ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Dorchester County

Perry M. Buckner, Circuit Court Judge

JOHN EDWARD WEIK,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

AMENDED PETITION FOR WRIT OF CERTIORARI

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INDEX

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 Section §16-3-20(B)(1)?

4.

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

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?

STATEMENT OF FACTS

Introduction

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

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

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

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

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

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

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

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

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

Petitioner strongly asserts infra that had counsel been candid with the trial judge about their inept attempts at trial preparation – which led to Rickborn resigning – the judge likely would have granted the continuance motion since it would have been obvious trial counsel Beauford was not prepared for trial. Further, this Court's opinion on direct appeal graphically illustrates counsel's inability to even follow the statutory requirements for obtaining a guilty but mentally ill plea or jury instruction. See, State v. Weik, 356 S.C. 76, 587 S.E.2d 683 (2003).[1]

[1] Petitioner moved this Court to allow him to file a petition for writ of certiorari in excess of the twenty-five page limit. This Court granted that motion. After the petition for writ of certiorari was filed, opposing counsel, Donald J. Zelenka, who tried this capital PCR notified undersigned appellate counsel and this Court that the PCR transcript only contained the partial testimony of Dr. Donald Morgan, and that the court reporter had failed to transcribe the entire testimony of petitioner's brother-in-law, William "Bill" Gunter. Court reporter Harriet Bennett then transcribed the entire testimony of Dr. Morgan after finding the missing tape. However, Ms. Bennett could not find the tape of Bill Gunter's testimony. This Court then remanded this case for a reconstruction hearing before the Honorable Perry Buckner, Jr. In the interim court reporter Robin Keil was located in California and she transcribed Bill Gunter's testimony. All of the attorneys involved stipulated that the transcription of Gunter's testimony was accurate. Petitioner then moved to amend the certiorari petition already filed with this Court, and that motion was granted.

ARGUMENT

1.

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

Relevant Facts

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

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

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

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

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

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

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

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

App. 1949, l. 10 – 1950, l. 14.

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

Closing Argument

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

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

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

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

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

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

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

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

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

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

The state then urged that if the amendment was allowed the state maintained that petitioner had failed to show "that in 1999 a reasonable counsel was constitutionally required to object to this evidence and argument, particularly after Ivey[2] and the fact that the court in 2005

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

thought it needed to caution both parties about the use of such evidence of real prison life. He has failed to show deficient performance." App. 4021.

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

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

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

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

> "This Court also failed to make finding as to why allowing the proposed amendment would not be required by justice. *It is impossible to conceive of a case where justice is more required.* This is not a contractual dispute between two parties of equal stature when the worst that will happen is that of them would pay

> damages to the other. The consequences for Applicant are far beyond a contractual dispute because he is a death sentenced prisoner. As the U.S. Supreme Court has said in several cases, `death is different.'" App. 4104-4105.
>
> The Court also failed to make a finding as to how the Respondents would be prejudiced by allowing the amendment. Of course, the Respondents would not be prejudiced by allowing the amendment for three reasons: First, the Respondents did not make a finding of prejudice in their proposed order so they did not even think they were prejudiced. Second, all of the evidence supporting the claim, i.e., the improper cross-examination of Dr. Rodgers by the Solicitor and the Solicitor's improper closing argument had been in the record since the first day of the PCR when the Court declared with the assent of the Respondent that the 1999 trial transcript was (and still is) a part of the PCR record. The Respondents, therefore, did not have to deal with new facts they had never heard previously. Third, the legal argument in support of the claim is not complicated so there cannot be nor is there a claim of prejudicial surprise. In fact, the Respondents dealt with the proposed amendment to their apparent satisfaction in their proposed order. The Respondents did not bother to file a Return or ask this Court to extend the time to submit the proposed orders because they needed time to deal with the Motion to Amend in their proposed order.

App. 4105.

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

App. 4104 – 4105.

Petitioner also argued in his Rule 59(e), SCRCP motion that under SCRCP 15(b) that the state had agreed the 1999 trial transcript was part of the PCR record and that constituted the state's implied consent to litigate the issue in the proposed amendment. App. 4106. Defense counsel also noted that the reasoning that conditions of incarceration or execution are improper

matters for evidence or argument went back to 1984 and State v. Plath (Plath II), 381 S.C. 1, 313 S.E.2d 619, 627 (1984). App. 4109.

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

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

Discussion

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

the jury." State v. Plath (Plath II), 281 S.C. 1, 15, 313 S.E.2d 619, 627 (1984). (emphasis added).

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

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

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

In Skipper v. South Carolina the United States Supreme Court held that Skipper had a right to present evidence that he made a good adjustment to prison. State v. Koon had earlier held that such evidence was irrelevant and hence inadmissible. The Court in Skipper v. South Carolina held that exclusion of evidence of a defendant's adaptability to prison violated his right to present mitigating evidence "as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982). In short, if the state can – and it does – offer evidence of a defendant's bad behavior, a defendant is entitled to offer evidence he can adapt to prison if the jury spares his life.

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

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

When Ivey reached PCR, the prison conditions issue was overlooked by PCR counsel, and it was not raised as a PCR issue. Ivey does not stand for anything on the merits because the good prison conditions issue was never properly raised, either on direct appeal, or on PCR.

There cannot be any legitimate reason under Strickland v. Washington, 466 U.S. 668 (1984) for failing to object to this good prison condition evidence. Evidence that petitioner can work and get paid in prison, could go to school in prison, have recreational activities in prison, get three "square meals a day" in prison, and have canteen privileges in prison, was extremely prejudicial and irrelevant to the jury's task at hand. The evidence and closing argument on good prison conditions was clearly intended to have the jury conclude that petitioner would have some of the pleasures of life behind the prison walls while the victim was forever dead in her grave.

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

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

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

As seen, petitioner moved to amend to add this good prison conditions issue following the PCR hearing. The trial transcript was part of the PCR record, and the PCR counsel for the state was surely aware that the State v. Plath, State v. Bowman and State v. Burkhart prison conditions issue was present in this case.

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

Further, pursuant to Rule 15 (b), the PCR court erred by not allowing the amendment since the issue was tried by implied consent when the trial transcript was made a part of the record, and the amendment to the PCR application was necessary to cause the judgment to conform to the evidence. Again, there was no prejudice to the state. See Stanley v. Kirkpatrick,

357 S.C. 169, 592 S.E.2d 296 (2004); ("the party opposing the motion [to amend] has a burden of establishing prejudice).

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

3.

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

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

During her deposition, on August 17, 2006 in preparation for the PCR hearing conducted in this case, she testified that she thought she had participated in three death penalty cases before petitioners. App. 3165, ll. 20 - 23. She informed the judge at the time of trial that it was her second death penalty trial. App. 4, ll. 8 - 14; App. 3297, ll. 5 - 11. At the PCR deposition, she testified that she was *second chair* for the trial of Calvin Shuler App. 3297, ll. 21 – 24, but this Court can take judicial notice of the fact that was not the case.[3]

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

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

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

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

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

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

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

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

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

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

App. 2952, ll. 18 - 23.

He envisioned a different role for her at trial:

> Well, you know, basically when you are acting in this kind of role you want someone to handle something else so you can be looking at different areas, and while someone is testifying you an be looking for possible objections.
>
> So you want to be concentrating on the entire Courtroom, and so I thought we would switch out basically so one could watch your back and you could watch their back.
>
> But I think during that time and prior to trial, when I wanted to separate those and say, you handle these witnesses and I'll handle these witnesses, she declined to do so.

App. 2967, ll. 4 - 16.

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

The PCR court denied relief on this issue, finding that Hardee-Thomas' failure to examine any jurors or witnesses, and Beauford's expectation of more assistance before trial and during the trial did not equate into Hardee-Thomas not serving as second counsel pursuant to the statute. App. 4056-4057.

Hardee-Thomas's complete lack of participation in any phase of this trial was ineffective, and it denied petitioner his right to have two attorneys appointed to his case. See also ABA Guidelines for Appointment and Performance of Counsel In Death Penalty Cases, 1989, Guideline 2.1: In cases where the death penalty is sought, two qualified trial attorneys should be assigned to represent the defendant. [4] Given the complexity of a capital case and the standards for representation imposed by both this state and the ABA, Hardee-Thomas's inactions fell below professional norms.

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

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

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

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

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

Petitioner also received ineffective assistance of counsel from the attorney who, concededly, did participate as an attorney in his case. His performance, as discussed *infra*, fell well below prevailing professional norms in violation of Wiggins, supra and Strickland, supra, and petitioner's convictions and sentence should be reversed. Respectfully, petitioner asks this Court to grant his petition for writ of certiorari.

4.

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

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

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

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

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

an investigator in this case, but he was hired after the trial had already started, he did not actually discuss the case with the attorneys, he did not have time to interview the witnesses he wanted to, and he was not asked to do anything during the trial.[5] App. 2515, ll. 8 - 18; App. 2518, ll. 10 - 11; App. 2520, ll. 6 - 16; App. 2528, ll. 3 - 6; App. 2522, l. 12 -2523, l. 15; App. 2531 - 2532; App. 2520, ll. 6 - 16; App. 2521, ll. 22 - 24. Beauford never actually met Parker, and does not even know what he looks like. App. 2980, ll. 16 - 20.

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

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

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

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

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

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

> In assessing the reasonableness of an attorney's investigation, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.

Wiggins v. Smith, 539 U.S. 510, 527 (2003). See also Haliym v. Mitchell, 492 F.3d 680 (6th Cir. 2007) (Court found counsel ineffective for failing to follow up with obvious avenues of investigation that would have produced valuable mitigating evidence).

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

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

> Q. And what was the purpose in hiring her [Rickborn]?
>
> A. She's a mitigating investigator.
>
> Q. Okay. Why is that important? Why was that important?
>
> A. Well, what we wanted her to do was basically get the social history with regards to Mr. Weik.
>
> Q. And why was social history so important in this case?
>
> A. To get a little bit of information regarding his background.
>
> Q. Okay. Why would that have been important in the penalty phase of this case?
>
> A. To give some defenses if any.

App. 3105, ll. 2 - 14.

And later,

> Q. Okay. And what would you have done with that information to help defend Mr. Weik?
>
> A. We used the information to defend him based on the information that you find.
>
> Q. Okay. Well, perhaps I'm being too general but how did the information contained in the reports from the mitigation investigators—how could that have been used at trial? In your opinion?
>
> A. To help defend him.
>
> Q. But how? I mean, specifically what could you have done or what was the purpose of having the information in hand?
>
> A. To help Mr. Beauford help defend Mr. Weik.

App. 3117, ll. 9 - 21.

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

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

Trial counsel was also ineffective for failing to ensure that he was receiving mitigation materials that were being sent to co-counsel. A quick review of the materials that were prepared by Rickborn, and which were sent to Hardee-Thomas but were never forwarded to Beauford, illustrates the wealth of information that could have (and should have) been developed prior to

trial. Instead, in the face of having received nothing from Hardee-Thomas, trial counsel simply went forward, apparently without even questioning co-counsel as to the absence of any materials. He did not have Parker's interview with Chris Weik prior to trial. App. 3026, l. 20 - 3027, l. 25. He did not realize that petitioner's reports of his father's bizarre account of being in the CIA were false. App. 3030, l. 1 – 3031, l. 12; he did not see Parker's interview with Lillie Weik prior to trial. App. 3032, ll. 3 - 19; he did not see Rickborn's report of the interview with Amy Maxwell prior to putting her on the stand. App. 3035, ll. 4 - 23. In short, though these materials were available, and in the possession of the defense, and even though Chris Weik was ready and willing to testify, trial counsel was completely unaware of the materials, and did not seek them out.

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

Russell C. Weik ("Chris Weik")

One witness the jury never heard from was Russell C. Weik, "Chris Weik." Chris is approximately a year younger than his brother, Eddie Weik, the petitioner. App. 2420, ll. 13 - 17. He was raised with Eddie and their sister. App. 2424, ll. 4 - 7. Chris testified at the PCR hearing that during school, petitioner was placed in learning facilities for the slower, special education, students. App. 2424, l. 25 - 2425, l. 7. Even though he completed the 11th grade, he

still could not read. App. 2426, l. 23 – 2427, l. 3. Petitioner was slow, and could not count money. App. 2430, ll. 16 - 23.

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

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

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

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

Chris described a particularly disturbing episode when the kids were around eight or nine. During a camping trip, the father gave them a loaded .45 caliber gun and had them "stand guard." They were instructed to guard the family against the Viet Cong. If the children had seen any Viet Cong, they were told to shoot them. Chris wanted to shoot a couple of times, but the

father insisted they wait until they actually see them, although "you probably won't see them because they sneak up on you in tennis shoes and cut your throat." App. 2444, l. 20 –2445, l. 24. The father believed that the Viet Cong were sneaking into America, to take over America. App. 2446, ll. 3 - 6. The family built bunkers, and the father would bring home bags of concrete, weapons, sea rations (sic), army helmets. The children had their own survival packs, bayonets, and cleaning kits. App. 2446, ll. 3 - 18.

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

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

laying in bed, their father continuing to break things, and their mother screaming and begging for him to stop. App. 2452, l. 19 – 2454, l. 17.

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

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

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

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

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

Chris Weik testified that he related these events to Scott Parker, (App. 2461, ll. 18 - 21), but the defense did not ask him to testify. App. 2462, ll. 8 - 9. The only time he spoke with Percy Beauford was after the trial. App. 421, ll. 11 -19. Chris Weik was subpoenaed as a witness

and was present at the courthouse, but no one ever spoke to him. App. 2421, l. 2 - 2422, l. 7. Chris Weik could have provided this valuable testimony to the jury, but no one thought to utilize him during the trial. None of this information was before the jury for their consideration.

Amy Weik-Maxwell (Weik's sister)

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

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

Magdalena Sharon Farrer Gunter

The jury never heard from Magdalena Sharon Farrer Gunter, also known as "Maggie." Ms. Gunter is Weik's half-sister. App. 2564, ll. 1 - 2. She confirmed that he seemed to have developmental difficulties. App. 2565, ll. 18 - 25. He needed special books to help him speak, and he was slow in walking. Ms. Gunter "felt like" petitioner should have be given psychological or psychiatric care, but "we didn't really talk about it. "[M]y mother wouldn't take children to doctors." App. 2566, l. 24 - 2567, l. 6. Ms. Gunter described living at the home:

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

App. 2568, ll. 7 - 10.

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

Russell Weik (Weik's father)

The jury never heard from Russell Weik, petitioner's father. Petitioner's profoundly disturbed father also took the stand during the PCR hearing. He testified he did not come to the trial because he had to work. App. 2573, ll. 8 - 11. By counsel not calling Russell Weik to the stand during the trial, the jury was denied the opportunity to gauge, not only the content of Weik's testimony, but his recalcitrance when challenged on his assumptions. In other words, had the jury had the opportunity to view Russell Weik on the stand, they may have appreciated the extreme mental illness that Eddie Weik was exposed to throughout his childhood and adulthood. Russell Weik testified to the following facts at the PCR hearing:

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

himself. After he completed his one month training at Parris Island, which should have been a three month training period, but the military consolidated it for him, he was then stationed in New London, Connecticut at the machinery repair shop. Then he was transferred to the Navy motion picture exchange. App. 2576, l. 1 – 2577, l. 25.

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

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

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

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

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

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

App. 2587, ll. 18 - 23.

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

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

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

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

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

App. 2615, ll. 10 - 16.

Russell Weik testified that he has an extraordinarily impressive genealogy:

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

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

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

with security clearance as well as mine. Only a few people they know" App. 2621, l. 18 - 2622, l. 2.

At Johns Hopkins, he learned deviant medical theories:

> If you are African-American, your heritage kind of gets thickened and it insulates your cranial cavity from the sun's rays so you don't suffer heat stroke as much as other people.
>
> Your skin is darker pigmented, so it looks like the sun's light, but these people have a part of the earth near the equator, either Central America or in Asia and parts of Africa, and they have different geographical hereditary characteristics.
>
> It has nothing to do with their ability to think or anything. Their dietary changes, Chinese people, they have a different slant, or Japanese people, because Japanese people kind of flinch their eyes because they were fisherman. They were on an island.
>
> Chinese people have poorer cooking facilities, and it caused the tear ducts to be enlarged.

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

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

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

The PCR court found that "counsel Beauford interviewed and developed an understanding of the available family testimony – All of which was presented to the jury." App. 4086-4087. There respectfully is no evidence to support this ruling as shown clearly above, and by Bill Gunter's testimony below. See Council v. State, 380 S.C. 159, 670 S.E.2d 356 (2008).

William "Bill" Gunter (Maggie's husband and Russell's son-in-law)

Bill Gunter was also not called as a witness at trial by defense counsel, though he was willing and able to do so. He explained at the PCR hearing that his wife Maggie Gunter was petitioner's "half-sister by Lily's first marriage." Supp. App. 43, l. 6 – 44, l. 10.

Gunter recalled that he met Russell at a race track in February of 1966. Gunter testified that Russell told him he had been "a mind sweeper in Charleston," and that he had a nervous breakdown. "[T]hey had to take him out in a straight jacket, he was in the mental ward in the Naval Hospital in Charleston, SC, and was assigned to the E Ward which is known in Navy language as, you know, in the military as echo." Supp. App. 44, ll. 8 – 10.

Gunter clearly remembered Russell relating his alleged military exploits. Russell told Gunter: "He was assigned to a mind sweeper out of Holy Loch, Scotland." The following occurred at the PCR hearing with Gunter:

> Q. Did he tell you anything about - - while he was in Holy Loch, Scotland, anything about his activities, some extraordinary activities that he got involved in?
>
> A. He started back in the late '70's, I think is what your referring to, as saying that he was doing clandestine operations, I think you would call them, in Vietnam, he would be flying out someplace - - flown out someplace in France, join a team of commandos, they would be inserted behind the lines in Vietnam.

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

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

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

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

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

A. He put it in later years, yes, he was employed by the CIA, he was actually an undercover operative for the CIA later on in later life.

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

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

Q. All right. When you started hearing these tales from Russell, did he appear that he believed what he was saying?

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

Supp. App. 47, l. 5 – 48, l. 15.

Gunter married Maggie in 1969 when she was eighteen-years-old. They spent a substantial amount of time with Russell and the family after their marriage in 1969 even though Gunter moved Maggie to Florida. Supp. App. 49, ll. 6 – 24.

At the time of the PCR hearing, Gunter was a semi-retired engineer from the Florida Department of Transportation. Supp. App. 43, l. 23 –44, l. 7. Gunter estimated that he and

Maggie would travel to the home where she lived with Russell in Moncks Corner "for a week at a time three or four times a year and then we would come up on weekends four, five, six times a year . . ." Gunter said they spent "at least a month if not a little bit more, each year at the Moncks Corner home. Supp. App. 71, ll. 8 – 21.

Gunter recalled the Weik home where petitioner grew up was in terrible disrepair. Gunter said eventually he and Maggie would stay in a motel room because of the horrible condition of the Weik home. Around 1997 or 1998 they had a thirty foot RV they would park in the yard when they visited. Supp. App. 71, l. 8 – 73, l. 16.

Gunter testified that Russell had a very violent temper, and that "the least little thing would set him off or upset him . . ." Supp. App. 52, ll. 17 – 20. Gunter said Russell would take:

> "The two boys . . . outside in the yard at night at all hours of the night and sometimes [it would] be real cold and they'd have what we refer to in the Navy as skivvies, either under shorts and a tee shirt and maybe barefoot or maybe socks or something on their feet would be all. He would make them stand at attention. Even in the house when they would take a bath he would come in. I want to do personnel inspection. They would stand at attention, let them give him a PI stand at attention, let them give him a PI inspection. Stand them in the yard at attention make them march around in formation and yell commands at them and he called it toughening up.

Supp. App. 50, l. 1 – 51, l. 13.

Gunter said that Russell would beat or whip the children with whatever he could get his hands on to discipline them. Gunter recalled:

> If a flyswatter was handy he'd whack them with that. And he kept one laying around, he would whack them with that. He had not got hold of an antenna one time, tore an antenna off a vehicle, his belt, he would throw things in the house, he grabbed them and beat on

them. He's literally hit them in the chest with his first before, hit them in the face.

Supp. App. 51, ll. 8 – 16.

Gunter said Russell would also yell and scream "shut the so and so up" at the children. In addition, Russell kept many weapons in the house because he "feared the government quite a bit, he was afraid they we're going to be invaded and we're going to need the guns to defend ourselves and defend yourself against your enemies." Supp. App. 52, l. 13 – 53, l. 5. Gunter testified Russell had muzzle loaders hanging on the wall. "He kept a forty-five with him that he claimed at one time was given to his father by General McArthur in the Philippines. He carried guns with him constantly, he collected guns, and he just bragged about owning a mini fourteen full automatic, he had shotguns, rifles, military guns especially he really liked." Supp. App. 52, l. 13 – 53, l. 23.

Gunter also said that Russell taught the children "various methods" to kill people: "How to grab them in their hand and immobilize them . . . in a quick way of killing them where they wouldn't make any sounds." Supp. App. 52, l. 13 – 53, l. 24.

Russell also kept several cases of dynamite in his garage. Gunter recalled an occasion where Russell "pulled out a stick of dynamite that was sweating." Gunter explained when dynamite was sweating it was "not moisture, its nitroglycerin coming out in its natural form." Supp. App. 54, l. 7 – 55, l. 9.

On another day, Gunter remembered Russell showing him the dynamite and "it popped, it scared the be-Jesus out of me. Before he had done it again I said, are you crazy? . . . He said, I

can boobie–trap mines around the house. If they come to get me I've got something I can defend myself with." Supp. App. 54, l. 7 – 55, l. 9.

Gunter stated that Russell believed his stories about his military exploits, "and swears that they're the truth to this day." Supp. App. 54, l. 7 – 57, l. 21.

As to petitioner, Gunter recalled that petitioner had a large head as a child and he did not look normal. Petitioner developed slowly but he craved attention. Instead Russell was indifferent towards petitioner, he made fun of petitioner calling him "Eggy" for Egghead. Supp. App. 56, l.11 – 59, l. 20. Gunter testified that petitioner found it hard to concentrate and "he would go from a caring, carefree individual to an almost spooky individual like he was being hunted and someone was after him. And he was real self-conscious . . . the least thing would upset him." Supp. App. 59, l. 7 – 61, l. 3.

Gunter remembered that he and Maggie were interviewed together about "five or six days possibly before the trial" by Scott Parker. Supp. App. 62, l. 22 – 63, l. 2.

> There were several family member there because Lily had called us, gathered us all together, said we need to do the interview, we're getting ready for Eddy's trial. That was the first time I met the attorney.
>
> Q. And who - - were you interviewed at that meeting?
>
> A. Yes, my wife and I both were.
>
> Q. By Scott Parker?
>
> A. By Scott Parker. Percy Beauford was in the room for a short time, left, Scott Parker done the interview.

Supp. App. 63, ll. 5 – 16.

Gunter remembered Beauford telling a group of family members that he wanted to pursue a defense of not guilty but reason of insanity, and "maybe manslaughter something like that." Supp. App. 64, l. 17 – l. 11; Supp. App. 64, l. 25 – l.5.

Gunter remembered as the trial progressed Beauford became more "down beat," and Beaufort admitted he was "in over his head." Supp. App. 65, l. 2 – 66, l. 11. Gunter recalled Beauford telling the family not to worry "it will be appealed and everything will be done over again, he'll have another attorney at that point." Supp. App. 65, l. 21 – 67, l. 20.

Gunter said he asked Beauford why he was not going to call him as a witness since he had known the family for so long and "was exposed quite a bit to the family and noticed the changes from being away for four or five, three, four, five months at a time and coming back to see the deterioration of the family and the family group . . ." Gunter remember Beauford "never did explain [why] to me other than we don't need your testimony, that was all he would tell us, my wife and I both." Supp. App. 67, l. 2 – 68, l. 13.

Gunter said among the other things he knew was that the children grew up in a house of filth "roaches everywhere, absolutely filthy. That's the only way I know how to put it. The house was in a state of disrepair." Supp. App. 68, l. 14 – 25. Gunter said Russell told him several times he would not repair the house because the deed to the house was in Lily's name and since she would not put his name on the deed: "I'm not going to make any changes to the house. I don't give a so and so if the whole so and so place falls down. I don't want to use that language in court. I don't want to use it anyway." Supp. App. 68, l. 14 – l. 2. Gunter also recalled that there was little running water in the house for years, "and Lily would have to go down the street and haul water to the house, she would take buckets to the neighbor's house, roll

them back in wheel barrels. She would catch rain water outside in a fifty-five gallon drum for the commode, the fill drains were just knotted up with roots." Gunter said for "eight to ten years they did not have running water of any appreciable amount in that house." Supp. App. 74, l. 21 – 75, l. 10.

Finally, Gunter said he only had one "very brief conversation in the room to the left just outside those doors" with Marva Hardee-Thomas during the trial. That was his only contact with her. Supp. App. 69, l. 20 – l. 4.

Substantial mitigating evidence never made it to the jury for their consideration during petitioner's trial. The jury never heard about petitioner's tyrannical and psychotic father who taught his children how to kill, and impressed on them how he used to kill people during his "fantasy-tours" in Vietnam. They never heard how his father used to plant land-mines in the family yard to teach his children how unpredictable and violent life is, or how he taught his children how to make bombs. They never heard of the beatings petitioner suffered when his father would put on his steel-toe boots and kick him repeatedly, or the time he was attacked by his father with a machete. They never heard how petitioner's father made them march in the cold, how he played with deadly dynamite, and subjected them to "random inspections."

The jury never heard of petitioner's developmental problems, and the fact that his mother would not take any of the children to doctors as Ms. Gunter explained. App. 2566-2567. The jury never heard that petitioner could not read when he left school in the 11th grade, or that petitioner's father used to make fun of petitioner's abnormally large head and called him "Eggy" for Egghead. App. 2426-2427. Too, the jury never heard how filthy petitioner's childhood home was, with roaches everywhere, and no running water for 8-10 years as Bill Gunter testified.

Perhaps most significantly, the jury never had the opportunity to view petitioner's father and evaluate for themselves the effect it must have had on petitioner to have been subjected to the psychological sickness and vicious physical control imposed on him by the man throughout his life. And of course, counsel could have subpoenaed Russell Weik to secure his attendance, despite Weik's claim that he "had to work" during his son's trial. The jury never heard petitioner's father recount his elaborate tales of clandestine military action and the bizarre arrogation of his importance in world affairs. They never heard him boast of his genealogical superiority, or his continued "flashbacks" to wartime Vietnam. In short, the jury was not able to gauge the effect it must have had on petitioner to have been at the mercy of a man so profoundly mentally ill, or consider the genetic component of this illness relative to petitioner's situation. The jury simply was never provided a window into petitioner's dysfunctional and terrifying life, even though the information was available, and the witnesses able to testify.

This information relating to petitioner's social history and family background was proper mitigating information that should have been presented to the jury for their consideration. *See* Council v. State, 380 S.C. 159, 670 S.E.2d 356 (2008) (finding trial counsel ineffective when he did not, among other deficiencies, conduct more than "limited" interviews with defendant's family and did not hire a social history investigator even though funds were available); Von Dohlen v. State, 360 S.C. 598, 602 S.E 2d 738 (2004) cert. denied 544 U.S. 943 (2005) (finding trial counsel was ineffective for failing to provide a defense expert with medical records and relevant information that existed before trial); Clark v. Mitchell, 425 F.3d at 294 ("the defendant's psychological and social history and his emotional and mental health are often of vital importance to the jury's decision at the punishment phase."); Williams v. Allen, 542 F.3d

1326 (11th Cir. 2008) (even under the "highly deferential" standard of federal habeas corpus review, the court found trial counsel was ineffective when, despite the availability of several of defendant's family members, counsel sought mitigating evidence only from defendant's mother and thus obtained an incomplete and misleading understanding of defendant's life history); Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991) (finding trial counsel ineffective for failing to investigate defendant's psychiatric history); Austin v. Bell, 126 F.3d 843 (6th Cir. 1997) (finding trial counsel ineffective when he did not present any mitigating evidence, and several of defendant's relatives, friends, death penalty experts and a minister were available and willing to testify on defendant's behalf); Haliym v. Mitchell, supra; Hartman v. Bagley, 492 F.3d 347 (6th Cir. Jul. 10, 2007). The omitted mitigation material was critical to providing the jury with some insight as to the real Weik family dynamic and would have provided compelling impeachment material for the cross- examination of state's witness, Dr. Shea, who largely painted a picture of an idyllic childhood. App. 2049, l. 16 - 2051, l. 24. Petitioner was prejudiced by his attorneys' substandard performance.

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

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

Strickland at 688.

Trial counsel did not articulate any reason why they failed to present this information to the jury, except that the one attorney who was actively participating in the trial was not provided the material by his co-counsel. Even so, the material that had been gathered was also incomplete. Trial counsel's performance was ineffective, and petitioner was prejudiced by their performance. Respectfully, petitioner asks this Court to grant his petition for writ of certiorari.

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

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

This Court noted recently in Council v. State, supra, that counsel in that case was "deficient in not beginning his investigation into Respondent's background once the state served its notice of intent to seek the death penalty." Id. at 7. In this case, there was simply never a mitigation investigator used at all, since trial counsel never secured what mitigation investigation had actually been undertaken. This Court in Council cited with approval the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, 11.4.1(2)(C) (1989) that "once counsel is appointed in any case in which the death penalty

is a possible punishment, he or she should begin, among other things, collecting information relevant to the sentencing phase including, but not limited to: medical history, educational history, family and social history, and prior adult and juvenile record." Id. This Court may also take notice of 11.4.1(A) (counsel should conduct independent investigations relating to guilt/ innocence phase and to the penalty phase of a capital trial. Both investigations should begin immediately upon counsel's entry into the case and should be pursued expeditiously.).

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

5.

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

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

> Q. Did you have the opportunity to read reports and different documents concerning Mr. Weik's condition?
>
> A. Different documents?
>
> Q. Medical records or reports.
>
> A. Unfortunately, I've never had the opportunity to go through either of the hospitalizations that he had at the institute in any detail. I have read portions of that, but not in the kind of detail and the kind of study that one would like to do, although we asked that they be subpoenaed.

App. 2027, ll. 7 - 13.

And then, during cross-examination:

> Q. Did you read the social history?
>
> A. Not in detail, sir.

Q. It's only about seven pages long, isn't it?

A. I've only had access to the record briefly during the *Blair* hearing.

Q. Yes, sir.

A. And then briefly today. So, no, I have not read that record as I should have.

Q. Okay. You would agree that record might provide important information, might help you give a better opinion.

A. Yes, absolutely.

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

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

Dr. Morgan is a Distinguished Professor at the University of South Carolina. Supp. App. 2, ll. 24-245. He has been extensively qualified to testify in both state and federal courts, in capital and non-capital cases. Supp. App. 3, l. 8 - 4, l. 2. He became involved in petitioner's case about two weeks before trial was scheduled to begin. Supp. App. 5, l. 2. At petitioner's post-conviction hearing, Dr. Morgan testified that, prior to his testimony during petitioner's trial, he was not provided any materials by defense counsel. He did not receive any discovery materials, investigative reports, or medical reports from the South Carolina State Hospital. Supp. App. 5, ll. 3-14. He did not meet with petitioner's attorneys prior to his testimony during either the Blair hearing, or the penalty phase of petitioner's trial. Supp. App. 7, ll. 7-10. Dr. Morgan testified that since the mid-eighties, it has been standard for there to be group meetings between experts, attorneys, and investigators prior to trial. Such a meeting clearly did not occur in this

case. Supp. App. 8, ll. 14-25. When he took the stand, he had no idea what questions he would be asked. Supp. App. 10, ll. 7-9.

In preparation for the post-conviction hearing, Dr. Morgan reviewed the following materials: petitioner's father's naval discharge; Dr. Rodgers' testimony, Drs. Crawford, Watts, McKee, Shae, Brannon, Berman, and his own testimony from the trial. He also reviewed the investigative reports that were created for trial back in 1999. Supp. App. 10, ll. 10-21. Dr. Morgan was asked what difference there would have been in his testimony back in 1999 had he been possession of these materials prior to petitioner's trial. Supp. App. 10, l. 22 - 11, l. 3. He testified his testimony would have been different in two material respects: (1) He would have explained the genetic component of schizophrenia to the jury, and (2) He would have been able to impeach the state's psychiatrist, and he would have been able to point out to defense counsel that the state's testimony did not meet the criteria for schizotypal personality disorder.

Dr. Morgan testified at the PCR hearing that had he known petitioner's father had been discharged from military service with a diagnosis of schizophrenia that he would have explained the genetic component of schizophrenia to the jury. Supp. App.11, ll.4-15. As he explained:

> Only about two percent of the population has schizophrenia but if you have a sibling or a parent, the chances are greatly increased that you would have schizophrenia.

Supp. App. 11, ll. 20-23.

At trial, during the penalty phase, Dr. Morgan testified that petitioner had a diagnosis of paranoid schizophrenia. He did not, however, testify that petitioner's father also had the same condition, as evidenced by the naval discharge, or that petitioner had the genetic propensity to

have that disorder. This information would have been critical for a jury to have, since they were charged with the duty to consider all mitigating information.

Dr. Morgan also testified that, had he had these materials in his possession prior to petitioner's trial, that he would have helped the defense attorneys impeach the state's case and confirm that petitioner suffered from paranoia schizophrenia. Dr. Morgan disagreed with the state's conclusion that petitioner merely suffered from schizoid personality. In his professional opinion, petitioner suffers from paranoid schizophrenia. According to Dr. Morgan, a reason the state gave for its diagnosis was the fact that petitioner's social life did not deteriorate. This, however, is not a requirement for a diagnosis of paranoia schizophrenia. In other words, the state claimed that petitioner did not have paranoia schizophrenia because his social life was not impaired. However, as Dr. Morgan pointed out, many paranoid schizophrenics work every day. It follows that that consideration should not have been used by the state to conclude that petitioner merely had schizoid personality and not paranoia schizophrenia. Additionally, according to Dr. Morgan, there were reports that petitioner heard voices and had a delusion (the Hag). These facts are inconsistent with a diagnosis of schizoid personality and support his diagnosis of paranoid schizophrenia.

Dr. Morgan also testified that the interviews with family members—which illustrated certain behaviors on the part of petitioner's father, and contradicted his mother's account of the social history, which she gave to the state, and which denied any physical or emotional abuse--would have reinforced his diagnosis of paranoia schizophrenia, and been significant in impeaching the state's expert. Supp. App. 18, l. 14- 19, l. 10. With this recently available information, Dr. Morgan would have been able to impeach the state's witnesses and their

conclusion that petitioner merely suffered schizotypal personality. Supp. App. 13, l. 3- 17, l. 20. The failure of trial counsel to provide this information to Dr. Morgan was ineffective on their part, and petitioner was prejudiced by their failure to exercise reasonable standards of competence in their representation of him.

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

Dr. Augustus Rodgers was a defense expert called at trial, too. He first became involved in the case five days before trial. App. p. 2906, ll. 12 - 21. He testified he did not receive any investigative materials from Minter. App.2865, ll. 11 - 13. He never received a chronology of events, although he usually does in cases in which he is involved. App. 2884, ll. 8 - 21. Margaret O'Shea provided a chronology at the PCR hearing. App. 2908, l. 10 – 2937, l. 8. The information she provided at the PCR hearing was exhaustive App. 2908, l. 10 - 2937, l. 8.

Jeff Bloom was called as a jury consultant expert in the case. He testified at PCR that he was retained a week before trial. App. 2736, ll. 10 - 14. Hardee-Thomas claimed that he was retained about a month before trial, and that he even helped to prepare the jury questionnaires. App. 3259, l. 22 - 3260, l. 8; App. 3268, ll. 22 - 24. Bloom also testified that Beauford was on

his own, that Hardee-Thomas had no role in the case. App. 2738, l. 10 - 2739, l. 13. He did not think the team understood how important *voir dire* was to the case. App. 2753, ll. 15 - 17. Bloom believed that the defense team was in over their heads. App. 2737, l. 25 - 2738, l. 2. Bloom testified that he has never allowed himself to be retained as a jury consultant under these circumstances since this case. App. 2739, ll. 16 - 23.

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

If trial counsel—either of them—had undertaken necessary steps to prepare this case prior to trial, they would have had time to remedy other deficiencies in their performance. For example, if mental health care professionals had been involved at an earlier point, the defense team may have complied with the statute regarding how to handle an assertion of guilty of

mentally ill. See State v. Weik, 356 S.C. 76, 82, 587 S.E.2d 683, 686 (2002) (noting that "no attempt" was made to comply with S.C. Code Ann. §17-24-20(D) (Supp.2001)).

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

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

> Q. And your theory of that was that voluntary manslaughter in this case would be the result of legal provocation, sufficient legal provocation, that Mr. Weik was denied access to his son by this woman?
>
> A. That was reaching, and the jury may not have come to that verdict, but I thought there could have been some evidence because I was arguing pretty much you have a legal right to see your child.
>
> Q. Okay.
>
> A. And then when that legal right was taken away by a person who has the immediate opportunity to do so, I thought, you know, that was justification.
>
> Did it rise to murder? The jury probably would not or may not have come back, but I thought the charge should be given.

Q. All right.

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

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

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

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

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

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

major component in the case because that is a phenomenon that if you ask, two out of four blacks will say, yes, I know what you're talking about." App. 2965, ll. 12 - 15.

Counsel was on notice at the beginning of this case that here was psychological component that needed to be explored. While the PCR court noted the "apparent breakdown in who would provide various materials received and what material was actually provided and received," it inexplicably found a lack of a showing of Sixth Amendment prejudice" in this record. App. 4086-4088. However, counsel's failure to meaningfully consult with mental health experts at an appropriate time, and their failure to provide those experts with materials they needed, falls well below standards for capital representation in this state. Petitioner was prejudiced by their performance, and he was denied his right to effective assistance of counsel under the Sixth and Fourteenth Amendments, and South Carolina state law. See supra Wiggins, Strickland. See also Williams v. Taylor, 529 U.S. 262 (2000) (counsel has an obligation to conduct a thorough investigation of a defendant's background). Respectfully, petitioner asks this Court to grant his petition for writ of certiorari.

6.

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

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

> Q. What did she jump ship for?
>
> MR. BEAUFORD: Your Honor, we're on the record. Basically I said—
>
> THE COURT: I don't want you to say anything---
>
> MR. BEAUFORD: Communication problems.
>
> THE COURT: Sir?
>
> MR. BEAUFORD: I would think communication problems is a broad area we could use on the record.

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

The next day, he informed the court that:

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

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

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

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

App. 475, ll. 8 - 12.[6]

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

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[6] Beauford also informed the judge that Rickborn had interviewed "a few lay witnesses" but he never actually reviewed those interviews prior to trial. App. 478, ll. 1 - 2.

however, did, since she is the one who responded to it. Here is why she did not bring the letter to the judge's attention:

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

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

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

Livingston, this Court reversed because the trial judge refused to grant a continuance where appointed trial counsel informed the court that he had not had sufficient time to obtain a witness who could testify regarding the defendant's mental condition.

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

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

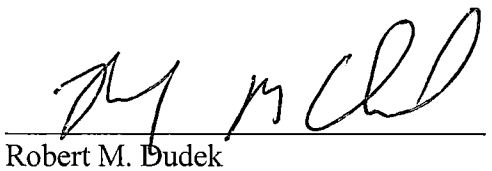
The judge did not have any other means by which this information was to be brought to his attention.

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

CONCLUSION

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

Respectfully submitted,



Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR PETITIONERS

This 14th day of October, 2009.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

JOHN EDWARD WEIK,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the amended petition for writ of certiorari and a copy of the supplemental appendix in this case have been served on Donald J. Zelenka, Esquire this 14th day of October, 2009.

Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR PETITIONERS

SWORN TO BEFORE ME this 14th day of October, 2009.

(L.S.)
Notary Public for South Carolina
My Commission Expires: November 16, 2008.