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S.C. SUPREME COURT

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

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

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**JOHN EDWARD WEIK,**

Petitioner,

V.

**STATE OF SOUTH CAROLINA,**

Respondent

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# RETURN TO AMENDED PETITION FOR WRIT OF CERTIORARI

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**HENRY D. McMASTER**
Attorney General

**JOHN W. McINTOSH**
Chief Deputy Attorney General

**DONALD J. ZELENKA**
Assistant Deputy Attorney General

P.O. Box 11549
Columbia, SC 29211
(803) 734-3601

**ATTORNEYS FOR RESPONDENT**

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## PETITIONER'S 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), SCRCP, 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 § 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?

5.

Whether 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?

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?

## RESPONDENTS STATEMENT OF FACTS

## PROCEDURAL HISTORY

This matter comes before this Court on appeal from an Order denying 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 Court entered an Order assigning the Honorable Perry M. Buckner, Presiding Judge in the matter.

On September 18 - 21, 2006, this matter was heard before Judge Buckner. 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. App.p. 2392-3147. Subsequently, the PCR Court received the post-hearing deposition of Dr. Geoffrey McKee and Patricia Rickborn which were taken October 3, 2006. App.p. 3347-3498. The Court requested proposed orders from each party which were provided. App.p. 3876-4023.

*State Post-Conviction Relief Proceedings.*

Mr. Weik filed his initial application for post-conviction relief in Dorchester County on June 19, 2003 application for post-conviction relief in Orangeburg County, through appellate counsel Dudek. App.p. 2222-28. In the application, it was alleged that he

received ineffective assistance of counsel.

Particularly, he alleged:

9. Ineffective assistance of counsel in derogation of the Sixth Amendment to the United States Constitution.

**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. App.p. 2229-2273. On June 19, 2006 an Amended Application was filed. App.p. 2274-78. On July 26, 2006, a return to the amended application was filed. App.p. 2279-2364. On September 15, 2006, the Applicant made a second amended application. App.p. 2365. During the hearing, the Applicant made further amendments. On January 18, 2007, the Applicant made a motion to file a third amended application. App.p. 2373-2384. Finally,

on February 6, 2007, the Applicant made a motion to amend the Application a fifth time. App.p. 2385-91.

In the third amended application dated January 18, 2007, as proposed to be amended February 6, 2007, the application read as follows:

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].***

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 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].**

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 ].***

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]**

20. **ABANDONED IN January 17, 2007 Letter and January 18, 2007 Motion to Amend, p1,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(* )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]**

22. **9(**). 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. Burkhart, - 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] .**

As noted above, on January 19, 2007, the Applicant , through counsel O'Connell advised the PCR Court that it was abandoning grounds 9 (a), 9(b), 9(c), 9(e), 9(I) 9(j), 9(k), 9(l), 9(q) and 9( t).

The Honorable Perry Buckner entered his written order of dismissal on March 12, 2007. App.p. 4023-4101. On April 25, 2007, the Petitioner, through counsel made a Rule 59(e) Motion to allow the fifth amendment and to correct reliance upon State v. Ivey. App.p. 4103-4110. On May 25, 2007, Judge Buckner entered his order stating that he had implicitly denied amended Ground U based upon the record being closed for a lengthy amount of time. Judge Buckner denied the motion for reconsideration and incorporated it

earlier reasoning. App.p. 4111-4112.

This appeal follows.

*Statement of State's Version of Facts Concerning Guilt.*

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. Susan had custody of Daniel after their relationship ended. She later married, had a second child, Amber, and subsequently divorced Amber's father. At the time of the criminal incident leading to the charges against Weik, Susan was living with her two children and fiancé in a mobile home next door to her father, Carl Hutto. During the year of the crime Weik began seeing his son, although he had not seen his son for nearly nine (9) years until then.

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 does not come back to work something happened. He called his son, Daniel, on the telephone. Daniel told him that "I can't see you anymore," after Weik tries to get his son to choose between the parents. 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 loaded 12 gauge semiautomatic shotgun and returned to the trailer. He kicked the door open that the victim had closed. He then 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.

## PRIOR PROCEEDINGS

### *Trial Proceedings*

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. 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.

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.

### *The Appeal*

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?

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?

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).

## STANDARD OF REVIEW

In reviewing a PCR denial, this Court is concerned only with whether there is any evidence of probative value to support the PCR judge's decision. If any evidence of probative value is found, this Court must affirm the ruling of the PCR court. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Stated another way, if there is any evidence to support the findings of the PCR judge, those findings must be upheld. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). However, where there is no evidence of probative value to support the findings of the PCR judge, the ruling will not be upheld. Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993). In reviewing the PCR court's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision. Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006). Thus, an appellate court gives great deference to the PCR court's findings of fact and conclusions of law. Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006); Pelzer v. State, 2009 WL 294797, 1 (S.C.App.) (S.C.App.,2009). Furthermore, this Court will reverse the PCR court's decision when it is controlled by an error of law. *Pierce v. State,* 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000); Lounds v. State , _ S.C. _ ,670 S.E.2d 646, 649 (2008).

*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 attorney performance remains simply reasonableness under prevailing professional norms." Strickland, supra. , at 688, 104 S.Ct. 2052. "Judicial scrutiny of counsel's performance must be highly deferential," and "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.,* at 689, 104 S.Ct. 2052. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id.,* at 690, 104 S.Ct. 2052. A reviewing court must make every effort to remove the distorting effects of hindsight. Strickland, 466 U.S. at 689; Knowles v. Mirzayance, _ U.S. _, 129 S.Ct. 1411 (2009).

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). Counsel's conduct is generally presumed to be a reasonable strategic choice, but is not reasonable to the extent that the choice of strategy does not rely upon either a full investigation of the law and facts or an abbreviated investigation of the law and facts limited only by "reasonable professional judgments." Id. at 690-91, 104 S.Ct. 2052. Trial counsel have a duty to reasonably investigate and present mitigation evidence at sentencing. See Wiggins v. Smith, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003); Williams v. Taylor, 529 U.S. 362, 395-96, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); Byram v. Ozmint, 339 F.3d 203, 209 (4th Cir.2003).

"Strickland does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant." Wiggins, 539 U.S. at 533, 123 S.Ct. 2527. The mere fact that trial counsel's strategy was unsuccessful does not render counsel's assistance unconstitutionally ineffective. Strickland, 466 U.S. at 689. 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).

Similarly, the Supreme Court recently confirmed the following in concluding that trial counsel was not deficient in abandoning an insanity defense and rejecting a Court of Appeals contrary conclusion that counsel had "nothing to lose":

> The law does not require counsel to raise every available nonfrivolous defense. See *Jones v. Barnes,* 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983); cf. *Wiggins v. Smith,* 539 U.S. 510, 533, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (explaining, in case involving similar issue of counsel's responsibility to present mitigating evidence at sentencing, that " *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant ... [or even to] present mitigating evidence at sentencing in every case"). **Counsel also is not required to have a tactical reason-above and beyond a reasonable appraisal of a claim's dismal prospects for success-for recommending that a weak claim be dropped altogether.**

Knowles v. Mirzayance, 129 S.Ct. 1411, 1422 (emphasis added). [1]

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

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[1] For example in Cagle v. Branker, 520 F.3d 320, 328 (C.A.4 (N.C.),2008), the Petitioner argued that, however insulated attorneys' strategic decisions ordinarily may be, the failure to present available evidence of good character in a capital case is beyond the pale. He pointed to a trio of recent capital cases in which the Supreme Court held counsel to be ineffective for failing to present available mitigating evidence: *Rompilla v. Beard,* 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005), *Wiggins v. Smith,* 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), and *Williams v. Taylor,* 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). He stresses that under *Wiggins,* prejudice requires only "a reasonable probability that at least one juror would have struck a different balance." 539 U.S. at 537, 123 S.Ct. 2527. And he argues that counsel's justification for not presenting evidence of Cagle's good character traits-the risk of opening the door to further damaging evidence-was unreasonable where the jury had already heard such ample evidence of Weik's bad character and convicted him of a terrible murder.

The problem is, the three cases on which Cagle relies to displace the ordinary *Strickland* deference to counsel's strategic choices, *Rompilla, Wiggins,* and *Williams,* are not on point. All three concern what *Rompilla* calls "norms of adequate investigation in preparing for the sentencing phase of a capital trial," 545 U.S. at 380, 125 S.Ct. 2456, and in all three, counsel's failure was a breach of the duty to investigate potential mitigating evidence before settling on a mitigation strategy, *see Rompilla,* 545 U.S. at 383, 125 S.Ct. 2456; *Wiggins,* 539 U.S. at 524-27, 123 S.Ct. 2527; *Williams,* 529 U.S. at 395, 120 S.Ct. 1495. The Court concluded that Cagle's attorneys *did* thoroughly investigate potential mitigating evidence. Noting that his complaint was with how they decided to use the evidence they found, the Court concluded that it is a paradigmatically strategic decision and it was not an unreasonable decision .

undermine confidence in the outcome of the trial. Id.

With respect to the prejudice prong of a sentencing-stage IAC claim, "the question is whether there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, 466 U.S. at 695. In Wiggins v. Smith, 539 U.S. 510, 534 (2003), the Court further noted that, "[i]n assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence." The "totality of the available evidence" includes "both that adduced at trial, and the evidence adduced in the habeas proceeding." Wiggins, 539 U.S. at 536 (quoting Williams, 529 U.S. at 397-98).

While Petitioner focuses his argument on the reasonableness of trial counsels' performance, it may be unnecessary for this Court to undertake such an analysis because Petitioner has failed to meet his burden under the second prong of Strickland, which requires that he "affirmatively prove prejudice." 466 U.S. at 693. As the Strickland Court explained, "A court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." Id. at 697 ("if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice ... that course should be followed"); see Smith v. Robbins, 528 U.S. 259, 286 n. 4 (2000); Fields v. Brown, 431 F.3d 1186, 1203-04 (9th Cir.2005). 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). A petitioner does not establish prejudice if he shows only that his counsel failed to present "cumulative" mitigation evidence, that is, evidence already presented to the jury. Broom v. Mitchell, 441 F.3d 392, 410 (6th Cir.2006).

"[T]o establish prejudice, the new evidence that a habeas petitioner presents must differ in a substantial way-in strength and subject matter-from the evidence actually presented at sentencing." Clark v. Mitchell, 425 F.3d 270, 286 (6th Cir.2005)(finding no prejudice where the proffered mitigating evidence revealed "a relatively stable, although imperfect, family environment" with no evidence of abuse). In contrast, undisclosed mitigating evidence supporting a finding of prejudice usually reveals shocking, disheartening, and utterly disturbing details about the petitioner's upbringing. ; Beuke v. Houk, 537 F.3d 618, 645 (6th Cir. 2008). *See, e.g.,* Wiggins, 539 U.S. at 534-35, 123 S.Ct. 2527 (finding prejudice where the undisclosed mitigating evidence showed that the petitioner was physically abused by his alcoholic mother and sexually molested by his foster parents); Williams v. Taylor, 529 U.S. 362, 398, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (finding prejudice where the undisclosed mitigating evidence consisted of "the graphic description of [the petitioner's] childhood, filled with abuse and privation"); *Harries,* 417 F.3d at 639 (finding prejudice where the undisclosed mitigating evidence would have shown petitioner's "traumatic childhood," which included "significant physical abuse" such as being "choked so severely that his eyes hemorrhaged"); *Johnson v. Bell,* 344 F.3d 567, 574 (6th Cir.2003) (collecting similar cases).

## ARGUMENT WHY CERTIORARI SHOULD BE DENIED

## ISSUES ONE AND TWO - PRISON EVIDENCE AND ARGUMENT

I. **Certiorari must be denied on the Petitioner's February 8, 2007 belated and procedurally barred amendment to his post-conviction relief claim that his counsel was ineffective in May 1999 in failing to object to the presentation of evidence and argument related to prison life.**

A. **First, the barred issue was not raised in the five (5) separate prior amended applications filed before and during (over the State's objection) the post-conviction relief hearing and the record was closed on September 21, 2006 and the hearing court had taken the matters under advisement.**

B. **Second, the February 8, 2007 post-hearing amendment raised an the entirely new ground which was made after the hearing court took the matter under advisement and requested proposed orders from the parties dealing with issues that had been presented.**

C. **Third, the new amendment did not address any claim previously raised by the evidence at the hearing and did not "conform to the evidence".**

1. **Neither trial counsel Beaufort nor Hardee-Thomas were asked at the hearing any questions about why they failed to object to the particular evidence or argument. To accept the amendment would have required the hearing judge to re-open the case to take additional testimony from counsel and/or the prosecutor concerning their reasons for not objecting and/or presenting the evidence. The Court did not err in its Order denying the requested amendment after the case was closed.**

II. **Certiorari must be denied because the claim was not properly raised in the lower court and is therefore not proper for certiorari**

**consideration.**

**A. Alternately, the PCR Court reasonably concluded that there was no Sixth Amendment violation for failing to object to evidence of prison life and argument based upon the evidence in 1999.**

In his petition, Weik asserts in his first two issues, an interrelated claim concerning the failure to object to the prosecutions closing argument. In the portion related to issue II, he claims that the PCR court erred by refusing to allow an amendment to the post-conviction relief application after the hearing was concluded. Petition, p. 17-18. Since the resolution of argument two may resolve argument one, Respondents will address it first. In the first argument, he asserts that he is entitled to relief on the claim, even though barred by the hearing judge on whether counsel was ineffective for failing to object to evidence and argument concerning facts of prison life, albeit initially brought out by the defense at trial. [Respondents note that because of the belated post-hearing amendment, no testimony has been taken concerning the basis for trial counsel's actions related to this issue]. Respondents submit that certiorari is not warranted on either claim.

**A. The Hearing Judge Properly Denied The Post-Hearing New Amendment.** (Question II - Petition, p. 17-18).

On the date the hearing judge required proposed orders to be submitted - February 8, 2007 - after an extensive evidentiary hearing in September 2006, two things happened. The Respondents and Petitioner submitted proposed orders. Two days before the submission date, counsel received a motion to amend and entirely new ground of ineffective assistance of counsel - a claim not raised by the earlier applications, not addressed in the prior testimony by either side, and not addressed in any depositions. No

reason has ever been given by the Petitioner's counsel why he delayed in raised this claim after five earlier amended applications - implicitly a claim that he now asserts that reasonable trial counsel in 1999 had a constitutional duty to raise on the fly during the trial while the prosecution inquired of the prison adaptability social worker witness. Such unexplained delay in raising the claim was properly denied.

In denying the amendment in the order of dismissal, Judge Buckner explicitly held:

> Subsequent to the hearing and presentation of testimony and after the record was closed, the Applicant on February 6, 2007, made this additional amendment based upon the intervening decision in State v. Burkhart , 371 S.C. 482, 640 S.E.2d 450 (S.C. January 8, 2007). Respondents 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), 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. Plainly, at the time the PCR hearing was held, Bowman and its cautionary foreshadowing of the Burkhart opinion. **This amendment is untimely and must be rejected.**

App.p. 4097-98. In denying the Rule 59 motion, Judge Perry Buckner clarified why he denied implicitly the post-hearing amendment of the claim. He stated that the following reasons existed:

- The record had been closed for a lengthy amount of time.
- The 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 issue of the solicitor's cross-examination of Dr. Augustus Rodgers.
- Having reconsidered the matter, the Court is not persuaded to change its mind.

App.p. 4111-4112.

In his petition before this Court, Weik assets that certiorari is warranted. He states the following reasons why he should be allowed to have amended his application to assert a claim that had not been raised since the application was first filed by present counsel Robert Dudek on June 19, 2003 [ App.p. 222-2228], through a series of amendments prior to and during the hearing:

1. The trial transcript was part of the record.
2. Counsel for the State with the Attorney General's Office was"surely aware of State v. Plath, State v. Bowman and State v. Burkhart prison conditions issue present in the case.
3. The State consented to the amendment s involving voir dire and the deposition of Jeff Bloom2, while opposing the present amendment.

Petition, p. 17. He further claims that the issue was tried "by implied consent" when the transcript was made part of the record. Id. He claims that there was no prejudice to the state. Petitioner did not abuse his discretion in implicitly denying the amendment The hearing judge did not abuse his discretion under Rule 15, in denying the extraordinarily

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2Respondents are not aware what this reference in the Petition to Jeff Bloom concerns. Mr. Bloom testified at the state PCR hearing. App.p. 2733-2789. Apparently, he is referring to the authorization of an amendment during the hearing and the possibility of taking Mr. Bloom's deposition 15 days within fifteen (15) days after hearing. App.p. 2944. However, this 15 day period was long passed when Weik made the amendment 5 months later. 1

belated amendment.

His reasoning as to why he should be allowed this amendment is faulty. The practice Weik now suggests of "implied consent" to any amendments because a trial transcripts are automatically a part of any PCR record is a recipe for sandbagging issues. Under his scenario, any claim related to evidence, argument or instruction would be required to have any post-conviction relief matter re-opened after a case is closed and testimony is completed. The petitioner fails to recognize that because this issue was not timely presented during the hearing, no questions were asked concerning the reasons why counsel did not object to the particular claims. Simply put, the procedural defect did not permit the State to litigate the claim. To know whether counsel was deficient under Strickland v. Washington, 466 U.S. 668(1984) , the evidentiary record would have had to have been re-opened and testimony taken from trial counsel. Petitioner ignores this fact and effect of the amendment.

Further, the contention that state counsel was aware of a list of cases as authorizing blatantly belated amendments after the case is closed flies in the face of fair litigation of the issues. As noted above, issues related to whether an amendment is allowed cannot be based upon whether the opposing counsel has read cases. The Petitioner fails to see the inapplicability of this logic. As noted, a similar argument can be made for the Applicant's series of PCR counsel to possess the same knowledge of caselaw and the transcript. In fact, appellate counsel Dudek was the person who filed the first application. With the same knowledge on June 19, 2003 that reasonable counsel would have about the record, particular with his own responsibility as the appellate

counsel to have previously surveyed the trial record for error. App.p. 2222-2227. Further, this claim was not raised in the second application on June 19, 2006 [ App.p. 2274-2278], the third application filed September 5, 2006 just prior to the actual evidentiary hearing [ App.p. 2365-2372], the amendment made during the actual state PCR hearing over the state's objections [ App.p. 2929-2942], and the fifth request to amend the application made in the courtroom during the evidentiary hearing over objection [App.p. 2373-2384].

Further, at the outset of the hearing it was resolved that the matters were being proceeded on the second application for post-conviction relief. App.p. 2399-2400. Importantly, at the close of the Applicant's case, Respondent's counsel made inquiry on whether the allegations were closed. App.p. 2939-40. At that point, the Applicant's counsel made three certain amendments in open court "to conform to the proof." App.p. 2940. The amendments and colloquy with Court are telling on why the later amendment after the case was closed was denied. See App.p. 2940-2945. Based upon those amendments that existed at the time of the hearing, the state made its decision to call witnesses, including counsel Beauford and Hardee-Thomas. App.p. 2946-47.

At the end of the hearing, Judge Buckner again reiterated that the state would be allowed a period of time to take the additional testimony of counsel Bloom due to the late amendments during the trial concerning one issue. At no time was any testimony taken concerning the evidence developed in the cross-examination of Dr. Rodgers or the Solicitor's closing argument based upon that evidence in 1999.

SCRCP Rule 71.1 (d) requires counsel to review the application and amend after being given a reasonable time to confer with the Applicant. As stated above, counsel

prior to and during the actual evidentiary hearing was able to make an extraordinary number of amendments. As the hearing judge recognized, some of the amendments required testimony from witnesses to address the claims, particularly when assertions of deficient performance, neglect, ignorance, strategy and reasonable performance is concerned and the basis for the Solicitor's presentation had an objection been made. As presented in the belated amendments, there was no opportunity to do so.

Respondent submits that certiorari on Issue two must be denied. Contrary to the assertion, the State was prejudiced by the delay. The judge did not abuse his discretion under Rule 15 in denying the amendment.

## II. Certiorari should be denied where the claim was not properly presented to the PCR court.

On February 8, 2007, the day proposed orders on the merits were due, the Petitioner, through counsel made a belated and untimely amendment raising an entirely new claim. App.p. 2385-87. In that document, he raised the following allegation for the first time:

> 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 th 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. Burkhart, - S.E.2d -, 2007 WL 80036 decided January 8, 2007. When an arbitrary factor is injected into the jury sentencing consideration, reversal is required.

Id. This claim was not addressed by any witnesses, not argued in the pre-hearing pleadings. Simply put, it was unspoken for the four years that the matter had been pending. To this day, because of the improper presentation, there is no evidence as to why the solicitor made the particular inquiries and why defense counsel acted as they did on this issue. The PCR Court implicitly denied the amendment. App.p. 4111-12. See also, App.p. 4097-4101 ( alternative findings). Certiorari must be denied.

### A. The Matter is Procedurally Barred From Certiorari.

The PCR court held that it explicitly and implicitly denied the request to amend the petition to include the February 8, 2007 amendment. App.p. 4097-983, 4111.

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3 Judge Buckner held:

> Subsequent to the hearing and presentation of testimony and after the record was closed, the Applicant on February 6, 2007, made this additional amendment based upon the intervening decision in State v. Burkhart , 371 S.C. 482, 640 S.E.2d 450 (S.C. January 8, 2007). Respondents 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), 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. Plainly, at the time the PCR hearing was held, Bowman and its cautionary foreshadowing of the Burkhart opinion. This amendment is untimely and must be rejected.

Because the lower court denied the matter on a procedural basis because it was not timely raised, certiorari must be denied. Issues that were not raised appropriately in the hearing level cannot be asserted in an appeal. See, *Plyler v. State,* 309 S.C. 408, 424 S.E.2d 477 (1992) (an issue which was neither raised at the PCR hearing nor ruled upon by the PCR court is procedurally barred); *Hyman v. State,* 278 S.C. 501, 299 S.E.2d 330 (1983) (same); *Rhodes v. State,* 349 S.C. 25, 32, 561 S.E.2d 606, 610 (S.C.,2002). For this initial reason, certiorari must be denied.

**B. Certiorari is not warranted alternately where a 6th Amendment violation has not been shown by prima facie deficient performance or prejudice.**

The PCR court also alternately denied relief concluding that the prejudice prong of Strickland had not been satified. App.p. 4098-4101. Assuming *arguendo* that the amendment is allowed, the delay by competent counsel in this proceeding as well as the failure to object in State v. Bowman and the rejection of 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. 4*

Applicant claims trial counsel failed to provide effective assistance of counsel

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App.p. 4097-98.

4 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).

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 these same privileges. Respondents have submitted that

they have failed to show deficient performance or prejudice by the failure to object.

The reason this issue is problematic stems from four South Carolina cases – one that was in existence prior to this case and three that were handed down after Applicant's trial.

In State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984), the court addressed the state's cross-examination of a professor who generally testified that life imprisonment was a punishment superior to the death penalty. During his direct examination, the professor testified about conditions of life imprisonment at CCI, and called life imprisonment "a form of slavery" – which the state supreme court concluded was "to demonstrate the permanence and deprivation entailed in life imprisonment". On cross, the State asked about another inmate's escape, which the court ultimately held was permissible:

> Since the witness claimed an intimate knowledge of CCI, and based his testimony upon that knowledge, it was not amiss for the State to pursue his claim more closely.

Plath, 281 S.C. at 12, 313 S.E.2d at 626.

After also rejecting a claim that the State was improperly was allowed to cross-examine a prison social worker on a complaint letter she wrote about an inmate's

freedom of movement, the court very strongly rebuked sentencing phase defenses which "sought to portray life imprisonment as preferable to capital punishment as a matter of social policy", or "drew a picture of life imprisonment as slavery, a condition of irretrievable loss". Plath, 281 S.C. at 14, 313 S.E.2d at 626-27. The court stated that such defenses improperly "invite[d] the jury to intrude upon the strictly legislative function of determining the nature of crime and punishment", and concluded:

> In the sentencing phase of a capital case, the function of the jury is not to legislate a plan of punishment but to make the "either/or" selection . . . . Such determinations as the time, place, manner, and conditions of execution or incarceration, as well as the matter of parole are reserved by statute and our cases to agencies other than the jury.

Plath, 281 S.C. at 14-15, 313 S.E.2d at 627.

The Plath court went on to note that while psychiatric testimony of future dangerousness was permissible, it had held that future adaptability to prison evidence was not – a conclusion subsequently overruled by the United States Supreme Court in Skipper v. South Carolina. Only in the context of justifying this distinction, Plath stated:

> A jury needs to know how a given defendant came to commit a given aggravated murder, to include aspects of his background, his character and the setting of the crime itself which may explain or even mitigate the conduct of which he has been found guilty. A jury does not need to know how often he will take a shower or whether or not he will be lonely and withdrawn during his tenure at CCI.

Plath, 281 S.C. at 15, 313 S.E.2d at 627.

Despite these admonitions, the Plath court returned to how the State's challenged questioning was only proper response to what that court considered at the time to be improper sentencing phase defenses on the utility of capital punishment or the conditions of capital punishment:

> In the case before us, defendants elected to enter the forbidden field of social policy and penology. It is neither surprising nor can it be deemed prejudicial that the State responded in kind, attempting to show through defendants' own witnesses that life imprisonment was not the total abyss which they portrayed it to be. . . . [The solicitor's] references [were] . . . merely reminders to the jury that life imprisonment was by no means as hopeless as defendants would have it believed. ***The State was entitled to make this response.***

Plath, 281 S.C. at 15-16, 313 S.E.2d at 627-28 (***emphasis added***). See also State v. Woomer, 278 S.C. 468, 299 S.E.2d 317 (1982) (evidence of defendant's prior escape was proper reply to defense evidence of good conduct while in prison).

Two decades after Plath ***and six (6) years after the 1999 trial in State v. Weik***, the state supreme court decided State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (2005). There, the defendant contended that the solicitor's questioning about movies, television, and books was irrelevant under the South Carolina Supreme Court's decision in Plath, and violative of the constitutional due process mandate in Gardner v. Florida, 430 U.S. 349 (1977), that a death sentence cannot be based "***on information the defendant had no opportunity to deny or explain***". The State argued, *inter alia*, that the issue was not preserved as the arguments made on appeal were not made to the trial court. The South Carolina Supreme Court agreed the issue was not preserved, but added ***in dicta***, a cautionary instruction to both sides that evidentiary presentations along these lines are improper:

> We take this opportunity, however, to caution the State and the defense that the evidence presented in a penalty phase of a capital trial is to be restricted to the individual defendant and the individual defendant's actions, behavior, and character. Generally, questions regarding escape and prison conditions are not relevant to the question of whether a defendant should be sentenced to death or life imprisonment without parole. We emphasize that how inmates, other than the defendant at trial, are treated in

> prison; and whether other inmates have escaped from prison, is inappropriate evidence in the penalty phase of a capital trial. We admonish both the State and the defense that the penalty phase should focus solely on the defendant and any evidence introduced in the penalty phase should be connected to that particular defendant.

State v. Bowman, 366 S.C. 485, 498-99, 623 S.E.2d 378, 384 (2005).

Subsequent to Bowman, the South Carolina Supreme Court addressed a case where the *solicitor* preemptively called a witness who extensively testified as to the conditions of confinement for a inmate serving life without parole. State v. Burkhart, 640 S.E.2d 450 (2007). The defense objected to the state's evidence, and later put in its own evidence of "bad" prison conditions. Justice Moore was joined by Justice Waller and wrote the opinion of the Court. Justice Moore cited Plath and other cases from the 80s and 90s for the proposition that evidence outside of the circumstances of the crime and the characteristics of the defendant was inadmissible in a sentencing phase. This included conditions of incarceration, the process of execution, or the deterrent effect of capital punishment. Burkhart, 640 S.E.2d at 453. Justice Moore noted that while the case at issue was tried before the decision in Bowman, its result was consistent with the "long-standing rule that evidence in the sentencing phase of a capital trial . . . be relevant to the character of the defendant or the circumstances of the crime". Id. Thus, Justice Moore concluded that reversible error had occurred, since the evidence of conditions of confinement "invited the jury to speculate about irrelevant matters" and injected an arbitrary factor in the proceedings in violation of S.C. Code Ann. § 16-3-25(C)(1) (2003).

In concurrence, Justice Pleicones wrote that he did not believe the court should apply the normal harmless error standard for constitutional violations to this issue,

concluding that "once improper evidence of any kind injects an arbitrary factor into the jury's consideration, [the] Court cannot uphold the death sentence under § 16-3-25(C)(1)". Burkhart, 640 S.E.2d at 454. Justice Pleicones saw no prejudice component once a statutory violation was established.

In dissent, the Chief Justice, joined by Justice Burnett, applied the normal rule that the introduction of evidence will not result in reversal unless it prejudiced the defendant. The Chief concluded that the issue was fully joined by both sides and used by the defendant to his advantage. Finally, the Chief noted that the standard in § 16-3-25(C)(1) was merely a recitation of the Eighth Amendment requirements, and coextensive with the Eighth Amendment – which is subject to a harmless error analysis. 640 S.E.2d at 454-57.

Subsequent to Burkhart, the South Carolina Supreme Court decided State v. Bryant, 372 S.C. 305, 642 S.E.2d 582 (2007). There, the defense called an expert that testified in great detail as to the "dismal conditions of prison life in general". Like Bowman, the Court reiterated that *defense* evidence on conditions of confinement was just as improper as State evidence on the subject.

### 3. Applicability of a *Strickland* prejudice analysis to this issue

The first hurdle that must be crossed is whether a normal Strickland prejudice analysis applies to this claim. Unlike Burkhart, Bowman, or Bryant, this case is in PCR, and in such a collateral attack Applicant must establish his claims through the constitutional vehicle of ineffective assistance of counsel. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993) (issues that could have been raised at trial or on direct appeal can not be raised in a PCR application absent a claim of ineffective assistance of counsel). Of

course, the familiar standard in Strickland v. Washington that applies to claims of ineffective assistance of counsel requires a showing of *both* deficient performance *and* prejudice – a reasonable probability of a different result at trial.

In the sentencing phase, prejudice is phrased somewhat differently. In Jones v. State, 332 S.C. 329, 504 S.E.2d.822 (1998), the South Carolina Supreme Court restated the "prejudice" prong in a capital sentencing proceeding as being established when "there is a reasonable probability that, absent [counsel's] errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death," citing Strickland. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Jones, 504 S.E.2d at 823-824. Accord Plath v. Moore, 130 F.3d 595 (4th Cir. 1997) ("given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and hence, the sentence imposed.").

There are only limited exceptions where prejudice is presumed – none of which apply here. In Nance v. Ozmint, 367 S.C. 547, 626 S.E.2d 878 (2006), our state supreme court outlined these limited exceptions:

> In Cronic, the [United States Supreme] Court identified three distinct situations in which a presumption of prejudice is appropriate. First, prejudice is presumed when the defendant is completely denied counsel "at a critical stage of his trial." Cronic, 466 U.S. at 659. Second, per-se prejudice occurs if there has been a constructive denial of counsel. This happens when a lawyer "entirely fails to subject the prosecution's case to meaningful adversarial testing," thus making "the adversary process itself presumptively unreliable." Id. Third, the Court identified certain

> instances "when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." Id. (citing Powell v. Alabama, 287 U.S. 45 (1932)). A finding of per-se prejudice under any of these three prongs is "an extremely high showing for a criminal defendant to make." Brown v. French, 147 F.3d 307, 313 (4th Cir.1998).

The supreme court in Nance pointed out that these situations of presumed prejudice are rare, and concluded with this instruction:

> Absent these narrow circumstances of presumed prejudice under Cronic, defendants must show actual prejudice under Strickland.

Nance, 367 S.C. at 552, 626 S.E.2d at 880.

Obviously these limited exceptions of presumed prejudice do not apply here. Counsel was present at all critical stages of Applicant's trial, so the first exception is inapplicable. The third exception is clearly not viable either, as it applies only when extreme circumstances external to counsel would prevent anyone from providing effective representation. The classic case, discussed in Cronic, is Powell v. Alabama, 287 U.S. 45 (1932), where in 1930's Alabama black youths were charged with a horrible crime. Hostile sentiment pervaded the community, and the defendants had to be kept under guard of soldiers. Only on the day of trial was a lawyer appointed, and he was not only unprepared but also was from a different state and unfamiliar with local procedure. Obviously, Applicant's trial nowhere approaches the inherently prejudicial circumstances of Powell.

Finally, the second exception – where counsel "entirely fails to subject the prosecution's case to adversarial testing" – is also inapplicable. An example of this

exception is Nance itself – where lead counsel was hampered by alcoholism, drug intake, and health issues affecting his memory, and co-counsel was a new lawyer who had only been practicing for eighteen months. The lawyers only interviewed one family member in preparation, and the mental expert was not provided with any requested background information. The lawyer told the jury in opening argument that he did not ask for the case; counsel only called three witnesses in the guilt phase during which they elicited prejudicial information; they failed to even qualify their expert; and they called the sister at the last minute without any preparation. The defense sentencing phase case only lasted seven minutes, and during closing co-counsel did not plead for his client's life, but instead described him as a "sick" man who did "sick" things. Nance, 367 S.C. at 554-58, 626 S.E.2d at 881-84.

Whether or not they made an individual mistake during the course of the representation, counsel in this case certainly endeavored to challenge the State's case throughout the proceedings. Clearly, this is not a Nance-type situation where counsel "entirely failed to subject the prosecution's case to any meaningful adversarial testing." Thus, where as here there was a sufficient effort overall, then any alleged individual mistakes are properly adjudged through Strickland's normal process, which includes the prejudice analysis.

This conclusion is consistent with the language of Strickland itself, despite our state supreme court's view in Burkhart of conditions of confinement evidence as an arbitrary factor for which it did not perform a prejudice analysis on direct appeal. Unlike a case on direct appeal – where the conviction is not yet considered final – during

collateral attack concerns of finality are of "profound importance". See generally Strickland, 466 U.S. at 693-94 (discussing concerns of finality when deciding the appropriate standard for prejudice). Hence, on collateral attack it is appropriate to filter claims through a prejudice analysis to ensure that the extreme social cost of reversing final convictions and sentences is only borne by society where the alleged error had a reasonable probability of affecting the result of the proceedings.

An example of this principle is found in Franklin v. Catoe, 346 S.C. 563, 552 S.E.2d 718 (2001). There, the South Carolina Supreme Court held that a prejudice analysis should be applied to claims that the defendant was not advised of and thus did not waive his right to personally give closing argument in the guilt phase of a capital trial – despite the fact that prior cases had not engaged in a prejudice analysis. Franklin noted the general rule that claims under Strickland include a prejudice analysis, and went on to conclude that since *in favorem vitae* review had been abolished and a PCR system of collateral attack established to explore such issues, a finding of *per se* reversible error was no longer warranted. Franklin, 346 S.C. at 571-74; 552 S.E.2d at 723-24. Finally, the Court noted that it and the United States Supreme Court have repeatedly held that "a harmless error analysis is appropriate where a capital defendant has suffered a deprivation of a *constitutional right*". Franklin, 346 S.C. 563 at 575 n.8, 552 S.E.2d at 725 n.8 (emphasis in original).

And that last statement precisely raises the final point why a prejudice analysis is appropriate to a claim that counsel failed to object to evidence of conditions of confinement. While Burkhart phrases its issue as a statutory one – that introduction of

evidence of conditions of confinement injects an arbitrary factor under S.C. Code Ann. § 16-3-25(C)(1) – Applicant here in PCR is raising, as he must, a *constitutional* issue – that he was effectively denied his Sixth Amendment right to counsel based on counsel's omission. Applicant must filter his statutory claim through the constitutional one – as a fundamental and legal matter, the claim he pled before this Court is constitutional. As Franklin specifically notes, this overriding constitutional claim upon which the statutory claim depends is subject to a harmless error analysis – – like any other constitutional claim.

**4. There was no prejudice.**

This Court cannot address whether counsel were deficient for not objecting to the evidence or argument absent evidence of the reasons based upon the presumption that counsel is effective. However, if a prejudice analysis is applied, then it is clear that reversal is not warranted. Again, in the sentencing phase, Applicant must show "there is a reasonable probability that, absent [counsel's] errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Jones, 504 S.E.2d at 823-824 (citing Strickland).

Given this relative equality of presentation by both sides on the issue of conditions of confinement, it cannot be said there would be a reasonable probability of a different result. Had counsel objected to the State's evidence on the issue, it would not have been allowed to make its own points along these lines as well. Given the overwhelming evidence in aggravation and the limited evidence in mitigation, admission of both the

State's and defense evidence of conditions of confinement does not establish Strickland prejudice. And, indeed, since evidence from both sides was admitted, argument on the subject was proper as within record, and the fact that both sides made argument on this issue does not change the calculation.5

The issue must be denied certiorari consideration. There is a probative basis to support the conclusion of the PCR court.

**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 inmate 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. App. 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. App. 1941.

During the Solicitor's cross-examination of Dr. Augustus 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

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5 It should be noted that it would be inappropriate to claim that had he objected and the trial court overruled his objection, the case would have been reversed on appeal and thus prejudice is established. Strickland is clear that the Court must "presume . . . that the judge or jury acted according to law", and "and assessment of the likelihood of result must exclude the possibility of arbitrariness, whimsy, caprice, nullification, or the like". 466 U.S. at 695. "A defendant has not entitlement to the luck of a lawless decisionmaker." Id.

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. (App. 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.
>
> 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 stiff, 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.

App. 2135-2136. Trial counsel did not object to this argument.

Assuming this issue is properly before this Court, Respondents submit 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 that 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

according to the opinion of the court. This was two years before the case was tried. The issue before the court, viewing counsel perspective at the time, on whether he was deficient in failing 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). Evidence of this falling within reasonable standards is within the Bowman decision itself when it cautions the prosecution and defense to not present this evidence in the future. Unlike Bowman, in Burkhart, possibly for the first time, similar evidence was objected to and the court decided the case.

The Applicant has failed to show that in 1999 reasonable counsel was constitutionally required to object to this evidence and argument, particularly after Ivey 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.

Although prejudice need not be addressed due to the failure to satisfy the initial prong, there is an inadequate showing to satisfy the reasonable probability standard for prejudice. Here, Dr. Rodgers opened the door by his own presentation of prison life testimony. It is difficult to imagine that once the defense witnesses declared that he developed his opinion on training inmates job function and skills for release and rehabilitation that Solicitor Bailey's brief inquiry about what prison life is undermined confidence in the death verdict. Certiorari must be denied.

**III. Certiorari is nor warranted based upon a claim that his Sixth Amendment right to counsel was violated when one counsel fully participated at trial and a second counsel had a lesser role. The Sixth Amendment does not require the presence or actions o two counsel, only the assistance of counsel. The State PCR court properly construed state law in rejecting the claim that Marva Hardee Thomas role in Mr. Weik's trial was in violation of §§ 16-3-26. (Petition Argument 3, p. 19-26).**

In argument three, the Petitioner contends that he was deprived his Sixth Amendment right to counsel and his statutory right 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. The PCR Court denied this allegation. App.p. 4054-4057. Respondent submits that there is probative evidence to support the denial. Certiorari must be denied.

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. App.p. 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 been 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. 6 Prior to jury selection, the court again made inquiry on the record about counsel qualifications. App. 513-514.

During the PCR hearing, evidence revealed that after the incident, Mr. Beauford was initially hired by Weik's parents to represent him. App.p. 2948-50. At some point, Beauford learned that this would be a death penalty case. App.p. 2949. The Weik family was unable to afford that type of representation and appointed counsel was sought. App.p. 2949. As a result, the Public Defender, Marva Hardee Thomas was ultimately appointed along with prior retained counsel Beauford. App.p. 2952-53.

Counsel Beauford testified that he envisioned his role as lead counsel , but that he and Ms. Hardee Thomas were to work together in the best interest of the client. App.p. 2952. He saw Ms. Hardee-Thomas's role initially to handle the experts and get them they information that they need to get started. App.p. 2952 - 56. 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

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6In the Petition, Weik points out that in a discovery deposition prior to the PCR hearing, counsel Hardee-Thomas asserted that she was second chair in the Calvin Shuler case. App.p. 3297. Petition, p. 18, n.2. It should be noted that Hardee-Thomas had been unable to locate her case file prior to testifying at both the deposition and PCR hearing. App.p. 3057-58.

of the trial. App.p. 2952-53.

The record also 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. App.p. 3061-63, 3093-095. 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. App.p. 3094-96. 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. App.p. 3121, 3127, 3129.

The record reveals that counsel Beauford was of the opinion prior to the trial that the mitigation investigation was being jointly handled by counsel Hardee-Thomas and Patti Rickborn, the retained investigator. App.p. 2955, 2968-2969. 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. App.p. 3858-3871. 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. App.p. 3872.

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. App.p. 3875.

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. App.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 reveals that two appointed counsel did, in fact, represent Mr. Weik. While Mr. Beauford may have wished and expected 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. App.p. 2968-69, 3005. 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 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.

Further, there was no per se Sixth Amendment violation. As stated in the Petition, p. 25, the Petitioner concedes that he had other counsel in the case. The Sixth Amendment only requires the assistance of counsel, not the assistance of two or more counsel in any case. The allegation was properly denied by the PCR court.

Certiorari is not warranted on this issue.

## IV. Certiorari is not warranted where the PCR Court reasonably concluded that trial counsel was not ineffective based upon the claim concerning their retention of investigators and experts concerning the family background. (Petition, p. 26-52) (Order, p. 4057-4088).

In arguments four and five, 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 to adequately present evidence through the family and the expert witnesses in mitigation.7 The PCR Court rejected the claim concluding that the retention of the experts was not constitutionally deficient or untimely. App.p. 4085-4086. Respondent submits that the trial record and PCR hearing

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7 Weik testified in the guilt phase of his trial. App. 1634-1711. He stated he vaguely remembered April 30, 1998, yet described his own actions on that date. App. 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. App. 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 not want him talking on the phone. App. 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. App. 1640. Weik described word for word his recollection of the rest of the telephone conversation. App. 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. App. 1642. While at the gas station, he decided he needed to see his son. App. 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. App. 1645. His mother then comes in and he described the verbal confrontation. App. 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 "ten to 20 years, life or death." App. 1647. He stated that he stopped and got his shotgun out which was loaded and was in the house. App. 1649. He described seeing himself there. App. 1649-50. He then described shooting her. App. 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. App. 1653. He described in detail being stopped by the police and his actions at that time. App. 1654-1666.

Weik stated that when he went to Susan's home, his intent was to apologize to his son. App. 1656-57. He denied having ill feelings toward her. App. 1657-58.

On cross-examination, Weik responded directly to his questions and stated that he was trying to respond "in the fullest detail." App. 1668. He denied telling Mr. Hall that he was going over to Susan's home. App. 1671. He again attempted to describe the events in response. App. 1675-1706. The Appellant was asked about the detail of his statement to the police. App. 1682-84. He stated that most of his statement was true. App. 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. App. 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. App. 1690-91.

record contains probative evidence to support the denial. The trial record reveals that the defense team presented in the penalty phase testimony from Weik's sister, Amy Weik Goings (App. 1918-1924, social worker Dr. Augustus Rodgers (App. 1925-1954, forensic psychologist Dr. Geoffrey McKee (App. 1955-1988), psychiatrist Dr. Donna Schwartz-Watts (App. 1987-2020), psychiatrist Dr. Donald Morgan (App. 2012-2043). It must be noted that in the guilt phase the Applicant and Lillie Weik also testified about the family background.8 Certiorari must be denied.

**WHAT THE 1999 JURY KNEW**

The record revealed to the 1999 jury that the father suffered Viet Nam flashbacks and he would act the flashback with violence toward the family (App. 1920-21), that he threatened to rip out Eddie's heart unless he got a haircut, the 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. (App. 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. App. 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

8 During 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 son's birth, his relationship with his son leading up to April 30, 1998, and his demeanor shortly before the incident. As stated above, Eddie testified in the guilt phase about his background.

disability. He noted the Weik had been a large baby which suggested some birth complications. App. 1934-35. From investigator Parker, he learned that Weik had suffered depression and heard voices from time to time suggesting auditory hallucinations. App. 1938-39. In addition Dr. Rodgers opined that Weik would be able to make a satisfactory adjustment in prison. App. 1940-50.

The jury also learned from Dr. McKee that about Weik's psychological testing. Particularly, he opined that Weik was not malingering and scored in the schizophrenia level. He felt that Weik had 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. App. 1964-65. Similarly, Dr. Schwartz Watts opined that about Weik's demeanor, hearing voices and rambling talk. She also described the church he had joined and the problems in 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. App. 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. App. 1999-2000.

Dr. Schwartz-Watts was asked if Weik could adapt to a structured situation in jail. App. 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. App. 2006.

Dr. Morgan opined similarly to Dr. Watts. He attempted to developed 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. App. 2030.He felt that Weik could be medicated and improved. He opined that Weik suffered from this condition in 1998 when the crime happened. App. 2033.

## WHAT INVESTIGATION WAS DONE

The Applicant asserts that the trial attorneys lacked organization to adequately prepare the mitigation issue for trial. A review of the post-conviction evidence contrasted with the trial record is revealing, but not as the Applicant hopes.

### Robert Minter

The defense hired Robert Minter, a licensed private investigator in 1999 for guilt investigation through Marva Hardee-Thomas. App.p. 2401. He testified that he had periodic meetings with defense counsel and interviewed potential witnesses in the case. App.p. 2402-03. However, he declared that he did not do a so-called mitigation investigation of Weik's family or school background. App.p. 2403-04. His bill, Respondents Exhibit 1, stated he spent 116 hours on the case. App.p. 2407, 3670. The itemization of his work, Respondent's Exhibit 2, revealed support for his meetings with counsel, review of the case file as early as January 31, 1999. App.p. 3671-73. Minter

confirmed by May 1, 1999, he had interviewed a number of witnesses. App.p. 2406, 3499. 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. [App.p. 3513].

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 a 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 psychidelic voices at the time. These dreams were told Pastor Dupree months before the murder. App.p. 3507-12.
   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 tole 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. App.p. 3507-12.

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 sone to church and wanted him baptized, but his mother would not allow it. App.p. 3506.

4. Gloria Varner was spoken to by Minter by telephone on May 3. She reported Weik would bring his some 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. App.p. 3514.

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*. App.p. 2406, 3505. Minter advised them he would continue on the list he received. Id. Subsequently, he spoke with Tammy Geddis who denied that Weik had ever told her about dreams. App.p. 3504. Pastor Bruce Scott stated that he only knew Weik casually from church, but had not heard him talk about dreams. App.p. 2411, 3504. Pastor Scott reported that when he was a child he had a "Hag" dream and recalled being unable to move. App.p. 3504.

Minter also had interviews concerning Weik's former employment at Broyhill. App.p. 2411, 3501. Alton Huggins reported to him that when he was plant manager, Weik volunteered for "nasty jobs" and was an eager worker. App.p. 3501. He said Weik had spoken with him about problems with his ex-wife and that he was not able to see his son. He, likewise, 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. App.p. 3501.

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. App.p. 3502.

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. App.p. 3500.

On March 11, Minter met with both counsel and investigator Rickborn and reviewed the evidence and photographs at the Sheriff's Department. App.p. 2413, 3672. Then Minter went to St. George with both counsel and met with Weik to discuss the case. App.p. 2413, 3672.

Minter also assisted the defense prior to trial by working on the juror questionnaires, assisted in getting a court order for state hospital records, contact witnesses by telephone prior to the trial and serving subpoenas.

Minter stated that most of his contact was with Beauford. Minter stated that he had his own idea where the trial was headed. App.p. 2418-19.

**Patricia Rickborn**

On October 3, 2006, Patricia Rickborn testified in a deposition de bene esse 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. App.p. 3412-13. However, she was unable to locate any file in preparation for her testimony. App.p. 3411-12, 3447-48. 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.App.p. 3415-16. She felt that the three month period that she faced in Weik was inadequate. App.p. 3416.

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 were the retained defense experts. App.p. 3417- 18. She said her contact person was Ms. 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. App.p. 3420-21. She stated her basis was that she was not getting cooperation from counsel Hardee-Thomas.

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. App.p. 3422-3446. Rickborn had suggested to counsel Hardee-Thomas that the psychologist or psychiatrist from the defense interview of Applicant's son to develop information that he did not want his father executed to minimize potential penalty phase testimony. Petitioner's Depo. Exh. 2, Tr. p. 22-23. App.p. 3423-24. 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). App.p. 3423-24, 3465-66. 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. App.p. 3467. 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. App.p. 3468. 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. App.p. 3425. 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. App.p. 3427, 3469. However, Rickborn did not recall getting the requested records prior to ending her involvement. App.p. 3427-28.

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. App.p. 3470-71. 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. App.p. 3472. 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. App.p. 3473.

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. App.p. 3474-79. She stated that she learned of these names from the Applicant and his family. Depo. Tr. p. 25-26. App.p. 3426-27.

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. App.p. 3428. Depo. Tr. p. 27. She stated that she had asked Hardee-Thomas four or five times about this issue. App.p. 3428-29. Depo. Tr. p. 27-28.

Rickborn interviewed the Applicant's sister Amy Weik on April 21, 1999. App.p. 3429-30. Depo. Tr. p. 28-29. Exh. 2, p. 18-20. App.p. 3481-83. 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 heard out as he was trained to do in the service, if he did not get a haircut. App.p. 3481-82.

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. App.p. 3481. 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. App.p. 3482. 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.*

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. App.p. 3483. 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. App.p. 3429-30.

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. App.p. 3430. 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. App.p. 3484. 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. App.p. 3430-31, 3486. 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. App.p. 3486. 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. App.p. 3431-32, 3487. 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. App.p. 3431, 3488. 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.* App.p. 3438.

Like Robert Minter, Rickborn interviewed Pastor Dupree on April 26, 1999. App.p. 3489, Exh. 2, p. 26. In addition to the similar information reported to Minter about the Wednesday night before the incident prayer meeting, DuPree 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. App.p. 3490.

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. App.p. 3491. 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. App.p. 3492-93. 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." App.p. 3493. 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. App.p. 3493.

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. App.p. 3493.

On April 27, 1999, Rickborn sent a resignation letter and summary of her work and complaints to counsel Beauford and Hardee-Thomas. App.p. 3432, 3494-96. Exh. 2, p. 31. Depo. Tr. p. 30. [Respondents Exhibit 15 - App.p. 3855]. Rickborn testified that

prior to the letter she had left messages with both counsel because of her expressed frustration. App.p. 3435.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. App.p. 3438-34443, Depo. P. 42. Rickborn recalled only one meeting that she had with Beauford before she resigned. App.p. 3443. However, he did contact her after the April 29 letter during the trial asserting the judge wanted to know why she was not there. App.p. 3444-45.

Rickborn testified that she had met with the Applicant at least twice prior to her March 12 memo. App.p. 3445, 3450. 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. App.p. 3451. She admitted both defense counsel were present during her first interview with him. App.p. 3451-52. Depo. Tr. p. 50-51. Rickborn was unable to recall if she spoke with Chris Weik. App.p. 3454. Depo. Tr. p. 53. Rickborn stated she never sought payment in the case or submitted any voucher. App.p. 3458. Depo. Tr. p. 57.

**Scott Parker**

Scott Parker testified that he was retained, through the B.J. Johns firm, as the mitigation investigator after Rickborn left the case. App.p. 2515. 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. App.p. 2515-17. Petitioner's Exhibits 3, 4, 5. App.p. 3519-3522. He stated he also interviewed Maggie Gunter. App.p. 2518. Petitioner's Exhibit 6. App.p. 3533. 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. App.p. 2524-25, 3675. 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. App.p. 2519.

In his reported interview with the Applicant's mother, Lillie Weik, 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. [Petitioner's Exh. 3 - App.p. 3619-23]. She became pregnant with the Applicant shortly after and described it as a surprise and 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 resulted in a miscarriage. App.p. 3519-20.

Lillie described to Parker the various temperaments of the Weik children. App.p. 3619. She described the Applicant as "very quiet and sullen", 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. App.p. 3521.

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 Christina woman. However, Parker reported this woman had died just prior to the trial. Id.

His mother had described various relationships the Applicant had with women. App.p. 3521. She said Weik had married a retarded girl who he had taken to the prom. They moved into their house, 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 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. App.p. 3521.

Lillie stated the Applicant had temper tantrums and was physical and had a fascination for guns and weapons. App.p. 3522. She described the temper of the other children and opined that Amy had psychic abilities. She felt Eddie did not drink a lot. App.p. 3522. 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. App.p. 3523.

The May 25, 1999 interview with Chris Weik [Plaintiff's Exh. 4 - App.p. 3524-29] 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, 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. App.p. 3526.

Chris stated that Eddie met Susan on his own and they had sex the afternoon they met. App.p. 3526. Chris described Susan's manipulation of Eddie and 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 wants Susan back and he attempted to do so, but she again rejected him. However, he continued and became baptized in 1997. App.p. 3527.

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. App.p. 3528.

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. App.p. 3528. Chris described two events, April 19, 1998 and April 27, 1998, prior to the incident where Eddie had locked himself in his room 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. App.p. 3529.

Parker also described in Plaintiff's Exh. 5, his May 14, 1999 interview with Weik's father, Russell Weik. App.p. 3530-32. 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. App.p. 3530-31.

Parker described talk about Weik's VA hospitalization and gave Parker his social security number to aid in their search for records. App.p. 3531. However, Weik indicated to him that the military records had been destroyed and he had been denied benefits, suggesting his dog tag ad been placed on someone else. App.p. 3531.

Parker stated Weik fantasized about warfare. He also learned that the father's

possessions, clothing, and collectibles were primarily military. App.p. 3531. 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 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. App.p. 3532.

Parker also admitted interviewing Magdalena and John Gunter. App.p. 3533-34.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. App.p. 3533. They described the home as initially immaculate. They left 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. App.p. 3534. They felt Eddie enjoyed hunting and fishing with John. They reported to Parker that Eddie felt stifled living with his parents. App.p. 3534.

**The Weik Family Testimony During the PCR Hearing**

At the PCR evidentiary hearing, various family members were presented by the Applicant to testify concerning the Applicant and his family background.

**Chris Weik** [App.p. 2420-2496]

The Applicant's younger brother, Chris Weik, testified that he was subpoenaed, but did not testify at trial. App.p. 2421. 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. App.p. 2422-28.

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. App.p. 2430-32. Chris described their living conditions with money as a problem, no air conditioning and clutter throughout the house. App.p. 2434-35. He described periods when water had to be hauled in for washing. App.p. 2435-36.

Chris described his father's stories of his service and that he claimed to have 2000 kills in 2 tours of VietNam. 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. App.p. 2441-45.

Chris described the "strict-discipline" in the home. App.p. 2448. 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. App.p. 2449. 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. App.p. 2454-55. His father would always watch war movies. App.p. 2544. He felt his father had flashbacks and would dress up.

He described his mother telling him that "Rhonda" was being choked by their father until his mother knocked him out by hitting Russell with a frying pan because his father had flipped out and thought his daughter was a VietNamese. App.p. 2456. Chris stated that Eddie felt he had caused a miscarriage and killed the twins after his mother was shocked by an worn electrical cord after the Applicant had gotten shocked by it when he grabbed it and his mother came to their rescue. He stated that she had grabbed the cord then and got shocked by it which prematurely induced the labor. App.p. 2456-57.

Chris also described his father making bombs. App.p. 2457. 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. App.p. 2459-61

Importantly, Chris stated that he also believed in "the Hag" and had similar experiences as Eddie. App.p. 2458-59.

Chris Weik stated he spoke to Scott Parker one day from 7:30 until one or two a.m. App.p. 2461. He declared he told Parker similar information as his testimony.

Christ said his brother had few friends. Chris stated that while the Applicant was not religious as a youth, he joined a church as an adult. Her stated tha Weik was sincere about the church, got baptized and became a junior deacon. Chris, however, considered the church a bunch of "fanatics" who would preach what you could and could not do and if you did not do it you would go to hell, yet the preacher rode around in a Cadillac and claimed he could heal people with the touch of his hand. App.p. 2465-66. However, Chris

admitted that neither nor Eddie believed that the preacher could do this and he was later gotten rid of. App.p. 2466.

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. App.p. 2467-68. He stated that he was unable to sleep because of it. He said his brother would get bottles of melatonin to sleep. App.p. 2467-68.

Chris said he spoke to Hardee-Thomas at trial and asked her when he was going to testify and she told him that he was not going to testify. App.p. 2470. He asked her why he was subpoenaed there and she told him that the Judge wanted him here to see his brother's fate in case he had any idea about an act of vengeance. App.p. 2470. He said he had never met her before then. He stated that he had told her about his alcohol addiction, but she stated that he was an alcoholic and that things he told her may be far-fetched but had happened and he could verify it by having his own records reviewed from the drug abuse center for two years prior to Weik shooting Susan. App.p. 2471. She stated that it was not relevant because there was not a trial. App.p. 2471, l. 10-11.

Chris also confirmed the matters he told Investigator Parker concerning his family and that he had stabbed his brother. App.p. 2473.

**Amy Weik [Goings] Maxwell**

The Applicant's sister testified concerning her relationship with her brother. App.p. 2536-38. She said that he had learning problems, called himself stupid and spoke very fast. App.p. 2537. She described her father as violent. App.p. 2538. She recounted when he tried to choke her while he was watching a war movie. She stated that he just

reached up and forcefully grabbed her throat when she went up to tickle him, referring to her as "Charlie." App.p. 2538-41. She said her father was violent in his discipline with them. App.p. 2541. She recalled the event when he told Eddie he would ram his hand into his heart unless he got a haircut. App.p. 2542-43. She also recalled her father breaking the TV set. App.p. 2543-44.

Amy also testified that she was told about her father's Viet Nam experiences and when he killed many people. App.p. 2544-45.

Amy stated she testified at the trial in 1999. App.p. 2546-48. 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. Id. She said Percy met with each one by one. She said his focus was on her brother's behavior and her father's behavior. App.p. 2547. 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. App.p. 2548.

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. App.p. 2549. She did not recall any discussion then about what she would be asked. Id. She stated that she had also met with Scott Parker. App.p. 2550-51.

She confirmed there was a time when the family 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. App.p. 2552. She also felt Eddie was a good parent and spoke of his cub scout involvement. App.p. 2553.

She verified that Eddie had spoken about the "hag" and was concerned about his dreams. App.p. 2553-54. She said she told this to the defense team. She also spoke about childhood problems, pregnancy problems, and insomnia with the defense team. App.p. 2554-56.

**William "Bill" Gunter**

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. Supp.App.p. 44-45. 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. Supp.App.p. 45. He stated the oldest was Larry who lives in Fort Mill. Id.

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. Supp.App.p. 45.

He testified that he met Russell in 1966 at a racetrack. Supp.App.p. 45.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. Supp.App.p. 45-46.

Gunter stated that **Russell Weik** stayed assigned to the ward until he separated from the Navy. Supp.App.p. 46. **Gunter stated that Russell** got married **to Lillie** after he got out. Supp.App.p. 46. He stated that Maggie lived with Russell and Lillie after they were married. Supp.App.p. 47.

Gunter stated that Russell told him about his service. Supp.App.p. 47. He stated

Russell told him that in his first tour, he was in Scotland as a minesweeper. Supp.App.p. 47. Russell told him that in the late seventies he was doing clandestine operations in Viet Nam. Supp.App.p. 47, l. 9-19. 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. Supp.App.p. 47, l. 20- 48, l.3. 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. Supp.App.p. 48.

Gunter testified that he dated Maggie for three and ½ years (3½). Supp.App.p. 49. 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. Id.

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. Supp.App.p. 48-50.

Gunter described the type of father Russell was and that he was not much of a father "per se." Supp.App.p. 50, l. 13-14. 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. Supp. App.p. 50-51.

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. Supp.App.p. 51-52.

Gunter described Weik's father as having a very violent temper. Supp.App.p. 52, l. 19-25. He stated that the least thing would set him off after he was fine at one point. Supp. App.p. 52-53.

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. Supp. App.p. 53, l. 1-13. He stated that he was afraid that the U.S. was going to be invaded and we needed to defend ourselves. Gunter also stated that Weik felt that he had total dislike for Blacks and Jews who he felt controlled and were given everything and were his enemies. Supp. App.p. 53-54.

Gunter stated that Weik taught children how to kill someone by taking the enemy out silently. Supp. App.p. 54-55. Concerning explosives, Gunter stated that he saw several cans of dynamite in the garage. He described unwrapping a sweating stick of dynamite with nitroglycerine. Supp. App.p. 54. 9

Gunter stated that the father had expressed his feelings about Blacks and Jews to

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9 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. Supp. App.p. 55.

his children. Gunter stated the father had never recanted his Viet Nam experiences and would swear it was the truth today. Supp. App.p. 15-21.

Gunter stated that he net his wife before Eddie's birth. Gunter stated that he was home on leave when Eddie was born. Supp. App.p. 56-57. However, Gunter did not recall Russell being at the hospital when Eddie was born, although Russell knew about it. Id. 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 pallet. Supp.App.p. 57-58. Gunter stated that he had two sons, one 34 ½ and one 30 years old. However, Gunter stated that Eddie seemed to develop later (slower) than others. Supp. App.p. 58-59. 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. Supp.App.p. 59-60.

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. Supp.App.p. 60-61

Concerning Eddie's personality, Gunter stated that he seemed to have more than one. Supp App.p. 61. He described Eddie from going from a caring and carefree person to being an almost spooky individual at times. Id. Gunter stated the least little thing would upset him and cause him to lose his temper, like the incident at Broyhill. He stated that Eddie he could not get over it. Supp.App.p. 61-62.

Gunter stated that he was in Florida when Eddie was arrested. Supp. App.p. 62-63. Gunter stated that he came to S.C. for the trial. Id. He testified that he met Eddie's lawyer no more than two weeks before the trial. Supp. App.p. 62. He recalled that he and his wife were also interviewed by Scott Parker within two weeks before, but it could have been five (5) days before. Supp.App.p. 63. He stated Parker met with them at the same time. He stated that he met in Mr. Beauford's office with Russell, Amy and maybe Chris. Supp.App.p. 63. He stated that Lillie had called to get them together for the trial. Id. He stated that he was initially interviewed by Scott Parker, but that Mr. Beauford came in shortly after it started. Supp. App.p. 63. Gunter opined that he thought this was a late date to be preparing for trial. Supp. App.p. 64.

Gunter stated that Beauford said that they were looking at not guilty by reason of insanity (NGRI) and at best involuntary manslaughter. Supp. App.p. 64. He stated that they were looking for a credible witness for defense. Id. Gunter stated that he learned that they were trying for death at that time. Id. He stated that he did not recall any discussion about death penalty procedures.

Gunter stated that during the trial, he would challenge Beauford about the testimony. Supp.App.p. 65. According to Gunter, Beauford stated that he was not worried too much and that all that would be handled on appeal because all death penalty cases were appealed. Supp. App.p. 65. He stated that Beauford told him that and that Weik would get another trial and all this could be brought out with another attorney. Id. He stated that Beauford stated 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. Supp. App.p. 65-66. He stated that the discussions during the trial would become more downbeat and

he got more defeated, declaring to them that he was in over his head. Supp. App.p. 66-67.

Gunter stated that his testimony was not used at trial and he did not know why. Supp. App.p. 67-68. Gunter stated that he had known the family for years and had seen the deterioration of the family. Supp. App.p. 68. 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. Supp. App.p. 68-69.

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. Supp. App.p. 68-69.

Concerning Marva Thomas, Gunter stated that he had a very brief conversation with Thomas during the trial. Supp. App.p. 69-70. 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. Supp. App.p. 70. He stated that we kept wondering when we'd testify. He stated we talked with Mr. Parker. Supp. App.p. 70.

On cross-examination, Gunter was 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. Supp. App.p. 71-72. Gunter opined that the total time was at least a month a year. He stated that he initially stated with the parents, then stayed in hotels and after 1997 stayed in an RV. Supp. App.p. 72-73. Gunter stated that no one lives in the original family home now. Supp. App.p. 73-74. Gunter stated that Russell Weik's new wife refused to live there. Supp. App.p. 74-75. Gunter stated that there was running water in the house. Supp. App.p. 74. 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. Supp. App.p. 74-75.

Gunter stated that he was a Mason. Supp. App.p. 75. As to how Russell reacted, he stated that he tried to join, but was blackballed. Supp. App.p. 76.

**Maggie Gunter [Half-Sister]**

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. App.p. 2563-2571.

**Russell Weik [Father of Applicant]**

His father, Russell Weik, testified that he was not at the trial because he had to work. App.p. 2573. 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. App.p. 2574. He described his "Gomer Pyle" techniques and manner of killings. App.p. 2583. He opined that he was in charge of a unit that killed 3060 people. App.p. 2587. He claimed to have later re-enlisted and ultimately went to the Naval Hospital. App.p. 2588-89. He questioned the validity of various records presented about him as being changed or created by the CIA to cover his real work. App.p. 2589. He also questioned the diagnosis of chronic schizophrenia. App.p. 2590. He claimed to be seeking various benefits he felt he was owed by the VA. App.p. 2590-2608.

Russell described Eddie as a slow learner, but hot tempered. App.p. 2608-09. He

said that his wife Lillie told him that Eddie could not keep his mouth shut when he was supposed to and he would get people angry with him. App.p. 2611. However, he said he wasn't with him much. App.p. 2611, l. 10.

Russell said that he suffered from flashbacks from the military. App.p. 2611-12. He described a submarine event where he became claustrophobic. App.p. 2612-13. Also, he claimed to still suffer from them and had trouble sleeping based upon Viet Nam. App.p. 2614-15.

Russell described his heritage going back to Pocahontas, Martha Custis and other figures. He admitted teaching his children how to fight and how to smell the enemy. He said he had a top security clearance. App.p. 2617-18.

**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. App.p. 2632. She said she would have liked to have had one year. App.p. 2633. 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. App.p. 2635. 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. App.p. 2637. 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. App.p. 2641.

Although she heard Augustus Rodgers' testimony at trial, she opined that he did not develop the substance of the family history she now has. App.p. 2642-43. 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. App.p. 2645. 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 any a social history written by Augustus Rodgers at the time of her trial testimony. App.p. 2659.

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. App.p. 2660.

Dr. Watts said that at the trial she lacked personal interviews with all the family members, did not have all school records and other developmental records concerning Weik. She wished she had these. App.p. 2661-62. 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 about the existence of the "hag" within his family. App.p. 2663-64. She felt this shared belief though supported her analysis concerning his mental illness. She felt the added records supported her earlier position at trial. App.p. 2665.

Importantly, though, Dr. Watts testified, however, that the additional information

did not change her diagnosis previously expressed at trial that Weik suffered from chronic simple schizophrenia. App.p. 2670-71. Dr. Watts declared that she was aware of the Hag at that time as a cultural concept. App.p. 2671. From investigator Rickborn's notes, Dr. Watts 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 different diagnosis. App.p. 2673-74.

**Dr. Donald Morgan**

At the hearing, Dr. Morgan testified that he was asked to examine Weik for insanity by Dr. Watts. App.p. 2500, Supp. App.p. 5. 10 He felt that he had not seen that he had not met with the defense counsel prior to the trial and thought he was not 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. Supp. App.p. 10. He also reviewed the the 1999 reports. Id. He claimed that he was not aware in 1999 that Weik's father had a diagnosis of schizophrenia. Supp. App.p. 11. Dr. Morgan opined that it would have explained the genetic component of his earlier opinion since only 2% of the population suffers from it and a greater chance exists it a family member has it. Supp. App.p. 11. He felt the lack of this information precluded the defense from impeaching the state psychiatrist. 11 Dr. Morgan opined that Weik suffered from paranoid schizophrenia, rather than schizoid personality disorder presented by Dr. Shea. Supp.

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10 It is noted that the bulk of Dr. Morgan's testimony is in the Supplemental Appendix due to an error on the part of the court reporter.

11 However, on cross-examination it was impeached by Dr. Morgan's own trial testimony that in fact he was aware of information about Russell Weik schizophrenia at the time of the trial and commented on it. App.p. 412, Supp.App.p. 23-25. As noted in the Supplemental Transcript, the insert begins on hearing transcript page 110 at App.p. 2503.

App.p. 12-14. He felt the state psychiatrist was also wrong when he concluded that there were no delusions or hallucinations presented and could have rebutted the testimony. Supp. App.p. 15-16.

Dr. Morgan was impeached based upon his bill where he admitted that reviewed records on May 3, 1999 and May 5, 1999 prior to the trial but could not recall what the records were at this time. App.p. 2503, 3674, Supp. App.p. 20-22. He also could not recall that he testified at trial that he was aware then that father suffered from paranoid schizophrenia (App. 411, l. 18-p. 412, l. 5). Supp. App.p. 23-25, 27. He stated he was in error in his prior PCR testimony that he was not aware of this matter. Supp. App.p. 25. However, Dr. Morgan denied that he had meetings with Mr. Beauford as indicated on Mr. Beauford's voucher on May 3 for one hour, may 6, for two hours , May 10 for 1 and ½ hours, May 14 for one and ½ hours and May 17 for one hour. Supp. App.p. 25. Dr. Morgan denied any knowledge about the case in his direct examination, 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. App. 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 then recalled and confirmed on cross-examination recalled that at trial, now refreshed, he had noted that the Applicant's father had delusions that the CIA had a special interest in his family and his talk about his father being in Viet Nam - which Dr. Morgan asserted that "none of which is true." Supp.

App.p. 27. Dr. Morgan stated that he did have contact with the defense investigator, Patti Rickborn. Supp. App.p. 29. He also stated that he thought that he had discussed the case with Dr. Watts. Id. He also stated that he read the Hall Institute seven page social worker report prior to his trial testimony. Supp. App.p. 30-31. See App.p. 2040. He also confirmed that the trial record also indicated that he had reviewed the videotape statements of the Petitioner. Supp. App.p. 30-31.

Dr. Morgan did not recall if he met with Scott Parker prior to the trial, but did not recall he was the person who gave him the information about Russell Weik's schizophrenia before the trial. Supp. App.p. 32, App.p. 2501.

On re-direct examination, it was pointed out that Lillie Weik was the source of the social history within the state hospital report. App.p. 2504-2505, 3516.

On re-cross, although there was some testimony about a large head, Dr. Morgan stated that he was aware that there was testimony that there were no neurological defects from dr. Brannon. App.p. 2507-2509. He relied upon that information when he gave his opinion. Dr. Morgan also noted that the social history that was in the final report (App.p. 3616, 3693, 3697-98, 3823-3826).

**Dr. Geoffrey McKee**

Dr. McKee testified in his deposition that he was retained to do testing of Weik. He was retained after a telephone call from Marva Hardee Thomas and Mr. Beauford in February 1999. App.p. 3352. He interviewed Weik on March 6 and May 15, 1999. App.p. 3352. 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. App.p. 3352-53. Prior to the competency hearing, he drafted an affidavit for counsel in

May 1999 opining that Weik was incompetent to stand trial. App.p. 3354, Depo. Tr.p. 8, Exhibit 1 [App.p. 3391-92]. He stated this was done because he was unable to attend the Blair hearing. App.p. 3354, 3391, ¶ 4. Before he testified in the penalty phase, Dr. McKee stated that he felt that he did not have any preparation with counsel. App.p. 3356. 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. App.p. 3356-57. He prepare notes about risk assessment and Weik's potential for adaptability for prison life. App.p. 3357-58, 3394-95. Depo. Tr.p. 11-12.

Dr. McKee noted that at the trial, however, he was never asked his opinion on prison adaptability by counsel. App.p. 3358-59. 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. App.p. 3360. He stated that if he had been advised that he was testifying in the penalty phase, he would have testified about the risk assessment and the three approaches he took 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. App.p. 3361-63.

Dr, McKee did not recall any face to face meetings with Beauford before the trial, but did have a telephone conversation with counsel. App.p. 3367-68. He stated that he would have discussed his findings with counsel including his opinion on adaptability to prison life. App.p. 3368. 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. App.p. 3371. Depo. Tr.p. 25 [*See Respondents Exhibit, 7, p. 8 -*

*App.p. 3686 - Jeff Bloom memorandum to Percy Beauford that "You should NOT consider using him as a witness."* ]. Dr. McKee was also refreshed on cross-examination that he did in fact testify in the penalty phase and not the guilt phase of the trial, contrary to his testimony on direct. App.p. 3371. He also did not recall the consultation he did with Dr. Watts that he had referred to at trial. App.p. 3372 Although he was admittedly present in court, he did not recall the testimony before he testified by Dr. Rodgers or that Dr. Rodgers had actually testified about Weik's adaptability to prison. App.p. 3372-73. See, App.p. 1940-41 [Dr. Rodger's testifying that "I do believe that Eddie would make a satisfactory adjustment to prison life."].

Dr. McKee felt that he was not aware that Weik had already been convicted of murder when he testified at trial. App.p. 3374. He also did not recall any discussion with Dr. Rodgers about his social history summary. Id. He stated that he 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 how he rationally respondent to questions. Dr. McKee also did not recall what records he reviewed on February 22, 1999 for three hours. App.p. 3377. He would have received the records from counsel at that time, but did not know how he received them. App.p. 3377, 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. App.p. 3378. Tr.p. 32. He thought he would have consulted with Dr. Watts but did not recall the substance. App.p. 3379-80.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. App.p. 3383-84.Depo. Tr.p. 37-38, citing App. 1967.

**Dr. Augustus Rodgers**

Dr. Rodgers testified that he became involved in the case several weeks before the trial in 1999. App.p. 2859. 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. App.p. 3837. During the PCR hearing, Dr. Rodgers referred to his trial testimony, App. 1925 concerning the information he had been provided before the trial. App.p. 2861-62. Dr. Rodgers, referring to a new social history prepared by present counsel's defense team, testified about the genogram prepared for the proceeding by mitigation specialist Margaret O'Shea. App.p. 2861-62, 2869.. He stated this was not done at the Weik trial and that he had not received similar social history information from any mitigation investigator in 1999 that he received before the post-conviction relief proceeding. App.p. 2864. He summarized his earlier 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. App.p. 2863-66. He described the Weik environment as negative and detrimental from birth and that no intervention was allowed. 12

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12During the state PCR hearing, testimony was also received from Dr. Seymour Halleck, a forensic psychiatrist who was not involved at trial. App.p. App.p. 2687-2733. 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. App.p. 2696. He described the voices that Weik is hearing since he was 15 and the influence of the Hag. App.p. 2697-2700. He stated that Weik claims to be able to see two dimensional material in three-dimensions. App.p. 2700. Dr. Halleck questioned the Applicant's belief that the CIA is hiding things, similar to his father. App.p. 2701. He offered that his belief in his father's military career was a product of mental illness. App.p. 2705-07. He opined that Weik's desire for the death penalty was a product of his mental illness. App.p. 2707-08.

Dr. Halleck felt that if he testified in 1999, his testimony would have been similar to Dr. Watts. App.p. 2712-15. He suggested that they should have videotaped a long interview with the Applicant by someone like Dr. Watts and shown it to the court and the jury during the trial to support the diagnosis of schizophrenia. App.p. 2713. He felt that he could have impeached some of Dr. Shea's opinion that there was no deterioration in function and the how strong the evidence of schizophrenia was. He felt there was a strong need for a family history. App.p. 2714-15. He assessed Weik's testimony and thought he had started out well but was not willing to answer questions by the prosecution and that he seemed confused. App.p. 2715.

On cross-examination, Dr. Halleck stated that he reached his diagnosis on September 7, 2006. App.p. 2717. His assessment was paranoid schizophrenia, schizotypal personality disorder and major depressive disorder. App.p. 2717. However, he stated the meeting with Applicant the day before his testimony merely supported his opinion, but dealt that Weik was more forthright about his symptoms then. App.p. 2717. However, he never did a written report. App.p. 2718. He admitted that if the prosecution was seeking his opinion there was no record of it other than his testimony this date. App.p. 2718. He admitted that he did not review the Naval records of Russell Weik - only PCR defense investigator O'Shea's summary of it. App.p. 2718. He stated that the material she provided indicated that Russell Weik's discharge was at a hearing and the diagnosis given in the report was "schizoid personality disorder", not schizophrenia and would fall under Axis Two. App.p. 2719, l. 2-4. Dr. Halleck admitted that Russell was not diagnosed with any Axis One disorder by the military. App.p. 2719. He admitted that some people have been diagnosed as schizophrenic can hold a job well, be competent to stand trial. App.p. 2723.

Concerning the "hag", Dr. Halleck understood that it was a part of the belief system. However, Dr. Halleck opined that anyone who was not under the influence of medication, he thought would be hallucinating. App.p. 2723. When questioned about the fact that counsel the week before randomly had four people come and tell below-signed counsel that they had experienced the "hag", Dr. Halleck stated that they had an hallucination. App. 2723. [ Percy Beauford testified that he had experienced the phenomenon of the "hag" and that he had asked four people in his office and three of the four had experienced the "hag." - App.p. 2965]. Dr. Halleck stated that Weik claimed to hear voices of many people - male and female - in both his meetings.

He also claimed that his speech was tangential and loses his train of thought. App.p. 2725. Although he had read the Applicant's arrest statements, he stated that he had not listened to the tape. App.p. 2725. He stated though that at the time of the arrest, Weik was more clear and coherent at the time of his arrest than he is presently. App.p. 2726.

Dr. Halleck stated that Weik described his thoughts on the CIA and Masons because he asked him about them. App.p. 2726-2727. Although he did not provide much information about the Masons, Weik told Dr. Halleck that he was worried about the CIA because they were after his father and they would be after him also. Id. He declared to Dr. Halleck that nothing can convince him that the CIA is not plotting against both of them. Id.

Dr. Halleck stated that he asked Weik about the crime. Weik stated to him that he called his son and his son did not want to talk with him, that Weik told his son that he did not want to be his father any longer and that he felt bad about it. . Weik told Halleck that he decided to go over there and see if he could make amends and tell him he was sorry, but the boy avoided him when he got there. App.p. 2728. He told Halleck next that the wife came out screaming, words were exchanged, she told him to leave, that he would never see his son again and never come back, and that she was going to call the police. App.p. 2728. Dr. Halleck stated that Weik told him that he went to his car and started to put it in reverse, but began hearing voices calling him names and that he was a bad person, messes up everything and does thing wrong. He then puts the car in forward, grabs a shotgun and goes in and shots her. App.p. 2729. In describing to Dr. Halleck why he shot her, Weik told him that "a man can only put up with so much" and he thought he was angry. App.p. 2729.

Dr. Halleck stated that Weik kept mocking his lead attorney who kept telling him that everything would be OK. App.p. 2730.

Dr. Halleck stated that he reviewed Weik's employment records. He stated that he did not disagree with Dr. Shea's assessment of them, except for that latter months at Broyhill. He stated that Weik felt that the new administration had come in and that he was being given orders by people he did not respect and he did not want to do some things that they wanted him to do. App.p. 2731. He stated that Weik declared that he felt terrible after he lost his job, got depressed and was thinking about suicide. App.p. 2731.

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 heath team and acquire records. She state

## ANALYSIS

### Counsel's Retention of Investigators - ISSUE FOUR.

The PCR Court found that the defense team's retention of the investigators was not constitutionally deficient. App.p. 4085-4086. Plainly, there was a delay from when counsel became appointed in the case to when many of the experts were retained. However, as the PCR Court noted, this delay in retaining the either investigator Minter or initially mitigation investigator 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 family genograms describing historical family traits and dysfunction within the family could or would have been presented. The problem with the claim of "untimeliness" is that any deficiencies in the defense teams 1999 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 Petitioner Weik, related to the background. Well before the trial, evidence of the father's violence, the hag, and the defense perception of his mental illness was known and produced to the knowledge and attention of counsel and ultimately their experts.

The problem with the late assignment did not necessarily impact upon the investigation, although it clearly impacted upon the stress of the investigators, particularly Ms. Rickborn, as the trial approached. The PCR Court correctly concluded that, despite the lengthy time in preparation form the PCR action and its investigation and presentation of a *fuller* mitigation case, the result and impact of the background evidence was

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that this was not done in the 1999 trial. App.p. App.p. 2908-2936.

essentially the same. The mental health psychiatric experts held essentially the same opinion of Weik's mental illness. The father, Russell Weik, still suffered from an illness that was presented to the jury - schizophrenia - albeit without the military records to support it. In 1999, the jury had sufficient evidence to assess the mitigation of the tragic family life of Eddie Weik. The PCR Court correctly and reasonably applied Strickland v. Washington in finding Petitioner had failed to show either deficiency or prejudice. Certiorari must be denied.

## V. Certiorari is not warranted where counsel adequately prepared the expert witnesses to testify concerning the petitioner's background. (Petition, p. 52-60. Order, p. 4086-4089).

In his fifth argument on certiorari, Petitioner asserts that Dr. Morgan, Dr. Watts, and Dr. Rogers did not receive necessary information about the case that would have supported their opinions in the case. Respondent incorporates by reference in its entirety the portion of the Petition set out as argument four with its summary of expert testimony and investigative information. The PCR court rejected this claim. App.p. 4086-4088.

This issue is equally without merit for certiorari. The problem this Court and the lower court faced is equating the PCR testimony which suggested no knowledge by either the lawyer or particular witness about the actual testimony with the fact that similar testimony was presented and developed in 1999. The only obvious failing concerns the PCR testimony of Dr. McKee. The problem is that it is clear that counsel Beauford interviewed and developed an understanding of the available family testimony. His calling of only Amy Weik, after both the mother and the Applicant had already testified in guilt, cannot be deemed deficient. Although there were other members willing to testify and that Chris Weik and John Gunter may have also been able to reveal an addition perspective about Russell Weik's problems and deficiencies, counsel Beauford made the choice not by ignorance , but after he had discussed that matters with them before the trial.

More importantly, there was no 6th Amendment prejudice in the failure to present 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 could have been better prepared, there has been an inadequate showing that

there was relevant omissions that the Applicant has shown that 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. This is not the test because the experts have continued in their same opinion in 2006 as testified to at the 1999 trial to a reasonable degree of certainty in their field. The only omission by possible neglect was Dr. McKee's testimony concerning adaptability to prison life. However, both Dr. Rodgers and Dr. Watts opined essentially that Weik would be adaptable in their 1999 tewstimony - it is just that Dr. McKee was not asked and claims he could have given an additional opinion on adaptability. The PCR Court could say that the failure to have Dr. McKee add to that chorus undermine confidence in the outcome of the case. He failed in his burden of proof.

Similarly, there was a breakdown apparent in who would provide various material received and what material was actually provided. 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 what source he learned it from. Counsel Hardee-Thomas testified essentially that she did not recall having reviewed all documents she received from the investigators and then passed them on to counsel. This testimony, along with inconsistency in some witnesses trial testimony and PCR recollection about what he knew and did not know (particularly Dr. Morgan who was significantly impeached about the bulk of his direct testimony in PCR on cross-examination ) made the assessment for this Court difficult as to the deficiency prong. However, the PCR Court

correctly found that the burden of proof rested with the Petitioner. While the Court was constrained to conclude that counsel did not provide all investigative family reports to all expert witnesses, the Strickland Sixth Amendment assessment does not stop there. App.p. 4088. Despite the deficiency, the Applicant 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, supra., "[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. The PCR court reasonably concluded that Weik had failed in his burden of proof. Certiorari is not warranted.

**VI. Certiorari is not warranted where the PCR court correctly concluded that deficient performance and prejudice was not showin when defense counsel failed to use a letter prepared by the mitigation investigator in attempting to secure a continuance. (Petition p. 61-66, Order App.p. 4088-4092.**

In his sixth argument, Weik contends that defense counsel erred in failing to present the Rickborn April 29, 1999 resignation letter in support of the motion for a continuance made on May 18, 1999. Weik suggests that the continuance would have otherwise been granted and contends that the only basis Beauford had for failing to have shown the letter to the trial judge was the fear of criticism for their incompetence. The PCR Court rejected this showing and concluded that Weik had failed in showing either deficient performance or prejudice by this failure. App.p. 4088-92. Certiorari should be denied where there is evidence that supports this Order.

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.

App. 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. App.. 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.

App..473-474) The Court asked if the new investigator could take her place and Beauford said that he could. App. 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. App. 476. The judge asked if Rickborn had started getting the records they needed and Beauford replied that she had

not. App. 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. App. 478. He offered to assist counsel with an order and would make calls top 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. App. 479. At that point, Judge Shuler wanted Beauford to have Rickborn in court the next day if they want her to continue on the case if her services were absolutely necessary or that he could find someone to replace her. Beauford then stated that he preferred to go with someone else he had spoken with. App. 476.

Respondent asserts 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 of Petitioner, the PCR Court properly concluded that 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 Petitioner suggests that trial counsel hid the basis for the resignation from the Court. He contends that if the reason had been presented, the Court would have taken steps to remedy the situation with a continuance. The PCR Court correctly disagreed.

First, the problems evident in the Rickborn letter about the communication

problems were the basis of her resignation. 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 motion hearing.

The PCR Court correctly concluded Weik had failed in his burden to show that there is a reasonable probability that the trial court would have granted the continuance by the mere presentation of the Rickborn letter. It was evident that there was a communication breakdown and the remedy was explored by the trial court. Certainly, it was not error by defense counsel that Rickborn be returned to the defense team after the letters between Rickborn and Hardee-Thomas revealed a breakdown between them. The trial court was presented with the appropriate alternative. His discretion would not have changed had become aware of the breadth of the breakdown between counsel and the particular investigator. He 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).

Certiorari must be denied.

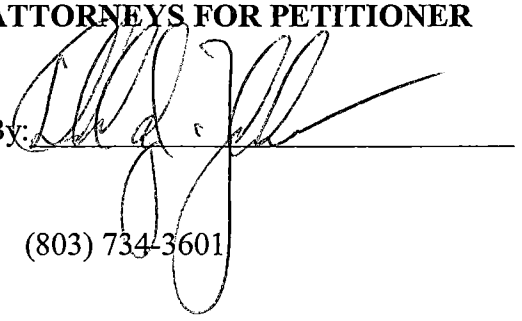
## CONCLUSION

For all the foregoing reasons, the Petition must be denied.

Respectfully submitted,

DONALD J. ZELENKA
Assistant Deputy Attorney Genera

**ATTORNEYS FOR PETITIONER**

By: 

(803) 734-3601

March 8, 2010

## CERTIFICATE OF SERVICE

**I, Donald J. Zelenka,** hereby certify that I have served the ***Return to Amended Petition for Writ of Certiorari*** in the foregoing action by depositing copies in the United States mail, postage prepaid, to Robert M. Dudek, Chief Appellate Defender, and Elizabeth Franklin-Best, Assistant Appellate Defender at Division of Appellate Defense, P. O. Box 11589, Columbia, SC 29211 this 8th day of March, 2010.

DONALD J. ZELENKA
Assistant Deputy Attorney General