

VOLUME NINE OF NINE

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Dorchester County

Perry M. Buckner, Circuit Court Judge

ORIGINAL

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S.C. SUPREME COURT

JOHN EDWARD WEIK,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPENDIX

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been provided and received the discovery material and Patti Rickborn's notes before the trial. She recalled having a general family history, but Weik did not allow a factual defense. She met with Beauford one time before that hearing and asked for Dr. Donald Morgan to be included and asked for a psychological and neurological consultation. She thought it was done. She also spoke with the mother and Chris at the Blair hearing and learned of the toxemia and pregnancy history. Although she did not meet with Rickborn, she met with Parker and received the Hall records at the Blair hearing. She was aware that the father had a mental illness and other family through the Hall records, but did not know Weik may have had a genetic disposition for schizophrenia. She felt this would have made her more confident in her opinion about Weik's schizophrenia.

Although she heard Augustus Rodgers' testimony at trial, he did not develop the substance of the family history she now has. She said she met with Dr. Brannon, Dr. McKee, and Dr. Morgan until the Blair hearing and had not prepped before that. Dr. Watts described items within the Hall records that she found to be useful and supportive of her diagnosis of chronic simple schizophrenia. She also did not recall seeing anything in writing from Scott Parker and recalled only discussing his findings with her. She also stated that she had not reviewed any a social history written by Augustus Rodgers at the time of her trial testimony.

Dr. Watts also recalled that Weik acted strange during the initial Blair hearing. She said at one point Weik hit his head on the table.

Dr. Watts said that at the trial she lacked personal interviews with all the family members, did not have all school records and other developmental records concerning Weik. She wished she had these. Since the trial, she learned that Weik did not speak until he was 2 years old, had few friends and the subject of teasing and confirmed that his father had a mental illness.

Concerning Weik's belief in the Hag, she opined that it was now seen as a shred belief within her family. She felt this supported her analysis concerning his mental illness. She felt the added records supported her position at trial.

Dr. Watts testified, however, that the additional information did not change her diagnosis expressed at trial that Weik suffered from chronic simple schizophrenia. She was aware of the Hag at that time as a cultural concept. From Rickborn's notes, she also knew of the father's influence over the family by fear. In addition, at the Blair hearing, she was also aware of Dr. Crawford different diagnosis.

Dr. Donald Morgan

At the hearing, Dr. Morgan testified that he was asked to examine Weik by Dr. Watts. He felt that he had not seen that he had not met with the defense counsel prior to the trial and thought he was not aware what they were going to ask him. At the time of this hearing, he itemized the material he reviewed including the father's Navy discharge, the trial testimony of Rodgers, Dr. Crawford, Dr. Watts, Dr. Shea, Dr. McKee, Dr. Behrmann and his own. He also reviewed the the 1999 reports. He claimed that he was not aware in 1999 that Weik's father had a diagnosis of schizophrenia and it would have explained the genetic component of his opinion since only 2% of the population suffers from it and a greater chance exists it a family member has it. He felt the lack of this information precluded the defense from impeaching the state psychiatrist. Dr. Morgan opined that Weik suffered from paranoid schizophrenia. He felt the psychiatrist was wrong when he concluded that there were no delusions or hallucinations presented and could have rebutted the testimony.

Dr. Morgan was impeached based upon his bill where he admitted that reviewed records on May 3 and May 5 but could not recall what the records were. He also could not recall that he

testified at trial that he was aware that father suffered from paranoid schizophrenia (Tr.p. 411, l. 18-p. 412, l. 5). He denied that meetings indicated in Beauford's voucher. Dr. Morgan denied knowledge about the case, yet at trial he referred to Mr. Hall's report about Weik eating by himself, staying away from other workers and always reading the Bible as strange ideas, but not psychotic. Tr.p. 417 [In Dr. Morgan's penalty phase testimony, Dr. Morgan described his interviews with the Applicant about the Hag, whether Weik thought he had a mental illness, and how the CIA is after his father and the mother confirmed that the CIA agents had stopped and checked their trunk. Dr. Morgan also admitted at trial that he had reviewed Carlos Torres social history from the Hall records]. Dr. Morgan did not recall if he met with Scott Parker prior to the trial. Although there was some testimony about a large head , he was aware that there was testimony that there were no neurological defects.

Dr. Geoffrey McKee

Dr. McKee testified in his deposition that he was retained to do testing of Weik. He was retained after a telephone call from Marva Hardee Thomas and Mr. Beauford in February 1999. He interviewed Weik on March 6 and May 15, 1999. Although he claimed to have been provided little information, he did receive Dr. Crawford's report, and had a verbal consultation with Dr. Stephen Shea. Prior to the competency hearing, he drafted an affidavit for counsel in May 1999 opining that Weik was incompetent to stand trial. Depo. Tr.p. 8, Exhibit 1. He stated this was done because he was unable to attend the Blair hearing. Before he testified in the penalty phase, Dr. McKee stated that he felt that he did not have any preparation with counsel. He thought he would be testifying in the penalty phase but ended up testifying only in the case in chief, but had prepared his notes on penalty phase issues. He prepare notes about risk assessment and Weik's potential for adaptability for prison life. Depo. Tr.p. 11-12. At the trial, however, he was never

asked his opinion on prison adaptability by counsel. Depo. TR.p. 12-13. He stated that he could have provided the court with more information about his opinion that Weik suffered from depressive disorder with psychotic features. He stated that if he had been advised that he was testifying in the penalty phase, he would have testified about the risk assessment and the three approaches he took to the assessments of anamnestic, the data on the likelihood of murders among inmates, and the absence of antisocial personality disorder or malingering by Weik. Depo. Tr.p. 15-17.

Dr. McKee did not recall any face to face meetings with Beauford before the trial, but did have a telephone conversation with counsel. He stated that he would have discussed his findings with counsel including his opinion on adaptability to prison life. Dr. McKee acknowledged his records revealed a meeting with counsel two days before he testified and a consultation with Jeff Bloom, but did not recall the specific discussions. He was not aware that Bloom recommended that he should not be called as a witness. Depo. Tr.p. 25 [See Respondents Exhibit, 7, p. 8]. Dr. McKee was also refreshed that he did in fact testify in the penalty phase and not the guilt phase of the trial. Id. 25. He did not recall the consultation he did with Dr. Watts. Although he was present in court, he did not recall the testimony before him by Dr. Rodgers or that Rodgers had testified about adaptability to prison. Depo. Tr.p. 26. Dr. McKee felt that he was not aware that Weik had already been convicted of murder when he testified at trial. He also did not recall any discussion with Dr. Rodgers about his social history summary. He stated that his opinion at trial was not changed by the testimony he heard from Dr. Rodgers. He also said he was not present when Weik testified at trial. Particularly, he was not aware how he rationally responded to questions. Dr. McKee also did not recall what records he reviewed on February 22, 1999 for three hours. He would have received the records from counsel at that time, but did not know how

he received them. Tr.p. 31. Dr. McKee stated that he had transcripts of Weik's statement and had reviewed Dr. Crawford's report before he did his May affidavit. Tr.p. 32. He thought he would have consulted with Dr. Watts but did not recall the substance. Tr.p. 33-34. Dr. McKee admitted that he had reviewed the social history, but not the medical records from Hall Institute prior to his trial testimony. Depo. Tr.p. 37-38, citing Tr.p. 1967.

Dr. Augustus Rodgers

Dr. Rodgers testified that he became involved in the case several weeks before the trial in 1999. However, his voucher, Respondents Exhibit 13, revealed that he began his billing on May 24, 1999 and claimed a total of 25 hours work in the matter, including his testimony. He referred to his trial testimony, Tr.p. 1925 concerning the information he had been provided before the trial. Dr. Rodgers, referring to a social history prepared by present counsel's defense team, testified about the genogram prepared for the proceeding by mitigation specialist Margaret O'Shea. He stated this was not done at the Weik trial and that he had not received similar social history information from a mitigation investigator in 1999 that he received before the post-conviction relief proceeding. He summarized his opinion that Weik had needed help for a long time and his conditions growing up needed intervention. He stated that he had similar impressions in 1999. He described the Weik environment as negative and detrimental from birth and that no intervention was allowed.⁷

⁷During the state PCR hearing, testimony was also received from Dr. Seymour Halleck, a forensic psychiatrist who was not involved at trial. Dr. Halleck opined that upon his review of the records and prior testimony that Weik suffers from schizophrenia paranoid type, schizotypal personality disorder and a major depressive episode. He described the voices that Weik is hearing since he was 15 and the influence of the Hag. He offered that his belief in his father's military career was a product of mental illness. He opined that Weik's desire for the death penalty was a product of his mental illness. He felt that if he testified in 1999, his testimony would have been similar to Dr. Watts. He felt that he could have impeached some of Dr. Shea's opinion that there was no deterioration in function and the how strong the evidence of schizophrenia was. He felt there was a strong need for a family history. He assessed Weik's testimony and thought he had started out well but was not willing to answer questions by the prosecution.

Margaret O'Shea also testified about the importance of the role of a mitigation investigator and the time it

ANALYSIS

1. Counsel's Retention of Investigators 9(m). 9(r).

This Court must find that the defense team's retention of the investigators was not constitutionally deficient. Plainly, there was a delay from when counsel became appointed in the case. However, this delay in retaining the either Minter or initially Rickborn did not impact upon the ultimate presentation of relevant information to the jury. As set out above, with more time it is evident that a case consisting of genograms describing historical family traits and dysfunction within the family would have been presented. The problem with the claim of "untimeliness" is that any deficiencies in their presentation was not the result of the delayed retention. The information was quickly developed in virtually the initial interviews of the close relatives as well as Weik related to the background. Well before the trial evidence of the father's violence, the hag, and the defense perception of his mental illness was known and produced.

The problem with the late assignment did not necessarily impact upon the investigation, but it clearly impacted upon the stress of the investigators, particularly Ms. Rickborn, as the trial approached. As noted above, despite the lengthy time in preparation form the PCR action and its investigation and presentation of a fuller mitigation case, the result was essentially the same. The psychiatric experts had the same opinion of Weik's mental illness. The father still suffered from an illness that was presented to the jury, albeit without the military records to support it. In 1999, the jury had sufficient evidence to assess the mitigation of the tragic family life. The Applicant had failed to show either deficiency or prejudice under Strickland.

takes to properly prepare the social background information for the mental heath team and acquire records. She state that this was not done in the 1999 trial.

2. Counsel alleged failure to prepare or present Testimony of Family Background to their experts. 9(n), 9(o), 9(s)

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

More importantly, there was no 6th Amendment prejudice in the failure to present additional family members. The jury had a general understanding of the family and Eddie Weik from the testimony of the Applicant, his mother, Amy and the experts. While the witnesses could have been better prepared, there has been an inadequate showing that there was relevant omissions that the Applicant has shown that a reasonable probability the result would have been different. Except for one omission, the Applicant's only claims are that the expert opinions would have been stronger to the particular expert. This is not the test because the experts have continued in their opinion as testified to at trial to a reasonable degree of certainty in their field. The only omission by possible neglect was Dr. McKee's testimony concerning adaptability. However, both Dr. Rodgers and Dr. Watts opined essentially that Weik would be adaptable. This

Court cannot say that the failure to have Dr. McKee add to that chorus undermine confidence in the outcome of the case. He failed in his burden of proof.

Similarly, there was a breakdown apparent in who would provide various material received and what material was actually provided. Defense counsel for this proceeding either could not find their file or could not recall when certain materials got into their files. Counsel Beauford testified that he had knowledge of most of the information received in this proceeding, but did not recall what source he learned it from. Counsel Hardee-Thomas testified essentially that she did not recall that she reviewed all documents she received from the investigators and then passed it on to counsel. This testimony, along with inconsistency in some witnesses trial testimony and PCR recollection about what he knew and did not know (Dr. Morgan) makes the assessment for this Court difficult as to the deficiency prong. However, the burden of proof rests with the Applicant and the Court is constrained to conclude that counsel did not provide all investigative family reports to all expert witnesses. However, the assessment does not stop there. Despite the deficiency, the Applicant failed to meet the burden of showing 6th Amendment prejudice. As stated above, the jury heard the basic information about Weik's mental illness and the dysfunctional family in which he was raised. As the Supreme court stated in Jones v. State, supra., "[J]ust because it was unsuccessful does not mean that [Weik] can now recharacterize the evidence and claim that counsel did not adequately present mitigation evidence. The "new" evidence is the same as the "old" evidence. At best, it is a fancier mitigation case. If the evidence was not persuasive in the first case, the defendant does not get a second chance. Otherwise, there would never be an end to litigation." Like Jones. Weik is not entitled to present a fancier mitigation case where the same evidence was presented in the trial. He has failed in his burden of proof.

9(p) The Applicant was denied effective assistance of counsel when trial counsel did not provide a sufficient basis for their continuance motion at the hearing on May 18, 2006 when such basis was available namely a letter to them from the mitigation investigator dated April 29, 1999 which set out in detail trial counsel's inept cooperation with and supervision of the mitigation investigator - one Patti Rickborn - which resulted in her resigning from the case. If trial counsel had provided this letter to the trial judge, he would have realized that trial counsel's on the record explanation of the reason why the mitigation expert resigned on April 29, 1999 was not accurate and the trial judge would have been alerted that they were not providing effective assistance of counsel to the Applicant, would have probably continued the trial so the new mitigation investigator would have had time to gather complete information about the Applicant's personal and family background which would have been provided to the mental health experts and presented to the jury and would probably have resulted in a life sentence. [IAC - CONTINUANCE REQUEST- failed to provide April 29 , 1999 Rickborn letter as explanation for resignation].

In allegation 9(p), Weik contends that defense counsel erred in failing to present Rickborn April 29, 1999 resignation letter in support of the motion for a continuance. Weik now suggests that the continuance would have otherwise been granted and the only basis to fail to have shown it was their own fear of criticism for their incompetence. This Court must conclude that Weik has failed in showing either deficient performance or prejudice by this failure.

The record reveals the following at the motion hearing on May 18, 1999 after the competency hearing, Applicant's trial counsel moved for a continuance:

Mr. Beauford: Just a little housekeeping, there's an outstanding motion in which we tried to get a continuance. Basically one of our mitigating experts has left the team and we have now Cot Parker who has just come aboard and he's a little bit coming behind and we're just gathering some of the information from the other expert. And we had filed the motion on having the matter continued and would like for the Court to maybe rule on that.

The Court: Well, what is his role? What is that mitigating part? What specific role does he have?

Mr. Beauford: He will be ...

The Court: And what happened to the fellow who left the team?

- Mr. Beauford:** Rickborn and Patty
- The Court:** Does she expect to get paid?
- Mr. Beauford:** I think so, your Honor. I haven't gotten a bill yet.
- The Court:** Well, I'm not going to pay her. If she doesn't come here and testify I am not. She's not going to get on the team to be paid and leave. I mean, she's not going to do that now, you know, that's not fair to you. It's not fair to you for her to jump ship on you. If she's going to get on the team and expect me to pay her, she ought to come here and testify in the case.
- Not that I don't – not that I'm saying I wouldn't pay this gentleman, I'll do that as well. But I just feel like it's unfair to you for her to jump ship and certainly unfair to the State and to me to have, you know, a trial scheduled months and months in advance set for this particular thing and then all of the sudden she jumps ship. What did she jump ship for?"
- Mr. Beauford:** Your Honor, we're on the record. Basically, I said –
- The Court:** I don't want you to say anything –
- Mr. Beauford:** Communications problems.
- The Court:** Sir?
- Mr. Beauford:** I would think communication problems is a broad area we could use on the record.
- The Court:** I don't want you to say anything to prejudice your client, but at the same time, you know, if she doesn't have a good reason to leave, then I don't see how anybody else should be prejudiced. If she's got a good reason to leave, I need to know it really on the record.
- In other words, if it's prejudicial to your client that she has jumped ship on you at the last second, you had to get somebody else, then I need to know what it is and I need to know what specifically your new fellow is going to do, how much time he needs, what it is he needs to do so I can say, all right, this is how it's going to be or isn't..
- And again, I'm not asking you to say anything that will prejudice your client in regards to Ms. Richards.

Tr. p. 442-445. The judge advised the lawyers he would either call the lawyers the following day or would come to the courthouse. “..... I mean I’ll just do what I’ve got to do to get this thing one way or the other resolved.” (Trans. P. 445-446).

On the following day, Solicitor Bailey raised the issue of the pending defense motion for a continuance. Tr. p.. 472. The judge asked about the investigator who left the team.

Mr. Beauford: Basically it was a matter of I guess communication in a sense. And I don’t know what happened there. I mean basically she felt the communication wasn’t the way she wanted it to be, so she decided not to be a part of the team, in short.

The Court: Has she, does she expect to be paid, first of all? That’s not all that important except for this: I mean, I think once she gets on board, you know, I mean, I don’t know whether she can jump ship so quick.

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

Tr. p.473-474) The Court asked if the new investigator could take her place and Beauford said that he could. Tr. p. 474-475. The judge then said “as long as you have what you need, you know.” Tr. 475. Beauford told the judge that Rickborn had not done some things she was supposed to have done such as getting Russell’s VA and military records. The judge then asked how long would it take the new investigator to do the things left undone and Beauford said he needed two weeks. Tr. p. 476. The judge asked if Rickborn had started getting the records they needed and Beauford replied that she had not. Tr. p. 477-478. The judge denied the motion noting that he was not able to grant a continuance to allow someone to plunder through VA hospital records on the father. Tr.p. 478. He offered to assist counsel with an order and would make calls top expedite it, but felt it was time to try the case knowing that there will also be

another witness or piece of evidence that can be found by either side. Tr.p. 479. At that point, Judge Shuler wanted Beauford to have Rickborn in court the next day if they want her to continue on the case if her services were absolutely necessary or that he could find someone to replace her. Beauford then stated that he preferred to go with someone else he had spoken with. Tr.p. 476.

The State maintains that because reversals of the denial of a continuance are "about as rare as the proverbial hens' teeth," petitioner failed to meet the prejudice prong. State v. Lytchfield, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957). The trial court's refusal of a motion for continuance in a criminal case will not be disturbed absent a clear abuse of discretion resulting in prejudice to the appellant. State v. Williams, 321 S.C. 455, 459, 469 S.E.2d 49, 51 (1996); Lytchfield, supra.

Here, the Applicant has failed to show that the failure to present the April 29 letter was itself deficient performance. Contrary to the claims, Rickborn was not the lawyer, and counsel had advised the judge that someone knew was available to take the case but needed two weeks. The Applicant seeks to suggest that counsel hid the basis for the resignation from the Court and that if there reason had been presented, the Court would have taken steps to remedy the situation with a continuance. The Court must disagree.

First, the problems evident in the letter about the communication problems were the basis of her resignation. She gave counsel a road map of items to complete, as set out above. Her focus was on the need for the military records of the father. These issues were revealed to the trial court at the hearing.

This Court cannot say that there is a reasonable probability that the trial court would have granted the continuance by the mere presentation of the Rickborn letter. It was evident that

there was a communication breakdown and the remedy was explored by the court. Certainly, it was not error by defense counsel that Rickborn be returned to the defense team after the letters between Rickborn and Hardee-Thomas revealed a breakdown between them. The trial court was presented with the appropriate alternative. His discretion would not have changed had become aware of the breadth of the breakdown between counsel and the particular investigator. He has failed in his burden of proof. Cf, Morris v. State, 371 S.C. 278, 639 S.E.2d 53 (2006) (counsel ineffective in failing to request a continuance when defendant absent).

9(*) Trial counsel was ineffective in failing to adequately voir dire potential jurors, and failing to object to the qualification of jurors who were automatically in favor of capital punishment for defendants convicted of an intentional homicide and/or unable to give due consideration to evidence in mitigation. [Amended at Hearing - IAC - VOIR DIRE ACTS AND OMISSIONS]

In this new allegation, Weik, relying upon the assessment of Jeff Bloom asserts that counsel was unprepared to adequately voir dire the potential juror at trial. Particularly, he claims counsel was ineffective in failing to adequately voir dire and challenge for cause the following jurors: Douglas Judy (#174), William Matthews (#204), Michael Black (#34), and Daniel Owens (#239). As a result of failing to move to excuse for cause the jurors, trial counsel was unable to strike the following jurors: Douglas Judy (#174), Jerry Bryan (#48), and Marvin Ladson (#183), all of whom served on Applicant's jury.

At the outset, this Court must review the individual voir dire of the particular jurors. Juror Douglas Judy, #174, stated that he would impose death for an intentional killing, and that if "he's found completely guilty of it he deserves the death penalty." (Tr. P. 562, lines 2-8). He also stated that "[i]f someone has killed someone over an argument or something, it wasn't really meant to happen but it did, well, that's [a] life sentence to me." (Tr. P. 569; lines 16-18). When

defense counsel inquired whether a killing “without any reason” necessitated a death sentence, Mr. Judy replied “[w]ell, I mean, if it was proven, you know, that there was no doubt in my mind that he did do it and I knew he did it with the evidence, it depends on the circumstances, you know whether to give him life or death.” (Tr. P. 562, lines 22-25).

However, the voir dire must be viewed as a whole. Judge also stated that : “ I’ll have to hear everything, you know, before I give a death sentence” (Tr.p. 564), and “if someone killed someone over an argument or something, it wasn’t really meant to happen but it did well that ‘s a life sentence to me” (Tr.p. 569, l. 16-19). In addition, Judge had advised the trial judge that he was in group three and would not automatically sentence a person to death or life if conviction, but would listen to the evidence before he decided. (Tr.p. 557-558) .

A prospective juror may be excluded for cause when his views on capital punishment are such as would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). See also State v. Wood, 362 S.C. 135, 607 S.E.2d 57 (2004), cert. denied --- U.S. ----, 125 S.Ct. 2942, 162 L.Ed.2d 873 (2005); State v. Council, 335 S.C. 1, 515 S.E.2d 508, cert. denied, 528 U.S. 1050, 120 S.Ct. 588, 145 L.Ed.2d 489 (1999); S.C.Code Ann. § 16-3-20(E) (juror may not be excused in a death penalty case unless his beliefs or attitudes against capital punishment would render him unable to return a verdict according to law). When reviewing the trial court's qualification or disqualification of prospective jurors, the responses of the challenged jurors must be examined in light of the entire voir dire. Council, supra. The determination of whether a juror is qualified to serve on a death penalty case is within the sole discretion of the trial judge and is not reversible on appeal unless wholly unsupported by the evidence. State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992), cert. denied, 508 U.S. 915, 113

S.Ct. 2355, 124 L.Ed.2d 263 (1993), overruled on other grounds, *Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999). The ultimate consideration is that the juror be unbiased, impartial, and able to carry out the law as explained to him. *Id.* On review, the trial court's disqualification of a prospective juror will not be disturbed where there is a reasonable basis from which the trial court could have concluded that the juror would not have been able to faithfully discharge his responsibilities as a juror under the law. *State v. Green*, 301 S.C. 347, 392 S.E.2d 157, cert. denied, 498 U.S. 881, 111 S.Ct. 229, 112 L.Ed.2d 183 (1990). See also *Wainwright*, *supra*, (there will be situations where the trial court is left with the definite impression that prospective juror would be unable to faithfully and impartially apply the law and this is why deference must be paid to trial court who sees and hears the juror). see *Heath v. Jones*, 941 F.2d 1126, 1136 (11th Cir. 1991) (counsel not ineffective in not seeking to strike juror could be fair and follow the law). There is no ineffectiveness from failure to challenge a juror where the attorney lacks the information to object to the juror. *Kimes v. U.S.*, 939 F.2d 776, 779 (9th Cir. 1991).

Here, viewing the responses as a whole, this Court cannot conclude that either deficient performance exist or 6th Amendment prejudice. The trial court did not find disqualification appropriate *sua sponte* based upon the entirety of the responses. This Court, viewing the entire voir dire does not see a basis for disqualification as a matter of law.

The Applicant points out that William Matthews, # 204, when asked his opinion about the death penalty, he responded that "...I would have to hear the facts and all. And if I felt like he committed it and he did it and, you know, was guilty of the crime, I would vote for it." (Tr. P. 1001, lines 1-9). Mr. Matthews said he had "always felt the same way I feel now." (Tr. P. 1002, lines 3-6). Defense counsel then went on to rehabilitate Mr. Williams by asking him if he would weigh all the factors, which the juror agreed to do. (Tr. P. 1003, lines 3-9).

However, Matthews had stated that he felt that he could give the death penalty if it was appropriate, but not in all cases. Tr.p. 997. On Beauford's questions, he confirmed that he would consider other factors than the crime in determining life or death and "I would hear the facts" and "other factors." Tr.p. 1001-01.

Like the other juror, the responses from the voir dire, as a whole, do not compel disqualification. He agreed he would listen to other factors than the crime in deciding death or life. He was qualified and counsel was not deficient in failing to seek his disqualification base on the responses.

Juror number 34, Michael Black, informed the Court "I favor the death penalty if he's guilty of it." (Tr. P. 1022, lines 14-15). The Court then asked "[w]hen you say he's guilty of it, you mean if he's guilty of the crime?," to which Mr. Black responded "Yes, sir." (Tr. P. 1022, lines 16-18). However, the Court determined that he was qualified when the juror by asking him if he would consider all factors, which he agreed he would do. (Tr. P. 1025-1027). On examination by defense counsel, the juror indicated he was "old school," but did not elaborate on what he meant other than to say "you're innocent until proven guilty."

Contrary to the claims of the Applicant, favoring the death penalty does not make a juror disqualified. It is only when those beliefs impair his ability to follow his oath and consider other factors. He had indicated to the court that he would no sentence a person automatically to death for murder but would listen to the circumstances. Considering the entirety of the voir dire, Black was qualified. His claims otherwise are a misstatement of the law. Counsel was not ineffective in failing to seek to strike for cause.

Juror number 239, Daniel Owens, initially stated he was in the "first paragraph," meaning death for everyone "[i]f murder is proven." (Tr. P. 1064, lines 13-19). Mr. Owens stated that

he would give the death penalty “unless there’s some real extenuating circumstances” and that he “would consider those.” Tr.p. 1066-67. Upon further inquiry by the court, the juror said he would consider all the facts. Tr.p. 1067, 1068. He then expressly confirmed that he would not always give a death penalty. Tr.p. 1068, 1070 and that “I would weigh all the facts.” Tr.p. 1069. The Applicant points out that counsel developed that the juror was inclined to give the death penalty, but that he would not always want to give a death penalty. Tr.p. 1071.

The problem with the Applicant’s approach with this jury is that he attempts to parse one sentence and then suggest that remainder of the responses are faulty. Here, there was no automatic disqualification by response which could be read as clearly indicating he was not automatically going to vote for death but would consider other factors. The trial found he was qualified. This Court cannot find counsel ineffective in failing to move for his disqualification based upon the entire voir dire which revealed a qualified juror. His claim must be denied.

9(). Applicant was denied the effective assistance of counsel at the penalty phase because trial counsel did not object to a portion of the Solicitor’s cross-examination of Applicant’s expert Dr. Augustus Rodgers, PhD and to the Solicitor’s closing argument as follows: during cross-examination, Dr. Rodgers admitted that the S.C. prisons where Applicant would be imprisoned if he received a life sentence have: crafts available for prisoners; jobs for which prisoners are sometimes paid; canteens where prisoners could buy soft drinks, candy bars, popcorn and other items with the money they earn in prison; job training; educational opportunities for prisoners to get their GEDs and to take college courses; recreational facilities available for prisoners; “three square meals” per day; free clothing and shoes; free medical care; radios and televisions.(Tr. 1944-1954). The Solicitor argued in closing argument that the jury should consider the fact that a prisoner would have a job in prison, get paid, have a canteen where he could buy soft drinks and candy and have a TV as reasons and compared the Applicant’s life in prison to the decedent who was dead and in her grave. Tr. p. 2135-2136. This evidence adduced during the cross-examination of Dr. Rodgers and the Solicitor’s argument injected arbitrary factors into the jury’s sentencing considerations in violation of S.C. Code Section 16-3-25(C)(1). “When th jury is invited to speculate about irrelevant matters upon which a death sentence may be based, §16-3-25(C)(1) is violated.” State v. Burkhart, - S.E.2d -, 2007**

WL 80036 decided January 8, 2007. When an arbitrary factor is injected into the jury sentencing consideration, reversal is required. (Motion to Amend received on February 6, 2007) (IAC- PENALTY PHASE - FAILURE TO OBJECT TO PRISON LIFE EVIDENCE AND ARGUMENT] .

Subsequent to the hearing and presentation of testimony and after the record was closed, the Applicant on February 6, 2007, made this additional amendment based upon the intervening decision in State v. Burkhart , __ S.C. __, __ S.E.2d __, 2007 WL 80036 (S.C. January 8, 2007). Respondents have opposed this amendment in their proposed order for a number of well - founded reasons. First, the record and amendments had been closed at the conclusion of the hearing on September 21, 2006. Second, the Applicant had been given numerous opportunities to amend since 2003. Third, the Court in Burkhart relied upon the Court's 2005 decision in State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (2005), the defendant challenged on appeal the admission of evidence regarding general prison conditions. Although the South Carolina Supreme Court held the issue was not preserved for review, the Court cautioned the State and the defense bar that such evidence is not relevant to the question of whether a defendant should be sentenced to death or life imprisonment. 366 S.C. at 498-99, 623 S.E.2d at 387. Plainly, at the time the PCR hearing was held, Bowman and its cautionary foreshadowing of the Burkhart opinion. This amendment is untimely and must be rejected.

Assuming *arguendo* that the amendment is allowed, the delay by competent counsel in this proceeding as well as the failure to object in Bowman and the rejection of a similar argument in State v. Ivey, 325 S.C. 137, 481 S.E.2d 125 (1997) where Ivey argued that the court erred by preventing the defense from ensuring that the jury had a correct understanding of the term "life imprisonment," where the solicitor introduced considerations of early release and

misled the jury about Ivey's future dangerousness to society, *while depicting life imprisonment as a luxury vacation.*⁸

Applicant claims 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 these same privileges. Respondents have submitted that they have failed to show deficient performance or prejudice by the failure to object.

1. The Opinion On Prison Life and Adaptability

During the presentation of Dr. Augustus Rodgers, a social worker, he revealed that as a consultant with the prisons, he was involved in the direct training and teaching of inmate to help them develop life skills which would enable them to adjust better to prison life and also better equip them and prepare them for release. Tr.p. 1940. He then admitted that he had spent time with Weik and gave an opinion that Weik could complete one of his programs and make a satisfactory adjustment to prison. Dr. Rodgers stated that he based this upon his observation in the local jail, the interaction with the prison personnel and that he had not been a source of difficulty. Tr.p. 1941.

During the Solicitor's cross-examination of Dr. Augustus Rodgers admitted that the S.C. prisons where Applicant would be imprisoned if he received a life sentence have: crafts available for prisoners; jobs for which prisoners are sometimes paid; canteens where prisoners could buy

⁸ It is interesting to note that death row inmate Thomas Ivey in his federal habeas action raised a strikingly similar claim before the 4th Circuit that was rejected in Ivey v. Catoe, 36 Fed.Appx. 718, Unpublished Op, No. 01-11. (4th Cir. 2002)(prosecutor's remarks regarding prison guard's testimony as to unobjected conditions at correctional facility were fair comment on the evidence, and thus permissible and stay not warranted to litigate in state PCR action counsel failure to object to prison conditions evidence). Ivey has been represented by one of Weik's counsel in his PCR litigation of a different murder trial.

soft drinks, candy bars, popcorn and other items with the money they earn in prison; job training; educational opportunities for prisoners to get their GEDs and to take college courses; recreational facilities available for prisoners; “three square meals” per day; free clothing and shoes; free medical care; radios and televisions. (Tr. p. 1944-1954). Trial counsel did not object.

2. Solicitor’s Closing Argument

Look at life in prison. You’ve heard some testimony that he can adjust to life imprisonment. You heard that from the psychiatrist, you’ve heard that from the social worker. But ask yourselves – one of the witnesses they called testified a little bit about life in prison, talked the fact that – and it’s life without parole, there’s no dispute about that so he would live the rest of his life in prison. The defense will tell you about that and the judge will instruct you on that.

But when you consider adjustment to prison, you got to look at what you’re adjusting to. You’re looking at adjustment to a life where he goes to prison, he’s behind the fences, he’ll be given a prison job, according to that witness sometimes they’ll pay them some money, he’s got a canteen where they can buy stuff, Cokes, candy bars, that kind of stuff, television to watch in their cells.

In the meantime, Susan Krasae is dead and in her grave. And I ask you if life imprisonment is an acceptable alternative to somebody who’s done what he’s done. That’s a choice you all are going to have to make.

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

Assuming this issue is properly before this Court, Respondents submitted that in 1999 when this case was tried, reasonable defense counsel who placed in evidence the issue of a capital inmates adaptability to prison life had no basis to object to evidence of what prison life is to assist the jury to determine whether the inmate would be adaptable to those conditions which may be different than that conditions he was presently living under or as a basis to impeach the opinion of the expert. As noted above, in 1997, the Court upheld an argument, by the same solicitor which described a prison as a holiday inn according to the opinion of the court. This

was two years before the case was tried. The issue before the court, viewing counsel perspective at the time, on whether he was deficient in failing to object at that time.

A counsel is not ineffective inn failing to forecast changes in the law. Sherrill v. Hargett, 184 F.3d 1172(10th Cir 1999); Reasonable counsel cannot be required to anticipate later decisions. Sistruck v. Vaughn, 96 F.3d 666, 672 (3d Cir. 1996)(counsel not deficient in failing to anticipate Batson). Evidence of this falling within reasonable standards is within the Bowman decision itself when it cautions the prosecution and defense to not present this evidence in the future. Unlike Bowman, in Burkhart, possibly for the first time, similar evidence was objected to and the court decided the case.

The Applicant has failed to show that in 1999 reasonable counsel was constitutionally required to object to this evidence and argument, particularly after Ivey and the fact that the Court in 2005 thought it needed to caution both parties about the use of such evidence of real prison life. He has failed to show deficient performance.

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

IT IS THEREFORE ORDERED:

1. That the Application for Post Conviction Relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this ____ day of February , 2007.

Honorable Perry M. BUCKNER
CIRCUIT COURT JUDGE

_____, South Carolina

STATE OF SOUTH CAROLINA)
)
 COUNTY OF DORCHESTER)
)
)
 JOHN EDWARD WEIK, #5068)
)
 Applicant,)
)
 vs.)
)
 STATE OF SOUTH CAROLINA,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS

C/A No. 03-CP-18-1070

ORDER OF DISMISSAL

#1
PMB

This matter comes before this Court by a series of amended applications for post-conviction relief filed by John Edward Weik through his court appointed counsel Michael P. O'Connell and Melissa Kimbrough. On July 9, 2003, the South Carolina Supreme Court entered an order assigning this Court jurisdiction. On September 18 - 21, 2006, this matter was heard. The Applicant was present and represented by Mr. O'Connell and Ms. Kimbrough. The Respondents were represented by Assistant Deputy Attorney General Donald J. Zelenka. Testimony was received from Robert Minter, Russell Christopher Weik, Dr. Donald Morgan, Scott Parker, Amy Weik Maxwell, John William Gunter, Magdalena Gunter, Russell C. Weik, Dr. Donna Schwartz Watts, Dr. Seymour Halleck, Jeffrey Bloom, Dr. Pamela Crawford, Dr. Augustus Rodgers, Margaret O'Shea, Percy Beauford, and Marva Hardee-Thomas. Subsequently, this Court received the post-hearing deposition of Dr. Geoffrey McKee and Patricia Rickborn taken October 3, 2006. This Court requested proposed orders from each party. This Order of Dismissal follows.

I.

PROCEDURAL HISTORY

On July 16, 1998, a Dorchester County Jury indicted John Edward Weik for Dorchester County for murder (98-GS-18-0750) and burglary in the first degree (98-GS-18-749). The State subsequently served notice of intent to seek the death penalty on July 20, 1998.

A. Statement of Facts

The Applicant, John E. Weik, had a relationship with Susan Krasae when she was about 17 years old. As a result, they had a son, Daniel, who was around ten years old when her death occurred.

#2
PnB
Susan had custody of Daniel after their relationship ended. She later married, had a second child, Amber, and divorced Amber's father. At the time of the incident, Susan was living with her two children and fiancé in a mobile home next door to her father, Carl Hutto. Weik had not seen his son for nearly nine (9) years. During the year of the crime he began seeing his son.

On April 30, 1998, John Weik lived with his parents in Moncks Corner. The day before he told his co-worker that he was having trouble with his son and that if he did not come back to work that something had happened. He called his son, Daniel, on the telephone. Daniel told him, "I can't see you anymore", after he had tried to get his son to choose between them. After the call, Weik got into his truck, armed with a loaded shotgun and drove to the Krasae trailer. An argument occurred. Ms. Krasae returned to the inside of her trailer with her children. Weik went to his truck, got a 12 gauge semiautomatic shotgun, which was loaded, and returned to the trailer. He kicked the door open the victim had closed and shot Susan Krasae four (4) times with double aught buckshot. She died as a result.

Weik got into his truck and drove off. After a short distance he was stopped. The Appellant subsequently gave statements to the law enforcement admitting his involvement in the crime.

B. Procedural History

Percy Beauford and Marva A. Hardee-Thomas represented the Applicant at trial. Solicitor Walter M. Bailey, Jr., Robert D. Robbins, and B. Harrison Bell represented the Respondents. A pretrial hearing was held on May 5, 1999. A competency hearing was held on May 18, 1999 before the Honorable M. Duane Shuler, Presiding Judge. Judge Shuler held that Weik was competent to stand trial on May 19, 1999.

#3
PAB
Jury selection began on May 24, 1999. On May 26, 1999, the trial began before Judge Shuler and jury. On May 27, 1999, the jury found Weik guilty of murder and burglary in the first degree. On May 29, 1999, the penalty phase began. The jury found beyond reasonable doubt the existence of the statutory aggravating circumstances of physical torture and burglary in the first degree; and recommended the death sentence. Judge Shuler then sentenced Weik to death for the murder conviction. He sentenced him to life imprisonment for burglary in the first degree.

Weik appealed to the South Carolina Supreme Court. On appeal, Robert M. Dudek of the South Carolina Office of Appellate Defense represented him. In the appeal, the following questions were raised by Weik:

- I. Whether the judge erred by refusing to hold a competency hearing during the guilt stage of the trial when defense counsel informed the judge Appellant was hearing voices, counsel had serious reservations about Appellant's ability to make rational decisions and assist counsel, and the judge had a continuing duty to assure Appellant was competent to stand trial?

- II. Whether the trial judge erred by refusing to accept Appellant's plea of guilty but mentally ill where the judge had already heard evidence Appellant was mentally ill, and his truncated misleading colloquy with Appellant about the meaning of "malice" was insufficient to justify the refusal to accept that plea once the jury already knew of it?
- III. Whether the judge erred by ruling Appellant was competent to stand trial where even the State's experts testified Appellant was not "faking", he was relating "bizarre information" to the doctors, where Dr. Schwartz-Watts and Dr. Morgan testified Appellant was not competent, and Dr. Brannon testified Appellant was "crazy", since the judge abused his discretion by finding Appellant competent given this evidence.
- IV. Whether the judge erred by failing to instruct the jury on the law of guilty but mentally ill where the judge earlier stated he would submit that verdict form, and there was evidence Appellant was hearing voices, felt unable to "get back out" of the house before he shot the decedent, and felt outside his body at the time he shot the decedent?
- #4
PMB
V. Whether the judge erred by admitting State's penalty exhibits 1-12, particularly State's 8, 9, & 11, since they are very gruesome photographs, and their probative value was far outweighed by their unduly prejudicial effect?
- VI. Whether Appellant's death sentence should be vacated as disproportionate to other death penalty cases since this was a domestic crime, the aggravating circumstances were only technically applicable, and Appellant was mentally ill?

The South Carolina Supreme Court on September 3, 2002, initially affirmed the conviction and sentence. State v. John Edward Weik, Op. No. 25556, 2002 WL 2008242 (SCSCT Sep. 3, 2002). A petition for rehearing was filed and granted on October 10, 2002. After argument, on January 9, 2003, the South Carolina Supreme Court adhered to its original decision.

The Applicant made a petition for writ of certiorari to the United States Supreme Court in the direct appeal. In the petition, he raised the following question presented:

"Whether the South Carolina court's refusal to make a competency inquiry when informed that the mentally ill Petitioner was hearing voices instructing his what to do at a

critical point during his death penalty trial violated Pate v. Robinson, 383 U.S. 375 (1966)?"

On June 16, 2003, the Court denied the petition. Weik v. South Carolina, 539 U.S. 930 (June 16, 2003).

This Court has before it the evidence presented at the hearing and the following materials:

1. Record on Appeal – 5 volumes
2. Written Taped Statement of John Weik.
3. Final Brief of Appellant.
4. Final Brief of Respondent.
5. Final Reply Brief of Appellant.
6. State Exhibit 67
7. State Exhibit 62.
8. Evidence transfer sheet.
9. April 30, 1998 traffic stop statement of Weik.
10. 911 Dispatch Tape Summary – Photos of Car (4).
11. Evidence transfer.
12. Appeal Notice documents, including notice of appeal, sentencing sheets, indictments, and verdicts.
13. Transcript of service of death penalty notice. July 20, 1998.

II.

ALLEGATIONS RAISED IN APPLICATIONS

Mr. Weik filed his initial application for post-conviction relief in Dorchester County on June 19, 2003, through appellate counsel Dudek. In the application, it was alleged that he received ineffective assistance of counsel on various grounds.

Particularly, he alleged:

9. Ineffective assistance of counsel in derogation of the Sixth Amendment to the United States Constitution.
- A. Defense counsel was ineffective, in violation of the Sixth Amendment to the United States Constitution, for failing to comply with the statutory requirements necessary for the Court to accept a guilty but mentally ill plea from petitioner. The South Carolina Supreme Court refused to address this issue on appeal due to defense counsel's ineffectiveness. **[Deleted in Amended Application]**.
- B. Defense counsel was ineffective, in violation of the Sixth Amendment to the United States Constitution, for failing to request that the Court charge guilty but mentally ill as a verdict form during the guilt phase. Counsel's ineffectiveness caused the Supreme Court to refuse to address this issue on direct appeal. **[Deleted in part in Amended Application]**.
- C. Defense counsel was ineffective in violation of the Sixth Amendment to the United States Constitution, by failing to offer available evidence of voluntary manslaughter. The decedent's daughter testified at the penalty stage of the trial, that the decedent and petitioner were involved in a physical altercation immediately before the shooting. This available evidence of heat of passion and a sufficient legal provocation would have caused the trial court to charge the jury on voluntary manslaughter, and could have averted a death penalty case. **[Deleted in Amended Application]**.
- D. Defense counsel's ineffectiveness was so pervasive that it violated petitioner's Sixth Amendment right, and also the South Carolina standard under Frett v. State, 298 S.C. 54, 378 S.E.2d 249 (1988). **[Deleted in Amended Application]**.

The Respondents made a Return to the original application on October 6, 2003. On June 19, 2006 an Amended Application was filed. On July 26, 2006, a return to the amended application

was filed. On September 15, 2006, the Applicant made a second amended application. During the hearing, the Applicant made further amendments. On January 18, 2007, the Applicant made a motion to file a third amended application. Finally, on February 6, 2007, the Applicant made a motion to amend the Application a fifth time. As presently presented before this court in the third amended application dated January 18, 2007, as proposed to be amended February 6, 2007, the application would read as follows:

- #7
PrB
1. **(ABANDONED Per January 22, 2007 Letter). 9 (a).** Applicant received ineffective assistance of counsel during the trial of his case inasmuch as counsel failed to proffer psychiatric testimony and evidence in support of their motion for a second Blair/competency hearing. *Strickland v. Washington*, 448 U.S. 668 (1984); *State v. Blair*, 275 S.C. 529, 273 S.E.2d 536 (1981); *Matthews v. State*, 358 S.C. 456, 596 S.E.2d 49 (2004); *State v. Burgess*, 356 S.C. 572, 590 S.E.2d 42 (Ct. App. 2003); *State v. Drayton*, 270 S.C. 582, 243 S.E.2d 458 (1978); *Hughes v. State*, 367 S.C. 389, 626 S.E.2d 805 (2006). **[IAC - FAILURE TO PRESENT PSYCHIATRIC TESTIMONY CONCERNING INTERVENING COMPETENCY TO STAND TRIAL]**
 2. **(ABANDONED Per January 22, 2007 Letter). 9(b)** Applicant received ineffective assistance of counsel inasmuch as counsel failed to offer a guilty but mentally ill defense during the guilt-or-innocence phase of his trial. *Strickland v. Washington*, *supra*; *State v. Hatfield*, 300 S.C. 469, 388 S.E.2d 802 (1990); S.C. Code Statute 17-24-20. **[FAILED TO OFFER GBMI DEFENSE].**
 3. **(ABANDONED Per January 22, 2007 Letter). 9(c)** Applicant received ineffective assistance of counsel inasmuch as counsel failed to provide evidence of Applicant's background to the State's experts when there is a reasonable probability that such evidence would have changed the opinions rendered by the State's experts at both the competency hearing and at the penalty phase. *Strickland v. Washington*, *supra*; *Williams v. Taylor*, *supra*. **[FAILED TO PROVIDE BACKGROUND EVIDENCE TO DEFENSE EXPERTS]**
 4. **9(d).** Applicant received ineffective assistance of counsel inasmuch as counsel failed to object to the trial judge's erroneous jury charge that malice could be implied from the use of a deadly weapon. *Strickland v. Washington*, *supra*; *Yates v. Evatt*, 500 U.S. 391 (1991). **[FAILED TO OBJECT TO IMPLIED MALICE INSTRUCTION].**

5. *(ABANDONED Per January 22, 2007 Letter)*. 9(e) Applicant received ineffective assistance of counsel inasmuch as counsel failed to object to the solicitor's offering expert testimony from Earl Asbell during the guilt phase when this witness had never been qualified in the area of blood spatter. *Strickland v. Washington, supra; McDill v. Mark's Auto Sales, 626 S.E.2d 52 (2006)*. **[FAILED TO OBJECT TO EXPERT OPINION ON BLOOD SPLATTER BASED UPON FAILURE OF EXPERT TO HAVE BEEN QUALIFIED BEFORE]**.
6. 9(f) Applicant was denied due process of law and a fair sentencing determination based on the State's use of "torture" as an aggravator which, as defined under South Carolina law, is unconstitutionally over broad. U.S. Const. Amend V, VIII, and XIV, the South Carolina Constitution and federal and state law. **[DENIED DUE PROCESS BY OVERBROAD TORTURE AGGRAVATOR]**.
7. 9(g) Applicant was not represented by two lawyers as required by S.C. Code Section 16-3-20(B)(1) and thus denied a fair trial because one of the lawyers appointed by the Court, Marva Hardee-Thomas, did not act as a lawyer during preparation for the trial and during the trial but merely provided as clerical assistance to the other appointed counsel. *State v. Diddlemeyer, 296 S.C. 235, 371 S.E.2d 793 (S.C. 1988)*. **[NEW- Only One Counsel Acted As Lawyer In Capital Case]**
8. 9(h) Applicant was denied effective assistance of counsel at the penalty phase inasmuch his lawyers did not object to the trial judge submitting the aggravating circumstance of torture which, as defined under South Carolina law, is unconstitutionally over broad. U.S. Const. Amends. Fifth, Eighth and Fourteenth, the South Carolina Constitution and federal and state law. **[NEW - IAC-TORTURE AGGRAVATOR - Counsel Filed to object to OVERBROAD TORTURE AGGRAVATOR - See ground 6]**.
9. *Abandoned per January 19, 2007 Letter*) 9(I). Applicant was denied effective assistance of counsel at the penalty phase when his attorneys failed to object to the trial judge's faulty instructions to the Applicant during the penalty phase that Applicant's final argument to the jury was restricted to commenting on the matters in evidence and the appropriate sentence he should receive. The Applicant was not instructed by the trial judge that he could also express remorse and ask for mercy and as a result elected not to argue to the jury. **[NEW - IAC - PERSONAL PENALTY PHASE CLOSING ISSUE - Failed to object to instructions in penalty phase that restricted personal argument to matters in evidence]**
10. **ABANDONED** per January 19, 2007 Letter 9(j) Applicant was denied effective assistance of counsel at the competency hearing because trial counsel did not timely hire investigators so they would have had sufficient time prior to trial to investigate and

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gather all of the Applicant's personal and family background. If complete evidence of the Applicant's personal and family background had been supplied to the Applicant's mental health experts, their testimony would have been substantially bolstered and the testimony of the state's mental health experts would have been impeached which would probably have resulted in finding that the Applicant was incompetent to stand trial. **[NEW- IAC - COMPETENCY HEARING - DID NOT TIMELY HIRE INVESTIGATORS TO MAKE FAMILY BACKGROUND INVESTIGATION].**

11. **ABANDONED** per January 19, 2007 Letter 9(k) Applicant was denied effective assistance of counsel at the competency hearing because trial counsel did not provide evidence of the Applicant's personal and family background to their mental health experts and had they done so, the mental health experts' testimony would have been substantially bolstered and the testimony of the state's mental health experts impeached which would probably have resulted in a finding that the Applicant was not competent to stand trial. **[NEW-IAC - Competency to stand trial Hearing - FAILED TO PROVIDE PERSONAL AND FAMILY BACKGROUND EVIDENCE TO DEFENSE EXPERTS]**
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12. **ABANDONED** per January 19, 2007 Letter : 9(l) Applicant was denied effective assistance of counsel at the competency hearing because trial counsel failed to properly prepare the mental health experts' testimony including but limited to not asking them in advance what they would be able to testify to as experts, not providing them with evidence of the Applicant's background which would have bolstered their testimony, not timely providing them the Applicant's records from the State Hospital, and not informing the experts of the questions they were going to ask the experts. Had trial counsel done these things, the Applicant would probably have been found incompetent to stand trial. **[NEW-IAC - Competency to Stand Trial - FAILED TO PREPARE MENTAL HEALTH TESTIMONY AND PROVIDE BACKGROUND AND ASK WHAT THEIR OPINION WAS AND POTENTIAL QUESTIONS].**
13. **9(m)** Applicant was denied effective assistance of counsel at the penalty phase because trial counsel did not timely hire investigators so they would have had sufficient time prior to trial to investigate and gather all of the Applicant's personal and family background. If complete evidence of the Applicant's personal and family background had been supplied to the Applicant's mental health experts and the social worker, their testimony would have been substantially bolstered and the testimony of the state's mental health experts would have been impeached which would probably have resulted in life sentence. **[NEW- IAC - PENALTY PHASE - DID NOT TIMELY HIRE INVESTIGATORS TO MAKE FAMILY BACKGROUND INVESTIGATION].**
14. **9(n)** Applicant was denied effective assistance of counsel at the penalty phase because trial counsel did not provide evidence of the Applicant's personal and family background to their mental health experts and the social worker and had they done so, their testimony would have been substantially bolstered and the

testimony of the state's mental health experts impeached which would probably have resulted in a life sentence. [NEW- IAC - PENALTY PHASE - FAILED TO PREPARE MENTAL HEALTH TESTIMONY AND PROVIDE FAMILY BACKGROUND EVIDENCE AND ASK WHAT THEIR OPINION WAS AND POTENTIAL QUESTIONS].

15. 9(o). Applicant was denied effective assistance of counsel at the penalty phase because trial counsel failed to properly prepare the mental health experts' testimony including but limited to not asking them in advance what they would be able to testify to as experts, not providing them with evidence of the Applicant's background which would have bolstered their testimony, not timely providing them the Applicants' records from the State Hospital, and not informing the experts of the questions they were going to ask the experts. Had trial counsel done these things, the Applicant would probably have been sentenced to life imprisonment. [NEW- IAC - PENALTY PHASE - FAILED TO PREPARE MENTAL HEALTH TESTIMONY AND PROVIDE FAMILY BACKGROUND EVIDENCE AND ASK WHAT THEIR OPINION WAS AND POTENTIAL QUESTIONS].

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16. 9(p) The Applicant was denied effective assistance of counsel when trial counsel did not provide a sufficient basis for their continuance motion at the hearing on May 18, 2006 when such basis was available namely a letter to them from the mitigation investigator dated April 29, 1999 which set out in detail trial counsel's inept cooperation with and supervision of the mitigation investigator - one Patti Rickborn - which resulted in her resigning from the case. If trial counsel had provided this letter to the trial judge, he would have realized that trial counsel's on the record explanation of the reason why the mitigation expert resigned on April 29, 1999 was not accurate and the trial judge would have been alerted that they were not providing effective assistance of counsel to the Applicant, would have probably continued the trial so the new mitigation investigator would have had time to gather complete information about the Applicant's personal and family background which would have been provided to the mental health experts and presented to the jury and would probably have resulted in a life sentence. [NEW - IAC - CONTINUANCE REQUEST- failed to provide April 29 , 1999 Rickborn letter as explanation for resignation].

17. ABANDONED per January 17, 2007 Letter : 9(q) Applicant was denied effective assistance of counsel when trial counsel did not report to the trial judge their incompetence in their representation of Applicant as set out in the April 29, 1999 letter of Patti Rickborn. If the trial judge had been given Ms. Rickborn's letter, he probably would have relieved trial counsel, granted a continuance and appointed competent counsel who would have provided effective counsel as opposed to the ineffective assistance provided by trial counsel as set out in this Application and the Applicant would probably have received a life sentence. [NEW- IAC - FAILED TO ADVISE

COURT OF OWN INCOMPETENCE AS SET OUT IN RICKBORN LETTER OF APRIL 29]

18. **9(r).** Applicant was denied effective assistance of counsel at the penalty phase because trial counsel did not timely hire investigators so they would have had sufficient time prior to trial to investigate and gather all the Applicant's personal and family background. If complete evidence of the Applicant's personal and family background had been presented to the jury, the Applicant probably would have been sentenced to life by the jury. [New -IAC - FAILED TO TIMELY HIRE MITIGATION INVESTIGATORS.]
19. **9(s)** Applicant was denied the effective assistance of counsel at the penalty phase because trial counsel did not present evidence to the jury of the Applicant's personal and family background which was in their possession at the time of the trial. If the evidence of the Applicant's personal and family background which was in trial counsel's possession had been presented to the jury, the jury would probably have sentenced him to life. [New in Third PCR Application - IAC- FAILED TO PRESENT PERSONAL AND FAMILY BACKGROUND INFORMATION IN COUNSEL'S POSSESSION]
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20. **ABANDONED IN** January 17, 2007 Letter and January 18, 2007 Motion to Amend, p1,n. 1: **9(t).** Applicant was denied the effective assistance of counsel at the competency hearing because trial counsel did not present evidence to the trial judge of the Applicant's personal and family background which was in their possession at the time of trial. If the evidence of the Applicant's personal and family background had been presented to the trial judge, he probably would have found the Applicant incompetent to stand trial. [New in Third PCR Application - IAC- COMPETENCY TO STAND TRIAL - FAILURE TO PRESENT FAMILY BACKGROUND INFORMATION]
21. **9(u).** Applicant was denied the effective assistance of counsel at the penalty phase because trial counsel did not object to a portion of the Solicitor's cross-examination of Applicant's expert Dr. Augustus Rodgers, PhD and to the Solicitor's closing argument as follows: during cross-examination, Dr. Rodgers admitted that the S.C. prisons where Applicant would be imprisoned if he received a life sentence have: crafts available for prisoners; jobs for which prisoners are sometimes paid; canteens where prisoners could buy soft drinks, candy bars, popcorn and other items with the money they earn in prison; job training; educational opportunities for prisoners to get their GEDs and to take college courses; recreational facilities available for prisoners; "three square meals" per day; free clothing and shoes; free medical care; radios and televisions. (Tr. 1944-1954). The Solicitor argued in closing argument that the jury should consider the fact that a prisoner would have a job in prison, get paid, have a canteen where he could buy soft drinks and candy and have a TV as reasons and compared the Applicant's life in prison to the decedent who was dead and in her grave. Tr. p. 2135-2136. This evidence adduced during the cross-

examination of Dr. Rodgers and the Solicitor's argument injected arbitrary factors into the jury's sentencing considerations in violation of S.C. Code Section 16-3-25(C)(1). "When the jury is invited to speculate about irrelevant matters upon which a death sentence may be based, §16-3-25(C)(1) is violated." State v. Burkhardt, - S.E.2d -, 2007 WL 80036 decided January 8, 2007. When an arbitrary factor is injected into the jury sentencing consideration, reversal is required. (Motion to Amend received on February 6, 2007) (IAC- PENALTY PHASE - FAILURE TO OBJECT TO PRISON LIFE EVIDENCE AND ARGUMENT]

22. 9(v) Trial counsel was ineffective in failing to adequately voir dire potential jurors, and failing to object to the qualification of jurors who were automatically in favor of capital punishment for defendants convicted of an intentional homicide and/or unable to give due consideration to evidence in mitigation. [Amended at Hearing - IAC - VOIR DIRE ACTS AND OMISSIONS]

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As noted above, on January 19, 2007, the Applicant, through counsel O'Connell advised this Court that it was abandoning grounds 9 (a), 9(b), 9(c), 9(e), 9(h) 9(j), 9(k), 9(l), 9(q) and 9(t). In addition, this Court notes that the Applicant only raised and argued grounds 9 (f), (g), (m), (n), (o), (r), (s), (p), (u), (v) in his proposed Order to the Court.

III.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and a review of the record, this Court is constrained to deny relief. Pursuant to S.C. Code Section 17-27-80, this Court makes the following findings of fact and conclusions of law on each of the grounds raised which the Applicant has not expressly abandoned.

A. General Law on Ineffective Assistance of Counsel Standards.

Under the standard for evaluating claims of ineffective assistance of counsel, the Applicant must establish that counsel's representation fell below an objective standard of reasonableness. Strickland v Washington, 466 U.S. 668 (1984). Counsel is "strongly presumed

to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of counsel’s performance is whether he fell outside of the range of competence demanded of lawyers practicing criminal law. Butler, supra. To put it another way, in order for petitioner to be granted Post-Conviction Relief for ineffective assistance of counsel, he must show (1) that counsel failed to render reasonably effective assistance under the prevailing professional norms and (2) he was prejudiced by his counsel’s ineffective assistance. Legge v. State, 349 S.C. 222, 562 S.E.2d 618 (S.C. 2002).

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Competency is measured against what an objectively reasonable attorney would have done under circumstances existing at the time of the representation. Savino v. Murray, 82 F.3d 593, 598 (4th Cir. 1996). The Court should, “decline to allow an ineffective assistance of counsel claim to create a situation where post-conviction attorneys stroll in with the full benefit of hindsight to second-guess trial lawyers who professionally discharge their duties to their clients under the manifold pressures of a state trial.” Mazzell v. Evatt, 88 F.3d 263, 269 (4th Cir. 1996).

As the Supreme Court made clear in Strickland:

... the reasonableness of counsel’s actions may be determined or substantially influenced by the defendant’s own statements or actions. Counsel’s actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigations are reasonable depends upon such information . . . [W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel’s failure to pursue those investigations may not later be challenged as unreasonable.

Strickland, 466 U.S. at 691; Barnes v. Thompson, 58 F.3d 971, 978 (4th Cir. 1995); Matthews v. Evatt, 105 F.3d 907, 919-920 (4th Cir. 1997). Bell v. Evatt, 72 F.3d 421, 429 (4th Cir. 1995). In

many cases, counsel's decision not to pursue a particular approach at sentencing reflects not incompetence, but rather a sound strategic choice. See Rose v. Lee, 252 F.3d 676, 693 (4th Cir.2001). Accord Bunch v. Thompson, 949 F.2d 1354, 1364 (4th Cir.1991).

In addition to a burden of showing deficient performance, counsel must also prove prejudice under the Sixth Amendment. The standard of prejudice differs depending upon whether it is related to guilt phase issues or penalty phase issues. In order to prove prejudice, an applicant must show that but for counsel's errors, there is a reasonable probability the result of the trial would have been different. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.*; Jones v. State, 332 S.C. 329, 504 S.E.2d-822 (1998). A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Petitioner must show that a reasonable probability exists that but for the unprofessional error, "at least one juror would have struck a different balance." Wiggins v. Smith, 539 U.S. 510, 537, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). Thus, Petitioner must show by a probability sufficient to undermine confidence in the outcome that the deficient performance "might well have influenced" at least one juror to choose life imprisonment. *Id.* at 538 (quoting Williams v. Taylor, 529 U.S. at 398). The Supreme Court has specifically rejected the contention that a petitioner must establish "a reasonable probability" by a preponderance of the evidence. Williams v. Taylor, 529 U.S. at 405-06. See also Rose v. Lee, 252 F.3d 676, 689 (4th Cir.2001) (noting same).

9(d). Applicant received ineffective assistance of counsel inasmuch as counsel failed to object to the trial judge's erroneous jury charge that malice could be implied from the use of a deadly weapon. Strickland v. Washington, *supra*; Yates v. Evatt, 500 U.S. 391 (1991). [FAILED TO OBJECT TO IMPLIED MALICE INSTRUCTION].

In allegation 9(d), Weik contends that trial counsel was deficient in the failure in the guilt phase to object to the alleged "implied malice" charge. During the state post-conviction relief hearing, counsel Percy Beauford testified that he did not object to the malice instruction because he did not think it was error and appropriate under South Carolina law. This Court must find that counsel's assessment was not deficient under the standards of competence demanded of counsel practicing criminal law in 1999. The Applicant has failed in his burden of proof on this claim.

A review of the trial record reveals that the trial judge denied the defense request for a manslaughter instruction. R. 1736-37. During the guilt phase instructions, the trial judge defined the elements of murder, including malice aforethought. R. 1770-1775.1 No objection was made to the instructions at the conclusion of the charge. R. 1783, ll. 5-7. The jury began deliberations at 3:35 PM and returned with a verdict at 3:46 PM. R. 1784-85.

During the trial, Judge Shuler gave the following pertinent instructions on murder and malice:

And so I'm going to give you the elements in regards to murder, the definition of murder, and then talk to you a few minutes about it.

1 During the state's closing argument, Solicitor Bailey described the fact that the record "reeks of malice" and that "as part of the instructions, Judge Shuler is going to tell you that you can infer malice from the intentional use of a deadly weapon, and that's exactly what the facts in this case shows, the intentional use of a deadly weapon four times against a helpless woman in her own home who was unarmed, offered no threat to her...". R. 1743, l. 3-10. Solicitor Bailey subsequently set out further incantations of the term malice as "the meaning of ill will, hatred or hostility toward another person... a general malignant recklessness of the lives and safety of others or condition of the mind that shows a heart regardless of social duty and fatally bent on mischief." R. 1748.

Defense counsel Beauford, in his guilt phase closing stated that he felt the case was weakest as to malice. : "Yes, you may infer malice from the use of a gun, but that does not make it malice. You may use that in making your determination. . . Was there that evil mind, evil intent, that hatred, that depraved heart...". 1755.

Murder is the unlawful killing of any person with malice aforethought, expressed or implied. That's the definition of murder in South Carolina. It's the unlawful killing of another human being with malice aforethought, either expressed or implied.

The State must prove, of course, that on or about the 30th day of April, I believe the indictment says, 1998, that's the first thing; in Dorchester County, that's the second thing; that a human being, that's the third thing; was killed, the fourth thing; with malice aforethought. Malice aforethought. And that malice aforethought must either be expressed or implied.

What is malice? What is malice? Let me tell you that malice is defined in the law of homicide as a term of art, that is a technical term importing wickedness and excluding just cause or excuse. It's something that springs from wickedness, from depravity, from a depraved spirit, from a heart devoid of social duty and fatally bent on mischief.

In the popular sense the term malice conveys the meaning of hatred or ill will or hostility toward another person. But in its legal sense it is employed in the description - - as it is employed in the description of murder it does not necessarily import ill will toward an individual, but signifies rather a general malignant recklessness of the lives and safety of others, or a condition of mind which shows a heart regardless of social duty and fatally bent on mischief.

In other words, a malicious killing is one where the act is done without legal justification, excuse, or extenuation. And malice has been frequently substantially so defined as consisting of the intentional doing of a wrongful act toward another without legal justification or excuse.

Now, that is the term of, and definition of, malice. That malice must be aforethought. What does aforethought mean? Aforethought simply means the malice must be in the mind of that person, the maliciousness must be in the mind of that person or heart of that person at some time, at least some time before the act of murder occurs. It may be weeks, it may be months, it could be seconds, it could be a second. It has to be in the mind, present in the mind on the part of that person at least

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some time before the fatal act is achieved.

And I said that murder is the unlawful killing of a human being with malice aforethought expressed or implied. What is expressed malice? By the way, malice can be expressed or implied. It doesn't mean that there are two different kinds of malice, but simply the manner in which that malice is shown.

Expressed malice may be - - malice may be expressed as where previous threats of vengeance or lying in wait or other circumstances show directly an intent to kill was in the mind of the defendant. Where someone, for example, speaks, expresses openly or does some act, expresses an act openly, like in vengeance, that kind of thing is an example of expressed malice.

But malice may also be implied or inferred. Malice may be implied through the use of a deadly weapon. A deadly weapon is defined as any article or instrument used to inflict serious bodily injury or death. Malice may be inferred from the use of a deadly weapon. Malice may be inferred from the intent to kill. Malice may be inferred from the use of a deadly weapon. Malice may be inferred from the intent to kill. Malice may be inferred from an intent to do serious bodily harm. Malice may be inferred or implied from the willful, deliberate, and intentional doing of an unlawful act without just case or excuse, or from the use of a deadly weapon.

The resulting implication only permits, rather than requires a jury, to infer malice. This permissive inference is an evidentiary fact to be taken into consideration by you, ladies and gentleman, along with all of the evidence in the case, and you should give it such weight as you feel it deserves.

The law says that malice may be inferred from evidence of such recklessness and wantonness that it indicates a depravity of a defendant's mind and his or her conscious disregard of human life. If the State proves facts beyond a reasonable doubt that raise any inference of malice to your satisfaction, this inference would simply be an evidentiary fact to be taken into consideration by you, ladies and gentlemen, along with all the evidence in the case, and you may give such inference of malice the degree which you determine it should receive. You are free

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to accept or reject this permissive inference depending upon your view of the evidence in the case.

R. p. 1770-1775. (emphasis added).

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Murder is the killing of any person with malice aforethought, either express or implied. S.C.Code Ann. 16-3-10 (2003). In a murder prosecution, malice may be implied if the defendant uses a deadly weapon. State v. Kelsey, 331 S.C. 50, 63, 502 S.E.2d 63, 69 (1998). The use of a deadly weapon gives rise to a permissive inference of malice. State v. Kelsey, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998); State v. Von Dohlen, 322 S.C. 234, 248, 471 S.E.2d 689, 697 (1996); State v. Mattison, 276 S.C. 235, 238, 277 S.E.2d 598, 600 (1981). The jury may draw an inference of malice from proof of the use of a deadly weapon if it concludes such is proper after considering all of the facts and circumstances in evidence. Mattison, 276 S.C. at 239, 277 S.E.2d at 600. In a charge to the jury, the judge should make clear to the jury that it is free to accept or reject the permissive inferences depending on its view of the evidence. State v. Peterson, 287 S.C. 244, 247, 335 S.E.2d 800, 802 (1985), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); see State v. Pilgrim, 320 S.C. 409, 415 n. 3, 465 S.E.2d 108, 112 n. 3 (Ct.App.1995) ("While the evidence in this case may give rise to an inference the attack was committed with malice and intent to kill, the inference is a permissive one which the jury is free to accept or reject."), overruled on other grounds by State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996). The Supreme Court has enunciated a proper jury charge:

The law says if one intentionally kills another with a deadly weapon, the implication of malice may arise. If facts are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.

State v. Elmore, 279 S.C. 417, 421, 308 S.E.2d 781, 784 (1983). The court cautioned the Bench that only slight deviations from the given charge would be acceptable. *Id.*

When a trial judge's charges that malice is presumed from the use of a deadly weapon, it is an unconstitutional burden shifting instructions. See Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). Counsel performance is deemed deficient when there is a failure to object to erroneous "presumption of malice" charges on the ground that they constituted unconstitutional burden shifting instructions. Taylor v. State, 312 S.C. 179, 439 S.E.2d 820 (1993) (counsel was deficient in failing to object to a jury charge which shifted the burden of proof to the defendant).² The question is whether the charge is truly a "presumption" charge or whether it falls in the concept of permissible inferences.

As recognized by defense counsel Beauford and supported by his own closing argument, when reading the trial judge's charge in its entirety, it is clear that the trial judge was, in reality, attempting to define the concept of "implied malice" as distinguished from the concept of "presumed malice." Considering the charge as a whole, this Court must conclude that reasonable jurors would not have understood the charge as creating a presumption of malice. See State v. Bell, 305 S.C. 11, 406 S.E.2d 165 (1991), cert. denied 502 U.S. 1038, 112 S.Ct. 888, 116

² There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In order to prove that counsel was ineffective, the applicant must show that counsel's performance was deficient and that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Strickland v. Washington, supra; Rhodes v. State, 349 S.C. 25, 561 S.E.2d 606 (2002). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.*

L.Ed.2d 791 (1992). Compare, Tate v. State, 351 S.C. 418, 570 S.E.2d 522 (2002)(instruction on presumption of malice burden shifting). 3

In Bell, the defendant complained the trial judge improperly defined malice as "the doing of a wrongful act intentionally and without just cause or excuse." The Supreme Court stated "[t]he trial judge's definition of malice is correct ... and the charge given is devoid of any presumption. Moreover, the trial judge clearly instructed the jury it was the State's burden to prove malice." 305 S.C. at 19, 406 S.E.2d at 170.

Here, the trial court thoroughly charged the jury that the burden of proving malice was on the State, and repeatedly emphasized the permissive inference of malice. Moreover, at no time does the charge use the word "presumption." The charge as a whole was sufficient. See State v. Patrick, 289 S.C. 301, 345 S.E.2d 481 (1986), overruled on other grounds, Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991). Accord, Sheppard v. State, 357 S.C. 646, 594 S.E.2d 462 (2006) (instruction on implied malice not error).

The Applicant has failed to meet his burden of proof in showing that Beauford was deficient. Since the instruction was not error and consistent with South Carolina law, reasonable counsel would not have objected. State v. Elmore. Counsel Beauford's testimony before this Court correctly revealed that the objection was not made because he thought the charge was consistent with state law and did not violate federal constitutional mandates

This Court must also conclude as a matter of law that 6th Amendment prejudice cannot be proven under Strickland, even if it is assumed that counsel was deficient. An unconstitutional

³ State v. Portee, 122 S.C. 298, 115 S.E. 238 (1922) (charge on malice implied from use of a deadly weapon was not a charge on the facts because charge indicated it was for jury to decide whether a deadly weapon had in fact been used).

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burden shifting instruction is not reversible error if the error was harmless beyond a reasonable doubt. Rose v. Clark, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986); Plyler v. State, 309 S.C. 408, 424 S.E.2d 477 (1992). The Court must determine whether there is a reasonable likelihood that the jury applied the instruction in a way that violates the Constitution. Boyde v. California, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990); State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000), cert. denied, 532 U.S. 1027, 121 S.Ct. 1974, 149 L.Ed.2d 766 (2001). An erroneous malice instruction is harmless if, based on all of the evidence presented to the jury, it did not contribute to the verdict. Plyler v. State, supra. In making this determination, the Court must review the evidence the jury considered in reaching its verdict and weigh the probative force of the evidence against the probative force of the presumption standing alone. Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992), cert. denied, 507 U.S. 927, 113 S.Ct. 1302, 122 L.Ed.2d 691 (1993); Gilbert v. Moore, 134 F.3d 642, 652 (4th Cir.1998) (en banc)

Malice is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong. State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998); State v. Johnson, 291 S.C. 127, 352 S.E.2d 480 (1987). Here, there is evidence that Weik committed a legally unprovoked attack with multiple shootings upon a defenseless victim.⁴ Simply put, the evidence

⁴ In his third specification in his original application, he claimed that counsel erred in failing to offer evidence of manslaughter. The reasoning why that claim is devoid of merit supports the fact that the "implied malice" claim is similarly lacking. The record reveals that at the conclusion of the guilt phase, counsel Beauford moved for a manslaughter instruction, which the trial judge denied. R. p. 1736-37. He now relied upon the penalty phase testimony of the decedent's daughter, Amber Krasae, to assert that there was evidence of manslaughter available, but not used.

Amber Krasae testified in the penalty phase that she was 8 years old and attended Knightsville Elementary School in the second grade. R.p. 1835. After general qualification, she testified that she was home after school with her brother Daniel watching T.V. R. 1838. She saw her mother go over to her grandfather's home next door. The Applicant then came to her home

when she was outside with her brother. He had been driving a truck. She testified that her mother came over from next door and "they started pushing each other" on the porch of the trailer. R. 1839-40. Then she said she went inside with Daniel. She stated her mother then came into the house and shut the screen door and she overheard her mother state: "If you don't leave, I'm going to call the police." R. 1841. She stated the Applicant then went to the back of the truck and got a gun. R.p. 1841. "I saw Eddie get a gun, he came to the house and he threw open the screen door. And then I was about to go to Daniel's room and Daniel was right in front of me so I ran to the bathroom..." with Daniel because there was no where else to run. R.p. 1842-43. She tried to shut the door, but could not since there was a shoe hanger on the door. She stated: "I saw him shoot her" more than once and call her a "motherfucker." R.p. 1843-44. Weik then left and they ran outside and a woman from across the street came over and called the police. R.p. 1844-45. The defense asked no questions of this witness. R.p. 1845.

In his pleadings, he contends that this was evidence of manslaughter that should have been presented in the guilt phase to support an instruction on manslaughter. In his statement to the police, Weik stated that he exchanged words with the victim on the porch. Statement, p. 11. In the guilt phase, Weik testified that he went to the Krasae residence and describes seeing the family in the yard. He enters the house and apologizes to his son who told him he could not talk. R. p. 1645. His mother then comes in and he described the verbal confrontation. R. p. 1645-46. He stated that he returned to his truck to start to leave and heard a voice say "Kill yourself, you lost everything, you idiot good for nothing" and another state "Aten to 20 years, life or death." R. p. 1647. He stated that he stopped and got his shotgun out which was loaded and was in the house. R. p. 1649. He described seeing himself there. R. p. 1649-50. He then described shooting her. R. p. 1650. He said it was like a dream, but one he could not wake up from because he did it. He then describes leaving, smelling gun powder, starting thinking about killing himself, but then heard Susan's father and left. He described leaving and heading toward the police. R. p. 1653. He described in detail being stopped by the police and his actions at that time. R. p. 1654-1666.

Weik testifies: "...she didn't touch me, but she's shaking the finger in my face, you know, calling me these words and stuff like that." R.p. 1646, ll. 8-10. However, she stated that she cursed him while he was there. R.p. 1675.

Where death is caused by use of a deadly weapon, words alone, however opprobrious, are not sufficient to constitute a legal provocation. *Id.* at 104, 64 S.E.2d at 134. Rather, when death is caused by the use of a deadly weapon, the opprobrious words must be accompanied by the appearance of an assault--by some overt, threatening act--which could have produced the heat of passion. *State v. Lowry*, 315 S.C. 396, 434 S.E.2d 272 (1993) *State v. Lowry*, 315 S.C. 396, 434 S.E.2d 272 (1993) (citing *State v. Judge*, 208 S.C. 497, 38 S.E.2d 715 (1946)). Manslaughter is

is overwhelming that when he went into the trailer with a loaded shotgun he planned to get the victim and did so with malice aforethought. Like the harmless error situations in Arnold,

defined as "the unlawful killing of another without malice." S.C.Code Ann. § 16-3-50 (Supp.2000)S.C.Code Ann. § 16-3-50 (Supp.2000); Carter v. State, 301 S.C. 396, 398, 392 S.E.2d 184, 185 (1990)Carter v. State, 301 S.C. 396, 398, 392 S.E.2d 184, 185 (1990). Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation. Heat of passion alone will not suffice to reduce murder to voluntary manslaughter. Both heat of passion and sufficient legal provocation must be present at the time of the killing. The sudden heat of passion, upon sufficient legal provocation, which mitigates a felonious killing to manslaughter, while it need not dethrone reason entirely, or shut out knowledge and volition, must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence. State v. Cole, at 101-02, 525 S.E.2d at 513 (internal citations omitted). Even when a person's passion has been sufficiently aroused by a legally adequate provocation, if at the time of the killing those passions had cooled or a sufficiently reasonable time had elapsed so that the passions of the ordinary reasonable person would have cooled, the killing would be murder and not manslaughter. State v. Hughey, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000)State v. Hughey, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000); State v. Gardner, 219 S.C. 97, 64 S.E.2d 130 (1951)State v. Gardner, 219 S.C. 97, 64 S.E.2d 130 (1951) (citing State v. Davis, 50 S.C. 405, 27 S.E. 905 (1897)).

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Roberts, Gilbert and Gleaton, there is harmless error beyond a reasonable doubt on the face of this record – malice is incontestable. Therefore, Weik is unable to show any reasonable probability that had counsel objected to the malice instruction, the result of the proceeding would have been different. There is a simple reason why the jury deliberated for such a short period of time – the evidence of guilt and malice was irrefutable. He failed in his burden of proof to show either deficient performance or prejudice under Strickland.

9(f) Applicant was denied due process of law and a fair sentencing determination based on the State's use of "torture" as an aggravator which, as defined under South Carolina law, is unconstitutionally over broad. U.S. Const. Amend V, VIII, and XIV, the South Carolina Constitution and federal and state law. [DENIED DUE PROCESS BY OVERBROAD TORTURE AGGRAVATOR].

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Pns

In allegation 9(f), Weik makes a free-standing due process claim the state's use of the torture aggravating factor is overbroad and in violation of the due process clause of the state and federal constitutions. This issue is not properly presented in a state post-conviction relief proceeding. This allegation raises a potential trial and direct appeal issue that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (1985). Post-conviction relief is not a substitute for an appeal. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993); Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised **at trial** or **on appeal**. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). The Applicant could have raised this issue prior to or during the sentencing proceeding and then on appeal. The failure to do so has waived this allegation as a ground for relief. Therefore, the Court must dismiss this allegation for this reason.

9(h) Applicant was denied effective assistance of counsel at the penalty phase inasmuch his lawyers did not object to the trial judge submitting the aggravating circumstance of torture which, as defined under South Carolina law, is unconstitutionally over broad. U.S. Const. Amends. Fifth, Eighth and Fourteenth, the South Carolina Constitution and federal and state law. [IAC- TORTURE AGGRAVATOR - Counsel Filed to object to OVERBROAD TORTURE AGGRAVATOR]

In allegation 9(h), the Applicant makes the same assertion as in ground 9(f), but raises it was a 6th Amendment ineffective assistance of counsel claim based upon a failure to object. During the state post-conviction relief hearing, counsel Beauford testified that he did not object to the submission of physical torture as an aggravating factor because he did not see any error in the submission. This Court must find that counsel was not deficient in failing to object since the submission was authorized under South Carolina law and the facts of this case. Further, 6th Amendment prejudice cannot be shown because, even if this factor were excluded as an aggravating factor, the death penalty would still have been authorized due to the existence of other found aggravators, thereby defeating any assertion under the Strickland prejudice prong.

This Court will address the Strickland prejudice prong first, since it is the easiest way to dispose of this claim. It is clear that if the claim had been timely raised at trial or in the appeal, it would have been denied because he was additionally found to be in violation of a second statutory aggravating factor – murder was committed while in the commission of burglary in the first degree. State v. Simmons, 360 S.C. 33, 599 S.E.2d 448 (2004) (where death sentence is supported by other valid aggravators, failure of one aggravator does not void death sentence); See S.C.Code Ann. § 16-3-20(B) (2003) (if statutory aggravating circumstance found, defendant sentenced to either death or life imprisonment); State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000) (jury may recommend life imprisonment for any reason or no reason at all); State v.

Elkins, 312 S.C. 541, 436 S.E.2d 178 (1993) (under our capital sentencing scheme, jury does not "weigh" aggravating circumstances; the failure of one aggravating circumstance does not require reversal where there remains a valid aggravator). See State v. Plath and Arnold, 281 S.C. 1, 313 S.E.2d 619 (1984), citing Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983).

In a recently announced decision, Brown v. Sanders, 546 U.S. 212, 126 S.Ct. 884, 163L.Ed.2d 723 (2006), the Supreme Court has stated that the "weighing/non-weighing scheme is accurate as far as it goes, but it now seems to us needlessly complex and incapable of providing for the full range of possible variations" in state death-penalty sentencing procedures. *Id.*, 884, 126 S.Ct. 884. Instead, "we are henceforth guided by the following rule: An invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances." *Id.* at 126 S.Ct. 884 (footnote omitted). In other words, where the allegation of error is "the skewing that could result from the jury's considering as aggravation properly admitted evidence that should not have weighed in favor of the death penalty," *id.* at 126 S.Ct. 884, constitutional error occurs "only where the jury could not have given aggravating weight to the same facts and circumstances under the rubric of some other, valid sentencing factor," *id.* at 126 S.Ct. 884. In addition to the narrow situation addressed in Sanders, the Court recognized that constitutional error also may arise from "other distortions caused by the invalidated factor beyond the mere addition of an improper aggravating element." *Id.* at 126 S.Ct. 884 n. 6.

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South Carolina statutory scheme is that of a non-weighting (consider) state. In Brown, the Court stated :

By contrast, in a non-weighting State--a State that permitted the sentencer to consider aggravating factors different from, or in addition to, the eligibility factors--this automatic skewing would not necessarily occur. It would never occur if the aggravating factors were entirely different from the eligibility factors. Nor would it occur if the aggravating factors added to the eligibility factors a category (such as an omnibus "circumstances of the crime" factor, which is quite common) that would allow the very facts and circumstances relevant to the invalidated eligibility factor to be weighed in aggravation under a different rubric. We therefore set forth different rules governing the consequences of an invalidated eligibility factor in a non-weighting State. [FN3] The sentencer's consideration of an invalid eligibility factor amounts to constitutional error in a non-weighting State in two situations. First, due process requires a defendant's death sentence to be set aside if the reason for the invalidity of the eligibility factor is that it "authorizes a jury to draw adverse inferences from conduct that is constitutionally protected," or that it "attache[s] the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, ... or to conduct that actually should militate in favor of a lesser penalty." *Zant*, 462 U.S., at 885, 103 S.Ct. 2733. Second, the death sentence must be set aside if the jury's consideration of the invalidated eligibility factor allowed it to hear evidence that would not otherwise have been before it. See *id.*, at 886, 103 S.Ct. 2733; see also *Tuggle v. Netherland*, 516 U.S. 10, 13-14, 116 S.Ct. 283, 133 L.Ed.2d 251 (1995) (per curiam).

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Under the Brown analysis, an invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process; unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances. In Brown, The jury's consideration of invalid special circumstances in *Sanders'* case gave rise to no constitutional violation. In California, the "special circumstances" listed in § 190.2 are the eligibility factors designed to satisfy Furman's narrowing requirement. If the jury finds the existence of one of those circumstances, it must "take into account" a separate list of sentencing

factors, including § 190.3(a)'s "circumstances of the crime" factor. That factor has the effect of rendering all of the specified factors nonexclusive, thus making California (in this Court's prior terminology) a non-weighting State. Setting aside the weighing/non-weighting dichotomy and applying the more direct analysis set out here, two of the four special circumstances were invalidated, but the remaining two are sufficient to satisfy Furman's narrowing requirement and alone rendered Sanders death eligible. Moreover, all of the facts and circumstances admissible to prove the invalid eligibility factors were also properly adduced as aggravating facts and circumstances under the "circumstances of the crime" sentencing factor. Even if § 190.3(a)'s direction to consider "the existence of any special circumstances found to be true" placed special emphasis upon the facts and circumstances relevant to the invalid factors, that impact "cannot fairly be regarded as a constitutional defect in the sentencing process," Zant, supra, at 889, 103 S.Ct. 2733. Pp. 892-894.

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Like Brown, since the physical torture of the victim arises from the circumstances of the crime and victim impact evidence, the jurors would have been able to consider these matters whether the torture factor existed or not, and any alleged invalidity of these matters cannot void the death penalty. See State v. Von Dohlen, 322 S.C. 234, 471 S.E.2d 689 (1996) (forensic pathologist could testify as to pain victim endured and although physical torture was not submitted to jury as aggravating circumstance, evidence regarding torture was still admissible as going to circumstances of crime). He has failed on this claim to show, assuming *arguendo* that the aggravator was unconstitutional and that the trial court would have rejected it, that there is a reasonable probability that the result of the proceeding would have been different. He has failed in his burden of proof to show Strickland prejudice. Thus, this allegation must be dismissed.

Further, this Court must find that counsel Beauford was not deficient in his assessment that the physical torture aggravating factor submission was not error which should have been objected to under the federal constitution. The Applicant has failed in his burden of proof to show otherwise. This Court must find that the physical torture aggravating factor is not void for vagueness. It clearly performs a narrowing function as established under Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (per curiam). The statutory aggravating circumstance of physical torture occurs (1) when the victim is subjected to serious physical abuse before death or (2) when the victim is subjected to an aggravated battery before death. State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). Physical torture is not predicated upon the amount of pain suffered by a murder victim. Although conscious awareness of pain may buttress the conclusion that the victim was subjected to serious physical abuse before death, its absence does not foreclose a finding of physical torture; the abusive and depraved nature of the homicidal assault is not erased solely because the victim mercifully may have been rendered unconscious at the outset of the attack. State v. Johnson, 338 S.C. 114, 525 S.E.2d 519, cert. denied 531 U.S. 840, 121 S.Ct. 104, 148 L.Ed.2d 62 (2000).

In Smith v. Moore, 137 F.3d 808 (4th Cir.1998), the Fourth Circuit held that the "physical torture" aggravating factor included in South Carolina's capital sentencing scheme properly narrowed the class of persons eligible for death penalty. To satisfy the Eighth and Fourteenth Amendments, a state's capital sentencing scheme must suitably channel or limit the jury's discretion in imposing the death penalty. See Lewis v. Jeffers, 497 U.S. 764, 774, 110 S.Ct. 3092, 3098-99, 111 L.Ed.2d 606 (1990); Maynard v. Cartwright, 486 U.S. 356, 362-64,

108 S.Ct. 1853, 1858-59, 100 L.Ed.2d 372 (1988); Godfrey v. Georgia, 446 U.S. 420, 428, 100 S.Ct. 1759, 1764-65, 64 L.Ed.2d 398 (1980) (plurality opinion). Accord, People v. Chatman, 38 Cal.4th 344, 133 P.3d 534, 42 Cal.Rptr.3d 621 (2006) (Torture-murder special circumstance, which requires infliction of "extreme physical pain," is not void for vagueness, since these words have commonsense meaning that jury can be expected to apply); State v. Page, 709 N.W.2d 739 (N.D. 2006) (no error); State v. Colon, 272 Conn. 106, 377, 864 A.2d 666, 828(2006) (same).

Whether a particular aggravating factor suitably channels or limits a jury's discretion depends, in part, on whether it "genuinely narrow[s] the class of persons eligible for the death penalty." Zant v. Stephens, 462 U.S. 862, 877, 103 S.Ct. 2733, 2742, 77 L.Ed.2d 235 (1983). An aggravating factor does not genuinely narrow the class of persons eligible for the death penalty "[i]f the sentencer fairly could conclude that [it] applies to every defendant." Arave v. Creech, 507 U.S. 463, 474, 113 S.Ct. 1534, 1542, 123 L.Ed.2d 188 (1993).

In Smith, as here, he contends that South Carolina's "physical torture" aggravating factor fails to genuinely narrow the class of persons eligible for the death penalty because it does not require an intent to torture separate and distinct from the intent to kill. The Fourth Circuit rejected this assertion. Under South Carolina law, physical torture exists "when the victim is intentionally subjected to serious physical abuse prior to death." State v. Smith, 298 S.C. 482, 381 S.E.2d 724, 726 (1989) (emphasis added); see also State v. Elmore, 279 S.C. 417, 308 S.E.2d 781, 785 n. 2 (1983). Thus, despite contentions to the contrary, it is clear that South Carolina law requires an intent to torture. Using the charge upheld in Elmore, 308 S.E.2d at 785 n. 2, the trial court in Smith defined physical torture as follows:

Physical torture is the intentional infliction of serious, vile, horrible or inhuman abuse upon the body of another before death.

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The instantaneous death of the victim does not constitute torture. Physical torture may include the malicious infliction of bodily harm to another by depriving him or her of a member of his or her body or by rendering a member of his or her body useless, or by seriously disfiguring his or her body or a member of his or her body, or the intentional and unmerciful prolonging of severe pain and abuse to the body of another, or the intentional and unmerciful infliction of serious and extensive physical pain and abuse to the body of another. (J.A. at 2093 (emphasis added).)

The Fourth Circuit concluded that the trial court's instruction adequately conveyed to the jury that it had to find an intent to torture.

Moreover, the trial court's definition of torture "make[s] it] clear that something other than those factors that a juror might expect to find present in an ordinary murder must be present." *Jones v. Murray*, 976 F.2d 169, 174 (4th Cir.1992). In other words, an ordinary person "could [not] conclude that [the 'physical torture'] aggravating circumstance applies to every defendant," *Arave*, 507 U.S. at 474, 113 S.Ct. at 1542, who intended to kill his victim. Cf. *Cartwright*, 486 U.S. at 364, 108 S.Ct. at 1859 (invalidating aggravating circumstance that "an ordinary person could honestly believe" described every murder); *Godfrey*, 446 U.S. at 428-29, 100 S.Ct. at 1764-65 (invalidating aggravating circumstance that "[a] person of ordinary sensibility could" honestly believe described "almost every murder"). Accordingly, it is clear that South Carolina's "physical torture" aggravating circumstance "genuinely narrow[s] the class of persons eligible for the death penalty." *Zant*, 462 U.S. at 877, 103 S.Ct. at 2742.

Since the aggravating circumstance was not overbroad, counsel cannot be deemed deficient in failing to object to the submission, particularly where such submissions had been specifically approved by the South Carolina Supreme Court and Fourth Circuit. Thus reasonable counsel in 1999 would not have been required under the standards to object to the submission.

His claim otherwise must be dismissed. He has failed in his burden of proof to show either deficient performance or prejudice under Strickland.

9(g) Applicant was not represented by two lawyers as required by S.C. Code Section 16-3-26(B)(1) and thus denied a fair trial because one of the lawyers appointed by the Court, Marva Hardee-Thomas, did not act as a lawyer during preparation for the trial and during the trial but merely provided as clerical assistance to the other appointed counsel. *State v. Diddlemeyer*, 296 S.C. 235, 371 S.E.2d 793 (S.C. 1988). [Only One Counsel Acted As Lawyer In Capital Case]

In allegation 9(g), the Applicant contends that he was deprived of two appointed counsel as required by Section 16-3-20 because he contends that only Percy Beauford was acting as his lawyer, although Marva Hardee Thomas was also appointed. He relies upon State v Diddlemeyer, 296 S.C. 235, 371 S.E.2d 793 (S.C. 1988) in support of his claim. This Court must deny relief on this allegation.

Section 16-3-26(B)(1) provides in pertinent part:

(B)(1) Whenever any person is charged with murder and the death penalty is sought, the court, upon determining that such person is unable financially to retain adequate legal counsel, shall appoint two attorneys to defend such person in the trial of the action. One of the attorneys so appointed shall have at least five years' experience as a licensed attorney and at least three years' experience in the actual trial of felony cases, and only one of the attorneys so appointed shall be the Public Defender or a member of his staff. In all cases where no conflict exists, the public defender or member of his staff shall be appointed if qualified. If a conflict exists, the court shall then turn first to the contract public defender attorneys, if qualified, before turning to the Office of Indigent Defense.

The statute does not set out any particular roles or responsibilities for the two lawyers appointed in the matter.

The record of the trial reveals on May 5, 1999, counsel Beauford and counsel Hardee Thomas both set out their qualifications. R. 3-4. Counsel Beauford stated that he was a solo

practitioner in practice since 1999 and had handled several murder trials before, although this was his first death penalty case. He declared that since he had started practicing he had felony experience for at least 5 years. Id. Marva Hardee Thomas stated that she had been practicing since September 1995 and had been a Public Defender. She stated that she had done over 30 to 40 trials and that this was her second involvement in a death penalty case, the first being third chair counsel in State v. Calvin Shuler. Id. Prior to jury selection, the court again made inquiry on the record about counsel qualifications. R. P. 513-514.

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DWB

During the hearing before this Court, it was developed that after the incident, Beauford was initially hired by Weik's parents to represent him. At some point, Beauford learned that this would be a death penalty case. The family was unable to afford that type of representation and appointed counsel was sought. As a result, Marva Hardee Thomas was ultimately appointed along with prior retained counsel Beauford.

Counsel Beauford testified that he envisioned his role as lead counsel, but that they were to work together in the best interest of the client. He saw her role initially to handle the experts and get them started. He felt that his role at trial was to make the decisions on strategy and present the witnesses although he initially thought that Ms. Hardee Thomas would have been more involved in the testimony aspect of the trial.

The record reveals that Ms. Hardee-Thomas saw her role as assisting Mr. Beauford in the preparation, gathering of witnesses, assisting in locating expert witness, but she did not see her role as either the first chair counsel or trial counsel. She stated that she made sure that all information she received from the retained experts and investigators was turned over to Mr. Beauford so that he could make a decision on how to use them. She conceded that she witnessed

the strategy discussions that Mr. Beauford had with Weik and did not disagree with the strategy used in the case. She was unequivocal that the trial decisions were made by Mr. Beauford.

The record reveals that counsel Beauford was of the opinion that the mitigation investigation was being jointly handled by counsel Hardee-Thomas and Patti Rickborn, the retained investigator. The record before this court reveals correspondence from Hardee Thomas scheduling jail visits for Dr. Schwartz-Watts, Dr. Brannon, Dr. Morgan and Dr. McKee, providing discovery material to forensic consultant Jim Springs and Patti Rickborn, and advising the defense expert witnesses and investigators of Sheriff disclosure meetings (Springs, Minter, Dr. Watts, Dr. Brannon, Dr. McKee, Rickborn, Respondents Exhibits 18-31. In addition, the record reveals that on May 6, 1999, Hardee-Thomas provided Beauford with a list of issues and deadlines leading up to the trial. Respondents Exhibit 32.

The record also reveals that Mr. Weik was provided death penalty statutes and sentencing procedures by both Beauford and Hardee Thomas on May 14, 1999 and that the attorneys reviewed it with Weik. Respondents Exhibit 35.

The Applicant is correct that counsel Hardee Thomas did not examine any of the witnesses during the trial or sentencing phase. However, the record does reveal that she was present during the proceedings and, in fact, participated in motion or evidence admissions and penalty phase jury charge requests. R.p. 1453, 1457, 1502, 1658-1659, 1709-1711, 1713, 1917, 1918, 2088, 2100, 2101-2102, 2217, 2219, 2220. Judge Shuler noted the interaction between Hardee Thomas and Weik in support of competency. R. 1724, l. 12-13., p. 1726, ll. 6-19, l. 22-23.

Contrary to the claims of Weik, the record before this Court reveals that two appointed counsel did, in fact, represent Mr. Weik. While Mr. Beauford may have wished and expected

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PMB

more trial assistance than he received from Ms. Hardee Thomas before the trial and during the trial, this expectation does not equate with an absence of appointed counsel as Weik suggests in his allegation. The appointment statute does not require counsel to share any certain percentage of argument, witnesses or particular roles for either counsel. The record reveals minimal participation by Hardee Thomas during the trial, but it does reveal participation and presence in the defense, albeit not questioning potential jurors or witnesses. While it may have been wiser in hindsight to have Ms. Hardee Thomas assume more of a role in relief of lead counsel, this retrospective hindsight does not evidence a statutory violation. Two counsel were appointed to represent Weik who possessed the statutory qualifications. How they performed those duties and the particular roles are not set out in the statute and the statute was not violated by the actions of either Mr. Beauford or Ms. Hardee Thomas in this case.

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D.B.

For the reasons set out above, he has failed to show a statutory violation under Section 16-3-26 and State v. Diddlemeyer. The allegation must be denied.

THE FAILURE TO INVESTIGATE AND PREPARE FAMILY BACKGROUND ISSUES

9(m) Applicant was denied effective assistance of counsel at the penalty phase because trial counsel did not timely hire investigators so they would have had sufficient time prior to trial to investigate and gather all of the Applicant's personal and family background. If complete evidence of the Applicant's personal and family background had been supplied to the Applicant's mental health experts and the social worker, their testimony would have been substantially bolstered and the testimony of the state's mental health experts would have been impeached which would probably have resulted in life sentence. [IAC - PENALTY PHASE - DID NOT TIMELY HIRE INVESTIGATORS TO MAKE FAMILY BACKGROUND INVESTIGATION].

9(n) Applicant was denied effective assistance of counsel at the penalty phase because trial counsel did not provide evidence of the Applicant's personal and family background to their mental health experts and the social worker and had they done so, their testimony would have been substantially bolstered and the testimony of the state's mental health experts impeached which would probably have resulted in a life sentence. [NEW- IAC -

PENALTY PHASE - FAILED TO PREPARE MENTAL HEALTH TESTIMONY AND PROVIDE FAMILY BACKGROUND EVIDENCE AND ASK WHAT THEIR OPINION WAS AND POTENTIAL QUESTIONS].

9(o). Applicant was denied effective assistance of counsel at the penalty phase because trial counsel failed to properly prepare the mental health experts' testimony including but limited to not asking them in advance what they would be able to testify to as experts, not providing them with evidence of the Applicant's background which would have bolstered their testimony, not timely providing them the Applicants' records from the State Hospital, and not informing the experts of the questions they were going to ask the experts. Had trial counsel done these things, the Applicant would probably have been sentenced to life imprisonment. [IAC - PENALTY PHASE - FAILED TO PREPARE MENTAL HEALTH TESTIMONY AND PROVIDE FAMILY BACKGROUND EVIDENCE AND ASK WHAT THEIR OPINION WAS AND POTENTIAL QUESTIONS].

9(r). Applicant was denied effective assistance of counsel at the penalty phase because trial counsel did not timely hire investigators so they would have had sufficient time prior to trial to investigate and gather all the Applicant's personal and family background. If complete evidence of the Applicant's personal and family background had been presented to the jury, the Applicant probably would have been sentenced to life by the jury. [IAC - FAILED TO TIMELY HIRE MITIGATION INVESTIGATORS.]

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ProB

9(s) Applicant was denied the effective assistance of counsel at the penalty phase because trial counsel did not present evidence to the jury of the Applicant's personal and family background which was in their possession at the time of the trial. If the evidence of the Applicant's personal and family background which was in trial counsel's possession had been presented to the jury, the jury would probably have sentenced him to life. [New in Third PCR Application - IAC- FAILED TO PRESENT PERSONAL AND FAMILY BACKGROUND INFORMATION IN COUNSEL'S POSSESSION]

In grounds 9(m), 9(n), 9(o), 9(r) and 9(s), Weik essentially contends that the defense team failed to timely and adequately investigate the family background by the retention of investigators, psychiatrist, psychologist and social worker in order to present adequate evidence through the family and the expert witnesses in mitigation.⁵ The trial record reveals that the

⁵Weik testified in the guilt phase of his trial. R. p. 1634-1711. He stated he vaguely remembered April 30, 1998, yet described his own actions on that date. R. p. 1634-37. He stated that he spoke to his son on telephone about an earlier school conversation that he had concerning another student picking on him. R. p. 1637-39. He described his conversation with Daniel and particularly that during the conversation he was told he had to go and that they did

defense team presented in the penalty phase testimony from Weik's sister, Amy Weik Goings (Tr.p. 1918-1924, social worker Dr. Augustus Rodgers (Tr.p. 1925-1954, forensic psychologist Dr. Geoffrey McKee (Tr.p. 1955-1988), psychiatrist Dr. Donna Schwartz-Watts (Tr.p. 1987-

#37
PWS

not want him talking on the phone. R. p. 1639-40. He stated that his mother and John (her fiancé) did not want him talking on the phone with Weik because they are jealous. R. p. 1640. Weik described word for word his recollection of the rest of the telephone conversation. R. p. 1640-41. Fearing that his son would not answer the phone or want to have anything to do with him, Weik then left the house in his truck towards Summerville toward the bank to get money for insurance for his mother and gas money. R. p. 1642. While at the gas station, he decided he needed to see his son. R. p. 1643. He then went to the Krasae residence and describes seeing the family in the yard. He enters the house and apologizes to his son who told him he could not talk. R. p. 1645. His mother then comes in and he described the verbal confrontation. R. p. 1645-46. He stated that he returned to his truck to start to leave and heard a voice say Akill yourself, you lost everything, you idiot good for nothing@ and another state Aten to 20 years, life or death.@ R. p. 1647. He stated that he stopped and got his shotgun out which was loaded and was in the house. R. p. 1649. He described seeing himself there. R. p. 1649-50. He then described shooting her. R. p. 1650. He said it was like a dream, but one he could not wake up from because he did it. He then describes leaving, smelling gun powder, starting thinking about killing himself, but then heard Susan=s father and left. He described leaving and heading toward the police. R. p. 1653. He described in detail being stopped by the police and his actions at that time. R. p. 1654-1666.

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

On cross-examination, Weik responded directly to his questions and stated that he was trying to respond Ain the fullest detail.@ R. p. 1668. He denied telling Mr. Hall that he was going over to Susan=s home. R. p. 1671. He again attempted to describe the events in response. R. p. 1675-1706. The Appellant was asked about the detail of his statement to the police. R. p. 1682-84. He stated that most of his statement was true. R. p. 1684-1706. He stated that in the statement he did not say anything about "the voices" and left out some things. He stated he did not feel anything when he shot her. R. p. 1687. He stated that when he described that he popped another shell in her and that it felt good and that "it felt better" on the next shot was in the statement, but he now claimed he was lying. R. p. 1690-91.

2020), psychiatrist Dr. Donald Morgan (Tr.p. 2012-2043). It must be noted that in the guilt phase the Applicant and Lillie Weik also testified about the family background.⁶

#38
PMB

The record revealed to the 1999 jury that the father suffered Viet Nam flashbacks and he would act out the flashback with violence toward the family (Tr.p. 1920-21), that he threatened to rip out Eddie's heart unless he got a haircut, that Eddie had recently joined a church and was trying to do everything he could for his son and described the father role he was trying to have with his son. (Tr.p. 1923-24). Amy testified that Weik had a personality change in the last few years and would isolate himself in his room and seemed depressed. She also described her father as paranoid and that something was wrong with him. The social worker presented a social history that Weik grew up in an impoverished family with chaos and disorganization. Tr.p. 1933. He described the father destroying the house upon impulse which terrorized the entire family, but it was not a one time episode. He found that Weik manifested hyperactivity revealed in his speech and learning disability. He noted the Weik had been a large baby which suggested some birth complications. Tr.p. 1934-35. From investigator Parker, he learned that Weik had suffered depression and heard voices from time to time suggesting auditory hallucinations. Tr.p. 1938-39. In addition Dr. Rodgers opined that Weik would be able to make a satisfactory adjustment in prison. Tr.p. 1940-50.

Dr. McKee also testified regarding Weik's psychological testing. Particularly, he opined that Weik was not malingering and scored in the schizophrenia level. He felt that Weik had

⁶During the guilt phase. Testimony in front of the jury was presented by Abraham Rodriguez (a co-worker at Broyhill who testified about his relationship with Weik and Weik's relationship with his son), Lilly Weik and the Applicant. R. 1589-1706. In particular, Lilly Weik testified about her children, the relationship Weik had with Susan, her description of Weik prior to his

delusions about the CIA, aliens, and the government watching him. In addition he noted a difference between schizophrenia and schizotypal disorder and opined that it did not apply to Weik. Dr. McKee opined that Weik was actively mentally ill and suffered schizophrenia, paranoid type and a history of major depressive disorder with psychotic features. Tr.p. 1964-65. Similarly, Dr. Schwartz Watts opined the same thing regarding Weik's demeanor, hearing voices, and rambling talk. She also described the church he had joined and the problems with some woman in church spreading gossip. She presented his work history and recent discipline as suggesting a personality change. She also described the "Hag" holding him down and the voices he heard. She also described the illnesses of schizophrenia and schizotypal personality disorder and felt that Weik fit schizophrenia. Tr.p. 1996- 1997. She found Weik's demeanor inappropriate and his belief about the CIA and his father's assertions that the CIA was after them, in addition to his claimed possession of special powers of smell to support her diagnoses. Tr.p. 1999-2000.

#39
Drs

Dr. Schwartz-Watts was asked if Weik could adapt to a structured situation in jail. Tr.p. 2005. She opined that he was not a sociopath and his symptoms would improve in a structured setting and felt it was unlikely that he would prey on other people in the prison setting. Tr.p. 2006.

Dr. Morgan opined similarly to Dr. Watts. He attempted to develop if Weik suffered in a disassociative state at the time of the murder. He described the "Hag" and the impact it had on Weik and the perceived problems he had with the CIA and ATF people following his family. He stated that Weik twists information to help him understand the voices that he hears. He opined that Weik suffered under paranoid schizophrenia. Tr.p. 2030. He felt that Weik could be

son's birth, his relationship with his son leading up to April 30, 1998, and his demeanor shortly

medicated and improved. He opined that Weik suffered from this condition in 1998 when the crime happened. Tr.p. 2033.

The Applicant asserts that the trial attorneys lacked organization to adequately prepare the mitigation issue for trial. The Court respectfully disagrees with this assertion.

Robert Minter

The defense hired Robert Minter, a licensed private investigator in 1999 for guilt investigation through Marva Hardee-Thomas. He testified that he had periodic meetings with defense counsel and interviewed potential witnesses in the case. However, he declared that he did not do a so-called mitigation investigation of Weik's family or school background. His bill, Respondents Exhibit 1, stated he spent 116 hours on the case. The itemization of his work, Respondent's Exhibit 2, revealed support for his meetings with counsel and his review of the case file as early as January 31, 1999. The record also reveals various written reports provided to defense counsel including:

1. February 2, 1999 - Repeat of visit with Bernice Austin, a relative of Weik who reported that the Applicant would meet with her in church and felt he was a devoted Christian. She stated he never talked about his dreams and did not seem disturbed about anything. Instead, she saw him as always smiling and saying something nice to people.
2. February 3, 1999 - Pastor LeGrand Dupree of Gateway Church stated he had visited Weik twice at the jail and recalled a dream one time. He felt Weik had a "quick temper," but did not recall why. He felt Weik was a loyal and regular church member but described him as angry most of the time. He stated in December, Weik described a dream about the Hag, who was like a root doctor with the face of a man on one side and a woman on the other with skin like molten lead and six digits on each hand wearing a robe. Weik said he could not move or scream, but heard psychedelic voices at the time. These dreams were told to Pastor Dupree months before the murder.

before the incident. As stated above, Eddie testified in the guilt phase about his background.

Dupree said he saw Weik the Wednesday before the murder and told him that he was going to do something bad unless he came to church and told him his former girlfriend would not let him see his son. Dupree thought Weik was obsessed with his son and did not like his ex-girlfriend's boyfriend. Weik asked the church to pray for him. When Dupree learned of the murder, he was surprised the girlfriend had been killed instead of the boyfriend.

3. February 3, 1999 - Ervin Varner, Weik's first cousin, reported that the Applicant was a loyal church member who would visit the sick and help anyone he could. He never heard Weik talk about dreams and did not see any character changes. He brought his son to church and wanted him baptized, but his mother would not allow it.
4. Minter spoke to Gloria Varner by telephone on May 3. She reported Weik would bring his son over to play with her grandchildren. She did not detect any problems between Daniel and Eddie. She said he would get his son every other weekend and they would visit her home.

#41
P.B.

Minter reported by memo to Perry Beauford and Hardee-Thomas on February 3 that these witnesses that he met would make excellent character witnesses, but did not assist the [mental] defense. Minter advised them he would continue on the list he received. Subsequently, he spoke with Tammy Geddis who denied that Weik had ever told her about dreams. Pastor Bruce Scott stated that he only knew Weik casually from church, but had not heard him talk about dreams. Pastor Scott reported that when he was a child he had a "Hag" dream and recalled being unable to move.

Minter also had interviews concerning Weik's former employment at Broyhill. Alton Huggins reported to him that when he was plant manager, Weik volunteered for "nasty jobs" and was an eager worker. He said Weik had spoken with him about problems with his ex-wife and that he was not able to see his son. He did not recall any discussions with Weik about visions. He did discuss with Weik about being saved in church. Huggins described Weik as a mild person.

Laura Tyson, the personnel manager at Broyhill advised minter that Weik was terminated for insubordination against a foreman that progressed to threats of violence. Although Weik had "perfect attendance" for several years, he also had minor disciplinary violations. Minter made a report for defense counsel of this contact on March 2, 1999.

On May 9, 1999, Minter spoke with Abraham Rodriguez, who described Weik's work at Broyhill and felt that Weik had been "set up" by management. He said that Weik spoke with him a lot, but not much about his personal life except that he did not like his son living with his mom and a man she was not married to. He told Minter that the crime was totally out of Weik's character and he had never seen him mad.

#42
PnB
On March 11, Minter met with both counsel and investigator Rickborn and reviewed the evidence and photographs at the Sheriff's Department. He then went to St. George with both counsel and met with Weik to discuss the case.

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

Minter stated that most of his contact was with Beauford. Minter stated that he understood where the trial was headed.

Patricia Rickborn

On October 3, 2006, Patricia Rickborn testified that she had been retained as a mitigation investigator for Weik after March 1999 based upon an affidavit that she had prepared for counsel. Depo. Tr. p. 11-13. However, she was unable to locate any file in preparation for her testimony. She felt that her normal experience in capital cases is to be assigned to the case for

one year to prepare an adequate mitigation case. Depo. Tr. p. 14-15. She felt that the three month period that she faced in Weik was inadequate.

Rickborn testified that she was retained by Hardee-Thomas. She stated that when she later learned the trial was set for May 1999 she was alarmed because she was not getting return calls from Hardee-Thomas and had not learned who the retained defense experts were. She said her contact person was Hardee-Thomas, although she recalled meeting with Beauford one time. Ultimately, she contacted Hardee-Thomas and Beauford and advised them that she would not be working in the case. Depo. Tr. p. 19-20. She stated her basis was that she was not getting cooperation from counsel Hardee-Thomas.

#43
PnB

Rickborn admitted that she had sent a series of memorandum to counsel Hardee-Thomas during her employment as the mitigation investigator. Depo. Tr. p. 21-46. Rickborn had suggested to counsel Hardee-Thomas that to develop information, from the psychologist or psychiatrist from the defense interview of Applicant's son, that he did not want his father executed to minimize potential penalty phase testimony. Petitioner's Depo. Exh. 2, Tr. p. 22-23. She also made requests for medical records of the Applicant, Exh. 2, p. 2. and sought assistance from his parents to locate family, teachers, friends and school and medical records (p. 3). In addition, as of March 12, 1999, she was advising counsel about the need for the State Hospital evaluation report and for counsel to contact the doctors to seek out mitigation or develop a basis to object to the testimony if they did not. Exh. 2, p. 4. On March 12, 1999, Rickborn also provided counsel Hardee-Thomas with a "to do" list for obtaining school and medical records. Exh. 2, p. 5. In addition, she noted at that time that in her interview with Weik, he advised her that he was taking thorazine. Rickborn felt it was important for her to point that out to counsel

for their "social history." Depo. Tr. p. 24. She had also noted at that time interviewed Ms. Weik and wanted to know how to get her information to the medical experts. Exh. 2, p. 6. Depo. Tr. p. 26. However, Rickborn did not recall getting the requested records prior to ending her involvement.

On March 22, 1999, Rickborn contacted the Berkeley County Health Department to obtain records and on March 23, 1999, served subpoenas on the health department and high school for the Applicant's records. Exh. 2, p. 7-8. On March 26, 1999, Rickborn reported back to counsel Hardee-Thomas that the hospital records were destroyed, that she was still looking for education records, and that she was continuing in her interviews. Exh. 2, p. 9. On April 13, she contacted Weik's mother to provide family members and church members for interviews and provide whatever forms to assist in a social history. Exh. 2, p. 10.

On April 20, 1999, Rickborn provided counsel with a list of family members and potential mitigation witnesses to be interviewed including church members. Exh. 2, p. 11-16. She stated that she learned of these names from the Applicant and his family. Depo. Tr. p. 25-26.

Rickborn also was seeking information from counsel Hardee-Thomas on whether they had received the father's military records and the need for a court order. Depo. Tr. p. 27. She stated that she had asked Hardee-Thomas four or five times about this issue. Depo. Tr. p. 27-28.

Rickborn interviewed the Applicant's sister Amy Weik on April 21, 1999. Depo. Tr. p. 28-29. Exh. 2, p. 18-20. In the report, she described the fact that her father's relationship with the children developed into a constant fear of his rage. She described to Rickborn incidents where her father had once choked her thinking she was a Vietnamese girl, that he told the Applicant that he would rip his heart out as he was trained to do in the service, if he did not get a

haircut.

Amy Weik reported to Rickborn that her father had been affected by the Vietnam War and told them he was in a special forces unit. Amy expressed fear to Rickborn when she learned the defense was seeking the military records because her father had said the records were classified and that there would be no records of his service. Exh. 2, p. 19.

Amy further described to Rickborn her brother's relationship with his son and the effect the loss of his job at Broyhill had on him. *Id.*

#45
PnB
Amy reported that the Applicant would always try to help people and identified some potential character witnesses. Amy expressed fear about revealing her fears and problems with her father, but Rickborn assessed that Amy would be a good trial witness. Exh. 2, p. 20. Rickborn stated that she would have faxed this report to counsel Hardee-Thomas as soon as she completed it. Depo. Tr. p. 29.

On that same date, April 21, 1999, Rickborn interviewed Joan Ferrer, who provided family background information based upon her marriage to Weik's oldest half-brother. She also reported family knowledge about Russell Weik's "secret missions" in Vietnam and the impact upon him, although she stated that it was initially reported occurring in World War II. Joan reported that she later learned from her sister's family that Russ had never seen combat. Exh. 2, p. 21.

Rickborn reported to counsel on April 22 that she had spoken with Lillian Weik on several occasions who advised her that she had shared all information she intended to and was very protective about her husband. Exh. 2, p. 23. The mother was reported to have confessed to Rickborn the choking incident, but felt her husband was a good father who never abused her son.

Rickborn opined to counsel in that memo that she hoped the other siblings would now open up to her. Exh. 2, p. 23.

Rickborn also advised Dr. Donna Schwartz-Watts on April 23, 1999, that she had learned that date that she was on the case and was going to see Weik that date and forwarded to her the information she had developed. Exh. 2, p. 24.

On April 23, 1999, Rickborn interviewed Amy Weik's common law husband, Stephen Walker who described the Applicant's work as a dedicated employee at Broyhill. Exh. 2, p. 25. He described Eddie as always talking about his visits with his son and that his mother would only call him when she wanted money or a high priced item. *Id.*

#46
PMB
Like Robert Minter, Rickborn interviewed Pastor Dupree on April 26, 1999. Exh. 2, p. 26. In addition to similar information reported to Minter about the Wednesday night before the incident prayer meeting, he reported to Rickborn that Eddie was a loner who did not handle stress well and described a church trip where he had become angry with some kids in the car. Dupree told Rickborn that Eddie had told him he had committed the murder and was prepared to take the consequences including giving up his life. Exh. 2, p. 27.

On April 27, Rickborn reported providing to Hardee-Thomas her notes from her interviews with Walker, Dupree and Ray Klocek and that she had provided them to Dr. Watts and was sending "the doctors" her contact list so "they" would be able to contact the siblings. Exh. 2, p. 28. The April 27, 1999, interview of "Ray" Klocek, Weik's youngest half-sister, who was twelve when her mother married Russell. She expressed fear of Russell and described hiding from him because of his obsession with guns. She described the Applicant as a "large head" baby with delayed potty training. Ex. 2, p. 29-30. She described being hit by Russell resulting

in being knocked unconscious. Russell would berate all the children, but found the Applicant to be an easy target and called him "worthless." Exh. 2, p. 30. "Ray" described to Rickborn that she moved out of the house when she became pregnant at 16 and later developed problems with alcohol and drugs. She also described an event when she returned home and Russell tried to kiss her.

Rickborn advised counsel in the Klocek memo that she lived in New Hampshire and may not be able to be a live witness but could be interviewed "by Dr. Schwartz-Watts or Dr. Morgan" so they could testify about it. She also stated her opinion that the memories of the Weik household by her "were very important." Exh. 2, p. 30.

#47
MB

On April 27, 1999, Rickborn sent a resignation letter and summary of her work and complaints to counsel Beauford and Hardee-Thomas. Exh. 2, p. 31. Depo. Tr. p. 30. [Respondents Exhibit 15]. Rickborn testified that prior to the letter she had left messages with both counsel because of her expressed frustration. Depo. Tr. p. 34. See Also, Petitioner's Exh. 3. Rickborn stated that she felt she had not been officially retained on the case because she had not seen an order authorizing it despite her requests. She said she received the April 30 letter from Hardee-Thomas where she said she provided the information along to Beauford, but felt Hardee-Thomas was just passing the buck. Depo. P. 42. Rickborn recalled only one meeting that she had with Beauford before she resigned. However, he did contact her after the April 29 letter during the trial asserting the judge wanted to know why she was not there.

Rickborn testified that she had met with the Applicant at least twice prior to her March 12 memo. She talked with him about the facts of the case, but did not recall if she had viewed or read the confessions. She found Weik remorseful. She admitted both defense counsel were

present during her first interview with him. Depo. Tr. p. 50-51. Rickborn was unable to recall if she spoke with Chris Weik. Depo. Tr. p. 53. Rickborn stated she never sought payment in the case or submitted any voucher. Depo. Tr. p. 57.

Scott Parker

Scott Parker testified that he was retained, through the B.J. Johns firm, as the mitigation investigator after Rickborn left the case. He stated he came into the case very late after meeting with counsel Thomas and stated that he provided anything he did to Percy Beauford. Parker stated he interviewed Lillie Weik (mother), Russell Weik (father), Chris Weik (brother) and the Applicant in a series of interviews on May 14, 1999 and May 25, 1999. Petitioner's Exhibits 3, 4, 5. He stated he also interviewed Maggie Gunter. Petitioner's Exhibit 6. He stated that there were other members that he wished to interview, but was not able to do so.

#98
PWB
Parker stated he spent at least 115 hours on the case. However, he was only present one day during the trial. Parker stated that he would usually have contact with Beauford's secretary when he dropped off material.

In his reported interview with the Applicant's mother, Lillie Weik, [Petitioner's Exh. 3] he reported that it was a joint interview and Lillie described the marriage with Russell after he was released from the service and her pregnancy shortly after the wedding, resulting in a miscarriage.

She became pregnant with the Applicant shortly after and described it as a surprise and that she had complications and had developed toxemia. She felt the Applicant was born without complications although she felt he had a large head when he was born April 26, 1967. She also described the later births of Chris in 1968 and Amy in 1971, and a later described pregnancy that resulted in a miscarriage.

Lillie described to Parker the various temperaments of the Weik children. She described the Applicant as "very quiet and sullen", had difficulty in learning, but with good motor skills. She felt the Applicant was not close to his father who did not deal well with children. She said he was hard, cruel, and violent toward Eddie. She described a time when Russell had thumped the Applicant in his chest and threatened him. She recalled fights that Eddie had at school resulting in discipline.

She said the Applicant had been mean toward cats and would shoot at them.

Parker noted that the family had superstitious ideas and an apparent belief in the occult. However, the Applicant was converted and baptized after being influenced by an older Christian woman. However, Parker reported this woman had died just prior to the trial.

#49
PMB
His mother had described various relationships the Applicant had with women. She said Weik had married a retarded girl whom he had taken to the prom. They moved into a house together, but they broke up when she began seeing someone else. She stated he had a brief relationship with the victim who he met through Chris. According to Lillie, she was on drugs and took all Eddie could give, but he broke up with her after she was seeing someone else and got pregnant, although they gave the boy the Weik name. Lillie described his relationship with his son as a stark contrast from the Applicant's relationship with his father. She also recalled the conversation on the day of the shooting.

Lillie stated the Applicant had temper tantrums and was physical and had a fascination for guns and weapons. She described the temper of the other children and opined that Amy had psychic abilities. She felt Eddie did not drink a lot. She noted that Russell had previously gone into a catatonic state on occasions. She denied any physical ailments in the family, except one

relative had depression. She said Eddie had bad dreams and would be fearful as a child, but these returned after his own son was born. She described three incidents where Eddie suffered head trauma when he was hit with a brickbat when he was 6 or 7, later hit in the head with a baseball bat, and once thrown through the windshield about the same time. She apparently did not take him to a doctor.

#50
PMB

The May 25, 1999 interview with Chris Weik [Plaintiff's Exh. 4] revealed that although his brother had been protective of him as a child, he felt that Eddie later had problems in school. He described the earlier "large head", the stigma of being poor, and Russell's inability to handle money. Chris believed in his father's words as the truth and described the violent training he put them through. Chris admitted stabbing Eddie with a knife and tried to strangle him before his father intervened. Chris stated that Amy believed in witchcraft and had been ridiculed for it. Concerning the "Hag," Chris stated he shared this belief with his brother, as well as his mother.

Chris stated that Eddie met Susan on his own and that they had sex the afternoon they met. Chris described Susan's manipulation of Eddie, and described that Eddie thought Chris was trying to steal Susan from him. He described her coming back with another child after her divorce. Chris said that Susan's father recommended to him to change his ways and become a Christian if he wanted Susan back. He attempted to do so, but she again rejected him. However, he continued and became baptized in 1997.

Chris described Eddie's lawsuit for visitation, Susan's coercion of money for the child's gifts, and Eddie's work as a den master. He also described the false charges that cost Eddie his job at Broyhill.

Chris said Eddie was concerned about his son's bruises and behavior and stories he learned

about Susan's new boyfriend, including smoking little cigarettes while the children were locked in their room. Chris described two events, April 19, 1998, and April 27, 1998, prior to the incident where Eddie had locked himself in his room. The first occurred after he had been cut off from his son on his birthday and the second when he had a telephone conversation with Eddie about how upset he was about not seeing his son on his birthday because of Susan's lies and that he felt as if he would blow his brains out.

#51
PMB
Parker also described in Plaintiff's Exh. 5, his May 14, 1999 interview with Weik's father, Russell Weik. In the memo, Parker described the home as filled with junk and a fire-trap. Parker described Russell Weik as delusional, bellicose, belligerent, narcissistic, ego-centric and grandiose. He described the claimed family background described by Russell. He described to him his entry into the Navy and his true role in the service as covert operations for the CIA, infiltrating Vietnam the power to command all troops, including generals. Weik reported to Parker killing "many thousand of Vietnamese and Viet Cong regulars." Weik denied being either wounded or hospitalized, but then admitted he had been in an "Echo" ward due to the problems when he was captured as a POW. During the interview, his wife would say to him that he was wrong.

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

Parker stated Weik's fantasized about warfare and his possessions, clothing, and collectibles were military. Weik admitted his violent tendencies toward his children, admitting

the choking event with Amy which stopped when he was struck with a frying pan. He described his own depression and hallucinations and sleep disorders. He admitted his many jobs. Further, he stated that he was not a good father, is abusive and violent, and has a dark side. Parker noted that while the parents acknowledged the beatings of the children, Eddie Weik denied it.

Parker also admitted interviewing Magdalena and John Gunter. Plaintiff Exh. 6. In that interview, Lillie was described as caring, impulsive, extroverted and committed mother and Russell was described in various ways such as possessive, violent, and paranoid. They described the home as initially immaculate. They stated that his violent tendencies increased after Russell stopped going to the VA. They described the children as hyper-active. John Gunter felt Eddie was corrupted with neo-Nazi anti-government and racial bias influences from Russell. They briefly described the schooling of Eddie. In addition, they felt Eddie originally had atheistic tendencies, but later threw himself into Christianity. They felt Eddie enjoyed hunting and fishing with John. They reported to Parker that Eddie felt stifled living with his parents.

The Family Testimony During the PCR Hearing

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

Chris Weik

The Applicant's younger brother Chris Weik testified that he was subpoenaed, but did not testify at trial. Chris described the family background of his mother and father. He asserted there is native-American heritage. He described in greater detail his life as a child, Eddie's slow development and Chris' success. He described his knowledge about the Applicant's employment at Broyhill.

Chris described the Applicant as being a loner as a child and other children picking on him because of his slowness and large head, ultimately leading up to fights in school. Chris described their living conditions with money as a problem, no air conditioning and clutter throughout the house. He described periods when water had to be hauled in for washing.

Chris described his father's stories of his service and that he claimed to have 2000 kills in 2 tours. He described the manner that his father claimed to kill with his hands. Chris said he used to believe his father about his killings, but was not sure now. Chris described the family camping trips and that they acted like they were guarding against the Viet Cong and feared the Viet Cong were living in the woods.

#53
PMB
Chris described the "strict-discipline" in the home. They were forbidden from discussing matters outside the home. Chris felt Eddie was beaten more severely than he was. Chris described being hit with a machete, locked in the attic as torture on a hot day, and being put in a boat cabin in the yard. Chris also described his father's hot temper breaking items in the house, including the television. There were weapons throughout the house including the machete, guns, and hand grenade, and dynamite.

His father would watch war movies. He felt his father had flashbacks and would dress up. He described "Rhonda" being choked until his mother hit Russell.

Chris stated that Eddie felt his Dad may have killed the twins his Mother miscarried, as she was shocked by an electrical cord with which Eddie also had been shocked.

Chris also described his father making bombs. He said he was afraid of his father. Also, he felt that Eddie was beaten down by him. He described the beatings they all received, including kicking from his boots.

Chris stated that he believed in "the Hag" and had similar experiences as Eddie.

Chris Weik stated he spoke to Scott Parker one day from 7:30 p.m. until 1:00 or 2:00 a.m. He declared he told Parker similar information as his testimony.

Christ said his brother had few friends, and attended a church with "fanatics." He said that Eddie had been telling him about the Hag for over one and a half years and described it as a 3-headed monster.

Chris said he spoke to Hardee-Thomas at trial and she told him that he was not needed to testify, but claimed the judge wanted to see him.

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

#54
PMB
Amy Weik

The Applicant's sister testified concerning her relationship with her brother. She said that he had learning problems, called himself stupid and spoke very fast. She described her father as violent. She recounted when he tried to choke her when he was watching a war movie. She said he was violent in his discipline. She recalled the event when he told Eddie he would ram his hand into his heart unless he got a haircut. She also recalled her father breaking TV.

She also was told about her father's Viet Nam experiences when he killed many people.

Amy stated she testified at the trial in 1999. She said she met at Beauford's office with defense counsel along with her mother, her boyfriend, Bill, and Maggie Gunter, Larry Farrar, and her father. She said Percy met with each one by one. She said his focus was on her brother's behavior and her father's behavior. She said she told Beauford what she knew. The meeting was about two weeks before the trial. She recalled that she had previously spoken with

Patti Rickborn over the telephone.

Amy said she met with Beauford again on the day she testified and told him she was upset by a call she received the night before from a bill collector. She did not recall any discussion then about what she would be asked. She stated that she had also met with Scott Parker.

She confirmed there was a time when they did not have running water in the house and she had to go with her mother to a neighbor's home to carry water back. She also felt Eddie was a good parent and spoke of his cub scout involvement.

She verified that Eddie had spoken about the HAG and was concerned about his dreams. She said she told this to the defense team. She also spoke about childhood problems, pregnancy problems, and insomnia with them.

#55
PnB

William "Bill" Gunter

Gunter testified that he was Weik's brother in law and married to Maggie. He met Weik's father Russell in 1966 after Russell was hospitalized in Charleston after a nervous breakdown while in the Navy. He met Lillie's daughter, Maggie, who was fifteen (15) at the time. Russell married Lillie after he was released and Maggie was living with them. He stated Russell told him about his alleged clandestine activity in the 1970's. However, Gunter felt the more he told him, the less he believed him.

Gunter married Maggie after she became eighteen (18) in 1969 and moved her from the Weik's home. Gunter learned the violent temper of Russell, the beatings of the children and physical and militaristic discipline he invoked on the children. Gunter described the presence of weapons and explosives and Russell's bias against Black and Jewish people. He also described Russell teaching the children how to kill slowly. Gunter said Russell has never recanted his

Vietnam experience.

Gunter recalled Eddie having a large head and thought he had a hair lip. He felt he walked later and talked slower than he should have compared to the rest of the family. The Applicant tried to get his father's attention and praise, but would be teased instead. Gunter felt it was hard for Eddie to make friends and was a loner and teased by others. Gunter found Eddie's demeanor ranged from caring to carefree to spooky.

#56
PnB
Gunter stated he met with Eddie's lawyer two weeks before the trial. He also met with Scott Parker. He described the meeting with the other family members in Beauford's office. Beauford stated they were looking at insanity or involuntary manslaughter. He said Beauford described that the State was seeking death. When he challenged Beauford about the testimony, he said it would be raised on appeal and he could get another trial with another attorney. Beauford felt more defeated each day during the trial. Gunter was upset he was not called as a witness because of his knowledge of the family.

Gunter described the filth of the Weik home in some detail. He also noted the Father's poking at the children.

Maggie Gunter

His half-sister testified about Eddie's childhood. She stated she was 16 when Eddie was born. She felt he did not talk or make sounds like a normal person. Once he started talking, it was very fast and he would ramble. Maggie described life with her step-father as unpleasant and that he had a violent temper on a power trip. The house was not clean and in disorder. It was full of maps, guns, and swords. Russell talked about killing people while in the Navy.

Russell Weik

His father, Russell Weik, testified that he was not at the trial because he had to work. He testified that he was taken into a covert unit by the CIA after he enlisted and described his various deployment and various ranks within the service. He described his "Gomer Pyle" techniques and manner of killings. He opined that he was in charge of a unit that killed 3060 people. He claimed to have later re-enlisted and ultimately went to the Naval Hospital. He questioned the validity of various records presented to him as being changed or created by the CIA to cover his real work. He also questioned the diagnosis of chronic schizophrenia. He claimed to be seeking various benefits he felt he was owed by the VA.

Russell described Eddie as a slow learner, but hot tempered. He felt Eddie could not keep his mouth shut. However, he said he wasn't with him that much.

#57
PWB
Russell said he suffered from flashbacks. He described a submarine event where he became claustrophobic. Also, he claimed to still suffer from them and had trouble sleeping based upon Viet Nam.

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

Expert Witnesses Who Were Part of the Original Defense Team

Dr. Donna Schwartz-Watts

She testified that she was retained three months prior to the trial. She said she would have liked to have had one year. She said she saw Weik two times before the Blair hearing. She had been provided and received the discovery material and Patti Rickborn's notes before the trial. She recalled having a general family history, but Weik did not allow a factual defense. She met

with Beauford one time before that hearing and asked for Dr. Donald Morgan to be included and asked for a psychological and neurological consultation. She thought it was done. She also spoke with the mother and Chris at the Blair hearing and learned of the toxemia and pregnancy history. Although she did not meet with Rickborn, she met with Parker and received the Hall records at the Blair hearing. She was aware that the father had a mental illness and other family through the Hall records, but did not know Weik may have had a genetic disposition for schizophrenia. She felt this would have made her more confident in her opinion about Weik's schizophrenia.

#58
PnB

Although she heard Augustus Rodgers' testimony at trial, he did not develop the substance of the family history she now has. She said she met with Dr. Brannon, Dr. McKee, and Dr. Morgan until the Blair hearing and had not prepped before that. Dr. Watts described items within the Hall records that she found to be useful and supportive of her diagnosis of chronic simple schizophrenia. She also did not recall seeing anything in writing from Scott Parker and recalled only discussing his findings with her. She also stated that she had not reviewed a social history written by Augustus Rodgers at the time of her trial testimony.

Dr. Watts also recalled that Weik acted strange during the initial Blair hearing. She said at one point Weik hit his head on the table.

Dr. Watts said that at the trial she lacked personal interviews with all the family members, and did not have all school records and other developmental records concerning Weik. She wished she had these. Since the trial, she learned that Weik did not speak until he was 2 years old, had few friends and the subject of teasing and confirmed that his father had a mental illness. Concerning Weik's belief in the Hag, she opined that it was now seen as a shared belief within

the family. She felt this supported her analysis concerning his mental illness. She felt the added records supported her position at trial.

Dr. Watts testified, however, that the additional information did not change her diagnosis expressed at trial that Weik suffered from chronic simple schizophrenia. She was aware of the Hag at that time as a cultural concept. From Rickborn's notes, she also knew of the father's influence over the family by fear. In addition, at the Blair hearing, she was also aware of Dr. Crawford's different diagnosis.

Dr. Donald Morgan

#59
PMB
At the hearing, Dr. Morgan testified that he was asked to examine Weik by Dr. Watts. He had not met with the defense counsel prior to the trial and thought that he was not fully aware what they were going to ask him. At the time of this hearing, he itemized the material he reviewed including the father's Navy discharge, the trial testimony of Rodgers, Dr. Crawford, Dr. Watts, Dr. Shea, Dr. McKee, Dr. Behrman and his own. He also reviewed the 1999 reports. He claimed that he was not aware in 1999 that Weik's father had a diagnosis of schizophrenia. He believed that it would have explained the genetic component of his opinion since only 2% of the population suffers from it, and a greater chance exists if a family member has it. He felt the lack of this information precluded the defense from impeaching the state psychiatrist. Dr. Morgan opined that Weik suffered from paranoid schizophrenia. He felt the psychiatrist was wrong when he concluded that there were no delusions or hallucinations presented and could have rebutted the testimony.

Dr. Morgan was impeached based upon his bill where he admitted that he reviewed records on May 3 and May 5 but could not recall what those records were. He also could not recall that

he testified at trial that he was aware that father suffered from paranoid schizophrenia (Tr.p. 411, l. 18-p. 412, l. 5). He denied the meetings indicated in Beauford's voucher. Dr. Morgan denied knowledge about the case, yet at trial he referred to Mr. Hall's report about Weik eating by himself, staying away from other workers and always reading the Bible as strange ideas, but not psychotic. Tr.p. 417 [In Dr. Morgan's penalty phase testimony, Dr. Morgan described his interviews with the Applicant about the Hag, whether Weik thought he had a mental illness, and how the CIA is after his father and the mother confirmed that the CIA agents had stopped and checked their trunk. Dr. Morgan also admitted at trial that he had reviewed Carlos Torres social history from the Hall records]. Dr. Morgan did not recall if he met with Scott Parker prior to the trial. Although there was some testimony about a large head, he was aware that there was testimony that there were no neurological defects.

#60
PMB

Dr. Geoffrey McKee

Dr. McKee testified in his deposition that he was retained to do some testing of Weik. He was retained after a telephone call from Marva Hardee Thomas and Mr. Beauford in February 1999. He interviewed Weik on March 6 and May 15, 1999. Although he claimed to have been provided little information, he did receive Dr. Crawford's report, and had a verbal consultation with Dr. Stephen Shea. Prior to the competency hearing, he drafted an affidavit for counsel in May 1999 opining that Weik was incompetent to stand trial. Depo. Tr.p. 8, Exhibit 1. He stated this was done because he was unable to attend the Blair hearing. Before he testified in the penalty phase, Dr. McKee stated that he felt that he did not have any preparation with counsel. He thought he would be testifying in the penalty phase but ended up testifying only in the case in chief, but had prepared his notes on penalty phase issues. He prepared notes about risk

assessment and Weik's potential for adaptability for prison life. Depo. Tr.p. 11-12. At the trial, however, he was never asked his opinion on prison adaptability by counsel. Depo. TR.p. 12-13. He stated that he could have provided the court with more information about his opinion that Weik suffered from depressive disorder with psychotic features. He stated that if he had been advised that he was testifying in the penalty phase, he would have testified about the following; the risk assessment, the three approaches he took as to the assessments of anamnestic, the data on the likelihood of murders among inmates, and the absence of antisocial personality disorder or malingering by Weik. Depo. Tr.p. 15-17.

#61
PnB
Dr. McKee did not recall any face to face meetings with Beauford before the trial, but did have a telephone conversation with counsel. He stated that he would have discussed his findings with counsel including his opinion on adaptability to prison life. Dr. McKee acknowledged his records revealed a meeting with counsel two days before he testified and a consultation with Jeff Bloom, but did not recall the specific discussions. He was not aware that Bloom recommended that he should not be called as a witness. Depo. Tr.p. 25 [See Respondents Exhibit, 7, p. 8]. Dr. McKee was also refreshed that he did in fact testify in the penalty phase and not the guilt phase of the trial. Id. 25. He did not recall the consultation he did with Dr. Watts. Although he was present in court, he did not recall the testimony before him by Dr. Rodgers or that Rodgers had testified about adaptability to prison. Depo. Tr.p. 26. Dr. McKee felt that he was not aware that Weik had already been convicted of murder when he testified at trial. He also did not recall any discussion with Dr. Rodgers about his social history summary. He stated that his opinion at trial was not changed by the testimony he heard from Dr. Rodgers. He also said he was not present when Weik testified at trial. Particularly, he was not aware of how he rationally responded to

questions. Dr. McKee also did not recall what records he reviewed on February 22, 1999 for three hours. He would have received the records from counsel at that time, but did not know how he received them. Tr.p. 31. Dr. McKee stated that he had transcripts of Weik's statement and had reviewed Dr. Crawford's report before he did his May affidavit. Tr.p. 32. He thought he would have consulted with Dr. Watts but did not recall the substance. Tr.p. 33-34. Dr. McKee admitted that he had reviewed the social history, but not the medical records from Hall Institute prior to his trial testimony. Depo. Tr.p. 37-38, citing Tr.p. 1967.

Dr. Augustus Rodgers

#62
PMB
Dr. Rodgers testified that he became involved in the case several weeks before the trial in 1999. However, his voucher, Respondents Exhibit 13, revealed that he began his billing on May 24, 1999 and claimed a total of 25 hours work in the matter, including his testimony. He referred to his trial testimony concerning the information he had been provided before the trial. Tr.p. 1925. Dr. Rodgers, referring to a social history prepared by present counsel's defense team, testified about the genogram prepared for the proceeding by mitigation specialist Margaret O'Shea. He stated this was not done at the Weik trial and that he had not received similar social history information from a mitigation investigator in 1999 that he received before the post-conviction relief proceeding. He summarized his opinion that Weik had needed help for a long time and his conditions growing up needed intervention. He stated that he had similar impressions in 1999. He described the Weik environment as negative and detrimental from birth and that no intervention was allowed.⁷

⁷During the state PCR hearing, testimony was also received from Dr. Seymour Halleck, a forensic psychiatrist who was not involved at trial. Dr. Halleck opined that upon his review of the records and prior testimony that Weik suffers from schizophrenia paranoid type, schizotypal personality disorder and a major depressive episode. He

ANALYSIS

1. **Counsel's Retention of Investigators 9(m) and (r).**

This Court must find that the defense team's retention of the investigators was not constitutionally deficient. Plainly, there was a delay from when counsel became appointed in the case. However, this delay in retaining Minter or Rickborn did not impact upon the ultimate presentation of relevant information to the jury. As set out above, with more time it is evident that a case consisting of genograms describing historical family traits and dysfunction within the family would have been presented. As to the claim of "untimeliness," any deficiencies in their presentation was not the result of the delayed retention. The information was quickly developed in the initial interviews of the close relatives as well as Weik related to the background. Probative evidence concerning the father's violence, the hag, and the defense perception of his mental illness was known and produced in advance of trial.

The problem with the late assignment did not necessarily impact upon the investigation, but it seemed to have impacted stress upon one of the investigators, particularly Ms. Rickborn, as the trial approached. As noted above, despite the lengthy time in preparation for the PCR action and its investigation and presentation of a fuller mitigation case, the result was essentially the

described the voices that Weik is hearing since he was 15 and the influence of the Hag. He offered that his belief in his father's military career was a product of mental illness. He opined that Weik's desire for the death penalty was a product of his mental illness. He felt that if he testified in 1999, his testimony would have been similar to Dr. Watts. He felt that he could have impeached some of Dr. Shea's opinion that there was no deterioration in function and the strength of the evidence of regarding schizophrenia. He felt there was a strong need for a family history. He assessed Weik's testimony and thought he had started out well but was not willing to answer questions by the prosecution.

Margaret O'Shea also testified about the importance of the role of a mitigation investigator and the time it takes to properly prepare the social background information for the mental health team and acquire records. She states that this was not done in the 1999 trial.

same. Thus, the Court believes there is not a reasonable probability that the result would have been different had a fuller mitigation case been presented.

The psychiatric experts had the same opinion of Weik's mental illness. The father still suffered from the same illness at trial in front of the jury as he did during the PCR hearing, (albeit without the military records to support it.) In 1999, the jury had sufficient evidence to assess the mitigation of the tragic family life. The Applicant has failed to show either deficiency or prejudice under Strickland.

2. Counsel's alleged failure to prepare or present Testimony of Family Background to their experts. 9(n), 9(o), 9(s)

*HEC
PMB*

This issue is equally without merit. The problem the Court faces is equating the PCR testimony which suggests no knowledge by either the lawyer or witness about the testimony with the fact that similar testimony was presented and developed during the trial of the case. The only obvious failing concerns the PCR testimony of Dr. McKee. However, in spite of Dr. McKee's PCR testimony, it is clear from the record that counsel Beauford interviewed and developed an understanding of the available family testimony – All of which was presented to the jury. His calling of only Amy Weik, after both the mother and the Applicant had testified in guilt, cannot be deemed deficient. The Court notes that there may have been other members of the family willing to testify, and perhaps Chris Weik and John Gunter may have also been able to reveal additional perspectives regarding Russell Weik's problems and deficiencies. However, it seems clear that counsel Beauford made these choices not by ignorance, but after he had discussed these matters with them before the trial.

More importantly, there was no 6th Amendment prejudice in the failure to present these

additional family members. The jury had a general understanding of the family and Eddie Weik from the testimony of the Applicant, his mother, Amy and the experts. While the witnesses arguably could have been better prepared, there has been an inadequate showing that there were relevant omissions such that to a reasonable probability the result would have been different. Except for one omission, the Applicant's only claims are that the expert opinions would have been stronger to the particular expert. All of the experts with the exception of Dr. McKee have continued in their opinions as testified to at the trial to a reasonable degree of certainty in their field. As to Dr. McKee's testimony concerning adaptability, it is noted that both Dr. Rodgers and Dr. Watts opined essentially that Weik would be adaptable. This Court cannot say that the failure to have Dr. McKee add to that chorus undermines confidence in the outcome of the case. Thus, the Applicant has failed in his burden of proof on these grounds as well.

#68
MB

Similarly, there seemed to be a breakdown apparent in who would provide various material received and what material was actually provided and received. Defense counsel for this proceeding either could not find their file or could not recall when certain materials got into their files. Counsel Beauford testified that he had knowledge of most of the information received in this proceeding, but did not recall from what source he had learned it. Counsel Hardee-Thomas testified essentially that she did not recall having reviewed all of the documents she received from the investigators and then when such was passed on to counsel Beauford. This testimony, along with inconsistency in some witnesses' trial testimony and PCR recollection about what witnesses knew and did not know (e.g. Dr. Morgan) makes the assessment for this Court difficult as to the deficiency prong. However, the burden of proof rests with the Applicant and the Court is constrained to conclude that counsel did not provide all investigative family reports to all

expert witnesses. However, the analysis does not stop here. Despite such a deficiency, the Court believes that the Applicant has failed to meet the burden of showing 6th Amendment prejudice. As stated above, the jury heard the basic information about Weik's mental illness and the dysfunctional family in which he was raised. As the Supreme Court stated in Jones v. State, "[J]ust because it was unsuccessful does not mean that [Weik] can now recharacterize the evidence and claim that counsel did not adequately present mitigation evidence. The "new" evidence is the same as the "old" evidence. At best, it is a fancier mitigation case. If the evidence was not persuasive in the first case, the defendant does not get a second chance. Otherwise, there would never be an end to litigation." Like Jones, Weik is not entitled to present a fancier mitigation case where the same evidence was presented in the trial. He has thus failed in his burden of proof on these grounds.

Heb
PAB

9(p) The Applicant was denied effective assistance of counsel when trial counsel did not provide a sufficient basis for their continuance motion at the hearing on May 18, 2006 when such basis was available namely a letter to them from the mitigation investigator dated April 29, 1999 which set out in detail trial counsel's inept cooperation with and supervision of the mitigation investigator - one Patti Rickborn - which resulted in her resigning from the case. If trial counsel had provided this letter to the trial judge, he would have realized that trial counsel's on the record explanation of the reason why the mitigation expert resigned on April 29, 1999 was not accurate and the trial judge would have been alerted that they were not providing effective assistance of counsel to the Applicant, would have probably continued the trial so the new mitigation investigator would have had time to gather complete information about the Applicant's personal and family background which would have been provided to the mental health experts and presented to the jury and would probably have resulted in a life sentence. [IAC - CONTINUANCE REQUEST- failed to provide April 29, 1999 Rickborn letter as explanation for resignation].

In allegation 9(p), Weik contends that defense counsel erred in failing to present Rickborn's April 29, 1999 resignation letter in support of the motion for a continuance. Weik

now suggests that the continuance would have otherwise been granted and the only basis not to have shown it was their own fear of criticism for their incompetence. This Court must conclude that Weik has failed in showing either deficient performance or prejudice by this failure.

The record reveals the following at the motion hearing on May 18, 1999 after the competency hearing, Applicant's trial counsel moved for a continuance:

Mr. Beauford: Just a little housekeeping, there's an outstanding motion in which we tried to get a continuance. Basically one of our mitigating experts has left the team and we have now Cot Parker who has just come aboard and he's a little bit coming behind and we're just gathering some of the information from the other expert. And we had filed the motion on having the matter continued and would like for the Court to maybe rule on that.

The Court: Well, what is his role? What is that mitigating part? What specific role does he have?

Mr. Beauford: He will be ...

The Court: And what happened to the fellow who left the team?
Mr. Beauford: Rickborn and Patty

The Court: Does she expect to get paid?

Mr. Beauford: I think so, your Honor. I haven't gotten a bill yet.

The Court: Well, I'm not going to pay her. If she doesn't come here and testify I am not. She's not going to get on the team to be paid and leave. I mean, she's not going to do that now, you know, that's not fair to you. It's not fair to you for her to jump ship on you. If she's going to get on the team and expect me to pay her, she ought to come here and testify in the case.

Not that I don't -- not that I'm saying I wouldn't pay this gentleman, I'll do that as well. But I just feel like it's unfair to you for her to jump ship and certainly unfair to the State and to me to have, you know, a trial scheduled months and months in advance set for this particular thing and then all of the sudden she jumps ship. What did she jump ship for?"

Mr. Beauford: Your Honor, we're on the record. Basically, I said –

The Court: I don't want you to say anything –

Mr. Beauford: Communications problems.

The Court: Sir?

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

The Court: I don't want you to say anything to prejudice your client, but at the same time, you know, if she doesn't have a good reason to leave, then I don't see how anybody else should be prejudiced. If she's got a good reason to leave, I need to know it really on the record.

In other words, if it's prejudicial to your client that she has jumped ship on you at the last second, you had to get somebody else, then I need to know what it is and I need to know what specifically your new fellow is going to do, how much time he needs, what it is he needs to do so I can say, all right, this is how it's going to be or isn't.

And again, I'm not asking you to say anything that will prejudice your client in regards to Ms. Richards.

Tr. p. 442-445. The judge advised the lawyers he would either call the lawyers the following day or would come to the courthouse. "..... I mean I'll just do what I've got to do to get this thing one way or the other resolved." (Trans. P. 445-446).

On the following day, Solicitor Bailey raised the issue of the pending defense motion for a continuance. Tr. p. 472. The judge asked about the investigator who left the team.

Mr. Beauford: Basically it was a matter of I guess communication in a sense. And I don't know what happened there. I mean basically she felt the communication wasn't the way she wanted it to be, so she decided not to be a part of the team, in short.

The Court: Has she, does she expect to be paid, first of all? That's not all that important except for this: I mean, I think once she gets on board, you know, I mean, I don't know whether she can jump ship so quick.

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

Tr. p. 473-474) The Court asked if the new investigator could take her place and Beauford said that he could. Tr. p. 474-475. The judge then said "as long as you have what you need, you know." Tr. 475. Beauford told the judge that Rickborn had not done some things she was supposed to have done such as getting Russell's VA and military records. The judge then asked how long would it take the new investigator to do the things left undone and Beauford said he needed two weeks. Tr. p. 476. The judge asked if Rickborn had started getting the records they needed and Beauford replied that she had not. Tr. p. 477-478. The judge denied the motion noting that he was not able to grant a continuance to allow someone to plunder through VA hospital records on the father. Tr.p. 478. He offered to assist counsel with an order and would make calls to expedite it, but felt it was time to try the case knowing that there will also be another witness or piece of evidence that can be found by either side. Tr.p. 479. At that point, Judge Shuler wanted Beauford either to have Rickborn in court the next day if they wanted her to continue on the case if her services were absolutely necessary, or to find someone to replace her. Beauford then stated that he preferred to go with someone else with whom he had spoken. Tr.p. 476.

The State maintains that because reversals of the denial of a continuance are "about as rare as the proverbial hens' teeth," petitioner failed to meet the prejudice prong. State v. Lytchfield, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957). The trial court's refusal of a motion

for continuance in a criminal case will not be disturbed absent a clear abuse of discretion resulting in prejudice to the appellant. State v. Williams, 321 S.C. 455, 459, 469 S.E.2d 49, 51 (1996); Lytchfield, supra.

Here, the Applicant has failed to show that the failure to present the April 29 letter was itself deficient performance. Contrary to the claims, Rickborn was not the lawyer, and counsel had advised the judge that someone new was available to take the case but needed two weeks. The Applicant seeks to suggest that counsel hid the basis for the resignation from the Court and that if the reason had been presented, the Court would have taken steps to remedy the situation with a continuance. The Court disagrees.

First, communication problems were the basis of her resignation as outlined in her letter. She gave counsel a road map of items to complete, as set out above. Her focus was on the need for the military records of the father. These issues were revealed to the trial court at the hearing.

This Court cannot say that there is a reasonable probability that the trial court would have granted the continuance by the mere presentation of the Rickborn letter. While there apparently was a communication breakdown, and while a continuation of the case as a remedy was explored by the court, the trial court remedied the situation with an appropriate alternative. His discretion would not have changed had he become aware of the breadth of the breakdown between counsel and the particular investigator. Applicant has failed in his burden of proof. Cf, Morris v. State, 371 S.C. 278, 639 S.E.2d 53 (2006) (counsel ineffective in failing to request a continuance when defendant absent).

9(v) Trial counsel was ineffective in failing to adequately voir dire potential jurors, and failing to object to the qualification of jurors who were automatically in favor of capital punishment for defendants convicted of an intentional homicide and/or unable to give due consideration to evidence in

mitigation. [Amended at Hearing - IAC - VOIR DIRE ACTS AND OMISSIONS]

In this new allegation, Weik, relying upon the assessment of Jeff Bloom asserts that counsel was unprepared to adequately voir dire the potential jurors at trial. Particularly, he claims counsel was ineffective in failing to adequately voir dire and challenge for cause the following jurors: Douglas Judy (#174), William Matthews (#204), Michael Black (#34), and Daniel Owens (#239). As a result of failing to move to excuse for cause the jurors, trial counsel was unable to strike the following jurors: Douglas Judy (#174), Jerry Bryan (#48), and Marvin Ladson (#183), all of whom served on Applicant's jury.

#11
PWB

At the outset, this Court must review the individual voir dire of the particular jurors. Juror Douglas Judy, #174, stated that he would impose death for an intentional killing, and that if "he's found completely guilty of it he deserves the death penalty." (Tr. P. 562, lines 2-8). He also stated that "[i]f someone has killed someone over an argument or something, it wasn't really meant to happen but it did, well, that's [a] life sentence to me." (Tr. P. 569; lines 16-18). When defense counsel inquired whether a killing "without any reason" necessitated a death sentence, Mr. Judy replied "[w]ell, I mean, if it was proven, you know, that there was no doubt in my mind that he did do it and I knew he did it with the evidence, it depends on the circumstances, you know whether to give him life or death." (Tr. P. 562, lines 22-25).

However, the voir dire must be viewed as a whole. Mr. Judy also stated that, "I'll have to hear everything, you know, before I give a death sentence" (Tr.p. 564), and "if someone killed someone over an argument or something, it wasn't really meant to happen but it did well that's a life sentence to me" (Tr.p. 569. l. 16-19). In addition, Judy had advised the trial judge that he

was in group three and would not automatically sentence a person to death or life if convicted, but would listen to the evidence before he decided. (Tr.p. 557-558).

A prospective juror may be excluded for cause when his views on capital punishment are such as would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). See also State v. Wood, 362 S.C. 135, 607 S.E.2d 57 (2004), cert. denied --- U.S. ----, 125 S.Ct. 2942, 162 L.Ed.2d 873 (2005); State v. Council, 335 S.C. 1, 515 S.E.2d 508, cert. denied, 528 U.S. 1050, 120 S.Ct. 588, 145 L.Ed.2d 489 (1999); S.C.Code Ann. § 16-3-20(E) (juror may not be excused in a death penalty case unless his beliefs or attitudes against capital punishment would render him unable to return a verdict according to law). When reviewing the trial court's qualification or disqualification of prospective jurors, the responses of the challenged jurors must be examined in light of the entire voir dire. Council, supra. The determination of whether a juror is qualified to serve on a death penalty case is within the sole discretion of the trial judge and is not reversible on appeal unless wholly unsupported by the evidence. State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992), cert. denied, 508 U.S. 915, 113 S.Ct. 2355, 124 L.Ed.2d 263 (1993), overruled on other grounds, Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999). The ultimate consideration is that the juror be unbiased, impartial, and able to carry out the law as explained to him. *Id.* On review, the trial court's disqualification of a prospective juror will not be disturbed where there is a reasonable basis from which the trial court could have concluded that the juror would not have been able to faithfully discharge his responsibilities as a juror under the law. State v. Green, 301 S.C. 347, 392 S.E.2d 157, cert. denied, 498 U.S. 881, 111 S.Ct. 229, 112 L.Ed.2d 183 (1990). See also Wainwright, supra. (there

will be situations where the trial court is left with the definite impression that prospective juror would be unable to faithfully and impartially apply the law and this is why deference must be paid to trial court who sees and hears the juror). see Heath v. Jones, 941 F.2d 1126, 1136 (11th Cir. 1991) (counsel not ineffective in not seeking to strike juror could be fair and follow the law). There is no ineffectiveness from failure to challenge a juror where the attorney lacks the information to object to the juror. Kimes v. U.S., 939 F.2d 776, 779 (9th Cir. 1991).

Here, viewing the responses as a whole, this Court cannot conclude that either deficient performance existed or 6th Amendment prejudice existed. The trial court did not find disqualification appropriate *sua sponte* based upon the entirety of the responses. This Court, viewing the entire voir dire does not see a basis for disqualification as a matter of law.

#23
PrB

The Applicant points out that William Matthews, # 204, when asked his opinion about the death penalty, responded that "...I would have to hear the facts and all. And if I felt like he committed it and he did it and, you know, was guilty of the crime, I would vote for it." (Tr. P. 1001, lines 1-9). Mr. Matthews said he had "always felt the same way I feel now." (Tr. P. 1002, lines 3-6). Defense counsel then went on to rehabilitate Mr. Williams by asking him if he would weigh all the factors, which the juror agreed to do. (Tr. P. 1003, lines 3-9).

However, Matthews had stated that he felt that he could give the death penalty if it was appropriate, but not in all cases. Tr.p. 997. On Beauford's questions, he confirmed that he would consider other factors than the crime in determining life or death and "I would hear the facts" and "other factors." Tr.p. 1001-01.

Like the other juror, the responses from the voir dire, as a whole, do not compel disqualification. He agreed he would listen to other factors than the crime in deciding death or

life. He was qualified and counsel was not deficient in failing to seek his disqualification based on the responses.

Juror number 34, Michael Black, informed the Court "I favor the death penalty if he's guilty of it." (Tr. P. 1022, lines 14-15). The Court then asked "[w]hen you say he's guilty of it, you mean if he's guilty of the crime?", to which Mr. Black responded "Yes, sir." (Tr. P. 1022, lines 16-18). However, the Court determined that he was qualified when the juror by asking him if he would consider all factors, which he agreed he would do. (Tr. P. 1025-1027). On examination by defense counsel, the juror indicated he was "old school," but did not elaborate on what he meant other than to say "you're innocent until proven guilty."

Contrary to the claims of the Applicant, favoring the death penalty does not make a juror disqualified. It is only when those beliefs impair his ability to follow his oath and consider other factors. The juror indicated to the court that he would not sentence a person automatically to death for murder but would listen to the circumstances. Considering the entirety of the voir dire, Black was qualified as a juror. Counsel was not ineffective in failing to seek to strike for cause.

Juror number 239, Daniel Owens, initially stated he was in the "first paragraph," meaning death for everyone "[i]f murder is proven." (Tr. P. 1064, lines 13-19). Mr. Owens stated that he would give the death penalty "unless there's some real extenuating circumstances" and that he "would consider those." Tr.p. 1066-67. Upon further inquiry by the court, the juror said he would consider all the facts. Tr.p. 1067, 1068. He then expressly confirmed that he would not always give a death penalty. Tr.p. 1068, 1070 and that "I would weigh all the facts." Tr.p. 1069. The Applicant points out that counsel developed that the juror was inclined to give the death penalty, but that he would not always want to give a death penalty. Tr.p. 1071.

The Court does not believe that, on the whole, such a response constitutes an automatic disqualification. Such a response can be read as clearly indicating he was not always going to vote for death and that he would consider other factors and weigh all the facts. The trial court found he was qualified. This Court cannot find counsel ineffective in failing to move for his disqualification based upon the entire voir dire which revealed a qualified juror. His claim must be denied.

#75
Pnd

9(u). Applicant was denied the effective assistance of counsel at the penalty phase because trial counsel did not object to a portion of the Solicitor's cross-examination of Applicant's expert Dr. Augustus Rodgers, PhD and to the Solicitor's closing argument as follows: during cross-examination, Dr. Rodgers admitted that the S.C. prisons where Applicant would be imprisoned if he received a life sentence have: crafts available for prisoners; jobs for which prisoners are sometimes paid; canteens where prisoners could buy soft drinks, candy bars, popcorn and other items with the money they earn in prison; job training; educational opportunities for prisoners to get their GEDs and to take college courses; recreational facilities available for prisoners; "three square meals" per day; free clothing and shoes; free medical care; radios and televisions.(Tr. 1944-1954). The Solicitor argued in closing argument that the jury should consider the fact that a prisoner would have a job in prison, get paid, have a canteen where he could buy soft drinks and candy and have a TV as reasons and compared the Applicant's life in prison to the decedent who was dead and in her grave. Tr. p. 2135-2136. This evidence adduced during the cross-examination of Dr. Rodgers and the Solicitor's argument injected arbitrary factors into the jury's sentencing considerations in violation of S.C. Code Section 16-3-25(C)(1). "When the jury is invited to speculate about irrelevant matters upon which a death sentence may be based, §16-3-25(C)(1) is violated." State v. Burkhart, - S.E.2d -, 2007 WL 80036 decided January 8, 2007. When an arbitrary factor is injected into the jury sentencing consideration, reversal is required. (Motion to Amend received on February 6, 2007) (IAC- PENALTY PHASE - FAILURE TO OBJECT TO PRISON LIFE EVIDENCE AND ARGUMENT].

Subsequent to the hearing and presentation of testimony and after the record was closed, on February 6, 2007, the Applicant made this additional amendment based upon the intervening

decision in State v. Burkhart, __ S.C. __, __ S.E.2d __, 2007 WL 80036 (S.C. January 8, 2007). Respondents have opposed this amendment in their proposed order for a number of well-founded reasons. First, the record and amendments had been closed at the conclusion of the hearing on September 21, 2006. Second, the Applicant had been given numerous opportunities to amend since 2003. Third, the Court in Burkhart relied upon the Court's 2005 decision in State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (2005), where the defendant challenged on appeal the admission of evidence regarding general prison conditions. Although the South Carolina Supreme Court held the issue was not preserved for review, the Court cautioned the State and the defense bar that such evidence is not relevant to the question of whether a defendant should be sentenced to death or life imprisonment. 366 S.C. at 498-99, 623 S.E.2d at 387. Bowman (and its cautionary foreshadowing of the Burkhart opinion) was established case law at the time the PCR hearing was held. This amendment is untimely and must be rejected.

Assuming *arguendo* that the amendment is allowed, the failure to object (as in Bowman) under the circumstances of this case is distinguishable. Our Court has rejected a similar argument in State v. Ivey, 325 S.C. 137, 481 S.E.2d 125 (1997) where Ivey argued that the court erred by preventing the defense from ensuring that the jury had a correct understanding of the term "life imprisonment," where the solicitor introduced considerations of early release and misled the jury about Ivey's future dangerousness to society, *while depicting life imprisonment as a luxury vacation*. 8

8 It is interesting to note that death row inmate Thomas Ivey in his federal habeas action raised a strikingly similar claim before the 4th Circuit that was rejected in Ivey v. Catoe, 36 Fed.Appx. 718, Unpublished Op. No. 01-11. (4th Cir. 2002)(prosecutor's remarks regarding prison guard's testimony as to unobjected conditions at correctional facility were fair comment on the evidence, and thus permissible and stay not warranted to litigate in state PCR action counsel failure to object to prison conditions evidence). Ivey has been represented by one of Weik's counsel in his PCR litigation of a different murder trial.

In the present case, Applicant claims trial counsel failed to provide effective assistance of counsel by failing to object to a portion of the Solicitor's cross-examination of Dr. Augustus Rodgers. The Solicitor had Dr. Rodgers admit that inmates at the S.C. Department of Corrections have certain privileges and the Applicant now argues that the failure to object to this portion of the Solicitor's closing argument in which he urged the jury to consider these same privileges. The Court points out again that this Amendment came well after the close of evidence (on or around February 6, 2007) and could have been raised in prior amended applications. Given the law as it existed during the trial of this case in 1999, this Court cannot conclude that Applicant has shown deficient performance or prejudice by the failure to object.

#77
DWB

1. The Opinion On Prison Life and Adaptability

During the presentation of Dr. Augustus Rodgers, a social worker, he revealed that as a consultant with the prisons, he was involved in the direct training and teaching of inmates to help them develop life skills which would enable them to adjust better to prison life and also better equip them and prepare them for release. Tr.p. 1940. He then admitted that he had spent time with Weik and gave an opinion that Weik could complete one of his programs and make a satisfactory adjustment to prison. Dr. Rodgers stated that he based this upon his observation in the local jail, the interaction with the prison personnel and that he had not been a source of difficulty. Tr.p. 1941.

During the Solicitor's cross-examination of Dr. Augustus Rodgers, he admitted that the South Carolina prisons where Applicant would be imprisoned if he received a life sentence have: crafts available for prisoners; jobs for which prisoners are sometimes paid; canteens where prisoners could buy soft drinks, candy bars, popcorn and other items with the money they earn in

prison; job training; educational opportunities for prisoners to get their GEDs and to take college courses; recreational facilities available for prisoners; "three square meals" per day; free clothing and shoes; free medical care; radios and televisions. (Tr. p. 1944-1954). Trial counsel did not object.

2. Solicitor's Closing Argument

Look at life in prison. You've heard some testimony that he can adjust to life imprisonment. You heard that from the psychiatrist, you've heard that from the social worker. But ask yourselves – one of the witnesses they called testified a little bit about life in prison, talked the fact that – and it's life without parole, there's no dispute about that so he would live the rest of his life in prison. The defense will tell you about that and the judge will instruct you on that.

But when you consider adjustment to prison, you got to look at what you're adjusting to. You're looking at adjustment to a life where he goes to prison, he's behind the fences, he'll be given a prison job, according to that witness sometimes they'll pay them some money, he's got a canteen where they can buy stuff, Cokes, candy bars, that kind of stuff, television to watch in their cells.

In the meantime, Susan Krasae is dead and in her grave. And I ask you if life imprisonment is an acceptable alternative to somebody who's done what he's done. That's a choice you all are going to have to make.

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

Assuming that this issue is properly before this Court, Respondents submitted that in 1999 when this case was tried, reasonable defense counsel who placed in evidence the issue of a capital inmates adaptability to prison life had no basis to object to evidence of what prison life is to assist the jury to determine whether the inmate would be adaptable to those conditions which may be different than those conditions he was presently living under or as a basis to impeach the opinion of the expert: As noted above, in 1997, the Court upheld an argument, by the same solicitor which described a prison as a "holiday inn." This was two years before the case was

#78
PMB

tried. The issue before the court now is whether reasonably prudent counsel at the time of the trial of this case was deficient in the failure to object at that time.

A counsel is not ineffective in failing to forecast changes in the law. Sherrill v. Hargett, 184 F.3d 1172(10th Cir 1999); Reasonable counsel cannot be required to anticipate later decisions. Sistruck v. Vaughn, 96 F.3d 666, 672 (3d Cir. 1996)(counsel not deficient in failing to anticipate Batson). It was not until the Burkhart decision in 2007 that the Court gave significant guidance to the prosecution and defense as to such evidence and the deficiency of counsel by failing to object to such evidence. Reasonable counsel in 1999 could not have been expected to have predicted a decision in 2007 of our Supreme Court, and thus on this ground cannot be considered deficient.

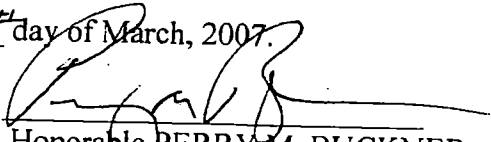
Therefore, the Applicant has failed to show that in 1999 reasonable counsel was constitutionally required to object to this evidence and argument. The Applicant has failed to show deficient performance.

Due to the failure to satisfy the initial prong of deficient counsel prong, the prejudice prong will not be addressed.

IT IS THEREFORE ORDERED:

1. That the Application for Post Conviction Relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 12th day of March, 2007.


Honorable PERRY M. BUCKNER
CIRCUIT COURT JUDGE

Walker, South Carolina

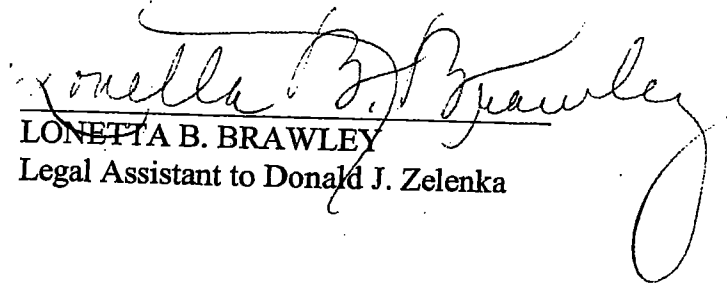
CERTIFICATE OF SERVICE

I, **Lonetta B. Brawley**, hereby certify that I have served the *Order of Dismissal* in the foregoing action by depositing copies in the United States mail, postage prepaid, to the following:

Michael P. O'Connell, Esquire
Stirling & O'Connell
P.O. Box 882
Charleston, SC 29402-0882

Melissa J. Kimbrough, Esquire
1811 Pickens Street
Columbia, SC 29201

This 3rd day of April, 2007.


LONETTA B. BRAWLEY
Legal Assistant to Donald J. Zelenka

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)

COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT
CASE NO: 2003-CP-18-1070

JOHN E. WEIK,
Petitioner/ Applicant.

vs.

APPLICANT'S 59(e)
MOTION

JON OZMINT,
COMMISSIONER OF THE SOUTH
CAROLINA DEPARTMENT OF
CORRECTIONS AND
AND THE STATE OF SOUTH CAROLINA
Respondents.

CLERK OF COURT
DORCHESTER COUNTY

Christy Anderson

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This is a Motion by Applicant pursuant to SCRPC 59(e). The Applicant asks this Court to alter or amend its ruling by allowing the proposed amendment (which would be Ground U if allowed) in the Applicant's Motion to Amend a Fifth time (hereafter Motion to Amend attached as Ex. 1) and by granting the Applicant a new sentencing trial. The Applicant will not re-argue all of the proposed Motion to Amend and refers the Court to his proposed order which is attached as Ex. 2. The Applicant's argument in support of Ground U starts on page 64 of his proposed order.

During the Solicitor's cross-examination of Dr. Augustus Rodgers, Dr. Rodgers to admitted that prisons in South Carolina have all sorts of advantages for prisoners. In his closing argument, the Solicitor's argument against a life sentence was based in part on what he elicited from Dr. Rodgers about prison conditions. Trial counsel did not object either time. The Applicant claims in

Ground U that the failure to object was ineffective assistance of counsel because bringing prison conditions to the attention of a jury injects an arbitrary factor into the jury's sentencing considerations in violation of S.C. Code Ann. 16-3-25(C)(1).

This Court in its Order of Dismissal did not allow this amendment because 1) the record and amendments had been closed at the conclusion of the hearing on September 21, 2006; 2) the Applicant had been given numerous opportunities to amend since 2003; 3) the case law supporting the Motion was established law at the time of the PCR. This Court did not expressly rule on the Motion to Amend or otherwise analyze the issue in the context of SCRCP 15(a)&(b) which was the basis of Applicant's Motion to Amend. This Court did not mention in the Order of Dismissal that Applicant had filed a Motion to Amend. The Respondents did not file a Return to the Motion to Amend.

Motions to Amend are governed by SCRCP 15(a) & (b). None of the reasons 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.

SCRCP 15(a): 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 failed to make a 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."

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.

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.

SCRCP 15(b): In his Motion to Amend, the Applicant also submitted an alternative ground for allowing the amendment: it was an amendment to conform to the evidence pursuant to SCRCP 15(b). This Court did not address SCRCP 15(b) in the Order of Dismissal.

SCRCP 15(b) states in applicable part “[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.” The Respondents did not object to any portion of the 1999 trial transcript being included in the PCR record so all of the facts in the transcript were in evidence as if they had been read into the record. Their agreement that the 1999 transcript was part of the PCR record was their implied consent to litigate the issue in the proposed amendment. They could have, for example, moved to exclude the Solicitor’s closing argument because it was not relevant to the issues raised in the pleadings. SCRCP 15(b) states further in applicable part “[s]uch amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, **even after judgment.**” This Court must allow the amendment.

Argument

This Court found in the Order of Dismissal that in 1997, two years before this case was tried, the Supreme Court in *State v. Ivey*, 325 S.C. 137, 481 S.E.2d 125 (1997) approved the same sort of objectionable cross-examination and closing argument as in this case. This Court found that in 2005 the Supreme Court in *State v. Bowman*, 366 S.C. 485, 623 S.E.2d (2005) reversed itself and

cautioned the State and defense bar that evidence regarding prison conditions is not relevant to the question of whether a defendant should be sentenced to death or life imprisonment. 623 S.E.2d at 387.¹ This Court found that *Bowman* foreshadowed the 2007 opinion of *State v. Burkhart*, __ S.C. __, __ S.E.2d __, 2007 WL 80036(S.C.) in which the Court reversed a death sentence because evidence of general prison conditions was brought to the attention of they jury in violation of S.C. Code Ann. § 16-3-25(C)(1) which prohibits a jury from considering an arbitrary factor when deciding death or life imprisonment.

This Court concluded, based on *Ivey*, that when this case was tried in 1999, it was acceptable for a jury in a death penalty case to consider general prison conditions but that changed in 2007 when the Supreme Court in *Burkhart* "gave significant guidance to prosecution and defense as to such as to such evidence and the deficiency of counsel by failing to object to such evidence. This Court held that reasonable counsel in 1999 would not have been able to predict the ruling in *Burkhart* which changed what the law was in 1997 per the *Ivey* opinion. Order of Dismissal at 79.

The Court's analysis has the patina of logic. The problem is that the beginning basis of this Court's analysis, *State v. Ivey, supra*, has nothing to do with the issue at hand. The facts of *Ivey* are mis-stated in the Order of Dismissal and none of the issues on appeal had anything to do with whether argument or evidence of prison conditions was admissible in a death penalty case in 1997 or was a forbidden arbitrary factor.

¹ The error was not preserved in *Bowman* so the cautioning by the Court was not part of the holding.

On page 76 of the Order of Dismissal, this Court frames the issue in *Ivey*. “[o]ur Court has rejected a similar argument in *State v. Ivey*, 325 S.C. 137, 481 S.E.2d 125 (1997) where Ivey argued that the court erred by preventing the defense from ensuring that the jury had a correct understanding of the term ‘life imprisonment’, where the solicitor introduced considerations of early release and misled the jury about Ivey’s future dangerousness to society, *while depicting life imprisonment as a luxury vacation.* (italics in original). On page 78, the Order of Dismissal states “[a]s noted above, in 1997, the Court upheld an argument by the same solicitor which described a prison as a ‘holiday inn’.”

The actual opinion in *Ivey* frames the facts and the issue on appeal quite differently.

Finally, Ivey argues that the court erred by preventing the defense from ensuring that the jury had a correct understanding of the term “life imprisonment,” where the solicitor introduced considerations of early release and misled the jury about Ivey’s future dangerousness to society, while depicting life imprisonment as a luxury vacation.

481 S.E.2d at 128-129. The Solicitor’s actions were not appealed or apparently even objected to by trial counsel. The Supreme Court was not asked to nor did it make any judgment of the Solicitor’s actions. Contrary to what is stated in the Order of Dismissal, the Court in *Ivey* did not uphold an argument “by the same solicitor which described prison as a ‘holiday inn.’” The term “holiday inn” does not appear in the opinion.

The Court is also incorrect that *State v. Burkhardt* was the first time the Supreme Court “gave significant guidance to prosecution and defense as to such evidence and the deficiency of counsel by failing to object to such evidence.”

Page 78 Order of Dismissal. As the *Burkhart* makes clear, the prohibition against prison conditions started long before this case and *Ivey* were tried.

We have 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 317 (1987). 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 other agencies other than the jury. *State v. Plath (Plath II)*, 281 S.C. 1, 313 S.E.2d 619, 627 (1984) (emphasis added in the Court's opinion.)

This case was tried before our decision in *Bowman*; however, we apply that reasoning here because it is consistent with our long standing rule 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. We are aware of the tension between evidence regarding the defendant's adaptability to prison life, which is clearly admissible, and this restriction on the admission of evidence regarding prison life *in general*. We note, however, that evidence of the defendant's characteristics may include prison conditions if narrowly tailored to demonstrate the defendant's personal behavior.

2007 WL 80036 (S.C.) (emphasis added in this Motion.)

This Court seems to suggest on page 78 that when trial counsel elicited from Dr. Rodgers evidence about the Applicant's adaptability to prison, they opened to door to the cross-examination of Dr. Rodgers about prison conditions and closing argument about that cross-examination. This suggestion is not a correct statement of the law. Applicant refers this Court to the indented paragraph immediately above this paragraph where the Court starts saying "We are aware of the tension"

CONCLUSION

This Court's reliance on *State v. Ivey* is unwarranted because *Ivey* is

irrelevant to the issue in the Motion to Amend. Evidence of prison conditions in capital cases was inadmissible in 1982, 1997, 1999, and in 2007. *State v. Plath (Plath II)*, 281 S.C. 1, 313 S.E.2d 619, 627 (1984) (emphasis added in the Court's opinion.) Just as in *Burkhart*, trial counsels' failure in this case to object to the cross-examination and closing argument which concerned prison conditions was ineffective assistance of counsel. This Court should allow the amendment and grant the Applicant a new sentencing trial.



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April 23, 2007

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STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT
CASE NO: 2003-CP-18-1070

JOHN E. WEIK, #5068
Applicant

vs.

ORDER

JON OZMINT,
COMMISSIONER OF THE SOUTH
CAROLINA DEPARTMENT OF
CORRECTIONS AND THE STATE OF
SOUTH CAROLINA

Respondents.

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P.B.

This Court issued its Order of Dismissal on March 12, 2007. Applicant then filed a Motion for Reconsideration under Rule 59(e) which came before me on April 23, 2007. After reviewing the Order of March 2007 and Applicant's Motion for Reconsideration, this Court wishes to clarify its previous Order.


Solicitor's Cross Examination of Dr. Augustus Rodgers

Though the amendment Ground U was addressed in the Order, this Court denied, implicitly, Applicant's request to amend his application in its previous Order. The reason for doing so was that the record had been closed for a lengthy amount of time. In addition, this matter was under advisement at the time the Applicant requested another amendment to his application. In spite of this, the Court addressed the issue of the Solicitor's cross examination of Dr. Augustus Rodgers.

Having reconsidered this matter, and Applicant's motion and argument in support thereof in full, this Court is not persuaded to change its mind. The Court now reiterates

and reincorporates its prior Order of Dismissal, and all the reasons in support contained therein, and respectfully denies Applicant's Motion for Reconsideration under Rule 59(e).

IT IS SO ORDERED.



The Honorable Perry M. Buckner, III
Presiding Judge

May 9, 2007