 A. During the trial, yes.

3 Q. Aside from the one meeting that you had with
4 Mr. Beauford, with other family members in his
5 office, were there any other meetings that you
6 attended?

7 A. No.

8 Q. At that meeting was Marva Hardee-Thomas
9 present?

10 A. Not that I recall, no.

11 Q. Okay.

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PnB

12 Testimony of Gunter
13 MR. O'CONNELL: Excuse me one second,
14 Judge, let me just check my notes.

15 THE COURT: Yes, sir.

16 Q. Do you recall there being another
17 investigator involved in the case before Mr. Parker
18 got involved?

19 A. I had heard about a lady that was doing some
20 interviews and was supposed to be calling us to talk
21 to us, but she never called. Mrs. O'Shea talked with
22 us at a later date.

23 Q. Mrs. O'Shea talked to you at a very later
24 date?

25 A. Yeah, a much later date. It was after the
trial. I'm sorry.

33

1 Q. It was after I got involved?

2 A. Right, it was when you got involved is when
3 we talked to Mrs. O'Shea, but we never talked to the
4 lady that was doing the interviews and she just
5 suddenly stopped. She was supposed to call us and
6 she suddenly stopped and the next thing we know we
7 were called up, we kept wondering when we were going
8 to give what little bit -- you know, what information
9 we had and the next thing we heard from is Lily
10 calling and saying that you're supposed to be on here
11 on this date to talk to the attorney, we're getting
12 ready to go to trial. And went in and talked with
13 Mr. Parker.

14 Q. Okay.

15 MR. O'CONNELL: Excuse me one second,
16 Judge.

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PMB

Testimony of Gunter

17 THE WITNESS: Sure.

18 MR. O'CONNELL: Would you answer any
19 questions Mr. Zelenka has to ask this
20 gentleman?

21 THE WITNESS: Sure.

22 THE COURT: Cross-examination.

23 MR. ZELENKA: Thank you, Your Honor.

24 THE WITNESS: Could you give me just a
25 moment to stand up a little bit? I've got a

34

1 pinched nerve in my back, need to move a
2 little bit if you don't mind.

3 MR. ZELENKA: Sure.

4 THE COURT: You may stand.

5 CROSS-EXAMINATION

6 BY MR. ZELENKA:

7 Q. Mr. Gunter, from 1966 until 1998 when this
8 incident happened, approximately how many days a year
9 did you spend in Moncks Corner each year?

10 A. Oh, gosh, we would come up for a week at a
11 time a lot and sometimes on weekends probably we'd
12 come up for a week at a time three or four times a
13 year and then we'd come up on weekends four, five,
14 six times a year. It just depended. We would have a
15 little bit of time, maybe a long weekend, we'd leave,
16 come up this way.

17 Q. So every year you were spending about a month
18 in Moncks Corner?

19 A. At least a month if not a little bit more,
20 depended upon the time of the year.

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PnB

21 Q. And where did you stay? Testimony of Gunter

22 A. I stayed sometime at the house and then we
23 got to where we would when the house just fell in
24 more and more of a disrepair we would get a room and
25 we'd sleep in a room at night, but we'd spend the day

35

John William Gunter - Cross-Exam by Mr. Zelenka

1 at the house.

2 Q. Okay. The house being Lily and Russel's
3 house?

4 A. Lily and Russel's house, yes.

5 Q. Okay. Now, as I understood the descriptions
6 of the house, there was just one big bedroom in the
7 house where everybody stayed. Is that incorrect?

8 A. The house had a living room, dining room,
9 kitchen and two bed rooms and a bath.

10 Q. Okay.

11 A. There was -- the upstairs portion was turned
12 into a bedroom early on when Russel and Lily first
13 got married and the children started coming along and
14 they needed more room in the house, because the three
15 of Lily's kids were still there and Lily started
16 having children. And I went upstairs and we redone
17 the attic in the house and turned the attic into a
18 large bedroom with a separate smaller bedroom in the
19 front. And the kids would take turns, the oldest one
20 got their choice and they usually took the front room
21 in the attic part of the house. So it was more than
22 actually two bedrooms.

23 Q. And when Eddy was staying there with his --
24 with his wife in that room, where were you staying
25 that month?

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Testimony of Gunter

36

John William Gunter - Cross-Exam by Mr. Zelenka

1 A. We had gotten to the point that we stayed
2 there once, slept on the couch and then from then on
3 we would go get a motel room, stay in a motel room in
4 Moncks Corner. The choices weren't that great in
5 Moncks Corner, so a lot of times we would stay at
6 I-26 here, I believe it is in Summerville, at a motel
7 there. We spent the night, but then we'd go back to
8 the house during the day.

9 Q. Now, in 1997 or 1998 how often did you come
10 up during that time period?

11 A. During that time we had moved an RV up that
12 Lily let us park on the place, I had a 30-foot RV
13 that I moved up there in '97 I believe it was and
14 parked it and we would stay in the RV and we would
15 come up several times on weekends. Probably average
16 about once a month on weekends because we had a place
17 then we could stay and keep up ourself.

18 Q. Where does your son live now in Moncks
19 Corner?

20 A. He lives across the road on a piece of
21 property that my wife inherited from her father, her
22 mother divided the estate up among the three children
23 or four children of the first marriage that Dick
24 Ferrare, her first husband, had left to her, divided
25 the property up and there was about seventy-five

37

John William Gunter - Cross-Exam by Mr. Zelenka

1 hundredths of an acre for each of the four children
2 of the first marriage. We kept our piece, the other

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PrB

Testimony of Gunter

3 three sold part to us and one of them to Chris.

4 Q. Okay. Who is living in the house now?

5 A. In the original home?

6 Q. Yeah.

7 A. No one.

8 Q. Okay. Why is that?

9 A. I can make an assumption, because Russel had
10 remarried and his current wife refused to stay in the
11 house and I was told that she refused to stay in the
12 house in the state it was in, that she wouldn't live
13 there. As a matter of fact, she said that herself
14 come to think of it to me. I told Russel if he
15 wanted to he could come live with me. But I wouldn't
16 live in that house, it needs too much work on it,
17 it's went downhill to the point you've got to stop
18 and look through the bushes to see the front door to
19 the house now.

20 Q. Okay. And when you were living in the house
21 roaches were on the floor, mosquitoes?

22 A. Roaches, mosquitoes, that's the reason we
23 started going to a motel room. I just -- I wasn't
24 reared in that kind of a house and I love Lily to
25 death as a second mother, but I couldn't live in that

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John William Gunter - Cross-Exam by Mr. Zelenka
1 kind of stuff.

2 Q. Okay. Did it have running water?

3 A. It had running water.

4 Q. Did it have running water every three times a
5 year that you were up there from 1966 to 1998?

6 A. It had running water in a sense. For a while
7 the well that Lily had when she and Rus got married,

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B2B

Testimony of Gunter

8 Rus was trying to add some drop pipe to it and
9 dropped some of the pipe down in the well and they
10 never could get enough drop pipe and the pump would
11 pump some water and quit and finally got to where it
12 didn't work. And Lily would have to go down the
13 street and haul water to the house, she would take
14 buckets to the neighbor's house, roll them back in
15 wheel barrows. He would catch rainwater outside in a
16 55-gallon drum for the commode, the fill drains were
17 just knotted up with roots.

18 Q. Okay. About how long did it not have running
19 water?

20 A. Several years before Lily finally got enough
21 money together somehow to get a well put down. In
22 the last few years that she lived they had a well put
23 in.

24 Q. Okay.

25 A. That well had been messed up probably where

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John William Gunter - Cross-Exam by Mr. Zelenka
1 it would pump just a little bit of water at a time.
2 You'd flush the commode and the pump would start
3 sucking air and it would take forever to fill the
4 tank back up and it was that way for several years
5 and there were, I'd say, probably eight to ten years
6 didn't have water.

7 Q. Eight to ten years?

8 A. Eight to ten years they did not have running
9 water of any appreciable amount in that house.

10 Q. What years was that?

11 A. Through the '80s and very early '90s.

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PnB

Testimony of Gunter

12 Q. Now, if I recall correctly you're a Mason?

13 A. I'm as Master Mason, past minister of my
14 lodge in Tallahassee, Florida.

15 Q. How did Russel or Eddy react to you being a
16 Mason? Did it ever come up in conversations, was it
17 favorable, unfavorable, questioning, curious?...

18 A. Questioning, curious. Russel tried to join
19 the local lodge but was not -- he was blackballed.

20 Q. You know he was blackballed?

21 A. He told me.

22 Q. Okay. Did that cause him to have a grudge
23 against the Masons?

24 A. Russel said he was a member of the DeMolay,
25 which is the branch of the Masons for young boys,

40

John William Gunter - Cross-Exam by Mr. Zelenka

1 early age before they're 21 years old is the DeMolay,
2 but he claimed to be a member of the DeMolay back
3 where he was from originally. And that to start with
4 he didn't speak I'd say all that favorable, but
5 Russel, Russel and I usually got along, but he never
6 spoke in that much of a derogatory manner in my -- in
7 my presence.

8 Q. Okay.

9 MR. ZELENKA: I don't think I have any
10 further questions at this time. Thank you,
11 Judge.

12 MR. O'CONNELL: Nothing further, Judge.

13 THE COURT: As to this witness?

14 MR. O'CONNELL: That's correct.

15 THE COURT: Mr. Zelenka?

16 MR. ZELENKA: No objection.

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PnB

Testimony of Gunter

17

THE COURT: You may step down and you
18 are excused.

19

THE WITNESS: Thank you, sir.

20

(Whereupon, the witness steps down from the
21 witness stand.)

22

23

24

25

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□

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P.B.

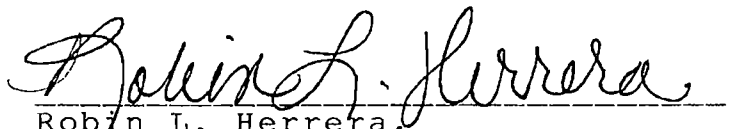
STATE OF CALIFORNIA)
 : C E R T I F I C A T E
COUNTY OF KERN)

I, Robin L. Herrera, Registered Merit Reporter
and Texas Certified Shorthand Reporter, certify
that the preceding pages are a true and correct
EXCERPT of the proceedings had at the aforesaid
time and place.

I certify that the same was reduced to
typewritten form from my original stenograph notes
by computer-aided transcription.

I further certify that I am not of counsel or
kin to any of the parties to this cause of action,
nor am I interested in any manner in its outcome.

IN WITNESS WHEREOF I have hereunto set my hand
this the 26th day of June 2009.



Robin L. Herrera,
RMR, Texas CSR 8741

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Pn/B

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

In the Court of Common Pleas
Certiorari to Dorchester County
Perry M. Buckner, Circuit Court Judge

JOHN EDWARD WEIK,

PETITIONER,

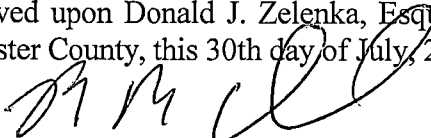
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

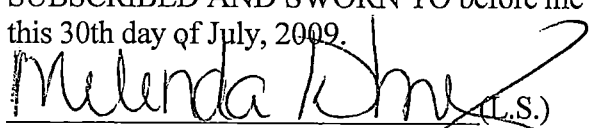
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Notice of Intent to Appeal in the above-referenced case has been served upon Donald J. Zelenka, Esquire, and the Clerk of Court, Court of Common Pleas, for Dorchester County, this 30th day of July, 2009.


Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 30th day of July, 2009.


Melinda Dine (L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2018



State of South Carolina
The Circuit Court of the Fourteenth Judicial Circuit

PERRY M. BUCKNER
JUDGE

101 HAMPTON STREET
POST OFFICE DRAWER 470
WALTERBORO, SOUTH CAROLINA 29488-0470
TELEPHONE: (843) 549-7878
FAX: (843) 549-9876
E-MAIL: pbucknerj@sccourts.org

July 20, 2009

The Honorable Daniel E. Shearouse
Clerk of The South Carolina Supreme Court
Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29201

RECEIVED

JUL 23 2009

S.C. SUPREME COURT

Re: John Edward Weik v. State of South Carolina
2003-CP-18-1070

Dear Mr. Shearouse:

Pursuant to the orders of the Supreme Court dated May 8, 2009 and June 3, 2009 remanding the above referenced case to this court for possible reconstruction of the testimony of William "Bill" Gunter, you will please find enclosed an original Order signed by Judge Buckner, concerning the same.

By copy of this letter, I am sending copies of this Order to Robert M. Dudek, Esquire and Donald J. Zelenka, Esquire, Michael O'Connell, Esquire, and Melissa Kimbrough, Esquire.

Thank you for your attention to this matter and please do not hesitate to contact our office if you have any questions or concerns.

Sincerely,

A handwritten signature in black ink, appearing to read "Ryan M. Waller".

Ryan M. Waller
Law Clerk to the Honorable Perry M. Buckner, III

Enclosures: as stated

cc: Robert M. Dudek, Esquire
Donald J. Zelenka, Esquire
Michael O'Connell, Esquire
Melissa Kimbrough, Esquire

STATE OF SOUTH CAROLINA
IN THE COURT OF GENERAL SESSIONS

Certiorari to Dorchester County
Perry M. Buckner, Circuit Court Judge

RECEIVED

JUL 22 2009

S.C. SUPREME COURT

JOHN EDWARD WEIK,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CONSENT ORDER

#1
P.B.

This death penalty case originally came before me by way of an appointment from the Supreme Court to hold a post-conviction relief hearing after petitioner's murder conviction and death sentence were affirmed on direct appeal. See State v. Weik, 356 S.C. 76, 587 S.E.2d 834 (2003), *cert. denied*, Weik v. South Carolina, 539 U.S. 930 (2003). That post-conviction relief hearing was held from September 18–21, 2006. Michael O'Connell and Lisa Kimbrough represented petitioner. Donald J. Zelenka represented the state. Robin Keil was the court reporter.

In my order dated March 12, 2007 I denied the application for post-conviction relief. Petitioner filed a timely notice of intent to appeal.

Court reporter Harriet Bennett later transcribed the transcript of the post-conviction relief hearing after Robin Keil resigned and moved out-of-state. On September 24, 2008 petitioner, through Deputy Chief Appellate Defender for Capital Appeals Robert M. Dudek and Appellate

Defender Elizabeth Franklin-Best, filed a petition for a writ of certiorari on behalf of petitioner in the state Supreme Court. Neither counsel Dudek nor counsel Best were involved or present for the post-conviction relief hearing that was held before this Court.

Subsequently, as counsel Zelenka was preparing his return to the petition for writ of certiorari, he noticed that a portion of the testimony of Dr. Donald Morgan had not been transcribed by Ms. Bennett, and that the entire testimony of petitioner's brother-in-law, William "Bill" Gunter, had not been transcribed. Counsel Zelenka sent a letter to the Supreme Court notifying that Court of this problem. Desiree Allen of Court Administration and Ms. Bennett were also notified of the missing testimony. Ms. Allen notified counsel Zelenka that she did not have a forwarding address for Ms. Keil, and that Ms. Keil had not delivered the tapes of the post-conviction relief hearing to her agency.

#2
PMB
Ms. Bennett then notified counsel Zelenka that she had located the partially missing testimony of Dr. Morgan, and she transcribed it for record. However, Ms. Bennett notified counsel Zelenka that she had not been given a tape with the testimony of Bill Gunter on it by Ms. Keil, and that she was therefore unable to transcribe it.

The Supreme Court, in its order dated May 8, 2009, remanded this matter to this Court to reconstruct the record of the testimony of Bill Gunter within thirty days. The Court left this Court with discretion on how ultimately to reconstruct the record but it cited Whitehead v. State, 452 S.C. 215, 574 S.E.2d 200 (2002) and China v. Parrott, 251 S.C. 239, 162 S.E.2d 276 (1968) for guidance.

When this Court notified counsel Dudek and counsel Zelenka, through his law clerk, on June 1, 2009 that the Court desired to have a reconstruction hearing on June 5, 2009, counsel Dudek requested a continuance based on the fact Bill Gunter lived in Florida, and the difficulty of obtaining his presence for a deposition or live testimony with that deadline. This Court notified

the Supreme Court of the continuance request, and the Supreme Court then which issued a supplemental order giving this Court the authority to issue a “limited continuance,” and reiterating that Mr. Gunter’s testimony was to be reconstructed and that Gunter was not to re-testify.

A hearing was held before this Court on June 5, 2009 at the Colleton County Courthouse. Petitioner was represented by counsel Dudek. Counsel Zelenka represented the state. Counsel Dudek moved this Court for a ten day continuance in an effort to see if the parties could stipulate to the testimony of Bill Gunter. This Court granted the continuance until June 15, 2009 to allow the parties to attempt to stipulate to Gunter’s testimony.

Although counsel Zelenka, counsel Dudek, counsel O’Connell, and counsel Kimbrough were apparently able to stipulate to almost all of Gunter’s testimony by way of the Gunter affidavit during that time period, they could not stipulate to the entirety of his testimony, and this Court was so notified. Consequently, this Court scheduled a reconstruction hearing for June 29, 2009.

#3
PnB
A reconstruction hearing was held at the Colleton County Courthouse on Monday, June 29, 2009. Counsel Dudek represented petitioner. Counsel Zelenka represented the state. Also present were PCR trial counsel O’Connell and counsel Kimbrough.

Counsel Dudek informed the Court that he had learned that Robin Keil, now Robin Herrera, the original court reporter at the post-conviction relief hearing, had relocated to California. Counsel Dudek had contacted court reporter Bennett to obtain an affidavit from her prior to the reconstruction hearing. Ms. Bennett provided counsel Dudek, with an “old” cell phone number and a prior email address for Ms. Herrera. Counsel Dudek was able to reach Ms. Herrera with the information provided by Ms. Bennett, and Ms. Herrera informed him, after returning his phone call and checking her records, that she still had a record of Gunter’s

testimony from the post-conviction relief hearing. Counsel Dudek asked Ms. Herrera to transcribe that testimony.

Ms. Herrera consequently transcribed the testimony of Bill Gunter and emailed it to counsel Dudek. Counsel Dudek then sent the transcript by email to this Court, opposing counsel Zelenka and PCR counsel O'Connell and Kimbrough. Counsel O'Connell, counsel Kimbrough, counsel Dudek, and counsel Zelenka all stipulated at the reconstruction hearing that the transcript provided by Ms. Herrera was a full and accurate transcription of Gunter's post-conviction relief testimony. That transcript was then introduced into evidence.

Petitioner also introduced an affidavit from Ms. Desiree Allen of Court Administration which stated that agency had not been provided a tape of the post-conviction relief hearing by court reporter Robin Keil (Herrera), and that Court Administration did not know how to contact her.

44
Pnb
In addition, Petitioner introduced an affidavit from court reporter Harriet Bennett which stated that she informed counsel Dudek, when he contacted her about submitting an affidavit for the reconstruction hearing, that she had a "old" cell phone number and an "old" email address for Ms. Herrera. The cell phone number and email address turned out to be still active, Ms. Herrera was contacted by counsel, and she transcribed the testimony of Bill Gunter and sent it by email to counsel Dudek, who in turn provided it to all involved in this reconstruction effort.

Counsel Dudek also informed this Court that Ms. Herrera had sent him the transcript by overnight mail to his home on Friday, June 26, 2009 but that it had not arrived as of the reconstruction hearing on Monday morning, June 29, 2009. Counsel stated he would provide a copy of the signed certificate of Ms. Herrera for the transcript when it arrived, and counsel has since provided that signed certificate to this Court. Finally, counsel Zelenka informed this Court that he would provide this contact information for Ms. Herrera to other staff at the Attorney

General's Office and South Carolina Court Administration since this is apparently not the only ^{Page} case involving unavailable records. *Petitioner was present at both the June 5, 2009 and the June 29, 2009 hearings*

Since appellate counsel for the petitioner, counsel for the state, and trial post-conviction relief counsel all stipulate, and move, that the transcript of Gunter's testimony be accepted as an accurate and complete transcript of his testimony, this Court grants the motion, and accepts that transcript as fully reconstructing the record pursuant to the Supreme Court's order of May 8, 2009.

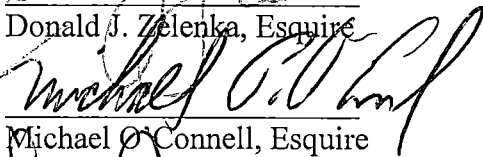
IT IS SO ORDERED.

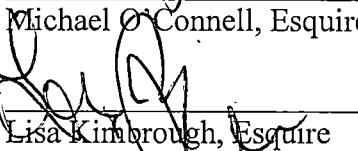

The Honorable Perry M. Buckner

WE SO MOVE:


Robert M. Dudek, Esquire


Donald J. Zelenka, Esquire


Michael O'Connell, Esquire


Lisa Kimbrough, Esquire

July 6, 2009
13

Walterburg, S.C.

Testimony of Gunter

1

1

2

* * *

3

THE COURT: You may call your next
4 witness.

5

MR. O'CONNELL: William Gunter.

6

7

THE COURT: William Gunter. Right hand
on your Bible, raise your left hand for me.

8

9

10

(John William Gunter, called as a witness,
having first been duly sworn, is examined and
testified as follows:)

11

12

13

THE COURT: State your full name for the
record and spell your last name for the court
reporter.

14

15

16

THE WITNESS: Full name is John William
Gunter, I'm known as Bill. Last name is
G-u-n-t-e-r.

17

THE COURT: Your witness.

18

MR. O'CONNELL: Thank you, Judge.

19

DIRECT EXAMINATION

20

BY MR. O'CONNELL:

21

Q. Mr. Gunter, where do you reside, what state?

22

A. In Perry, Florida.

23

Q. What do you do for a living?

24

25

A. I'm a semi-retired engineer from the Florida
Department of Transportation. I do contract

2

1 observation for a company called Jones Edmunds and
2 Associates engineering firm out of Gainesville,

#6
PAB

Testimony of Gunter

3 Florida.

4 Q. And your wife is Maggy Gunter?

5 A. Yes, she is.

6 Q. And how is she related to Eddy Weik?

7 A. She's his half-sister by Lily's first

8 marriage.

9 Q. Lily is her mother. Is your wife her oldest
10 child?

11 A. No, the second oldest.

12 Q. Who is the oldest?

13 A. The oldest is Larry, he resides in Rock Hill,

14 South Carolina. Excuse me, Fort Mill, South

15 Carolina.

16 Q. All right. When did you first meet Eddy

17 Weik's father Russel?

18 A. At the -- I think it was Berkeley County was

19 the name of it raceway the last weekend, the last

20 Saturday in February of 1966.

21 Q. And what was he doing at the time?

22 A. At the time I met him we were at a racetrack.

23 Q. I'm sorry, in the rest of his life what was

24 he doing?

25 A. Oh, he was in the U. S. Navy.

1 Q. And was he stationed in Charleston?

2 A. He had been on a, I mean, sweeper in

3 Charleston and had a, I believe he characterized it

4 as a nervous breakdown, and they had to take him out

5 in a straightjacket, he was in the mental ward in the

6 Naval Hospital in Charleston, South Carolina, and was

7 assigned to E Ward which is known in Navy language

#7
PnB

Testimony of Gunter

8 as, you know, in the military as echo.

9 Q. All right. And your understanding from him
10 was what was that, a psychiatric ward?

11 A. It was the more -- I would call it the
12 convalescent ward after treatment, as such. He was
13 reassigned to that ward and they were allowed certain
14 liberties, some of them were allowed passes to go out
15 on the town, it was a lot more relaxed atmosphere. I
16 visited him once or twice that they had ping pong
17 tables there, pool tables and stuff.

18 Q. You met him at the racetrack in 1966. Is
19 that also when you met his sister who is now your
20 wife?

21 A. Right, that was his -- that was Lily's
22 daughter, yes. He had met Lily and we walked in,
23 myself and a friend of mine by the name of Jim
24 Daniels had walked in and had just went up to the
25 refreshment stand when he walked up and Jim knew

4

1 Russel from an assignment at a barracks that Russel
2 was in or either at the hospital, I don't know which
3 it was, they had known each other, casual
4 acquaintance, hollered at each other. He said, Look,
5 I met a lady that has two daughters, would you like
6 to meet them? You're asking a single sailor on leave
7 if he wants to meet a young lady, it's like asking a
8 man in the desert if he's thirsty, if he wants a
9 drink of water. So I imagine I did.

10 Q. So that began your romantic relationship with
11 the lady who is now your wife?

#8
PMB

Testimony of Gunter

12 A. Right.

13 Q. How old was she at that time?

14 A. She was 15 at that time. I took her to be
15 about 17 or 18, she had led on to me like she was
16 older and I found out several weeks later how old she
17 was, at that time it was a little bit too late.

18 Q. All right. And you recall the occasion that
19 you next saw -- after Mr. Weik, Russel Weik was
20 released from the hospital, what was your
21 understanding about his status with the Navy when he
22 was released from the hospital?

23 A. My understanding was that he was released
24 because of his mental breakdown. That was my
25 understanding.

5

#9
PnB
1 Q. What I mean is when he got out of the
2 hospital, had he been released from the Navy,
3 discharged?

4 A. Oh, no, he was separated later after he --
5 well, he stayed in that, in that regard until
6 assigned to that ward until he was separated is my
7 understanding.

8 Q. All right. Was he then married to Lily?

9 A. He got married after, right after he got out.
10 He was separated shortly after I met him and then
11 they got married within a short, short period of
12 time.

13 Q. Okay. Then you began to -- you continued
14 your romantic relationship, I guess you courted
15 Maggy?

16 A. Right.

Testimony of Gunter

17 Q. And she was living with Lily and Russel after
18 they married?

19 A. Yes.

20 Q. Did Russel tell you about his service in the
21 Navy and the places he had been?

22 A. He told me he had been stationed during his
23 first tour, now, he had re-enlisted by the time he
24 was in Charleston, that was his second enlistment, I
25 don't know the period of time, maybe a year or less.

6

1 He was in Holy Loch, Scotland. He was assigned to a
2 minesweeper out of Holy Loch, Scotland.

3 Q. Did he tell you anything about -- while he
4 was in Holy Loch, Scotland, anything about his
5 activities, some extraordinary activities that he got
6 involved in?

7 A. He started back in the late '70s, I think is
8 what you're referring to, as saying that he was doing
9 clandestine operations, I think you would call them,
10 in Vietnam, he would be flying out someplace -- flown
11 out someplace in France, join a team of commandos,
12 they would be inserted behind the lines in Vietnam.

13 Q. Did he explain to you what he did in Vietnam?

14 A. First supposedly he would go in and gather
15 intelligence and later on it become they would go on
16 search and seizure and they would kill people and all
17 sorts of stuff and such.

18 Q. Did he ever describe to you any negotiation
19 with the CIA?

20 A. He talked a lot about that, being a CIA

#18
PnB

Testimony of Gunter

21 operative.

22 Q. Did he ever describe to you that he was
23 employed by the CIA?

24 A. He put it in later years, yes, he was
25 employed by the CIA, he was actually an undercover

7

1 operative for the CIA later on in later life.

2 Q. Did he describe to you how many times he had
3 been to Vietnam?

4 A. Not exactly, but over the years it become a
5 large amount of time. Not in numbers, no.

6 Q. All right. When you started hearing these
7 tails from Russel, did he appear that he believed
8 what he was saying?

9 A. To begin it I don't know if he was just
10 embellishing a little bit, but he began to actually
11 believe these over the years. As time grew the more
12 he told and the more he actually believed them
13 himself.

14 Q. You continued to date your -- the lady who is
15 now your wife for some period of time after you met
16 her and then you got married. How long did you date
17 her before you all got married?

18 A. About three and a half years. And I do want
19 to explain our relationship was a lot long distance
20 through correspondence because shortly -- a few
21 months after I met her I was transferred back to
22 sonar school in Key West and we would see each other
23 once or twice a year.

24 Q. All right. When you got married how old was
25 your wife?

#11
P.B

1 A. She was 18 years old.

2 Q. And she was still living at home?

3 A. Still living at home.

4 Q. And when you got married did you all move out
5 of Charleston, or this area rather?

6 A. We left on September the 3rd, 1969, left her
7 home and was married in Orangeburg, South Carolina.

8 Q. And --

9 A. And we went from there to Florida and made
10 our home in Florida and we've been there for 37 years
11 this past September 3rd.

12 Q. During the time that you -- after you got
13 married and up until 1999, did you have contact from
14 time to time with the Weik family?

15 A. Yes, I did.

16 Q. And what kind of contact was that?

17 A. I would be granted -- I normally would save
18 my leave up to around Christmastime because I like to
19 be with my family at Christmas and I would get
20 sometimes up to three and four weeks leave at one
21 time. And I'd spend part of it at home and the other
22 half I would spend with Maggy up at Moncks Corner.

23 Q. All right. After you got married did you and
24 your wife visit the Weik household?

25 A. Yes, we did.

1 Q. What year were you married?

2 A. We were married in 1969.

#12
PnB

Testimony of Gunter

3 Q. All right, sir. What -- did you have an
4 opportunity to see the interaction between Russel,
5 the father, and his children?

6 A. Yes, I did.

7 Q. I want you to describe to the judge the sorts
8 of things that you observed about Russel and his
9 relationship to his children and what he was --
10 things that he was having them do.

11 A. Russel, if you're talking about what kind of
12 a father, Russel wasn't really in my terms that much
13 of a father figure per se. He -- the children were
14 there, he paid little attention to them other than
15 when they would come by he would reach out and thump
16 thumb, or what he called a ski jump. When he would
17 catch them he would take his fingers, run them down
18 his nose real hard. It really irritated the
19 children. He would do things, as he called it,
20 toughen them up.

21 Q. Like what?

22 A. The boys in particular. Amy was a very small
23 child at the time, just a baby, and I don't know so
24 much that he had Amy do it, but the two boys he used
25 to take outside in the yard at night at all hours of

10

1 the night and sometime be real cold and they'd have
2 what we refer to in the Navy as a skivies, either
3 undershorts and a tee shirt and maybe barefoot or
4 maybe socks or something on their feet would be all.
5 He would make them stand at attention. Even in the
6 house when they would take a bath he would come in.
7 I want to do a personnel inspection. They would

#13
P.B.

Testimony of Gunter

8 stand at attention, let them give him a PI
9 inspection. Stand them in the yard at attention,
10 make them march around in formation and yell commands
11 at them and he called it toughening up.

12 Q. Were these things done in jest?

13 A. I think in his own mind --

14 Q. Well, what did it appear to you?

15 A. It appeared to me to be that he was serious
16 with what he was doing.

17 Q. Did you ever see him engage in any discipline
18 of his children, specifically his two sons?

19 A. He would -- if he chastised them, I think the
20 proper term is beat them or whip them with whatever
21 he could get in hand at the time.

22 Q. I'm interested in that, the beating or
23 whipping, whatever he could get his hands on. Would
24 you talk to the judge and tell the judge what you
25 observed.

11

1 THE WITNESS: Pardon me for not turning
2 too much, I've got a --

3 THE COURT: I can hear you just fine.

4 THE WITNESS: That's fine. Okay, thank
5 you.

6 If a flyswatter was handy he'd
7 whack them with that. And he kept one laying
8 around, he would whack them with that. He
9 had got hold of an antenna one time, tore an
10 antenna off a vehicle, his belt, he would
11 throw things in the house, he grabbed them

#14
PUB

12 Testimony of Gunter
13 and beat on them. He's literally hit them in
14 the chest with his fist before, hit them in
15 the face.

16 Q. What sorts of things did he hit them for,
17 what were the reasons?

18 A. He had a very violent temper, the least thing
19 that would set him off or upset him, it just -- they
20 could walk in and be playing as children would do and
21 run through the living room when he was watching,
22 say, a favorite TV show of some type and run by his
23 chair, bump his chair, or he had a bad foot where he
24 had gotten it hurt in an industrial accident at a
25 sawmill, I believe, got a toe crushed, if they bumped
 his foot or whatever, just anything that set him off,

12

#15
RB
1 he could be set off at ease.

2 Q. Was -- in your view, based on what you saw,
3 was there any pattern to what would set him off or
4 any predictability?

5 A. No predictability really. He could be fine
6 one instant, the slightest thing if he was talking to
7 someone, the kids come through interrupted or
8 anything else, he would yell and scream shut the so
9 and so up I'm -- can't you see I'm busy or I'm
10 talking or something of that nature.

11 Q. Do you recall seeing firearms at the weik
12 household?

13 A. There were muzzle loaders hanging on the wall
14 and not just imitations, they were real guns hanging
15 on walls. He kept a .45 with him that he claimed at
16 one time was given to his father by general McArthur

Testimony of Gunter

17 in the Philippines. He carried guns with him
18 constantly, he collected guns, and he just bragged
19 about owning a mini 14 full automatic, he had
20 shotguns, rifles, military guns especially he really
21 liked.

22 Q. Did you understand why he had all these
23 firearms?

24 A. He would tell me it was for his protection.
25 He feared the government quite a bit, he was afraid

13

1 we're going to be invaded and we're going to need the
2 guns to defend ourselves and defend yourself against
3 your enemies.

4 Q. Did he ever describe to you who he thought
5 the enemies were?

6 A. He had a total dislike at that time
7 especially for blacks and Jews, especially blacks and
8 Jews. He just constantly talked about how that they
9 controlled everything and everything was being given
10 to the blacks and that the Jews controlled all the
11 money.

12 Q. Did you ever observe him giving any
13 instructions to his children about defending
14 themselves against other people?

15 A. At times I did, yes.

16 Q. What did you observe?

17 A. He taught them various methods and then again
18 about how to kill someone, how to grab them in their
19 hand and immobilize them with grips that they had
20 where you could take a man to his knees or a woman or

#16
P-10

Testimony of Gunter

21 whatever to their knees and a quick way of killing
22 them where they wouldn't make any sounds.

23 Q. He would actually say to his children this is
24 how you kill someone silently or words to that
25 effect?

14

1 A. Words to that effect, yes.

2 Q. All right.

3 A. How to take an enemy out quickly so they
4 can't do you any harm and this is the way do you it.

5 Q. What was the condition -- did you ever see
6 him with any explosives?

7 A. Yes, several cases of dynamite he had at one
8 time stored in his garage. My wife and I were up on
9 a visit and he said, Look, and he had a real excited
10 just gleam look in his face. He said, I got
11 something to show you. And I walked out in the old
12 garage that he had and he had several cases stacked
13 up I'd say about that high (indicating). He opened
14 one of them up, and I know what dynamite is, I've
15 been in the construction business since 1974. He
16 pulled out, opened up, unwrapped from the waxy-like
17 paper that dynamite is wrapped in and pulled out a
18 stick of dynamite that was sweating.

19 Q. All right. What's the significance of
20 dynamite sweating?

21 A. It's in a very unstable state when it starts
22 to sweat, the sweat that's on there is not moisture,
23 it's nitroglycerin coming out in its natural form.
24 He wiped his finger -- picked it up, wiped his finger
25 down like this, shook it on the floor. When he did,

#17
PnB

1 it popped, it scared the be-Jesus out of me. Before
2 he done it again I said, Are you crazy? You're going
3 to blow us all up. Put the darn thing back. I said,
4 You're going to blow a hole in the ground. What have
5 you got this for? He said, I can boobie trap mines
6 around the house, if they come to get me I've got
7 something I can defend myself with.

8 Q. As far as his attitude towards African
9 Americans and Jewish people, was this something he
10 expressed in the presence of his children about how
11 much he hated them?

12 A. Yes, several times.

13 Q. Did he ever admit to you at any time that his
14 stories about his exploits in Vietnam and being part
15 of an elite unit and being flown from England to
16 France to Vietnam were untrue?

17 A. No, he just -- he actually believed them. He
18 never -- he told them for the truth and swears that
19 they're the truth to this day.

20 Q. Now I want to talk to you about Eddy.

21 THE COURT: Just a moment. Come on in.

22 (Mr. Weik enters the courtroom.)

23 Q. I want to talk to you about your
24 observations.

25 MR. ZELENKA: Your Honor, can we just

1 Let the record reflect --

2 THE COURT: Let the record reflect the

#18
PnB

3 Testimony of Gunter
4 applicant is back in the courtroom after the
5 request of counsel being examined by an
6 expert witness for the applicant.

7 You may proceed with the
8 examination of Dr. Gunter or Mr. Gunter.

9 MR. O'CONNELL: Thank you, Judge.

10 Q. I want to talk -- I want you to talk about
11 your observations of Eddy. You actually knew your
12 wife and met the family prior to Eddy's birth; is
13 that correct?

14 A. That's correct.

15 Q. And he was the oldest child of your
16 mother-in-law's second set of children?

17 A. Yes.

18 Q. I want you to talk about what your
19 observations were of Eddy when he is a young child.

20 A. Excuse me. Can I get a cup of water, please?

21 Q. Sure.

22 THE COURT: Got it right here.

23 Q. Let's start with the day he was born. Were
24 you here?

25 A. Yes, I was home on leave from Key West,
 Florida, going to Seattle, Washington, and I come up

17

1 and spend a couple of weeks with my future wife or
2 girlfriend at the time.

3 Q. Did -- do you remember Eddy's father going to
4 the hospital when he was born?

5 A. No. As to my -- no, he was not there. I was
6 there with my wife and Lily when Eddy was born that
7 night.

#19
BnB

Testimony of Gunter

8 Q. Do you know why he wasn't, Rus was not there?

9 I mean, did he know about it?

10 A. Yes, he knew about it.

11 Q. In advance?

12 A. In advance, yeah.

13 Q. All right. When you observed Eddy as a young
14 child, tell me what you observed that was -- if there
15 was anything different, what was different about Eddy
16 if there was?

17 A. Eddy had a little different look than most
18 children. His head was a little bit larger than a
19 normal child, he looked at birth I thought -- he was
20 as my first cousin was at home, had a cleft palate or
21 that we refer to as hair lip. And I asked Lily if he
22 had a cleft palate and she said, no, he's fine. But
23 he didn't look as a normal child looked because his
24 head seemed to be enlarged out.

25 Q. All right. What about as he grew older, did

18

1 you notice -- could you say whether or not he reached
2 the developmental milestones at appropriate ages? In
3 other words, did he walk, talk at appropriate ages?

4 A. Eddy seemed to develop slower than other
5 children did at his age. He walked at a much later
6 date, he began to talk very slowly, he didn't seem to
7 grasp things as quick as other children did.

8 Q. And you were present from time to time when
9 his younger brother was born and he was growing up
10 and his younger sister?

11 A. Yes, I was.

#20
P.D

Testimony of Gunter

12 Q. And how would you compare their development
13 to Eddy's in terms of talking and walking and those
14 sorts of developmental milestones?

15 A. They developed more along the lines of a
16 normal child. They walked at, you know, between nine
17 and ten months, begin to walk around ten months to a
18 year and where it took Eddy much longer than that.

19 Q. You have your own children? You have
20 children?

21 A. I have two sons.

22 Q. And they are how old?

23 A. The oldest one is in Columbus, Georgia, he's
24 34 1/2 years old, the youngest one lives in Moncks
25 Corner, South Carolina, and he will be 30 years old

19

1 December the 8th.

2 Q. So you had an opportunity to watch your own
3 children develop?

4 A. Yes.

5 Q. How would you compare their development to
6 Eddy's in terms of talking and walking?

7 A. My oldest son walked at nine months, my
8 youngest son started walking at about ten and a half
9 months. They both started talking about the same
10 time, expressing themselves in words and full
11 sentences very early, at a very early age and much
12 earlier than Eddy was.

13 Q. Do you know about how old Eddy was when he
14 started walking?

15 A. I don't remember exactly, but I remember
16 growing up it took longer. And I feel a little

Hg1
P-3

Testimony of Gunter

17 uncomfortable talking about this in front of Eddy and
18 all because it's a little embarrassing.

19 Q. That's inherent in the situation and I
20 understand that.

21 A. But that's the reason I seem to stutter a
22 little bit with it, it's embarrassing, but Eddy was
23 slower being potty trained, much slower than other
24 children as far as, I mean, they were more along the
25 normal expected time, plus or minus a month just

20

1 given as an average that you need to look at if your
2 child's not talking or walking at a certain age you
3 need to be concerned, maybe consult a doctor about
4 it.

5 Q. What about his behavior as a young child,
6 what was that like?

7 A. Eddy appeared to do things to try to get
8 attention. He craved attention, he craves praise and
9 he got very little of either, especially with the
10 praise when would do something good his father seemed
11 to just take an indifferent approach to it.

12 Q. Did his father ever tease him for any purpose
13 when he was a young child?

14 A. Constantly.

15 Q. About what?

16 A. Called him eggy and it wasn't eggy because
17 just for any reason other than that he was an
18 egghead.

19 Q. You mean you're talking about the size of his
20 head?

#22
PAB

Testimony of Gunter

21 A. Yeah, refer -- that's what I took it as.

22 Now, that was my impression.

23 Q. As Eddy developed into his late, you know,

24 seven, eight, nine, ten and into his adolescence,

25 what did you observe about his behavior, what kind of

21

1 guy was he, how did he relate it other people?

2 A. Didn't relate very well. Eddy and I got

3 along very well together, always have, but I took a

4 little extra time with him, but he didn't seem to

5 relate to other kids, other kids seemed to tease him

6 a lot because they could fluster him. And as

7 children, the cruelty of children in their teasing,

8 they're serious with it. And if they found

9 someone -- in growing up myself I know my cousin was

10 teased very, very hard because of his speech pattern

11 and his speech and he would do things to get

12 attention. I noticed a lot of that in Eddy.

13 Q. As he grew into his teenage years did you

14 observe whether he had regular friends that he

15 associated with?

16 A. Very, very few.

17 Q. Why did you think that was, what were your

18 observations?

19 A. Part of it was Eddy's actions his-self,

20 his -- trying to find a way to put this in words --

21 but it was just hard for Eddy to make friends. It

22 was very hard for him to make friends it seemed like

23 and he become somewhat of a loner, possibly because

24 of the teasing that he got when he was -- when he was

25 younger and going to school. He had a few friends

#23
PnB

1 there in the neighborhood that they played with,
2 but....

3 Q. Do you remember ever seeing any problems that
4 Eddy had concentrating on tasks or on one particular
5 subject that he had to deal with?

6 A. It was very hard for him to keep attention in
7 one area very long. He would get a project started
8 and lose interest in it and start on something else.

9 Q. When he became into his -- when he got into
10 his 20s and early 30s, how would you describe his
11 personality?

12 A. I'm not trying to be humorous here, but which
13 one? Because Eddy seemed to have more than one to
14 me. I'm not an expert as such, but....

15 Q. Explain that.

16 A. He would go from a very caring, carefree
17 individual to an almost spooky individual like he was
18 being hunted and someone was after him. And he was
19 real self-conscious. When he would take him out
20 fishing or hunting he was totally relaxed in an
21 element he enjoyed in others, he felt like people
22 were getting. That's my impression.

23 Q. That's what I'm asking.

24 A. Yeah.

25 Q. That's what I'm interested in.

1 A. The least thing would upset him. Like at
2 Broyhill there was a man that constantly stayed after

#24
PMB

Testimony of Gunter

3 him all the time and eventually made him lose his
4 temper to the point that he got fired for it. And
5 just the least thing could upset him and he just
6 couldn't turn it loose.

7 Q. I want to bring you up to -- were you in town
8 when Eddy was arrested for this?

9 A. No, I was in Florida.

10 Q. All right. When did you -- you came up here
11 for the trial?

12 A. Yes, we did.

13 Q. And do you recall when you first met Eddy's
14 lawyers?

15 A. Yeah, it was just a few days before the
16 trial. I would say no more than two weeks, it's been
17 eight years ago and I didn't write the dates down,
18 but I know we come up to do the interviews and just a
19 few days later they had the trial, trial started.

20 Q. Do you recall who interviewed you?

21 A. Scott Parker interviewed me and my wife
22 and --

23 Q. You met Scott Parker today?

24 A. Yes. I saw him when he come in today, we
25 spoke briefly.

24

1 Q. All right. And he interviewed you and your
2 wife. Was that interview together?

3 A. It was together, yes.

4 Q. All right. Do you recall about how long
5 before the trial that interview took place?

6 A. No more than two weeks before and I think it
7 was more like five or six days before.

#25
PnB

Testimony of Gunter

8 Q. All right. Did -- when was the first time
9 that you met with either Mr. Beauford or
10 Ms. Hardee-Thomas?

11 A. At that same time.

12 Q. About two weeks before the trial?

13 A. Within two weeks. I would say five or six
14 days possibly before the trial.

15 Q. What -- would you set that meeting for me?
16 Who was there and where was it?

17 A. Trying to remember exactly all of them that
18 was there. It was in Mr. Beauford's office, which I
19 believe if memory serves is close to the jail in
20 Moncks Corner. We went into the office, I know
21 Russel Weik was there, I think Amy was there, I'm
22 speaking of Amy as the younger of the siblings of
23 Russel's family, I don't recall whether Chris was
24 there or not, I want to say that he was but I can't
25 be absolutely sure, but I think he was.

25

1 Q. It's safe to say there are several family
2 members?

3 A. There were several family members there
4 because Lily had called us, gathered us all together,
5 said we need to do the interview, we're getting ready
6 for Eddy's trial. That was the first time I met the
7 attorney.

8 Q. And who -- were you interviewed at that
9 meeting?

10 A. Yes, my wife and I both were.

11 Q. By Scott Parker?

#26
PnB

□

Testimony of Gunter

12 A. By Scott Parker. Percy Beauford was in the
13 room for a short time, left, Scott Parker done the
14 interview.

15 Q. All right. Did -- do you recall what, if
16 anything, Mr. Beauford said to the group of you that
17 were at that meeting either before or after,
18 during -- in terms of what the meeting was about,
19 what he wanted to accomplish?

20 A. He was trying to see at that time and I
21 thought it rather a late date to find out who he
22 could use as witnesses for the trial. And he had
23 told us that he wanted to pursue not guilty by
24 reasons of insanity, I believe was the way he put it.
25 And at best maybe manslaughter or something like

26

#2?
PnB
1 that. But that was the purpose of the interview to
2 see if we could be a credible witness for the
3 defense.

4 Q. Did you then understand at the time of that
5 meeting that the State was seeking the death penalty
6 against him?

7 A. I do remember it seems like Mr. Beauford
8 saying that they were trying for death, the death
9 penalty in the murder case.

10 Q. Did either Mr. Beauford or Ms. Hardee-Thomas
11 describe to the group what the process, what the
12 structure of death penalty cases is?

13 A. Not to my knowledge, no.

14 Q. All right. Did you --

15 A. Let me rephrase that. Not that I recall he
16 did not.

Testimony of Gunter

17 Q. That's fine, that's all you can testify to.

18 A. Yeah.

19 Q. Did they -- aside from the things that you've
20 talked about, not guilty by reason of insanity and I
21 think you said voluntary manslaughter?

22 A. I think involuntary manslaughter. Was either
23 not guilty by reason of insanity or non-voluntary
24 manslaughter.

25 Q. Okay. Did Mr. Beauford talk to you at all

27

#28
PnB
1 about the death penalty and what he might present or
2 what -- ask you what was available to try to convince
3 the jury not to sentence to death? Did he suggest or
4 ask you information about that that was relevant to
5 that?

6 A. No. The only thing that I can recall
7 Mr. Beauford saying when we questioned him at
8 recesses in the court at various times, that when we,
9 especially I would question him about challenging
10 some of the testimony, that he wasn't worried too
11 much because all of this would come up in the appeal
12 because all death penalty cases were appealed
13 automatically and he would get a, I believe the way
14 he phrased it, he would get another trial at that
15 point and all of this could be brought out then.

16 Q. What was the context of those remarks by
17 Mr. Beauford, what was being talked about with him
18 when he would say those sorts of things?

19 A. It was after we'd have a round in court and
20 at each round he went in, he started out with on an

Testimony of Gunter

21 upbeat note that I'm going to, I think we've got a
22 good chance to get not guilty by reasons of insanity
23 and he'll get three or four years in a mental
24 institution and once he's cured he'll be, he'll be
25 out. And Lily grabbed ahold of that, his mother.

28

1 And then he come back in after he
2 would -- and say he was in over his head he began to
3 realize, that he came in started saying, changing we
4 probably will go for manslaughter, probably get a
5 manslaughter, and he kept going more and more into,
6 well, he's going to be found guilty of murder, but
7 don't worry, it will be appealed and everything will
8 be done over again, he'll have another attorney at
9 that point.

10 Q. He'll have another attorney?

11 A. Yeah, that was the basis -- that was what I
12 assumed from what he said that I recall.

13 Q. Okay.

14 A. That's what I recall, that they had attorneys
15 that handled these appeals, when they went before the
16 Supreme Court it would be handed back down and they
17 have, you know, good attorneys up there that handles
18 appeals, not to worry.

19 Q. All right. And did he -- in terms of a new
20 trial, what did he say about that?

21 A. The impression that I got, the best I recall
22 is -- just a moment -- that he would -- that once it
23 went before the Supreme Court that it would
24 automatically be appealed. And the impression he
25 left upon the family was that and at the new trial

#29
PAB

1 that, you know, some things could be brought out,
2 or....

3 Q. What did you understand that he meant by
4 bringing something out?

5 A. He was confusing quite a bit, but it was
6 almost as if don't worry, it will be appealed, and
7 the sentencing will be changed and everything will be
8 okay.

9 Q. Do you recall that part of the discussion
10 where he began to tell you that it will be appealed
11 and he'll -- everything will be okay? What stage of
12 the trial was that discussed during?

13 A. We were probably halfway through the case.
14 That was in the second or third day when he began
15 talking each day, it got -- he got more and more
16 downbeat, not upset, he wasn't upbeat about the
17 trial, he just got more and more down and more and
18 more defeated.

19 Q. Were you ever asked to testify?

20 A. I was told when I was interviewed I was being
21 interviewed as a potential witness and that I would
22 be a witness. And when we got to the court he said
23 you can just come on in, we're not going to use your
24 testimony.

25 Q. Did you ask him any questions about why that

1 was?

2 A. I asked him why, because I had known the

#36
PAB

Testimony of Gunter

3 family so many years, I knew them as long as -- you
4 know, within a few moments as long as he knew them
5 and was exposed quite a bit to the family and noticed
6 the changes from being away for four or five, three,
7 four, five months at a time and coming back and see
8 the deterioration of the family and the family group
9 per se and was never -- he never did explain to me
10 other than we don't need your testimony, that was all
11 he would tell us, my wife and I both.

12 Q. Tell me about the condition of the Weik house
13 when these children were growing up. How would you
14 describe that?

15 A. Filth piled up with junk, magazines that were
16 from back in the early '70s piled up, roaches
17 everywhere, absolutely filthy. That's the only way I
18 know to put it. The house was in a state of repair
19 [sic]. I asked Russel several times, asked him to
20 make repairs on the house. He said, I won't do it
21 because my name's not on the deed and Lily won't put
22 it on so I'm not going to make any changes to the
23 house. I don't give a so and so if the whole so and
24 so place falls down. I don't want to use that
25 language in court, I don't want to use it anyway.

31

1 Q. I think you made your point.

2 A. Thank you.

3 Q. You mentioned something about the children
4 walking by Rus and getting poked and jabbed and hit.
5 Would you just explain that a little bit more than
6 you previously did and what reaction the children had
7 to it.

#31
OnB

Testimony of Gunter

8 A. He did it -- the children didn't like it. It
9 was -- he would say that, well, I'm trying to make
10 them aware of their surroundings, but he would laugh
11 quite a bit and just he used to call himself -- he
12 was known as Gomer Pyle because he resembled Gomer
13 Pyle off the TV show. He would say, Old Gomer's got
14 you again, you got to be on your toes, you can't --
15 you never know when somebody's going to be there to
16 get you, you got to be watching yourself every
17 moment.

18 Q. I want to get back a moment, just for a
19 moment to the lawyers. Did you ever have any
20 conversations with Marva Hardee-Thomas?

21 A. Other than very brief conversation in the
22 room to the left just outside those doors, very
23 brief.

24 Q. Outside this courtroom?

25 A. Outside the courtroom.

32

1 Q. Was that during the trial?

2 A. During the trial, yes.

3 Q. Aside from the one meeting that you had with
4 Mr. Beauford, with other family members in his
5 office, were there any other meetings that you
6 attended?

7 A. No.

8 Q. At that meeting was Marva Hardee-Thomas
9 present?

10 A. Not that I recall, no.

11 Q. Okay.

#32
PnB

□

#33
PrB

Testimony of Gunter

17

THE WITNESS: Sure.

18

19

MR. O'CONNELL: Would you answer any questions Mr. Zelenka has to ask this gentleman?

20

21

THE WITNESS: Sure.

22

THE COURT: Cross-examination.

23

MR. ZELENKA: Thank you, Your Honor.

24

25

THE WITNESS: Could you give me just a moment to stand up a little bit? I've got a

34

1

pinched nerve in my back, need to move a

2

little bit if you don't mind.

3

MR. ZELENKA: Sure.

4

THE COURT: You may stand.

5

CROSS-EXAMINATION

6

BY MR. ZELENKA:

7

Q. Mr. Gunter, from 1966 until 1998 when this

8

incident happened, approximately how many days a year

9

did you spend in Moncks Corner each year?

10

A. Oh, gosh, we would come up for a week at a

11

time a lot and sometimes on weekends probably we'd

12

come up for a week at a time three or four times a

13

year and then we'd come up on weekends four, five,

14

six times a year. It just depended. We would have a

15

little bit of time, maybe a long weekend, we'd leave,

16

come up this way.

17

Q. So every year you were spending about a month

18

in Moncks Corner?

19

A. At least a month if not a little bit more,

20

depended upon the time of the year.

#34
PnB

21 Q. And where did you stay? ^{Testimony of Gunter}

22 A. I stayed sometime at the house and then we
23 got to where we would when the house just fell in
24 more and more of a disrepair we would get a room and
25 we'd sleep in a room at night, but we'd spend the day

35

John William Gunter - Cross-Exam by Mr. Zelenka

1 at the house.

2 Q. Okay. The house being Lily and Russel's
3 house?

4 A. Lily and Russel's house, yes.

5 Q. Okay. Now, as I understood the descriptions
6 of the house, there was just one big bedroom in the
7 house where everybody stayed. Is that incorrect?

8 A. The house had a living room, dining room,
9 kitchen and two bed rooms and a bath.

10 Q. Okay.

11 A. There was -- the upstairs portion was turned
12 into a bedroom early on when Russel and Lily first
13 got married and the children started coming along and
14 they needed more room in the house, because the three
15 of Lily's kids were still there and Lily started
16 having children. And I went upstairs and we redone
17 the attic in the house and turned the attic into a
18 large bedroom with a separate smaller bedroom in the
19 front. And the kids would take turns, the oldest one
20 got their choice and they usually took the front room
21 in the attic part of the house. So it was more than
22 actually two bedrooms.

23 Q. And when Eddy was staying there with his --
24 with his wife in that room, where were you staying
25 that month?

#36
P.B

John William Gunter - Cross-Exam by Mr. Zelenka

1 A. We had gotten to the point that we stayed
2 there once, slept on the couch and then from then on
3 we would go get a motel room, stay in a motel room in
4 Moncks Corner. The choices weren't that great in
5 Moncks Corner, so a lot of times we would stay at
6 I-26 here, I believe it is in Summerville, at a motel
7 there. We spent the night, but then we'd go back to
8 the house during the day.

9 Q. Now, in 1997 or 1998 how often did you come
10 up during that time period?

11 A. During that time we had moved an RV up that
12 Lily let us park on the place, I had a 30-foot RV
13 that I moved up there in '97 I believe it was and
14 parked it and we would stay in the RV and we would
15 come up several times on weekends. Probably average
16 about once a month on weekends because we had a place
17 then we could stay and keep up ourself.

18 Q. Where does your son live now in Moncks
19 Corner?

20 A. He lives across the road on a piece of
21 property that my wife inherited from her father, her
22 mother divided the estate up among the three children
23 or four children of the first marriage that Dick
24 Ferrare, her first husband, had left to her, divided
25 the property up and there was about seventy-five

John William Gunter - Cross-Exam by Mr. Zelenka

1 hundredths of an acre for each of the four children
2 of the first marriage. We kept our piece, the other

#36
PAB

Testimony of Gunter

3 three sold part to us and one of them to Chris.

4 Q. Okay. Who is living in the house now?

5 A. In the original home?

6 Q. Yeah.

7 A. No one.

8 Q. Okay. Why is that?

9 A. I can make an assumption, because Russel had
10 remarried and his current wife refused to stay in the
11 house and I was told that she refused to stay in the
12 house in the state it was in, that she wouldn't live
13 there. As a matter of fact, she said that herself
14 come to think of it to me. I told Russel if he
15 wanted to he could come live with me. But I wouldn't
16 live in that house, it needs too much work on it,
17 it's went downhill to the point you've got to stop
18 and look through the bushes to see the front door to
19 the house now.

20 Q. Okay. And when you were living in the house
21 roaches were on the floor, mosquitoes?

22 A. Roaches, mosquitoes, that's the reason we
23 started going to a motel room. I just -- I wasn't
24 reared in that kind of a house and I love Lily to
25 death as a second mother, but I couldn't live in that

38

John William Gunter - Cross-Exam by Mr. Zelenka

1 kind of stuff.

2 Q. Okay. Did it have running water?

3 A. It had running water.

4 Q. Did it have running water every three times a
5 year that you were up there from 1966 to 1998?

6 A. It had running water in a sense. For a while
7 the well that Lily had when she and Rus got married,

#37
07B

Testimony of Gunter

8 Rus was trying to add some drop pipe to it and
9 dropped some of the pipe down in the well and they
10 never could get enough drop pipe and the pump would
11 pump some water and quit and finally got to where it
12 didn't work. And Lily would have to go down the
13 street and haul water to the house, she would take
14 buckets to the neighbor's house, roll them back in
15 wheel barrows. He would catch rainwater outside in a
16 55-gallon drum for the commode, the fill drains were
17 just knotted up with roots.

18 Q. Okay. About how long did it not have running
19 water?

20 A. Several years before Lily finally got enough
21 money together somehow to get a well put down. In
22 the last few years that she lived they had a well put
23 in.

24 Q. Okay.

25 A. That well had been messed up probably where

39

John William Gunter - Cross-Exam by Mr. Zelenka

1 it would pump just a little bit of water at a time.
2 You'd flush the commode and the pump would start
3 sucking air and it would take forever to fill the
4 tank back up and it was that way for several years
5 and there were, I'd say, probably eight to ten years
6 didn't have water.

7 Q. Eight to ten years?

8 A. Eight to ten years they did not have running
9 water of any appreciable amount in that house.

10 Q. What years was that?

11 A. Through the '80s and very early '90s.

#38
PnB

Testimony of Gunter

12 Q. Now, if I recall correctly you're a Mason?

13 A. I'm as Master Mason, past minister of my

14 lodge in Tallahassee, Florida.

15 Q. How did Russel or Eddy react to you being a

16 Mason? Did it ever come up in conversations, was it

17 favorable, unfavorable, questioning, curious?

18 A. Questioning, curious. Russel tried to join

19 the local lodge but was not -- he was blackballed.

20 Q. You know he was blackballed?

21 A. He told me.

22 Q. Okay. Did that cause him to have a grudge

23 against the Masons?

24 A. Russel said he was a member of the DeMolay,

25 which is the branch of the Masons for young boys,

40

John William Gunter - Cross-Exam by Mr. Zelenka

1 early age before they're 21 years old is the DeMolay,

2 but he claimed to be a member of the DeMolay back

3 where he was from originally. And that to start with

4 he didn't speak I'd say all that favorable, but

5 Russel, Russel and I usually got along, but he never

6 spoke in that much of a derogatory manner in my -- in

7 my presence.

8 Q. Okay.

9 MR. ZELENKA: I don't think I have any

10 further questions at this time. Thank you,

11 Judge.

12 MR. O'CONNELL: Nothing further, Judge.

13 THE COURT: As to this witness?

14 MR. O'CONNELL: That's correct.

15 THE COURT: Mr. Zelenka?

16 MR. ZELENKA: No objection.

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PnB

Testimony of Gunter

17 THE COURT: You may step down and you
18 are excused.

19 THE WITNESS: Thank you, sir.
20 (Whereupon, the witness steps down from the
21 witness stand.)
22
23
24
25

□

#40
P.B

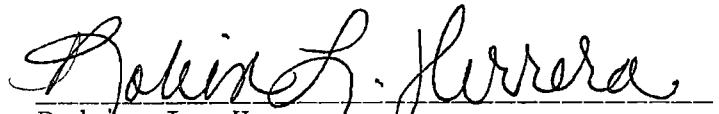
STATE OF CALIFORNIA)
 : C E R T I F I C A T E
COUNTY OF KERN)

I, Robin L. Herrera, Registered Merit Reporter
and Texas Certified Shorthand Reporter, certify
that the preceding pages are a true and correct
EXCERPT of the proceedings had at the aforesaid
time and place.

I certify that the same was reduced to
typewritten form from my original stenograph notes
by computer-aided transcription.

I further certify that I am not of counsel or
kin to any of the parties to this cause of action,
nor am I interested in any manner in its outcome.

IN WITNESS WHEREOF I have hereunto set my hand
this the 26th day of June 2009.


Robin L. Herrera,
RMR, Texas CSR 8741

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PnB



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June 30, 2009

RECEIVED

JUN 30 2009

S.C. SUPREME COURT

Ms. Rebecca H. Hill
Circuit Court Reporter
522 Dowling Avenue
Walterboro, SC 29488

Dear Ms. Hill:

Our office has been requested to perfect the appeal arising out of:

John Edward Weik v. State of South Carolina Indictment #: 2003-CP-18-1070

County: Colleton Date of Trial: June 29, 2009

Presiding Judge: Perry M. Buckner

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

We request that the lines on the paper be numbered from 1-25, and that you include in the transcript any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments. We have found that even if there are no objections, we need to review both opening and closing arguments for appeal.

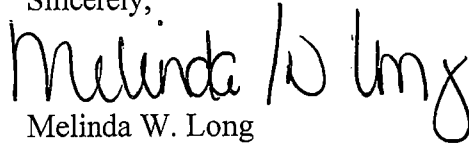
If you are aware of the existence of co-defendants not listed in the prior captioned case, please contact us prior to transcribing the transcript. In this manner, we can consult our records to ensure that in ordering a transcript, a duplication has not occurred. In addition, if the Attorney General's Office has already requested an original transcript, please notify us.

Ms. Rebecca H. Hill
June 30, 2009
Page Two

I am sorry for any inconvenience this may cause, but I appreciate your assistance in this matter. If you have any questions, or problems, please contact me.

Thank you for your kind cooperation in this matter.

Sincerely,

A handwritten signature in black ink that reads "Melinda W. Long". The signature is written in a cursive, flowing style. The first name "Melinda" is written in a larger, more prominent script, followed by "W." and "Long". The signature is positioned to the right of the typed name.

Melinda W. Long
Legal Assistant

xc: S.C. Supreme Court
Attorney General's Office

Law Offices of STIRLING & O'CONNELL

145 King Street Suite 410, Charleston, South Carolina, 29401 Telephone (843) 577-9890 Fax (843) 577-9826

ATTORNEYS AT LAW

Ann M. Stirling
Michael P. O'Connell

June 17, 2009

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JUN 19 2009

BY FAX 843 549-9876

Perry M. Buckner, III

Circuit Court Judge for the Fourteenth Circuit

P.O. Drawer 470

Walterboro, SC 29488

S.C. SUPREME COURT

RE: John Weik v. John Ozmint, Commissioner of the South Carolina Department
of Corrections, et al.
Case No. 00-CP-18-1070

Dear Judge Buckner:

You will find enclosed my Affidavit which is in response to Don Zelenka's Affidavit dated June 15, 2009. I note that Mr. Zelenka's has filed his Affidavit with the South Carolina Supreme Court. As I understand it, we are still in the Court of Common Pleas for Dorchester County on remand from the Supreme Court to settle the record. I have not received any Order from you or from the Supreme Court that this matter has been taken by the Supreme Court. I would appreciate it if you could let me know of any information you have in this regard.

There is one small difference between Mr. Zelenka's version of the testimony and the Applicant's. Mr. Gunter in his Affidavit stated that Russell Weik told him that he had never been in Vietnam. Mr. Zelenka's memory is that Mr. Gunter did not testify to this effect. While we are not abandoning our position, we do not believe this difference is substantial. I might add that all three lawyers spent a considerable amount of time since the June 5th hearing arriving at this one small difference.

When we had the phone conference on June 5, 2009, you asked us to advise you on or before June 15, 2009 if we could agree on Mr. Gunter's testimony. In the event we determined we could not agree, my memory is that you also asked us to advise you if we would agree that you could resolve our difference based on affidavits without the necessity of another hearing. Given that there is other evidence in the record that Russell never went to Vietnam (for example Applicant's Ex. 9 introduced in evidence at the PCR hearing which were Mr. Weik's Naval Hospital records) and invented much of his personal history which we consider important for the appeal, we believe you should resolve this matter based on the affidavits and that another hearing is not warranted. I cannot imagine that we would have anything to add at a hearing to three affidavits you have been sent, i.e., Don Zelenka's, William Gunter's and mine. I cannot speak for Don Zelenka but it appears he is content to have you decide this matter on the affidavits

E-MAIL

Ann Stirling: astirling@stirlingoconnell.com

Donna Dodds: ddodds@stirlingoconnell.com

Michael O'Connell: moconnell@stirlingoconnell.com

Sarah Pendleton: spendleton@stirlingoconnell.com

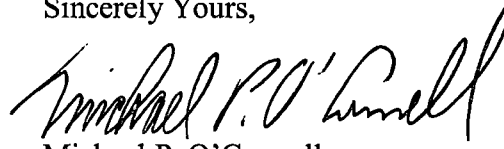
Judge Buckner
June 17, 2009
Page Two

without another hearing. I am sure he will correct me if I am mis-construing his position about the necessity of another hearing.

I spoke with your law clerk today and he informed me that a hearing has been scheduled for June 29, 2009. I am scheduled to start an out of town vacation on June 26th through July 6th. If you believe we should have a hearing, I would appreciate it if you would change the date so I do not have to drive back to South Carolina for this hearing. I hope you can accommodate me.

I look forward to hearing from you. I remain,

Sincerely Yours,

A handwritten signature in black ink, appearing to read "Michael P. O'Connell". The signature is fluid and cursive, with the first name "Michael" being the most prominent.

Michael P. O'Connell

MPOC/sg
Attachment

Cc w/att: Donald Zelenka, Assistant Attorney General (by fax)
Robert Dudek, Esquire (by fax)
Mr. John Weik (by US Mail)
Lisa Kimbrough, Esquire (by fax)
Daniel Shearhouse, Clerk of the S.C. Supreme Court (by US Mail)

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)
JOHN E. WEIK,)
Plaintiff,)
vs.)
STATE OF SOUTH CAROLINA,)
Defendant.)

IN THE GENERAL SESSIONS COURT
THE FIRST JUDICIAL CIRCUIT
CASE NO. 03-CP-18-1070

AFFIDAVIT
OF MICHAEL P. O'CONNELL

1. I have reviewed Don Zelenka's email dated June 16, 2009 at 3:56 p.m. I agree that the only difference between the State and the Petitioner is whether William Gunter testified PCR hearing that Russell Weik told Mr. Gunter that he (Russell Weik) was never in Vietnam. Mr. Gunter states unequivocally in his affidavit that he so testified at the PCR hearing. Mr. Zelenka claims that he did not so testify.

2. Mr. Zelenka proffers several reasons as to why he is correct and the Petitioner is wrong.

A. Mr. Zelenka's recollection is that Mr. Gunter never testified that Russell Weik told him he (Russell Weik) was never in Vietnam. I do not accuse Mr. Zelenka of bad faith but his three (3) year old recollection is already suspect. In his original reconstruction of Mr. Gunter's testimony (sent in an email on June 10, 2009 to all counsel and this Court (attached as Ex. 1), he claimed based on his notes Mr. Gunter testifying that Mr. Gunter "had a nervous breakdown while he was in the Navy, was in E ("Echo") ward, a mental ward at the Charleston Naval Hospital. He described being in a straight jacket and later being assigned to the ward with liberties." When I took exception to Mr. Zelenka's memory about Mr. Gunter testifying that he had been in the Naval Hospital after a nervous breakdown, he agreed with my position that Mr. Gunter testified that **Russell Weik** had the nervous breakdown, etc. (attached as Ex. 2 my email to Don Zelenka and his response). Mr. Zelenka also stated in his original reconstruction that Mr. Gunter "testified he met Eddie Weik (Russell) in 1966 at a racetrack" which suggests that Mr. Gunter met the

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S.C. SUPREME COURT

Applicant in 1966 which was prior to the Applicant's birth in 1967. Moreover, there was no testimony that Russell Weik was ever referred to as "Eddie". According to his Naval Hospital Records (see Applicant's Ex 9 at the PCR hearing), Russell Weik's full name is Russell Cassell Weik. Mr. Zelenka apparently agrees that Mr. Gunter did not testify that he met the Applicant in 1966 since he does not insist that it be in the record.

3. Mr. Zelenka states that Mr. Gunter's testimony that Russell Weik told him that he (Russell Weik) was never in Vietnam is inconsistent and cannot be reconciled with the Court's "summary" at pages 56-57 of the Order where Mr. Zelenka states the "Court memorialized the Gunter testimony that Gunter said Russell never recanted his Vietnam experience". Mr. Gunter does reconcile the statements in his affidavit and his reconciliation makes sense. In paragraph 5, Mr. Gunter describes Russell Weik's claims about his clandestine activities, etc. but in the last sentence in that paragraph Mr. Gunter states that "He originally told me he had been on a minesweeper in Scotland." In the following paragraph, Mr. Gunter states "The more Russell told his stories about clandestine work for the CIA, killing people and gathering intelligence, the more Russell believed them. I knew his stories were not true from the beginning." The point Mr. Gunter makes and that he made when he testified at the PCR hearing is that Russell told him the truth about his Naval service when Mr. Gunter first met Russell but then started inventing heroic stories about himself which Russell never recanted and which Russell began to believe.

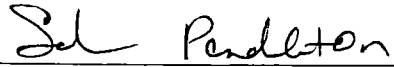
4. Mr. Zelenka states in his June 10th email "Importantly, no Rule 59 motion was made to address this finding at the time the order was entered." First of all, as I point out above, the Court's "summarization" of Mr. Gunter's testimony is not inconsistent with Mr. Gunter's affidavit so there was no reason for us to have filed a Rule 59 motion. Secondly, the Court's "summarization" of Mr. Gunter's testimony is just that. The Court did not purport to repeat Mr. Gunter's testimony verbatim. Thirdly, even if we did believe the Court's summarization was inconsistent with Mr. Gunter's testimony, there would have been no reason to file a Rule 59 motion because we did not have a transcript of Mr. Gunter's testimony and in a Rule 59 motion we would have been relying

on notes and memory. In the appeal we would have had the transcript of Mr. Gunter's testimony to point out to the Supreme Court the error of the Court's finding if we believed it was error.

FURTHER AFFIANT SAYETH NOT.


MICHAEL P. O'CONNELL

SWORN to before me this
17 day of June, 2009.


NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: 7.15-2017

Michael O'Connell

From: Don Zelenka [AGDZELENKA@scag.gov]
Sent: Wednesday, June 10, 2009 5:02 PM
To: Robert M. Dudek; Michael O'Connell; lisakimbrough@yahoo.com
Cc: pbucknerlc@sccourts.org
Subject: John Weik - Testimony of John William Bill Gunter - Zelenka Proposed Stipulated Testimony
Attachments: Testimony of William Bill Gunter.pdf

To: Michael O'Connell, Robert Dudek, Lisa Kimbrough
 cc: Ryan Waller, Judge Buckner's Clerk

Re: Proposed Stipulated Testimony of William Gunter.

i have reviewed all the available information and notes I have in the matter and I am proposing the following draft for a stipulation of the testimony that Mr. Gunter gave on September 18. Absent a stipulation i am prepared to propose this testimony in reconstruction by affidavit consistent with Whitehead v. State and China v. Parrott. the testimony is consistent with the prior order, my notes, my paralegal's notes, as well as my independent memory of his testimony. Of course I am willing to consider additional inclusions if propped by counsel from the hearing and/or Mr. Gunter's recollections. I am attaching copies in pdf.

Testimony of John William "Bill" Gunter - September 18, 2006.

John William "Bill" Gunter testified during the first day of the hearing on September 18, 2006. He testified as the last witness on that date after the conclusion of the testimony of Amy Weik Maxwell. Her testimony was completed and a break occurred prior to Mr. Gunter. This is reflected in the hearing transcript at page 170 and in the Appendix on appeal at page 2562. The direct examination was by Michael O'Connell and cross-examination by Don Zelenka. There was no re-direct and no re-cross. Court recessed at 5:30 PM.

DIRECT EXAMINATION by Michael O'Connell

John William "Bill" Gunter testified under oath that he was the brother in law of Eddie Weik (Russell) and married to his half sister Maggie. He stated that he resides in Florida and was retired from the department of transportation. He stated that Maggie Gunter was the half sister of Eddie and was the second oldest. He stated the oldest was Larry who lives in Fort Mill.

Gunter testified that he had been in the Navy in Charleston. He had a nervous breakdown and was in E ("Echo") ward, a mental ward at the Charleston Naval Hospital. He described being in a straitjacket and later being assigned to the ward with liberties.

He testified that he met Eddie Weik (Russell) in 1966 at a racetrack. He met Lillie's daughter Maggie who was 15 years old at the time. He thought she was 17 or 18 at the time. However, when he learned her age, it was too late.

Gunter stated that he stayed assigned to the ward until he separated from the Navy. He got married to Maggie after he got out. He stated that Maggie lived with Russell and Lillie after they were married.

Gunter stated that Russell told him about his service. He stated Russell told him that in his first tour, he was in Holy? ____, Scotland as a minesweeper. Russell told him that in the late seventies he was doing clandestine operations in Viet Nam. He stated that Russell told him that he would gather intelligence, search and seizures and kill people. He said he talked about it being a CIA op. He stated that in later years, Russell claimed he did undercover operations for the CIA. He stated that Russell claimed to have gone to Viet Nam many times. When asked if he believed Russell, Gunter stated to begin with, the more them (stories) the more he believed them and as time went on he believed it was true.

Gunter testified that he dated Maggie for three and ½ years (3½). He stated it was mostly through correspondence and he saw her once a year. He said that she was eighteen when they were married. He said that they left on September 3, 1969 and married in Orangeburg. Since then they have made home in Florida for thirty-seven (37) years.

He stated that he has had contact with Weik's family. He stated that he met with them at Christmas time and while on leave. He also saw them part at his home and part with Maggie in Moncks Corner.

6/17/2009

Gunter described the type of father Russell was and that he was not much of a father. He described the children being there, but that Russell would pay little attention to them. He stated that Russell would do things to toughen them up. He said Russell would take the boys outside at night in the cold dressed only in skivvies and stand at attention and have a personal inspection. He described that Russell made them march around the yard in formation. He stated that in Russell's mind these were serious.

Concerning discipline, Gunter stated that Russell was physical. He stated Weik would chastize them and beat or whip them with whatever was in his hand at the time and whatever he could find, like a fly swatter, yard stick, vehicle antenna, belt or with his fist. He described Weik hitting the children by throwing things or hitting them in the face.

Gunter described Weik's father as having a violent temper. He stated that the least thing would set him off after he was fine at one point.

Concerning firearms, Gunter stated that Weik had muzzle loader hanging on the walls. He collected and carried guns constantly. Weik claimed one of the guns belong to [General] MacArthur. He said that Weik said he had the guns for protection from the government enemies. Gunter stated that Weik felt that he had total dislike for Blacks and Jews who he felt controlled and were given everything.

Gunter stated that Weik taught children how to kill someone by taking the enemy out silently. Concerning explosives, Gunter stated that he saw several cans of dynamite in the garage. He described unwrapping a sweating stick of dynamite with nitroglycerine.

[During the earlier part of Gunter's testimony, the Applicant was not in courtroom. At this point of the testimony, Weik returns to the courtroom].

Gunter stated that the father had expressed his feelings about Blacks and Jews to this children. Gunter stated the father had never recanted his Viet Nam experiences and would swear it was the truth today.

Gunter stated that he met his wife before Eddie's birth. Gunter stated that he was home on leave when Eddie was born. However, Gunter did not recall Russell being at the hospital when Eddie was born. Gunter observed that Eddie had a different look and felt his head was larger and that he had a "hair lip," although he did not have a cleft palate. Gunter stated that he had two sons, one 34 1/2 and one 30 years old. Gunter stated that Eddie seemed to develop later (slower) than others. He stated that Eddie walked later, talked slowly and was slow to potty train. He described other family members walking at 9-10 months, but found it took Eddie longer.

Concerning Eddie's behavior as a child, Gunter stated that he appeared to do things to get attention or praise. However, Gunter found the father was indifferent and abusive and teased Eddie by calling him "Eggy" (egghead).

Gunter stated that Eddie did not relate to other kids and was teased a lot. Gunter opined the Eddie had very few friends and felt it was hard for him to make friends. He felt Eddie was a loner and teased. Gunter stated that it was hard for Eddie to keep attention on things.

Concerning Eddie's personality, Gunter stated that he seemed to have more than one. He described Eddie from going from a caring and carefree to being spooky at times. Gunter stated the least little thing would upset him and that he could not get over it.

Gunter stated that he was in Florida when Eddie was arrested. He stated that he came to S.C. for the trial. He testified that he met Eddie's lawyer about two weeks before the trial. He stated he was interviewed by Scott Parker together about two weeks before, but it could have been five (5) days before. He stated he met with them at the same time. He stated that he met in Mr. Beauford's office with Russell, Amy and maybe Chris. He stated that Lillie had called to get them together for the trial. He stated that he was initially interviewed by Scott Parker, but that Beauford came in shortly after. Gunter opined that he thought this was a late date.

Gunter stated that Beauford said that they were looking at not guilty by reason of insanity (NGRI) and at best involuntary manslaughter. He stated that they were looking if a credible witness for defense. Gunter stated that he learned that they were trying for death at that time. He stated that he did not recall any discussion about death penalty procedures. Gunter stated that he would challenge him about testimony. Beauford stated that all that would be handled on appeal and that he would get another trial and another attorney. He stated that he thought it would be NGRI and after 3 to 4 years he would then get out. Gunter stated that Beauford stated don't worry, it will be OK.

He stated that the discussions during the trial would become more downbeat and he got more defeated.

Gunter stated that his testimony was not used at trial. Gunter stated that he had known the family for years and had seen the deterioration of the family. Gunter described the conditions of the Gunter house as filth with roaches and total disrepair. He saw magazines from the 70's. He stated that the father did not care.

Gunter described that the father poked and jabbed at the children saying "Gomer got you again" when he poked them. Gunter stated that the children did not like it.

Concerning Marva Thomas, Gunter stated that he had a very brief conversation with Thomas during the trial. He stated that he later recalled an investigator who stopped in a discussion with them. He stated that she called back later and was Mrs. O'Shea. He stated that we kept wondering when we'd testify. He stated we talked with Mr. Parker.

CROSS-EXAMINATION By DON ZELENKA

When asked how often between 1966 through 1988 he spent in Moncks Corner, Gunter stated that it was a week at a time several times a year and lots of weekends. Gunter opined that the total time was at least a month a year. He stated that he initially stayed with the parents, then stayed in hotels and after 1997 stayed in an RV. Gunter stated that no one lives in the original family home now. Gunter stated that Russell Weik's new wife refused to live there. Gunter stated that "in a sense" there was running water in the house. He described Lillie going down the street and borrowing the neighbor's water and catching rain water. Gunter stated that this went on for several years. He opined there were 8 to 10 years of no running water in the 80's and 90's.

Gunter stated that he was a Mason. As to how Russell reacted, he stated that he tried to join, but was blackballed.

RE-DIRECT - there was no re-direct.

A bench conference was then held to discuss how many more witnesses and how much more time would be needed in the case.

Court was in recess at 5:30 PM. Judge Buckner stated court would reconvene at 9:30 am.

Ex 2

Michael O'Connell

From: Don Zelenka [AGDZELENKA@scag.gov]
Sent: Wednesday, June 10, 2009 6:03 PM
To: pbucknerj@sccourts.org; Michael O'Connell
Cc: Robert M. Dudek; Lisa Kimbrough
Subject: Re: FW: John Weik - Testimony of John William Bill Gunter - Zelenka Proposed Stipulated Testimony - First Corrected Version
Attachments: Testimony of William Bill Gunter.pdf

I agree with your correction and have made the appropriate changes in bold.

Testimony of John William "Bill" Gunter - September 18, 2006. (First Revision - June 10, 2009 per O'Connell email)

John William "Bill" Gunter testified during the first day of the hearing on September 18, 2006. He testified as the last witness on that date after the conclusion of the testimony of Amy Weik Maxwell. Her testimony was completed and a break occurred prior to Mr. Gunter. This is reflected in the hearing transcript at page 170 and in the Appendix on appeal at page 2562. The direct examination was by Michael O'Connell and cross-examination by Don Zelenka. There was no re-direct and no re-cross. Court recessed at 5:30 PM.

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RE-DIRECT - there was no re-direct.

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Court was in recess at 5:30 PM. Judge Buckner stated court would reconvene at 9:30 am.

>>> "Michael O'Connell" <moconnell@stirlingoconnell.com> 6/10/2009 5:41 PM >>>

From: Michael O'Connell

Sent: Wednesday, June 10, 2009 5:39 PM

To: 'Don Zelenka'

Cc: 'Robert M. Dudek'; 'Lisa Kimbrough'

Subject: RE: John Weik - Testimony of John William Bill Gunter - Zelenka Proposed Stipulated Testimony

Don: I have not fully reviewed your proffer but I do have a significant difference. Bill Gunter did not have a nervous breakdown, was never in a mental ward at the Naval Hospital, was never in a straight jacket and was never assigned to the ward with liberties. Bill Gunter was describing Russell Weik's Naval experience. He was not asked if he believed Russell's claims about his Vietnam service and his CIA experiences. He was asked if Russell believed his own claims and, as time went on and Russell repeated the same claims, Russell began to believe his own claims.

More tomorrow.

Michael

HENRY McMASTER
ATTORNEY GENERAL



June 15, 2009

RECEIVED

JUN 15 2009

S.C. SUPREME COURT

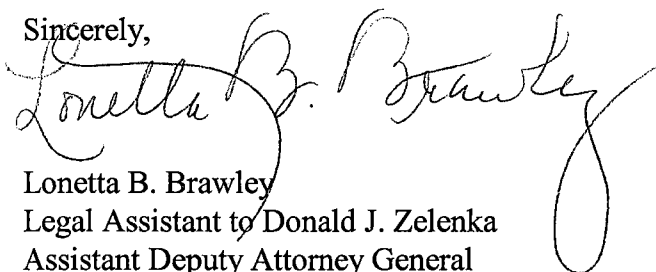
Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P. O. Box 11330
Columbia, SC 29211

Re: The State v. John Edward Weik

Dear Mr. Shearouse:

Enclosed please find the **Affidavit of Donald John Zelenka**, along with attachments, regarding the above-referenced matter. By copy of this letter, I am serving all interested parties with same.

Sincerely,



Lonetta B. Brawley
Legal Assistant to Donald J. Zelenka
Assistant Deputy Attorney General

/lbb
Enclosures

cc: Robert M. Dudek, Esquire
Michael P. O'Connell, Esquire
Melissa J. Kimbrough, Esquire
Honorable Perry M. Buckner

STATE OF SOUTH CAROLINA	)	
	)	IN THE SOUTH CAROLINA SUPREME COURT
COUNTY OF DORCHESTER	)	
JOHN EDWARD WEIK,	)	
	)	
Petitioner	)	
	)	
v.	)	AFFIDAVIT OF
	)	DONALD JOHN ZELENKA
	)	
THE STATE,	)	
	)	
Respondent	)	

PERSONALLY APPEARED BEFORE ME DONALD JOHN ZELENKA, who

being duly sworn, deposes and says that:

1. I was counsel for the Respondents and present throughout the testimony of John William Gunter on September 18, 2006 at the Dorchester County Courthouse.
2. I have reviewed my notes, the affidavit of Mr. Gunter dated June 12, 2009, the transcript of the post-conviction relief hearing and the original order denying state post-conviction relief dated March 12, 2007.
3. In Mr. Gunter's affidavit, page 2, he states:
 - "5. Russell talked about his alleged clandestine activities in the service in the 1970's. Russell told me about his actions in Vietnam including gathering intelligence, search, and seizure missions that resulted in killing people. Russell also informed me he was employed by the CIA and that he was involved in undercover operations many times in Vietnam. ***Russell told me he was never in Vietnam.*** He originally told me he had been on a minesweeper in Scotland.
 6. The more Russell told his stories about clandestine work for the CIA, killing people and gathering intelligence, the more Russell believed them. I knew his stories were not true from the beginning." (emphasis added)."
4. This statement that "Russell told me he was never in VietNam" is inconsistent with my recollection of the testimony and Judge Buckner's earlier findings concerning his

testimony. Parsing the order at page 55, the Court earlier found : "He stated Russell told him about his alleged clandestine activity in the 1970's. However, Gunter felt the more he told him, the less he believed him. (Order, p. 55 paragraph 4).

Further the Court found Gunter had testified: "**Gunter said Russell has never recanted his VietNam experience.**" Order, p. 55-56, paragraph 5.

Gunter's present affidavit, therefore is not consistent with your original order and summary of testimony and in direct contradiction of it.

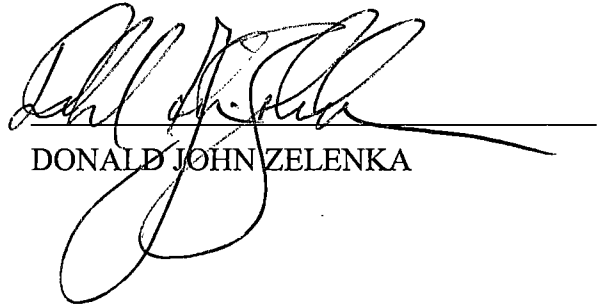
5. The original order is consistent with my notes from the proceeding and Mr. Gunter's testimony. I am attaching my notes from the proceeding to this affidavit and incorporate them by reference. Notes, page 1,2, 4. [These notes were previously provided to counsel and the court].
6. According to my recollection of Mr. Gunter's testimony, rather than a finding that Gunter testified that "**Russell told me he was never in Vietnam**" a summary of the testimony should include the following:

"Gunter stated that Russell told him about his service. He stated Russell told him that in his first tour, he was in Scotland on a minesweeper. Russell told him that in the late seventies he was doing clandestine operations in Viet Nam. He stated that Russell told him that he would gather intelligence, search and seizures and kill people. He said he talked about it being a CIA op. He stated that in later years, Russell claimed he did undercover operations for the CIA. He stated that Russell claimed to have gone to Viet Nam many times. When asked if Russell believed his claims, Gunter stated to begin with, the more Russell told them (stories) the more he believed them and as time went on Gunter thought Russell believed it was true."

"Gunter stated that the father had expressed his feelings about Blacks and Jews to this children. Gunter stated the father had never recanted his Viet Nam experiences and would swear it was the truth today."

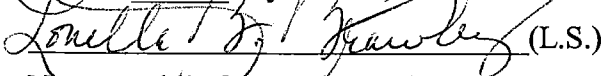
7. According to my recollection and notes, I am also attaching to this affidavit my recollection of the entirety of Mr. Gunter's testimony. However, the critical difference it the sentence set out above.

FURTHER AFFIANT SAYETH NOT.


DONALD JOHN ZELENKA

SUBSCRIBED AND SWORN TO before

me this 15th day of June, 2009

 (L.S.)

Notary Public for South Carolina

My Commission Expires: 12-5-16

SUMMARY OF TESTIMONY OF JOHN WILLIAM GUNTER BY DONALD J. ZELENKA

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Testimony of John William "Bill" Gunter - September 18, 2006.

John William "Bill" Gunter testified during the first day of the hearing on September 18, 2006. He testified as the last witness on that date after the conclusion of the testimony of Amy Weik Maxwell. Her testimony was completed and a break occurred prior to Mr. Gunter. This is reflected in the hearing transcript at page 170 and in the Appendix on appeal at page 2562. The direct examination was by Michael O'Connell and cross-examination by Don Zelenka. There was no re-direct and no re-cross. Court recessed at 5:30 PM.

DIRECT EXAMINATION by Michael O'Connell

John William "Bill" Gunter testified under oath that he was the brother in law of Eddie Weik and married to his older half-sister Maggie. He stated that he resides in Florida and was retired from the department of transportation. He stated that Maggie Gunter was the half sister of Eddie and was the second oldest. He stated the oldest was Larry who lives in Fort Mill.

Gunter testified that **Russell Weik** (father of Eddie) had been in the Navy in Charleston. **Russell** had a nervous breakdown and was in E ("Echo") ward, a mental ward at the Charleston Naval Hospital. He described that Russell had been in a straitjacket and later being assigned to the ward with liberties.

He testified that he met Russell in 1966 at a racetrack. He met Lillie's daughter Maggie who was 15 years old at the time. He thought she was 17 or 18 at the time.

However, when he learned her age, it was too late.

Gunter stated that **Russell Weik** stayed assigned to the ward until he separated from the Navy. **Gunter stated that Russell** got married to **Lillie** after he got out. He stated that Maggie lived with Russell and Lillie after they were married.

Gunter stated that Russell told him about his service. He stated Russell told him that in his first tour, he was in Scotland as a minesweeper. Russell told him that in the late seventies he was doing clandestine operations in Viet Nam. He stated that Russell told him that he would gather intelligence, search and seizures and kill people. He said he talked about it being a CIA op. He stated that in later years, Russell claimed he did undercover operations for the CIA. He stated that Russell claimed to have gone to Viet Nam many times. When asked if Russell believed his claims, Gunter stated to begin with, the more Russell told them (stories) the more Russell believed them and as time went on Gunter thought Russell believed it was true.

Gunter testified that he dated Maggie for three and ½ years (3½). He stated it was mostly through correspondence and he saw her once a year. He said that she was

eighteen when they were married. He said that they left on September 3, 1969 and married in Orangeburg. Since then they have made home in Florida for thirty-seven (37) years.

He stated that he has had contact with Weik's family. He stated that he met with them at Christmas time and while on leave. He also saw them part at his home and part with Maggie in Moncks Corner.

in file
Gunter described the type of father Russell was and that he was not much of a father. He described the children being there, but that Russell would pay little attention to them. He stated that Russell would do things to toughen them up. He said Russell would take the boys outside at night in the cold dressed only in skivvies and stand at attention and have a personal inspection. He described that Russell made them march around the yard in formation. He stated that in Russell's mind these were serious.

Concerning discipline, Gunter stated that Russell was physical. He stated Weik would chastize them and beat or whip them with whatever was in his hand at the time and whatever he could find, like a fly swatter, yard stick, vehicle antenna, belt or with his fist. He described Weik hitting the children by throwing things or

hitting them in the face.

Gunter described Weik's father as having a violent temper. He stated that the least thing would set him off after he was fine at one point.

Concerning firearms, Gunter stated that Weik had muzzle loader hanging on the walls. He collected and carried guns constantly. Weik claimed one of the guns belong to [General] MacArthur. He said that Weik said he had the guns for protection from the government enemies. Gunter stated that Weik felt that he had total dislike for Blacks and Jews who he felt controlled and were given everything.

Gunter stated that Weik taught children how to kill someone by taking the enemy out silently. Concerning explosives, Gunter stated that he saw several cans of dynamite in the garage. He described unwrapping a sweating stick of dynamite with nitroglycerine.

[During the earlier part of Gunter's testimony, the Applicant was not in courtroom. At this point of the testimony, Weik returns to the courtroom].

Gunter stated that the father had expressed his feelings about Blacks and Jews to his children. Gunter stated the father had never recanted his Viet Nam experiences and would swear it was the truth today.

128
Gunter stated that he met his wife before Eddie's birth. Gunter stated that he was home on leave when Eddie was born. However, Gunter did not recall Russell being at the hospital when Eddie was born. Gunter observed that Eddie had a different look and felt his head was larger and that he had a "hair lip," although he did not have a cleft palate. Gunter stated that he had two sons, one 34 ½ and one 30 years old. Gunter stated that Eddie seemed to develop later (slower) than others. He stated that Eddie walked later, talked slowly and was slow to potty train. He described other family members walking at 9-10 months, but found it took Eddie longer.

Concerning Eddie's behavior as a child, Gunter stated that he appeared to do things to get attention or praise. However, Gunter found the father was indifferent and abusive and teased Eddie by calling him "Eggy" (egghead).

Gunter stated that Eddie did not relate to other kids and was teased a lot. Gunter

opined the Eddie had very few friends and felt it was hard for him to make friends. He felt Eddie was a loner and teased. Gunter stated that it was hard for Eddie to keep attention on things.

Concerning Eddie's personality, Gunter stated that he seemed to have more than one. He described Eddie from going from a caring and carefree to being spooky at times. Gunter stated the least little thing would upset him and that he could not get over it.

M
2/9

Gunter stated that he was in Florida when Eddie was arrested. He stated that he came to S.C. for the trial. He testified that he met Eddie's lawyer about two weeks before the trial. He stated he was interviewed by Scott Parker together about two weeks before, but it could have been five (5) days before. He stated he met with them at the same time. He stated that he met in Mr. Beauford's office with Russell, Amy and maybe Chris. He stated that Lillie had called to get them together for the trial. He stated that he was initially interviewed by Scott Parker, but that Beauford came in shortly after. Gunter opined that he thought this was a late date to be preparing for trial.

2
#10

Gunter stated that Beauford said that they were looking at not guilty by reason of insanity (NGRI) and at best involuntary manslaughter. He stated that they were looking for a credible witness for defense. Gunter stated that he learned that they were trying for death at that time. He stated that he did not recall any discussion about death penalty procedures. Gunter stated that he would challenge him about testimony. Beauford stated that all that would be handled on appeal and that he would get another trial and another attorney. He stated that he thought it would be NGRI and after 3 to 4 years he would then get out. Gunter stated that Beauford stated don't worry, it will be OK.

He stated that the discussions during the trial would become more downbeat and he got more defeated.

Gunter stated that his testimony was not used at trial and he did not know why. Gunter stated that he had known the family for years and had seen the deterioration of the family. Gunter described the conditions of the Gunter house as filth with roaches and total disrepair. He saw magazines from the 70's. He stated that the father did not care.

Gunter described that the father poked and jabbed at the children saying "Gomer got you again" when he poked them . Gunter stated that the children did not like it.

Concerning Marva Thomas, Gunter stated that he had a very brief conversation with Thomas during the trial. He stated that years later, he later recalled an investigator who stopped in a discussion with them. He stated that she called back later and was Mrs. O'Shea. He stated that we kept wondering when we'd testify. He stated we talked with Mr. Parker.

CROSS-EXAMINATION By DON ZELENKA

When asked how often between 1966 through 1988 he spent in Moncks Corner, Gunter stated that it was a week at a time several times a year and lots of weekends. Gunter opined that the total time was at least a month a year. He stated that he initially stayed with the parents, then stayed in hotels and after 1997 stayed in an RV. Gunter stated that no one lives in the original family home now. Gunter stated that Russell Weik's new wife refused to live there. Gunter stated that "in a sense" there was running water in the house. He described Lillie going down the street and borrowing the neighbor's water and catching rain water. Gunter stated

that this went on for several years. He opined there were 8 to 10 years of no running water in the 80's and 90's.

Gunter stated that he was a Mason. As to how Russell reacted, he stated that he tried to join, but was blackballed.

RE-DIRECT - there was no re-direct.

A bench conference was then held to discuss how many more witnesses and how much more time would be needed in the case.

Court was in recess at 5:30 PM. Judge Buckner stated court would reconvene at 9:30 am.

POST-CONVICTION RELIEF HEARING NOTES - SEPTEMBER 18, 2006 related to John
William Gunter

Donald J. Zelenka
Assistant Deputy Attorney General

15
8/13

Jan
William Gunter
"Bill"

- Brother in law of Eddie Weik.
- From Long Flor.
- Maggie Gunter - 12 sister of Eddie
 - oldest is Mary (Ford Mill)
- 1st met ~~Eddie~~ Russell Weik in 1966.
 - Russell had been in Navy in Charleston & ^{had} ~~had~~ a nervous breakdown - E. - Ward.
 - Strait-jacket -
 - re-assigned to ward w/ libertines.
- met ~~him~~ at Ruedrich in 1966
 - Lillie's daughter.
 - "Jim" knew before
 - She was 15 at time; Russell was 17/18
 - at that time $\Rightarrow$ too late.
- Russell when got out of hospital
 - he stayed assigned to Ward until separated.
 - got married after he got out.
- Maggie living w/ Lillie & Russell after marriage
 - He died in 1st term
 - Holy Loch Island - marriage.
 - Russell told him in

M
11/4

late 70's doing clandestine ops
in Viet Nam.

- He explained he would gather intelligence; seaches + Kellys
- He talked about it being a CIA op.
- In later yrs claimed undercover op for CIA
- Over yrs → Russell claimed large amt. of time.

To begin with, the more he told
Heron (stories) the more he
believed them

- Dated Maggie - 3 yrs → correspondence
J. saw once / this yr
- 18 when married.
- Left Sept. 3, 1969 - married in O'by
a home in Flor. ever
since.

Contact w/ Wife's Family:

- Christmas Time home
- part at home + part w/ Maggie in North Carolina

Russell + Children

What kind of Father? → Children there, but
paid little attention. Thompson +

toughen them up. Took boys outside + he
in - Scrimis + stand at attention; personal
inspection (P.I.) - Made them march around
yard - in Russell's mind thought scums.

- Physical
- Chastise / beat a whip with whatever
in hand at time.

- fly swatter, yard stick
antenna, belt, ~~thing~~
Brown things, hit in
face.

(Faber)

- He had a violent temper
- Pattern to set him off -
fine at the pt.
- Firearms - Messge leaders on walls.
 - one claimed own by McArthur.
 - Messge object guns.
- Said had guns for protection
ag. Sub's enemies
- total dislike for Blacks / Jews -
- Target Children - how to kill ~~more~~ silently
- Explosives - saw several cases of dynamite
in garage; had several cases.
 - He unwrapped a sweating stick of
dynamite sweating.

B
etc.

Feeling about Blacks / Jews - expressed to children

- Never recalled Viet Nam experience - will never
+ with today.

- met wife prior to Eddie's Birth.

Eddie

- home on leave her under
Eddie born

- did not recall Russell at hospital.

Observations

1. He had a sufficient look.

- head larger.

- had a hairlip +
did not have a clear
pullet.

- ~~walk~~

- Eddie seemed to develop later
than other

- walk later

- talk orally.

- other family walked 9-10 months.

- took Eddie longer.

B
A17.

34 years old
30 years old
10 months.

His Children

- I don't remember
- clothes - potty trained.

Behaviour as Child

- appeared to do things to get attention or praise.
- Father was indifferent.
- Father teased him "Eggy"

Eddie

- did not relate to other kids
- he was teased a lot.
- He had very few friends
 - need for him to make friends
 - lone
 - teased
 - need neighbourhood friends

1/18

→ hard to keep attention in meetings.

Eddie his personality.

- go from caring + carefree

- to spooky individual.

- least

- In Florida when Eddie arrested

- Came up for trial

- met Eddie's lawyer about 2 weeks before trial.

- interviewed w/ Scott Packer

- interviewed together about 2 weeks, ~~or~~ could be 5 days before

- met w/ them at one time.

In Mr. Beaupre's office

- Russell, Amy, maybe Chris

- Little called to get them together for trial + interviewed by Scott Packer, but ~~not~~ Beaupre in shortly

involuntary

- Beauford said looking at NGR1 + at least manuscripts to see if credible evidence for life
- learned & yes for "death" at that time.
- (I do not recall discussion of death penalty) procedure

- Beauford did not ask
- Beauford at Court about challenge testimony in appeal + got another trial.
- After a round in Court
- bought NGR1 - 3 1/4 yrs + he got out.
- Appealed + done over again w/ another Atty.
- Dis discussion occurred during trial + he got more deflated.
- Did not have his testimony used and exposed quite a bit.
- saw detentions of family.

Conditions of Wick House

- Filth + junk; magazines from 70's
- filthy -

Children did not like being poked or jabbed.

- Saw "Yome" get up again when poked jabbed.

• had brief conversation w/ Maria Hendo
Thomas.

• Heard about another kidney injury
- she suddenly stopped
then called later.

M
2/1.

POST-CONVICTION RELIEF HEARING NOTES - SEPTEMBER 18, 2006 related to John
William Gunter

Elaine H. Shirley
Paralegal with Attorney General's Office

MS

"Bill"
John William Gunter (Brother in Law: married
to sister, ^{Half-}Maggie)
Reside in Florida - DOT retired.
(Maggie 2nd oldest)

Met the Father in 1966 @ Raceway -
He was in Navy (Chas) - mental ward
@ Chas Navy Hosp.
Maggie was 15

M3
#20 Dad's status in Navy? Discharged? NO

Married to Lillie? Shortly after.

Russell tell you about his service?

Scotland - a "minesweeper"

Late 70's - clandestine operations

What'd he do in Vietnam? Search +
Seizure; Kill people

CIA? Yes.

Employed by CIA? Yes, an U/K op.

Times to Vietnam? Many Times.

Did he believe what he was saying?

No time went on, he believed it was true.

3 1/2 yr courtship (she was 18) -

Left 1969 to Orangelg

Florida for 37 yrs. now.

Contact w/ Weik families? Yes

After married, did you + Maggie visit the Weik home? Yes

Observed?

Russell wasn't much of a father; he did things to "toughen them up". Took the boys out in the cold at night; make them stand at attention; march in formation, etc.

Discipline?

Beat them, whipped them w/ whatever he could find. flyswatter, vehicle antenna, belt, fist - Violent - least thing would set him off.

firearms? Yes, real guns hanging on the wall. He collected/ carried guns constantly.

Why? for protection from the govt. Blacks, Jews controlled + were given everything.

Taught kids how to kill someone; "take an enemy out".

Stored dynamite in his garage.

"Orwell," dynamite w/ nitroglycerin

(L. returns to courtroom.)

you met family prior to Eddie's birth? yes

When Eddie was a child

was Russell at hospital when Eddie born?

NO

→ why was he different?

Head was larger; + "hair lip"

Developed slower than other children

2 sons: 34 1/2 yr. - } developed normally
30 yr. - }

Eddie: slow to talk

slow to walk

slow to potty train

He craved attention & praise; father was indifferent; abusive

Called him "EGGY" (egghead)

teen years, friends? very few.

Hard for him to make friends; loner.

Jealous as a child.

Couldn't keep attention on things

2046
- 1969
= 37

Personality? He seemed to have more than one.

Caring at times -

Spooky at times -

Least little thing would upset him;
couldn't get over it.

Were you here for trial? (yes)

Interviewed few days before trial
by Scott Parker

met defense team few days before trial
Thought it was a rather late date.

Beauford talk to you about DP?

I would challenge him about testimony;
Beauford said ~~that~~ all of that will be
handled on appeal; he'll get another trial.

Don't worry. It'll be OK.

Each day, he got more + more
"down beat".

Didn't need my testimony - why?

I'd known the family for years -
had seen the deterioration.

Condition of Weik house? filth.

Roaches; total dis. repair; didn't ^{father} care.

Father poked + jabbed @ the kids, they didn't like it.

Discussions w/ Hardee Thomas? very briefly during trial.

Recall an investigator? Mrs O'Shea talked w/ us much later.

We kept wondering when we'd testify - we talked w/ Mr. Parker.

CROSS:

1966-1988

How many days/years did you spend in Moncks Corner? a week at a time several x year; lots of weekends.

Total at least a month a year

you stayed w/ mom + dad? yes - then stayed at hotels.

1997- stayed in RV.

Who lives in original home now? no one. New wife refused to live there.

Running water back then? in a sense.

Lillie went down the street + borrow neighbor's water; catch rain water.

How long? several years.

8 - 10 years of no running water.
(80's + 90's)

Mason? Yes,

How did Russell react? He tried to join,
but he was blackballed.

NO Re-direct. NO Re-cross.

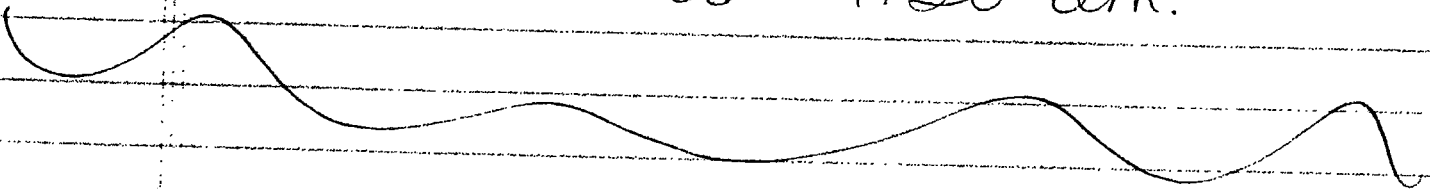
(Witness excused.)

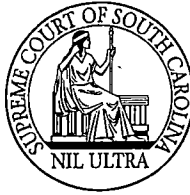
M-8
41

{ Bench conference to determine how
many more witnesses; how much
more time needed - }

Court in recess at 5:30 pm.

Re-convene at 9:30 am.





The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

June 3, 2009

The Honorable Perry M. Buckner
101 Hampton Street
P O Drawer 470
Walterboro, SC 29488-0470

Re: Weik, John Edward v. State

Dear Judge Buckner:

Enclosed is the order issued in the above entitled matter.

Very truly yours,

CLERK

DES/dmh

Enclosure

cc: Deputy Chief Appellate Defender for Capital Appeals Robert M. Dudek
Assistant Deputy Attorney General Donald J. Zelenka

The Supreme Court of South Carolina

John Edward Weik, Petitioner,
v.
State of South Carolina, Respondent.

ORDER

By order dated May 8, 2009, we remanded this matter to the Honorable Perry M. Buckner, III, for reconstruction of the record of the testimony of William “Bill” Gunter from the hearing on petitioner’s application for post-conviction relief. The order states Judge Buckner is to hold a hearing to reconstruct the record of the testimony within thirty days of the order remanding the matter.

Judge Buckner has notified the Court that an extension of time has been sought to procure the presence of the witness. We hereby authorize Judge Buckner to grant a limited extension, in his discretion, to procure the presence of the witness. However, we take this opportunity to remind those involved that the purpose of the remand is to *reconstruct* the testimony of the witness, not to have him re-testify. As our previous order stated, Judge

Buckner may consider affidavits of counsel and the court reporter, *among other things*, to reconstruct the lost testimony. The hearing required by our previous order is to determine if the lost testimony can be reconstructed. If it is determined at such a hearing that the witness cannot be located and the lost testimony cannot be reconstructed by other means, Judge Buckner shall inform this Court that reconstruction is not possible and this Court will determine the proper course of action to be taken thereafter.

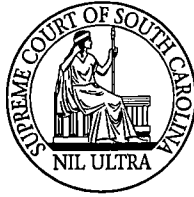
IT IS SO ORDERED.



C. J.
FOR THE COURT

Columbia, South Carolina

JUN 03 2009



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

May 8, 2009

Deputy Chief Appellate Defender for Capital Appeals
Robert M. Dudek
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Assistant Deputy Attorney General Donald J. Zelenka
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Re: Weik, John Edward v. State

Dear Counsel:

Enclosed is the order issued in the above entitled matter.

Very truly yours,

CLERK

DES/dmh

Enclosure

cc: The Honorable Perry M. Buckner



HENRY McMASTER
ATTORNEY GENERAL

May 8, 2009

RECEIVED

MAY - 8 2009

S.C. SUPREME COURT

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P. O. Box 11330
Columbia, SC 29211

Re: John Weik v. State
Dorchester County Death Penalty PCR Appeal

Dear Mr. Shearouse:

I am in receipt of a May 4, 2009 letter from Ms. Desiree Allen concerning the missing portions of the transcript from Mr. Weik's post-conviction relief hearing. In light of the conclusions that no further court reporter records exist and the fact that the entire testimony of Mr. William "Bill" Gunter, a witness for Mr. Weik is not included in the record, as provided, I would request a remand to the Honorable Perry Buckner for the purpose of reconstructing the record.

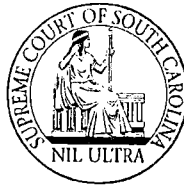
I regret this step in an already lengthy process, but consider it necessary to preserve the integrity of the original order of Judge Buckner, who advised Mr. Varner's testimony, and the integrity of the proceedings.

Sincerely,

Donald J. Zelenka
Assistant Deputy Attorney General

DJZ/lbb
Enclosure

cc: Honorable Perry M. Buckner
Robert M. Dudek, Esquire



South Carolina Court Administration

South Carolina Supreme Court
Columbia, South Carolina

ROSALYN FRIERSON
DIRECTOR

MARY S. SCHROEDER
DEPUTY DIRECTOR

ATTORNEY GENERAL'S OFFICE
RECEIVED 5-6-09
ADMINISTRATIVE INSTRUCTIONS
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1015 SUMTER STREET, SUITE
200
COLUMBIA, SOUTH
CAROLINA 29201
PHONE: (803) 734-1800
FAX: (803) 734-0269

May 4, 2009

Donald J. Zelenka
Assistant Deputy Attorney General
Office of Attorney General
P.O. Box 11549
Columbia, SC 29211-1549

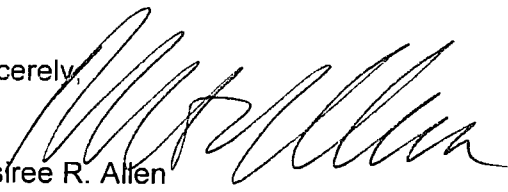
In re: State v. John E. Weik

Dear Mr. Zelenka:

This is in follow-up to the letter dated April 17, 2009, from Ms. Harriett Bennett. She asked me to check our records to determine if a tape from September 18, 2006 was contained among the records delivered to us by Ms. Robin (Keil) Davis. As you know, Ms. Davis is no longer employed by the Judicial Department. Our office retains the records of court reporters that leave our employ.

After a thorough search of court reporter records and tapes in storage on more than one occasion, we have determined that these records and tapes were not among those delivered to this office. Please contact me if I may be of further assistance to you.

Sincerely,


Desiree R. Allen
Program Manager

CC: The Honorable Daniel E. Shearouse, Clerk, S.C. Supreme Court
Robert M. Dudek, Esq., S.C. Office of Indigent Defense

RECEIVED

MAY - 8 2009

S.C. SUPREME COURT

The Supreme Court of South Carolina

John Edward Weik, Petitioner,
v.
State of South Carolina, Respondent.

ORDER

This matter is before the Court by way of a notice of appeal from an order denying petitioner's application for post-conviction relief. Petitioner has filed a petition for a writ of certiorari and appendix.

However, in preparing a return to the petition, counsel for the State discovered significant portions of testimony are missing from the transcript of the hearing on petitioner's PCR application, specifically the testimony of Dr. Donald Morgan and William "Bill" Gunter. Accordingly, this matter was held in abeyance while an attempt was made to resolve the defects in the record. A transcription of Dr. Morgan's testimony was obtained; however, the tapes containing Mr. Gunter's testimony could not be located. Counsel for the State therefore submits the matter should be remanded for reconstruction of the record of Mr. Gunter's testimony.

This matter is remanded to the Honorable Perry M. Buckner, III, for reconstruction of the record of the testimony of William "Bill" Gunter from the hearing on petitioner's PCR application. See Whitehead v. State, 452 S.C. 215, 574 S.E.2d 200 (2002); see also China v. Parrott, 251 S.C. 329, 162 S.E.2d 276 (1968). Judge Buckner may consider affidavits of counsel and the court reporter, among other things, to reconstruct the lost testimony. China v. Parrott, supra. Judge Buckner shall hold a hearing to reconstruct the record of the testimony within thirty days of the date of this order. If Judge Buckner determines reconstruction is not possible, this Court and the parties shall be notified within fifteen days of the date of the reconstruction hearing. If the record of the testimony is reconstructed, the parties shall notify this Court and the appeal will proceed.

IT IS SO ORDERED.


C. J.
FOR THE COURT

Columbia, South Carolina

May 8, 2009

HENRY McMASTER
ATTORNEY GENERAL



RECEIVED

MAY - 1 2009

May 1, 2009

S.C. SUPREME COURT

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P. O. Box 11330
Columbia, SC 29211

Re: Weik, John Edward v. State
Omissions in State Post-Conviction Relief Hearing Transcript

Dear Mr. Shearouse:

This is a response to the April 1, 2009 letter holding this matter in abeyance and giving counsel and Court Administration the opportunity to resolve any potential defects in the record. Unfortunately, only one of the two deficiencies has been resolved.

1. Testimony of Dr. Donald Morgan

On April 20, 2009, I received from Court Reporter Harriet Bennett pages 110-1 through 110-27 which includes the missing testimony of Dr. Morgan. A copy of the record and transmission is attached.

2. Testimony of William "Bill" Ganter

Unfortunately, at this time it appears a remand for reconstruction of the record will be necessary. I have not heard from Court Administration they have been successful in locating the missing tape. However, Ms. Bennett informed me that this tape had not been sent to her previously. She advised me on April 16 and 17 that she was still checking with Court Administration concerning the matter.

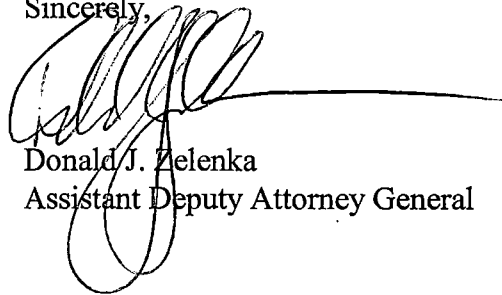
Honorable Daniel E. Shearouse
May 1, 2009

Page -2-

In light of this omission, I believe a remand to reconstruct the record of Mr. Ganter's testimony would be necessary.

Please advise.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Zelenka', with a long horizontal line extending to the right.

Donald J. Zelenka
Assistant Deputy Attorney General

DJZ/lbb

Enclosures: April 17 Letter - Bennett
Transcript, pages 110-1 through 110-27

cc: Robert M. Dudek, Esquire
Honorable Rosalyn Frierson
Desiree Allen, S.C. Court Administration
Honorable Perry M. Buckner

HARRIET P. BENNETT
P. O. Box 86
Ladson, S. C. 29456

April 17, 2009

Donald J. Zelenka, Esq.
Assistant Deputy Attorney General
P. O. Box 11549
Columbia, S.C. 29211 1549

IN RE: John E. Weik v. State
2003 CP 18 1070

Dear Don:

Attached are pages 110-1 through 110-27, which I would ask that you insert at the proper place in the transcript of record of the above hearing.

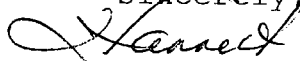
As I told your paralegal on yesterday, upon checking I found that I did indeed skip the B side of the tape when I prepared the record (beginning at page 110, in the direct examination of Dr. Morgan).

I cannot apologize enough for the confusion that has caused you and Appellate Defense, and I have no earthly idea how I could have done this. I don't believe this has occurred before or since.

By copy of this letter, I am enclosing a copy of these pages as well to Appellate Defense.

The other question you had concerning the testimony at the end of the Court day of September 18, 2006, I do not have. This tape was not sent to me by Robin Keil when she asked me to prepare this record for her. I have asked Ms. Allen at Court Administration to check and see if perhaps it was contained with the other records that Robin turned in to her for storage. I will let you hear about this as soon as I can.

Sincerely,



copy to Appellate Defense
copy to Ms. Desiree Allen.

ATTORNEY GENERAL'S OFFICE
RECEIVED 4-20-09
ADMINISTRATIVE INSTRUCTIONS
____ FILE ____ OPEN ____ END
____ HAVE ____ COPIES MADE
____ ROUTE TO ____
____ ORDER: ____ TRANSPORT
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____ OTHER: ____

1 or not he was competent to stand trial?

2 A. That happened here in this Court.

3 Q. And I don't know if Judge Buckner is familiar with
4 you, but I am. You have testified both for the State
5 and for the Defense on the issue of competency?

6 A. Yes.

7 Q. Now, I want to direct your attention back to the
8 -- to 1999. Did you have an opportunity to meet with
9 the defense lawyers prior to your testimony?

10 A. No.

11 Q. Now, when do you think you began testifying in
12 death penalty cases in South Carolina? Just approxi-
13 mately?

14 A. The first one I can remember is Larry Gene Bell,
15 and I don't know when that was.

16 Q. All right. Was there a time -- did there come a
17 time in your experience in testifying in death penalty
18 cases that lawyers began to meet with you and other
19 mental health physicians and personnel prior to the
20 trial?

21 A. Well, even in that case I met with Mr. Swerling for
22 about an hour, but things have evolved so that generally
23 all of the people involved in the case have at least
24 one meeting so that we know what the others have found
25 out or what they are doing and what kind of strategy

1 might be helpful.

2 Q. And typically who would have been at those meet-
3 ings that you had?

4 A. Typically it would be a lawyer, a psychologist, the
5 investigators, or probably two lawyers, the lead lawyer
6 and the assistant, and any mental health experts.

7 I review medical examinations, including MRIs and
8 generally an EEG.

9 Q. In this case, you got involved in 1999. I'm
10 sorry.

11 Before I go there, you said over time the practice
12 as you have experienced in preparing your testimony for
13 trial has evolved.

14 Do you think it has become standard for you to
15 have the meetings you have described in death penalty
16 cases prior to trial?

17 A. Well, usually prior to any testimony I give.

18 Q. I'm sorry, but at what point in time from the time
19 you first testified to date, when do you think it became
20 standard to have meetings between experts and lawyers
21 and the investigators?

22 A. From my own experience, I would say in the mid-
23 eighties.

24 Q. In this case, did such a meeting occur?

25 A. No.

1 Q. In this case, did you repeat your direct examina-
2 tion?

3 A. Right.

4 Q. Was it a man or woman?

5 A. It was a man.

6 Q. Do you happen to remember his name?

7 A. No, I don't remember his name.

8 A. Did you ever talk to him before you got up on
9 this witness stand and testify?

10 A. No.

11 Q. Did you talk with his co-counsel?

12 A. We talked briefly with his co-counsel. I didn't
13 talk much but Dr. Watts really felt that Dr. Brannon
14 should be called, and she took care of that.

15 Q. What was the substance of the conversation with
16 the woman lawyer who represented Mr. Weik in 1999?

17 A. . .

18 Q. Was it substantive about this case, or was it
19 about administrative matters and getting another expert
20 . .

21 A. It was only about getting another expert. I was
22 only sitting there. I didn't really participate in
23 that.

24 Q. Did she ask you at all about your proposed or ex-
25 pected testimony?

1 A. No.

2 Q. Did you have an opportunity to review any investi-
3 gative reports the mitigation investigators had prepared?

4 A. No.

5 Q. Then in 1999?

6 A. No.

7 Q. When you went on the stand, did you know what you
8 were going to be asked?

9 A. No.

10 Q. Now, in preparation for today, what materials did
11 you review?

12 A. I reviewed his father's naval discharge. I reviewed
13 Dr. Rodgers' testimony, Drs. Crawford, Watts, McKee,
14 Shea, Brannon, Berman, and my own.

15 In terms of investigative reports, there were many,
16 many reports, and I had those.

17 Q. All right. Were there reports from 1999?

18 A. Yes.

19 Q. And they were reports that were generated as a
20 result of this case?

21 A. Yes.

22 Q. Now, the reports that you reviewed in preparation
23 for today, that existed in 1999, if you had seen them
24 -- and I'm talking about investigative reports plus
25 Mr. Weik's father's reports from the Naval Hospital, tell

1 me what difference that would have made in your testi-
2 mony, if you had had those records available to review
3 in 1999?

4 A. Well, it certainly would have bolstered my opinion.
5 His father left the service with a diagnosis of schizo-
6 phrenia, and Dr. Watts and I both felt that he had
7 schizophrenia.

8 Q. You didn't know that in 1999, did you, that his
9 father was discharged . .

10 A. No.

11 Q. So what difference would it have made in that par-
12 ticular aspect, had you known his father had a diagnosis
13 of schizophrenia when you testified in 1999?

14 A. I could have explained the genetic component of
15 schizophrenia.

16 Q. Explain that to the Court, the genetic component
17 of schizophrenia.

18 A. We're not sure how much it is, but there is clearly
19 a genetic component to schizophrenia.

20 Only about two percent of the population has schizo-
21 phrenia but if you have a sibling or a parent, the
22 chances are greatly increased that you would have
23 schizophrenia.

24 Q. All right, sir. Now, aside from that, is there any
25 other difference that you can think of that it would

1 have made in your testimony in 1999 if you had what
2 existed in 1999 that had been prepared by the investi-
3 gators in this case?

4 A. . .

5 Q. I'm talking about anything that would have changed
6 or assisted with your testimony?

7 A. Well, I certainly think that we could have impeached
8 the State's psychiatrist.

9 Q. Talk to me about that.

10 A. I . .

11 Q. Well, first of all, I want you to include in that
12 question what difference it would have made had you been
13 able to speak with the lawyers that represented Mr.
14 Weik at any time substantively other when when you were
15 in this Courtroom.

16 A. Well, I hopefully could have educated them about
17 a way to ask me questions that would help me explain to
18 the jury my findings.

19 Q. All right. Now, I want you to address yourself to
20 both the issue of competency and the issue of your tes-
21 timony in the penalty portion of the trial?

22 A. I don't think I can testify to that. I testified
23 to the case in chief.

24 Q. All right, sir. There was -- was there testimony
25 of one of the psychiatrists or psychologists, or more

DR. MORGAN ON DIRECT

1 than one, that testified for the State that you ques-
2 tioned or believed was wrong?

3 A. I believed the diagnosis was wrong.

4 Q. All right.

5 A. I thought that the Defendant suffered from paranoid
6 schizophrenia. They insisted that he had a schizoid
7 personality.

8 One of the main reasons that they gave for coming
9 to that conclusion was that his social life did not
10 deteriorate.

11 That is not a requirement when you're talking about
12 paranoid schizophrenia. Many people with paranoid
13 schizophrenia work every day.

14 Q. Do you recall who was testifying that there was no
15 determination of his functioning prior to the time the
16 shooting occurred?

17 Do you recall which one of the mental health ex-
18 perts testified to that?

19 A. I think it was Dr. Shea but I am not sure.

20 Q. The fact that the deterioration function is not one
21 of the criteria for schizophrenia, is that in the DSM, the
22 Diagnostic and Statistical Manual?

23 A. Yes, and there is a section in there that says gen-
24 erally people with schizophrenia have a downward
25 course; that is, they do deteriorate, but with paranoid

DR. MORGAN ON DIRECT

1 schizophrenia that is not true.

2 Q. That is not true?

3 A. That is not true.

4 Q. Now, the testimony from the State's psychiatrist
5 in 1999 was that Mr. Weik -- his diagnosis was that he
6 had a schizotypal personality disorder?

7 A. Right.

8 Q. Can you explain to the Judge what that is and whe-
9 ther it is considered to be a major mental illness?

10 A. It is an Axis Two diagnosis.

11 Q. What is an Axis Two diagnosis?

12 A. A personality disorder as well as mental retardation
13 is not an Axis Two. I can't remember right now -- I
14 brought the book but I cannot remember -- there are five
15 or at least five on the whole list of things . .

16 Q. Would you like to refer to the DSM?

17 A. I'd rather use the TR, if I could get it.

18 THE COURT: Have a seat. They'll bring it to you,
19 Doctor.

20 (Brief pause in the proceeding)

21 BY MR. O'CONNELL:

22 Q. Doctor, I'm handing you a publication. What is
23 that?

24 A. This is a Diagnostic and Statistical Manual, the
25 Fourth Edition, text revised.

1 Q. All right. Is that a text that is recognized by
2 psychiatrists and psychologists?

3 A. Yes. It is the manual of mental disorders. It
4 is the manual.

5 Okay, for schizotypal personality, you have to have
6 a pervasive pattern of social and inter-personal defi-
7 cits marked by acute discomfort which can reduce capacity
8 for close relationships, as well as cognitive inter-
9 stipual distortions or eccentric behavior beginning in
10 early adulthood and present in a variety of contexts,
11 as indicated by five or more, and then there is nine
12 things to choose from.

13 And it does not occur in the course of schizophrenia
14 or a mood disorder with psychotic features.

15 (Witness reading rapidly from DSM Manual)

16 I can read these to you if you want me to do it,
17 but no where in there is there delusions and hallucina-
18 tions.

19 Q. You're talking about for . .

20 A. Schizotypal personality.

21 Q. Which was whose diagnosis?

22 A. The diagnosis the State offered, and there are ex-
23 perts who specifically mentioned that he heard voices
24 and had a delusion.

25 So that -- you can't have it both ways.. Either

1 they can't have that or you've got to call it schizo-
2 phrenia.

3 Q. I think you just mentioned this and I want to make
4 sure. On the issue of delusions, a schizotypal does not
5 have these?

6 A. They do not have delusions.

7 Q. And the testimony you reviewed about whether he was
8 having delusions in 1999 was what?

9 A. . .

10 Q. Not the testimony but your own examination.

11 A. My own examination -- the State mentioned it.

12 Q. If you had had the opportunity-- were you present
13 when the State psychologist, psychiatrist testified?

14 A. I was present when Dr. Behrman and Dr. Shea and
15 Dr. Crawford testified.

16 Q. I think those were the three who testified for the
17 State.

18 Would the fact that you pointed out to defense law-
19 yers that the State's testimony did not meet the cri-
20 teria for schizotypal personality disorder -- is it your
21 testimony that you could have pointed it out?

22 A. Yeah, if I had had an opportunity, I certainly
23 would have.

24 We could have then prepared some impeachment of the
25 State's witnesses.

1 Q. Would one of your efforts to impeach have been to
2 show the State psychiatrists and psychologists the DSM
3 Fourth?

4 A. Right. The criteria did not change. Just the text
5 has changed.

6 Q. I think I've asked this question but I am not sure
7 I understood the answer.

8 Is schizotypal personality disorder a major mental
9 illness?

10 A. In terms of -- they say, no, it is not a major men-
11 tal illness, but some schizotypal people are very im-
12 paired in terms of their interactions with other people
13 and in terms of their ability to work.

14 Q. Are these people who are or have schizotypal per-
15 sonality disorder, is that exclusive from paranoid
16 schizophrenia? Do you have to have that one and not
17 the other?

18 A. No, you can have both, but once you start having
19 delusions and hallucinations then the schizotypal person-
20 ality is secondary.

21 MR. O'CONNELL: Excuse me one second, Your Honor.

22 (Brief pause in the proceeding)

23 BY MR. O'CONNELL:

24 Q. Have you ever talked with the defense lawyers since
25 1999?

DR. MORGAN ON DIRECT

1 A. About this case?

2 Q. Yes.

3 A. I did in another case, but not in this case.

4 Q. You did another case for the Public Defender?

5 A. Correct.

6 Q. Marva Hardee-Thomas?

7 A. Correct. In that case, the lead lawyer had a three
8 hour meeting with all of us involved.

9 Q. All right. Do you remember who that was?

10 A. No.

11 THE COURT: Anything further?

12 MR. O'CONNELL: Yes, sir.

13 BY MR. O'CONNELL:

14 Q. Do you remember anything specific about interviews
15 with family members in 1999 that would have assisted you
16 in your testimony, had you seen them?

17 A. Had I seen them?

18 Q. Yes, sir.

19 A. Well, certain behavior on the part of the father
20 and the amount of abuse which the mother -- the mother
21 gave a social history to the State in which she blatantly
22 denied any physical or emotional abuse.

23 Yet when you -- it was clear that that happened.

24 Q. What difference would that have made or what im-
25 pact does the abuse that you now know about have had

DR. MORGAN ON DIRECT

1 on your testimony?

2 A. Again, it would bolster my testimony, and I think
3 it should have been brought out in front of the jury,
4 and it would have impeached the State's psychiatrist.

5 Q. What difference would it have made -- what differ-
6 ence would physical or emotional abuse have made to a
7 diagnosis of paranoid schizophrenia?

8 A. It is not necessary.

9 Q. But does it reenforce the diagnosis?

10 A. Yes. Yes, it certainly can reenforce it.

11 Q. Thank you, Dr. Morgan. Please answer any ques-
12 tions Mr. Zelenka may have for you.

13 THE COURT: Cross examination.

14 MR. ZELENKA: Thank you, Your Honor.

15 CROSS EXAMINATION

16 BY MR. ZELENKA:

17 Q. Dr. Morgan, you became involved in this case about
18 the end of April of 1999. Is that correct?

19 A. I don't remember. It was shortly before the case
20 went to trial.

21 Q. Dr. Morgan, let me ask you to see if you can iden-
22 tify that document.

23 A. Yes.

24 Q. What is it?

25 A. This is a bill that we sent to the Public Defender.

DR. MORGAN ON CROSS

1 Q. Is that your bill?

2 A. This is my bill.

3 Q. And does that bill indicate when you first became
4 involved with the case?

5 A. . .

6 Q. April 30, 1999?

7 A. It was probably several days before that.

8 Q. And that is when you had your contact with Ms.
9 Schwartz-Watts?

10 A. Right.

11 Q. Did you ever review at that time the records that
12 Dr. Schwartz-Watts had?

13 A. No.

14 Q. You never saw her records?

15 A. No.

16 Q. She brought you into the case essentially?

17 A. Correct.

18 Q. Now, the second item on that bill, I believe, is a
19 trip to St. George?

20 A. No, that's the first item on the bill.

21 Q. Okay, what's the second item?

22 A. Interview with Mr. Weik.

23 Q. And what date was that interview?

24 A. May first.

25 Q. May first -- okay. The next item on that bill?

DR. MORGAN ON CROSS

1 A. The next item is review of records, one hour.

2 MR. ZELENKA: Court's indulgence. I got ahead of
3 myself. I apologize.

4 Your Honor, we would move to enter this.

5 THE COURT: Any objection?

6 MR. O'CONNELL: No objection.

7 THE COURT: Number 2, Don?

8 MR. ZELENKA: I believe it will be Number 3.

9 (Dr. Morgan's bill admitted in evidence without
10 objection as Respondent's Exhibit 3)

11 BY MR. ZELENKA:

12 Q. And is . .

13 THE COURT: Respondent's Exhibit 3 will be admitted
14 into evidence without objection as Respondent's Number
15 3. You may proceed.

16 Q. All right.

17 A. The last item you were discussing was for your in-
18 terview of Mr. Weik?

19 A. That's the second item.

20 Q. When did that occur?

21 A. May first.

22 Q. Okay, and the next item is a review of the record,
23 is that correct?

24 A. Correct.

25 Q. What date did that happen, your review of the records?

110-15

1 A. May third and fourth.

2 Q. That would be one hour review of records?

3 A. Correct.

4 Q. And what records would you have been reviewing at
5 that time?

6 A. I can't remember. I don't know.

7 Q. You spent an hour reviewing some records?

8 A. Right.

9 Q. But you can't recall what they were?

10 A. No.

11 Q. Do you recall who you got those records from?

12 A. I don't know. I can't recall that.

13 Q. Okay. What is the next item on the bill?

14 A. It says the 5th -- May 5, 1999. A hearing, and I
15 think that was a competency hearing.

16 Q. And after the competency hearing, what is next?

17 A. I came here to interview Mr. Weik again.

18 Q. Did that interview-- are you sure that was with
19 Mr. Weik and not with the lawyers?

20 A. I am positive that was not with the lawyers.

21 Q. And your next billing item?

22 A. It was a hearing on the 18th, May 18th. A hearing
23 and a trip and that's when I think I listened to part
24 of the . .

25 Q. Trial testimony?

1 A. . . hearing.

2 Q. What is your next item?

3 A. The next item says penalty phase and travel, and
4 I think that is incorrect. I don't think I testified
5 in the penalty phase.

6 Q. All right. Now, in preparation for today, you tes-
7 tified in addition to the testimony of yourself, you
8 also reviewed the testimony of Dr. Watts?

9 A. Yes.

10 Q. Dr. Shea?

11 A. Yes.

12 Q. Dr. Brannon?

13 A. Yes.

14 Q. Dr. Watts, Dr. Shea, Dr. Palmer--Dr. Palmer, Dr.
15 Brannon?

16 A. Yes.

17 Q. Did you review the testimony of Dr. Rodgers?

18 A. Yes.

19 Q. And you reviewed the testimony given in the guilt
20 phase by your client, John Weik?

21 A. No.

22 Q. Why didn't you do that? Was it just not provided?

23 A. I wasn't asked to.

24 Q. But you specifically reviewed your testimony?

25 A. Yes.

1 Q. And in your direct examination, one of the factors
2 or the main factor that you think your testimony was in-
3 accurate was because you didn't have any knowledge about
4 the mental health status of Mr. Weik's father? Correct?

5 A. That would have been helpful, yes.

6 Q. And you also testified that you weren't given any
7 social history information by defense lawyers. Is that
8 also correct?

9 A. That's correct.

10 Q. And I ask you to review Volume One of the transcript
11 on page 411 . .

12 THE COURT: Identify for the record what transcript
13 you are referring to.

14 BY MR. ZELENKA:

15 Q. The transcript of record on appeal, Volume One,
16 State versus John Edward Weik, and that is attached to
17 our return.

18 I ask you to review page 411, beginning at lines
19 18 and go over to page 412, line five.

20 A. It says -- the question is, did you in your inves-
21 tigation determine whether there was anyone in this fam-
22 ily that had schizophrenia?

23 A. Yes. I didn't, but the gentleman that was doing
24 the mitigation.

25 You were given information -- I was given that
110-18

1 information.

2 Who in his family -- that his father suffered from
3 paranoid schizophrenia also.

4 Q. So you did testify you had information that his
5 father suffered from paranoid schizophrenia?

6 A. Yes.

7 Q. You got that information from the defense teams?

8 A. Yes.

9 Q. So you were incorrect in your testimony on direct,
10 is that correct?

11 A. Yes.

12 Q. Now, Dr. Morgan, do you deny that you met with
13 Percy Beauford on May 3, 1999, for an hour and a half,
14 and had a discussion with him?

15 A. That's not true.

16 Q. May 6, 1999, for two hours?

17 A. That's not true.

18 Q. Okay. May 10, 1999, for an hour and a half?

19 A. No.

20 Q. May 14th, 1999, for one and a half hours?

21 A. No.

22 Q. May 17, 1999, for one hour?

23 A. No.

24 Q. And you also clarified that on Respondent's Exhibit
25 3, on 5 14 99, an interview that took four hours, and

1 that was not done in the presence of counsel. Is that
2 correct?

3 A. When is this?

4 Q. On May 14, 1999?

5 A. No.

6 Q. Counsel wasn't with you at any of your meetings
7 with John Weik?

8 A. That's correct.

9 Q. And you did not meet with counsel for an hour and
10 a half on May 14, 1999?

11 A. That's correct.

12 Q. All right. The records that were reviewed on May
13 3rd and May 4th, were those State Hospital records?

14 A. I don't remember.

15 Q. The testimony you sat through at the time of the
16 competency hearing revealed that it was the State's
17 opinion that he suffered from schizotypal personality
18 disorder?

19 A. That is correct.

20 Q. So you were aware it was the State's opinion it
21 was schizotypal personality, and your opinion was firm
22 that it was schizophrenic. Correct?

23 A. Correct.

24 Q. Would that opinion be that he was paranoid schizo-
25 phrenic and he was suffering from a psychosis and at the
110-20

DR. MORGAN ON CROSS

1 time of trial he was not competent?

2 A. Correct.

3 Q. So even at the competency stage there was a huge
4 difference on the impact of the mental illness at that
5 time. Correct?

6 A. Yes.

7 Q. And at the competency hearing now that your opin-
8 ion has been refreshed, you were aware that his father
9 suffered from schizophrenia?

10 A. Yes.

11 Q. And you were not only aware of it but you also
12 asserted that one of the factors of John Weik was an
13 individual whose mental illness was a delusion of his
14 father that he suffered from while in the service, is
15 that correct?

16 A. Correct.

17 Q. And what was that, if you recall?

18 A. The delusion?

19 Q. Yes.

20 A. He felt that the CIA had a special interest in him
21 and his family. He talked about his father talking about
22 being in Vietnam and none of that, of course, is true.

23 Q. None of it is true?

24 A. . .

25 Q. So the father had a delusion and therefore that was

1 reflected in his mental illness?

2 A. His father's mental illness? I believe so and he
3 expanded it over time.

4 MR. ZELENKA: Beg the Court's indulgence.

5 (Brief pause in the proceeding)

6 BY MR. ZELENKA:

7 Q. Dr. Morgan, again this is Volume One at page 417,
8 and let me ask you to refer to line 13, to reflect whe-
9 ther you have some information about law enforcement
10 incident reports concerning Mr. Weik's demeanor shortly
11 before the incident.

12 A. On line 13?

13 Q. Yes, beginning at line 13.

14 A. So that people who are having a schizophrenic epi-
15 sode clearly appear to have a schizotypal personality.
16 All right. And you could have both. (reading from tran-
17 script of record at place cited)

18 Q. So, again, that information prevails and you did
19 have some information about his employment situation
20 and you did have reports that had been given to you pre-
21 sumably by the defense team. Is that right?

22 A. I can't remember, but I don't remember getting any-
23 thing except from the investigator.

24 Q. From the investigator?

25 A. Right.

1 Q. Which investigator?

2 A. The second investigator.

3 Q. Help me out here. I don't know who was the first or
4 second.

5 A. The first investigator was a lady from Columbia
6 who resigned.

7 Q. Ms. Rickborn?

8 A. Correct.

9 Q. Did you have contact with Betty Rickborn?

10 A. No.

11 Q. Did you have contact with Scott Parker?

12 A. I'm not sure.

13 Q. But someone had given you some information?

14 A. That's right.

15 Q. And it was part of the defense team?

16 A. That's right.

17 Q. Anything from Donna Schwartz Watts?

18 A. I think Donna and I discussed this case. Whether
19 she had more information than I had, I don't know.

20 Q. In the penalty phase of the trial -- Let me ask you
21 to refer to Volume Five, page 2040. I refer you to
22 lines 12 through 25.

23 Would you read that and see if it refreshes your
24 recollection?

25 A. When you were at Hall Institute didn't you always

1 read the social worker's report? Yes. The social
2 worker did a report in this case. (Reading from tran-
3 script of record the requested page and lines)

4 Q. Did you read that social history?

5 A. Not in detail. It's only seven pages long, isn't
6 it? I had access to that record briefly during the Blair
7 Hearing.

8 Q. Would you continue reading to the top of the next
9 page?

10 A. And then briefly today, so, no, I have not read the
11 record as I should have.

12 Would you agree that the record might provide im-
13 portant information and might help you give a better
14 opinion? Yes, absolutely. That's why you wanted to
15 read it? Yes, that's right.

16 Q. Let me ask you to refer to page 2036 of that same
17 volume.

18 A. I have it.

19 Q. Lines one through four.

20 A. Have you listened to and seen the videotape of the
21 stop alongside of the road and read the transcript there?
22 Answer, yes.

23 Q. Okay, that's all. So you have seen the videotape
24 and have reviewed the transcript of those statements.
25 Is that correct?

DR. MORGAN ON CROSS

1 A. That's what it says, yes.

2 MR. ZELENKA: No further questions.

3 THE COURT: Any Redirect?

4 MR. O'CONNELL: Thank you, Judge.

5 REDIRECT EXAMINATION

6 BY MR. O'CONNELL:

7 Q. Doctor, with respect to Respondent's Exhibit Num-
8 ber 3, is that the bill you sent for your services in
9 the case?

10 A. Yes.

11 Q. In doing work on these cases, do you work for free?

12 A. Do I work for free?

13 Q. Yes. Not bill people for time if you went to St.

14 George and met with the team? Would you have billed for
15 that?

16 A. Certainly.

17 Q. Now, the Attorney General read out some dates, May
18 third, May sixth, May tenth, May 14th and May 17th, and
19 suggested that those were meetings that someone says
20 you had with the defense lawyers in this case.

21 Are any of those reflected on your bill?

22 A. No.

23 Q. Now, the information you received in the transcript
24 from 1999 that Mr. Weik was schizophrenic, do you be-
25 lieve you received that information from an investigator?

110-25

1 A. That the father had schizophrpenia..

2 Q. Did you receive that information that the father
3 had schizophrenia -- excuse me -- did you receive that
4 information from an investigator?

5 A. Correct.

6 Q. Do you know this gentleman?

7 A. No.

8 THE COURT: Identify for the record who you asked
9 him about.

10 MR. O'CONNELL: Your Honor, this is Scott Parker,
11 who I asked to stand. He was the second investigator
12 working on the matter.

13 THE COURT: Very well. Proceed.

14 BY MR. O'CONNELL:

15 Q. As far as you recall, was the person you received
16 the information from that the father was schizophrenic,
17 was he a psychologist or psychiatrist?

18 A. No.

19 Q. Did whoever it was that gave you the opinion, did
20 they show you any records that reflected a diagnosis of
21 schizophrenia?

22 A. Not that I remember.

23 Q. Dr. Morgan, I want to show you what has been marked
24 for identification as Plaintiff's Exhibit 1 and 2. Have
25 you seen that type of document before?

DR. MORGAN ON REDIRECT

1 A. Yes.

2 Q. And what is that?

3 A. It is a staffing document.

4 Q. Is that typically -- first of all, from what insti-
5 tution is that?

6 A. This I'm sure came from the Hall Institute.

7 Q. And at what stage of a person's admission is a docu-
8 ment like that produced?

9 A. Usually at the end.

10 Q. If I could show you on the second . .

11 MR. O'CONNELL: Judge, I would move to admit Plain-
12 tiff's Exhibit 2 which is a portion of the . .

13 THE COURT: Wait a second. It hasn't been identi-
14 fied for the record and I want to know if there is an
15 objection.

16 Ask him to identify it as to date and what the title
17 of the document would be.

18 BY MR. O'CONNELL

19

20

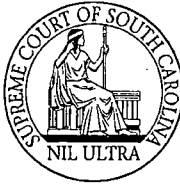
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24

25



South Carolina Court Administration
South Carolina Supreme Court
Columbia, South Carolina

ROSALYN FRIERSON
DIRECTOR

MARY S. SCHROEDER
DEPUTY DIRECTOR

1015 SUMTER STREET, SUITE
200
COLUMBIA, SOUTH
CAROLINA 29201
PHONE: (803) 734-1800
FAX: (803) 734-0269

May 4, 2009

Donald J. Zelenka
Assistant Deputy Attorney General
Office of Attorney General
P.O. Box 11549
Columbia, SC 29211-1549

RECEIVED

MAY 04 2009

S.C. SUPREME COURT

In re: State v. John E. Weik

Dear Mr. Zelenka:

This is in follow-up to the letter dated April 17, 2009, from Ms. Harriett Bennett. She asked me to check our records to determine if a tape from September 18, 2006 was contained among the records delivered to us by Ms. Robin (Keil) Davis. As you know, Ms. Davis is no longer employed by the Judicial Department. Our office retains the records of court reporters that leave our employ.

After a thorough search of court reporter records and tapes in storage on more than one occasion, we have determined that these records and tapes were not among those delivered to this office. Please contact me if I may be of further assistance to you.

Sincerely,


Desiree R. Allen
Program Manager

CC: The Honorable Daniel E. Shearouse, Clerk, S.C. Supreme Court ✓
Robert M. Dudek, Esq., S.C. Office of Indigent Defense



HENRY McMASTER
ATTORNEY GENERAL

April 8, 2009

RECEIVED

APR 09 2009

S.C. SUPREME COURT

Ms. Harriet P. Bennett
Reporter
S.C. Court Administration
P. O. Box 86
Ladson, South Carolina 29456

843-971-1340 (FAX)

RE: *John E. Weik, #5068 v. State of South Carolina*
C/A No. 2003-CP-18-1070 - Judge Perry Buckner
Dorchester County
Death penalty PCR Hearing
September 18-21, 2006
Missing Transcript Portions
Robin Keil - Court reporter (Transcript prepared by Harriet Bennett)

Dear Ms. Bennett:

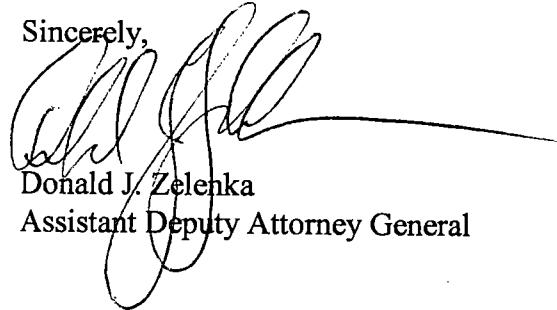
Pursuant to our telephone conversation on Monday April 6, 2009 and the receipt of your fax to me on the same date, which was delivered to me on April 7, I am faxing to you portions of the transcript including the transcript index and testimony from Dr. Donald Morgan and Amy Maxwell and Magdalene Gunter.

I have determined that on September 18, 2006 at two separate places, which were not included in the transcript provided to South Carolina Appellate Defense on March 24, 2008. In the provided transcript, these omissions occurred at Transcript pages 110, l. 4 [App. p. 2502] (Dr. Morgan), and pg. 170, l. 7 [App. p. 2562] (William Gunter), respectfully. In particular, the majority of the direct examination and the entire cross-examination of Dr. Donald Morgan was not included in comparing it with my own notes and my paralegal's notes from that hearing. In addition, on the same date, the testimony from the Applicant's witness, William "Bill" Gunter is not included at all.

I am also providing you and the Applicant's counsel, by mail, a copy of the contemporaneous notes of my paralegal, Elaine Shirley, concerning the testimony of Dr. Morgan and Mr. Gunter which reveals the length and significance of the missing portions.

Please advise me of the status of this review, if possible. Also, please use as my fax number 803-734-4035 in the future, if necessary.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Zelenka', with a long horizontal line extending to the right.

Donald J. Zelenka
Assistant Deputy Attorney General

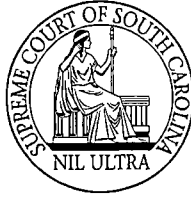
DJZ:

Enclosures:

Weik v. State, Tr. P. 1-5, 104-115, 166-171

Weik v. State, Shirley PCR Notes: Day One - Dr. Donald Morgan, Scott Parker, Amy Weik Maxwell, William Bill Gunter .

cc: The Honorable Daniel E. Shearouse
 The Honorable Perry M. Buckner, III
 The Honorable Desiree Allen
 Robert M. Dudek, Esq., w/enclosures
 Elizabeth Franklin Best, Esq., w/enclosures
 Michael O'Connell, Esq. , w/enclosures
 Lisa Kimbrough, Esq., w/enclosures.



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

April 1, 2009

Assistant Deputy Attorney General Donald J. Zelenka
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Re: Weik, John Edward v. State

Dear Counsel:

This is in response to your letter dated March 30, 2009 requesting the appeal in the above entitled matter be held in abeyance.

Please be advised this appeal will be held in abeyance for a period of thirty (30) days to give counsel and Court Administration the opportunity to resolve any potential defects with the transcripts in this matter.

Very truly yours,



CLERK

DES/dmh

cc: Deputy Chief Appellate Defender for Capital Appeals Robert M. Dudek
The Honorable Rosalyn Frierson
Desiree Allen, Court Administration



HENRY McMASTER
ATTORNEY GENERAL

RECEIVED
MAR 30 2009
S.C. SUPREME COURT

March 30, 2009

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: *John E. Weik, #5068 v. State of South Carolina*
Death Penalty PCR C/A No. 03-CP-18-1070
Records Omissions

Dear Mr. Shearouse:

This is a request to hold this appeal in abeyance due to apparent missing portions of testimony from the September 18-21, 2006 PCR transcript prepared by Harriet Bennett when Robin Keil was the court reporter. My return in this matter is due today.

In preparing my Return this weekend, I noticed significant portions of Dr. Donald Morgan's testimony on September 18, 2006 referred to in the Order at page App. 4081-4082 was not in the transcript. I have reviewed my own contemporaneous notes from the hearing, as well as those of the office paralegal, Elaine Shirley, and it appears portions of direct and cross-examination of Dr. Morgan is not included in the transcription provided to S.C. Office of Appellate Defense and included in the transcript. This includes testimony favorable to Mr. Weik in the greater portion of the direct examination, as well as testimony of impeachment value in the entire cross-examination of Dr. Morgan, set out on pages 2497-2510 [Tr. pp. 105-118] is incomplete and needs to be corrected.

It appears at App. 2502 [Tr. p. 110], a "brief pause" is referenced at line 4. Unfortunately, at that point, direct and cross-examination occurred and is not included in the provided transcript. The testimony on p. 110, l. 5 [App. 2502], then picks up during Mr. O'Connell's re-direct and includes the state's re-cross of Dr. Morgan according to this office's notes. The exclusions are evident in contrast to the PCR Court's Order at 4081-82 (Order, pp. 59-60).

The transcript and Appendix also does not include any portion of the testimony of John

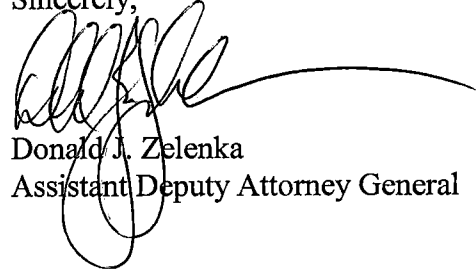
Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
March 30, 2009
Page 2

William "Bill" Gunter. He testified on September 18, 2006 after Amy Weik Maxwell. Her testimony concludes at App. p. 2562 (Tr. p. 170). His testimony was noted in the Order at pp. 55-56, App. pp. 4077-78.

In light of these omissions, I have this date conferred with opposing counsel and are requesting Court Administration and the court reporter to review and correct the record in those areas. In the alternative, I believe this case can be remanded for record reconstruction of the testimony of Dr. Morgan and William Gunter. I will continue to compare this office's notes of the hearing with the transcript provided to Appellate Defense.

I would note that since the lawyers with Appellate Defense were not included in hearing below, they would not have been otherwise aware of the omissions.

Sincerely,

A handwritten signature in black ink, appearing to read "Donald J. Zelenka", with a long horizontal flourish extending to the right.

Donald J. Zelenka
Assistant Deputy Attorney General

DJZ:dmd

cc: The Honorable Perry M. Buckner, III
Robert M. Dudek, Esq.
Elizabeth Franklin Best
Honorable Roselyn Frierson, SC. Court Administration
Michael O'Connell, Esq.
Lisa Kimbrough, Esq.



HENRY McMASTER
ATTORNEY GENERAL

RECEIVED
MAR 30 2009
S.C. SUPREME COURT

March 30, 2009

Honorable Rosalyn Frierson, Director
South Carolina Court Administration
1015 Sumter Street
Columbia, SC 29201

Honorable Desiree Allen
South Carolina Court Administration
1015 Sumter Street
Columbia, SC 29201

RE: *John E. Weik, #5068 v. State of South Carolina*
C/A No. 2003-CP-18-1070 - Judge Perry Buckner
Dorchester County
Death penalty PCR Hearing
September 18-21, 2006
Missing Transcript Portions
Robin Keil - Court reporter (Transcript prepared by Harriet Bennett)

Dear Ms. Frierson and Ms. Allen:

In preparing my response in this appeal, I have determined that there are significant portions of testimony from the hearing, particularly, on September 18, 2006 at two separate places, which were not included in the transcript provided to South Carolina Appellate Defense on March 24, 2008.

In particular, the majority of the direct examination and the entire cross-examination of Dr. Donald Morgan was not included in comparing it with my own notes and my paralegal's notes from that hearing. In addition, on the same date, the testimony from its final witness, William Gunter is not included at all. In the provided transcript, these omissions occurred at Transcript pages 110, l. 4 [App. p. 2502] (Dr. Morgan), and pg. 170, l. 7 [App. p. 2562] (William Gunter), respectfully.

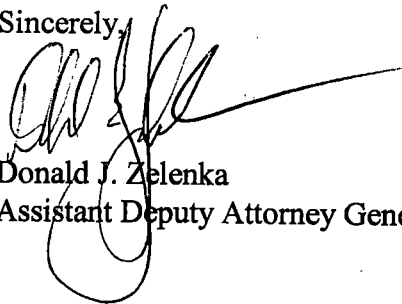
I am enclosing for your information a copy of the July 9, 2007 request form to court reporter

Honorable Rosalyn Frierson, Director
Honorable Desiree Allen
South Carolina Court Administration
March 30, 2009
Page 2

Keil from the Division of Appellate Defense, the September 26, 2007 memorandum from Desiree Allen concerning the status of the transcript, and the March 25, 2008 confirmation that the transcript had been received by Appellate Defense.

Please advise me of the status of this review, if possible.

Sincerely,



Donald J. Zelenka
Assistant Deputy Attorney General

DJZ:dmd
Enclosures

cc: ~~The Honorable Daniel E. Shearouse~~
The Honorable Perry M. Buckner, III
Robert M. Dudek, Esq.
Elizabeth Franklin Best, Esq.
Michael O'Connell, Esq.
Lisa Kimbrough, Esq.



SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

ATTORNEY GENERAL'S OFFICE

RECEIVED 7-9-07

ADMINISTRATIVE INSTRUCTIONS

FILE OPEN END

Joseph H. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney
2/3/29 ROUTE TO

ORDER TRANSCRIPT

OPEN RECORDS CLERK RECORDS

OTHER

July 6, 2007

Ms. Robin L. Keil
Circuit Court Reporter
P O Box 3335
Summerville, SC 29483-3335

Dear Ms. Keil:

Our office has been requested to perfect the appeal arising out of:

John Edward Weik v. The State

Indictment #: 2003-CP-18-1070

County: Dorchester

Date of Trial: September 18 - 21, 2006

Presiding Judge: Perry M. Buckner

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

We request that the lines on the paper be numbered from 1-25, and that you include in the transcript any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments. We have found that even if there are no objections, we need to review both opening and closing arguments for appeal.

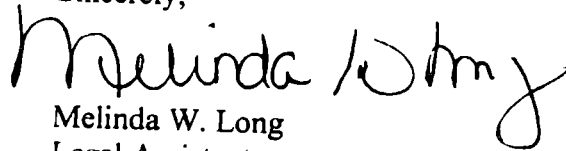
If you are aware of the existence of co-defendants not listed in the prior captioned case, please contact us prior to transcribing the transcript. In this manner, we can consult our records to ensure that in ordering a transcript, a duplication has not occurred. In addition, if the Attorney General's Office has already requested an original transcript, please notify us.

Ms. Robin L. Keil
July 6, 2007
Page Two

I am sorry for any inconvenience this may cause, but I appreciate your assistance in this matter. If you have any questions, or problems, please contact me.

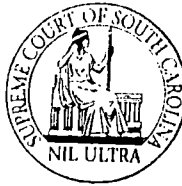
Thank you for your kind cooperation in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Melinda W. Long". The signature is fluid and cursive, with the first name "Melinda" being more prominent and the last name "Long" written in a more compact, stylized manner.

Melinda W. Long
Legal Assistant

xc: S.C. Supreme Court
Attorney General's Office



South Carolina Court Administration

South Carolina Supreme Court
Columbia, South Carolina

ROSALYN FRIERSON
DIRECTOR

MARY S. SCHROEDER
DEPUTY DIRECTOR

1015 SUMTER STREET, SUITE 200
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1800
FAX: (803) 734-0269

MEMORANDUM

TO: Melinda Long
FROM: Desiree R. Allen *DL*
RE: **John Edward Weik** transcript
DATE: September 26, 2007

This is in response to your letter dated September 13, 2007, requesting that I confirm in writing the status of the transcript referenced above. Ms. Keil is no longer employed by Court Administration. She is, however, being allowed to prepare transcripts from her records when requests are received by this office. According to our records, Ms. Keil has not filed an extension on this transcript. She has been contacted and provided with an extension form. I anticipate that an extension will be requested by Ms. Keil. When it is approved, a copy will be sent to your office.

CC: S.C. Supreme Court
Office of the Attorney General

RECEIVED

SEP 28 2007

Referred to *Zelinka*
Answered _____



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1387

Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

1002
Dorchester

March 25, 2008

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
Post Office Box 11330
Columbia, SC 29211

Dear Mr. Shearouse:

The following case falls under the 60 day rule for appeals, and the date we received the transcript is listed to the side.

John Edward Weik v. The State

3/24/2008

I would appreciate you beginning our time limits from the above dates, and if you need additional information, or have any questions please contact me.

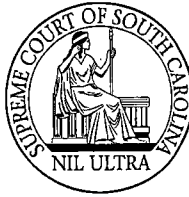
Thank you for your assistance in this matter.

Sincerely,

Melinda W. Long

Melinda W. Long
Legal Assistant

3-26-08
3/24/08
HAVE _____ COPIES MADE
FOR THE TO _____
ORDER _____ F. W. 10/1/07
RECORDS _____ PLEASE RETURN
OTHER: _____



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

March 2, 2009

Assistant Deputy Attorney General Donald J. Zelenka
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Re: Weik, John Edward v. State

Dear Counsel:

The following Order has been endorsed on your Motion to Enlarge Time for Filing Return to Petition for Writ of Certiorari and Petition to File Return to Petition for Writ of Certiorari in Excess of Page Limitation Pursuant to Rule 227(d)(3), SCACR in the above entitled case on appeal.

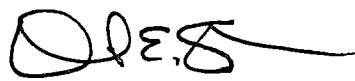
"Granted.

s/ Jean H. Toal C.J.
For the Court

March 2, 2009."

Please be advised the return should be served and filed on or before March 30, 2009.

Very truly yours,


CLERK

DES/dmh

Assistant Deputy Attorney General Donald J. Zelenka

Page Two

March 2, 2009

cc: Deputy Chief Appellate Defender for Capital Appeals
Robert M. Dudek

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Certiorari From Dorchester County
Perry M. Buckner, Circuit Court Judge
2003-CP18-01070

RECEIVED

FEB 26 2009

S.C. SUPREME COURT

JOHN EDWARD WEIK,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

**MOTION TO ENLARGE TIME FOR
FILING RETURN TO PETITION FOR WRIT OF CERTIORARI
AND PETITION TO FILE RETURN TO PETITION FOR
WRIT OF CERTIORARI IN EXCESS OF PAGE
LIMITATION PURSUANT TO RULE 227(d)(3), SCACR**

I. MOTION TO ENLARGE TIME

The Respondents, above-named, hereby make a motion to this Court to extend the time for filing the Return to the Petition for Writ of Certiorari from February 27, 2009 for a period of thirty (30) days up to and including March 29, 2009. This request is primarily due to the unexpected hospitalization of below signed counsel at Palmetto Richland Heart Hospital from February 10 through February 13, 2009 due to a heart procedure.

Since discharge, counsel has been on partial work days due to recovery from the procedure and current medical needs. In addition, this request is due to the extensive length of the appendix, the fact the petition consists of 54 pages addressing 6 specified issues in a death

penalty PCR action, and intervening business events in state and federal court, including Return to Original Writ and Motion to Stay in Thomas Ivey (Feb. 2), Return to federal habeas writ in Quincy Lowery (Feb. 6), Amended Return and Responses to Motion for Summary Judgement in Antonio Tisdale (Feb. 17) .

Wherefore Respondents respectfully request an extension of a period of time of thirty (30) days up to and including March 29, 2009 to complete this Return of Respondent. Counsel spoke with opposing counsel Robert Dudek who had no objection to the request .

II. PETITION TO ALLOW EXCESS PAGES

Counsel for the above-named Respondent requests that this Court issue an order allowing Respondent to file a Return to the Petition for Writ of Certiorari in excess of twenty-five pages – a waiver of the page limitation under Rule 227(d)(3), SCACR, up to and including sixty (60) pages. In support of this motion, counsel for Respondent would respectfully show the Court that:

1. He represents Respondent on his appeal from the denial of post-conviction relief in this murder appeal raising ineffective assistance of counsel.
2. The Petition before this Court consists of 53 pages and raises 6 issues.
3. The Order of Dismissal below consists of 79 pages and a additional Order Denying the Rule 59 motion.
4. The present incomplete draft Return to the Petition consists 58 pages of argument.
5. Respondent's counsel has consulted with opposing counsel, Robert Dudek who expressed no objection to a sixty (60) page Return.

WHEREFORE, Counsel for Respondent requests an order allowing for the filing of a sixty page Return to the Petition in this matter and the extend the time to file up to and including

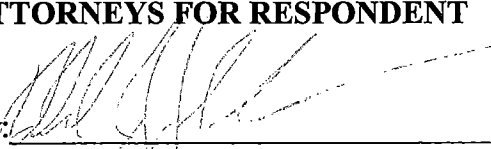
Respectfully submitted,

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

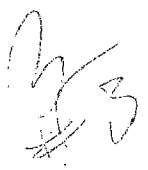
DONALD J. ZELENKA
Assistant Deputy Attorney General

ATTORNEYS FOR RESPONDENT

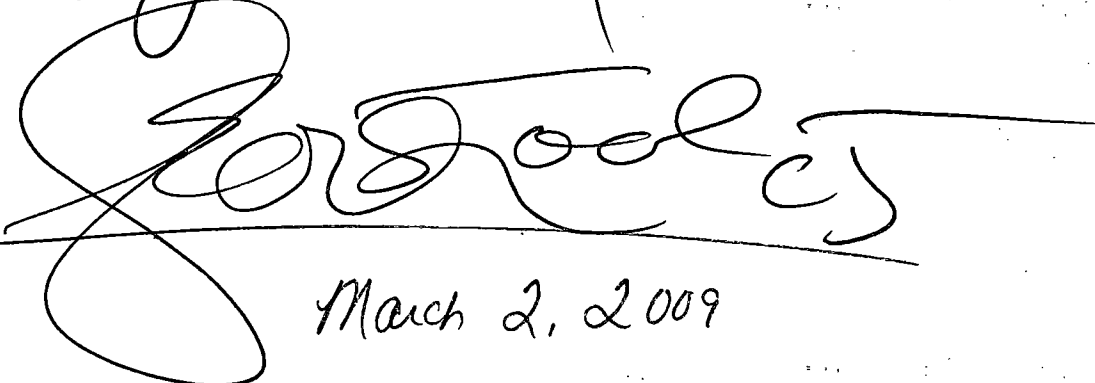
By: 

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

February 26, 2009.



Granted



March 2, 2009

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Certiorari from Dorchester County
Perry M. Buckner, Circuit Court Judge
2003-CP18-01070

JOHN EDWARD WEIK,

Petitioner,

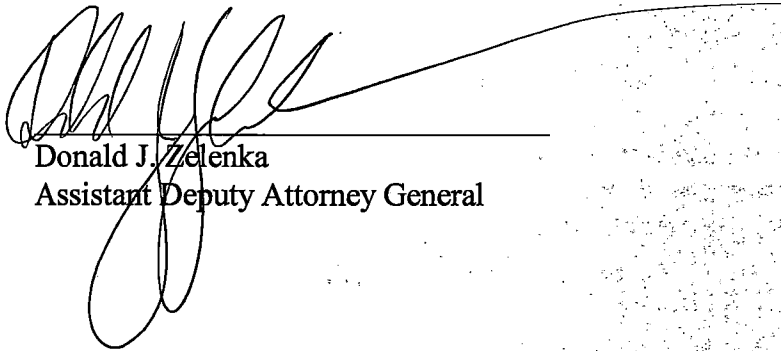
v.

STATE OF SOUTH CAROLINA,

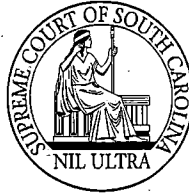
Respondent.

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served Respondents Motion to Enlarge Time for Filing Return on Robert M. Dudek and Elizabeth A. Franklin-Best, Esquires, 1330 Lady Street, Suite 401, Columbia, South Carolina 29201 by depositing copies in the InterAgency Mail this 26th day of February, 2009.



Donald J. Zelenka
Assistant Deputy Attorney General



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

January 30, 2009

Donald J. Zelenka , Esquire
Assistant Deputy Attorney General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Re: Weik, John Edward v. State

Dear Counsel:

The following Order has been endorsed on your Motion to Enlarge Time for Filing Return to Petition for Writ of Certiorari in the above entitled case on appeal.

“Granted.

Jean H. Toal C.J.
For the Court

By s/ Daniel E. Shearouse
Clerk

January 30, 2009.”

Donald J. Zelenka , Esquire
Re: Weik, John Edward v. State
January 30, 2009
Page two

The Return to Petition for Writ of Certiorari should be served and filed by
February 27, 2009.

Very truly yours,


CLERK

DES/jjp

Robert M. Dudek , Esquire

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Certiorari From Dorchester County
Perry M. Buckner, Circuit Court Judge
2003-CP18-01070

RECEIVED

JAN 28 2009

S.C. SUPREME COURT

JOHN EDWARD WEIK,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

**MOTION TO ENLARGE TIME FOR
FILING RETURN TO PETITION FOR WRIT OF CERTIORARI**

The Respondents, above-named, hereby make a second motion to this Court to extend the time for filing the Return to the Petition for Writ of Certiorari from January 28, 2009 for a period of thirty (30) days up to and including February 27, 2009. This request is due to the extensive length of the appendix, the fact the petition consists of 54 pages addressing 6 specified issues in a death penalty PCR action, and intervening business events in state and federal court.

Respondents have been involved in numerous litigation in both state and federal court during this time period which has prevented the completion of this brief in a sufficient and timely manner. Counsel has further in this 30 day period filed federal habeas briefs in the District Court in Eric Youmas (Jan. 5), and Demetric Caldwell (January 7). On December 29, 2008, counsel made a Brief of Respondent in Andre Rosemond v. State (Death Penalty) on certiorari in this

Court. Counsel filed a Brief of Petitioner in State v. John Boyd Frazier on Jan, 5, 2009, an Initial Brief of Respondent in State v. LaQuint Johnson (Jan.7) and an Initial Brief of Respondent in State v. Quincy Allen (Death Penalty) on January 21, 2009. Counsel also filed Return to a Petition for Writ of Certiorari in Jimmy Locklair (Laurens) on Jan. 9, 2009, and a Return to the Petition of Writ of Certiorari in Jimmy Locklair v. State (Spartanburg)(Death Penalty) on January 16, 2009. Counsel prepared a Proposed Order in Jesse Sapp v. State of South Carolina, a Berkeley County death penalty PCR matter pending before Judge James Williams of approximately 140 pages on December 30, 2008.

Wherefore Respondents respectfully request an extension of a period of time of thirty (30) days up to and including February 27, 2009 to complete this Return of Respondent. Counsel spoke with opposing counsel Robert Dudek who had no objection to the request .

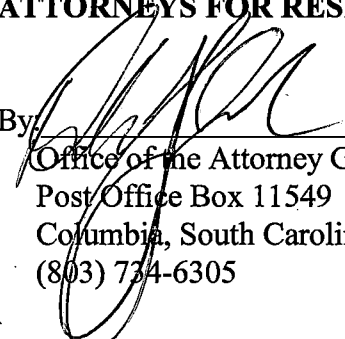
Respectfully submitted,

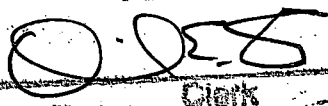
HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

ATTORNEYS FOR RESPONDENT

By 
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305


GRANTED
Jean H. Tait
For the Court
By 
Clerk

January 30, 2009.

January 28, 2009

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Certiorari from Dorchester County
Perry M. Buckner, Circuit Court Judge
2003-CP18-01070

JOHN EDWARD WEIK,

Petitioner,

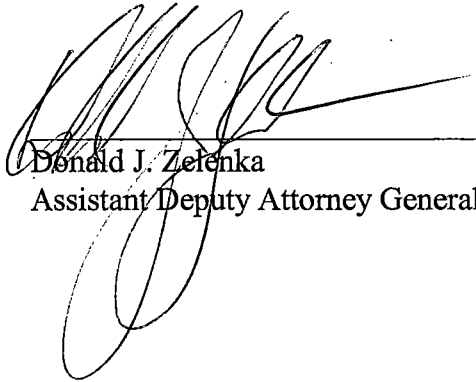
v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served Respondents Motion to Enlarge Time for Filing Return on Robert M. Dudek and Elizabeth A. Franklin-Best, Esquires, 1330 Lady Street, Suite 401, Columbia, South Carolina 29201 by depositing copies in the InterAgency Mail this 28th day of January , 2009.



Donald J. Zelenka
Assistant Deputy Attorney General



HENRY McMASTER
ATTORNEY GENERAL

RECEIVED

JAN 28 2009

January 29, 2009

S.C. SUPREME COURT

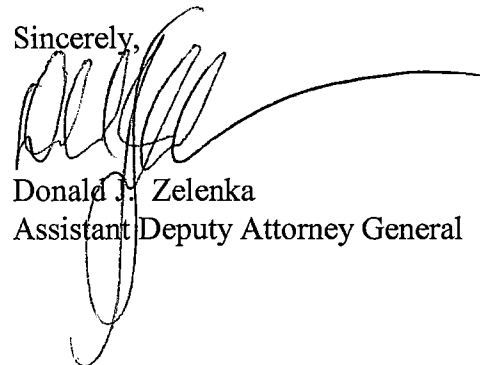
Honorable Daniel E. Shearouse
Clerk, The Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

Re: John Edward Weik v. State

Dear Mr. Shearouse:

Enclosed please find the *Motion to Enlarge Time for Filing Return for Writ of Certiorari*, along with a *Certificate of Service*, in the above-referenced case.

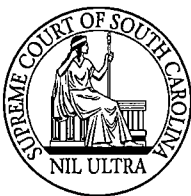
Sincerely,



Donald J. Zelenka
Assistant Deputy Attorney General

DJZ/lbb

cc: Robert M. Dudek, Esquire
Elizabeth Franklin-Best, Esquire



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

December 31, 2008

Assistant Deputy Attorney General Donald J. Zelenka
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Re: Weik, John Edward v. State

Dear Counsel:

The following Order has been endorsed on your Motion to Enlarge Time for Filing Return to Petition for Writ of Certiorari in the above entitled case on appeal.

“Granted.

Jean H. Toal C.J.
For the Court

By s/ Brenda F. Shealy
Chief Deputy Clerk

December 31, 2008.”

Please be advised the return should be served and filed on or before January 28, 2009.

Assistant Deputy Attorney General Donald J. Zelenka
Page Two
December 31, 2008

Very truly yours,

A handwritten signature in cursive script, reading "Brenda J. Shealy". The signature is written in black ink and is positioned above the printed name.

CHIEF DEPUTY CLERK

BFS/dmh

cc: Deputy Chief Appellate Defender for Capital Appeals
Robert M. Dudek



HENRY McMASTER
ATTORNEY GENERAL

RECEIVED

DEC 30 2008

December 30, 2008

S.C. SUPREME COURT

Honorable Daniel E. Shearouse
Clerk, The Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

Re: John Edward Weik v. State

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the *Motion to Enlarge Time for Filing Return to Petition for Writ of Certiorari*, along with a *Certificate of Service*, in the above-referenced case.

Sincerely,

Donald J. Zelenka
Assistant Deputy Attorney General

DJZ/epj

cc: Robert M. Dudek, Esquire
Elizabeth Franklin-Best, Esquire

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Certiorari From from Dorchester County
Perry M. Buckner, Circuit Court Judge
2003-CP18-01070

RECEIVED

DEC 30 2008

S.C. SUPREME COURT

JOHN EDWARD WEIK,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

**MOTION TO ENLARGE TIME FOR
FILING RETURN TO PETITION FOR WRIT OF CERTIORARI**

The Respondents, above-named, hereby make a second motion to this Court to extend the time for filing the Return to the Petition for Writ of Certiorari from December 29, 2008 for a period of thirty (30) days up to and including January 28, 2009. (Respondent made a letter request on December 29, 2008). This request is due to the extensive length of the appendix, the fact the petition consists of 54 pages addressing 6 specified issues in a death penalty PCR action, and intervening business events in state and federal court.

Respondents have been involved in numerous litigation in both state and federal court during this time period which has prevented the completion of this brief in a sufficient and timely manner. The Counsel has further in this 30 day period filed federal habeas briefs in the District Court in Frenchis Abraham (2) (December 1, 2, 2008), Stephen Green (December 5), Alonzo

Portwood (Dec. 10), Lamont Cutler (Dec. 15) Tyrone Shumpert (Dec. 17) , Michael McCoy (Dec. 11), Clifford Thompson (Dec. 12). Counsel further made a Return to Petition for Writ of Certiorari in State v. Lance Lyles on December 19, 2008. On December 22, 2008, counsel made a Return to a Petition for Writ of Certiorari in Angle Vasquez, a death penalty PCR action. On December 29, 2008, counsel made a Brief of Respondent in Andre Rosemond v. State on certiorari in this Court. Below-signed counsel also made a Brief in Opposition in the United States Supreme Court in Freddie Owens v. S.C. on December 10. Counsel is also preparing for filing this date a Proposed Order in Jesse Sapp v. State of South Carolina, a Berkely County death penalty PCR matter pending before Judge James Williams of approximately 140 pages

Wherefore Respondents respectfully request an extension of a period of time of thirty (30) days up to and including January 28, 2009 to complete this Return of respondent. Counsel spoke with opposing counsel Robert Dudek who had no objection to the request .

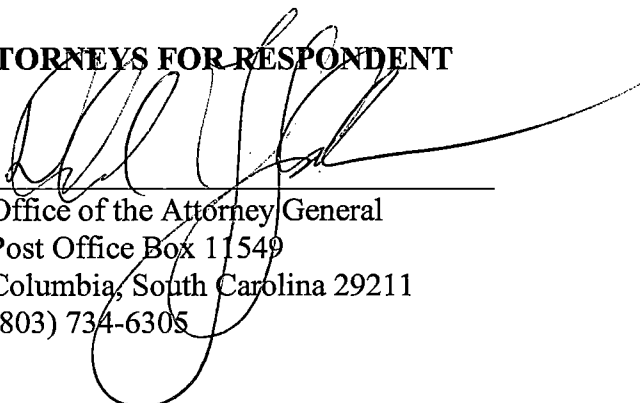
Respectfully submitted,

HENRY D. McMASTER
Attorney General

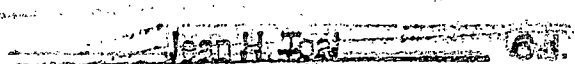
JOHN W. McINTOSH
Chief Deputy Attorney General

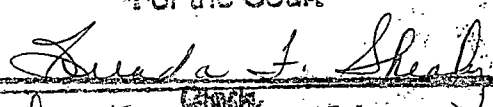
DONALD J. ZELENKA
Assistant Deputy Attorney General

ATTORNEYS FOR RESPONDENT

By: 
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

Granted.


For the Court


Chief Deputy Clerk

December 31, 2009

December 30, 2008

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Certiorari From from Dorchester County
Perry M. Buckner, Circuit Court Judge
2003-CP18-01070

JOHN EDWARD WEIK,

Petitioner,

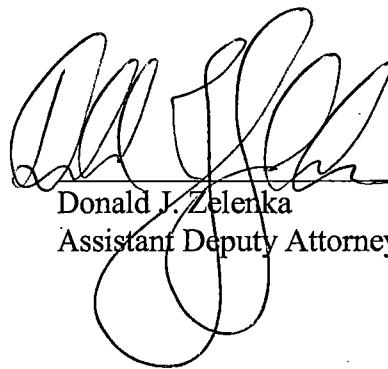
v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served Respondents Motion to Enlarge Time for Filing Return on Robert M. Dudek and Elizabeth A. Franklin-Best, Esquires, 1330 Lady Street, Suite 401, Columbia, South Carolina 29201 by depositing copies in the InterAgency Mail this 30th day of December , 2008.



Donald J. Zelenka
Assistant Deputy Attorney General



HENRY McMASTER
ATTORNEY GENERAL

RECEIVED

DEC 30 2008

December 29, 2008

S.C. SUPREME COURT

Honorable Daniel E. Shearouse
Clerk, The Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

Re: John Edward Weik v. State - Death Penalty PCR Appeal
2nd Extension - Return to Certiorari

Dear Mr. Shearouse:

The Return to Petition for Writ of Certiorari in the above-referenced case is due to be filed on today's date. Due to my heavy workload I have been unable to prepare the return within the time period. Therefore, I am requesting an extension of thirty (30) days to file and serve the Return. I have consulted with opposing counsel Robert Dudek who has no objection to this request.

By copy of this letter I am informing opposing counsel of this communication with the Court.

Sincerely,

Donald J. Zelenka
Assistant Deputy Attorney General

DJZ/

cc: Robert M. Dudek, Esquire

The Supreme Court of South Carolina

John Edward Weik, **Petitioner**

V.

State of South Carolina, Respondent.

The Honorable Perry M. Buckner
Dorchester County
Trial Court Case No. 2003-CP-18-01070

ORDER

For good cause having been shown, the time for serving and filing the Return to Petition for Writ of Certiorari in the above entitled matter is hereby extended until December 29, 2008.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY *Grenda L. Shealy*
CLERK
Chief Deputy

Columbia, South Carolina

November 25, 2008

cc: Deputy Chief Appellate Defender for Capital Appeals
Robert M. Dudek
Assistant Deputy Attorney General Donald J. Zelenka



RECEIVED

NOV 24 2008

S.C. SUPREME COURT

HENRY McMASTER
ATTORNEY GENERAL

November 24, 2008

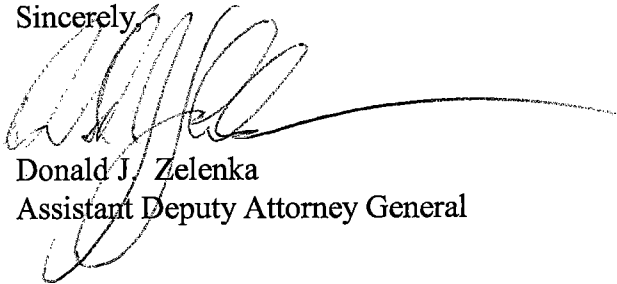
Honorable Daniel E. Shearouse
Clerk, The Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

Re: John Edward Weik v. State

Dear Mr. Shearouse:

The Return to Petition for Writ of Ceriorari in the above-referenced case is due to be filed on today's date. Due to my heavy workload I have been unable to prepare the return in a timely manner. Therefore, I am requesting an extension of thirty (30) days to file and serve the Return. By copy of this letter I am informing opposing counsel of this request.

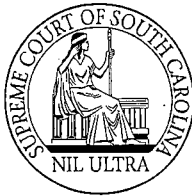
Sincerely,



Donald J. Zelenka
Assistant Deputy Attorney General

DJZ/lbb

cc: Robert M. Dudek, Esquire



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

October 22, 2008

Deputy Chief Appellate Defender for Capital Appeals
Robert M. Dudek
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: Weik, John Edward v. State

Dear Counsel:

The following Order has been endorsed on your Petition for a Final Two Day Extension to File the Petition for Writ of Certiorari and Appendix in the above entitled case on appeal.

“Granted.

s/ Jean H. Toal C.J.
For the Court

October 22, 2008.”

Please be advised that the Petition for Writ of Certiorari and Appendix should be served and filed on or before October 24, 2008.

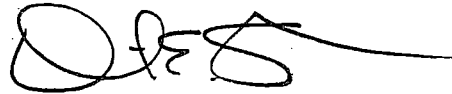
Deputy Chief Appellate Defender for Capital Appeals

Robert M. Dudek

Page Two

October 22, 2008

Very truly yours,

A handwritten signature in black ink, appearing to be 'R. M. Dudek', with a long horizontal flourish extending to the right.

CLERK

DES/dmh

cc: Assistant Deputy Attorney General Donald J. Zelenka

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Dorchester County
Perry M. Buckner, Circuit Court Judge

JOHN EDWARD WEIK,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR A FINAL TWO DAY EXTENSION
TO FILE PETITION FOR A WRIT
OF CERTIORARI AND THE APPENDIX

The undersigned counsel respectfully requests a final extension of two days in which to file the petition for a writ of certiorari and the appendix in the above-referenced death penalty case. In support of this motion, counsel would respectfully show the Court:

1. The petition for a writ of certiorari and the appendix in this case are due to be served and filed Wednesday, October 22, 2008 having been extended by prior orders of this Court. This final two day extension request, until Friday, October 24, 2008, is based in part on the unforeseen circumstance that lead counsel had his car keys stolen yesterday, October 16, 2008 not far from his home. Consequently, counsel must, at a minimum, have his car and home locks replaced which constitutes an unforeseen distraction to his work on this case. Counsel and co-counsel have been diligently writing the petition for writ of certiorari in this case.

ORIGINAL
RECEIVED
OCT 17 2008
S.C. SUPREME COURT

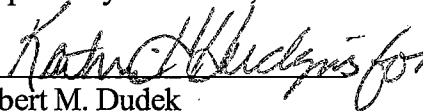
2. Further, this office is short of attorneys with the unexpected recent resignation of an appellate defender, and her cases had to be reassigned. Counsel also must file a brief in the Court of Appeals on Monday, October 20, 2008 in the murder case of State v. Michael Watts. Counsel is also working on this case with one of the newer attorneys, Elizabeth Franklin-Best, so that she will be able to be first counsel on a capital appeal in the future. The record in this case is voluminous -- the Appendix is in excess of 4,000 pages. Counsel has an extraordinary heavy caseload of mostly murder cases at this time, and that caseload is exacerbated by this office being short of attorneys.

3. Moreover, petitioner is raising seven issues in the petition for a writ of certiorari, and this Court recently granted counsel's motion to exceed the twenty-five page limit for the petition for a writ of certiorari.

4. Counsel is well aware of Justice Waller's order on extensions in death penalty cases. Opposing counsel, as indicated by his signature below, kindly does not oppose this request.

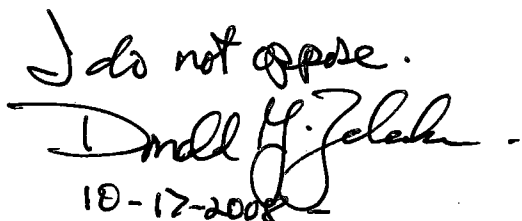
WHEREFORE, the undersigned counsel would respectfully request a final extension of two days from Wednesday, October 22, 2008 until Friday, October 24, 2008, in which to file the petition for writ of certiorari and appendix in this case.

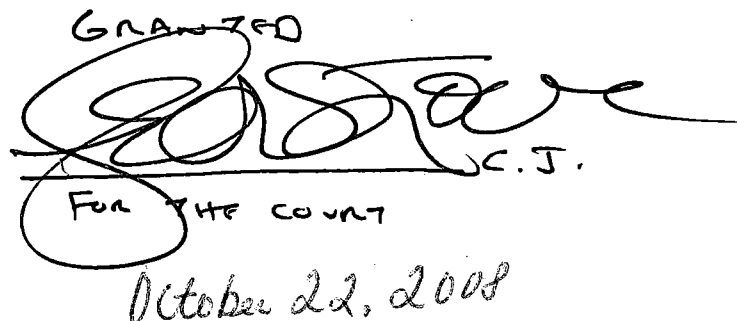
Respectfully submitted,



Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals
Attorney for Petitioner

October 17, 2008


I do not oppose.
10-17-2008

GRANTED

C.J.
For the Court
October 22, 2008

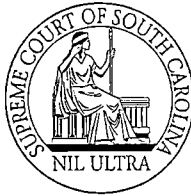
I DO NOT OPPOSE THIS REQUEST:

RY RCLD
Donald J. Zelenka

neither do I.

Donald J. Zelenka -

10/11/11
10/11/11
10/11/11



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

October 15, 2008

Deputy Chief Appellate Defender for Capital Appeals
Robert M. Dudek
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: Weik, John Edward v. State

Dear Counsel:

The following Order has been endorsed on your Petition to Exceed Twenty-Five Page Limit for a Petition for Writ of Certiorari in the above entitled case on appeal.

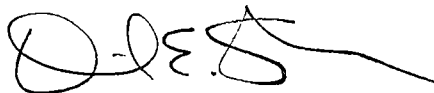
"Granted.

s/ Jean H. Toal C.J.
For the Court

October 15, 2008."

By copy of this letter we are advising opposing counsel of the action of the Court in this matter.

Very truly yours,


CLERK

DES/dmh

Deputy Chief Appellate Defender for Capital Appeals
Robert M. Dudek
Page Two
October 15, 2008

cc: Assistant Deputy Attorney General Donald J. Zelenka

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Dorchester County
Perry M. Buckner, Circuit Court Judge

ORIGINAL

RECEIVED

OCT - 9 2008

S.C. SUPREME COURT

JOHN EDWARD WEIK,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION TO EXCEED TWENTY-FIVE
PAGE LIMIT FOR A PETITION FOR
A WRIT OF CERTIORARI

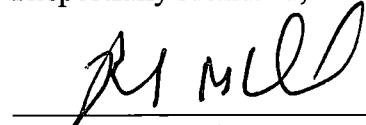
The undersigned counsel would respectfully request an order allowing him to file a petition for writ of certiorari in this case in excess of the twenty-five page limit imposed by Rule 227(e)(3), SCACR. In support of this motion, counsel would respectfully show the Court:

1. The petition for a writ of certiorari and appendix in this case are due to be served and filed in this Court on October 22, 2008. The Appendix is in excess of four thousand pages, and numerous meritorious issues were raised during post-conviction.
2. Counsel does not think that justice to the highly unusual facts of this death penalty case can be done in the twenty-five pages authorized by Rule 227(e) (3), SCACR.
3. Consequently, counsel respectfully moves that this Court allow him to file a petition for a writ of certiorari not in excess of seventy-five pages. Counsel will make every effort for brevity, and hopefully will be considerably short of that seventy-five page limit in the final analysis.

4. Counsel is requesting that opposing counsel, Donald J. Zelenka, of the Office of the Attorney General, consent or not oppose this request.

WHEREFORE, undersigned counsel would respectfully request an order from this Court granting him the right to exceed the twenty-five page limit of Rule 227(e)(3), SCACR. Counsel would also request that the order grant him the right to file a petition for a writ of certiorari in this death penalty case not in excess of seventy-five pages.

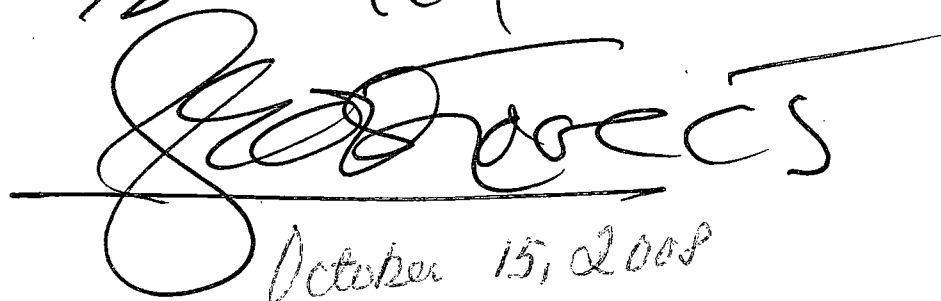
Respectfully submitted,



Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

Elizabeth A. Franklin-Best
Assistant Appellate Defender
Attorneys for Petitioner

October 9, 2008

Granted

October 15, 2008

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Dorchester County
Perry M. Buckner, Circuit Court Judge

JOHN EDWARD WEIK,

PETITIONER,

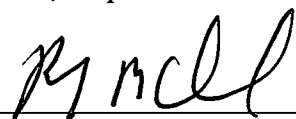
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

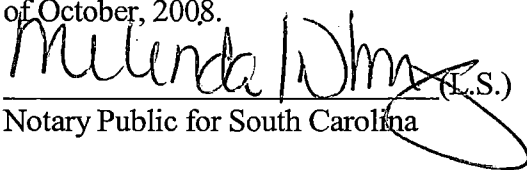
I certify that a true copy of the petition to file a petition for writ of certiorari in excess of the twenty-five page limit has been served on Donald J. Zelenka, Esquire this 9th day of October, 2008.


Robert M. Dudek
Deputy Chief Attorney for Capital Appeals

Elizabeth A. Franklin-Best
Assistant Appellate Defender

ATTORNEYS FOR PETITIONER

SWORN TO BEFORE ME this 9th day
of October, 2008.


(L.S.)
Notary Public for South Carolina

My Commission Expires: November 16, 2008.

Hopkins, Debbie

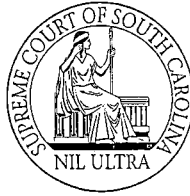
From: Don Zelenka [AGDZELENKA@ag.state.sc.us]
Sent: Thursday, October 09, 2008 3:12 PM
To: Hopkins, Debbie
Cc: Robert M. Dudek
Subject: John Weik DP PCR Appeal - Cert Petition - Excess Pages

I have no objection to a request to extend the page limits on the cert return in this matter.

Sincerely,

Donald J. Zelenka
Assistant Deputy Attorney General
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, South Carolina 29211
803-734-3601
803-734-4035(FAX)
agdzenka@ag.state.sc.us

10/9/2008



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

September 24, 2008

Deputy Chief Appellate Defender for Capital Appeals
Robert M. Dudek
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: Weik, John Edward v. State

Dear Counsel:

The following Order has been endorsed on your Petition for Extension to File Petition for a Writ of Certiorari and the Appendix in the above entitled case on appeal.

“Granted. No further extensions
will be granted.

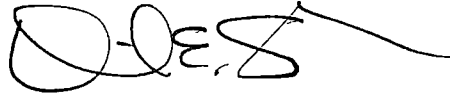
s/ Jean H. Toal C.J.
For the Court

September 24, 2008.”

Please be advised that the Petition for Writ of Certiorari and Appendix must be served and filed on or before October 22, 2008.

Deputy Chief Appellate Defender for Capital Appeals
Robert M. Dudek
Page Two
September 24, 2008

Very truly yours,

A handwritten signature in black ink, appearing to read 'R. M. Dudek', with a long horizontal flourish extending to the right.

CLERK

DES/dmh

cc: Assistant Deputy Attorney General Donald J. Zelenka

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Dorchester County
Perry M. Buckner, Circuit Court Judge

JOHN EDWARD WEIK,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR EXTENSION
TO FILE PETITION FOR A WRIT
OF CERTIORARI AND THE APPENDIX

The undersigned counsel respectfully requests a final extension of thirty days in which to file the petition for a writ of certiorari and the appendix in the above-referenced death penalty case. In support of this motion, counsel would respectfully show the Court:

1. The petition for a writ of certiorari and the appendix in this case are due to be served and filed today, having been extended by prior orders of this Court.
2. Counsel is working on this case with one of the newer attorneys, Elizabeth Franklin-Best, so that she will be able to be first counsel on a capital appeal in the future. The record in this case is voluminous -- the Appendix is in excess of 4,000 pages. Counsel is presently working on the murder case of State v. Adams Gibson which consists of a transcript of about 1,100 pages. Counsel also must prepare for two presentations at the annual Public Defender's Convention next week. In addition, counsel had four oral

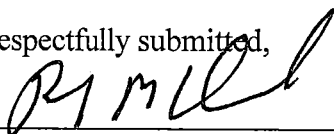
arguments last week, two before this Court, and two in the Court of Appeals. Counsel has an extraordinary heavy caseload of mostly murder cases at this time.

3. Further, petitioner raised a myriad of issues at the PCR hearing that co-counsel has outlined, and counsel must evaluate them with co-counsel, and then determine which issues to brief.

4. Counsel is well aware of Justice Waller's order on extensions in death penalty cases. However, counsel assures this Court that this request is made out of absolute necessity, and not for purposes of delay. Opposing counsel, as indicated by his signature below, kindly does not oppose this request.

WHEREFORE, the undersigned counsel would respectfully request a final extension of thirty day extension in which to file the petition for writ of certiorari and appendix in this case.

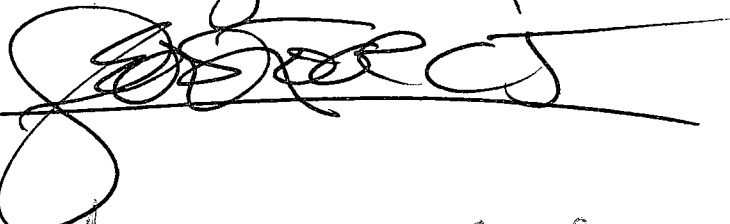
Respectfully submitted,



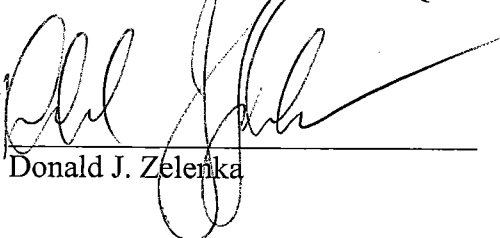
Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals
Attorney for Petitioner

September 22, 2008

Granted
No Further Extensions
will be granted



I DO NOT OPPOSE THIS REQUEST:


Donald J. Zelenka

September 24, 2008

The Supreme Court of South Carolina

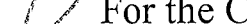
John Edward Weik, Petitioner,
v.
State of South Carolina, Respondent.

The Honorable Perry M. Buckner
Dorchester County
Trial Court Case No. 2003-CP-18-01070

ORDER

For good cause having been shown, the time for serving and filing the Petition for Writ of Certiorari and Appendix in the above entitled matter is hereby extended until September 22, 2008.

IT IS SO ORDERED.



For the Court

C.J.

Columbia, South Carolina

August 26, 2008

cc: Deputy Chief Appellate Defender for Capital Appeals
Robert M. Dudek
Assistant Deputy Attorney General Donald J. Zelenka

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Dorchester County
Perry M. Buckner, Circuit Court Judge

JOHN EDWARD WEIK,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR EXTENSION
TO FILE PETITION FOR A WRIT
OF CERTIORARI AND THE APPENDIX

The undersigned counsel would respectfully requests an extension of thirty days in which to file the petition for a writ of certiorari and the appendix in the above-referenced death penalty case. In support of this motion, counsel would respectfully show the Court:

1. The petition for a writ of certiorari and the appendix in this case are due to be served and filed today, having been extended by prior orders of this Court.
2. Counsel has completed the voluminous appendix in this case. The Appendix is in excess of 4,000 pages. Counsel is presently writing and editing the eleven issue brief in the death penalty case of State v. Steven Bixby which is due to be filed with this Court Friday, August 29, 2008. Counsel is today, August 22, 2008, filing a petition for a writ of certiorari to the Court of Appeals with this Court in the murder case of State v. Nathaniel Ferguson. Counsel also filed a petition for rehearing with this Court in the murder case of

ORIGINAL

RECEIVED

AUG 25 2008

S.C. SUPREME COURT

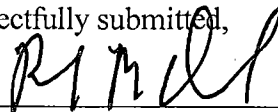
State v. Cornelius Washington on Tuesday, August 19, 2008. Counsel also filed a return to the state's petition for rehearing with the Court of Appeals on Monday, August 18, 2008 in the case of State v. Ricky Brannon. Further, counsel on Friday, August 15, 2008 filed a brief with the Court of Appeals in the case of State v. Perry Strickland which involved two novel issues and a brief that same day in the case of State v. Ronnie Middleton.

3. Importantly, Elizabeth Franklin-Best will be co-counsel in this case. This is only co-counsel's second death penalty case, and undersigned counsel would like adequate time to work on this case himself, and supervise co-counsel on handling a death penalty PCR. Petitioner raised a myriad of issues at PCR that counsel must evaluate, and then brief. Finally, counsel has been advised to have oral surgery as soon as an infection is eliminated by medication to prevent a reoccurrence. For all of the above reasons counsel would most respectfully request any and all consideration this Court can give to not making this a final extension. Counsel also has a very heavy caseload of other murder cases he must handle.

4. Counsel is well aware of Justice Waller's order on extensions in death penalty cases. However, counsel assures this Court that this request is made out of absolute necessity, and not for purposes of delay. Opposing counsel, as indicated by his signature below, kindly does not oppose this request.

WHEREFORE, the undersigned counsel would respectfully request a thirty day extension in which to file the petition for writ of certiorari and appendix in this case.

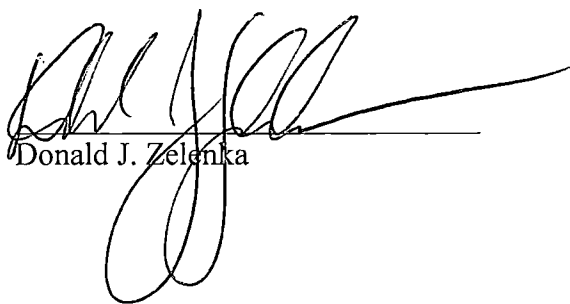
Respectfully submitted,



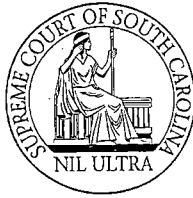
Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals
Attorney for Petitioner

August 22, 2008

I DO NOT OPPOSE THIS REQUEST:



Donald J. Zelenka



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

July 25, 2008

Deputy Chief Appellate Defender for Capital Appeals
Robert M. Dudek
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: Weik, John Edward v. State

Dear Counsel:

The following Order has been endorsed on your Petition for Extension to File Petition for a Writ of Certiorari and the Appendix in the above entitled case on appeal.

“Granted.

Jean H. Toal C.J.
For the Court

By s/ Daniel E. Shearouse
Clerk

July 25, 2008.”

Please be advised that the Petition for Writ of Certiorari and Appendix should be served and filed on or before August 22, 2008.

Deputy Chief Appellate Defender for Capital Appeals
Robert M. Dudek
Page Two
July 25, 2008

Very truly yours,

A handwritten signature in black ink, appearing to read 'R. M. Dudek', with a long horizontal flourish extending to the right.

CLERK

DES/dmh

cc: Assistant Deputy Attorney General Donald J. Zelenka

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

JUL 23 2008

Appeal from Dorchester County
Perry M. Buckner, Circuit Court Judge

S.C. SUPREME COURT

JOHN EDWARD WEIK,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR EXTENSION
TO FILE PETITION FOR A WRIT
OF CERTIORARI AND THE APPENDIX

The undersigned counsel would respectfully requests an extension of thirty days in which to file the petition for a writ of certiorari and the appendix in the above-referenced death penalty case. In support of this motion, counsel would respectfully show the Court:

1. The petition for a writ of certiorari and the appendix in this case are due to be served and filed today, having been extended by a prior order of this Court.

2. Counsel is working to complete the appendix in this case. Petitioner had five amended PCR applications, the PCR hearing is voluminous, and the case also involves depositions. The appendix will be several volumes once all the documents have been retrieved, and counsel is working to assure that all relevant documents are in the Appendix. Counsel is working on the death penalty case of State v. Steven Bixby with co-counsel Lanelle DuRant and Charles Grose. Counsel is also reading the murder case of State v.

Andre King with the hope of filing the brief in that case on Friday, July 25, 2008 in the Court of Appeals. Court also must file briefs in the murder cases of State v. Andre Johnson and State v. Victor Hernandez which are due on August 1, 2008 in the Court of Appeals. Counsel also has to do several cases that are unexpectedly due to the unanticipated resignation of Ellen Cleary, and the reassignment of those cases.

3. Counsel is well aware of Justice Waller's order on extensions in death penalty cases. However, this request is made out of absolute necessity, and not for purposes of delay. Counsel would most respectfully ask this Court to give consideration to not making this a "no further extensions" order given the above unusual circumstances, and his very heavy caseload of mostly murder and death penalty cases.

4. Opposing counsel, as indicated by his signature below, kindly does not oppose this request.

WHEREFORE, the undersigned counsel would respectfully request a thirty day extension in which to file the petition for writ of certiorari and appendix in this case.

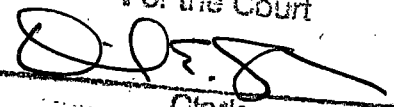
Respectfully submitted,



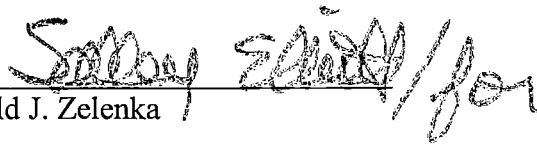
Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

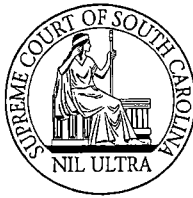
Attorney for Petitioner

July 23, 2008

GRANTED,
Jean H. Toat
For the Court
By 
Clerk
July 25, 2008

I DO NOT OPPOSE THIS REQUEST:


Donald J. Zelenka



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

June 25, 2008

Deputy Chief Appellate Defender for Capital Appeals
Robert M. Dudek
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: Weik, John Edward v. State

Dear Counsel:

The following Order has been endorsed on your Petition for Extension to File
Petition for a Writ of Certiorari and the Appendix in the above entitled case on
appeal.

“Granted.

Jean H. Toal C.J.
For the Court

By s/ Daniel E. Shearouse
Clerk

June 25, 2008.”

Please be advised that the Petition for Writ of Certiorari and Appendix should be
served and filed on or before July 23, 2008.

Deputy Chief Appellate Defender for Capital Appeals

Robert M. Dudek

Page Two

June 25, 2008

Very truly yours,

A handwritten signature in black ink, appearing to read "R. M. Dudek", followed by a long horizontal flourish.

CLERK

DES/dmh

cc: Assistant Deputy Attorney General Donald J. Zelenka

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

JUN 23 2008

S.C. SUPREME COURT

Appeal from Dorchester County
Perry M. Buckner, Circuit Court Judge

JOHN EDWARD WEIK,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR EXTENSION
TO FILE PETITION FOR A WRIT
OF CERTIORARI AND THE APPENDIX

The undersigned counsel would respectfully requests an extension of thirty days in which to file the petition for a writ of certiorari and the appendix in the above-referenced death penalty case. In support of this motion, counsel would respectfully show the Court:

1. The petition for a writ of certiorari and the appendix in this case are due to be served and filed today, having been extended by a prior order of this Court.

2. Counsel is working on the petition for a writ of certiorari to the Court of Appeals in the case of State v. Donald Paige which is due in this Court by Thursday, June 26, 2008. Counsel is also working on the petition for a writ of certiorari in the case of Frank Zeigler v. The State which is due in this Court by Friday, June 27, 2008. Counsel filed a petition for a writ of certiorari in the case of Thomas Stutts v. State with this Court on Friday, June 20, 2008. Counsel also has a petition for a writ of certiorari that is due in this

Court by Monday, June 30, 2008 in the case of Charles Judd v. State. Counsel is also working on the death penalty case of State v. Quincy Allen which is due in this Court by Monday, July 7, 2008.

3. Counsel is well aware of Justice Waller's order on extensions in death penalty cases. However, this request is made out of absolute necessity, and not for purposes of delay.

4. Opposing counsel, as indicated by his signature below, kindly does not oppose this request.

WHEREFORE, the undersigned counsel would respectfully request a thirty day extension in which to file the petition for writ of certiorari and appendix in this case.

Respectfully submitted,

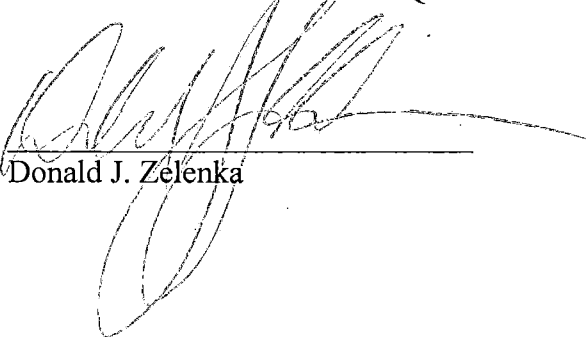


Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

Attorney for Petitioner

June 23, 2008

I DO NOT OPPOSE THIS REQUEST:



Donald J. Zelenka

GRANTED.

Jean H. Toal C.J.
For the Court
By [Signature]
Clerk

June 25, 2008

The Supreme Court of South Carolina

John Edward Weik, Petitioner,
v.
State of South Carolina, Respondent.

The Honorable Perry M. Buckner
Dorchester County
Trial Court Case No. 2003-CP-18-01070

ORDER

For good cause having been shown, the time for serving and filing the Petition for Writ of Certiorari and Appendix in the above entitled matter is hereby extended until June 23, 2008.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY

CLERK

Columbia, South Carolina

May 27, 2008

cc: Deputy Chief Appellate Defender for Capital Appeals
Robert M. Dudek
Assistant Deputy Attorney General Donald J. Zelenka



Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

Original

May 23, 2008

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RECEIVED
MAY 23 2008
S.C. SUPREME COURT

Re: John Edward Weik v. The State (Capital Case)

Dear Mr. Shearouse:

The petition for writ of certiorari and accompanying appendix in the above captioned case are due to be served and filed today. Unfortunately, due to my heavy caseload, I was not able to complete this petition for service. For this reason, I respectfully request an extension of thirty days in which to file this petition.

By copy of this letter, I am informing Donald J. Zelenka, Esquire, of the Office of the Attorney General, of this request. Thank you for your consideration in this matter.

Sincerely,

Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

RMD/mwl

cc: Donald J. Zelenka, Esquire



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

ORIGINAL

Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

RECEIVED

MAR 25 2008

S.C. SUPREME COURT

March 25, 2008

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
Post Office Box 11330
Columbia, SC 29211

Dear Mr. Shearouse:

The following case falls under the 60 day rule for appeals; and the date we received the transcript is listed to the side.

John Edward Weik v. The State

3/24/2008

I would appreciate you beginning our time limits from the above dates, and if you need additional information, or have any questions please contact me.

Thank you for your assistance in this matter.

Sincerely,

Melinda W. Long
Legal Assistant



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

March 12, 2008

RECEIVED

MAR 12 2008

S.C. SUPREME COURT

Ms. Desiree Allen
S.C. Court Administration
1015 Sumter Street, 2nd Floor
Columbia, South Carolina 29201-3739

Dear Ms. Allen:

Below is a list of transcript(s) that were requested by this office. Pursuant to Supreme Court Rule 206(e), the allotted time of sixty (60) days has lapsed to either receive the transcript or an extension to deliver same.

<u>Court Reporter</u>	<u>Due Date</u>	<u>Case Name</u>
Ms. Robin L. Keil	2/7/08	John Edward Weik

Trial Date: September 18 - 21, 2006

I would appreciate your confirming in writing as to the status of the above-referenced transcript(s). If you should have any questions, please do not hesitate to contact me.

Sincerely,


Melinda W. Long
Legal Assistant

xc: S.C. Supreme Court
Attorney General's Office



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

February 12, 2008

RECEIVED

FEB 12 2008

S.C. SUPREME COURT

Ms. Desiree Allen
S.C. Court Administration
1015 Sumter Street, 2nd Floor
Columbia, South Carolina 29201-3739

Dear Ms. Allen:

Below is a list of transcript(s) that were requested by this office. Pursuant to Supreme Court Rule 206(e), the allotted time of sixty (60) days has lapsed to either receive the transcript or an extension to deliver same.

<u>Court Reporter</u>	<u>Due Date</u>	<u>Case Name</u>
Ms. Robin L. Keil	2/7/08	John Edward Weik

Trial Date: September 18 - 21, 2006

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Sincerely,

Melinda W. Long
Legal Assistant

xc: S.C. Supreme Court
Attorney General's Office



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

RECEIVED

JAN 02 2008

S.C. SUPREME COURT

January 2, 2008

Ms. Desiree Allen
S.C. Court Administration
1015 Sumter Street, 2nd Floor
Columbia, South Carolina 29201-3739

Dear Ms. Allen:

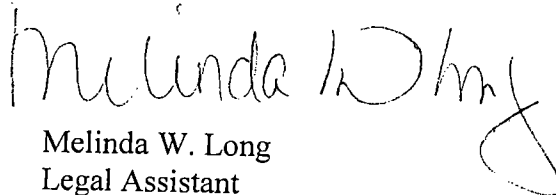
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<u>Court Reporter</u>	<u>Due Date</u>	<u>Case Name</u>
Ms. Robin L. Keil	12/7/07	John Edward Weik

Trial Date: September 18 - 21, 2006

I would appreciate your confirming in writing as to the status of the above-referenced transcript(s). If you should have any questions, please do not hesitate to contact me.

Sincerely,


Melinda W. Long
Legal Assistant

xc: S.C. Supreme Court
Attorney General's Office



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

RECEIVED

DEC 13 2007

S.C. SUPREME COURT

December 13, 2007

Ms. Desiree Allen
S.C. Court Administration
1015 Sumter Street, 2nd Floor
Columbia, South Carolina 29201-3739

Dear Ms. Allen:

Below is a list of transcript(s) that were requested by this office. Pursuant to Supreme Court Rule 206(e), the allotted time of sixty (60) days has lapsed to either receive the transcript or an extension to deliver same.

<u>Court Reporter</u>	<u>Due Date</u>	<u>Case Name</u>
Ms. Robin L. Keil	12/7/07	John Edward Weik

Trial Date: September 18 - 21, 2006

I would appreciate your confirming in writing as to the status of the above-referenced transcript(s). If you should have any questions, please do not hesitate to contact me.

Sincerely,

Melinda W. Long
Legal Assistant

xc: S.C. Supreme Court
Attorney General's Office

Hopkins, Debbie

From: Hopkins, Debbie
Sent: Monday, October 29, 2007 11:57 AM
To: Allen, Desiree
Subject: RE: Weik

Thank you. I will document my case file.

Debbie M. Hopkins
Administrative Assistant
South Carolina Supreme Court
P. O. Box 11330
Columbia, South Carolina 29211
(803) 734-1080

From: Allen, Desiree
Sent: Monday, October 29, 2007 11:56 AM
To: Hopkins, Debbie
Subject: Weik

Debbie, Robin has sent an extension request in this case. We will grant it. That gives her through 11.26 to deliver the transcript.

Desiree R. Allen, Court Services Manager
Court Reporters/Court Interpreters
Direct - 803.734.1860
Fax - 803.734.0269
email - dallen@scccourts.org
website - www.scccourts.org



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

October 19, 2007

RECEIVED

OCT 19 2007

S.C. SUPREME COURT

Ms. Desiree Allen
S.C. Court Administration
1015 Sumter Street, 2nd Floor
Columbia, South Carolina 29201-3739

Dear Ms. Allen:

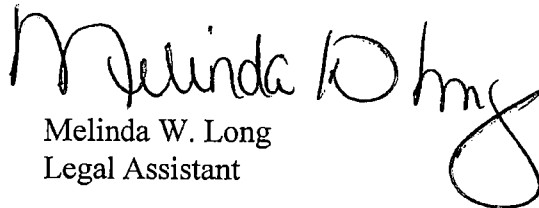
Below is a list of transcript(s) that were requested by this office. Pursuant to Supreme Court Rule 206(e), the allotted time of sixty (60) days has lapsed to either receive the transcript or an extension to deliver same.

<u>Court Reporter</u>	<u>Due Date</u>	<u>Case Name</u>
Ms. Robin L. Keil	9/4/07	John Edward Weik

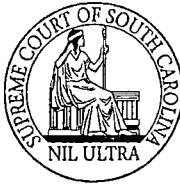
Trial Date: September 18 - 21, 2006

I would appreciate your confirming in writing as to the status of the above-referenced transcript(s). If you should have any questions, please do not hesitate to contact me.

Sincerely,


Melinda W. Long
Legal Assistant

xc: S.C. Supreme Court
Attorney General's Office



South Carolina Court Administration

South Carolina Supreme Court
Columbia, South Carolina

ROSALYN FRIERSON
DIRECTOR

MARY S. SCHROEDER
DEPUTY DIRECTOR

1015 SUMTER STREET, SUITE 200
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1800
FAX: (803) 734-0269

MEMORANDUM

TO: Melinda Long
FROM: Desiree R. Allen *[Signature]*
RE: **John Edward Weik** transcript
DATE: September 26, 2007

RECEIVED

SEP 26 2007

S.C. SUPREME COURT

This is in response to your letter dated September 13, 2007, requesting that I confirm in writing the status of the transcript referenced above. Ms. Keil is no longer employed by Court Administration. She is, however, being allowed to prepare transcripts from her records when requests are received by this office. According to our records, Ms. Keil has not filed an extension on this transcript. She has been contacted and provided with an extension form. I anticipate that an extension will be requested by Ms. Keil. When it is approved, a copy will be sent to your office.

CC: S.C. Supreme Court
Office of the Attorney General



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

September 13, 2007

Ms. Desiree Allen
S.C. Court Administration
1015 Sumter Street, 2nd Floor
Columbia, South Carolina 29201-3739

Dear Ms. Allen:

Below is a list of transcript(s) that were requested by this office. Pursuant to Supreme Court Rule 206(e), the allotted time of sixty (60) days has lapsed to either receive the transcript or an extension to deliver same.

Court Reporter
Ms. Robin L. Keil

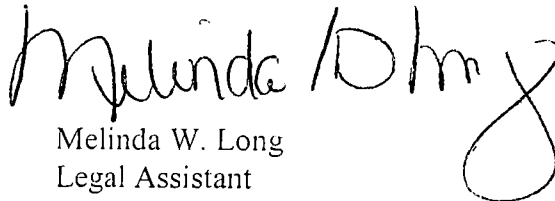
Due Date
9/4/07

Case Name
John Edward Weik

Trial Date: September 18 - 21, 2006

I would appreciate your confirming in writing as to the status of the above-referenced transcript(s). If you should have any questions, please do not hesitate to contact me.

Sincerely,


Melinda W. Long
Legal Assistant

xc: S.C. Supreme Court
Attorney General's Office

RECEIVED

SEP 14 2007

S.C. SUPREME COURT



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

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Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

July 6, 2007

RECEIVED

JUL - 6 2007

S.C. SUPREME COURT

Ms. Robin L. Keil
Circuit Court Reporter
P O Box 3335
Summerville, SC 29483-3335

Dear Ms. Keil:

Our office has been requested to perfect the appeal arising out of:

John Edward Weik v. The State

Indictment #: 2003-CP-18-1070

County: Dorchester

Date of Trial: September 18 - 21, 2006

Presiding Judge: Perry M. Buckner

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

We request that the lines on the paper be numbered from 1-25, and that you include in the transcript any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments. We have found that even if there are no objections, we need to review both opening and closing arguments for appeal.

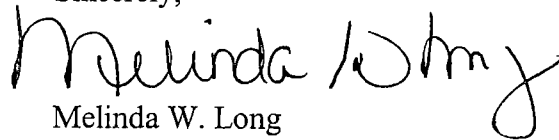
If you are aware of the existence of co-defendants not listed in the prior captioned case, please contact us prior to transcribing the transcript. In this manner, we can consult our records to ensure that in ordering a transcript, a duplication has not occurred. In addition, if the Attorney General's Office has already requested an original transcript, please notify us.

Ms. Robin L. Keil
July 6, 2007
Page Two

I am sorry for any inconvenience this may cause, but I appreciate your assistance in this matter. If you have any questions, or problems, please contact me.

Thank you for your kind cooperation in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Melinda W. Long". The signature is fluid and cursive, with the first name "Melinda" being more prominent than the last name "Long".

Melinda W. Long
Legal Assistant

xc: S.C. Supreme Court
Attorney General's Office

Law Offices of STIRLING & O'CONNELL

145 King Street Suite 410, Charleston, South Carolina, 29401 Telephone (843) 577-9890 Fax (843) 577-9826

ATTORNEYS AT LAW

Ann M. Stirling
Michael P. O'Connell

June 11, 2007

Clerk of Court
South Carolina Supreme Court
1231 Gervais Street
P.O. Box 11330
Columbia, SC 29211

RE: Weik v. State of South Carolina
2003-CP-18-1070

Dear Clerk:

Enclosed please find a Notice of Appeal (with corresponding Orders) and Proof of Service in the above referenced case. Please note a copy of this Notice has been sent to the Clerk of Court for Dorchester County as well as Donald Zelenka, Esquire.

Please call if you have any questions.

Sincerely,



Sarah G. Pendleton
Legal Assistant

/sp

Enclosure

Cc w/enc: Clerk of Court, Dorchester County
Donald Zelenka, Esquire
Mr. John Weik

RECEIVED

JUN 13 2007

S.C. SUPREME COURT

E-MAIL

Ann Stirling: astirling@stirlingoconnell.com

Michael O'Connell: moconnell@stirlingoconnell.com

Donna Dodds: ddodds@stirlingoconnell.com

Sarah Gallagher: sgallagher@stirlingoconnell.com

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM DORCHESTER COUNTY

In the Court of Common Pleas
The Honorable Perry M. Buckner

Case No.2003-CP-18-1070

John Edward Weik,.....Appellant

Vs.

Jon Ozmint, Commissioner of
the State of South Carolina Department
of Corrections and the State of
South Carolina.....Respondent.

NOTICE OF APPEAL

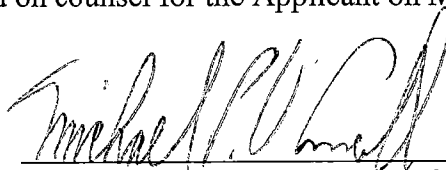
John E. Weik, hereby gives notice that he appeals the Order of Dismissal denying his Application for Post Conviction Relief signed by Perry M. Buckner, Circuit Court Judge, on March 12, 2007 and the denial of the Applicant's Motion for Reconsideration pursuant to SCRCP 59(e) which was served on counsel for the Applicant on May 24, 2007.

RECEIVED

JUN 13 2007

S.C. SUPREME COURT

DATED: 6/11/07



MICHAEL P. O'CONNELL, ESQUIRE
STIRLING & O'CONNELL
145 King Street, Suite 410
Charleston, SC 29401
(843) 577-9890
ATTORNEY FOR THE APPLICANT

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM DORCHESTER COUNTY

In the Court of Common Pleas
The Honorable Perry M. Buckner

Case No.2003-CP-18-1070

John Edward Weik,.....Appellant

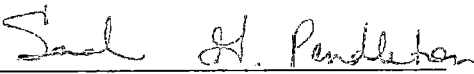
Vs.

Jon Ozmint, Commissioner of
the State of South Carolina Department
of Corrections and the State of
South Carolina.....Respondent.

PROOF OF SERVICE

I, Sarah G. Pendleton, do hereby certify that a filed copy of the foregoing **Notice of Appeal** in the above captioned case has been served on counsel for the Respondent by placing in the U.S. mail, postage prepaid, a copy of the same at the address shown below on this 11th day of June, 2007.

Donald Zelenka, Esquire
S.C. Attorney General's Office
P.O. Box 11549
Columbia, SC 29211


Sarah G. Pendleton

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

JUDGMENT IN A CIVIL CASE
2003CP1801070

JOHN EDWARD WEIK, #5068

STATE OF S.C.

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE

- () JURY VERDICT. THIS ACTION CAME BEFORE THE COURT FOR A TRIAL BY JURY. THE ISSUES HAVE BEEN TRIED AND A VERDICT RENDERED.
- () DECISION BY THE COURT. THIS ACTION CAME TO TRIAL OR HEARING BEFORE THE COURT. THE ISSUES HAVE BEEN TRIED OR HEARD AND A DECISION RENDERED.
- () ACTION DISMISSED (CHECK REASON): () RULE 12b, SCRPC; () RULE 41a SCRPC (VOL NONSUIT); () RULE 43k, SCRPC (SETTLED) () OTHER
- () ACTION STRICKEN (CHECK REASON): () RULE 40(j) SCRPC; () BANKRUPTCY () BINDING ARBITRATION, SUBJECT TO RIGHT TO RESTORE TO CONFIRM VACATE OR MODIFY ARBITRATION AWARD; () OTHER _____

IT IS ORDERED AND ADJUDGED: (4) See Attached order; () Statement of Judgment by the court.

Order of Dismissal

Dated at St. George, this 4th day of April, 2007.

Cheryl Graham

CHERYL GRAHAM
CLERK OF COURT

BY: Carolyn Ayer, Deputy/Civil Court Coordinator

Carolyn Ayer

THIS JUDGMENT WAS ENTERED ON THE 4th DAY OF April, 2007.
AND A COPY WAS MAILED FIRST CLASS THIS 4th DAY OF April
2007 TO ATTORNEY OF RECORD OR TO PARTIES WHEN APPEARING PRO SE
AS FOLLOWS:

Michael O'Connell
Melissa Kimbrough

Donald Zelenka

2007 APR -4 PM 4:04
CLERK OF COURT
DORCHESTER COUNTY
CERTIFIED COPY

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

CERTIFIED COPY

2007 APR -4 PM 4:04

IN THE COURT OF COMMON PLEAS

JOHN EDWARD WEIK, #5068
Applicant,

C/A No. 03-CP-18-1070

ORDER OF DISMISSAL

vs.

STATE OF SOUTH CAROLINA,

Respondent.

2007 APR -4 AM 2:25
CLERK OF COURT
DORCHESTER COUNTY

FILED-RECORDED

This matter comes before this Court by a series of amended applications for post-conviction relief filed by John Edward Weik through his court appointed counsel Michael P. O'Connell and Melissa Kimbrough. On July 9, 2003, the South Carolina Supreme Court entered an order assigning this Court jurisdiction. On September 18 - 21, 2006, this matter was heard. The Applicant was present and represented by Mr. O'Connell and Ms. Kimbrough. The Respondents were represented by Assistant Deputy Attorney General Donald J. Zelenka. Testimony was received from Robert Minter, Russell Christopher Weik, Dr. Donald Morgan, Scott Parker, Amy Weik Maxwell, John William Gunter, Magdalena Gunter, Russell C. Weik, Dr. Donna Schwartz Watts, Dr. Seymour Halleck, Jeffrey Bloom, Dr. Pamela Crawford, Dr. Augustus Rodgers, Margaret O'Shea, Percy Beauford, and Marva Hardee-Thomas. Subsequently, this Court received the post-hearing deposition of Dr. Geoffrey McKee and Patricia Rickborn taken October 3, 2006. This Court requested proposed orders from each party. This Order of Dismissal follows.

#1
PMB

I.

PROCEDURAL HISTORY

On July 16, 1998, a Dorchester County Jury indicted John Edward Weik for Dorchester County for murder (98-GS-18-0750) and burglary in the first degree (98-GS-18-749). The State subsequently served notice of intent to seek the death penalty on July 20, 1998.

A. *Statement of Facts*

The Applicant, John E. Weik, had a relationship with Susan Krasae when she was about 17 years old. As a result, they had a son, Daniel, who was around ten years old when her death occurred.

#2
PnB Susan had custody of Daniel after their relationship ended. She later married, had a second child, Amber, and divorced Amber's father. At the time of the incident, Susan was living with her two children and fiancé in a mobile home next door to her father, Carl Hutto. Weik had not seen his son for nearly nine (9) years. During the year of the crime he began seeing his son.

On April 30, 1998, John Weik lived with his parents in Moncks Corner. The day before he told his co-worker that he was having trouble with his son and that if he did not come back to work that something had happened. He called his son, Daniel, on the telephone. Daniel told him, "I can't see you anymore", after he had tried to get his son to choose between them. After the call, Weik got into his truck, armed with a loaded shotgun and drove to the Krasae trailer. An argument occurred. Ms. Krasae returned to the inside of her trailer with her children. Weik went to his truck, got a 12 gauge semiautomatic shotgun, which was loaded, and returned to the trailer. He kicked the door open the victim had closed and shot Susan Krasae four (4) times with double aught buckshot. She died as a result.

Weik got into his truck and drove off. After a short distance he was stopped. The Appellant subsequently gave statements to the law enforcement admitting his involvement in the crime.

B. Procedural History

Percy Beauford and Marva A. Hardee-Thomas represented the Applicant at trial. Solicitor Walter M. Bailey, Jr., Robert D. Robbins, and B. Harrison Bell represented the Respondents. A pretrial hearing was held on May 5, 1999. A competency hearing was held on May 18, 1999 before the Honorable M. Duane Shuler, Presiding Judge. Judge Shuler held that Weik was competent to stand trial on May 19, 1999.

#3
PAB
Jury selection began on May 24, 1999. On May 26, 1999, the trial began before Judge Shuler and jury. On May 27, 1999, the jury found Weik guilty of murder and burglary in the first degree. On May 29, 1999, the penalty phase began. The jury found beyond reasonable doubt the existence of the statutory aggravating circumstances of physical torture and burglary in the first degree; and recommended the death sentence. Judge Shuler then sentenced Weik to death for the murder conviction. He sentenced him to life imprisonment for burglary in the first degree.

Weik appealed to the South Carolina Supreme Court. On appeal, Robert M. Dudek of the South Carolina Office of Appellate Defense represented him. In the appeal, the following questions were raised by Weik:

- I. Whether the judge erred by refusing to hold a competency hearing during the guilt stage of the trial when defense counsel informed the judge Appellant was hearing voices, counsel had serious reservations about Appellant's ability to make rational decisions and assist counsel, and the judge had a continuing duty to assure Appellant was competent to stand trial?

- II. Whether the trial judge erred by refusing to accept Appellant's plea of guilty but mentally ill where the judge had already heard evidence Appellant was mentally ill, and his truncated misleading colloquy with Appellant about the meaning of "malice" was insufficient to justify the refusal to accept that plea once the jury already knew of it?
- III. Whether the judge erred by ruling Appellant was competent to stand trial where even the State's experts testified Appellant was not "faking", he was relating "bizarre information" to the doctors, where Dr. Schwartz-Watts and Dr. Morgan testified Appellant was not competent, and Dr. Brannon testified Appellant was "crazy", since the judge abused his discretion by finding Appellant competent given this evidence.
- IV. Whether the judge erred by failing to instruct the jury on the law of guilty but mentally ill where the judge earlier stated he would submit that verdict form, and there was evidence Appellant was hearing voices, felt unable to "get back out" of the house before he shot the decedent, and felt outside his body at the time he shot the decedent?
- #4 V. Whether the judge erred by admitting State's penalty exhibits 1-12, particularly State's 8, 9, & 11, since they are very gruesome photographs, and their probative value was far outweighed by their unduly prejudicial effect?
Pm B
- VI. Whether Appellant's death sentence should be vacated as disproportionate to other death penalty cases since this was a domestic crime, the aggravating circumstances were only technically applicable, and Appellant was mentally ill?

The South Carolina Supreme Court on September 3, 2002, initially affirmed the conviction and sentence. State v. John Edward Weik, Op. No. 25556, 2002 WL 2008242 (SCSCT Sep. 3, 2002). A petition for rehearing was filed and granted on October 10, 2002. After argument, on January 9, 2003, the South Carolina Supreme Court adhered to its original decision.

The Applicant made a petition for writ of certiorari to the United States Supreme Court in the direct appeal. In the petition, he raised the following question presented:

"Whether the South Carolina court's refusal to make a competency inquiry when informed that the mentally ill Petitioner was hearing voices instructing his what to do at a

critical point during his death penalty trial violated Pate v. Robinson, 383 U.S. 375 (1966)?"

On June 16, 2003, the Court denied the petition. Weik v. South Carolina, 539 U.S. 930 (June 16, 2003).

This Court has before it the evidence presented at the hearing and the following materials:

1. Record on Appeal – 5 volumes
2. Written Taped Statement of John Weik.
3. Final Brief of Appellant.
4. Final Brief of Respondent.
5. Final Reply Brief of Appellant.
6. State Exhibit 67
7. State Exhibit 62.
8. Evidence transfer sheet.
9. April 30, 1998 traffic stop statement of Weik.
10. 911 Dispatch Tape Summary – Photos of Car (4).
11. Evidence transfer.
12. Appeal Notice documents, including notice of appeal, sentencing sheets, indictments, and verdicts.
13. Transcript of service of death penalty notice. July 20, 1998.

#5
PnB

II.

ALLEGATIONS RAISED IN APPLICATIONS

Mr. Weik filed his initial application for post-conviction relief in Dorchester County on June 19, 2003, through appellate counsel Dudek. In the application, it was alleged that he received ineffective assistance of counsel on various grounds.

Particularly, he alleged:

9. Ineffective assistance of counsel in derogation of the Sixth Amendment to the United States Constitution.

- #6
PMB
- A. Defense counsel was ineffective, in violation of the Sixth Amendment to the United States Constitution, for failing to comply with the statutory requirements necessary for the Court to accept a guilty but mentally ill plea from petitioner. The South Carolina Supreme Court refused to address this issue on appeal due to defense counsel's ineffectiveness. **[Deleted in Amended Application]**.
 - B. Defense counsel was ineffective, in violation of the Sixth Amendment to the United States Constitution, for failing to request that the Court charge guilty but mentally ill as a verdict form during the guilt phase. Counsel's ineffectiveness caused the Supreme Court to refuse to address this issue on direct appeal. **[Deleted in part in Amended Application]**.
 - C. Defense counsel was ineffective in violation of the Sixth Amendment to the United States Constitution, by failing to offer available evidence of voluntary manslaughter. The decedent's daughter testified at the penalty stage of the trial, that the decedent and petitioner were involved in a physical altercation immediately before the shooting. This available evidence of heat of passion and a sufficient legal provocation would have caused the trial court to charge the jury on voluntary manslaughter, and could have averted a death penalty case. **[Deleted in Amended Application]**.
 - D. Defense counsel's ineffectiveness was so pervasive that it violated petitioner's Sixth Amendment right, and also the South Carolina standard under Frett v. State, 298 S.C. 54, 378 S.E.2d 249 (1988). **[Deleted in Amended Application]**.

The Respondents made a Return to the original application on October 6, 2003. On June 19, 2006 an Amended Application was filed. On July 26, 2006, a return to the amended application

was filed. On September 15, 2006, the Applicant made a second amended application. During the hearing, the Applicant made further amendments. On January 18, 2007, the Applicant made a motion to file a third amended application. Finally, on February 6, 2007, the Applicant made a motion to amend the Application a fifth time. As presently presented before this court in the third amended application dated January 18, 2007, as proposed to be amended February 6, 2007, the application would read as follows:

- #7
PnB
1. **(ABANDONED Per January 22, 2007 Letter). 9 (a).** Applicant received ineffective assistance of counsel during the trial of his case inasmuch as counsel failed to proffer psychiatric testimony and evidence in support of their motion for a second Blair/competency hearing. *Strickland v. Washington*, 448 U.S. 668 (1984); *State v. Blair*, 275 S.C. 529, 273 S.E.2d 536 (1981); *Matthews v. State*, 358 S.C. 456, 596 S.E.2d 49 (2004); *State v. Burgess*, 356 S.C. 572, 590 S.E.2d 42 (Ct. App. 2003); *State v. Drayton*, 270 S.C. 582, 243 S.E.2d 458 (1978); *Hughes v. State*, 367 S.C. 389, 626 S.E.2d 805 (2006). **[IAC - FAILURE TO PRESENT PSYCHIATRIC TESTIMONY CONCERNING INTERVENING COMPETENCY TO STAND TRIAL]**
 2. **(ABANDONED Per January 22, 2007 Letter). 9(b)** Applicant received ineffective assistance of counsel inasmuch as counsel failed to offer a guilty but mentally ill defense during the guilt-or-innocence phase of his trial. *Strickland v. Washington*, *supra*; *State v. Hatfield*, 300 S.C. 469, 388 S.E.2d 802 (1990); S.C. Code Statute 17-24-20. **[FAILED TO OFFER GBMI DEFENSE]**.
 3. **(ABANDONED Per January 22, 2007 Letter). 9(c)** Applicant received ineffective assistance of counsel inasmuch as counsel failed to provide evidence of Applicant's background to the State's experts when there is a reasonable probability that such evidence would have changed the opinions rendered by the State's experts at both the competency hearing and at the penalty phase. *Strickland v. Washington*, *supra*; *Williams v. Taylor*, *supra*. **[FAILED TO PROVIDE BACKGROUND EVIDENCE TO DEFENSE EXPERTS]**
 4. **9(d).** Applicant received ineffective assistance of counsel inasmuch as counsel failed to object to the trial judge's erroneous jury charge that malice could be implied from the use of a deadly weapon. *Strickland v. Washington*, *supra*; *Yates v. Evatt*, 500 U.S. 391 (1991). **[FAILED TO OBJECT TO IMPLIED MALICE INSTRUCTION]**.

5. **(ABANDONED Per January 22, 2007 Letter).** 9(e) Applicant received ineffective assistance of counsel inasmuch as counsel failed to object to the solicitor's offering expert testimony from Earl Asbell during the guilt phase when this witness had never been qualified in the area of blood spatter. *Strickland v. Washington, supra; McDill v. Mark's Auto Sales*, 626 S.E.2d 52 (2006). **[FAILED TO OBJECT TO EXPERT OPINION ON BLOOD SPLATTER BASED UPON FAILURE OF EXPERT TO HAVE BEEN QUALIFIED BEFORE].**
6. 9(f) Applicant was denied due process of law and a fair sentencing determination based on the State's use of "torture" as an aggravator which, as defined under South Carolina law, is unconstitutionally over broad. U.S. Const. Amend V, VIII, and XIV, the South Carolina Constitution and federal and state law. **[DENIED DUE PROCESS BY OVERBROAD TORTURE AGGRAVATOR].**
7. 9(g) Applicant was not represented by two lawyers as required by S.C. Code Section 16-3-20(B)(1) and thus denied a fair trial because one of the lawyers appointed by the Court, Marva Hardee-Thomas, did not act as a lawyer during preparation for the trial and during the trial but merely provided as clerical assistance to the other appointed counsel. *State v. Diddlemeyer*, 296 S.C. 235, 371 S.E.2d 793 (S.C. 1988). **[NEW- Only One Counsel Acted As Lawyer In Capital Case]**
8. 9(h) Applicant was denied effective assistance of counsel at the penalty phase inasmuch his lawyers did not object to the trial judge submitting the aggravating circumstance of torture which, as defined under South Carolina law, is unconstitutionally over broad. U.S. Const. Amends. Fifth, Eighth and Fourteenth, the South Carolina Constitution and federal and state law. **[NEW - IAC- TORTURE AGGRAVATOR - Counsel Filed to object to OVERBROAD TORTURE AGGRAVATOR - See ground 6].**
9. **Abandoned per January 19, 2007 Letter)** 9(I). Applicant was denied effective assistance of counsel at the penalty phase when his attorneys failed to object to the trial judge's faulty instructions to the Applicant during the penalty phase that Applicant's final argument to the jury was restricted to commenting on the matters in evidence and the appropriate sentence he should receive. The Applicant was not instructed by the trial judge that he could also express remorse and ask for mercy and as a result elected not to argue to the jury. **[NEW - IAC - PERSONAL PENALTY PHASE CLOSING ISSUE - Failed to object to instructions in penalty phase that restricted personal argument to matters in evidence]**
10. **ABANDONED per January 19, 2007 Letter** 9(j) Applicant was denied effective assistance of counsel at the competency hearing because trial counsel did not timely hire investigators so they would have had sufficient time prior to trial to investigate and

gather all of the Applicant's personal and family background. If complete evidence of the Applicant's personal and family background had been supplied to the Applicant's mental health experts, their testimony would have been substantially bolstered and the testimony of the state's mental health experts would have been impeached which would probably have resulted in finding that the Applicant was incompetent to stand trial. **[NEW- IAC - COMPETENCY HEARING - DID NOT TIMELY HIRE INVESTIGATORS TO MAKE FAMILY BACKGROUND INVESTIGATION].**

- #9
PmB
11. **ABANDONED per January 19, 2007 Letter 9(k)** Applicant was denied effective assistance of counsel at the competency hearing because trial counsel did not provide evidence of the Applicant's personal and family background to their mental health experts and had they done so, the mental health experts' testimony would have been substantially bolstered and the testimony of the state's mental health experts impeached which would probably have resulted in a finding that the Applicant was not competent to stand trial. **[NEW-IAC - Competency to stand trial Hearing - FAILED TO PROVIDE PERSONAL AND FAMILY BACKGROUND EVIDENCE TO DEFENSE EXPERTS]**
 12. **ABANDONED per January 19, 2007 Letter : 9(l)** Applicant was denied effective assistance of counsel at the competency hearing because trial counsel failed to properly prepare the mental health experts' testimony including but limited to not asking them in advance what they would be able to testify to as experts, not providing them with evidence of the Applicant's background which would have bolstered their testimony, not timely providing them the Applicants' records from the State Hospital, and not informing the experts of the questions they were going to ask the experts. Had trial counsel done these things, the Applicant would probably have been found incompetent to stand trial. **[NEW-IAC - Competency to Stand Trial - FAILED TO PREPARE MENTAL HEALTH TESTIMONY AND PROVIDE BACKGROUND AND ASK WHAT THEIR OPINION WAS AND POTENTIAL QUESTIONS].**
 13. **9(m)** Applicant was denied effective assistance of counsel at the penalty phase because trial counsel did not timely hire investigators so they would have had sufficient time prior to trial to investigate and gather all of the Applicant's personal and family background. If complete evidence of the Applicant's personal and family background had been supplied to the Applicant's mental health experts and the social worker, their testimony would have been substantially bolstered and the testimony of the state's mental health experts would have been impeached which would probably have resulted in life sentence. **[NEW- IAC - PENALTY PHASE - DID NOT TIMELY HIRE INVESTIGATORS TO MAKE FAMILY BACKGROUND INVESTIGATION].**
 14. **9(n)** Applicant was denied effective assistance of counsel at the penalty phase because trial counsel did not provide evidence of the Applicant's personal and family background to their mental health experts and the social worker and had they done so, their testimony would have been substantially bolstered and the

testimony of the state's mental health experts impeached which would probably have resulted in a life sentence. [NEW- IAC - PENALTY PHASE - FAILED TO PREPARE MENTAL HEALTH TESTIMONY AND PROVIDE FAMILY BACKGROUND EVIDENCE AND ASK WHAT THEIR OPINION WAS AND POTENTIAL QUESTIONS].

15. 9(o). Applicant was denied effective assistance of counsel at the penalty phase because trial counsel failed to properly prepare the mental health experts' testimony including but limited to not asking them in advance what they would be able to testify to as experts, not providing them with evidence of the Applicant's background which would have bolstered their testimony, not timely providing them the Applicants' records from the State Hospital, and not informing the experts of the questions they were going to ask the experts. Had trial counsel done these things, the Applicant would probably have been sentenced to life imprisonment. [NEW- IAC - PENALTY PHASE - FAILED TO PREPARE MENTAL HEALTH TESTIMONY AND PROVIDE FAMILY BACKGROUND EVIDENCE AND ASK WHAT THEIR OPINION WAS AND POTENTIAL QUESTIONS].

#10
PMB

16. 9(p) The Applicant was denied effective assistance of counsel when trial counsel did not provide a sufficient basis for their continuance motion at the hearing on May 18, 2006 when such basis was available namely a letter to them from the mitigation investigator dated April 29, 1999 which set out in detail trial counsel's inept cooperation with and supervision of the mitigation investigator - one Patti Rickborn - which resulted in her resigning from the case. If trial counsel had provided this letter to the trial judge, he would have realized that trial counsel's on the record explanation of the reason why the mitigation expert resigned on April 29, 1999 was not accurate and the trial judge would have been alerted that they were not providing effective assistance of counsel to the Applicant, would have probably continued the trial so the new mitigation investigator would have had time to gather complete information about the Applicant's personal and family background which would have been provided to the mental health experts and presented to the jury and would probably have resulted in a life sentence. [NEW - IAC - CONTINUANCE REQUEST- failed to provide April 29 , 1999 Rickborn letter as explanation for resignation].

17. ABANDONED per January 17, 2007 Letter : 9(q) Applicant was denied effective assistance of counsel when trial counsel did not report to the trial judge their incompetence in their representation of Applicant as set out in the April 29, 1999 letter of Patti Rickborn. If the trial judge had been given Ms. Rickborn's letter, he probably would have relieved trial counsel, granted a continuance and appointed competent counsel who would have provided effective counsel as opposed to the ineffective assistance provided by trial counsel as set out in this Application and the Applicant would probably have received a life sentence. [NEW- IAC - FAILED TO ADVISE

COURT OF OWN INCOMPETENCE AS SET OUT IN RICKBORN LETTER OF APRIL 29 J.

18. 9(r). Applicant was denied effective assistance of counsel at the penalty phase because trial counsel did not timely hire investigators so they would have had sufficient time prior to trial to investigate and gather all the Applicant's personal and family background. If complete evidence of the Applicant's personal and family background had been presented to the jury, the Applicant probably would have been sentenced to life by the jury. [New -IAC - FAILED TO TIMELY HIRE MITIGATION INVESTIGATORS.]
19. 9(s) Applicant was denied the effective assistance of counsel at the penalty phase because trial counsel did not present evidence to the jury of the Applicant's personal and family background which was in their possession at the time of the trial. If the evidence of the Applicant's personal and family background which was in trial counsel's possession had been presented to the jury, the jury would probably have sentenced him to life. [New in Third PCR Application - IAC- FAILED TO PRESENT PERSONAL AND FAMILY BACKGROUND INFORMATION IN COUNSEL'S POSSESSION]
- #(1)
PnB
20. ABANDONED IN January 17, 2007 Letter and January 18, 2007 Motion to Amend, pl,n. 1; 9(t). Applicant was denied the effective assistance of counsel at the competency hearing because trial counsel did not present evidence to the trial judge of the Applicant's personal and family background which was in their possession at the time of trial. If the evidence of the Applicant's personal and family background had been presented to the trial judge, he probably would have found the Applicant incompetent to stand trial. [New in Third PCR Application - IAC- COMPETENCY TO STAND TRIAL - FAILURE TO PRESENT FAMILY BACKGROUND INFORMATION]
21. 9(u). Applicant was denied the effective assistance of counsel at the penalty phase because trial counsel did not object to a portion of the Solicitor's cross-examination of Applicant's expert Dr. Augustus Rodgers, PhD and to the Solicitor's closing argument as follows: during cross-examination, Dr. Rodgers admitted that the S.C. prisons where Applicant would be imprisoned if he received a life sentence have: crafts available for prisoners; jobs for which prisoners are sometimes paid; canteens where prisoners could buy soft drinks, candy bars, popcorn and other items with the money they earn in prison; job training; educational opportunities for prisoners to get their GEDs and to take college courses; recreational facilities available for prisoners; "three square meals" per day; free clothing and shoes; free medical care; radios and televisions.(Tr. 1944-1954). The Solicitor argued in closing argument that the jury should consider the fact that a prisoner would have a job in prison, get paid, have a canteen where he could buy soft drinks and candy and have a TV as reasons and compared the Applicant's life in prison to the decedent who was dead and in her grave. Tr. p. 2135-2136. This evidence adduced during the cross-

examination of Dr. Rodgers and the Solicitor's argument injected arbitrary factors into the jury's sentencing considerations in violation of S.C. Code Section 16-3-25(C)(1). "When the jury is invited to speculate about irrelevant matters upon which a death sentence may be based, §16-3-25(C)(1) is violated." State v. Burkhardt, - S.E.2d -, 2007 WL 80036 decided January 8, 2007. When an arbitrary factor is injected into the jury sentencing consideration, reversal is required. (Motion to Amend received on February 6, 2007) (IAC- PENALTY PHASE - FAILURE TO OBJECT TO PRISON LIFE EVIDENCE AND ARGUMENT]

22. 9(v) Trial counsel was ineffective in failing to adequately voir dire potential jurors, and failing to object to the qualification of jurors who were automatically in favor of capital punishment for defendants convicted of an intentional homicide and/or unable to give due consideration to evidence in mitigation. [Amended at Hearing - IAC - VOIR DIRE ACTS AND OMISSIONS]

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As noted above, on January 19, 2007, the Applicant, through counsel O'Connell advised this Court that it was abandoning grounds 9 (a), 9(b), 9(c), 9(e), 9(h) 9(j), 9(k), 9(l), 9(q) and 9(t). In addition, this Court notes that the Applicant only raised and argued grounds 9 (f), (g), (m), (n), (o), (r), (s), (p), (u), (v) in his proposed Order to the Court.

III.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and a review of the record, this Court is constrained to deny relief. Pursuant to S.C. Code Section 17-27-80, this Court makes the following findings of fact and conclusions of law on each of the grounds raised which the Applicant has not expressly abandoned.

A. General Law on Ineffective Assistance of Counsel Standards.

Under the standard for evaluating claims of ineffective assistance of counsel, the Applicant must establish that counsel's representation fell below an objective standard of reasonableness. Strickland v Washington, 466 U.S. 668 (1984). Counsel is "strongly presumed

to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of counsel’s performance is whether he fell outside of the range of competence demanded of lawyers practicing criminal law. Butler, supra. To put it another way, in order for petitioner to be granted Post-Conviction Relief for ineffective assistance of counsel, he must show (1) that counsel failed to render reasonably effective assistance under the prevailing professional norms and (2) he was prejudiced by his counsel’s ineffective assistance. Legge v. State, 349 S.C. 222, 562 S.E.2d 618 (S.C. 2002).

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Competency is measured against what an objectively reasonable attorney would have done under circumstances existing at the time of the representation. Savino v. Murray, 82 F.3d 593, 598 (4th Cir. 1996). The Court should, “decline to allow an ineffective assistance of counsel claim to create a situation where post-conviction attorneys stroll in with the full benefit of hindsight to second-guess trial lawyers who professionally discharge their duties to their clients under the manifold pressures of a state trial.” Mazzell v. Evatt, 88 F.3d 263, 269 (4th Cir. 1996).

As the Supreme Court made clear in Strickland:

. . . the reasonableness of counsel’s actions may be determined or substantially influenced by the defendant’s own statements or actions. Counsel’s actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigations are reasonable depends upon such information . . . [W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel’s failure to pursue those investigations may not later be challenged as unreasonable.

Strickland, 466 U.S. at 691; Barnes v. Thompson, 58 F.3d 971, 978 (4th Cir. 1995); Matthews v. Evatt, 105 F.3d 907, 919-920 (4th Cir. 1997). Bell v. Evatt, 72 F.3d 421, 429 (4th Cir. 1995). In

many cases, counsel's decision not to pursue a particular approach at sentencing reflects not incompetence, but rather a sound strategic choice. See Rose v. Lee, 252 F.3d 676, 693 (4th Cir.2001). Accord Bunch v. Thompson, 949 F.2d 1354, 1364 (4th Cir.1991).

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In addition to a burden of showing deficient performance, counsel must also prove prejudice under the Sixth Amendment. The standard of prejudice differs depending upon whether it is related to guilt phase issues or penalty phase issues. In order to prove prejudice, an applicant must show that but for counsel's errors, there is a reasonable probability the result of the trial would have been different. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.*; Jones v. State, 332 S.C. 329, 504 S.E.2d 822 (1998). A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Petitioner must show that a reasonable probability exists that but for the unprofessional error, "at least one juror would have struck a different balance." Wiggins v. Smith, 539 U.S. 510, 537, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). Thus, Petitioner must show by a probability sufficient to undermine confidence in the outcome that the deficient performance "might well have influenced" at least one juror to choose life imprisonment. *Id.* at 538 (quoting Williams v. Taylor, 529 U.S. at 398). The Supreme Court has specifically rejected the contention that a petitioner must establish "a reasonable probability" by a preponderance of the evidence. Williams v. Taylor, 529 U.S. at 405-06. See also Rose v. Lee, 252 F.3d 676, 689 (4th Cir.2001) (noting same).

9(d). Applicant received ineffective assistance of counsel inasmuch as counsel failed to object to the trial judge's erroneous jury charge that malice could be implied from the use of a deadly weapon. Strickland v. Washington, *supra*; Yates v. Evatt, 500 U.S. 391 (1991). [FAILED TO OBJECT TO IMPLIED MALICE INSTRUCTION].

In allegation 9(d), Weik contends that trial counsel was deficient in the failure in the guilt phase to object to the alleged "implied malice" charge. During the state post-conviction relief hearing, counsel Percy Beauford testified that he did not object to the malice instruction because he did not think it was error and appropriate under South Carolina law. This Court must find that counsel's assessment was not deficient under the standards of competence demanded of counsel practicing criminal law in 1999. The Applicant has failed in his burden of proof on this claim.

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A review of the trial record reveals that the trial judge denied the defense request for a manslaughter instruction. R. 1736-37. During the guilt phase instructions, the trial judge defined the elements of murder, including malice aforethought. R. 1770-1775.1 No objection was made to the instructions at the conclusion of the charge. R. 1783, ll. 5-7. The jury began deliberations at 3:35 PM and returned with a verdict at 3:46 PM. R. 1784-85.

During the trial, Judge Shuler gave the following pertinent instructions on murder and malice:

And so I'm going to give you the elements in regards to murder, the definition of murder, and then talk to you a few minutes about it.

¹ During the state's closing argument, Solicitor Bailey described the fact that the record "reeks of malice" and that "as part of the instructions, Judge Shuler is going to tell you that you can infer malice from the intentional use of a deadly weapon, and that's exactly what the facts in this case shows, the intentional use of a deadly weapon four times against a helpless woman in her own home who was unarmed, offered no threat to her..." R. 1743, l. 3-10. Solicitor Bailey subsequently set out further incantations of the term malice as "the meaning of ill will, hatred or hostility toward another person...a general malignant recklessness of the lives and safety of others or condition of the mind that shows a heart regardless of social duty and fatally bent on mischief." R. 1748.

Defense counsel Beauford, in his guilt phase closing stated that he felt the case was weakest as to malice. : "Yes, you may infer malice from the use of a gun, but that does not make it malice. You may use that in making your determination. . . Was there that evil mind, evil intent, that hatred, that depraved heart..." R. 1755.

Murder is the unlawful killing of any person with malice aforethought, expressed or implied. That's the definition of murder in South Carolina. It's the unlawful killing of another human being with malice aforethought, either expressed or implied.

The State must prove, of course, that on or about the 30th day of April, I believe the indictment says, 1998, that's the first thing; in Dorchester County, that's the second thing; that a human being, that's the third thing; was killed, the fourth thing; with malice aforethought. Malice aforethought. And that malice aforethought must either be expressed or implied.

What is malice? What is malice? Let me tell you that malice is defined in the law of homicide as a term of art, that is a technical term importing wickedness and excluding just cause or excuse. It's something that springs from wickedness, from depravity, from a depraved spirit, from a heart devoid of social duty and fatally bent on mischief.

In the popular sense the term malice conveys the meaning of hatred or ill will or hostility toward another person. But in its legal sense it is employed in the description - - as it is employed in the description of murder it does not necessarily import ill will toward an individual, but signifies rather a general malignant recklessness of the lives and safety of others, or a condition of mind which shows a heart regardless of social duty and fatally bent on mischief.

In other words, a malicious killing is one where the act is done without legal justification, excuse, or extenuation. And malice has been frequently substantially so defined as consisting of the intentional doing of a wrongful act toward another without legal justification or excuse.

Now, that is the term of, and definition of, malice. That malice must be aforethought. What does aforethought mean? Aforethought simply means the malice must be in the mind of that person, the maliciousness must be in the mind of that person or heart of that person at some time, at least some time before the act of murder occurs. It may be weeks, it may be months, it could be seconds, it could be a second. It has to be in the mind, present in the mind on the part of that person at least

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some time before the fatal act is achieved.

And I said that murder is the unlawful killing of a human being with malice aforethought expressed or implied. What is expressed malice? By the way, malice can be expressed or implied. It doesn't mean that there are two different kinds of malice, but simply the manner in which that malice is shown.

Expressed malice may be - - malice may be expressed as where previous threats of vengeance or lying in wait or other circumstances show directly an intent to kill was in the mind of the defendant. Where someone, for example, speaks, expresses openly or does some act, expresses an act openly, like in vengeance, that kind of thing is an example of expressed malice.

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But malice may also be implied or inferred. Malice may be implied through the use of a deadly weapon. A deadly weapon is defined as any article or instrument used to inflict serious bodily injury or death. Malice may be inferred from the use of a deadly weapon. Malice may be inferred from the intent to kill. Malice may be inferred from the use of a deadly weapon. Malice may be inferred from the intent to kill. Malice may be inferred from an intent to do serious bodily harm. Malice may be inferred or implied from the willful, deliberate, and intentional doing of an unlawful act without just case or excuse, or from the use of a deadly weapon.

The resulting implication only permits, rather than requires a jury, to infer malice. This permissive inference is an evidentiary fact to be taken into consideration by you, ladies and gentleman, along with all of the evidence in the case, and you should give it such weight as you feel it deserves.

The law says that malice may be inferred from evidence of such recklessness and wantonness that it indicates a depravity of a defendant's mind and his or her conscious disregard of human life. If the State proves facts beyond a reasonable doubt that raise any inference of malice to your satisfaction, this inference would simply be an evidentiary fact to be taken into consideration by you, ladies and gentlemen, along with all the evidence in the case, and you may give such inference of malice the degree which you determine it should receive. You are free

to accept or reject this permissive inference depending upon your view of the evidence in the case.

R. p. 1770-1775. (emphasis added).

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Murder is the killing of any person with malice aforethought, either express or implied. S.C.Code Ann. 16-3-10 (2003). In a murder prosecution, malice may be implied if the defendant uses a deadly weapon. State v. Kelsey, 331 S.C. 50, 63, 502 S.E.2d 63, 69 (1998). The use of a deadly weapon gives rise to a permissive inference of malice. State v. Kelsey, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998); State v. Von Dohlen, 322 S.C. 234, 248, 471 S.E.2d 689, 697 (1996); State v. Mattison, 276 S.C. 235, 238, 277 S.E.2d 598, 600 (1981). The jury may draw an inference of malice from proof of the use of a deadly weapon if it concludes such is proper after considering all of the facts and circumstances in evidence. Mattison, 276 S.C. at 239, 277 S.E.2d at 600. In a charge to the jury, the judge should make clear to the jury that it is free to accept or reject the permissive inferences depending on its view of the evidence. State v. Peterson, 287 S.C. 244, 247, 335 S.E.2d 800, 802 (1985), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); see State v. Pilgrim, 320 S.C. 409, 415 n. 3, 465 S.E.2d 108, 112 n. 3 (Ct.App.1995) ("While the evidence in this case may give rise to an inference the attack was committed with malice and intent to kill, the inference is a permissive one which the jury is free to accept or reject."), overruled on other grounds by State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996). The Supreme Court has enunciated a proper jury charge:

The law says if one intentionally kills another with a deadly weapon, the implication of malice may arise. If facts are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.

State v. Elmore, 279 S.C. 417, 421, 308 S.E.2d 781, 784 (1983). The court cautioned the Bench that only slight deviations from the given charge would be acceptable. Id.

When a trial judge's charges that malice is presumed from the use of a deadly weapon, it is an unconstitutional burden shifting instructions. See Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). Counsel performance is deemed deficient when there is a failure to object to erroneous "presumption of malice" charges on the ground that they constituted unconstitutional burden shifting instructions. Taylor v. State, 312 S.C. 179, 439 S.E.2d 820 (1993) (counsel was deficient in failing to object to a jury charge which shifted the burden of proof to the defendant).² The question is whether the charge is truly a "presumption" charge or whether it falls in the concept of permissible inferences.

As recognized by defense counsel Beauford and supported by his own closing argument, when reading the trial judge's charge in its entirety, it is clear that the trial judge was, in reality, attempting to define the concept of "implied malice" as distinguished from the concept of "presumed malice." Considering the charge as a whole, this Court must conclude that reasonable jurors would not have understood the charge as creating a presumption of malice. See State v. Bell, 305 S.C. 11, 406 S.E.2d 165 (1991), cert. denied 502 U.S. 1038, 112 S.Ct. 888, 116

² There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In order to prove that counsel was ineffective, the applicant must show that counsel's performance was deficient and that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Strickland v. Washington, supra; Rhodes v. State, 349 S.C. 25, 561 S.E.2d 606 (2002). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Id.

L.Ed.2d 791 (1992). Compare, Tate v. State, 351 S.C. 418, 570 S.E.2d 522 (2002)(instruction on presumption of malice burden shifting). 3

In Bell, the defendant complained the trial judge improperly defined malice as "the doing of a wrongful act intentionally and without just cause or excuse." The Supreme Court stated "[t]he trial judge's definition of malice is correct ... and the charge given is devoid of any presumption. Moreover, the trial judge clearly instructed the jury it was the State's burden to prove malice." 305 S.C. at 19, 406 S.E.2d at 170.

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P.B.
Here, the trial court thoroughly charged the jury that the burden of proving malice was on the State, and repeatedly emphasized the permissive inference of malice. Moreover, at no time does the charge use the word "presumption." The charge as a whole was sufficient. See State v. Patrick, 289 S.C. 301, 345 S.E.2d 481 (1986), overruled on other grounds, Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991). Accord, Sheppard v. State, 357 S.C. 646, 594 S.E.2d 462 (2006) (instruction on implied malice not error).

The Applicant has failed to meet his burden of proof in showing that Beauford was deficient. Since the instruction was not error and consistent with South Carolina law, reasonable counsel would not have objected. State v. Elmore. Counsel Beauford's testimony before this Court correctly revealed that the objection was not made because he thought the charge was consistent with state law and did not violate federal constitutional mandates

This Court must also conclude as a matter of law that 6th Amendment prejudice cannot be proven under Strickland, even if it is assumed that counsel was deficient. An unconstitutional

3 State v. Portee, 122 S.C. 298, 115 S.E. 238 (1922) (charge on malice implied from use of a deadly weapon was not a charge on the facts because charge indicated it was for jury to decide whether a deadly weapon had in fact been used).

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burden shifting instruction is not reversible error if the error was harmless beyond a reasonable doubt. Rose v. Clark, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986); Plyler v. State, 309 S.C. 408, 424 S.E.2d 477 (1992). The Court must determine whether there is a reasonable likelihood that the jury applied the instruction in a way that violates the Constitution. Boyde v. California, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990); State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000), cert. denied, 532 U.S. 1027, 121 S.Ct. 1974, 149 L.Ed.2d 766 (2001). An erroneous malice instruction is harmless if, based on all of the evidence presented to the jury, it did not contribute to the verdict. Plyler v. State, supra. In making this determination, the Court must review the evidence the jury considered in reaching its verdict and weigh the probative force of the evidence against the probative force of the presumption standing alone. Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992), cert. denied, 507 U.S. 927, 113 S.Ct. 1302, 122 L.Ed.2d 691 (1993); Gilbert v. Moore, 134 F.3d 642, 652 (4th Cir.1998) (en banc)

Malice is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong. State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998); State v. Johnson, 291 S.C. 127, 352 S.E.2d 480 (1987). Here, there is evidence that Weik committed a legally unprovoked attack with multiple shootings upon a defenseless victim.⁴ Simply put, the evidence

⁴ In his third specification in his original application, he claimed that counsel erred in failing to offer evidence of manslaughter. The reasoning why that claim is devoid of merit supports the fact that the "implied malice" claim is similarly lacking. The record reveals that at the conclusion of the guilt phase, counsel Beauford moved for a manslaughter instruction, which the trial judge denied. R. p. 1736-37. He now relied upon the penalty phase testimony of the decedent's daughter, Amber Krasae, to assert that there was evidence of manslaughter available, but not used.

Amber Krasae testified in the penalty phase that she was 8 years old and attended Knightsville Elementary School in the second grade. R.p. 1835. After general qualification, she testified that she was home after school with her brother Daniel watching T.V. R. 1838. She saw her mother go over to her grandfather's home next door. The Applicant then came to her home

when she was outside with her brother. He had been driving a truck. She testified that her mother came over from next door and "they started pushing each other" on the porch of the trailer. R. 1839-40. Then she said she went inside with Daniel. She stated her mother then came into the house and shut the screen door and she overheard her mother state: "If you don't leave, I'm going to call the police." R. 1841. She stated the Applicant then went to the back of the truck and got a gun. R.p. 1841. "I saw Eddie get a gun, he came to the house and he threw open the screen door. And then I was about to go to Daniel's room and Daniel was right in front of me so I ran to the bathroom..." with Daniel because there was no where else to run. R.p. 1842-43. She tried to shut the door, but could not since there was a shoe hanger on the door. She stated: "I saw him shoot her" more than once and call her a "motherfucker." R.p. 1843-44. Weik then left and they ran outside and a woman from across the street came over and called the police. R.p. 1844-45. The defense asked no questions of this witness. R.p. 1845.

In his pleadings, he contends that this was evidence of manslaughter that should have been presented in the guilt phase to support an instruction on manslaughter. In his statement to the police, Weik stated that he exchanged words with the victim on the porch. Statement, p. 11. In the guilt phase, Weik testified that he went to the Krasae residence and describes seeing the family in the yard. He enters the house and apologizes to his son who told him he could not talk. R. p. 1645. His mother then comes in and he described the verbal confrontation. R. p. 1645-46. He stated that he returned to his truck to start to leave and heard a voice say "Kill yourself, you lost everything, you idiot good for nothing" and another state "Aten to 20 years, life or death." R. p. 1647. He stated that he stopped and got his shotgun out which was loaded and was in the house. R. p. 1649. He described seeing himself there. R. p. 1649-50. He then described shooting her. R. p. 1650. He said it was like a dream, but one he could not wake up from because he did it. He then describes leaving, smelling gun powder, starting thinking about killing himself, but then heard Susan's father and left. He described leaving and heading toward the police. R. p. 1653. He described in detail being stopped by the police and his actions at that time. R. p. 1654-1666.

Weik testifies: "...she didn't touch me, but she's shaking the finger in my face, you know, calling me these words and stuff like that." R.p. 1646, ll. 8-10. However, she stated that she cursed him while he was there. R.p. 1675.

Where death is caused by use of a deadly weapon, words alone, however opprobrious, are not sufficient to constitute a legal provocation. *Id.* at 104, 64 S.E.2d at 134. Rather, when death is caused by the use of a deadly weapon, the opprobrious words must be accompanied by the appearance of an assault--by some overt, threatening act--which could have produced the heat of passion. State v. Lowry, 315 S.C. 396, 434 S.E.2d 272 (1993) State v. Lowry, 315 S.C. 396, 434 S.E.2d 272 (1993) (citing State v. Judge, 208 S.C. 497, 38 S.E.2d 715 (1946)). Manslaughter is

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is overwhelming that when he went into the trailer with a loaded shotgun he planned to get the victim and did so with malice aforethought. Like the harmless error situations in Arnold, defined as "the unlawful killing of another without malice." S.C.Code Ann. § 16-3-50 (Supp.2000)S.C.Code Ann. § 16-3-50 (Supp.2000); Carter v. State, 301 S.C. 396, 398, 392 S.E.2d 184, 185 (1990)Carter v. State, 301 S.C. 396, 398, 392 S.E.2d 184, 185 (1990). Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. Heat of passion alone will not suffice to reduce murder to voluntary manslaughter. Both heat of passion and sufficient legal provocation must be present at the time of the killing. The sudden heat of passion, upon sufficient legal provocation, which mitigates a felonious killing to manslaughter, while it need not dethrone reason entirely, or shut out knowledge and volition, must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence. State v. Cole, at 101-02, 525 S.E.2d at 513 (internal citations omitted). Even when a person's passion has been sufficiently aroused by a legally adequate provocation, if at the time of the killing those passions had cooled or a sufficiently reasonable time had elapsed so that the passions of the ordinary reasonable person would have cooled, the killing would be murder and not manslaughter. State v. Hughey, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000)State v. Hughey, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000); State v. Gardner, 219 S.C. 97, 64 S.E.2d 130 (1951)State v. Gardner, 219 S.C. 97, 64 S.E.2d 130 (1951) (citing State v. Davis, 50 S.C. 405, 27 S.E. 905 (1897)).

Roberts, Gilbert and Gleaton, there is harmless error beyond a reasonable doubt on the face of this record – malice is incontestable. Therefore, Weik is unable to show any reasonable probability that had counsel objected to the malice instruction, the result of the proceeding would have been different. There is a simple reason why the jury deliberated for such a short period of time – the evidence of guilt and malice was irrefutable. He failed in his burden of proof to show either deficient performance or prejudice under Strickland.

9(f) Applicant was denied due process of law and a fair sentencing determination based on the State's use of "torture" as an aggravator which, as defined under South Carolina law, is unconstitutionally over broad. U.S. Const. Amend V, VIII, and XIV, the South Carolina Constitution and federal and state law. [DENIED DUE PROCESS BY OVERBROAD TORTURE AGGRAVATOR].

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In allegation 9(f), Weik makes a free-standing due process claim the state's use of the torture aggravating factor is overbroad and in violation of the due process clause of the state and federal constitutions. This issue is not properly presented in a state post-conviction relief proceeding. This allegation raises a potential trial and direct appeal issue that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (1985). Post-conviction relief is not a substitute for an appeal. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993); Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised **at trial or on appeal**. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). The Applicant could have raised this issue prior to or during the sentencing proceeding and then on appeal. The failure to do so has waived this allegation as a ground for relief. Therefore, the Court must dismiss this allegation for this reason.

9(h) Applicant was denied effective assistance of counsel at the penalty phase inasmuch his lawyers did not object to the trial judge submitting the aggravating circumstance of torture which, as defined under South Carolina law, is unconstitutionally over broad. U.S. Const. Amends. Fifth, Eighth and Fourteenth, the South Carolina Constitution and federal and state law. [IAC- TORTURE AGGRAVATOR - Counsel Filed to object to OVERBROAD TORTURE AGGRAVATOR]

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In allegation 9(h), the Applicant makes the same assertion as in ground 9(f), but raises it was a 6th Amendment ineffective assistance of counsel claim based upon a failure to object. During the state post-conviction relief hearing, counsel Beauford testified that he did not object to the submission of physical torture as an aggravating factor because he did not see any error in the submission. This Court must find that counsel was not deficient in failing to object since the submission was authorized under South Carolina law and the facts of this case. Further, 6th Amendment prejudice cannot be shown because, even if this factor were excluded as an aggravating factor, the death penalty would still have been authorized due to the existence of other found aggravators, thereby defeating any assertion under the Strickland prejudice prong.

This Court will address the Strickland prejudice prong first, since it is the easiest way to dispose of this claim. It is clear that if the claim had been timely raised at trial or in the appeal, it would have been denied because he was additionally found to be in violation of a second statutory aggravating factor – murder was committed while in the commission of burglary in the first degree. State v. Simmons, 360 S.C. 33, 599 S.E.2d 448 (2004) (where death sentence is supported by other valid aggravators, failure of one aggravator does not void death sentence); See S.C.Code Ann. § 16-3-20(B) (2003) (if statutory aggravating circumstance found, defendant sentenced to either death or life imprisonment); State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000) (jury may recommend life imprisonment for any reason or no reason at all); State v.

Elkins, 312 S.C. 541, 436 S.E.2d 178 (1993) (under our capital sentencing scheme, jury does not "weigh" aggravating circumstances; the failure of one aggravating circumstance does not require reversal where there remains a valid aggravator). See State v. Plath and Arnold, 281 S.C. 1, 313 S.E.2d 619 (1984), citing Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983).

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In a recently announced decision, Brown v. Sanders, 546 U.S. 212, 126 S.Ct. 884, 163L.Ed.2d 723 (2006), the Supreme Court has stated that the "weighing/non-weighing scheme is accurate as far as it goes, but it now seems to us needlessly complex and incapable of providing for the full range of possible variations" in state death-penalty sentencing procedures. *Id.*, 884, 126 S.Ct. 884. Instead, "we are henceforth guided by the following rule: An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances." *Id.* at 126 S.Ct. 884 (footnote omitted). In other words, where the allegation of error is "the skewing that could result from the jury's considering as aggravation properly admitted evidence that should not have weighed in favor of the death penalty," *id.* at 126 S.Ct. 884, constitutional error occurs "only where the jury could not have given aggravating weight to the same facts and circumstances under the rubric of some other, valid sentencing factor," *id.* at 126 S.Ct. 884. In addition to the narrow situation addressed in Sanders, the Court recognized that constitutional error also may arise from "other distortions caused by the invalidated factor beyond the mere addition of an improper aggravating element." *Id.* at 126 S.Ct. 884 n. 6.

South Carolina statutory scheme is that of a non-weighing (consider) state. In Brown, the Court stated :

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By contrast, in a non-weighing State--a State that permitted the sentencer to consider aggravating factors different from, or in addition to, the eligibility factors--this automatic skewing would not necessarily occur. It would never occur if the aggravating factors were entirely different from the eligibility factors. Nor would it occur if the aggravating factors added to the eligibility factors a category (such as an omnibus "circumstances of the crime" factor, which is quite common) that would allow the very facts and circumstances relevant to the invalidated eligibility factor to be weighed in aggravation under a different rubric. We therefore set forth different rules governing the consequences of an invalidated eligibility factor in a non-weighing State. [FN3] The sentencer's consideration of an invalid eligibility factor amounts to constitutional error in a non-weighing State in two situations. First, due process requires a defendant's death sentence to be set aside if the reason for the invalidity of the eligibility factor is that it "authorizes a jury to draw adverse inferences from conduct that is constitutionally protected," or that it "attache[s] the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, ... or to conduct that actually should militate in favor of a lesser penalty." *Zant*, 462 U.S., at 885, 103 S.Ct. 2733. Second, the death sentence must be set aside if the jury's consideration of the invalidated eligibility factor allowed it to hear evidence that would not otherwise have been before it. See *id.*, at 886, 103 S.Ct. 2733; see also *Tuggle v. Netherland*, 516 U.S. 10, 13-14, 116 S.Ct. 283, 133 L.Ed.2d 251 (1995) (per curiam).

Under the Brown analysis, an invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process; unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances. In Brown, The jury's consideration of invalid special circumstances in *Sanders'* case gave rise to no constitutional violation. In California, the "special circumstances" listed in § 190.2 are the eligibility factors designed to satisfy *Furman's* narrowing requirement. If the jury finds the existence of one of those circumstances, it must "take into account" a separate list of sentencing

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factors, including § 190.3(a)'s "circumstances of the crime" factor. That factor has the effect of rendering all of the specified factors nonexclusive, thus making California (in this Court's prior terminology) a non-weighting State. Setting aside the weighing/non-weighting dichotomy and applying the more direct analysis set out here, two of the four special circumstances were invalidated, but the remaining two are sufficient to satisfy Furman's narrowing requirement and alone rendered Sanders death eligible. Moreover, all of the facts and circumstances admissible to prove the invalid eligibility factors were also properly adduced as aggravating facts and circumstances under the "circumstances of the crime" sentencing factor. Even if § 190.3(a)'s direction to consider "the existence of any special circumstances found to be true" placed special emphasis upon the facts and circumstances relevant to the invalid factors, that impact "cannot fairly be regarded as a constitutional defect in the sentencing process," Zant, supra, at 889, 103 S.Ct. 2733. Pp. 892-894.

Like Brown, since the physical torture of the victim arises from the circumstances of the crime and victim impact evidence, the jurors would have been able to consider these matters whether the torture factor existed or not, and any alleged invalidity of these matters cannot void the death penalty. See State v. Von Dohlen, 322 S.C. 234, 471 S.E.2d 689 (1996) (forensic pathologist could testify as to pain victim endured and although physical torture was not submitted to jury as aggravating circumstance, evidence regarding torture was still admissible as going to circumstances of crime). He has failed on this claim to show, assuming *arguendo* that the aggravator was unconstitutional and that the trial court would have rejected it, that there is a reasonable probability that the result of the proceeding would have been different. He has failed in his burden of proof to show Strickland prejudice. Thus, this allegation must be dismissed.

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Further, this Court must find that counsel Beauford was not deficient in his assessment that the physical torture aggravating factor submission was not error which should have been objected to under the federal constitution. The Applicant has failed in his burden of proof to show otherwise. This Court must find that the physical torture aggravating factor is not void for vagueness. It clearly performs a narrowing function as established under Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (per curiam). The statutory aggravating circumstance of physical torture occurs (1) when the victim is subjected to serious physical abuse before death or (2) when the victim is subjected to an aggravated battery before death. State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). Physical torture is not predicated upon the amount of pain suffered by a murder victim. Although conscious awareness of pain may buttress the conclusion that the victim was subjected to serious physical abuse before death, its absence does not foreclose a finding of physical torture; the abusive and depraved nature of the homicidal assault is not erased solely because the victim mercifully may have been rendered unconscious at the outset of the attack. State v. Johnson, 338 S.C. 114, 525 S.E.2d 519, cert. denied 531 U.S. 840, 121 S.Ct. 104, 148 L.Ed.2d 62 (2000).

In Smith v. Moore, 137 F.3d 808 (4th Cir.1998), the Fourth Circuit held that the "physical torture" aggravating factor included in South Carolina's capital sentencing scheme properly narrowed the class of persons eligible for death penalty. To satisfy the Eighth and Fourteenth Amendments, a state's capital sentencing scheme must suitably channel or limit the jury's discretion in imposing the death penalty. See Lewis v. Jeffers, 497 U.S. 764, 774, 110 S.Ct. 3092, 3098-99, 111 L.Ed.2d 606 (1990); Maynard v. Cartwright, 486 U.S. 356, 362-64,

108 S.Ct. 1853, 1858-59, 100 L.Ed.2d 372 (1988); Godfrey v. Georgia, 446 U.S. 420, 428, 100 S.Ct. 1759, 1764-65, 64 L.Ed.2d 398 (1980) (plurality opinion). Accord, People v. Chatman, 38 Cal.4th 344, 133 P.3d 534, 42 Cal.Rptr.3d 621 (2006) (Torture-murder special circumstance, which requires infliction of "extreme physical pain," is not void for vagueness, since these words have commonsense meaning that jury can be expected to apply); State v. Page, 709 N.W.2d 739 (N.D. 2006) (no error); State v. Colon, 272 Conn. 106, 377, 864 A.2d 666, 828(2006)(same).

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Whether a particular aggravating factor suitably channels or limits a jury's discretion depends, in part, on whether it "genuinely narrow[s] the class of persons eligible for the death penalty." Zant v. Stephens, 462 U.S. 862, 877, 103 S.Ct. 2733, 2742, 77 L.Ed.2d 235 (1983). An aggravating factor does not genuinely narrow the class of persons eligible for the death penalty "[i]f the sentencer fairly could conclude that [it] applies to every defendant." Arave v. Creech, 507 U.S. 463, 474, 113 S.Ct. 1534, 1542, 123 L.Ed.2d 188 (1993).

In Smith, as here, he contends that South Carolina's "physical torture" aggravating factor fails to genuinely narrow the class of persons eligible for the death penalty because it does not require an intent to torture separate and distinct from the intent to kill. The Fourth Circuit rejected this assertion. Under South Carolina law, physical torture exists "when the victim is intentionally subjected to serious physical abuse prior to death." State v. Smith, 298 S.C. 482, 381 S.E.2d 724, 726 (1989) (emphasis added); see also State v. Elmore, 279 S.C. 417, 308 S.E.2d 781, 785 n. 2 (1983). Thus, despite contentions to the contrary, it is clear that South Carolina law requires an intent to torture. Using the charge upheld in Elmore, 308 S.E.2d at 785 n. 2, the trial court in Smith defined physical torture as follows:

Physical torture is the intentional infliction of serious, vile, horrible or inhuman abuse upon the body of another before death.

The instantaneous death of the victim does not constitute torture. Physical torture may include the malicious infliction of bodily harm to another by depriving him or her of a member of his or her body or by rendering a member of his or her body useless, or by seriously disfiguring his or her body or a member of his or her body, or the intentional and unmerciful prolonging of severe pain and abuse to the body of another, or the intentional and unmerciful infliction of serious and extensive physical pain and abuse to the body of another. (J.A. at 2093 (emphasis added).)

The Fourth Circuit concluded that the trial court's instruction adequately conveyed to the jury that it had to find an intent to torture.

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Moreover, the trial court's definition of torture "make[s] it] clear that something other than those factors that a juror might expect to find present in an ordinary murder must be present." Jones v. Murray, 976 F.2d 169, 174 (4th Cir.1992). In other words, an ordinary person "could [not] conclude that [the 'physical torture'] aggravating circumstance applies to every defendant," Arave, 507 U.S. at 474, 113 S.Ct. at 1542, who intended to kill his victim. Cf. Cartwright, 486 U.S. at 364, 108 S.Ct. at 1859 (invalidating aggravating circumstance that "an ordinary person could honestly believe" described every murder); Godfrey, 446 U.S. at 428-29, 100 S.Ct. at 1764-65 (invalidating aggravating circumstance that "[a] person of ordinary sensibility could" honestly believe described "almost every murder"). Accordingly, it is clear that South Carolina's "physical torture" aggravating circumstance "genuinely narrow[s] the class of persons eligible for the death penalty." Zant, 462 U.S. at 877, 103 S.Ct. at 2742.

Since the aggravating circumstance was not overbroad, counsel cannot be deemed deficient in failing to object to the submission, particularly where such submissions had been specifically approved by the South Carolina Supreme Court and Fourth Circuit. Thus reasonable counsel in 1999 would not have been required under the standards to object to the submission.

His claim otherwise must be dismissed. He has failed in his burden of proof to show either deficient performance or prejudice under Strickland.

9(g) Applicant was not represented by two lawyers as required by S.C. Code Section 16-3-26(B)(1) and thus denied a fair trial because one of the lawyers appointed by the Court, Marva Hardee-Thomas, did not act as a lawyer during preparation for the trial and during the trial but merely provided as clerical assistance to the other appointed counsel. *State v. Diddlemeyer*, 296 S.C. 235, 371 S.E.2d 793 (S.C. 1988). [Only One Counsel Acted As Lawyer In Capital Case]

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P.B.
In allegation 9(g), the Applicant contends that he was deprived of two appointed counsel as required by Section 16-3-20 because he contends that only Percy Beauford was acting as his lawyer, although Marva Hardee Thomas was also appointed. He relies upon State v Diddlemeyer, 296 S.C. 235, 371 S.E.2d 793 (S.C. 1988) in support of his claim. This Court must deny relief on this allegation.

Section 16-3-26(B)(1) provides in pertinent part:

(B)(1) Whenever any person is charged with murder and the death penalty is sought, the court, upon determining that such person is unable financially to retain adequate legal counsel, shall appoint two attorneys to defend such person in the trial of the action. One of the attorneys so appointed shall have at least five years' experience as a licensed attorney and at least three years' experience in the actual trial of felony cases, and only one of the attorneys so appointed shall be the Public Defender or a member of his staff. In all cases where no conflict exists, the public defender or member of his staff shall be appointed if qualified. If a conflict exists, the court shall then turn first to the contract public defender attorneys, if qualified, before turning to the Office of Indigent Defense.

The statute does not set out any particular roles or responsibilities for the two lawyers appointed in the matter.

The record of the trial reveals on May 5, 1999, counsel Beauford and counsel Hardee Thomas both set out their qualifications. R. 3-4. Counsel Beauford stated that he was a solo

practitioner in practice since 1999 and had handled several murder trials before, although this was his first death penalty case. He declared that since he had started practicing he had felony experience for at least 5 years. Id. Marva Hardee Thomas stated that she had been practicing since September 1995 and had been a Public Defender. She stated that she had done over 30 to 40 trials and that this was her second involvement in a death penalty case, the first being third chair counsel in State v. Calvin Shuler. Id. Prior to jury selection, the court again made inquiry on the record about counsel qualifications. R. P. 513-514.

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During the hearing before this Court, it was developed that after the incident, Beauford was initially hired by Weik's parents to represent him. At some point, Beauford learned that this would be a death penalty case. The family was unable to afford that type of representation and appointed counsel was sought. As a result, Marva Hardee Thomas was ultimately appointed along with prior retained counsel Beauford.

Counsel Beauford testified that he envisioned his role as lead counsel, but that they were to work together in the best interest of the client. He saw her role initially to handle the experts and get them started. He felt that his role at trial was to make the decisions on strategy and present the witnesses although he initially thought that Ms. Hardee Thomas would have been more involved in the testimony aspect of the trial.

The record reveals that Ms. Hardee-Thomas saw her role as assisting Mr. Beauford in the preparation, gathering of witnesses, assisting in locating expert witness, but she did not see her role as either the first chair counsel or trial counsel. She stated that she made sure that all information she received from the retained experts and investigators was turned over to Mr. Beauford so that he could make a decision on how to use them. She conceded that she witnessed

the strategy discussions that Mr. Beauford had with Weik and did not disagree with the strategy used in the case. She was unequivocal that the trial decisions were made by Mr. Beauford.

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The record reveals that counsel Beauford was of the opinion that the mitigation investigation was being jointly handled by counsel Hardee-Thomas and Patti Rickborn, the retained investigator. The record before this court reveals correspondence from Hardee Thomas scheduling jail visits for Dr. Schwartz-Watts, Dr. Brannon, Dr. Morgan and Dr. McKee, providing discovery material to forensic consultant Jim Springs and Patti Rickborn, and advising the defense expert witnesses and investigators of Sheriff disclosure meetings (Springs, Minter, Dr. Watts, Dr. Brannon, Dr. McKee, Rickborn, Respondents Exhibits 18-31. In addition, the record reveals that on May 6, 1999, Hardee-Thomas provided Beauford with a list of issues and deadlines leading up to the trial. Respondents Exhibit 32.

The record also reveals that Mr. Weik was provided death penalty statutes and sentencing procedures by both Beauford and Hardee Thomas on May 14, 1999 and that the attorneys reviewed it with Weik. Respondents Exhibit 35.

The Applicant is correct that counsel Hardee Thomas did not examine any of the witnesses during the trial or sentencing phase. However, the record does reveal that she was present during the proceedings and, in fact, participated in motion or evidence admissions and penalty phase jury charge requests. R.p. 1453, 1457, 1502, 1658-1659, 1709-1711, 1713, 1917, 1918, 2088, 2100, 2101-2102, 2217, 2219, 2220. Judge Shuler noted the interaction between Hardee Thomas and Weik in support of competency. R. 1724, l. 12-13., p. 1726, ll. 6-19, l. 22-23.

Contrary to the claims of Weik, the record before this Court reveals that two appointed counsel did, in fact, represent Mr. Weik. While Mr. Beauford may have wished and expected

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more trial assistance than he received from Ms. Hardee Thomas before the trial and during the trial, this expectation does not equate with an absence of appointed counsel as Weik suggests in his allegation. The appointment statute does not require counsel to share any certain percentage of argument, witnesses or particular roles for either counsel. The record reveals minimal participation by Hardee Thomas during the trial, but it does reveal participation and presence in the defense, albeit not questioning potential jurors or witnesses. While it may have been wiser in hindsight to have Ms. Hardee Thomas assume more of a role in relief of lead counsel, this retrospective hindsight does not evidence a statutory violation. Two counsel were appointed to represent Weik who possessed the statutory qualifications. How they performed those duties and the particular roles are not set out in the statute and the statute was not violated by the actions of either Mr. Beauford or Ms. Hardee Thomas in this case.

For the reasons set out above, he has failed to show a statutory violation under Section 16-3-26 and State v. Diddlemeyer. The allegation must be denied.

THE FAILURE TO INVESTIGATE AND PREPARE FAMILY BACKGROUND ISSUES

9(m) Applicant was denied effective assistance of counsel at the penalty phase because trial counsel did not timely hire investigators so they would have had sufficient time prior to trial to investigate and gather all of the Applicant's personal and family background. If complete evidence of the Applicant's personal and family background had been supplied to the Applicant's mental health experts and the social worker, their testimony would have been substantially bolstered and the testimony of the state's mental health experts would have been impeached which would probably have resulted in life sentence. [IAC - PENALTY PHASE - DID NOT TIMELY HIRE INVESTIGATORS TO MAKE FAMILY BACKGROUND INVESTIGATION].

9(n) Applicant was denied effective assistance of counsel at the penalty phase because trial counsel did not provide evidence of the Applicant's personal and family background to their mental health experts and the social worker and had they done so, their testimony would have been substantially bolstered and the testimony of the state's mental health experts impeached which would probably have resulted in a life sentence. [NEW- IAC -

PENALTY PHASE - FAILED TO PREPARE MENTAL HEALTH TESTIMONY AND PROVIDE FAMILY BACKGROUND EVIDENCE AND ASK WHAT THEIR OPINION WAS AND POTENTIAL QUESTIONS].

9(o). Applicant was denied effective assistance of counsel at the penalty phase because trial counsel failed to properly prepare the mental health experts' testimony including but limited to not asking them in advance what they would be able to testify to as experts, not providing them with evidence of the Applicant's background which would have bolstered their testimony, not timely providing them the Applicants' records from the State Hospital, and not informing the experts of the questions they were going to ask the experts. Had trial counsel done these things, the Applicant would probably have been sentenced to life imprisonment. [IAC - PENALTY PHASE - FAILED TO PREPARE MENTAL HEALTH TESTIMONY AND PROVIDE FAMILY BACKGROUND EVIDENCE AND ASK WHAT THEIR OPINION WAS AND POTENTIAL QUESTIONS].

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PMS
9(r). Applicant was denied effective assistance of counsel at the penalty phase because trial counsel did not timely hire investigators so they would have had sufficient time prior to trial to investigate and gather all the Applicant's personal and family background. If complete evidence of the Applicant's personal and family background had been presented to the jury, the Applicant probably would have been sentenced to life by the jury. [IAC - FAILED TO TIMELY HIRE MITIGATION INVESTIGATORS.]

9(s) Applicant was denied the effective assistance of counsel at the penalty phase because trial counsel did not present evidence to the jury of the Applicant's personal and family background which was in their possession at the time of the trial. If the evidence of the Applicant's personal and family background which was in trial counsel's possession had been presented to the jury, the jury would probably have sentenced him to life. [New in Third PCR Application - IAC- FAILED TO PRESENT PERSONAL AND FAMILY BACKGROUND INFORMATION IN COUNSEL'S POSSESSION]

In grounds 9(m), 9(n), 9(o), 9(r) and 9(s), Weik essentially contends that the defense team failed to timely and adequately investigate the family background by the retention of investigators, psychiatrist, psychologist and social worker in order to present adequate evidence through the family and the expert witnesses in mitigation.⁵ The trial record reveals that the

⁵Weik testified in the guilt phase of his trial. R. p. 1634-1711. He stated he vaguely remembered April 30, 1998, yet described his own actions on that date. R. p. 1634-37. He stated that he spoke to his son on telephone about an earlier school conversation that he had concerning another student picking on him. R. p. 1637-39. He described his conversation with Daniel and particularly that during the conversation he was told he had to go and that they did

defense team presented in the penalty phase testimony from Weik's sister, Amy Weik Goings (Tr.p. 1918-1924, social worker Dr. Augustus Rodgers (Tr.p. 1925-1954, forensic psychologist Dr. Geoffrey McKee (Tr.p. 1955-1988), psychiatrist Dr. Donna Schwartz-Watts (Tr.p. 1987-

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not want him talking on the phone. R. p. 1639-40. He stated that his mother and John (her fiancé) did not want him talking on the phone with Weik because they are jealous. R. p. 1640. Weik described word for word his recollection of the rest of the telephone conversation. R. p. 1640-41. Fearing that his son would not answer the phone or want to have anything to do with him, Weik then left the house in his truck towards Summerville toward the bank to get money for insurance for his mother and gas money. R. p. 1642. While at the gas station, he decided he needed to see his son. R. p. 1643. He then went to the Krasae residence and describes seeing the family in the yard. He enters the house and apologizes to his son who told him he could not talk. R. p. 1645. His mother then comes in and he described the verbal confrontation. R. p. 1645-46. He stated that he returned to his truck to start to leave and heard a voice say Akill yourself, you lost everything, you idiot good for nothing@ and another state Aten to 20 years, life or death.@ R. p. 1647. He stated that he stopped and got his shotgun out which was loaded and was in the house. R. p. 1649. He described seeing himself there. R. p. 1649-50. He then described shooting her. R. p. 1650. He said it was like a dream, but one he could not wake up from because he did it. He then describes leaving, smelling gun powder, starting thinking about killing himself, but then heard Susan=s father and left. He described leaving and heading toward the police. R. p. 1653. He described in detail being stopped by the police and his actions at that time. R. p. 1654-1666.

Weik stated that when he went to Susan=s home, his intent was to apologize to his son. R. p. 1656-57. He denied having ill feelings toward her. R. p. 1657-58.

On cross-examination, Weik responded directly to his questions and stated that he was trying to respond Ain the fullest detail.@ R. p. 1668. He denied telling Mr. Hall that he was going over to Susan=s home. R. p. 1671. He again attempted to describe the events in response. R. p. 1675-1706. The Appellant was asked about the detail of his statement to the police. R. p. 1682-84. He stated that most of his statement was true. R. p. 1684-1706. He stated that in the statement he did not say anything about "the voices" and left out some things. He stated he did not feel anything when he shot her. R. p. 1687. He stated that when he described that he popped another shell in her and that it felt good and that "it felt better" on the next shot was in the statement, but he now claimed he was lying. R. p. 1690-91.

2020), psychiatrist Dr. Donald Morgan (Tr.p. 2012-2043). It must be noted that in the guilt phase the Applicant and Lillie Weik also testified about the family background.⁶

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The record revealed to the 1999 jury that the father suffered Viet Nam flashbacks and he would act out the flashback with violence toward the family (Tr.p. 1920-21), that he threatened to rip out Eddie's heart unless he got a haircut, that Eddie had recently joined a church and was trying to do everything he could for his son and described the father role he was trying to have with his son. (Tr.p. 1923-24). Amy testified that Weik had a personality change in the last few years and would isolate himself in his room and seemed depressed. She also described her father as paranoid and that something was wrong with him. The social worker presented a social history that Weik grew up in an impoverished family with chaos and disorganization. Tr.p. 1933. He described the father destroying the house upon impulse which terrorized the entire family, but it was not a one time episode. He found that Weik manifested hyperactivity revealed in his speech and learning disability. He noted the Weik had been a large baby which suggested some birth complications. Tr.p. 1934-35. From investigator Parker, he learned that Weik had suffered depression and heard voices from time to time suggesting auditory hallucinations. Tr.p. 1938-39. In addition Dr. Rodgers opined that Weik would be able to make a satisfactory adjustment in prison. Tr.p. 1940-50.

Dr. McKee also testified regarding Weik's psychological testing. Particularly, he opined that Weik was not malingering and scored in the schizophrenia level. He felt that Weik had

⁶During the guilt phase. Testimony in front of the jury was presented by Abraham Rodriquez (a co-worker at Broyhill who testified about his relationship with Weik and Weik's relationship with his son), Lilly Weik and the Applicant. R. 1589-1706. In particular, Lilly Weik testified about her children, the relationship Weik had with Susan, her description of Weik prior to his

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Drs

delusions about the CIA, aliens, and the government watching him. In addition he noted a difference between schizophrenia and schizotypal disorder and opined that it did not apply to Weik. Dr. McKee opined that Weik was actively mentally ill and suffered schizophrenia, paranoid type and a history of major depressive disorder with psychotic features. Tr.p. 1964-65. Similarly, Dr. Schwartz Watts opined the same thing regarding Weik's demeanor, hearing voices, and rambling talk. She also described the church he had joined and the problems with some woman in church spreading gossip. She presented his work history and recent discipline as suggesting a personality change. She also described the "Hag" holding him down and the voices he heard. She also described the illnesses of schizophrenia and schizotypal personality disorder and felt that Weik fit schizophrenia. Tr.p. 1996- 1997. She found Weik's demeanor inappropriate and his belief about the CIA and his father's assertions that the CIA was after them, in addition to his claimed possession of special powers of smell to support her diagnoses. Tr.p. 1999-2000.

Dr. Schwartz-Watts was asked if Weik could adapt to a structured situation in jail. Tr.p. 2005. She opined that he was not a sociopath and his symptoms would improve in a structured setting and felt it was unlikely that he would prey on other people in the prison setting. Tr.p. 2006.

Dr. Morgan opined similarly to Dr. Watts. He attempted to develop if Weik suffered in a disassociative state at the time of the murder. He described the "Hag" and the impact it had on Weik and the perceived problems he had with the CIA and ATF people following his family . He stated that Weik twists information to help him understand the voices that he hears. He opined that Weik suffered under paranoid schizophrenia. Tr.p. 2030. He felt that Weik could be

son's birth, his relationship with his son leading up to April 30, 1998, and his demeanor shortly

medicated and improved. He opined that Weik suffered from this condition in 1998 when the crime happened. Tr.p. 2033.

The Applicant asserts that the trial attorneys lacked organization to adequately prepare the mitigation issue for trial. The Court respectfully disagrees with this assertion.

Robert Minter

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The defense hired Robert Minter, a licensed private investigator in 1999 for guilt investigation through Marva Hardee-Thomas. He testified that he had periodic meetings with defense counsel and interviewed potential witnesses in the case. However, he declared that he did not do a so-called mitigation investigation of Weik's family or school background. His bill, Respondents Exhibit 1, stated he spent 116 hours on the case. The itemization of his work, Respondent's Exhibit 2, revealed support for his meetings with counsel and his review of the case file as early as January 31, 1999. The record also reveals various written reports provided to defense counsel including:

1. February 2, 1999 - Repeat of visit with Bernice Austin, a relative of Weik who reported that the Applicant would meet with her in church and felt he was a devoted Christian. She stated he never talked about his dreams and did not seem disturbed about anything. Instead, she saw him as always smiling and saying something nice to people.
2. February 3, 1999 - Pastor LeGrand Dupree of Gateway Church stated he had visited Weik twice at the jail and recalled a dream one time. He felt Weik had a "quick temper," but did not recall why. He felt Weik was a loyal and regular church member but described him as angry most of the time. He stated in December, Weik described a dream about the Hag, who was like a root doctor with the face of a man on one side and a woman on the other with skin like molten lead and six digits on each hand wearing a robe. Weik said he could not move or scream, but heard psychedelic voices at the time. These dreams were told to Pastor Dupree months before the murder.

before the incident. As stated above, Eddie testified in the guilt phase about his background.

Dupree said he saw Weik the Wednesday before the murder and told him that he was going to do something bad unless he came to church and told him his former girlfriend would not let him see his son. Dupree thought Weik was obsessed with his son and did not like his ex-girlfriend's boyfriend. Weik asked the church to pray for him. When Dupree learned of the murder, he was surprised the girlfriend had been killed instead of the boyfriend.

3. February 3, 1999 - Ervin Varner, Weik's first cousin, reported that the Applicant was a loyal church member who would visit the sick and help anyone he could. He never heard Weik talk about dreams and did not see any character changes. He brought his son to church and wanted him baptized, but his mother would not allow it.
4. Minter spoke to Gloria Varner by telephone on May 3. She reported Weik would bring his son over to play with her grandchildren. She did not detect any problems between Daniel and Eddie. She said he would get his son every other weekend and they would visit her home.

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Minter reported by memo to Perry Beauford and Hardee-Thomas on February 3 that these witnesses that he met would make excellent character witnesses, but did not assist the [mental] defense. Minter advised them he would continue on the list he received. Subsequently, he spoke with Tammy Geddis who denied that Weik had ever told her about dreams. Pastor Bruce Scott stated that he only knew Weik casually from church, but had not heard him talk about dreams. Pastor Scott reported that when he was a child he had a "Hag" dream and recalled being unable to move.

Minter also had interviews concerning Weik's former employment at Broyhill. Alton Huggins reported to him that when he was plant manager, Weik volunteered for "nasty jobs" and was an eager worker. He said Weik had spoken with him about problems with his ex-wife and that he was not able to see his son. He did not recall any discussions with Weik about visions. He did discuss with Weik about being saved in church. Huggins described Weik as a mild person.

Laura Tyson, the personnel manager at Broyhill advised minter that Weik was terminated for insubordination against a foreman that progressed to threats of violence. Although Weik had "perfect attendance" for several years, he also had minor disciplinary violations. Minter made a report for defense counsel of this contact on March 2, 1999.

On May 9, 1999, Minter spoke with Abraham Rodriguez, who described Weik's work at Broyhill and felt that Weik had been "set up" by management. He said that Weik spoke with him a lot, but not much about his personal life except that he did not like his son living with his mom and a man she was not married to. He told Minter that the crime was totally out of Weik's character and he had never seen him mad.

#49
PAB
On March 11, Minter met with both counsel and investigator Rickborn and reviewed the evidence and photographs at the Sheriff's Department. He then went to St. George with both counsel and met with Weik to discuss the case.

Minter also assisted the defense prior to trial by working on the juror questionnaires, assisted in getting a court order for state hospital records, contacted witnesses by telephone prior to the trial and serving subpoenas.

Minter stated that most of his contact was with Beauford. Minter stated that he understood where the trial was headed.

Patricia Rickborn

On October 3, 2006, Patricia Rickborn testified that she had been retained as a mitigation investigator for Weik after March 1999 based upon an affidavit that she had prepared for counsel. Depo. Tr. p. 11-13. However, she was unable to locate any file in preparation for her testimony. She felt that her normal experience in capital cases is to be assigned to the case for

one year to prepare an adequate mitigation case. Depo. Tr. p. 14-15. She felt that the three month period that she faced in Weik was inadequate.

Rickborn testified that she was retained by Hardee-Thomas. She stated that when she later learned the trial was set for May 1999 she was alarmed because she was not getting return calls from Hardee-Thomas and had not learned who the retained defense experts were. She said her contact person was Hardee-Thomas, although she recalled meeting with Beauford one time. Ultimately, she contacted Hardee-Thomas and Beauford and advised them that she would not be working in the case. Depo. Tr. p. 19-20. She stated her basis was that she was not getting cooperation from counsel Hardee-Thomas.

#43
PnB
Rickborn admitted that she had sent a series of memorandum to counsel Hardee-Thomas during her employment as the mitigation investigator. Depo. Tr. p. 21-46. Rickborn had suggested to counsel Hardee-Thomas that to develop information, from the psychologist or psychiatrist from the defense interview of Applicant's son, that he did not want his father executed to minimize potential penalty phase testimony. Petitioner's Depo. Exh. 2, Tr. p. 22-23. She also made requests for medical records of the Applicant, Exh. 2, p. 2. and sought assistance from his parents to locate family, teachers, friends and school and medical records (p. 3). In addition, as of March 12, 1999, she was advising counsel about the need for the State Hospital evaluation report and for counsel to contact the doctors to seek out mitigation or develop a basis to object to the testimony if they did not. Exh. 2, p. 4. On March 12, 1999, Rickborn also provided counsel Hardee-Thomas with a "to do" list for obtaining school and medical records. Exh. 2, p. 5. In addition, she noted at that time that in her interview with Weik, he advised her that he was taking thorazine. Rickborn felt it was important for her to point that out to counsel

for their "social history." Depo. Tr. p. 24. She had also noted at that time interviewed Ms. Weik and wanted to know how to get her information to the medical experts. Exh. 2, p. 6. Depo. Tr. p. 26. However, Rickborn did not recall getting the requested records prior to ending her involvement.

On March 22, 1999, Rickborn contacted the Berkeley County Health Department to obtain records and on March 23, 1999, served subpoenas on the health department and high school for the Applicant's records. Exh. 2, p. 7-8. On March 26, 1999, Rickborn reported back to counsel Hardee-Thomas that the hospital records were destroyed, that she was still looking for education records, and that she was continuing in her interviews. Exh. 2, p. 9. On April 13, she contacted Weik's mother to provide family members and church members for interviews and provide whatever forms to assist in a social history. Exh. 2, p. 10.

On April 20, 1999, Rickborn provided counsel with a list of family members and potential mitigation witnesses to be interviewed including church members. Exh. 2, p. 11-16. She stated that she learned of these names from the Applicant and his family. Depo. Tr. p. 25-26.

Rickborn also was seeking information from counsel Hardee-Thomas on whether they had received the father's military records and the need for a court order. Depo. Tr. p. 27. She stated that she had asked Hardee-Thomas four or five times about this issue. Depo. Tr. p. 27-28.

Rickborn interviewed the Applicant's sister Amy Weik on April 21, 1999. Depo. Tr. p. 28-29. Exh. 2, p. 18-20. In the report, she described the fact that her father's relationship with the children developed into a constant fear of his rage. She described to Rickborn incidents where her father had once choked her thinking she was a Vietnamese girl, that he told the Applicant that he would rip his heart out as he was trained to do in the service, if he did not get a

haircut.

Amy Weik reported to Rickborn that her father had been affected by the Vietnam War and told them he was in a special forces unit. Amy expressed fear to Rickborn when she learned the defense was seeking the military records because her father had said the records were classified and that there would be no records of his service. Exh. 2, p. 19.

Amy further described to Rickborn her brother's relationship with his son and the effect the loss of his job at Broyhill had on him. *Id.*

#45
PnB
Amy reported that the Applicant would always try to help people and identified some potential character witnesses. Amy expressed fear about revealing her fears and problems with her father, but Rickborn assessed that Amy would be a good trial witness. Exh. 2, p. 20. Rickborn stated that she would have faxed this report to counsel Hardee-Thomas as soon as she completed it. Depo. Tr. p. 29.

On that same date, April 21, 1999, Rickborn interviewed Joan Ferrer, who provided family background information based upon her marriage to Weik's oldest half-brother. She also reported family knowledge about Russell Weik's "secret missions" in Vietnam and the impact upon him, although she stated that it was initially reported occurring in World War II. Joan reported that she later learned from her sister's family that Russ had never seen combat. Exh. 2, p. 21.

Rickborn reported to counsel on April 22 that she had spoken with Lillian Weik on several occasions who advised her that she had shared all information she intended to and was very protective about her husband. Exh. 2, p. 23. The mother was reported to have confessed to Rickborn the choking incident, but felt her husband was a good father who never abused her son.

Rickborn opined to counsel in that memo that she hoped the other siblings would now open up to her. Exh. 2, p. 23.

Rickborn also advised Dr. Donna Schwartz-Watts on April 23, 1999, that she had learned that date that she was on the case and was going to see Weik that date and forwarded to her the information she had developed. Exh. 2, p. 24.

On April 23, 1999, Rickborn interviewed Amy Weik's common law husband, Stephen Walker who described the Applicant's work as a dedicated employee at Broyhill. Exh. 2, p. 25. He described Eddie as always talking about his visits with his son and that his mother would only call him when she wanted money or a high priced item. *Id.*

#46
P.B.
Like Robert Minter, Rickborn interviewed Pastor Dupree on April 26, 1999. Exh. 2, p. 26. In addition to similar information reported to Minter about the Wednesday night before the incident prayer meeting, he reported to Rickborn that Eddie was a loner who did not handle stress well and described a church trip where he had become angry with some kids in the car. Dupree told Rickborn that Eddie had told him he had committed the murder and was prepared to take the consequences including giving up his life. Exh. 2, p. 27.

On April 27, Rickborn reported providing to Hardee-Thomas her notes from her interviews with Walker, Dupree and Ray Klocek and that she had provided them to Dr. Watts and was sending "the doctors" her contact list so "they" would be able to contact the siblings. Exh. 2, p. 28. The April 27, 1999, interview of "Ray" Klocek, Weik's youngest half-sister, who was twelve when her mother married Russell. She expressed fear of Russell and described hiding from him because of his obsession with guns. She described the Applicant as a "large head" baby with delayed potty training. Ex. 2, p. 29-30. She described being hit by Russell resulting

in being knocked unconscious. Russell would berate all the children, but found the Applicant to be an easy target and called him "worthless." Exh. 2, p. 30. "Ray" described to Rickborn that she moved out of the house when she became pregnant at 16 and later developed problems with alcohol and drugs. She also described an event when she returned home and Russell tried to kiss her.

Rickborn advised counsel in the Klocek memo that she lived in New Hampshire and may not be able to be a live witness but could be interviewed "by Dr. Schwartz-Watts or Dr. Morgan" so they could testify about it. She also stated her opinion that the memories of the Weik household by her "were very important." Exh. 2, p. 30.

#47
MB
On April 27, 1999, Rickborn sent a resignation letter and summary of her work and complaints to counsel Beauford and Hardee-Thomas. Exh. 2, p. 31. Depo. Tr. p. 30. [Respondents Exhibit 15]. Rickborn testified that prior to the letter she had left messages with both counsel because of her expressed frustration. Depo. Tr. p. 34. See Also, Petitioner's Exh. 3. Rickborn stated that she felt she had not been officially retained on the case because she had not seen an order authorizing it despite her requests. She said she received the April 30 letter from Hardee-Thomas where she said she provided the information along to Beauford, but felt Hardee-Thomas was just passing the buck. Depo. P. 42. Rickborn recalled only one meeting that she had with Beauford before she resigned. However, he did contact her after the April 29 letter during the trial asserting the judge wanted to know why she was not there.

Rickborn testified that she had met with the Applicant at least twice prior to her March 12 memo. She talked with him about the facts of the case, but did not recall if she had viewed or read the confessions. She found Weik remorseful. She admitted both defense counsel were

present during her first interview with him. Depo. Tr. p. 50-51. Rickborn was unable to recall if she spoke with Chris Weik. Depo. Tr. p. 53. Rickborn stated she never sought payment in the case or submitted any voucher. Depo. Tr. p. 57.

Scott Parker

#48
PMB
Scott Parker testified that he was retained, through the B.J. Johns firm, as the mitigation investigator after Rickborn left the case. He stated he came into the case very late after meeting with counsel Thomas and stated that he provided anything he did to Percy Beauford. Parker stated he interviewed Lillie Weik (mother), Russell Weik (father), Chris Weik (brother) and the Applicant in a series of interviews on May 14, 1999 and May 25, 1999. Petitioner's Exhibits 3, 4, 5. He stated he also interviewed Maggie Gunter. Petitioner's Exhibit 6. He stated that there were other members that he wished to interview, but was not able to do so.

Parker stated he spent at least 115 hours on the case. However, he was only present one day during the trial. Parker stated that he would usually have contact with Beauford's secretary when he dropped off material.

In his reported interview with the Applicant's mother, Lillie Weik, [Petitioner's Exh. 3] he reported that it was a joint interview and Lillie described the marriage with Russell after he was released from the service and her pregnancy shortly after the wedding, resulting in a miscarriage.

She became pregnant with the Applicant shortly after and described it as a surprise and that she had complications and had developed toxemia. She felt the Applicant was born without complications although she felt he had a large head when he was born April 26, 1967. She also described the later births of Chris in 1968 and Amy in 1971, and a later described pregnancy that resulted in a miscarriage.

Lillie described to Parker the various temperaments of the Weik children. She described the Applicant as "very quiet and sullen", had difficulty in learning, but with good motor skills. She felt the Applicant was not close to his father who did not deal well with children. She said he was hard, cruel, and violent toward Eddie. She described a time when Russell had thumped the Applicant in his chest and threatened him. She recalled fights that Eddie had at school resulting in discipline.

She said the Applicant had been mean toward cats and would shoot at them.

Parker noted that the family had superstitious ideas and an apparent belief in the occult. However, the Applicant was converted and baptized after being influenced by an older Christian woman. However, Parker reported this woman had died just prior to the trial.

#49
PMB
His mother had described various relationships the Applicant had with women. She said Weik had married a retarded girl whom he had taken to the prom. They moved into a house together, but they broke up when she began seeing someone else. She stated he had a brief relationship with the victim who he met through Chris. According to Lillie, she was on drugs and took all Eddie could give, but he broke up with her after she was seeing someone else and got pregnant, although they gave the boy the Weik name. Lillie described his relationship with his son as a stark contrast from the Applicant's relationship with his father. She also recalled the conversation on the day of the shooting.

Lillie stated the Applicant had temper tantrums and was physical and had a fascination for guns and weapons. She described the temper of the other children and opined that Amy had psychic abilities. She felt Eddie did not drink a lot. She noted that Russell had previously gone into a catatonic state on occasions. She denied any physical ailments in the family, except one

relative had depression. She said Eddie had bad dreams and would be fearful as a child, but these returned after his own son was born. She described three incidents where Eddie suffered head trauma when he was hit with a brickbat when he was 6 or 7, later hit in the head with a baseball bat, and once thrown through the windshield about the same time. She apparently did not take him to a doctor.

#50
PMB
The May 25, 1999 interview with Chris Weik [Plaintiff's Exh. 4] revealed that although his brother had been protective of him as a child, he felt that Eddie later had problems in school. He described the earlier "large head", the stigma of being poor, and Russell's inability to handle money. Chris believed in his father's words as the truth and described the violent training he put them through. Chris admitted stabbing Eddie with a knife and tried to strangle him before his father intervened. Chris stated that Amy believed in witchcraft and had been ridiculed for it. Concerning the "Hag," Chris stated he shared this belief with his brother, as well as his mother.

Chris stated that Eddie met Susan on his own and that they had sex the afternoon they met. Chris described Susan's manipulation of Eddie, and described that Eddie thought Chris was trying to steal Susan from him. He described her coming back with another child after her divorce. Chris said that Susan's father recommended to him to change his ways and become a Christian if he wanted Susan back. He attempted to do so, but she again rejected him. However, he continued and became baptized in 1997.

Chris described Eddie's lawsuit for visitation, Susan's coercion of money for the child's gifts, and Eddie's work as a den master. He also described the false charges that cost Eddie his job at Broyhill.

Chris said Eddie was concerned about his son's bruises and behavior and stories he learned

about Susan's new boyfriend, including smoking little cigarettes while the children were locked in their room. Chris described two events, April 19, 1998, and April 27, 1998, prior to the incident where Eddie had locked himself in his room. The first occurred after he had been cut off from his son on his birthday and the second when he had a telephone conversation with Eddie about how upset he was about not seeing his son on his birthday because of Susan's lies and that he felt as if he would blow his brains out.

#51
P.B.
Parker also described in Plaintiff's Exh. 5, his May 14, 1999 interview with Weik's father, Russell Weik. In the memo, Parker described the home as filled with junk and a fire-trap. Parker described Russell Weik as delusional, bellicose, belligerent, narcissistic, ego-centric and grandiose. He described the claimed family background described by Russell. He described to him his entry into the Navy and his true role in the service as covert operations for the CIA, infiltrating Vietnam the power to command all troops, including generals. Weik reported to Parker killing "many thousand of Vietnamese and Viet Cong regulars." Weik denied being either wounded or hospitalized, but then admitted he had been in an "Echo" ward due to the problems when he was captured as a POW. During the interview, his wife would say to him that he was wrong.

Parker described talk about Weik's VA hospitalization and gave Parker his social security number to aid in their search for records. However, Weik indicated to him that records had been destroyed and he had been denied benefits, suggesting his dog tag ad been placed on someone else.

Parker stated Weik's fantasized about warfare and his possessions, clothing, and collectibles were military. Weik admitted his violent tendencies toward his children, admitting

the choking event with Amy which stopped when he was struck with a frying pan. He described his own depression and hallucinations and sleep disorders. He admitted his many jobs. Further, he stated that he was not a good father, is abusive and violent, and has a dark side. Parker noted that while the parents acknowledged the beatings of the children, Eddie Weik denied it.

#52
PWB

Parker also admitted interviewing Magdalena and John Gunter. Plaintiff Exh. 6. In that interview, Lillie was described as caring, impulsive, extroverted and committed mother and Russell was described in various ways such as possessive, violent, and paranoid. They described the home as initially immaculate. They stated that his violent tendencies increased after Russell stopped going to the VA. They described the children as hyper-active. John Gunter felt Eddie was corrupted with neo-Nazi anti-government and racial bias influences from Russell. They briefly described the schooling of Eddie. In addition, they felt Eddie originally had atheistic tendencies, but later threw himself into Christianity. They felt Eddie enjoyed hunting and fishing with John. They reported to Parker that Eddie felt stifled living with his parents.

The Family Testimony During the PCR Hearing

At the hearing, various family members were presented by the Applicant to testify concerning the Applicant and his family background.

Chris Weik

The Applicant's younger brother Chris Weik testified that he was subpoenaed, but did not testify at trial. Chris described the family background of his mother and father. He asserted there is native-American heritage. He described in greater detail his life as a child, Eddie's slow development and Chris' success. He described his knowledge about the Applicant's employment at Broyhill.

Chris described the Applicant as being a loner as a child and other children picking on him because of his slowness and large head, ultimately leading up to fights in school. Chris described their living conditions with money as a problem, no air conditioning and clutter throughout the house. He described periods when water had to be hauled in for washing.

Chris described his father's stories of his service and that he claimed to have 2000 kills in 2 tours. He described the manner that his father claimed to kill with his hands. Chris said he used to believe his father about his killings, but was not sure now. Chris described the family camping trips and that they acted like they were guarding against the Viet Cong and feared the Viet Cong were living in the woods.

#53
PnB
Chris described the "strict-discipline" in the home. They were forbidden from discussing matters outside the home. Chris felt Eddie was beaten more severely than he was. Chris described being hit with a machete, locked in the attic as torture on a hot day, and being put in a boat cabin in the yard. Chris also described his father's hot temper breaking items in the house, including the television. There were weapons throughout the house including the machete, guns, and hand grenade, and dynamite.

His father would watch war movies. He felt his father had flashbacks and would dress up. He described "Rhonda" being choked until his mother hit Russell.

Chris stated that Eddie felt his Dad may have killed the twins his Mother miscarried, as she was shocked by an electrical cord with which Eddie also had been shocked.

Chris also described his father making bombs. He said he was afraid of his father. Also, he felt that Eddie was beaten down by him. He described the beatings they all received, including kicking from his boots.

Chris stated that he believed in "the Hag" and had similar experiences as Eddie.

Chris Weik stated he spoke to Scott Parker one day from 7:30 p.m. until 1:00 or 2:00 a.m. He declared he told Parker similar information as his testimony.

Christ said his brother had few friends, and attended a church with "fanatics." He said that Eddie had been telling him about the Hag for over one and a half years and described it as a 3-headed monster.

Chris said he spoke to Hardee-Thomas at trial and she told him that he was not needed to testify, but claimed the judge wanted to see him.

Chris also confirmed the matters he told Investigator Parker concerning his family and that he had stabbed his brother.

Amy Weik

#54
PMB
The Applicant's sister testified concerning her relationship with her brother. She said that he had learning problems, called himself stupid and spoke very fast. She described her father as violent. She recounted when he tried to choke her when he was watching a war movie. She said he was violent in his discipline. She recalled the event when he told Eddie he would ram his hand into his heart unless he got a haircut. She also recalled her father breaking TV.

She also was told about her father's Viet Nam experiences when he killed many people.

Amy stated she testified at the trial in 1999. She said she met at Beauford's office with defense counsel along with her mother, her boyfriend, Bill, and Maggie Gunter, Larry Farrar, and her father. She said Percy met with each one by one. She said his focus was on her brother's behavior and her father's behavior. She said she told Beauford what she knew. The meeting was about two weeks before the trial. She recalled that she had previously spoken with

Patti Rickborn over the telephone.

Amy said she met with Beauford again on the day she testified and told him she was upset by a call she received the night before from a bill collector. She did not recall any discussion then about what she would be asked. She stated that she had also met with Scott Parker.

She confirmed there was a time when they did not have running water in the house and she had to go with her mother to a neighbor's home to carry water back. She also felt Eddie was a good parent and spoke of his cub scout involvement.

She verified that Eddie had spoken about the HAG and was concerned about his dreams. She said she told this to the defense team. She also spoke about childhood problems, pregnancy problems, and insomnia with them.

#55
PnB

William "Bill" Gunter

Gunter testified that he was Weik's brother in law and married to Maggie. He met Weik's father Russell in 1966 after Russell was hospitalized in Charleston after a nervous breakdown while in the Navy. He met Lillie's daughter, Maggie, who was fifteen (15) at the time. Russell married Lillie after he was released and Maggie was living with them. He stated Russell told him about his alleged clandestine activity in the 1970's. However, Gunter felt the more he told him, the less he believed him.

Gunter married Maggie after she became eighteen (18) in 1969 and moved her from the Weik's home. Gunter learned the violent temper of Russell, the beatings of the children and physical and militaristic discipline he invoked on the children. Gunter described the presence of weapons and explosives and Russell's bias against Black and Jewish people. He also described Russell teaching the children how to kill slowly. Gunter said Russell has never recanted his

Vietnam experience.

Gunter recalled Eddie having a large head and thought he had a hair lip. He felt he walked later and talked slower than he should have compared to the rest of the family. The Applicant tried to get his father's attention and praise, but would be teased instead. Gunter felt it was hard for Eddie to make friends and was a loner and teased by others. Gunter found Eddie's demeanor ranged from caring to carefree to spooky.

#56
PWB
Gunter stated he met with Eddie's lawyer two weeks before the trial. He also met with Scott Parker. He described the meeting with the other family members in Beauford's office. Beauford stated they were looking at insanity or involuntary manslaughter. He said Beauford described that the State was seeking death. When he challenged Beauford about the testimony, he said it would be raised on appeal and he could get another trial with another attorney. Beauford felt more defeated each day during the trial. Gunter was upset he was not called as a witness because of his knowledge of the family.

Gunter described the filth of the Weik home in some detail. He also noted the Father's poking at the children.

Maggie Gunter

His half-sister testified about Eddie's childhood. She stated she was 16 when Eddie was born. She felt he did not talk or make sounds like a normal person. Once he started talking, it was very fast and he would ramble. Maggie described life with her step-father as unpleasant and that he had a violent temper on a power trip. The house was not clean and in disorder. It was full of maps, guns, and swords. Russell talked about killing people while in the Navy.

Russell Weik

His father, Russell Weik, testified that he was not at the trial because he had to work. He testified that he was taken into a covert unit by the CIA after he enlisted and described his various deployment and various ranks within the service. He described his "Gomer Pyle" techniques and manner of killings. He opined that he was in charge of a unit that killed 3060 people. He claimed to have later re-enlisted and ultimately went to the Naval Hospital. He questioned the validity of various records presented to him as being changed or created by the CIA to cover his real work. He also questioned the diagnosis of chronic schizophrenia. He claimed to be seeking various benefits he felt he was owed by the VA.

#57
PAB
Russell described Eddie as a slow learner, but hot tempered. He felt Eddie could not keep his mouth shut. However, he said he wasn't with him that much.

Russell said he suffered from flashbacks. He described a submarine event where he became claustrophobic. Also, he claimed to still suffer from them and had trouble sleeping based upon Viet Nam.

Russell described his heritage going back to Pocahontas, Martha Custis and other historical figures. He admitted teaching his children how to fight and how to smell the enemy. He said he had a top security clearance.

Expert Witnesses Who Were Part of the Original Defense Team

Dr. Donna Schwartz-Watts

She testified that she was retained three months prior to the trial. She said she would have liked to have had one year. She said she saw Weik two times before the Blair hearing. She had been provided and received the discovery material and Patti Rickborn's notes before the trial. She recalled having a general family history, but Weik did not allow a factual defense. She met

with Beauford one time before that hearing and asked for Dr. Donald Morgan to be included and asked for a psychological and neurological consultation. She thought it was done. She also spoke with the mother and Chris at the Blair hearing and learned of the toxemia and pregnancy history. Although she did not meet with Rickborn, she met with Parker and received the Hall records at the Blair hearing. She was aware that the father had a mental illness and other family through the Hall records, but did not know Weik may have had a genetic disposition for schizophrenia. She felt this would have made her more confident in her opinion about Weik's schizophrenia.

#58
PnB
Although she heard Augustus Rodgers' testimony at trial, he did not develop the substance of the family history she now has. She said she met with Dr. Brannon, Dr. McKee, and Dr. Morgan until the Blair hearing and had not prepped before that. Dr. Watts described items within the Hall records that she found to be useful and supportive of her diagnosis of chronic simple schizophrenia. She also did not recall seeing anything in writing from Scott Parker and recalled only discussing his findings with her. She also stated that she had not reviewed a social history written by Augustus Rodgers at the time of her trial testimony.

Dr. Watts also recalled that Weik acted strange during the initial Blair hearing. She said at one point Weik hit his head on the table.

Dr. Watts said that at the trial she lacked personal interviews with all the family members, and did not have all school records and other developmental records concerning Weik. She wished she had these. Since the trial, she learned that Weik did not speak until he was 2 years old, had few friends and the subject of teasing and confirmed that his father had a mental illness. Concerning Weik's belief in the Hag, she opined that it was now seen as a shared belief within

the family. She felt this supported her analysis concerning his mental illness. She felt the added records supported her position at trial.

Dr. Watts testified, however, that the additional information did not change her diagnosis expressed at trial that Weik suffered from chronic simple schizophrenia. She was aware of the Hag at that time as a cultural concept. From Rickborn's notes, she also knew of the father's influence over the family by fear. In addition, at the Blair hearing, she was also aware of Dr. Crawford's different diagnosis.

Dr. Donald Morgan

#59
PMB
At the hearing, Dr. Morgan testified that he was asked to examine Weik by Dr. Watts. He had not met with the defense counsel prior to the trial and thought that he was not fully aware what they were going to ask him. At the time of this hearing, he itemized the material he reviewed including the father's Navy discharge, the trial testimony of Rodgers, Dr. Crawford, Dr. Watts, Dr. Shea, Dr. McKee, Dr. Behrmann and his own. He also reviewed the 1999 reports. He claimed that he was not aware in 1999 that Weik's father had a diagnosis of schizophrenia. He believed that it would have explained the genetic component of his opinion since only 2% of the population suffers from it, and a greater chance exists if a family member has it. He felt the lack of this information precluded the defense from impeaching the state psychiatrist. Dr. Morgan opined that Weik suffered from paranoid schizophrenia. He felt the psychiatrist was wrong when he concluded that there were no delusions or hallucinations presented and could have rebutted the testimony.

Dr. Morgan was impeached based upon his bill where he admitted that he reviewed records on May 3 and May 5 but could not recall what those records were. He also could not recall that

#60
PMB

he testified at trial that he was aware that father suffered from paranoid schizophrenia (Tr.p. 411, l. 18-p. 412, l. 5). He denied the meetings indicated in Beauford's voucher. Dr. Morgan denied knowledge about the case, yet at trial he referred to Mr. Hall's report about Weik eating by himself, staying away from other workers and always reading the Bible as strange ideas, but not psychotic. Tr.p. 417 [In Dr. Morgan's penalty phase testimony, Dr. Morgan described his interviews with the Applicant about the Hag, whether Weik thought he had a mental illness, and how the CIA is after his father and the mother confirmed that the CIA agents had stopped and checked their trunk. Dr. Morgan also admitted at trial that he had reviewed Carlos Torres social history from the Hall records]. Dr. Morgan did not recall if he met with Scott Parker prior to the trial. Although there was some testimony about a large head, he was aware that there was testimony that there were no neurological defects.

Dr. Geoffrey McKee

Dr. McKee testified in his deposition that he was retained to do some testing of Weik. He was retained after a telephone call from Marva Hardee Thomas and Mr. Beauford in February 1999. He interviewed Weik on March 6 and May 15, 1999. Although he claimed to have been provided little information, he did receive Dr. Crawford's report, and had a verbal consultation with Dr. Stephen Shea. Prior to the competency hearing, he drafted an affidavit for counsel in May 1999 opining that Weik was incompetent to stand trial. Depo. Tr.p. 8, Exhibit 1. He stated this was done because he was unable to attend the Blair hearing. Before he testified in the penalty phase, Dr. McKee stated that he felt that he did not have any preparation with counsel. He thought he would be testifying in the penalty phase but ended up testifying only in the case in chief, but had prepared his notes on penalty phase issues. He prepared notes about risk

assessment and Weik's potential for adaptability for prison life. Depo. Tr.p. 11-12. At the trial, however, he was never asked his opinion on prison adaptability by counsel. Depo. TR.p. 12-13. He stated that he could have provided the court with more information about his opinion that Weik suffered from depressive disorder with psychotic features. He stated that if he had been advised that he was testifying in the penalty phase, he would have testified about the following: the risk assessment, the three approaches he took as to the assessments of anamnestic, the data on the likelihood of murders among inmates, and the absence of antisocial personality disorder or malingering by Weik. Depo. Tr.p. 15-17.

#61
PnB
Dr. McKee did not recall any face to face meetings with Beauford before the trial, but did have a telephone conversation with counsel. He stated that he would have discussed his findings with counsel including his opinion on adaptability to prison life. Dr. McKee acknowledged his records revealed a meeting with counsel two days before he testified and a consultation with Jeff Bloom, but did not recall the specific discussions. He was not aware that Bloom recommended that he should not be called as a witness. Depo. Tr.p. 25 [See Respondents Exhibit, 7, p. 8]. Dr. McKee was also refreshed that he did in fact testify in the penalty phase and not the guilt phase of the trial. Id. 25. He did not recall the consultation he did with Dr. Watts. Although he was present in court, he did not recall the testimony before him by Dr. Rodgers or that Rodgers had testified about adaptability to prison. Depo. Tr.p. 26. Dr. McKee felt that he was not aware that Weik had already been convicted of murder when he testified at trial. He also did not recall any discussion with Dr. Rodgers about his social history summary. He stated that his opinion at trial was not changed by the testimony he heard from Dr. Rodgers. He also said he was not present when Weik testified at trial. Particularly, he was not aware of how he rationally responded to

questions. Dr. McKee also did not recall what records he reviewed on February 22, 1999 for three hours. He would have received the records from counsel at that time, but did not know how he received them. Tr.p. 31. Dr. McKee stated that he had transcripts of Weik's statement and had reviewed Dr. Crawford's report before he did his May affidavit. Tr.p. 32. He thought he would have consulted with Dr. Watts but did not recall the substance. Tr.p. 33-34. Dr. McKee admitted that he had reviewed the social history, but not the medical records from Hall Institute prior to his trial testimony. Depo. Tr.p. 37-38, citing Tr.p. 1967.

Dr. Augustus Rodgers

#62
Dr. B
Dr. Rodgers testified that he became involved in the case several weeks before the trial in 1999. However, his voucher, Respondents Exhibit 13, revealed that he began his billing on May 24, 1999 and claimed a total of 25 hours work in the matter, including his testimony. He referred to his trial testimony concerning the information he had been provided before the trial. Tr.p. 1925. Dr. Rodgers, referring to a social history prepared by present counsel's defense team, testified about the genogram prepared for the proceeding by mitigation specialist Margaret O'Shea. He stated this was not done at the Weik trial and that he had not received similar social history information from a mitigation investigator in 1999 that he received before the post-conviction relief proceeding. He summarized his opinion that Weik had needed help for a long time and his conditions growing up needed intervention. He stated that he had similar impressions in 1999. He described the Weik environment as negative and detrimental from birth and that no intervention was allowed.⁷

⁷During the state PCR hearing, testimony was also received from Dr. Seymour Halleck, a forensic psychiatrist who was not involved at trial. Dr. Halleck opined that upon his review of the records and prior testimony that Weik suffers from schizophrenia paranoid type, schizotypal personality disorder and a major depressive episode. He

ANALYSIS

1. Counsel's Retention of Investigators 9(m) and (r).

#63
AnB

This Court must find that the defense team's retention of the investigators was not constitutionally deficient. Plainly, there was a delay from when counsel became appointed in the case. However, this delay in retaining Minter or Rickborn did not impact upon the ultimate presentation of relevant information to the jury. As set out above, with more time it is evident that a case consisting of genograms describing historical family traits and dysfunction within the family would have been presented. As to the claim of "untimeliness," any deficiencies in their presentation was not the result of the delayed retention. The information was quickly developed in the initial interviews of the close relatives as well as Weik related to the background. Probative evidence concerning the father's violence, the hag, and the defense perception of his mental illness was known and produced in advance of trial.

The problem with the late assignment did not necessarily impact upon the investigation, but it seemed to have impacted stress upon one of the investigators, particularly Ms. Rickborn, as the trial approached. As noted above, despite the lengthy time in preparation for the PCR action and its investigation and presentation of a fuller mitigation case, the result was essentially the

described the voices that Weik is hearing since he was 15 and the influence of the Hag. He offered that his belief in his father's military career was a product of mental illness. He opined that Weik's desire for the death penalty was a product of his mental illness. He felt that if he testified in 1999, his testimony would have been similar to Dr. Watts. He felt that he could have impeached some of Dr. Shea's opinion that there was no deterioration in function and the strength of the evidence of regarding schizophrenia. He felt there was a strong need for a family history. He assessed Weik's testimony and thought he had started out well but was not willing to answer questions by the prosecution.

Margaret O'Shea also testified about the importance of the role of a mitigation investigator and the time it takes to properly prepare the social background information for the mental health team and acquire records. She states that this was not done in the 1999 trial.

same. Thus, the Court believes there is not a reasonable probability that the result would have been different had a fuller mitigation case been presented.

The psychiatric experts had the same opinion of Weik's mental illness. The father still suffered from the same illness at trial in front of the jury as he did during the PCR hearing, (albeit without the military records to support it.) In 1999, the jury had sufficient evidence to assess the mitigation of the tragic family life. The Applicant has failed to show either deficiency or prejudice under Strickland.

2. Counsel's alleged failure to prepare or present Testimony of Family Background to their experts. 9(n), 9(o), 9(s)

#64
PnB
This issue is equally without merit. The problem the Court faces is equating the PCR testimony which suggests no knowledge by either the lawyer or witness about the testimony with the fact that similar testimony was presented and developed during the trial of the case. The only obvious failing concerns the PCR testimony of Dr. McKee. However, in spite of Dr. McKee's PCR testimony, it is clear from the record that counsel Beauford interviewed and developed an understanding of the available family testimony – All of which was presented to the jury. His calling of only Amy Weik, after both the mother and the Applicant had testified in guilt, cannot be deemed deficient. The Court notes that there may have been other members of the family willing to testify, and perhaps Chris Weik and John Gunter may have also been able to reveal additional perspectives regarding Russell Weik's problems and deficiencies. However, it seems clear that counsel Beauford made these choices not by ignorance, but after he had discussed these matters with them before the trial.

More importantly, there was no 6th Amendment prejudice in the failure to present these

#68 MB
additional family members. The jury had a general understanding of the family and Eddie Weik from the testimony of the Applicant, his mother, Amy and the experts. While the witnesses arguably could have been better prepared, there has been an inadequate showing that there were relevant omissions such that to a reasonable probability the result would have been different. Except for one omission, the Applicant's only claims are that the expert opinions would have been stronger to the particular expert. All of the experts with the exception of Dr. McKee have continued in their opinions as testified to at the trial to a reasonable degree of certainty in their field. As to Dr. McKee's testimony concerning adaptability, it is noted that both Dr. Rodgers and Dr. Watts opined essentially that Weik would be adaptable. This Court cannot say that the failure to have Dr. McKee add to that chorus undermines confidence in the outcome of the case. Thus, the Applicant has failed in his burden of proof on these grounds as well.

Similarly, there seemed to be a breakdown apparent in who would provide various material received and what material was actually provided and received. Defense counsel for this proceeding either could not find their file or could not recall when certain materials got into their files. Counsel Beauford testified that he had knowledge of most of the information received in this proceeding, but did not recall from what source he had learned it. Counsel Hardee-Thomas testified essentially that she did not recall having reviewed all of the documents she received from the investigators and then when such was passed on to counsel Beauford. This testimony, along with inconsistency in some witnesses' trial testimony and PCR recollection about what witnesses knew and did not know (e.g. Dr. Morgan) makes the assessment for this Court difficult as to the deficiency prong. However, the burden of proof rests with the Applicant and the Court is constrained to conclude that counsel did not provide all investigative family reports to all

expert witnesses. However, the analysis does not stop here. Despite such a deficiency, the Court believes that the Applicant has failed to meet the burden of showing 6th Amendment prejudice. As stated above, the jury heard the basic information about Weik's mental illness and the dysfunctional family in which he was raised. As the Supreme Court stated in Jones v. State, "[J]ust because it was unsuccessful does not mean that [Weik] can now recharacterize the evidence and claim that counsel did not adequately present mitigation evidence. The "new" evidence is the same as the "old" evidence. At best, it is a fancier mitigation case. If the evidence was not persuasive in the first case, the defendant does not get a second chance. Otherwise, there would never be an end to litigation." Like Jones, Weik is not entitled to present a fancier mitigation case where the same evidence was presented in the trial. He has thus failed in his burden of proof on these grounds.

Heb
PMB

9(p) The Applicant was denied effective assistance of counsel when trial counsel did not provide a sufficient basis for their continuance motion at the hearing on May 18, 2006 when such basis was available namely a letter to them from the mitigation investigator dated April 29, 1999 which set out in detail trial counsel's inept cooperation with and supervision of the mitigation investigator - one Patti Rickborn - which resulted in her resigning from the case. If trial counsel had provided this letter to the trial judge, he would have realized that trial counsel's on the record explanation of the reason why the mitigation expert resigned on April 29, 1999 was not accurate and the trial judge would have been alerted that they were not providing effective assistance of counsel to the Applicant, would have probably continued the trial so the new mitigation investigator would have had time to gather complete information about the Applicant's personal and family background which would have been provided to the mental health experts and presented to the jury and would probably have resulted in a life sentence. [IAC - CONTINUANCE REQUEST- failed to provide April 29, 1999 Rickborn letter as explanation for resignation].

In allegation 9(p), Weik contends that defense counsel erred in failing to present Rickborn's April 29, 1999 resignation letter in support of the motion for a continuance. Weik

now suggests that the continuance would have otherwise been granted and the only basis not to have shown it was their own fear of criticism for their incompetence. This Court must conclude that Weik has failed in showing either deficient performance or prejudice by this failure.

The record reveals the following at the motion hearing on May 18, 1999 after the competency hearing, Applicant's trial counsel moved for a continuance:

Mr. Beauford: Just a little housekeeping, there's an outstanding motion in which we tried to get a continuance. Basically one of our mitigating experts has left the team and we have now Cot Parker who has just come aboard and he's a little bit coming behind and we're just gathering some of the information from the other expert. And we had filed the motion on having the matter continued and would like for the Court to maybe rule on that.

The Court: Well, what is his role? What is that mitigating part? What specific role does he have?

Mr. Beauford: He will be ...

The Court: And what happened to the fellow who left the team?
Mr. Beauford: Rickborn and Patty

The Court: Does she expect to get paid?

Mr. Beauford: I think so, your Honor. I haven't gotten a bill yet.

The Court: Well, I'm not going to pay her. If she doesn't come here and testify I am not. She's not going to get on the team to be paid and leave. I mean, she's not going to do that now, you know, that's not fair to you. It's not fair to you for her to jump ship on you. If she's going to get on the team and expect me to pay her, she ought to come here and testify in the case.

Not that I don't -- not that I'm saying I wouldn't pay this gentleman, I'll do that as well. But I just feel like it's unfair to you for her to jump ship and certainly unfair to the State and to me to have, you know, a trial scheduled months and months in advance set for this particular thing and then all of the sudden she jumps ship. What did she jump ship for?"

Mr. Beauford: Your Honor, we're on the record. Basically, I said --

The Court: I don't want you to say anything --

Mr. Beauford: Communications problems.

The Court: Sir?

Mr. Beauford: I would think communication problems is a broad area we could use on the record.

The Court: I don't want you to say anything to prejudice your client, but at the same time, you know, if she doesn't have a good reason to leave, then I don't see how anybody else should be prejudiced. If she's got a good reason to leave, I need to know it really on the record.

In other words, if it's prejudicial to your client that she has jumped ship on you at the last second, you had to get somebody else, then I need to know what it is and I need to know what specifically your new fellow is going to do, how much time he needs, what it is he needs to do so I can say, all right, this is how it's going to be or isn't..

And again, I'm not asking you to say anything that will prejudice your client in regards to Ms. Richards.

Tr. p. 442-445. The judge advised the lawyers he would either call the lawyers the following day or would come to the courthouse. "..... I mean I'll just do what I've got to do to get this thing one way or the other resolved." (Trans. P. 445-446).

On the following day, Solicitor Bailey raised the issue of the pending defense motion for a continuance. Tr. p.. 472. The judge asked about the investigator who left the team.

Mr. Beauford: Basically it was a matter of I guess communication in a sense. And I don't know what happened there. I mean basically she felt the communication wasn't the way she wanted it to be, so she decided not to be a part of the team, in short.

The Court: Has she, does she expect to be paid, first of all? That's not all that important except for this: I mean, I think once she gets on board, you know, I mean, I don't know whether she can jump ship so quick.

Mr. Beauford:

Initially, Your Honor, when she said she wasn't going to be a member of the team it was left at that. Then there was some response back and forth I think from Ms. Hardee-Thomas concerning I guess some communication situation. She said because you all have it this way I want to be paid.

Tr. p. 473-474) The Court asked if the new investigator could take her place and Beauford said that he could. Tr. p. 474-475. The judge then said "as long as you have what you need, you know." Tr. 475. Beauford told the judge that Rickborn had not done some things she was supposed to have done such as getting Russell's VA and military records. The judge then asked how long would it take the new investigator to do the things left undone and Beauford said he needed two weeks. Tr. p. 476. The judge asked if Rickborn had started getting the records they needed and Beauford replied that she had not. Tr. p. 477-478. The judge denied the motion noting that he was not able to grant a continuance to allow someone to plunder through VA hospital records on the father. Tr. p. 478. He offered to assist counsel with an order and would make calls to expedite it, but felt it was time to try the case knowing that there will also be another witness or piece of evidence that can be found by either side. Tr. p. 479. At that point, Judge Shuler wanted Beauford either to have Rickborn in court the next day if they wanted her to continue on the case if her services were absolutely necessary, or to find someone to replace her. Beauford then stated that he preferred to go with someone else with whom he had spoken. Tr. p. 476.

The State maintains that because reversals of the denial of a continuance are "about as rare as the proverbial hens' teeth," petitioner failed to meet the prejudice prong. State v. Lytchfield, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957). The trial court's refusal of a motion

for continuance in a criminal case will not be disturbed absent a clear abuse of discretion resulting in prejudice to the appellant. State v. Williams, 321 S.C. 455, 459, 469 S.E.2d 49, 51 (1996); Lytchfield, supra.

Here, the Applicant has failed to show that the failure to present the April 29 letter was itself deficient performance. Contrary to the claims, Rickborn was not the lawyer, and counsel had advised the judge that someone new was available to take the case but needed two weeks. The Applicant seeks to suggest that counsel hid the basis for the resignation from the Court and that if the reason had been presented, the Court would have taken steps to remedy the situation with a continuance. The Court disagrees.

First, communication problems were the basis of her resignation as outlined in her letter. She gave counsel a road map of items to complete, as set out above. Her focus was on the need for the military records of the father. These issues were revealed to the trial court at the hearing.

This Court cannot say that there is a reasonable probability that the trial court would have granted the continuance by the mere presentation of the Rickborn letter. While there apparently was a communication breakdown, and while a continuation of the case as a remedy was explored by the court, the trial court remedied the situation with an appropriate alternative. His discretion would not have changed had he become aware of the breadth of the breakdown between counsel and the particular investigator. Applicant has failed in his burden of proof. Cf, Morris v. State, 371 S.C. 278, 639 S.E.2d 53 (2006) (counsel ineffective in failing to request a continuance when defendant absent).

9(v) Trial counsel was ineffective in failing to adequately voir dire potential jurors, and failing to object to the qualification of jurors who were automatically in favor of capital punishment for defendants convicted of an intentional homicide and/or unable to give due consideration to evidence in

mitigation. [Amended at Hearing - IAC - VOIR DIRE ACTS AND OMISSIONS]

In this new allegation, Weik, relying upon the assessment of Jeff Bloom asserts that counsel was unprepared to adequately voir dire the potential jurors at trial. Particularly, he claims counsel was ineffective in failing to adequately voir dire and challenge for cause the following jurors: Douglas Judy (#174), William Matthews (#204), Michael Black (#34), and Daniel Owens (#239). As a result of failing to move to excuse for cause the jurors, trial counsel was unable to strike the following jurors: Douglas Judy (#174), Jerry Bryan (#48), and Marvin Ladson (#183), all of whom served on Applicant's jury.

#11
PWB
At the outset, this Court must review the individual voir dire of the particular jurors. Juror Douglas Judy, #174, stated that he would impose death for an intentional killing, and that if "he's found completely guilty of it he deserves the death penalty." (Tr. P. 562, lines 2-8). He also stated that "[i]f someone has killed someone over an argument or something, it wasn't really meant to happen but it did, well, that's [a] life sentence to me." (Tr. P. 569; lines 16-18). When defense counsel inquired whether a killing "without any reason" necessitated a death sentence, Mr. Judy replied "[w]ell, I mean, if it was proven, you know, that there was no doubt in my mind that he did do it and I knew he did it with the evidence, it depends on the circumstances, you know whether to give him life or death." (Tr. P. 562, lines 22-25).

However, the voir dire must be viewed as a whole. Mr. Judy also stated that, " I'll have to hear everything, you know, before I give a death sentence" (Tr.p. 564), and "if someone killed someone over an argument or something, it wasn't really meant to happen but it did well that's a life sentence to me" (Tr.p. 569, l. 16-19). In addition, Judy had advised the trial judge that he

was in group three and would not automatically sentence a person to death or life if convicted, but would listen to the evidence before he decided. (Tr.p. 557-558) .

A prospective juror may be excluded for cause when his views on capital punishment are such as would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). See also State v. Wood, 362 S.C. 135, 607 S.E.2d 57 (2004), cert. denied --- U.S. ----, 125 S.Ct. 2942, 162 L.Ed.2d 873 (2005); State v. Council, 335 S.C. 1, 515 S.E.2d 508, cert. denied, 528 U.S. 1050, 120 S.Ct. 588, 145 L.Ed.2d 489 (1999); S.C.Code Ann. § 16-3-20(E) (juror may not be excused in a death penalty case unless his beliefs or attitudes against capital punishment would render him unable to return a verdict according to law). When reviewing the trial court's qualification or disqualification of prospective jurors, the responses of the challenged jurors must be examined in light of the entire voir dire. Council, supra. The determination of whether a juror is qualified to serve on a death penalty case is within the sole discretion of the trial judge and is not reversible on appeal unless wholly unsupported by the evidence. State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992), cert. denied, 508 U.S. 915, 113 S.Ct. 2355, 124 L.Ed.2d 263 (1993), overruled on other grounds, Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999). The ultimate consideration is that the juror be unbiased, impartial, and able to carry out the law as explained to him. Id. On review, the trial court's disqualification of a prospective juror will not be disturbed where there is a reasonable basis from which the trial court could have concluded that the juror would not have been able to faithfully discharge his responsibilities as a juror under the law. State v. Green, 301 S.C. 347, 392 S.E.2d 157, cert. denied, 498 U.S. 881, 111 S.Ct. 229, 112 L.Ed.2d 183 (1990). See also Wainwright, supra, (there

will be situations where the trial court is left with the definite impression that prospective juror would be unable to faithfully and impartially apply the law and this is why deference must be paid to trial court who sees and hears the juror). see Heath v. Jones, 941 F.2d 1126, 1136 (11th Cir. 1991) (counsel not ineffective in not seeking to strike juror could be fair and follow the law). There is no ineffectiveness from failure to challenge a juror where the attorney lacks the information to object to the juror. Kimes v. U.S., 939 F.2d 776, 779 (9th Cir. 1991).

#23
PrB
Here, viewing the responses as a whole, this Court cannot conclude that either deficient performance existed or 6th Amendment prejudice existed. The trial court did not find disqualification appropriate *sua sponte* based upon the entirety of the responses. This Court, viewing the entire voir dire does not see a basis for disqualification as a matter of law.

The Applicant points out that William Matthews, # 204, when asked his opinion about the death penalty, responded that "...I would have to hear the facts and all. And if I felt like he committed it and he did it and, you know, was guilty of the crime, I would vote for it." (Tr. P. 1001, lines 1-9). Mr. Matthews said he had "always felt the same way I feel now." (Tr. P. 1002, lines 3-6). Defense counsel then went on to rehabilitate Mr. Williams by asking him if he would weigh all the factors, which the juror agreed to do. (Tr. P. 1003, lines 3-9).

However, Matthews had stated that he felt that he could give the death penalty if it was appropriate, but not in all cases. Tr.p. 997. On Beauford's questions, he confirmed that he would consider other factors than the crime in determining life or death and "I would hear the facts" and "other factors." Tr.p. 1001-01.

Like the other juror, the responses from the voir dire, as a whole, do not compel disqualification. He agreed he would listen to other factors than the crime in deciding death or

life. He was qualified and counsel was not deficient in failing to seek his disqualification based on the responses.

#74
On B

Juror number 34, Michael Black, informed the Court "I favor the death penalty if he's guilty of it." (Tr. P. 1022, lines 14-15). The Court then asked "[w]hen you say he's guilty of it, you mean if he's guilty of the crime?", to which Mr. Black responded "Yes, sir." (Tr. P. 1022, lines 16-18). However, the Court determined that he was qualified when the juror by asking him if he would consider all factors, which he agreed he would do. (Tr. P. 1025-1027). On examination by defense counsel, the juror indicated he was "old school," but did not elaborate on what he meant other than to say "you're innocent until proven guilty."

Contrary to the claims of the Applicant, favoring the death penalty does not make a juror disqualified. It is only when those beliefs impair his ability to follow his oath and consider other factors. The juror indicated to the court that he would not sentence a person automatically to death for murder but would listen to the circumstances. Considering the entirety of the voir dire, Black was qualified as a juror. Counsel was not ineffective in failing to seek to strike for cause.

Juror number 239, Daniel Owens, initially stated he was in the "first paragraph," meaning death for everyone "[i]f murder is proven." (Tr. P. 1064, lines 13-19). Mr. Owens stated that he would give the death penalty "unless there's some real extenuating circumstances" and that he "would consider those." Tr.p. 1066-67. Upon further inquiry by the court, the juror said he would consider all the facts. Tr.p. 1067, 1068. He then expressly confirmed that he would not always give a death penalty. Tr.p. 1068, 1070 and that "I would weigh all the facts." Tr.p. 1069. The Applicant points out that counsel developed that the juror was inclined to give the death penalty, but that he would not always want to give a death penalty. Tr.p. 1071.

The Court does not believe that, on the whole, such a response constitutes an automatic disqualification. Such a response can be read as clearly indicating he was not always going to vote for death and that he would consider other factors and weigh all the facts. The trial court found he was qualified. This Court cannot find counsel ineffective in failing to move for his disqualification based upon the entire voir dire which revealed a qualified juror. His claim must be denied.

#75
PnB

9(u). Applicant was denied the effective assistance of counsel at the penalty phase because trial counsel did not object to a portion of the Solicitor's cross-examination of Applicant's expert Dr. Augustus Rodgers, PhD and to the Solicitor's closing argument as follows: during cross-examination, Dr. Rodgers admitted that the S.C. prisons where Applicant would be imprisoned if he received a life sentence have: crafts available for prisoners; jobs for which prisoners are sometimes paid; canteens where prisoners could buy soft drinks, candy bars, popcorn and other items with the money they earn in prison; job training; educational opportunities for prisoners to get their GEDs and to take college courses; recreational facilities available for prisoners; "three square meals" per day; free clothing and shoes; free medical care; radios and televisions.(Tr. 1944-1954). The Solicitor argued in closing argument that the jury should consider the fact that a prisoner would have a job in prison, get paid, have a canteen where he could buy soft drinks and candy and have a TV as reasons and compared the Applicant's life in prison to the decedent who was dead and in her grave. Tr. p. 2135-2136. This evidence adduced during the cross-examination of Dr. Rodgers and the Solicitor's argument injected arbitrary factors into the jury's sentencing considerations in violation of S.C. Code Section 16-3-25(C)(1). "When the jury is invited to speculate about irrelevant matters upon which a death sentence may be based, §16-3-25(C)(1) is violated." State v. Burkhardt, - S.E.2d -, 2007 WL 80036 decided January 8, 2007. When an arbitrary factor is injected into the jury sentencing consideration, reversal is required. (Motion to Amend received on February 6, 2007) (IAC- PENALTY PHASE - FAILURE TO OBJECT TO PRISON LIFE EVIDENCE AND ARGUMENT].

Subsequent to the hearing and presentation of testimony and after the record was closed, on February 6, 2007, the Applicant made this additional amendment based upon the intervening

#76
PnB

decision in State v. Burkhart, __ S.C. __, __ S.E.2d __, 2007 WL 80036 (S.C. January 8, 2007). Respondents have opposed this amendment in their proposed order for a number of well-founded reasons. First, the record and amendments had been closed at the conclusion of the hearing on September 21, 2006. Second, the Applicant had been given numerous opportunities to amend since 2003. Third, the Court in Burkhart relied upon the Court's 2005 decision in State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (2005), where the defendant challenged on appeal the admission of evidence regarding general prison conditions. Although the South Carolina Supreme Court held the issue was not preserved for review, the Court cautioned the State and the defense bar that such evidence is not relevant to the question of whether a defendant should be sentenced to death or life imprisonment. 366 S.C. at 498-99, 623 S.E.2d at 387. Bowman (and its cautionary foreshadowing of the Burkhart opinion) was established case law at the time the PCR hearing was held. This amendment is untimely and must be rejected.

Assuming *arguendo* that the amendment is allowed, the failure to object (as in Bowman) under the circumstances of this case is distinguishable. Our Court has rejected a similar argument in State v. Ivey, 325 S.C. 137, 481 S.E.2d 125 (1997) where Ivey argued that the court erred by preventing the defense from ensuring that the jury had a correct understanding of the term "life imprisonment," where the solicitor introduced considerations of early release and misled the jury about Ivey's future dangerousness to society, *while depicting life imprisonment as a luxury vacation*.⁸

⁸ It is interesting to note that death row inmate Thomas Ivey in his federal habeas action raised a strikingly similar claim before the 4th Circuit that was rejected in Ivey v. Catoe, 36 Fed.Appx. 718, Unpublished Op, No. 01-11. (4th Cir. 2002)(prosecutor's remarks regarding prison guard's testimony as to unobjected conditions at correctional facility were fair comment on the evidence, and thus permissible and stay not warranted to litigate in state PCR action counsel failure to object to prison conditions evidence). Ivey has been represented by one of Weik's counsel in his PCR litigation of a different murder trial.

#22
DnB

In the present case, Applicant claims trial counsel failed to provide effective assistance of counsel by failing to object to a portion of the Solicitor's cross-examination of Dr. Augustus Rodgers. The Solicitor had Dr. Rodgers admit that inmates at the S.C. Department of Corrections have certain privileges and the Applicant now argues that the failure to object to this portion of the Solicitor's closing argument in which he urged the jury to consider these same privileges. The Court points out again that this Amendment came well after the close of evidence (on or around February 6, 2007) and could have been raised in prior amended applications. Given the law as it existed during the trial of this case in 1999, this Court cannot conclude that Applicant has shown deficient performance or prejudice by the failure to object.

1. The Opinion On Prison Life and Adaptability

During the presentation of Dr. Augustus Rodgers, a social worker, he revealed that as a consultant with the prisons, he was involved in the direct training and teaching of inmates to help them develop life skills which would enable them to adjust better to prison life and also better equip them and prepare them for release. Tr.p. 1940. He then admitted that he had spent time with Weik and gave an opinion that Weik could complete one of his programs and make a satisfactory adjustment to prison. Dr. Rodgers stated that he based this upon his observation in the local jail, the interaction with the prison personnel and that he had not been a source of difficulty. Tr.p. 1941.

During the Solicitor's cross-examination of Dr. Augustus Rodgers, he admitted that the South Carolina prisons where Applicant would be imprisoned if he received a life sentence have: crafts available for prisoners; jobs for which prisoners are sometimes paid; canteens where prisoners could buy soft drinks, candy bars, popcorn and other items with the money they earn in

prison; job training; educational opportunities for prisoners to get their GEDs and to take college courses; recreational facilities available for prisoners; "three square meals" per day; free clothing and shoes; free medical care; radios and televisions. (Tr. p. 1944-1954). Trial counsel did not object.

2. Solicitor's Closing Argument

Look at life in prison. You've heard some testimony that he can adjust to life imprisonment. You heard that from the psychiatrist, you've heard that from the social worker. But ask yourselves – one of the witnesses they called testified a little bit about life in prison, talked the fact that – and it's life without parole, there's no dispute about that so he would live the rest of his life in prison. The defense will tell you about that and the judge will instruct you on that.

#78
PMB
But when you consider adjustment to prison, you got to look at what you're adjusting to. You're looking at adjustment to a life where he goes to prison, he's behind the fences, he'll be given a prison job, according to that witness sometimes they'll pay them some money, he's got a canteen where they can buy stuff, Cokes, candy bars, that kind of stuff, television to watch in their cells.

In the meantime, Susan Krasae is dead and in her grave. And I ask you if life imprisonment is an acceptable alternative to somebody who's done what he's done. That's a choice you all are going to have to make.

Tr. p. 2135-2136. Trial counsel did not object to this argument.

Assuming that this issue is properly before this Court, Respondents submitted that in 1999 when this case was tried, reasonable defense counsel who placed in evidence the issue of a capital inmates adaptability to prison life had no basis to object to evidence of what prison life is to assist the jury to determine whether the inmate would be adaptable to those conditions which may be different than those conditions he was presently living under or as a basis to impeach the opinion of the expert. As noted above, in 1997, the Court upheld an argument, by the same solicitor which described a prison as a "holiday inn." This was two years before the case was

tried. The issue before the court now is whether reasonably prudent counsel at the time of the trial of this case was deficient in the failure to object at that time.

A counsel is not ineffective in failing to forecast changes in the law. Sherrill v. Hargett, 184 F.3d 1172(10th Cir 1999); Reasonable counsel cannot be required to anticipate later decisions. Sistruck v. Vaughn, 96 F.3d 666, 672 (3d Cir. 1996)(counsel not deficient in failing to anticipate Batson). It was not until the Burkhart decision in 2007 that the Court gave significant guidance to the prosecution and defense as to such evidence and the deficiency of counsel by failing to object to such evidence. Reasonable counsel in 1999 could not have been expected to have predicted a decision in 2007 of our Supreme Court, and thus on this ground cannot be considered deficient.

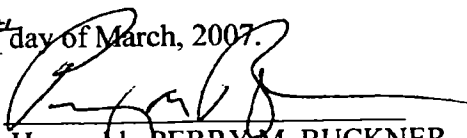
Therefore, the Applicant has failed to show that in 1999 reasonable counsel was constitutionally required to object to this evidence and argument. The Applicant has failed to show deficient performance.

Due to the failure to satisfy the initial prong of deficient counsel prong, the prejudice prong will not be addressed.

IT IS THEREFORE ORDERED:

1. That the Application for Post Conviction Relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 12th day of March, 2007.


Honorable PERRY M. BUCKNER
CIRCUIT COURT JUDGE

Walter, South Carolina



HENRY McMASTER
ATTORNEY GENERAL

May 22, 2007

Honorable Cheryl Graham
Clerk of Court, Dorchester County
101 Ridge Street
St. George, SC 29477

Re: John Weik v. State of South Carolina
03-CP-18-1070

Dear Ms. Graham:

Enclosed please find an Order dated May 9, 2007 in the above-referenced matter for filing in your office. By copy of this letter I am serving opposing counsel with same.

Sincerely,

Lonetta B. Brawley
Legal Assistant to Donald J. Zelenka
Assistant Deputy Attorney General

/lbb
Enclosure

cc: Michael P. O'Connell, Esquire
Melissa J. Kimbrough, Esquire
David M. Pascoe, Solicitor
Sandi Wofford, Victims Assistance

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	FIRST JUDICIAL CIRCUIT
COUNTY OF DORCHESTER	)	CASE NO: 2003-CP-18-1070
	)	
JOHN E. WEIK,	)	
	)	
Applicant	)	
	)	
vs.	)	ORDER
	)	
JON OZMINT,	)	
COMMISSIONER OF THE SOUTH	)	
CAROLINA DEPARTMENT OF	)	
CORRECTIONS AND THE STATE OF	)	
SOUTH CAROLINA	)	
	)	
Respondents.	)	
	)	

#1
P.B.

This Court issued its Order of Dismissal on March 12, 2007. Applicant then filed a Motion for Reconsideration under Rule 59(e) which came before me on April 23, 2007. After reviewing the Order of March 2007 and Applicant's Motion for Reconsideration, this Court wishes to clarify its previous Order.

Solicitor's Cross Examination of Dr. Augustus Rodgers

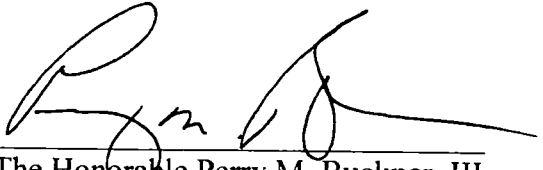
Though the amendment Ground U was addressed in the Order, this Court denied, implicitly, Applicant's request to amend his application in its previous Order. The reason for doing so was that the record had been closed for a lengthy amount of time. In addition, this matter was under advisement at the time the Applicant requested another amendment to his application. In spite of this, the Court addressed the issue of the Solicitor's cross examination of Dr. Augustus Rodgers.

Having reconsidered this matter, and Applicant's motion and argument in support thereof in full, this Court is not persuaded to change its mind. The Court now reiterates

and reincorporates its prior Order of Dismissal, and all the reasons in support contained therein, and respectfully denies Applicant's Motion for Reconsideration under Rule 59(e).

IT IS SO ORDERED.

May 9, 2007



The Honorable Perry M. Buckner, III
Presiding Judge

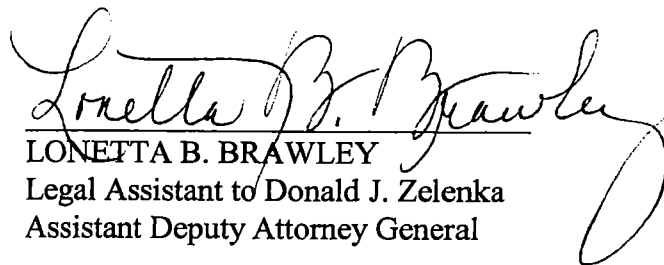
CERTIFICATE OF SERVICE

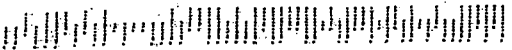
I, Lonetta B. Brawley, hereby certify that I have served the ***Order*** in the foregoing action
by depositing copies in the United States mail, postage prepaid, to the following:

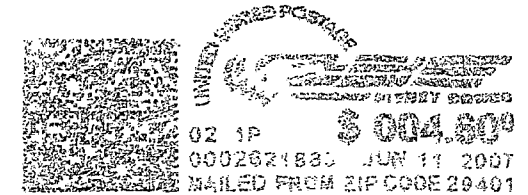
Michael P. O'Connell, Esquire
Stirling & O'Connell
P.O. Box 882
Charleston, SC 29402-0882

Melissa J. Kimbrough
1811 Pickens Street
Columbia, SC 29201

This 22nd day of May, 2007.


LONETTA B. BRAWLEY
Legal Assistant to Donald J. Zelenka
Assistant Deputy Attorney General

Sti 
145 King Street, Suite 410
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Charleston, SC 29402



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Clerk of Court
South Carolina Supreme Court
1231 Gervais Street
P.O. Box 11330
Columbia, SC 29211