

**INDEX OF EXHIBITS TO THE RETURN
PETITION FOR WRIT OF HABEAS CORPUS**

(Mikal Mahdi)

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Mar 26 2025

S.C. SUPREME COURT

1. August 18, 2014 Amended Order of Dismissal,
(PCR), (C/A 09-CP-09-164);
2. September 24, 2018 Order (28 U.S.C. § 2254 Proceedings,
United States District Court), (C/A 8:16-3911-TMC);
3. Petition for Writ of Certiorari (PCR Appeal),
(Appellate Case No. 2014-002131);
4. Return to Petition for Writ of Certiorari (PCR Appeal),
(Appellate Case No. 2014-002131);
5. December 8, 2006 Sentencing Order;
6. Portion of PCR Transcript, pp. 1621-1624).

ATTACHMENT NO. 1

STATE OF SOUTH CAROLINA
COUNTY OF CALHOUN

Mikal D. Mahdi, #5238,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

C/A No. 09-CP-09-164

AMENDED ORDER OF DISMISSAL

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OCT 10 2014

S.C. SUPREME COURT

FILED

2014 AUG 20 P 1:00

HELEN THASTY
CLERK OF COURT
CALHOUN COUNTY
SOUTH CAROLINA

This is a capital post-conviction relief (PCR) case. Applicant, Mikal D. Mahdi ("Mahdi") filed an application for PCR on August 18, 2009 pursuant to *S.C. Code Ann. Section 17-27-160* and the S.C. Supreme Court's July 23, 2009 Order staying execution, allowing Mahdi to pursue potential PCR relief, and assigning this Court with continuing jurisdiction of this action. Respondent filed a Return denying the allegations of the application and moved to dismiss with prejudice. Mahdi filed two amended applications on March 19 and July 29, 2010, and Respondent filed a Return to each as above. On March 4, 2011, Mahdi moved to amend his Final Application to include an additional ground, which was formally objected to by Respondent, and this Court granted the late amendment over Respondent's objection. On March 9, 2011, an evidentiary hearing was held. On December 18, 2012, this Court issued an Order of Dismissal, filed January 8, 2013, denying and dismissing the allegations of the Final Application with prejudice.

The State subsequently filed a timely Rule 59, SCRCP Motion to Alter or Amend one (1) of the findings in the Order of Dismissal.¹ On February 11, 2013, this Court heard argument on

¹ In its Rule 59, SCRCP Motion, the State objected to the Court's finding of deficient performance under Ground 10(a)/11(a)iii. The State's reasons for the Motion are fully set forth in its Motion to Alter or Amend. The State did not object to the Court's finding that Petitioner had not established prejudice under Ground 10(a)/11(a)iii.

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the State's Rule 59 Motion. After careful consideration of the entire record, the arguments of Respondent and Mahdi, and after careful reconsideration of the law and all of the evidence and testimony in the case, this Court grants the State's Rule 59 Motion as to that one (1) portion of the Order of Dismissal and enters this Amended Order of Dismissal as the Final Order in this case. The Application for PCR, as amended, is DENIED and DISMISSED WITH PREJUDICE, for the reasons set forth below.

I. PROCEDURAL HISTORY

Mahdi murdered James E. Myers on June 18, 2004 in Calhoun County. Mahdi was arrested on June 21, 2004 in Florida on a fugitive from justice warrant. He waived extradition, was returned to South Carolina, and charged with Myers's murder, the grand larceny of his truck, and the burglary of his work shed.² Mahdi was indicted by the Calhoun County grand jury on August 23, 2004 for murder, grand larceny greater than \$5,000, and burglary 2nd degree (violent) (2004-GS-09-243 through 244). The State sought the death penalty. The South Carolina Supreme Court assigned the case to the Honorable Clifton Newman, Circuit Court Judge.

The Continuances

Attorneys Carl Grant and Glen Walters were appointed to represent Mahdi in 2004. The case was first scheduled for trial in January, 2006. Attorneys Grant and Walters moved for a continuance based on the need for more time to complete their mitigation investigation. (PCR Tr. 597-98; Respondent's Ex. 16). The Court granted the request, continuing the trial until early November 2006. (PCR Tr. 597-98; Respondent's Ex. 17). Meanwhile, in the spring of 2006, Mr. Grant was seriously injured in motorcycle accident, whereupon Mr. Walters was substituted

²The building described as the "shed" is actually more like a workshop or cabin. It is located on the victim's farm in Calhoun County. Myers and his wife were married there. Myers' wife had an office inside the "shed". A television and chairs were also located inside the "shed." (R. 1357-67, 1395-1425).

as first chair capital counsel, and attorney Joshua Koger, Jr., was appointed to represent Mahdi as second chair capital counsel. Shortly before trial, the case was continued again until November 26, 2006.

Jury Selection

On November 26, 2006, jury selection began before Judge Newman. General *voir dire*, individual *voir dire*, and jury selection were completed on November 29, 2006, with a jury and four alternates impaneled. Prior to the swearing of the jury, Mahdi waived his right to a jury trial and changed his plea to guilty. (R. 123-1336).

The Guilty Plea

On November 30, 2006, Mahdi pled guilty before Judge Newman to murder, grand larceny over \$5,000, and burglary 2nd degree (violent). Prior to his guilty plea, Mahdi was re-examined by Dr. Michael Cross, whereupon Mahdi was determined to be competent for the 2nd time. (R. 1254-59, 1336-43). Prior to the plea, Judge Newman found on the record that Mahdi was competent to plead guilty. (R. 1258-59, 1342-43). Judge Newman accepted Mahdi's guilty pleas to all charges and ensured Mahdi's pleas were knowingly, voluntarily, and intelligently entered into by extensive and detailed questioning of Mahdi under oath. (R. 1259-84). After acceptance of the pleas, the impaneled unsworn jury and alternates were dismissed. Mahdi's guilty pleas concluded on the same day as entered, November 30, 2006.

The Sentencing Proceeding

After the statutorily required 24 hour waiting period, the sentencing proceeding began on December 1, 2006, with evidence concluding on December 5, 2006, and final arguments on December 6, 2006. On December 8, 2006, Judge Newman issued his sentencing decision by reading into the record his written sentencing order, filed on the same date. (R. 1726-42, 1810-26, 1842-53; Sentencing Order pp. 1-12). Judge Newman found the following statutory

aggravating circumstances had been proven by the State beyond a reasonable doubt: (1) the murder was committed during the commission of a grand larceny; and (2) the murder was committed during the commission of a burglary. (R. 1730-31, 1814-15, 1845; Sentencing Order p. 4). After considering all of the evidence in extenuation, aggravation, and mitigation of punishment, Judge Newman sentenced Mahdi to death for the murder of James Myers. (R. 1726-42, 1810-26). Mahdi was sentenced to 15 years for burglary 2nd degree and 10 years for grand larceny, to run consecutively to one another and to the murder sentence. (R. 1741, 1825).

The Appeal

Mahdi appealed his death sentence to the South Carolina Supreme Court. He was represented by attorney Katherine Hudgins of the Office of Appellate Defense. On appeal, Mahdi raised one issue: "Did the trial judge improperly consider Mikal Mahdi's initial exercise of his constitutional right to a trial by jury in imposing a death sentence?" (Final Brief of Appellant/Petitioner, p. 3). The State, represented by Assistant Attorney General Anthony Mabry, filed a responsive brief. (See Final Brief of Respondent). On June 15, 2009, the South Carolina Supreme Court affirmed Mahdi's death sentence. *Mahdi v. State*, 383 S.C. 135, 678 S.E.2d 807 (2009). The Remittitur was issued July 1, 2009. Mahdi did not seek certiorari to the United States Supreme Court.

The Motion for Stay of Execution

Mahdi, through attorney Hudgins, filed a Motion for a Stay of Execution on June 23, 2009 before the South Carolina Supreme Court, to pursue potential PCR remedies. Pursuant to *In Re Stays of Execution*, the State filed a Return and did not oppose the Stay request to pursue potential PCR remedies. On July 23, 2009, the Supreme Court issued its Order granting the stay and assigning this Court to hear Mahdi's PCR application.

The Appointment of Collateral Counsel Hearing

On August 11, 2009, this Court convened a hearing pursuant to the Order of the Supreme Court to determine if Mahdi desired PCR counsel. Mahdi was present at the hearing, along with Assistant Attorney General Mabry, and attorney Melissa "Lisa" Kimbrough, who was there at this Court's request. Mahdi desired to have counsel appointed to represent him, indicating he wished to have Teresa Norris, Esq., represent him. On August 19, 2009, this Court held a conference call with Ms. Norris, attorney Robert Lominack, and Mr. Mabry, regarding Norris' and Lominack's qualifications and willingness to serve as PCR counsel and the timely scheduling and disposition of this matter. On August 24, 2009, this Court issued its Order of Appointment of PCR Counsel and Scheduling Order, filed August 28, 2009, appointing Norris and Lominack to represent Mahdi.

The PCR Application

Prior to the issuance of the Order of Appointment of Counsel, Mahdi filed a *pro se* PCR Application. (2009-CP-09-00164). Mahdi filed two subsequent Amended Applications. The State filed Returns to all three applications, denied the allegations, and moved to dismiss. Mahdi also moved to amend his final application, which was formally objected to by the State by the filing of a formal objection, which served as a Return to this final allegation. This Court granted Mahdi's motion to amend his final application to add one additional allegation, over the State's formal objection.

II. FACTS

Mahdi murdered James Myers, an off-duty police captain, on July 18, 2004 in Calhoun County, South Carolina, during a crime spree. (R. 1341-68). At the time of his murder, Myers had thirty-one years of service as both a fireman and as a police officer, with the rank of Captain. (R. 1357). Mahdi was a fugitive wanted for several crimes he committed outside South

Carolina.

A. Crimes

Virginia

On July 14, 2004 in Lawrenceville, Virginia, *Mahdi*, a resident of Virginia, burglarized the home of Amanda Weaver, Mahdi's grandmother's neighbor, stealing a .380 caliber chrome pistol. (R. 1498-1527). On the same day, he stole Virginia license plates from a vehicle at a car rental agency in Lawrenceville, and then stole a Mercury Sable station wagon from a car lot about 1/10th of a mile from the car rental agency. (R. 1357-67). Mahdi then left Virginia, where homicide detectives were pursuing him for his involvement in the death of a drug dealer. (PCR Tr. 480-82, 513, 550, 604, 688-89). Mahdi would later indicate he was involved in another homicide in which the body was never discovered. (PCR Tr. 514).³ Mahdi was traveling to Florida, where he had friends. (PCR Tr. 689).

North Carolina

On July 15, 2004, around 7:05 p.m., Mahdi entered an Exxon station in Winston-Salem, North Carolina armed with the stolen .380 caliber pistol. He took a beer from the store's cooler and placed it on the counter. While the store clerk verified Mahdi's age, Mahdi pulled out the pistol, shot the clerk, and then shot him again as he lay on the floor. (R. 1567-96). The event was captured clearly on surveillance video, and Mahdi's fingerprints were recovered from a mat that lay on the store's counter. (R. 1589). After shooting the victim, Mahdi attempted to rob the store's cash register, but was unable to open it. (R. 1483-98, 1567-82, 1693-94, 1777-78; State's Ex. 94). He then left the store with only the beer. (State's Ex. 94). The store clerk,

³This information was not presented at Mahdi's plea or sentencing proceeding. Mahdi's involvement in homicides in Virginia was developed at the PCR hearing as a result of Mahdi's allegations.

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Christopher J. Boggs, died from his wounds. (R. 1567-82, 1585).⁴

South Carolina

(Columbia)

At 3:30 a.m. on Sunday morning, July 17, 2004, Corey Pitts was sitting at a traffic light at the intersection of Bull and Washington Streets in Columbia, South Carolina, when Mahdi car-jacked him of his red 2000 Ford Expedition. (R. 1528-40). Pitts's description of his assailant was consistent with Mahdi's physical appearance. Pitts told police the man who car-jacked him was carrying a chrome pistol. Pitts identified Mahdi at the sentencing hearing as the man who stuck the chrome gun in his face, forced him out of his vehicle, and stole his vehicle.⁵ (R. 1532).

(Calhoun County)

Approximately thirty-five minutes after the car-jacking, Mahdi drove the stolen red Ford Expedition to the Wilco Hess station at Exit 139 off I-26 in Calhoun County. (R. 1360). The Expedition now bore the license plates Mahdi stole from Lawrenceville, VA. (R. 1360-62). Mahdi's fingerprints were found inside the Expedition, and on the license tag and the frame surrounding the tag.

Mahdi attempted for forty-five minutes to an hour to use a credit card at one of the Wilco gas pumps to fuel the Expedition, but the pump would not accept the card. Due to this suspicious behavior, the Wilco store clerks notified police. Mahdi abandoned the stolen Expedition behind the station, and, as police arrived, fled into woods near the station. (R. 1361-62). The police searched unsuccessfully for Mahdi and concluded he had obtained a ride from someone at a

⁴ Subsequent to the instant PCR hearing, Mahdi pled guilty to 1st degree murder in the death of Christopher J. Boggs, and received a life sentence.

⁵ The Mercury Sable station wagon stolen from Lawrenceville, VA was found in the parking lot of Washington Street United Methodist Church near the scene of the car-jacking. (R. 1359).

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nearby Waffle House. Mahdi was, instead, on foot in the woods near the store, headed toward victim James Myers's farm.

James Myers owned a farm approximately a $\frac{1}{4}$ to $\frac{1}{2}$ a mile through the woods from the Wilco station. (R. 1362, 1399-1401). While fleeing on foot from police, Mahdi came upon Myers's work shed and broke into it. (R. 1362, 1411). While there, he watched T.V., converted Myers's shotgun into a sawed off shotgun, and painted it black. (R. 1603). He went through SLED investigation files maintained by Myers's wife, a SLED agent. (R. 1414-16). He armed himself with Myers's .22 caliber rifle, which was kept in the shed with other guns. (R. 1604).

Myers was off work June 18, 2004, having returned with his wife from Edisto Beach, where they celebrated the birthdays of his wife, sister, and daughter. (R. 1402-03). After returning home, Myers stopped by his father's home, as he routinely did, to visit and help his father with the loss of Myers's mother, who had died two years earlier. (R. 1404). After visiting with his father, Myers left around 6:45 p.m. and headed to his farm, where Mahdi was lying in wait at the shed. (R. 1363-64, 1403-25). Mahdi confronted Myers in the shed, and shot him nine times with the victim's own .22 caliber rifle, killing him. (R. 1364, 1541-66, 1696).⁶ After murdering Myers, Mahdi poured diesel fuel on and around the body and set the body on fire. (R. 1364, 1696). He then stole Captain Myers's police issued Dodge truck and a license plate from another vehicle located near the shed. (R. 1365, 1414, 1418). In addition to the .22 rifle, Mahdi stole Captain Myers' police issued Ruger assault rifle and the converted shotgun.

Myers's wife began missing him around 9:00 p.m., when he did not come home as expected. She called him several times and paged him, with no response. Finally, she

⁶There is evidence that after Mahdi confronted Myers at the cabin, he forced Myers to empty his pockets on a table or chair inside the cabin. (R. 1419-21, 1774). It is also possible Mahdi emptied Myers's pockets after he murdered him.

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contacted Myers's father and discovered what time he left his father's home. Mrs. Myers drove to their farm, and finding the gate to the property open, she drove to the shed and found her husband's truck missing. Mrs. Myers then went into the shed and found her husband's burned and bullet riddled body lying in a pool of blood. She knew immediately he was dead and screamed for an unknown period of time. When she finally calmed down enough to use her phone, she contacted 911 and waited until the police arrived. (R. 1395-1425).

In the shop within feet of Myers's body, police found the keys to Corey Pitts's stolen Ford Expedition. (R. 1365). Also found at the scene were multiple, fired .22 caliber shell casings and 7 fired .22 caliber bullets. (R. 1541-65). Police also found evidence Mahdi had tried to hot-wire the victim's other truck. (R. 1413-14).

Florida

On July 21, 2004, in Satellite Beach, Florida, Mahdi was spotted by police in the victim's truck.⁷ He jumped out of the truck, while it was moving, and fled. Mahdi ran for the beach, carrying the fully-loaded Ruger assault rifle. (R. 1377-94). Police were about to use deadly force when Mahdi dropped the gun and continued to run. He ran into a condominium complex and was eventually apprehended on the fifth floor of the building with the use of a police dog.

While transporting Mahdi to the police station, the arresting officer thanked him for not shooting him with the assault rifle, to which Mahdi responded that the gun was "stuck on a three shot." Mahdi said with "cold eyes," "You don't think I could have got you - - I couldn't have shot you, the other cop, and excuse my language, that fucking dog." (R. 1394).

⁷ By this time, police in Virginia and South Carolina had connected the crimes there and here to Mahdi. A nationwide BOLO was issued for Mahdi's arrest. (R. 1365-66). Florida police noticed Mahdi's erratic driving and thought he might be an impaired driver and began following him. Mahdi refused to stop for police. He eventually ran over a stop sign near the end of the pursuit. (R. 1379-82).

After Mahdi's arrest, police discovered the license plate on Myers's police-issued Dodge truck had been replaced with the license plate off Myers's personal GMC truck. (R. 1559-60). Clothing found by police inside the Dodge truck matched clothing Mahdi was seen wearing at the Wilco station in Calhoun County. Shorts found in the truck matched the shorts worn by Mahdi in the surveillance video of the murder at the Exxon station in Winston-Salem. Shoes found in the truck matched footwear impressions found near the scene of Myers' murder. The Ruger Mini 14 assault rifle was recovered, and the sawed off shotgun and ammunition were found in the truck, as was an "Atlas" taken from Myers's shop, with Mahdi's fingerprints on the Jacksonville, Florida map. (R. 1394-95, 1561). This led police to two witnesses in Jacksonville, who purchased a .380 caliber pistol and a .22 rifle from Mahdi shortly after Myers' murder. (R. 1366, 1565). The witnesses identified Myers's Dodge truck as the vehicle Mahdi was driving at the time, and identified Mahdi in a photographic lineup, as the person who sold them the chrome .380 pistol and the .22 rifle. The only personal item belonging to Myers that was missing but never recovered was his police badge, which he kept in his truck or in the pocket of his pants. (R. 1418-21).

Ballistics testing confirmed the recovered .380 caliber pistol was the weapon used to murder the store clerk, Christopher J. Boggs, in Winston-Salem, and the .22 rifle was used on Myers. (R. 1562, 1592-96).

The autopsy determined Myers died from multiple gunshot wounds, after being shot nine times, including four in the chest and three in the head. The pathologist, Dr. Janice Ross, opined Myers was shot first in the chest and possibly once in the head. After he collapsed to the floor of the shed, he possibly raised his head and was shot again, and then was shot again in the head while his head was lying on the floor. (R. 1702).

B. Aggravation Factors
(Mahdi's Prior Criminal Acts)

During the sentencing hearing, in addition to the facts and circumstances of the crime, Judge Newman heard evidence in aggravation, including Mahdi's prior criminal activity as a juvenile and as an adult. Mahdi's initial involvement with law enforcement stemmed from an arrest and adjudication for car-breaking, petit larceny, and escape from custody, for which he was placed on juvenile probation.

Mahdi was committed to the Virginia's Department of Juvenile Justice (DJJ) at age fourteen for two counts of breaking and entering and two counts of grand larceny. (R. 1437). He admittedly was also involved in the sale of crack cocaine at the same age. (R. 1440). He was charged with assaulting and causing bodily injury to another inmate in Virginia's DJJ. (R. 1441-42). While in Virginia's DJJ, Mahdi told authorities one of his strengths was "robbing people." (R. 1440). During one of the break-ins he committed, Mahdi stole a .44 magnum pistol. (R. 1428-29). When Brunswick County, Virginia police attempted to arrest Mahdi on a detention order for that charge, he and his father refused to come out of their home. An eight hour standoff ensued, during which Sheriff James Woodley heard Mahdi say, "Them motherfuckers got guns." Mahdi also told police after he was finally arrested, "I'm going to kill a cop before I die." (R. 1431).

At the age of seventeen, Mahdi was arrested for slashing his mother's tires and for resisting arrest. During this arrest, Mahdi grabbed the holstered pistol of one of the investigating police officers. He later told one of the officers that he should have killed "that bitch," referring to his own mother. (R. 1457-62). Mahdi was also convicted as a juvenile of contempt of court and obstruction of justice. (R. 1612).

As an adult, Mahdi was convicted and served three years in prison, for brutally stabbing Moises Rivera, a maintenance supervisor, at an apartment complex in Richmond, Virginia, five times in the back with a knife, after Rivera investigated a disturbance at the apartment complex and came upon Mahdi trying to break into an apartment on April 17, 2001. Rivera's lung was punctured, and he arrested in the ambulance but was revived by EMS personnel. Rivera was in the hospital for six days and was out of work for two months as a result of the assault. (R. 1473-75).

Mahdi was released from the Virginia prison system on May 12, 2004. At the time Myers was murdered, Mahdi was on supervised probation for the Rivera assault, with requirements that he not to leave Virginia, violate any laws, or possess a firearm. (R. 1483-97). After his release, Mahdi tried to get his grandmother's neighbor, Amanda Weaver, to help him assemble a 9 mm pistol. He bragged to her he was dabbling in drug dealing to make money, and was going to knock off some drug dealers. (R. 1500-02). On June 14, 2004, the day before the .380 pistol disappeared from Ms. Weaver's home, as a condition of his supervised probation, Mahdi was required to submit to a urine drug screen administered by Virginia's Department of Probation and Parole. The test result showed he was using marijuana less than two months after being released from prison. (R. 1491). Thereafter, he stole the gun, the Mercury Sable, and the license plate and drove to North Carolina.

(Mahdi's Prison Conduct)

Judge Newman also received evidence regarding Mahdi's previous behavior inside prison. During Mahdi's juvenile incarceration, he assaulted another inmate causing bodily injury. (R. 1435-52). Mahdi was incarcerated in Virginia's DJJ from August 1999 until May 2000, for contempt of court and obstruction of justice. (R. 1612-13). His record while

incarcerated was plagued by maladaptive behavior. (R. 1612-13; State's Ex. 95). Records from Virginia's DJJ also document his committing several assaults during this incarceration. (R. 1441-42; State's Ex. 95).⁸

As an adult, Mahdi was incarcerated in the Virginia Department of Corrections (DOC) from October 11, 2001, to May 12, 2004, repeatedly disobeying corrections officers' orders. (R. 1485-86). He had numerous disciplinary infractions, including repeatedly using profanity or vulgar language toward employees, and threatening an officer on November 25, 2002. Due to his poor institutional adjustment and increased security level, Mahdi was transferred from Nottaway Correctional Institution to Wallens Ridge State Prison, where his behavior did not improve. While in Virginia's DOC, Mahdi was charged with setting a fire, giving false information to an employee, destroying state property, and assault on a non-inmate. (R. 1453-56; State's Ex. 86).

As a South Carolina pre-trial detainee on the instant charges, Mahdi was charged with assaulting a correctional officer, who sustained a mild concussion. (R. 1619). At the disciplinary hearing, Mahdi looked at the officer and said that, at the next chance he got, he would kill the "motherfucking officer." (R. 1616). During a search of Mahdi's cell, officers found a three to four foot piece of rope and some pieces of metal. (R. 1617). Mahdi was housed by himself. (R. 1618). He was caught damaging a conference room and hiding metal fragments from a wall socket on his person. (R. 1622-23). On another occasion, Mahdi was found with a fifteen-foot rope made of blankets. (R. 1624). Another piece of metal was found in his cell on a different occasion. (R. 1627-28). Mahdi also wrote a grievance in which he

⁸At the plea and sentencing hearing, the State did not introduce all of Mahdi's prison disciplinary violations while in Virginia's DJJ. Only a very small number of those were introduced. At PCR, the State introduced all of Mahdi's juvenile disciplinary violations while incarcerated. They totaled over 40.

discussed killing DOC employees. (R. 1629). Mahdi made additional threats toward a DOC employee at the disciplinary hearing. (R. 1646-48).

Captain Gary Lane testified that at the time of trial, Mahdi was kept on the High D Wing of the super-max portion of Kirkland Correctional Facility. This facility houses the six most difficult to manage inmates in the entire South Carolina DOC. (R. 1652-53). These six inmates are kept differently than the other 23,000 inmates in the DOC. (R. 1661-62). Their six cells are even more secure than death-row. (R. 1662). While in one of these super-secure cells, Mahdi made a rope and obtained two pieces of contraband metal, of which one was sharpened to a point. (R. 1656-57). Mahdi had been transferred to the High D Wing, from the High C Wing, because of a history of making objects and because a "hammer-like" weapon was found in Mahdi's cell. (R. 1653, 1655).

During jury selection before Judge Newman, a homemade handcuff key was found in Mahdi's possession, after he had persuaded his courthouse security detail to remove leg braces or irons and replace them with shackles. (R. 1319-21, 1664-65). Mahdi admitted he made the key in the DOC, kept it secreted in his mouth during the trial, and took it out of his mouth when he was away from guards for a meeting with his attorneys. (R. 1666-67). Mahdi had attempted to use it in the county jail but had not had an opportunity to use it in the courtroom, due to the guards' watchfulness. (R. 1319-21). Calhoun County Sheriff Thomas S. Summers, Jr., testified that he tried the handcuff key on three handcuff sets, and was able to open two of the three sets with the key. (R. 1667). Summers testified Mahdi could have easily used the key to remove his restraints and assault someone in the courtroom. (R. 1670).

C. The Sentencing Order

On December 8, 2006, Judge Newman issued his twelve page sentencing order, which he

read into the record. Judge Newman found that the State proved two aggravating circumstances beyond a reasonable doubt: (1) the murder of James Myers was committed during the commission of a larceny; and (2) the murder of Myers was committed during the commission of a burglary. (R. 1845; Sentencing Order, p. 4).

In addition to finding the State had established two aggravating circumstances beyond a reasonable doubt, Judge Newman found that while there was strong evidence of two other alleged aggravating circumstances, the State did not prove those other aggravating circumstances beyond a reasonable doubt.⁹ Therefore, Judge Newman did not consider or give any weight to those other alleged aggravating circumstances. (R. 1845-46; Sentencing Order, p. 4-5).

Judge Newman found the State presented compelling evidence of prior and subsequent bad acts of Mahdi, which showed Mahdi's bad character, evil nature, and malignant heart. Judge Newman found these acts covered a period over eight years and included housebreaking, stealing guns, robbing people, selling crack cocaine, vandalism, and malicious wounding of another human being. In his order, Judge Newman summarized these acts in detail. Judge Newman found the State had established Mahdi's bad character and propensities by clear and convincing evidence. Judge Newman did not consider this evidence as proof of any aggravating circumstance. (R. 1846-48; Sentencing Order, p. 5-7).

In his order, Judge Newman noted that he had considered all statutory mitigating circumstances and non-statutory mitigating circumstances argued by Mahdi, as well as other mitigating circumstances supported by the evidence. (R. 1848; Sentencing Order, p. 7).

Judge Newman considered Mahdi's age (21 years) and mentality at the time of this murder. Judge Newman noted the last time Mahdi's I.Q. was tested, at age fourteen, his I.Q.

⁹ These two alleged aggravating circumstances were that the murder was committed during the commission of an armed robbery and that Captain Myers was murdered because he was a police officer.

was 108, slightly above average. While he considered this statutory mitigating circumstance, he did not give it great weight because Mahdi began his criminal career at an early age, fourteen. Judge Newman found that at twenty-one Mahdi was experienced in the world of crime. Judge Newman found that by the time Mahdi committed these crimes, he was well aware of the severity of his crimes and the possible consequences. Judge Newman found that given the evidence in this case, there was nothing in Mahdi's age or mentality that in any way mitigated, excused, or lessened his culpability, nor should it be given any significant weight in his ultimate decision as to the appropriate sentence. (R. 1848-49; Sentencing Order, p. 7-8).

Judge Newman also considered what the defense contended to be Mahdi's turbulent and transient childhood and upbringing. Judge Newman noted that there was no testimony from Mahdi's clinical social worker that Mahdi ever suffered any physical or sexual abuse. Additionally, records from Virginia's DJJ showed Mahdi's father, brother, and grandmother continually expressed great care and concern for his well-being. Judge Newman found that while Mahdi's family life may have been less than ideal, particularly without the presence of a loving and caring mother, he did not find that Mahdi's difficult childhood and family life contributed in any significant way to his senseless criminal activities. Therefore, while he considered this non-statutory mitigating circumstance, he did not believe that it should be given any significant weight in his ultimate sentencing determination. (R. 1849; Sentencing Order, p. 8).

Judge Newman also considered Mahdi's offered testimony of prison adaptability. While he considered the testimony of defense expert James Aiken, Judge Newman pointed out that he had reviewed and considered Mahdi's records regarding his prior behavior in various correctional institutions. Judge Newman found Mahdi had consistently been disruptive and uncooperative and had threatened to kill prison employees. Judge Newman found prison officers had repeatedly

found homemade weapons, ropes, and other contraband in Mahdi's cells. Judge Newman also found and pointed out that during this very trial, Mahdi brought a homemade handcuff key into the courthouse with the intent to use it, if possible to escape, thus posing a serious threat to courtroom security. Judge Newman noted that Mahdi admitted to the elected Sheriff of Calhoun County that he made the key while being housed and monitored at the State's highest security level facility. While Judge Newman believed Mr. Aiken was highly credentialed and gave impressive testimony, based on Mahdi's behavior in correctional institutions throughout his adolescence and adult years, Judge Newman did not believe Mahdi was sufficiently adaptable to prison life for this non-statutory mitigating circumstance to be given any significant weight in his ultimate decision as to the appropriate sentence to be imposed. (R. 1849-50; Sentencing Order, p. 8-9).

Mahdi requested, and Judge Newman considered Mahdi's guilty plea as a non-statutory, mitigating circumstance to determine the appropriate sentence to be imposed. Judge Newman noted that the plea occurred on the fourth day of the trial, following jury selection but prior to the jury being sworn. Judge Newman pointed out that this was one day following the discovery of Mahdi's homemade handcuff key. Additionally, Judge Newman found that Mahdi had failed to demonstrate any remorse for his actions. Therefore, while he considered the guilty plea, Judge Newman concluded that no significant weight should be given to it in his ultimate decision as to the sentence to be imposed. (R. 1850; Sentencing Order, p. 9).

Judge Newman also considered the impact of the crime upon the victim's family and the community. Judge Newman found the victim, James Myers, was a husband, father, grandfather, son and friend to many. Judge Newman found Myers was a well-respected police officer, an outdoorsman, a mentor, and a treasured member of humanity. Furthermore, Judge Newman found Mahdi burglarized Myers's farm shed and stole his family's sense of security and serenity.

Moreover, Judge Newman found Mahdi, by committing these crimes, robbed the Myers family and their friends of their right to peaceful enjoyment of life. (R. 1851; Sentencing Order, p. 10).

In his final decision, Judge Newman noted that he was acutely aware of the decision before him, and he stated that he did not take it lightly. Moreover, Judge Newman noted that he considered Mahdi's plea for mercy and the State's plea for justice. In evaluating these two ideals, Judge Newman also said that he was reminded of his sworn duty to preserve, protect, and defend the Constitution of this State and the United States. Furthermore, Judge Newman stated that this obligation was not only to Mikal Mahdi, but of equal importance, this was an obligation that he had to the citizens of South Carolina.

Judge Newman made the following poignant statements in concluding his Order:

My challenge and my commitment throughout my judicial career has been to temper justice with mercy and to seek to find the humanity in every defendant that I sentence. That sense of humanity does not seem to exist in Mikal Dean Mahdi. (R. 1824, 1851; Sentencing Order, p. 10).

In extinguishing the life, hope and dreams of Captain Myers in such a wicked, depraved, and conscienceless manner, the defendant, Mikal Dean Mahdi, also extinguished any justifiable claim to receive the mercy he seeks from this Court. (R. 1852; Sentencing Order, p. 11).

In considering all of the evidence in this case, I have concluded that the only appropriate punishment for the murder of Captain James E. Myers is death." (R. 1825, 1852; Sentencing Order, p. 11).

Judge Newman then stated, "I find as an affirmative fact that the evidence in this case warrants the imposition of the death penalty and that its imposition is not the result of prejudice, passion, or any other arbitrary factor." (R. 1852; Sentencing Order p. 11). Judge Newman then formally sentenced Mahdi to death. (R. 1853; Sentencing Order, p. 12).

III. PCR ALLEGATIONS/GROUNDS

Based on Mahdi's PCR application, amended applications, and Motion to Amend, Mahdi

alleges the following grounds entitle him to post-conviction relief:

Ground 10(a)/11(a)(i): Trial counsel failed to object when the trial judge improperly based his decision to impose a death sentence on petitioner's assertion of his right to a jury trial, thereby effectively punishing him for exercising this constitutional right.¹⁰

Ground 10(a)/11(a)(ii): Counsel failed to adequately advise Applicant of the advantages of jury sentencing, which resulted in the Applicant pleading guilty and purporting to waive his right to jury sentencing.

Ground 10(a)/11(a)(iii): Counsel failed to adequately investigate, develop, and present mitigation evidence concerning Applicant's family, social, institutional, and mental health history.¹¹

10(a)/11(a)(iv): Counsel failed to assert that applicant's death sentence violates the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution due to Applicant's developmental deficits.¹²

(10)(b)/11(b): *Applicant's death sentence violates the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution due to Applicant's developmental deficits.* At the time of the offenses, Applicant was developmentally impaired such that he had the "mental age" of a juvenile due to his atrocious background of deprivation, neglect, abuse, and institutionalization. The Cruel and Unusual Punishment Clause precludes the infliction of the death penalty upon him, just as it precludes execution of those under the age of 18 at the time of the offenses, because of these grave developmental deficits. *See Roper v. Simmons*, 543 U.S. 551 (2005).

11(a)(v): Counsel failed to assert that S.C. Code Section 16-3-20 is unconstitutional in that it automatically precludes jury sentencing following a guilty plea in violation of the Sixth, Eighth, and Fourteenth Amendments as addressed in *Ring v. Arizona*, 536 U.S. 584 (2002). Moreover, this statute forces a capital defendant to choose between his right to a jury trial and his right to present mitigating evidence, namely that he has accepted responsibility for the crime. While this issue has been rejected by state courts, *see State v. Downs*, 361 S.C. 141, 604 S.E.2d 377 (2004), it has not been reviewed by federal courts and counsel were thus ineffective in failing to adequately preserve the record for subsequent litigation.

10 Mahdi alleged under this ground counsel's deficient performance in failing to preserve this issue for appellate review deprived petitioner of the right to effective assistance of counsel under the Sixth and Fourteenth Amendments and *Strickland v. Washington*, 466 U.S. 668 (1984).

11 Mahdi alleged under this ground counsel's conduct in each instance separately and cumulatively was both unreasonable and prejudicial in sentencing. *Strickland v. Washington*, 466 U.S. 668 (1984); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008).

12 Mahdi alleged under this ground counsel's conduct in each instance, separately and cumulatively was both unreasonable and prejudicial in sentencing. *Strickland v. Washington*, 466 U.S. 668 (1984); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008).

The PCR Merit's Hearing

On March 9, 2011, an evidentiary merits hearing was convened at the Broad River Correctional Institution. Present at the hearing were Mahdi, his collateral attorneys, along with representatives from the Attorney General's Office and the victim's widow, Amy Myers. Mahdi called several witnesses to testify at the hearing: Carson Burwell, Rose Gupton, Sophie Gee, Myra Harris, Carol Wilson, George Smith, Sharon Pond, Nicholas Cooper-Lewter, Lawanda Burwell, Drs. Craig Haney, DeRossett Myers, and Donna M. Schwartz-Watts. Mahdi also submitted sworn affidavits of James Woodley, Dora Wynn, Doug Pond, and Sandra Wynn Burwell. Mahdi did not testify at the PCR hearing. Respondent called the following witnesses at the evidentiary hearing: Carl Grant, Esq., Glenn Walters, Esq., Josh Koger, Esq., Paige Tarr Haas Munn, Dr. Thomas Martin, James Gordan, and Dr. Geoffrey McKee. Additionally, exhibits were introduced by both sides. At the evidentiary hearing, this Court had the opportunity to view and hear the witnesses who testified in person, and make a credibility assessment with regard to each witness.

After reviewing the record, including the Record on Appeal and the trial exhibits, and after reviewing all of the evidence submitted in this case, including the testimony of each witness and the exhibits introduced at the PCR hearing, and after making a credibility assessment regarding the witnesses and evidence introduced, this Court finds the application for post-conviction relief to be without merit and denies and dismisses the application with prejudice.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Standard of Review

In a PCR action, the applicant has the burden of proving his allegations by a preponderance of the evidence. *Rule 71.1(e), SCRPC; Butler v. State*, 286 S.C. 441, 334 S.E.2d

813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); *Butler, supra*.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Butler, supra*. An applicant must overcome this presumption to prevail on PCR. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Second, counsel's deficient performance must have prejudiced the applicant, such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117, 385 S.E.2d at 625, citing *Strickland*.

"Surmounting *Strickland*'s high bar is never an easy task[.]" *Premo v. Moore*, 131 S.Ct. 733 (2011) citing *Harrington v. Richter*, 131 S.Ct. 770 (2011), quoting *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010). "It is 'all too tempting' to 'second-guess counsel's assistance after conviction or adverse sentence.'" *Harrington v. Richter*, 562 U.S. ___, (2011), citations omitted. "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Id.*; *Strickland*, 466 U.S., at 690.

In the context of a guilty plea, the applicant also must establish prejudice by proving "counsel's constitutionally-ineffective performance affected the outcome of the plea process."

Hill v. Lockhart, 474 U.S. 52, 59 (1985). The applicant must show, but for counsel's ineffective assistance, there is a reasonable probability he would not have pled guilty but would have proceeded to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

In the context of sentencing phase issues, the applicant must show deficient performance and prejudice. To show prejudice is to show that "there is a reasonable probability that ... the sentencer—including an appellate court, to the extent it independently reweighs the evidence--would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695; *see also Wiggins*, 539 U.S. at 537; *Jones v. State*, 332 S.C. 329, 344-45, 504 S.E.2d 822, 829-30 (1998). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Jones*, 504 S.E.2d at 823-824. The United States Supreme Court made clear that the burden is *not on the State* to show the lack of prejudice, but the burden is *on the applicant* to show prejudice. *Wong v. Belmontes*, 130 S.Ct. 383 (2009), *citing Strickland, supra*. The applicant must prove that had counsel acted competently there is a reasonable probability that a different sentence would have resulted. *Id.*; *Wiggins v. Smith*, 539 U.S. 510, 535, 536 (2003); *see also Terry v. State*, 394 S.C. 62, 714 S.E.2d 326 (2011). Such a showing "requires a substantial, not just conceivable, likelihood of a different result." *Cullen v. Pinholster*, 131 S.Ct. 1388, 1403 (2011), *citing Harrington*, 131 S.Ct. at 791 (2011).

IV. Mahdi's Grounds Lack Merit

A. Ground 10(a)/11(a)(i)

Trial counsel failed to object when the trial judge improperly based his decision to impose a death sentence on petitioner's assertion of his right to a jury trial, thereby effectively punishing him for exercising this constitutional right. Counsel's deficient performance in failing to preserve the issue for appellate review deprived petitioner of the right to effective assistance of counsel.

Mahdi had the burden of proving this allegation. *Butler, supra*. He offered no evidence, however, in support of this ground at his hearing. (PCR Tr. 20-710). Mahdi failed to prove counsel was ineffective in this regard. *Id.* Furthermore, Judge Newman did not base his decision to sentence Mahdi to death on Mahdi's assertion of his right to a jury trial. At the plea and sentencing, Mahdi asked the Court to consider his guilty plea as a non-statutory mitigating circumstance. Judge Newman did consider the guilty plea as a non-statutory mitigating circumstance, but chose not to give this non-statutory mitigating circumstance great weight. (R. 1848, 1850; Sentencing Order, pp. 7, 9). In his sentencing order, Judge Newman stated:

The defense further argues a non-statutory mitigating circumstance that the Court should consider the defendant's guilty plea in determining the appropriate sentence to be imposed. The defendant's guilty plea occurred during the fourth day of his trial following jury selection, but prior to the jury being sworn. This was one day following his attempted escape through the use of a homemade key. In addition, Mr. Mahdi has failed to demonstrate any remorse for his actions at any point in time known to this Court. Therefore, I conclude that no significant weight should be given to this non-statutory mitigating circumstance in the Court's ultimate decision as to the sentence to be imposed.

(R. 1738-39, 1822-23, 1850, Sentencing Order, p. 9).

Mahdi engages in a strained reading of one sentence of this one paragraph of a twelve page capital sentencing order in an attempt to vacate his death sentence. In his direct appeal brief, Mahdi selected a single sentence from this paragraph and alleged the selected sentence evidenced the trial judge considered the initial exercise of Mahdi's right to a jury trial as a circumstance supporting the imposition of the death penalty.¹³ (See BOA, p. 9, 11, 18-21).

Judge Newman did not consider Mahdi's participation in *voir dire* and selecting a jury as an aggravating circumstance. See *State v. Ray*, 310 S.C. 431, 437, 427 S.E.2d 171, 174-75

¹³ The sentence reads, "The defendant's guilty pleas occurred during the fourth day of his trial following jury selection, but prior to the jury being sworn." (See BOA).

(1993) (trial judges are presumed to know the law and apply a narrowing definition of this state's death penalty statute), *referencing Walton v. Arizona*, 497 U.S. 639 (1990).

Mahdi's allegation of ineffective assistance of counsel in this regard is without merit. Mahdi offered no evidence on this ground at the PCR evidentiary hearing, and Judge Newman did not sentence Mahdi to death for participating in *voir dire* and selecting a jury. Mahdi's assertion is not supported by the sentencing order or the record. Mahdi was sentenced to death only for the appropriate reasons, the circumstances of the crime and his character. Therefore, counsel was not ineffective in failing to object to this portion of the sentencing order. Mahdi cannot show deficient performance or resulting prejudice from counsel's alleged failure to object. See, *Strickland, supra*; *Wong, supra*; *Wiggins, supra*; *Jones, supra*. This ground must be dismissed with prejudice.

B. Ground 10(a)/11(a)(ii)

Counsel failed to adequately advise Applicant of the advantages of jury sentencing, which resulted in the Applicant pleading guilty and purporting to waive his right to jury sentencing.

There is no merit to this second allegation. Mahdi does not specify the jury sentencing advantages to which he alludes, nor how counsel inadequately advised him of those advantages. This ground must be dismissed as vague and ambiguous.

Mahdi did not testify, and offered no testimony or other evidence at the merits hearing on this issue.¹⁴ Mahdi did not question any of his former appointed attorneys on this issue. (PCR Tr. pp. 587-710). Mahdi has failed to meet his burden of proof on this allegation, which must therefore be dismissed with prejudice. *Butler, supra*; *Hill, supra*. Furthermore, having offered no

¹⁴ At the close of Mahdi's PCR case presentation, Respondent moved for a directed verdict due to lack of any evidence or proof offered on his ground. When asked for a response, collateral counsel gave none. This Court held the motion for a directed verdict in abeyance until the completion of the PCR merits hearing. At the conclusion of the merits hearing, there was still not evidence offered on this ground by applicant Mahdi. (PCR Tr. 1-719).

proof, Mahdi waived and abandoned this issue. *Parks v. Morris Homes Corp.*, 245 S.C. 461, 471, 141 S.E.2d 129, 134 (1965) (Further, it is a litigant's duty to bring to the court's attention any perceived error, and "the failure to do so amounts to a waiver of the alleged error."). *See also Gibbs v. Kimbrell*, 311 S.C. 261, 267, 428 S.E.2d 725, 729 (Ct. App. 1993) (discussing waiver).

Furthermore, the record indicates Mahdi was fully advised of his rights to jury sentencing and the pros and cons of having a jury conduct his sentencing verses a judge determining his sentence. (See R. 1324-68). After Mahdi indicated a possible guilty plea, court recessed overnight, and Mahdi was given additional time to talk to his lawyers about whether he wanted to plead guilty and have the judge determine his sentence or proceed with a jury trial and have a jury determine his guilt and sentence. (R. 1332-36). The record reflects that discussions in this regard had already occurred before counsel indicated to the Court that Mahdi might change his plea to guilty. (R. 1329-32). Mahdi clearly understood his right to have a jury determine his sentence, because several days of individual *voir dire* and jury selection had been completed, and a panel of twelve jurors and four alternates had been seated but not sworn at the time Mahdi indicated he might plead guilty. (R. 1370-71). After the overnight recess, Mahdi told the Court he wanted to enter a plea of guilty. (R. 1336).

Additionally, prior to Mahdi's entry of a plea of guilty, Judge Newman conducted a *Blair* hearing to determine whether Mahdi was competent to plead guilty. (R. 1336-43). Dr. Michael Cross testified that Mahdi had a rational understanding of what a guilty plea meant, and the risks, benefits, and possible consequences. (R. 1340). Mahdi told the Court that he was competent to plead guilty, and he wanted to move forward with the guilty plea. (R. 1342). Judge Newman found on the record that Mahdi was competent to plead guilty. (R. 1343). Judge Newman's finding in this regard is fully supported by the record.

During the lengthy colloquy with the Court, Mahdi was placed under oath. (R. 1343).

Mahdi testified that he understood that if he pled guilty in front of Judge Newman that the possible sentences were life in prison and the death penalty. (R. 1347). Mahdi testified under oath that he understood he had the right to a jury sentencing, and that in order to sentence him to death all twelve jurors would have to unanimously agree that he should be sentenced to death. (R. 1347-48). Mahdi also stated under oath that he understood that if he pled guilty, the Judge would solely determine the sentence, not the twelve jurors. (R. 1349).

Mahdi told Judge Newman that he had had sufficient time to discuss with his attorneys and his family his decision to plead guilty. (R. 1351). Mahdi stated he had no complaints against his attorneys, was fully satisfied with them, and did not need any more time to discuss anything with them. (R. 1268). Mahdi acknowledged that, understanding the nature of the charges, the possible penalties, including death, the other possible consequences of his guilty plea, and his constitutional rights, he wanted to plead guilty. (R. 1356). The record shows Mahdi knowingly, intelligently, and voluntarily made the decision to enter a plea of guilty and have Judge Newman sentence him, rather than the jury he had selected and impaneled. (R. 1324-68). See *Boykin v. Alabama*, 395 U.S. 238 (1969); *Rayford v. State*, 314 S.C. 46, 443 S.E.2d 805 (1994) (record of plea proceeding, including applicant's answers to the trial judge's questions, clearly establishes that applicant could not have had misconceptions regarding sentencing).

Additionally, counsel testified at the PCR hearing that Mahdi decided he wanted Judge Newman to sentence him rather than the jury he had selected and impaneled. (PCR Tr. 682-84). Mahdi offered no testimony on this issue and offered no evidence that contradicted counsel's sworn testimony on this issue. This Court finds counsel's testimony on this issue to be credible. This Court also finds that counsel's testimony on this issue is supported and corroborated by Mahdi's responses to Judge Newman's questions during the guilty plea itself.

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Given the vague allegations of this ground, the lack of any supportive evidence in the record, and the clear record before this Court that Mahdi understood the advantages and disadvantages of jury sentencing, this ground must be dismissed with prejudice. See *Strickland, supra*; *Hill, supra*; *Butler, supra*. There is no proof that counsel was deficient in any manner in this regard. See *Strickland, supra*; *Hill, supra*; *Butler, supra*.

Additionally, as a result of this record, Mahdi cannot show prejudice. *Hill, supra*. Given this record, including counsel's credible testimony, the record of the plea proceeding, and the evidence that would have been submitted to the chosen jury, including the horrendous facts of Myers's murder, the murder of Christopher Boggs in North Carolina, and Mahdi's maladaptive prison behavior and atrocious criminal record, Mahdi has not met and cannot meet his burden of proof that there is a reasonable probability he would not have pled guilty, and would have proceeded to trial with a different outcome. This ground must be dismissed with prejudice.

C. Ground 10(a)/11(a)(iii)

Counsel failed to adequately investigate, develop, and present mitigation evidence concerning Applicant's family, social, institutional, and mental health history.

At the merits hearing, under this ground, Mahdi raised several different specific allegations of ineffective assistance of counsel:

- a) Counsel should have interviewed and called at sentencing several of Mahdi's extended family members and also community members to testify to his family, social, scholastic, and mental health history.
- b) Counsel should have presented the testimony collateral counsel presented [at PCR] through a different forensic social worker than the one counsel used at sentencing.
- c) Counsel should have introduced testimony from an expert regarding the effect of Mahdi's life of incarceration on Mahdi.

- d) Counsel failed to adequately investigate, develop, and present evidence concerning his mental health history or mentality; specifically, counsel should have discovered and presented the testimony Mahdi presented through Drs. Schwartz-Watts and Myers at PCR, and counsel failed to provide certain records to their own psychiatric/psychological experts;
- e) Finally, counsel failed to introduce certain documents at sentencing such as certain school records, his DJJ records, records from his commitment to the Walter Carter Center at age nine, his father's records, and counsel failed to call school officials.

This Court finds there is no merit to these allegations for the reasons set forth below.

Our Supreme Court has analyzed claims of failure to investigate, discover, and present mitigation evidence under *Strickland, Wiggins v. Smith*, 539 U.S. 510 (2003) and its progeny. See *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009); *Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008) (relying on *Wiggins* and *Rompilla v. Beard*, 545 U.S. 374 (2005), finding counsel deficient and defendant prejudiced by failure to investigate, develop, or present any mitigation evidence regarding defendant's violent upbringing, abuse at home, and mental illness other than limited testimony by his mother); *Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007); *Nance v. Ozmint*, 367 S.C. 547, 557 n. 8, 626 S.E.2d 878, 883 n. 8 (2006) (citing *Wiggins* and concluding counsel should have investigated and presented evidence of adaptability to prison and mitigating social history evidence outlining defendant's troubled childhood and mental illness); *Von Dohlen v. State*, 360 S.C. 598, 606-07, 602 S.E.2d 738, 742-43 (2004) (concluding counsel was ineffective in failing to adequately prepare and present evidence in penalty phase defendant suffered from severe, chronic depression at time of murder given counsel failed to provide expert witness with crucial medical records and related information which prevented that witness from conveying an accurate diagnosis of defendant's mental condition to the jury); *Simpson v. Moore*, 367 S.C. 587, 605-07, 627 S.E.2d 701, 711-12 (2006) (reversing PCR court's conclusion capital defendant suffered prejudice from failure to offer sufficient social history evidence in

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mitigation where record showed counsel did in fact do adequate investigation and presented similar mitigation evidence); *Jones v. State*, 332 S.C. 329, 344-45, 504 S.E.2d 822, 829-30 (1998) (fancier mitigation case does not establish ineffective assistance of counsel).

To establish deficient performance, a person challenging a conviction or sentence must show that "counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. A court considering a claim of ineffective assistance must apply a "strong presumption" that counsel's representation was within the "wide range" of reasonable professional assistance. *Id.* at 689. The challenger's burden is to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687.

The *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. *Id.* at 689-90. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." *Id.* at 689. The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Id.* at 690. *Strickland* does not guarantee perfect representation, only a "reasonably competent attorney." *Id.* at 687; *Harrington v. Richter*, 131 S.Ct. 770 (2011).

This standard is necessarily a general one. *Bobby v. Van Hook*, 558 U.S. 4 (2009). "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Strickland*, 466 U.S. at 688-689. "Restatements of professional standards, we have recognized can be useful 'guides' to what reasonableness entails, but only to the extent they describe the professional norms prevailing when the

representation took place.” *Bobby v. Van Hook; Strickland*, at 688. The ABA Guidelines for Appointment and Performance of Defense Counsel in Death Penalty Cases are not the definition of what reasonableness means under *Strickland*, and they are not “inexorable commands with which all capital defense counsel must comply.” *Van Hook*, *supra*.¹⁵ In fact, as Justice Alito pointed out in his concurring opinion in *Van Hook*:

I join the Court’s *per curiam* opinion but emphasize my understanding that the opinion in no way suggests that the American Bar Association’s Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003) (2003 Guidelines or ABA Guidelines) have special relevance in determining whether an attorney’s performance meets the standard required by the Sixth Amendment. The ABA is a venerable organization with a history of service to the bar, but it is, after all, a private group with limited membership. The views of the association’s members, not to mention the views of the members of the advisory committee that formulated the 2003 Guidelines, do not necessarily reflect the views of the American bar as a whole. It is the responsibility of courts to determine the nature of the work that a defense attorney must do in a capital case in order to meet the obligations imposed by the Constitution, and I see no reason why the ABA Guidelines should be given a privileged position in making that determination.¹⁶

While the ABA Guidelines provide noble standards for legal representation in capital cases and are intended to improve that representation, they are not minimum constitutional standards, which defense counsel must follow or they are ineffective. *Yarborough v. Johnson*, 520 F.3d 329 (4th Cir. 2008); *Walker v. True*, 401 F.3d 574, 583 n. 7 (4th Cir. 2005) (the *Strickland* inquiry

15 As the United States Supreme Court pointed out in *Bobby v. Van Hook*, the original ABA standards were very brief and described defense counsel’s duty to investigate both the merits and mitigating circumstances in general terms. However, the 2003 ABA Guidelines were quite different; they were 131 pages long, were directives that expanded what had been a broad outline of counsel’s duties in all criminal cases into detailed prescriptions for legal representation of capital defendants. They discuss the duty to investigate mitigating evidence in exhaustive detail, specifying what attorneys should look for, where to look, and when to begin. They include, for example, the requirement that counsel’s investigation cover every period of the defendant’s life from the moment of conception and that counsel contact *virtually everyone* who knew the defendant and his family and obtain records concerning not only the client, but also his parents, grandparents, siblings and children. If the 2003 ABA Guidelines were the standard of effective assistance of counsel, few would be the capital defense attorney who would be found effective.

16 Chief Justice Tol and Justice Burnett noted similarly in their dissenting opinion in *Ard*, the ABA Guidelines are not the standard for ineffective assistance of counsel, but the standard remained reasonableness under *Strickland*. Their position has been supported by recent decisions of the United States Supreme Court. See also generally *State v. Blakely*, 402 S.C. 650, 742 S.E.2d 29 (Cr. App. 2013), citing *Rompilla*, 545 U.S. at 400, citing *Strickland*. See also *Medlin v. State*, 276 S.C. 540, 544, 280 S.E.2d 648, 650 (1981) (Littlejohn and Gregory, JJ, concurring in part and dissenting in part) (ABA Standards are not controlling or dispositive of an issue).

"does not entail the application of *per se* rules derived from ABA standards), vacated on other grounds, 546 U.S. 1086 (2006). See *Roe v. Flores-Ortega*, 528 U.S. 470, 479 (2000); *Strickland*, 466 U.S. 688-89 (cautioning against the fallacy of treating guidelines as a "checklist for judicial evaluation of attorney performance").

Subsequent to *Van Hook*, the United States Supreme Court handed down *Cullen v. Pinholster*, 131 S.Ct. 1388 (2011) in which the Court reiterated the determination of whether counsel's performance was deficient and ultimately ineffective cannot be made based on specific guidelines. *Id.* In fact, the Court pointed out in *Pinholster* that "[b]eyond the general requirement of reasonableness, 'specific guidelines are not appropriate.'" *Id.*, citing *Strickland* at 688. The *Pinholster* Court went on to state: "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions..." *Id.*, quoting *Strickland*, at 688-89. The *Pinholster* Court went further in stating:

Strickland itself rejected the notion that the same investigation will be required in every case. *Id.*, at 691, 104 S.Ct. 2052 ("Counsel has a duty to make reasonable investigations *or* to make a reasonable decision that makes particular investigations unnecessary" (emphasis added)). It is "[r]are" that constitutionally competent representation will require "any one technique or approach." *Richter*, 562 U.S. at ___, 131 S.Ct. at 779. The Court of Appeals erred in attributing strict rules to this Court's recent case law. [FN 17 The Court of Appeals was not necessarily wrong in looking to other precedents of this Court for guidance, but "the *Strickland* test 'of necessity requires a case-by-case examination of the evidence.'" *Terry Williams*, 529 U.S. 362, 391, 120 S.Ct. 1495, 146 L.Ed. 389 (2000) (quoting *Wright v. West*, 505 U.S. 277, 308, 112 S.Ct. 2482, 120 L.Ed. 225 (1992)(KENNEDY, J., concurring in judgment).]

As a result, it is clear that since the decisions by the United States Supreme Court and the South Carolina Supreme Court referencing the ABA guidelines, the United States Supreme Court has made clear that the mere fact that an attorney did not follow the ABA Guidelines in general or specific ABA Guidelines does not mean counsel's performance was deficient in

performing a mitigation investigation in a capital case. See *Pinholster, supra*; *Van Hook, supra*; *Strickland, supra*.

What the Sixth Amendment requires is counsel in a capital case conduct a reasonable and thorough investigation into mitigation evidence. *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362, 296 (2000); *Strickland*, 466 U.S. 668 (1984).

This Court has reviewed Mahdi's allegations in this ground under the above-cited standards. This Court finds Mahdi has failed to show deficient performance, and Mahdi has also failed to show prejudice for the reasons set forth below. As a result, there is no merit to this ground.

(a) The Alleged Failure to Present Family Member and Community Witnesses

At the PCR hearing, Mahdi called several aunts and one uncle to testify to Mahdi's background and that of his family. Mahdi also offered the affidavit of another aunt. He offered the testimony of two community witnesses and the affidavits of two community witnesses on the same issue. Mahdi contends counsel was deficient in failing to call these family members and community witnesses at sentencing, and he alleges he was prejudiced by this alleged deficient performance. At PCR, Mahdi called the following family members as mitigation witnesses: Carson Burwell (a paternal uncle), Rose Gup-ton (a maternal aunt), Sophie Gee (a maternal aunt), and Lawanda Burwell (a paternal aunt and Carson's wife). Mahdi also offered the affidavit of Sandra Burwell (a paternal aunt). Mahdi also called a community activist, George Smith, and Virginia Pond, another member of Mahdi's community. Mahdi also offered affidavits from James Woodley and Douglas Pond, two more members of Mahdi's community.

Carson Burwell testified as follows. His brother, Shareef Mahdi [Mahdi's father], was an unwanted child who also experienced problems when attending integrated schools, and

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eventually converted to Islam and changed his name from Thomas Burwell to Shareef Mahdi. Mahdi's father and mother's marriage was an arranged marriage, and Mahdi's mother left Mahdi's father when Mahdi was a small child leaving Mahdi and his brother with Mahdi's father. Mahdi's father lacked supervision and parenting skills, and Mahdi's father was unable to hold a job. Carson and his wife, Lawanda, attempted to help Mahdi by taking him into their home when he was eight years old. Mahdi could not read, and Carson taught Mahdi how to read. Mahdi made a false accusation of child abuse against Carson's wife, and Carson and Lawanda were almost arrested based on this accusation. Mahdi also asked the responding police officer for his pistol so he could kill himself, which resulted in Mahdi's commitment to the Walter Carter Center [a psychiatric center] at age nine. Carson testified to Mahdi's manipulative behavior in Carson's home both before and after the commitment to the Carter Center, and Mahdi's misbehavior while in the Carter Center. He testified to Mahdi's disruptive behavior at school after being released from the Carter Center and after Mahdi found out his brother had re-united with their father, which forced Carson and Lawanda to return Mahdi to live with his father. Carson also testified to Mahdi's being asked to leave his uncle Nathan's home as an adult because Mahdi would not abide by the rules of that home. Finally, Carson testified he could not recall ever meeting with any defense attorneys or mitigation investigators from South Carolina prior to trial, and if they had asked him to appear as a witness he would have and asked the Court to spare Mahdi's life. (PCR. 21-77).

Rose Gupton, a maternal aunt, testified she was one of ten children, and her sister, Mahdi's mother, was very timid and withdrawn because of verbal abuse by their father. Gupton's mother converted to Islam after separating from Gupton's father [Mahdi's maternal grandfather]. Mahdi's mother and father's marriage was an arranged marriage, which Mahdi's mother did not really want. Mahdi's mother was seventeen when she married Mahdi's father.

Gupton claimed Mahdi's mother later told her Mahdi's father raped her on their wedding night; however, there is no evidence Mahdi ever knew of this accusation or was told of it until his PCR counsel related it to him. (PCR. 84). Mahdi's mother lived with Gupton for several months after she left Mahdi's father. Mahdi came and stayed with his mother during this time, and he was angry and would throw bowls and hit his mother. Mahdi's mother did not want to leave the children with Mahdi's father, but she was afraid of him because he had threatened her. There was no contact between Mahdi and his mother, after she left Mahdi's father, until Mahdi was a teenager, when he lived with her. Gupton said she was not talked to prior to Mahdi's death sentence. If she had been, she would have testified in his behalf and asked for mercy. Gupton could not explain why her sisters, Sophie Gee and Corliss Artis, who were interviewed by the defense team, did not tell her about Mahdi's arrest for murder until after he was convicted and sentenced to death. She claimed they must not have known about the trial because she talks to her sisters every day, and they never told her of an impending trial. (PCR. 77-92).

Sophie Gee, a maternal aunt, testified she is a registered nurse and is one of ten children. Mahdi's maternal grandfather was verbally abusive to Mahdi's mother. Mahdi's mother was shy and withdrawn. Gee's mother and four of her siblings converted to Islam, which was restrictive regarding clothing and socialization. She was not allowed to date and neither was her sister, Mahdi's mother, but she recalled two teenage friends Mahdi's mother had while growing up. Mahdi's mother was seventeen when she married Mahdi's father. Mahdi's mother interacted with her family the same when married as before. Mahdi's mother is an introvert and doesn't like socializing. Mahdi's mother was very protective of her children, dressed them in all white, and was afraid to let them play when they were small because they would get dirty. Mahdi's mother lived with Gee for a time after she left Mahdi's father. She did not want to leave her children, but Mahdi's father threatened her life. Mahdi's mother left

Mahdi's father because he was physically abusive and controlling. Mahdi's mother tried to maintain contact with the boys and sent toys and clothes, but Mahdi's father would not let her see them. Gee did not think Mahdi's father was stable. Gee saw the boys again when they were about seventeen, and Mahdi wanted to meet his mother. She claimed Mahdi thought his mother was dead. Gee admitted she and her sister Corlis Artis were interviewed by Mahdi's defense team prior to trial. Gee claimed had she been asked to testify she would have. She stated she loved Mahdi and would have asked the judge to spare his life. Gee admitted she was aware Mahdi slashed his mother's tires after reuniting and living with her; he slashed her tires because she would not let him use the car, and he was arrested for this crime. Gee stated this incident ended the relationship between Mahdi and his mother. Gee admitted she knew counsel's forensic social worker and mitigation investigator were in Virginia acting on Mahdi's behalf; she answered their questions, and there was nothing that prevented her from telling them any other information that might be helpful to Mahdi. (PCR. 92-108).

Lawanda Burwell, Carson's wife, testified to Mahdi's family background. She described Mahdi's paternal grandparents and how their marriage was not particularly a happy one. The paternal grandparents were both educators. Mahdi lived in a modular home with his father on his grandmother, Nancy's farm. Mahdi's grandmother received government subsidies from tobacco allotments, and she owned a house in Lawrenceville and another on the family farm. There were six children by Mahdi's paternal grandparents. One child was a nutritionist in Texas, and one was a stewardess who had lived all over the United States. Carson has a master's degree in education, and Lawanda has a doctorate from Harvard. None of the other children or grandchildren have been involved in criminal conduct like Mahdi. Mahdi's brother, Saleem, was in the United States Army and served two tours in Afghanistan. Mahdi came to live with Lawanda and Carson because his father was unable to take care of the boys. Mahdi

fabricated a claim of physical abuse against Lawanda and told a police officer he wanted to kill himself, which resulted in his being placed in the Carter Center. Mahdi had made similar statements in the past regarding shooting himself, but Lawanda did not believe he was suicidal. Lawanda was not impressed with the Carter Center. After Mahdi's release from there, he began to misbehave and eventually had to be returned to his father. Lawanda attributed this misbehavior to Mahdi's attempt to force his return to his father. She admitted she would have been reluctant to testify at trial, because she had not seen Mahdi since he was a small child but claimed she probably would have come around and testified as she did at PCR. (PCR. 239-95).

Sandra Burwell submitted an affidavit. She averred she was previously married to Nathan Burwell, Mahdi's paternal uncle. Mahdi's family was highly regarded in the black community in Lawrenceville, Virginia. Mahdi's great grandfather was caucasian. While Mahdi's grandmother Nancy could be "snooty" and put on airs, his grandfather Nathan was a sweet man. After finishing the day teaching agriculture, Nathan would visit and help black-owned Brunswick County farmers and consequently was rarely home to spend time with his children. The grandfather's first marriage ended when his wife and child died in childbirth. He then married Mahdi's grandmother after getting her pregnant and being forced to marry her. All of the Burwell children are intelligent and well-educated; however, none of the men have accomplished much on their own. According to Sandra, the men in the family were supported by their spouses, as she did Nathan. Mahdi's father is Nathan's brother. His problems started when he was forced to attend an all-white school when integration was voluntary. She recalled an incident in high-school when Mahdi's father stood up for himself and other black students, but Mahdi's grandparents and the black community did not support him because of possible repercussions, even though he was in the right. Mahdi's father then went to live with a paternal uncle and aunt in New Jersey but had to leave because of his behavior. Not long after, Mahdi's

father joined the Marines. When he returned from service, he joined the Nation of Islam and married Mahdi's mother. He brought Mahdi's mother to Lawrenceville and moved in with his parents. They lived in the one bedroom finished basement. Mahdi's mother would come upstairs basically to eat. Mahdi's mother was very timid and difficult to engage in conversation. Mahdi's father was very domineering with her. While Mahdi's mother never spoke of any unhappiness, Sandra believed Mahdi's mother was making moves to provide her a way out of her situation. She finished high school/got her GED. She then gave birth to Mahdi. She enrolled in a nursing program in a junior college. After completing it, she convinced Mahdi's father, who had no job, the best plan would be for her to join the military. When she came home, she informed him she wanted a divorce and had only returned for the children. Mahdi's father would not allow this, and, according to Sandra, ultimately tried to kill Mahdi's mother with the sons watching. Mahdi's father constantly told Mahdi and Saleem that their mother abandoned them and did not love them. Sandra also recalled when Mahdi was first sent to jail as a juvenile, she was in the courtroom, and after being released, Mahdi was to report to his probation officer. He did not report. She alleged he was a juvenile and had no way of getting there, and he was under his father's custody. When he did not report, he was picked up and the standoff with police occurred. She feels the failure to report was not his fault. She wanted to visit Mahdi when he was confined, but Mahdi's father had to approve visitors and would not allow her to visit. She felt so bad for Mahdi she even considered adopting him, though she never did. **(Affidavit of Sandra Burwell).**

At PCR, Mahdi also presented the testimony of a community activist George Smith, an affidavit of James Woodley, an affidavit of Vernon Pond, and the testimony of Sharon Pond, who all testified to Mahdi's father's behavior in the community. Both Smith and Pond testified to an incident where Mahdi's father jumped into a segregated [all white] swimming pool and

would not leave in protest. He was arrested and began throwing items at the jail. As a result, he was sent for a mental evaluation. The evaluation eventually determined Mahdi's father had no major mental illness. Mr. Woodley averred to Mahdi's father's conversion to Islam, his defiant behavior in the community, and his physically abusive behavior toward his wife and his mother. (PCR. 166-86, & Affidavits of James Woodley and Vernon Pond).

Counsels' Mitigation Investigation

At the PCR merits hearing, Respondent called the following witnesses in response to this specific allegation: Carl Grant, Esq., Glenn Walters, Esq., Josh Kroger, Esq., Paige Tarr Haas Munn, James Gordon, Dr. Thomas Martin, and Dr. Geoffrey McKee. Respondent also offered in evidence the testimony of Marjorie Hammock from the sentencing proceeding before Judge Newman, several exhibits introduced through Hammock in Mahdi's sentencing proceeding, and several exhibits generated during counsel's mitigation investigation.

The record shows counsel (Mr. Grant and Mr. Walters) retained a mitigation investigator (Paige Tarr Haas Munn), a forensic social worker (Marjorie Hammock), and a private investigator (James Gordon), to investigate and develop Mahdi's family and social history for mitigation evidence to be presented at sentencing. Counsel also retained two psychiatric or psychological experts, Dr. Thomas Martin (a forensic psychiatrist) and Dr. Geoffrey McKee (a forensic psychologist), to investigate Mahdi's psychiatric history and mentality at the time of the crime and uncover any mental deficiencies or disorders that would mitigate punishment. (PCR. 503-710). The record shows the mitigation investigator and forensic social worker interviewed numerous members of Mahdi's family, and counsel also interviewed potential mitigation witnesses themselves. (R. 1746-47, PCR. 503-710). Counsel and the investigators also consulted with Mahdi's North Carolina defense team [on the Boggs murder] and obtained from

them mitigation evidence or information they had uncovered. (PCR. 503-710). Counsel also moved for and obtained a continuance for almost one year in order to completely and thoroughly investigate and develop the mitigation case on Mahdi's behalf. (PCR. 597-98, Resp. Ex. 16[Continuance Motion], Resp. Ex. 17[Continuance Order]).

Ms. Tarr Haas Munn (hereinafter "Tarr"), the mitigation investigator, was retained by attorney Carl Grant on the recommendation of Jeff Bloom, an experienced capital defense attorney. (PCR. 589). She had previously served as mitigation investigator or specialist in thirty to forty capital cases. (PCR. 562-63). As a result, she was thoroughly familiar with the necessity of, and how to conduct a capital mitigation investigation. Tarr investigated Mahdi's social, family, school, institutional, and mental health history by interviewing Mahdi, his father, mother, grandmother, paternal uncle Carson, paternal aunt Lawanda, paternal aunt Kathy Burwell, maternal aunt Sophie Gee, maternal aunt Corlis Artis, paternal uncle Nathan, and school officials, and by obtaining records of Mahdi's background including his DJJ records, his school records, and his records of commitment to a psychiatric facility (the Walter Carter Center) in Baltimore at age nine. (PCR. 563-75; Resp. Ex. 12). Tarr also summarized these particular psychiatric records for counsel and their retained experts. (PCR. 565-66). Tarr also summarized Mahdi's school records for counsel and the retained experts. Tarr also traveled to North Carolina and met with Mahdi's attorneys representing him on the Boggs murder; because, they had conducted a mitigation investigation themselves on Mahdi's behalf, and their information was shared with Tarr. (PCR. 569-75, Resp. Ex. 12).¹⁷ Tarr also traveled to Lawrenceville, Virginia and made contact with Mahdi's grandmother Nancy and uncle Nathan, and traveled to Baltimore, Maryland and made contact with Mahdi's aunt Lawanda, uncle

¹⁷Mahdi's North Carolina defense attorneys were present at the PCR evidentiary hearing and did not contradict this testimony.

Carson, and aunt Kathy. Tarr also located Mahdi's maternal aunts Corliss Artis and Sophie Gee in Richmond, Virginia. Tarr also located Mahdi's mother Vera. Tarr also attempted to speak with Mahdi's brother, Saleem, however, he was repeatedly unavailable to speak with Tarr. (PCR. 563-75). Tarr provided counsel with summaries of these witnesses' potential testimony and relayed to counsel the information collected by her. (PCR. 574). She returned to Virginia, Maryland, and Pennsylvania with the forensic social worker where they were able to interview members of Mahdi's immediate and extended family. As of November 6, 2006, a month before Mahdi's sentencing, Tarr had spent approximately 170 hours interviewing witnesses, collecting documents, and producing data in her quest to put together an appropriate mitigation presentation at sentencing. At that time, she anticipated working an additional seventy-five hours in preparing the case for trial. (Resp. Ex. 10).

The record shows Marjorie Hammock, a forensic social worker, retained by Carl Grant, had previously worked as a forensic social worker in numerous capital cases in several states including South Carolina. At the time of sentencing, Hammock had testified and been qualified as an expert in clinical social work in approximately fourteen cases, worked on twenty-five capital cases, and, was working on another five capital cases, here, in Florida, and Alabama. (R. 1739-63). Hammock traveled with Tarr on the second occasion to Lawrenceville, to meet with Mahdi's paternal grandmother Nancy and uncle Nathan. She interviewed both. Hammock also traveled to Richmond and attempted to speak in person with Mahdi's mother, who was not cooperative, and was finally able to speak with her but only by phone. Hammock also interviewed a family friend. She also interviewed Mahdi's maternal aunts Sophie Gee and Corlis Artis. She also traveled to Baltimore where she met and interviewed Mahdi's uncle and aunt, Carson and Lawanda Burwell. She also interviewed Mahdi's father, Shareef Mahdi, while in Philadelphia, Pennsylvania. (R. 1739-63, PCR. 563-75).

Counsel also participated in the mitigation investigation. Counsel traveled to North Carolina and met with Mahdi's defense attorneys and mitigation investigators in the Boggs murder case, who shared with counsel the results of their investigation. Counsel testified there were team meetings at which their own mitigation investigator, forensic social worker, retained psychiatric and psychological experts, and counsel were present, and each person shared what their investigation had uncovered. (PCR. 595-97, 612).

Counsel testified they also interviewed Mahdi with regard to mitigation information or evidence. Counsel also traveled to Virginia and spoke with Mahdi's grandmother Nancy and uncle Nathan. Mahdi's uncle Nathan was not cooperative in their mitigation investigation, and counsel was hesitant to call Nathan as a witness because he assisted police in identifying Mahdi from the video of the North Carolina murder and was proud of that fact.¹⁸ Counsel testified Mahdi's grandmother was cooperative in their mitigation investigation, and they had her present at sentencing to testify, but she was unwilling to assist Mahdi regarding mitigation testimony, stating she was there [at sentencing] to defend the Burwell family name.

Counsel also talked with Mahdi's uncle Carson and aunt Lawanda. While Carson and Lawanda were cooperative in providing background information on Mahdi and his family, Carson informed counsel he would not be helpful to Mahdi if he testified in the case. Carson informed counsel Mahdi was defiant and manipulative in their home. Counsel testified Carson and Lawanda's position was they were glad Mahdi was out of their home. Carson also told counsel he and his wife were not going to help Mahdi. Carson told counsel prior to the sentencing proceeding if he were called to testify he would have bad things to say about Mahdi. Lawanda testified at PCR she would have been reluctant to testify at Mahdi's sentencing

¹⁸ Ms. Tarr also related to this Court that Mahdi's uncle Nathan was not helpful in the mitigation investigation. (PCR. 576).

proceeding in 2006. Carson admitted at PCR he may have told Mahdi's North Carolina attorneys Mahdi was a "demon" because of Mahdi's disruptive conduct in their home. Counsel also interviewed Mahdi's aunt Kathy Burwell, and she indicated she did not wish to participate in Mahdi's sentencing hearing, because she was still angry and resentful at Mahdi's brother for almost burning her house down. Counsel also interviewed Mahdi's brother, Saleem; however, he was not particularly helpful or interested in testifying.¹⁹ Counsel testified Mahdi's father was not cooperative ("standoffish") and did not want to be involved. (PCR 636). Counsel testified Mahdi himself indicated to them he did not want his father involved in his trial or sentencing proceeding. Counsel testified Mahdi's mother was completely uncooperative and did not want to participate in Mahdi's sentencing proceeding. (PCR. 602-710). Neither Mahdi's mother, nor father or brother testified at the PCR hearing or offered any affidavits. (PCR. 1-720).

Both Dr. Martin and Dr. McKee, counsel's psychiatric and psychological experts, also took a social history from Mahdi, and also a psychiatric history. Both Martin and McKee were aware of Mahdi's commitment to a psychiatric facility when he was age nine and reviewed those records in detail. Dr. Martin also reviewed Tarr's interview summaries with Mahdi's family members. Both experts were also aware Mahdi had been placed in special education classes in elementary school. Both Martin and McKee were present at defense team meetings where information was shared regarding the joint investigation into Mahdi's past. Both Dr. Martin and Dr. McKee found separately that Mahdi was not suffering from any major mental illness at the time he committed Myers' murder, and they diagnosed him with anti-social personality disorder at the time of this murder. While Dr. Martin testified he found Mahdi had suffered

¹⁹ Collateral counsel's forensic social worker, Nicholas Cooper-Lewter, admitted at PCR that Mahdi's brother, Saleem, would not talk to him either. (PCR. 317-18).

from some recurrent depression in his life, he did not find any evidence Mahdi was suffering from any depression at the time he committed Myers' murder. Dr. Martin testified at the PCR hearing the records introduced by Mahdi at PCR would not change his diagnosis. Dr. McKee testified at the PCR hearing he did not need additional records to make his diagnosis or issue his report. Neither Dr. Martin nor Dr. McKee changed their diagnosis based on records shown them by applicant at PCR. (PCR. 508-61).

Counsel testified they wanted someone at the sentencing hearing to testify on Mahdi's behalf regarding his family and social history mitigation; however, the only person who was willing to come and testify was Mahdi's grandmother Nancy; the rest of the family, including aunts, were not willing to participate. (PCR. 636, II. 12-25, 638, II. 10-21, 649-50, 693-94, 696-97, 691). Counsel testified they had the grandmother present at trial to testify and worked with her; however, she did not want to discuss Mahdi and how he came to be where he was; she wanted to talk about all of the accolades of the family, and even though Mahdi committed these horrible crimes, the Burwell family was still a good family. (PCR. 620-21, 691-92). As a result of the lack of cooperation from the family, counsel presented the mitigation evidence including Mahdi's family and social history through their forensic social worker. (PCR. 624, II. 17-22).

The Mitigation Presentation at Sentencing

Marjorie Hammock conducted a bio-social assessment of Mahdi's life and family history and presented the same in the sentencing proceeding. (R. 1739-63). Hammock informed Judge Newman she interviewed Mahdi's grandmother Nancy, his uncle Carson, his uncle Nathan, his aunt Lawanda, his mother Vera Telea Artis, his aunt Sophie Gee, another aunt Corliss Artis, Mahdi's father Shareef, and a family friend. (R. 1746-47). She conducted her bio-social assessment by interviewing family members, reviewing records, interviewing Mahdi, and taking

information from anyone who would give information about him, his life, and his development. (R. 1762). She also reviewed a synopsis of Madhi's school records and reviewed a report from his admission in Baltimore to the Walter Carter Center psychiatric facility at age nine. (R. 1747). Hammock presented, through her testimony and the exhibits introduced through her, the following mitigation evidence at sentencing before Judge Newman:

Like the family witnesses presented at PCR, Hammock informed Judge Newman of the problems within Mahdi's family. Mahdi's family looked like an intact family, but there were problems under the surface. There was alcoholism in the family, and there was some neglect on the part of Mahdi's grandfather. (R. 1750). Mahdi's grandmother, Nancy Burwell, was not allowed to have her fallopian tubes tied after the birth of 1 of the siblings born before Mahdi's father was born. (Def. Ex. 2/Resp. Ex. 5). Mahdi's grandmother, Nancy, was not emotionally available to Mahdi's father or his father's younger sister, Kathy. (Def. Ex. 2). Mahdi's father considered himself an unwanted child. (R. 1750).

Mahdi's father, like Mahdi, was extremely troubled as a child. (R. 1749-50). Mahdi's father was described as disturbed as a young child, and he threw tantrums. Mahdi's father's childhood was difficult, and he grew up in a situation feeling alienated from everyone around him. (R. 1750).

Mahdi's father was traumatized by his attending desegregated schools as a young child. (R. 1750). This experience was destructive to Mahdi's father; he was ridiculed, isolated, challenged physically by classmates, ignored, or received negative feedback from some of the instructors at the desegregated school. (Def. Ex. 2).

Mahdi's father was unable to get along with his own family and others in the community and was constantly in conflict with those around him. (R. 1750). Mahdi's father had committed assaults on some of his own family members. (R. 1433). Mahdi's father did not finish high

school; he was the only sibling not to graduate, and this was a source of consternation between him and his family. (R. 1750). Mahdi's father was unable to hold a job, and he eventually converted to Islam. (R. 1750-51). His conversion to Islam and changing his name from Thomas Burwell to Shareef Mahdi brought grief to the Burwell family. (R. 1750). Mahdi's father was suffering from depression as early as 1971. (Def. Ex. 2). Mahdi's father was discharged from the Marines under less than honorable conditions. (R. 1750). Mahdi's father was not able to function well, and there was some description of Mahdi's father suffering continuing depression. (R. 1751). There were a number of incidents involving Mahdi's father with local law enforcement. (R. 1751, 1433). He was involved in a series of misdemeanors, all said to be racially motivated. (Def. Ex. 2). And, Mahdi's father's involvement in the 8 hour stand-off with police.

Mahdi's mother was different. She was *very, very withdrawn* and did not want to participate in Hammock's interview at all. (R. 1756). It appeared Mahdi's mother was frightened about being involved with the family again because of her previous experiences with Mahdi's father. (R. 1757). While Mahdi's mother did eventually educate herself, join the military, and at the present time worked and took care of herself, she was totally isolated from her own family, as well as Mahdi's father's family. (R. 1757). While she may occasionally speak to some members of the family, there was a disconnection. (R. 1757). The information regarding Mahdi's mother came from Mahdi's mother, her siblings, and the Burwells and was all consistent. (R. 1757).

Mahdi's parent's marriage was a pre-arranged marriage to which Mahdi's mother did not agree, and Mahdi's father was much older at the time of the marriage than Mahdi's mother, who was just sixteen. (R. 1751). The marriage was arranged by Mahdi's maternal grandmother, and Mahdi's father was twenty-seven at the time. (Def. Ex. 2). Mahdi's mother had no choice but to

join the marriage, and there was conflict in the marriage from its beginning. (R. 1751). After the wedding, Mahdi's father changed Mahdi's mother's birth name, Vera, to Tilea. (Def. Ex. 2). Mahdi's father was physically abusive to Mahdi's mother, and Mahdi's mother eventually left to escape from the abuse. (R. 1751). Mahdi's mother was in what she described *and others described* as an abusive relationship, with Mahdi's father, and she decided to leave because she could no longer stay with Mahdi's father even though it meant leaving her own children. (R. 1757).

Mahdi's childhood was chaotic. (R. 1751). Mahdi's brother and Mahdi were born into a very unstable family. (R. 1751). The two boys were born within a twenty-four month period of time. (R. 1757). Mahdi's father could not provide for or take care of the family. (R. 1751). The family moved several times, ultimately ending up back in Lawrenceville living with Mahdi's grandmother. Once again, Mahdi's father was unable to sustain himself. (R. 1751).

There was a great deal of conflict between Mahdi's father and mother, and Mahdi and his brother witnessed this. (R. 1751). Mahdi and his brother witnessed domestic violence committed by their father against their mother. (Def. Ex. 2). Mahdi's mother eventually left Mahdi's father and her children trying to get away from the abuse committed by Mahdi's father. (R. 1751). Mahdi's mother was forced to leave because of the abuse. (R. 1757-58). And, Mahdi's mother left Mahdi and his brother when Mahdi was just 4 or 5 years old. (R. 1751-52).

After Mahdi's mother left, the chaos continued. (R. 1752). Mahdi's father tried to take care of the children, and the grandmother, Nancy, also tried to provide assistance during this time, but the relationship between Mahdi's father and the grandmother and the rest of the family was constantly confrontational. (R. 1752). Mahdi and his brother witnessed their father commit domestic violence on their grandmother, Nancy. (Def. Ex. 2). During this period of time, there were several moves in terms of schooling for Mahdi from Lawrenceville to Richmond and back

to Lawrenceville. (R. 1752).

Judge Newman was aware of the incident described by family members at PCR where Mahdi's father forced Mahdi's mother to return to Lawrenceville and assaulted her. (R. 1752). After Mahdi's mother left to escape from the abuse, she was literally forced to return from Richmond to Lawrenceville, ostensibly to see the boys, but this ultimately resulted in physical conflict, and she left again not to see her children for a number of years. (R. 1752). Mahdi's mother was taken from Richmond to Lawrenceville by Shareef Mahdi, who then abused Mahdi's mother. Mahdi's uncle Nathan actually rescued Mahdi's mother, but as a result of this incident, Mahdi witnessed more abuse and violence. (Def. Ex. 2). After this incident, Mahdi's mother moved to Pottsdale, without the children, in order to escape from Shareef. (Def. Ex. 2).

Ultimately, Mahdi's father was unable to take care of Mahdi at all. (R. 1753). Mahdi's father suffered from depression. (Def. Ex. 2). At this point in time, when he was age eight, Mahdi is sent to live with his aunt and uncle in Baltimore, and his brother was sent to live with another aunt in Texas. (R. 1753). As a result, Mahdi and his brother were separated from each other, and from their father. (R. 1753, Def. Ex. 2).

Mahdi had to live with his aunt and uncle because of his father's inability to care for him. Lawanda and Carson related Mahdi was a bright and energetic young boy, but very, very troubled, who had difficulty in school. (R. 1753). Carson related that when Mahdi came to live with them he could not read. (R. 1753). And, there was conflict at this time in getting Mahdi to deal with the fact he had these academic limitations. (R 1754).

Mahdi was hospitalized, psychiatrically, in Baltimore. (R. 1747-49, 1756). This admission lasted approximately two months at a mental health facility, and Mahdi was released.

(R. 1756).²⁰ Mahdi was committed involuntarily to the Walter Carter Center psychiatric facility, after being separated from his brother and father, where he was diagnosed with Major Depression with suicidal ideation, adjustment disorder, R/O Adjustment Disorder, Developmental Reading Disorder, and history of right arm and leg fractures.²¹ (Def. Ex. 1). Mahdi spent sixty days in the facility. After Mahdi was released from the mental health facility, he stayed only a short time with Carson and Lawanda, because he was anxious to be reunited with his father and brother. (R. 1756). Mahdi's behavior in Carson and Lawanda's home was defiant and became even more defiant when Mahdi learned his brother had already re-united with his father. As a result, Mahdi had to be returned to live with his father. (Def. Ex. 2).

Mahdi, his brother, and his father were re-united on the Burwell family property, an isolated place in the country. They often had no food, heat, or money. (Def. Ex. 2). Mahdi had difficulty in his adolescence, which eventually resulted in his incarceration. (R. 1749). Mahdi re-united with his mother after being released from DJJ after his 1st stint of incarceration. (Def. Ex. 1). While they reunited, it was not a successful or good reunion. Mahdi and his mother did not get along and both had very different ideas about his living with her. (R. 1758). They eventually parted ways, and Mahdi and his mother had not spoken to each other since. (R. 1758).

Mahdi's education was disrupted many times. (R. 1752, 1756). This was reflected in the school records. (R. 1752). The records also noted lateness and absences, but this was not consistent through the whole record. (R. 1756). Mahdi also had to change residences several

²⁰The testimony at the original *Blair* hearing was that Mahdi was not suffering from any mental illness. (R 131). Mahdi also stated at his guilty plea under oath, that he had not been previously treated for alcohol abuse, drug abuse or mental illness. (R 1346). When asked if he had any physical, emotional or nervous problem that might keep him from understanding what he was doing, Mahdi stated "I have none of those problems, Your Honor." (R 1347).

²¹Mahdi suffered broken bones as child while riding a bicycle and falling off of monkey bars. There was no contention at PCR that Mahdi was ever physically or sexually abused by anyone. (PCR. 571-72).

times. (Def. Ex. 2). Mahdi was forced to change elementary schools five times. (Def. Ex. 3).²² Even in his pre-teen years there was a lack of stability in terms of Mahdi's attending school, and it was reflected in the kinds of reports he received. (R. 1760-61).

Mahdi constantly had difficulty in school academically. (R. 1752). He was considered bright, but did not perform well. (R. 1752-53). He was a particularly poor reader. (R. 1753). Both Carson and Lawanda reported Mahdi had difficulty in school, could not read, and there was constant conflict in getting Mahdi to deal with his academic limitations. (R. 1753-54). The school records during this time were consistent with this report. (R. 1754). Mahdi had uneven skills in school. (R. 1755). He was in the average math program, but in the below average reading program. (R. 1755). While he excelled in science, his reading, vocabulary, and spelling remained below average. (R. 1756). When he was involuntarily committed to the Carter Center, Mahdi's initial diagnosis included "Developmental Reading Disorder." (Def. Ex. 2). Mahdi's difficulties in reading and writing remained at or below grade level throughout elementary school. (R. 1755, Def. Ex. 3). Mahdi needed improvement in a number of areas, including standards for behavior and showing respect for authority. (R. 1755). And, Mahdi had poor self-esteem throughout his academic time. (R. 1753). It was noted several places in the records Mahdi had poor self-esteem and had difficulty in relationships with others. (R. 1756). Mahdi had numerous absences in school, and Mahdi's father removed him from school in the fifth grade to home school him; however, there was no information the home schooling actually occurred. (Def. Ex. 3). In summary, Mahdi's educational history was one of poor school progress. (R. 1762).

22 Mahdi started out kindergarten at Sister Clara Muhammad School in Richmond, and he completed part of kindergarten at Totoro Elementary School in Lawrenceville. He was moved back to Richmond and attended Chamberlayne Elementary School for part of that year. Then he was removed from there and sent to Baltimore where he attended Scotts Branch Elementary School for two years. Then he was removed from that school while in the Carter Center, and ultimately returned to Lawrenceville to live with his father. (R. 1754-56).

Mahdi did not receive proper parenting while growing up. (R. 1759). Mahdi's father was not equipped to provide consistency, positive reinforcement, support, care giving, to teach social values in the community, and how to develop relationships with others, i.e. those things a child needs to grow up healthy. (R. 1759). Mahdi's father had his own personal issues, which prohibited him from being a good father. (R. 1759). Mahdi's father and mother were not really available to Mahdi on any kind of consistent basis while growing up. (R. 1760). Mahdi was exposed to a lot of conflict and chaos. (R. 1760). In his preteen years, Mahdi was exposed to more chaos, more movement, more change, a lack of stability even in terms of his attending school, and this was reflected in the school reports he received. (R. 1760). In his adolescent years, Mahdi was exposed to more chaos. (R. 1761). He was exposed to his father's outbursts and problems. (R. 1761). His father was known to be at odds with people in the community, with his own family, and with law enforcement. (R. 1761). While Mahdi cares about his father, he wanted more than anything else to have an intact family and an ongoing relationship, it simply did not happen. (R. 1761). Mahdi did not receive from his mother or father consistent help in growing up, developing good skills, or a sense of value. (R. 1761). While some people in Mahdi's life tried to provide these things, it was not consistent enough for him to learn how to do these types of things. (R. 1761).

Mahdi had been traumatized throughout his early life, and this had an impact on his ability to make good choices. This affected his ability to have a good sense of himself and others. And, it impacted his ability to behave according to societal norms. (R. 1762).

During her investigation of Mahdi's life, Hammock assessed whether certain risk factors were present or not. She testified before Judge Newman certain risk factors were present. Mahdi had been abused and neglected. Mahdi suffered from abandonment. Mahdi was never exposed to the right kind of socialization. And, he has poor self-esteem. He also has a poor

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history of school progress and a poor sense of self. (R. 1762). Mahdi was someone who had been neglected, abandoned, suffered from poor parenting, and as a result was likely to end up in a situation where he was out of control and did damage to himself and others. Mahdi fit the typical profile of persons who end up in the kind of situation before Judge Newman, because Mahdi never really had a chance to develop appropriately. (R. 1762-63)

The State did not cross-examine Hammock or challenge her mitigation testimony. (R. 1763). The State did not challenge the accuracy of the exhibits introduced through Hammock. (R. 1739-63). All of this evidence was before Judge Newman [the sentencing court] uncontested.

Furthermore, while the State introduced portions of Mahdi's DJJ records during sentencing as evidence of Mahdi's character, the records also confirmed much of what Hammock testified to before Judge Newman regarding Mahdi's upbringing and family. The records indicated Mahdi lacked appropriate parental discipline and support, and he was not supervised as a child or given appropriate structure and guidelines. (State's Ex. 85 & See R. 1440, 1442, 1869-70, 1873-74). Mahdi began smoking marijuana at age twelve, had been smoking marijuana every day since, and he began selling crack cocaine at age fourteen. (R. 1440). Mahdi needed self-esteem training, family services, and values clarification. Mahdi suffered from the lack of a mother. (R. 1446). Mahdi's father was not involved in his life; his father had a criminal record for malicious damage to property and escape; Mahdi had no supervision, no curfew, and Mahdi's father did not care about Mahdi's criminal behavior. (R. 1869-70, 73-74). Mahdi came from a dis-functional one-parent family. Mahdi's father believed the criminal justice system was prejudiced, and he also voiced his belief there were many white supremacists in the area. (R. 2146). And, a young Mahdi also made similar racial comments. (R. 2154).

The Lack of Merit of this Allegation

This Court has carefully reviewed the mitigation evidence presented *at the PCR hearing* with regards to this particular allegation in comparison with the mitigation evidence presented *at the sentencing hearing*, and considered counsels', their mitigation specialists', private investigator's, and experts' testimony regarding their mitigation investigation, and counsels' testimony why they presented the mitigation evidence they did present, and why they did not present other mitigation evidence. The record supports counsel in this case conducted a reasonable and thorough mitigation investigation and presented what mitigation they could that was favorable to Mahdi at the time of the sentencing proceeding. See *Van Hook, supra; Pinholster, supra; Wiggins, supra; Rompilla, supra; Williams, supra; Rosemond, supra; Council, supra; Simpson, supra; Jones, supra*. Contrary to Mahdi's assertion, the record shows counsel's investigation was based on more than just guilt/innocence. Based on the entire record, and the credible evidence presented, this Court finds Mahdi has not met his burden of proof to show counsel's performance was deficient in this regard. See *Van Hook, supra; Pinholster, supra; Strickland, supra; Wiggins, supra; Rompilla, supra; Wong, supra; Rosemond, supra; Council, supra; Simpson, supra; Jones, supra*.

This Court viewed the witnesses in this case, listened to their testimony, observed their demeanor, and judged their credibility accordingly. This Court finds the testimony of counsel and their defense team on this allegation *to be credible* and the present testimony of Mahdi's witnesses regarding their previous willingness to testify *to be not credible*. Accordingly, this Court finds Mahdi has failed to meet his burden of proof on this particular allegation, and has failed to show counsel was deficient. See *Butler, supra; Wiggins, supra; Council, supra*.

This Court does not find Carson Burwell's testimony credible regarding his willingness to come and testify on Mahdi's behalf at the time of sentencing for several reasons. First,

Carson could not recall talking to any attorneys or investigators from South Carolina prior to Mahdi's sentencing proceeding. The implication from his testimony was counsel and their investigators did not speak with him, and therefore, they were deficient in their mitigation investigation. However, the record clearly shows counsel's forensic social worker spoke to Carson before Mahdi's sentencing proceeding and obtained background information from him. The mitigation investigator also confirmed at PCR she spoke with Carson on more than one occasion. Tarr also confirmed Hammock traveled with her to Baltimore and interviewed Carson. Counsel also testified Carson was interviewed prior to trial. Additionally, at PCR, Tarr produced her notes which detailed exactly what Carson told her, that Mahdi was manipulative *and* the incident which led to Mahdi's commitment to the Carter Center was more of Mahdi's manipulative behavior, not a real suicide attempt. (PCR. 572-74). Counsel also testified they spoke with Carson prior to the sentencing, and Carson told them if he were called as a witness he would have bad things to say about Mahdi. Carson also informed them he and Lawanda, were not going to help Mahdi in his sentencing proceeding. (PCR. 618-20, 627-28, 649-50, 693-97). As a result, this Court finds Carson's testimony regarding his willingness to come and testify at the time of sentencing is not credible.

Likewise, this Court does not find credible Carson's wife's testimony that even though she was reluctant to testify at the time of trial, she could have been coaxed into coming to South Carolina to testify at sentencing. Again, counsel's mitigation investigator and social worker had met with Lawanda Burwell, and counsel also talked to her as well. Carson and Lawanda had indicated to counsel they did not want to be involved. Carson indicated to the North Carolina defense team that when Mahdi lived with them he was a "demon." Carson and Lawanda had communicated to counsel they were glad Mahdi was out of their home. Carson admitted Mahdi was defiant and manipulative. Both Lawanda and Carson admitted Mahdi

made a false claim of child abuse against Lawanda. This false claim of abuse also accompanied Mahdi's statement to the responding officer that led to his commitment to the Carter Center. Carson communicated to counsel prior to the sentencing hearing he and his wife Lawanda were not going to help Mahdi. As a result, this Court does not find credible Lawanda's claim, several years after sentencing, she could have been coaxed into coming to South Carolina to testify on Mahdi's behalf even though she was admittedly reluctant to do so at the time.

Similarly, this Court does not find credible Rose Gupton's testimony she did not know about Mahdi's criminal charges for this murder or his trial until after he was sentenced to death. Counsel or their mitigation experts interviewed two of her sisters, Sophie Gee and Corliss Artis, regarding this very case, and Gupton testified she spoke with those sisters every day. This Court does not find credible her claim that if she had known about the sentencing proceeding she would have testified, because her claim that she did not know about Mahdi's charges is simply not credible. Furthermore, counsel's credible testimony at PCR was that even Mahdi's aunts were not willing to assist in testifying. As a result, this Court finds that Mahdi's aunts and uncles were not willing to come to South Carolina and testify on Mahdi's behalf in 2006.

The circumstances counsel faced are similar to those faced by counsel in *Rutherford v. Crosby*, 385 F.3d 1300 (11th Cir. 2000). In that case, the defendant's family was uncooperative at the time of trial. This Court notes the behavior of Mahdi's family is understandable in this type of case. When the crime has been recently committed and the community and those who knew the victim are still outraged, the defendant's family and friends are likewise shocked, angry, embarrassed, and disappointed in the defendant's behavior. In this case, as in others, they are in no mood to assist the defendant in escaping responsibility for his crimes at the time of trial. (See PCR. 619, II. 19-24, 636, II. 20-25). It is only after the passage of many years, when the case is on post-conviction relief, and the case is no longer in the forefront of the community's

or the victim's family's mind, and the defendant's family's anger and embarrassment has dissipated, that witnesses become cooperative and insist they would have cooperated at the time of trial, when in fact they were originally hesitant, did not want to be involved, or refused to testify. Along the same lines, the record in this case shows Mahdi had engaged in conduct within his own family which would have caused and did cause family members to be reluctant to assist him in his mitigation case. Mahdi had faked a claim child abuse against Carson and Lawanda, almost resulting in their arrest. Furthermore, Mahdi had slashed his own mother's tires and was involved in the destruction of another aunt's automobile.

Mahdi's family's reluctance to testify is further demonstrated by what occurred at the PCR hearing. Mahdi's mother did not testify. His father did not testify. Mahdi's brother did not testify. Mahdi's grandmother did not testify, apparently because she now has dementia; however, there was no contention by Mahdi counsel should have called the grandmother at sentencing. At the time of the sentencing proceeding, she was only interested in defending the family name, not helping Mahdi. None of Mahdi's immediate family testified at the PCR merits hearing; nor were any affidavits offered by them. (PCR. Tr. 1-720).

Mahdi offered the testimony of one aunt by affidavit, therefore she was not subject to cross-examination about what she communicated to counsel prior to the sentencing proceeding and negative things she knew about Mahdi. One of Mahdi's relatives who did testify at PCR, Lawanda, admitted she would have been reluctant to testify at the time of sentencing. Counsel's credible testimony at PCR was Carson specifically told them if called to testify he would have bad things to say about Mahdi. Additionally, counsel testified Carson informed them he and his wife Lawanda would not be coming to South Carolina to testify and help Mahdi, and Carson was speaking for both he and his wife. Counsel furthermore testified Kathy Burwell informed them she did not want to be involved in Mahdi's sentencing proceeding either.

This Court finds counsel, its mitigation investigator, and forensic social worker attempted to develop live mitigation evidence witnesses from Mahdi's family but were unable to do so due to the family members' reluctance and/or refusal to testify at the time of trial, or refusal or inability to testify in a helpful fashion. (PCR. 503-710). This Court further finds counsel and their investigators conducted a reasonable mitigation investigation, including talking with all of Mahdi's immediate family, and several members of his extended family, including several aunts and uncles, regarding Mahdi's family and social background. See *Pinholster, supra*; *Van Hook, supra*; *Wiggins, supra*; *Rompilla, supra*.

Based on the record, this Court also finds Mahdi has failed to demonstrate deficient performance here because much, if not all, of the evidence Mahdi offered at PCR regarding his family and social history, whether through family or community witnesses, was cumulative to the evidence presented in Mahdi's capital sentencing proceeding. The forensic social worker presented through her testimony and the exhibits introduced through her basically the same information before Judge Newman presented at PCR through Mahdi's extended family and community members. In fact, the mitigation evidence presented by Hammock was from many of the same people who testified at PCR. See generally *Huffington v. Nuff*, 140 F.3d 572 (4th Cir. 1998) (even if counsel was ineffective for failing to contact impeachment witnesses identified by defendant, there was no prejudice in part because testimony was cumulative); *Simpson v. Moore*, 367 S.C. at 605-07, 627 S.E.2d at 711-12 (counsel did in fact do adequate investigation and presented similar mitigation evidence); *Jones v. State*, 504 S.E.2d 822 (S.C. 1998) (mitigation evidence presented at PCR was not that different from evidence presented at trial). This allegation must be dismissed with prejudice.

Furthermore, if counsel did not present certain evidence Mahdi presented at PCR, there was an objectively reasonable strategic reason for not doing so. See *Strickland, supra*; *Council*,

supra. Mahdi presented several family members at the PCR hearing who were interviewed by Tarr, Hammock, and/or counsel prior to the sentencing proceeding, but not called before Judge Newman. Counsel testified that at the time of the sentencing proceeding these witnesses were not cooperative or were unwilling to testify at the sentencing proceeding. Further, counsel testified the witnesses related or their investigation uncovered the witnesses would say bad things about Mahdi. Carson Burwell related to Mahdi's North Carolina defense team Mahdi "was a demon." This fact was established by a document generated by Tarr after meeting with the North Carolina attorneys and shared with counsel in this case. (PCR. 503-05, Resp. Ex. 7). Carson also related to counsel if he were called to testify he would have bad things to say about Mahdi. (PCR. 618-19). Carson indicated Mahdi was manipulative and faked abuse and suicidal gestures. (PCR. 572-74, 64). Both Lawanda and Carson admitted Mahdi almost had them arrested by police when he made a false claim of child abuse and manufactured false evidence of that abuse. (PCR. 572-74, 58-61, 63-64, 266-67, 287-88, 290). They also related Mahdi acted out while at the Carter Center, and had to be placed in isolation. (PCR. 66-67, 292). Carson also related to Tarr that Mahdi was manipulative. (PCR. 572-74). Both Carson and Lawanda related Mahdi acted out after being released from the Carter Center and had to be returned to live with his father. (PCR. 68-69, 293-94, 618-619). Both related Mahdi would only talk about suicide when he did not get his way or did something wrong. (PCR. 572-74, 64-66, 288-89, 618-19). Carson also related the incident which led to Mahdi's commitment to the Carter Center was more of Mahdi's manipulative behavior and was not a real suicide attempt. Lawanda also testified at PCR she did not believe Mahdi was actually suicidal and made similar statements in their home when he did not get his way or got in trouble. This testimony from Carson and Lawanda would have directly undercut the mitigation evidence presented before Judge Newman regarding Mahdi's commitment and diagnosis at the Carter Center. (See Def. Ex.

2). Carson was also aware of an incident where Mahdi, his brother, and father were involved in maliciously destroying Carson's sister's car. (PCR. 69). Carson and Lawanda also related that when Mahdi lived with his uncle Nathan as an adult, he could not abide by the rules of the home, and was forced to leave. (PCR. 70, 278).

At PCR, Mahdi also called an aunt, Sophie Gee, to testify as to mitigation. Gee was aware of the incident where Mahdi slashed his mother's tires. Gee testified Mahdi slashed his mother's tires because she would not let him use the car. She was also aware Mahdi was arrested for this incident. (PCR. 105-06). If she had been called at sentencing, she would have been questioned about this incident, further underscoring this incident to the sentencing court, and also informing the court Mahdi slashed his mother's tires simply because she would not let him use her car.

Counsel was not ineffective in failing to call witnesses from whom bad things could be elicited about Mahdi, or who indicated they were not going to be helpful to Mahdi. This Court finds it was an objectively reasonable trial strategy decision for counsel not to call Carson or Lawanda Burwell or Sophie Gee, who could be asked on cross-examination about instances of bad conduct by Mahdi and would have been required to answer truthfully to such questions. *Reed v. Florida Department of Corrections*, 393 F.3d 1217 (11th Cir. 2010) (attorneys not ineffective in failing to call family members who would have opened the door to bad things about defendant's past); *Rutherford, supra* (attorneys' strategic decision not to call witnesses on alcoholism of defendant was objectively reasonable where it would have opened door to prior violent behavior of defendant the jury had not heard). See *Bell v. Kelly*, 260 Fed. App. 599 (4th Cir. 2008) (*Unpublished*) (state court's determination petitioner failed to prove prejudice was not unreasonable where he alleged counsel was ineffective for failing to investigate and present family members mitigation evidence where family members could have been cross-examined

about defendant's prior bad conduct such as infidelity, abandonment of his children, wife, and girlfriend, domestic abuse, and failure to pay child support), citing *Barnes v. Thompson*, 58 F.3d 571 (1995) (counsel not ineffective in capital case in failing to offer family members who constituted "cross-purpose evidence."); *Moody v. Polk*, 408 F.3d 141, 154 (4th Cir. 2005) (to the extent affidavits presented new information, they were "double edged.").

Further, calling Mahdi's family members as mitigation witnesses during the sentencing proceeding would have exposed Mahdi to testimony that none of Mahdi's cousins had engaged in violent criminal activity against another. (PCR. 278-82, 284-85). See *Reed, supra* (similar). In fact, Mahdi's own brother Saleem grew up in the same household as Mahdi, under similar circumstances, and had not engaged in, been arrested for, or convicted of any violent behavior toward other persons during his life. (PCR. 284-85, 318-19). *Id.* Further, the record shows Mahdi's family is well-educated with many family members employed as professionals or educators, and one distant relative having graduated from Harvard. If Mahdi's family members had been called as witnesses, the State could have contrasted Mahdi's criminal history with other family members who were successful and did not engage in criminal conduct.

This Court had the opportunity to view the witnesses' testimony at the merits hearing, and make a credibility assessment accordingly, and finds the testimony of counsel to be credible on this issue. Counsel's testimony on this issue is also supported and corroborated by the evidence and testimony introduced at the PCR hearing. Counsel made an objectively reasonable trial strategy decision to not present witnesses who were uncooperative, refusing to testify, or had bad things to say about Mahdi or from whom bad information about Mahdi could have been elicited on cross-examination. *Strickland, supra* (objectively reasonable trial strategy decisions are not subject to claims of ineffective assistance of counsel); *Wong, supra* (it was an objectively reasonable trial strategy decision for counsel not to call witnesses who would expose

on cross-examination bad character evidence about the defendant); *Council, supra* (counsel's strategic decisions will be judged on an objective standard of reasonableness).

This Court finds Mahdi has not shown that counsel was deficient in failing to investigate, develop, or present mitigation evidence from his family members or community witnesses. Counsel conducted a reasonable investigation regarding mitigation evidence and presented what evidence it could at the sentencing proceeding that was favorable to Mahdi through Hammock and other witnesses or evidence without exposing Mahdi to negative character evidence. See *Van Hook, supra*; *Pinholster, supra*; *Wiggins, supra*; *Rosemond, supra*. This allegation is without merit.

(b) The New Social Worker

At the PCR hearing, Mahdi called Nicholas Cooper-Lewter, Ph.D. who was qualified as an expert in clinical social work and psycho-social assessment, and who testified to his psychosocial assessment of Mahdi. (PCR. 187-89). In conducting the same, he testified he spoke with Carson and Lawanda Burwell, Frances Read, Rose Gup-ton, Sophia Gee, Sandra Burwell, Debra Gray, Pastor Myra Harris, Gerald Wilson, George Smith, and Sharon Pond, to name a few. (PCR. 190-91). Others were listed on the second page of his report. Cooper-Lewter also indicated he reviewed two notebooks of documents provided by PCR counsel. He testified unlike a psychologist or psychiatrist, he does not do testing. (PCR. 193). As a social historian, he makes no diagnoses. He also consulted with deRossett Myers, Ph.D. and Donna Schwartz-Watts, M.D., two of Mahdi's PCR experts. (PCR. 193-94).

In Cooper-Lewter's opinion, Mahdi was born into a very fragile family with toxic relationships between husband and wife, and there were unpredictable repeated losses that would destabilize. He also saw an issue with Mahdi's relationship with his father, who had issues with depression and anger. According to Cooper Lewter, Mahdi's flawed father was Mahdi's role

model and the person to whom he was most attached. (PCR. 194-95). Cooper-Lewter believed Mahdi's mother enjoyed Mahdi in the beginning. (PCR. 196). Mahdi's mother left him when he was around four or five, and it was a traumatic experience for Mahdi. (PCR 196-97).

Cooper-Lewter believed Mahdi was not comforted by his father regarding his mother's abandonment; instead, he was exposed to physical violence in his father's home. (PCR. 197-98). Cooper-Lewter indicated Mahdi attached to his father at a young age, which was not helpful. (PCR 199). Cooper-Lewter claimed Mahdi's father admitted he did not supervise his children as he should have and acknowledged he placed Mahdi in a situation where he was looking after his father and brother. (PCR. 200-201). According to Cooper-Lewter, when Mahdi was about age eight, he was both shocked and excited to discover his mother was alive. (PCR. 202). When Mahdi's father attempted to kidnap Mahdi's mother, Mahdi and his brother attempted to intervene. (PCR. 202-03). Mahdi was further traumatized when his mother left again. (PCR. 203). Cooper-Lewter testified Mahdi attended five different schools between pre-kindergarten and the eight grade and it would have been difficult for Mahdi to connect with peers or teachers as a result of his frequent moves. (PCR. 204-05, 207). According to Cooper-Lewter, Mahdi did not receive the type of intensive treatment he needed when he was at the Carter Center. (PCR. 208-09). He testified the documents from the Carter Center indicated Mahdi blamed himself for his family breaking up, and Mahdi wanted was his family back together. (PCR. 211-12). Mahdi was diagnosed with major depression recurrent with suicidal ideation; adjustment disorder and developmental reading disorder were both ruled out. (PCR. 212). Cooper-Lewter testified that while the records indicated that Mahdi never stopped looking for or wanting his mother, he did not know how to accomplish a reunion. (PCR. 218). Cooper-Lewter believed Mahdi did not have a lot of structure in his life, particularly between ages five and eight. (PCR. 219). In his opinion, after Mahdi was released from the Carter Center, there may have been

some brief improvement in his behavior, but the same issues existing before would have re-emerged. (PCR. 220-21). The structure and stability provided for Mahdi in Baltimore was not available when returned to his father's home. (PCR. 222-23). Cooper-Lewter noted it was a matter of months between Mahdi's return to his father and the Brunswick County School's assessment he should be enrolled in special education classes. (PCR. 224-25).

According to Cooper-Lewter, after Mahdi was withdrawn from school by his father, Mahdi became responsible for taking care of his father and his brother. (PCR. 225-27). While he was home-schooled by his father, Mahdi was taught how to shoot, use knives, move around the countryside, and distract others. (PCR. 228). Cooper-Lewter alleged Mahdi essentially fell through the social network. (PCR. 229-30).

Cooper-Lewter noted when Mahdi went to DJJ, he was diagnosed with conduct disorder, which Cooper-Lewter alleged DJJ assessed was the result of incompetent parenting and lack of supervision. (PCR. 234-35). Two weeks lapsed between Mahdi's first stint in DJJ and his second stint. (PCR. 299). Cooper-Lewter claimed the incident leading to Mahdi's second stint in DJJ would have been a major betrayal because Mahdi's father blamed Mahdi for the standoff that led to his incarceration. (PCR. 300-01). Cooper-Lewter alleged Mahdi's mental status declined during his second stint in DJJ, culminating in Mahdi threatening to commit suicide. (PCR. 302-07).

Cooper-Lewter contended Mahdi's mental state continued to decline. When Mahdi was released from DJJ at age seventeen, Cooper-Lewter argued Mahdi did not get better. (PCR. 308-09). Mahdi attempted to reconnect with his mother, but the attempt did not go well. (PCR. 309). Cooper-Lewter pointed to the fact Mahdi was incarcerated in adult prison within a month of his release. (PCR. 309). Cooper-Lewter maintained Mahdi continued going downhill during his adult incarceration. (PCR. 309). Cooper-Lewter opined some of the incidents Mahdi

witnessed in Wallens Ridge gave credence to the ideas Mahdi was taught by his father. (PCR. 309-11).

Cooper-Lewter admitted he did not include any details of Mahdi's employment history in his report, asserting he did not do so because he did not believe it important in terms of impacting Mahdi's psycho-social history. (PCR. 315-17). Cooper-Lewter did not review Hammock's notes, Dr. McKee's notes, or Dr. Martin's notes. (PCR. 328-29). Cooper-Lewter did not interview Mahdi's brother, Saleem. (PCR. 317-18). He admitted Saleem had the same mother and father, and lived with the father during the same periods of time as Mahdi. (PCR. 318-19). He admitted Saleem went to the Job Corps, but Mahdi ended up in DJJ. (PCR. 319). Cooper-Lewter also testified he was only asked to assess Mahdi's history until he was released from Wallens Ridge. (PCR. 319-21). Cooper-Lewter also did not talk with Nathan Burwell, Mahdi's uncle. (PCR. 329-30). He also did not review the videotaped statement of Nancy Burwell, Mahdi's grandmother, made by trial counsel. (PCR. 330). He could not say why Mahdi left the State of Virginia, or what psycho-social stressors Mahdi was under, if any, when he left shortly before Christopher Boggs's murder in North Carolina or Myers's murder in South Carolina (PCR. 321).

Cooper-Lewter acknowledged when Mahdi was in Virginia's DJJ, Mahdi had threatened to hurt others and act crazy if he was not released from DJJ on time. (PCR. 322-23). Cooper-Lewter also acknowledged Mahdi admitted he made one suicide threat because he wanted to go to special housing because he believed he would receive more recreational time there. (PCR. 324). He recalled Mahdi's aunt Lawanda stating Mahdi would say similar things [suicidal threats] in her home when he did not get his way. (PCR. 325-27). Similarly, Mahdi had informed personnel at the Carter Center he only wanted to hurt himself when he could not get his way. (PCR. 327). Cooper-Lewter also admitted Mahdi indicated to him he was embarrassed by

his father's "rantings." (PCR. 331-32). He noted Mahdi indicated his father's rants would go on and on, and there was a point where Mahdi just stopped listening to his father. (PCR. 332).

The Lack of Merit of this Allegation

Mahdi alleges counsel should have called a different social worker, Cooper-Lewter, and related to Judge Newman what Cooper-Lewter related to this Court. However, Mahdi ignores counsel did retain and call a qualified forensic social worker who conducted a psycho-social assessment of Mahdi and interviewed Mahdi, Mahdi's immediately family, a family friend, and many members of Mahdi's extended family. As previously set forth above, Hammock testified in detail before Judge Newman to her psycho-social assessment, the problems in Mahdi's family including his father's difficulties in life, including depression, criminal arrests, inability to keep a job, inability to support the family, and inability to get along with the community and even with his own family. (R. 1734-63 & Def. Ex. 2). She also testified to Mahdi's life of deprivation, including transience, lack of proper support, abandonment by his mother, witnessing domestic violence committed by his father on his mother and grandmother, lack of a proper male role model, poverty, and psychiatric commitment at the age of 9. (R. 1734-63 & Def. Ex. 2). She also testified to the risk factors Mahdi was exposed to as a child and adolescent and how that affected the rest of his life. (R. 1734-63). She also testified to Mahdi's numerous school disruptions, difficulties in school, and lack of any evidence Mahdi was home-schooled by his father. (R. 1734-63, Def. Ex. 2 & 3). The DJJ records introduced at sentencing also detailed Mahdi came from a dysfunctional one parent family, Mahdi was provided with no structure or guidelines as a child, Mahdi's father did not care about Mahdi's criminal behavior, Mahdi's father attributed his problems to white supremacists in the area, and Mahdi made similar statements as his father. Cooper-Lewter admitted at PCR this information was all before Judge

Newman. (PCR. 328-40). This Court does not find counsel was deficient in failing to introduce the testimony of a different forensic social worker.

This Court finds Mahdi has failed to show deficient performance in failing to present the information presented by Cooper-Lewter because much of Cooper-Lewter's testimony was also testified to by Hammock and/or introduced through the exhibits during her testimony. *Simpson*, 367 S.C. at 605-07, 627 S.E.2d at 711-12 (counsel did in fact do adequate investigation and presented similar mitigation evidence); *Jones v. State*, 677 S.E.2d 20, 382 S.C. 589 (2009) (mitigation evidence presented at PCR was not that different from evidence presented at trial). Furthermore, the fact that one forensic social worker testified differently at PCR than the one who testified at sentencing, does not prove deficient performance of trial counsel. *Reed v. Florida Dept. of Corrections*, 593 F.3d 1219 (11th Cir. 2010) (fact that expert retained at trial and expert retained later at PCR differed, does not prove trial counsel was ineffective); *Davis v. Singletary*, 19 F.3d 1471, 1475 (11th Cir. 1997) ("the mere fact that a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial."). Counsel is not required to expert shop. See *Poyner v. Murray*, 964 F.2d 1404, 1419 (4th Cir. 1992) (petitioner could not establish ineffective assistance because counsel did not "expert shop" until one could be found who would testify favorably). In order to show deficient performance, it was incumbent upon Mahdi to show that had counsel provided additional documents or information to their expert, Hammock, she would have come up with a different opinion or result in her psycho-social assessment. *Von Dohlen v. State*, 360 S.C. 598, 606-07, 602 S.E.2d 738, 742-43 (2004) (holding counsel was ineffective in failing to adequately prepare and present evidence in penalty phase defendant suffered from severe, chronic depression at the time of the murder given counsel failed to provide *their expert* witness with crucial medical records and related information which

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prevented *that witness* from conveying accurate diagnosis of defendant's mental condition to the jury). Specifically, at PCR, Mahdi did not call Hammock and prove had she been provided with certain additional records or information, her opinion or the result of her psychosocial assessment would have been different. *Von Dohlen, supra.*²³ Hammock was simply not called at PCR. Mahdi had failed to meet his burden of proof on this issue. *Id.; Butler, supra.*

Additionally, Cooper-Lewter's testimony was not all beneficial to Mahdi. If counsel had called Cooper-Lewter, the Solicitor would have impeached Cooper-Lewter or introduced many bad things about Mahdi as the State did at PCR. Cooper-Lewter specifically relied on Mahdi's DJJ records in forming his assessment. Mahdi committed over forty disciplinary violations in the Virginia DJJ including assaulting a teacher, assaulting guards on numerous occasions, assaulting other inmates, leading an escape attempt, refusing to follow orders, refusing to be disciplined, cursing staff, and damaging and destroying property. Mahdi was diagnosed at DJJ with conduct disorder, a pre-cursor to anti-social personality disorder. Mahdi faked a suicide attempt at DJJ in order to manipulate the system to gain better conditions of confinement. Mahdi's aunt Lawanda informed Cooper-Lewter that in their home Mahdi would threaten to harm himself when he did not get his way. Mahdi also informed personnel at the Carter Center he only wanted to hurt himself when he did not get his way. Mahdi told Cooper-Lewter he never should have been placed in special education in elementary school, because he did not belong there. Cooper-Lewter basically agreed. Mahdi had numerous disciplinary violations within the Virginia adult DOC, including assaulting staff, setting fire to his cell, and possession

23 This includes Mahdi's assertion counsel was deficient for failing to provide their expert Hammock with Mahdi's father's military, medical/psychiatric, and criminal records. Further, Mahdi cannot demonstrate deficient performance with regard to these records because Hammock testified before Judge Newman to the information contained in those records, i.e. Mahdi's father's less than honorable discharge from the military, his suffering from depression, inability to hold a job, support his family, parent his children, get along with others, and his record of assaults and misdemeanors. Mahdi's father's criminal record was also contained in the DJJ records introduced at sentencing, and a State's witness testified to Mahdi's father's criminal assaults on family members.

of contraband. Mahdi's brother grew up in the same home as Mahdi, and Mahdi's brother did not commit violent criminal offenses against others. Mahdi held several different jobs during his life and even obtained college credits. Mahdi had never been physically or sexually abused by his father, mother, Uncle Carson, or Aunt Lawanda. (PCR. 340-341).

Cooper-Lewter was also impeached at the PCR hearing. He did not review any records on Mahdi after he was released from Virginia's DOC. He did not review Dr. Martin's notes, he did not review Dr. McKee's notes, and he did not even review Hammock's interview notes even though these notes dealt with Mahdi's life history, including before he was released from Virginia's adult DOC. Cooper-Lewter could not opine what stressors, if any, Mahdi was under or caused him to commit the murder of Christopher Boggs or Captain Myers. Cooper-Lewter admitted he did not include any details regarding Mahdi's employment history in his report, and he asserted he did not do so because he did not believe it was important in terms of impacting Mahdi's psycho-social history.

Given all of these factors, this Court does not find counsel was deficient in failing to call another forensic social worker, Cooper-Lewter, at sentencing before Judge Newman. See *Pinholster, supra*; *Van Hook, supra*; *Rompilla, supra*; *Wiggins, supra*; *Strickland, supra*.

(c) Dr. Haney

Craig Haney, Ph.D, who was qualified as an expert in social psychology with specific expertise in prison systems and the effects of incarceration on inmates, [and who is also an attorney] testified at PCR he reviewed Mahdi's school records, psychiatric records, DJJ records, and Virginia DOC records. (PCR. 362-63). Haney testified Mahdi was identified early as someone with a significant psychological/psychiatric disorder when he was diagnosed with depression at age nine and treated as an inpatient at the Walter Carter Center. (PCR. 364-66). Haney opined there was no indication Mahdi was cured when released; instead, there was a

recommendation he receive follow-up treatment or therapy, and according to Haney, Mahdi received limited treatment and was not medicated. (PCR. 366-67). While Mahdi was in DJJ, he did receive some contact with therapists, but Haney believed that was in the context of the correctional institution whose primary purpose was not to provide therapy. (PCR. 368). Haney alleged in Virginia's DJJ, Mahdi would have experienced victimization akin to what Mahdi saw when his father victimized his mother. (PCR. 370). Haney asserted the records indicated Mahdi projected a tough exterior as a defense to avoid being victimized by others in the institution. (PCR. 371-72). According to Haney, Mahdi's inability to deal with his anger resulted in a record replete with incidents of impulsive acting out, though some of his actions were done out of stupidity. (PCR. 373). Haney opined Mahdi's problems were deeper than DJJ understood them, and in light of the fact the problems Mahdi had in his first stint were reoccurring in his second stint, DJJ should have considered using a different approach in handling his problems. (PCR. 378-79). Haney contended Mahdi was released from this second stint with a record arguably indicating his behavior was getting worse, and in Haney's opinion, Mahdi left DJJ with many of the same problems he had when entering the system. (PCR. 377-80). Haney agreed some of the records indicated Mahdi's expression of suicidal thoughts could be viewed as attempts to manipulate his situation, but Haney alleged it was not inconsistent for someone to express suicidal thoughts and be manipulative. (PCR. 374-75).²⁴ Haney agreed Mahdi began acting out after his release from the Carter Center when he learned his brother was living with his father. (PCR. 398). He understood Lawanda Burwell as stating Mahdi had said "why don't you shoot me" or "just shoot me" on a number of occasions, but Haney was not sure what that meant. (PCR. 399). Haney noted in Mahdi's stint in Virginia's

²⁴ Haney contended that sometimes juveniles have problems talking about wanting to end their lives, so they occasionally articulate a secondary purpose for making threats to commit suicide. (Tr. 375).

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adult prisons, he had almost no psychological or psychiatric contact and characterized the overwhelming majority of Mahdi's infractions leading to his placement in Virginia's super-max as relatively minor. (PCR. 381-82). In reviewing the records from Wallens Ridge, Haney alleged Mahdi's pattern of behavior of acting out in irrational and impulsive ways evident in DJJ records continued. (PCR. 391). Haney claimed a connection between those actions and Mahdi's alleged underlying, untreated, psychological issues. (PCR. 392). Haney contended the overwhelming majority of offenses for which Mahdi was written up were impulsive, and Haney claimed Mahdi was *not one who devised elaborate plans or victimized others*. (PCR. 393). Haney alleged none of Mahdi's alleged lifelong mental health issues were addressed while he was in adult prison, and no effort was made by the prison system to ease Mahdi's transition to society. (PCR. 393-94). Haney did recall extensive testing was done on Mahdi when he entered DJJ, and DJJ recommended he be placed in an anger management program. (PCR. 400-01). Haney admitted Mahdi was kicked out of the anger management program. (PCR. 401). Haney also admitted Mahdi did have periodic visits with one or two different psychologists while he was in DJJ. (PCR. 401-02). Haney also acknowledged he was aware a psychologist diagnosed Mahdi with intermittent explosive disorder and antisocial personality disorder when admitted to the Virginia DOC. (PCR. 395). Haney testified he only examined Mahdi's institutional history. He did not examine Mahdi's employment history. (PCR. 410-11). While he talked with Mahdi, Haney did not discuss anything occurring after Wallens Ridge with him. Thus, he was not aware of what exactly may have influenced Mahdi when these present crimes were committed. (PCR. 403-05). Haney admitted he had not seen any of Mahdi's prison records from South Carolina (PCR. 402). Haney admitted Mahdi has a high I.Q. (PCR. 403). Haney contended Mahdi's prior untreated problems led him to engage in a lot of irrational, immature, and impulsive things he should not have done. (PCR. 407-09). Haney asserted Mahdi's choices

were impaired by virtue of the experiences preceding them. (PCR. 408).

The Lack of Merit of this Allegation

Mahdi alleges counsel should have called Dr. Haney or a similar expert at sentencing to elicit the testimony above and underscore the impact of Mahdi's confinement on him. There is no merit to this allegation. This Court observed Dr. Haney's testimony. This Court finds his testimony is not credible or persuasive, nor are his conclusions supported by the evidence in the record. This Court does not accept Haney's attempt to place the blame for Mahdi's criminal conduct on the criminal justice system, be it juvenile, adult, or both, or on *alleged* untreated psychological issues. This Court finds this testimony is not credible on this record. Nor does this Court believe Judge Newman would have found this testimony credible or persuasive.

Haney completely ignores the fact Mahdi made personal choices to engage in criminal conduct repeatedly after being arrested or confined. Haney also ignores the fact Mahdi engaged in criminal conduct knowing it was wrong, but having no remorse for the commission of those crimes or empathy for the victims. Haney also ignores the fact Mahdi committed numerous criminal acts simply because he wanted to.

The sentencing Court was aware Mahdi was committed to the Carter Center after being separated from his father and brother. The Court was aware of the diagnosis of Mahdi while there and of his discharge diagnosis. The Court was also aware of the dis-function in Mahdi's family from the testimony of Hammock, the exhibits introduced by counsel, and the DJJ records introduced by the State. However, to accept Haney's position, that Mahdi's criminal conduct was not his fault because the system failed him, is simply not credible on this record, and Judge Newman would not have accepted it either.

The record shows the following. Mahdi stole items from victims because he wanted to

and did not think he would get caught. Mahdi stabbed Moises Rivera because Rivera caught him breaking into an apartment as an adult. Mahdi murdered drug dealers in Virginia to create a false drought so he could make more money selling drugs. Mahdi burglarized a home in Lawrenceville so he could steal a gun. Mahdi stole a license plate and a car to leave Virginia because police were closing in on him for one of the homicides he committed there. Mahdi murdered Christopher Boggs to rob the Exxon in Winston-Salem. Mahdi car-jacked a car in Columbia, South Carolina because his other car, the one stolen in Virginia, had broken down. Mahdi murdered Captain Myers because Mahdi had burglarized Myers' shed, and Myers came in on Mahdi inside the shed. Mahdi attempted to burn Myers' body to destroy evidence. Mahdi also stole Myers' truck to escape from South Carolina. The record shows Mahdi is willing to commit crimes and committed crimes if necessary for his own personal benefit.

Nor does this Court accept Haney's testimony Mahdi is just an impulsive actor and does not victimize others. Mahdi's Virginia DJJ and DOC records show without question he is a person who victimizes others and manipulates the system for his own benefit. Mahdi repeatedly assaulted guards in both DJJ and adult prisons in Virginia. Mahdi almost killed Moises Rivera. Further, Mahdi's records from the South Carolina DOC, which Dr. Haney did not review, show Mahdi has repeatedly assaulted guards and threatened to assault guards. Additionally, Mahdi's conduct in murdering Christopher Boggs in North Carolina shows his plan was to murder Boggs simply so he could rob the store's cash register. Furthermore, counsels' testimony, along with that of Dr. Martin and Dr. McKee at PCR, shows Mahdi plans out criminal behavior when necessary to benefit himself. As a result, this Court does not accept Haney's testimony as credible on this point and so finds.

Nor does this Court accept Haney's testimony Mahdi's incarceration in DJJ and in adult prison led to his later criminal conduct. Haney misses the point. The elephant in the

courtroom is Mahdi's bad character and characteristics that led him to be confined, and which led him to be confined in the institutions in which he was confined. And, when released from confinement, Mahdi did not change his conduct so he would not go back to a harsh prison environment but committed even more and more violent offenses. Mahdi was not confined after his first brush with the law. He was arrested at age fourteen after breaking into a car, stealing a purse, and escaping from police custody. Mahdi admitted to DJJ staff he had no problem in stealing and felt no remorse about it. He was placed on *juvenile probation* for this offense. (PCR. 342-343, Va. DJJ Records). Mahdi did not adjust his behavior. He broke into two homes and stole firearms, one a .44 magnum pistol. As a result, he was confined at Virginia's DJJ. While there, Mahdi led a pre-meditated assault on another inmate, in which he enlisted the support of other juveniles, resulting in this inmate's injury and medical treatment. While there, Mahdi complained he should not be confined at all because he did not have a lengthy record. Mahdi admitted one of his strengths was robbing people. During this confinement, Mahdi engaged in other disruptive behavior and committed other disciplinary violations. After his release from DJJ, Mahdi was confined again after engaging in an eight-hour standoff with police. During this incident, Mahdi was heard to say "them mother-fuckers' got guns" and "I'm going to kill a police officer before I die." While Mahdi attempts to blame his father for this stand-off, Mahdi could have walked out of his home at any time during the standoff. When the stand-off ended, police found Mahdi in a back room of the house watching television. He was recommitted to DJJ for obstruction of justice and contempt of court. While incarcerated this second time, Mahdi assaulted other inmates, destroyed property, assaulted staff, threatened staff, and generally refused to follow orders or comply with discipline. Mahdi threatened if he was not released from DJJ on time (i.e. when he expected to be released), he would "go around acting crazy" and assaulting people. True to his word, Mahdi fashioned a

sheet into a noose and tied it around his neck, causing him to be placed on suicide watch. Later, Mahdi admitted to a staff counselor this suicide attempt was not genuine, and he only wanted better living conditions, specifically more recreation time, and was attempting to manipulate the system by the suicidal gesture. After this incident, Mahdi incurred other disciplinary violations, including an assault.

Mahdi was eventually released from DJJ. Rather than maintaining good behavior so he would not to return to prison, he slashed his mother's tires either because she would not come to the door of her residence, or she would not let him use her car. At that time, Mahdi stated to police he should have killed "the bitch," referring to his own mother. Subsequently, as an adult, Mahdi attempted to break into an apartment. When caught in this act, he severely stabbed Moises Rivera, a maintenance worker at the complex. Mahdi fled the scene and was apprehended by police using dogs. He was sentenced to adult prison for this brutal assault. While in prison, Mahdi engaged in the same behavior he had in DJJ. He disobeyed direct orders, was found in possession of contraband, set fire to his cell, and committed other disciplinary violations. As a result of his prison misconduct, Mahdi was assigned to a Super Max facility, Wallens' Ridge. There, Mahdi engaged in similar conduct including assaulting a non-inmate and other disciplinary violations.

After being released from Wallens's Ridge, Mahdi did not change his behavior so he would not go back to a harsh prison environment. He initially lived with his uncle and grandmother, but would not live by the rules of the home and was asked to leave. Rather than obeying the law, Mahdi engaged in numerous criminal acts while on supervised probation knowing they could result in revocation of probation and return to prison. Mahdi possessed a 9 mm handgun, sold drugs, and was involved in the murder of a drug dealer. Mahdi told Dr. Martin he was involved in another murder in which police had yet to discover the body. Mahdi

burglarized the home of Amanda Weaver and stole a .380 pistol, which he was not supposed to have under the conditions of his probation. He stole a car and a license plate and left the State of Virginia because detectives were closing in on him for one homicide. Under his probation, Mahdi was not supposed to leave Virginia. Shortly thereafter, Mahdi murdered Christopher Boggs in North Carolina so he could rob the store's cash register. He then drove to South Carolina, car-jacked a vehicle in Columbia, and attempted to pass a stolen credit card in Calhoun County. Mahdi then burglarized Myers's shed, murdered Myers, and stole Myers's truck and firearms and drove to Florida. While there, he impersonated a police officer and fled from police in Myers's police issued truck.

While incarcerated pre-trial, Mahdi assaulted a guard resulting in the guard having a concussion. Mahdi later threatened the life of this guard. He also threatened the life of a female guard. Mahdi has repeatedly been found in possession of contraband. Because of his behavior while being incarcerated pre-trial, he was kept on the High C Wing of the Super-Max portion of Lieber Correctional Facility. Mahdi also tried to escape during his trial.

As a result, this Court does not find Haney's testimony on the impact of prison on Mahdi to be credible or persuasive. Nor would it have been to Judge Newman. Quite the opposite is true. The record shows Mahdi has had an impact on each prison or institution he has been in, not the reverse.

Additionally, contrary to Haney's testimony, the record shows Mahdi was violent before being incarcerated at Wallens Ridge. According to school records, Mahdi was physically aggressive toward other children. Mahdi threatened to kill a police officer when he was a juvenile. He grabbed a police officer's gun during another arrest as a teenager. He also slashed his mother's tires as a teenager and told an officer he should have killed his own mother. He threw a cement block through an aunt's windshield as a teenager. In 1998, Mahdi stated his

only strength was robbing people. Mahdi assaulted inmates while incarcerated in DJJ including on April 11, 1999 by hitting the victim in the head with a broom. Mahdi had twelve major institutional violations and twelve moderate violations while at Culpepper Juvenile Institution. Mahdi had anger management training in DJJ but did not practice what he learned. Mahdi committed several assaults on guards in DJJ including punching a guard in the face on September 29, 1999, assaulting a staff person on November 18, 1999, and another staff person on December 5, 1999. Mahdi also threatened to assault individuals on several occasions while a juvenile. Mahdi stabbed Moises Rivera multiple times. The record shows Mahdi was violent even at a young age. This Court finds Haney's testimony is not credible on this issue.

Nor does this Court accept Haney's theory Mahdi's incarceration caused him to commit crimes. Mahdi engaged in criminal behavior before ever being incarcerated. He had no remorse for stealing even as a juvenile. After being released from Wallens' Ridge, Mahdi began to sell drugs and bragged to his grandmother's neighbor about his drug dealing. He also bragged he was going to kill drug dealers. The evidence produced at PCR shows he did exactly that, becoming involved in the murder of two drug dealers in Virginia.

This Court finds counsel was not deficient in failing to investigate, develop, and present the testimony presented by Dr. Haney. *See Pinholster, supra; Van Hook, supra; Rompilla, supra; Wiggins, supra; Strickland, supra; Rosemond, supra.* The evidence is not credible, nor would it have been to Judge Newman, the sentencing court. Haney's position is refuted by the evidence and Mahdi's record. Further, if counsel had called Haney as a witness, the State would have been able to highlight Mahdi's lengthy criminal career including his commission of crimes before he was ever incarcerated as a juvenile and his assaultive and predatory behavior while in juvenile and adult prisons.

(d) Dr. Schwartz-Watts's and Dr. Myers's testimony

Mahdi alleges counsel did not adequately investigate his mentality both before and at the time of the crime. He asserts counsel should have discovered what Dr. Schwartz-Watts (a psychiatrist) and Dr. Myers (a psychologist) found, that Mahdi was suffering from serious mental illnesses during his life and at the time of the murder of Captain Myers.²⁵

Dr. Donna Schwartz-Watts, a psychiatry expert, testified at PCR she reviewed two notebooks of records, transcripts of Mahdi's prior hearings, and records from Dr. McKee. (PCR. 458-60). She interviewed Mahdi three times; however, Mahdi did not trust her or provide her much information. (PCR. 460, 478). She obtained more information regarding Mahdi's thought process after he left Wallens Ridge from Dr. Martin's and Dr. McKee's notes. (PCR. 478-80). Dr. Schwartz-Watts diagnosed Mahdi as suffering from major depression, anxiety disorder, paranoid personality disorder, reactive attachment disorder, and antisocial personality disorder. (PCR. 460-61). She opined the depression was in remission at the PCR hearing. (PCR. 462). She alleged Mahdi's depression went into remission between the times she spoke with him. She opined Mahdi was suffering from these diagnoses when he went on the crime spree that included the murder of Myers. (PCR. 468-71). She also disagreed with the Virginia DOC's diagnosis Mahdi met the criteria for intermittent explosive disorder. (PCR. 473). Contradicting Dr. Haney, she stated Mahdi was not an impulsive person by nature. (PCR. 473).

Dr. Schwartz-Watts testified reactive attachment disorder was a very rare disorder not seen in a lot of adults. (PCR. 463). She opined Mahdi suffered from the inhibited type of attachment disorder, noting the records indicate Mahdi was typically described as being

²⁵ Dr. Schwartz-Watts evaluated Mahdi beginning approximately one year before the merits hearing in this case. She issued her report approximately three days before the merits hearing. Absent from her report is any discussion of the crimes against Captain Myers, Christopher Boggs, or the drug dealer in Virginia and how Mahdi's alleged mental illnesses could have caused Mahdi to commit any of these crimes.

detached. (PCR. 463). She noted the reactive attachment disorder would have been the result of numerous disruptions in relationships he had in his childhood. (PCR. 464). There was little stability in his early life; Mahdi's mother left when he was young, his father had some mental illness, was available to Mahdi only at times, Mahdi lived with his aunt and uncle for some time, and he moved six times in that period. (PCR. 464-65).

Dr. Schwartz-Watts testified that while the illnesses were in effect when Mahdi shot Myers, she did not see them diminishing his capacity in the sense of his being entitled to a statutory mitigator. (PCR. 475). She indicated Mahdi had expressed to her some remorse for the crimes. (PCR. 476).

Dr. Schwartz-Watts did not ask Mahdi about the murder in North Carolina, but she believed he would have been suffering from major depression at that time. (PCR. 482-83). The last documentation she saw evidencing Mahdi's depression was a statement from Mr. Crutchfield, Mahdi's co-defendant [in a homicide] from Virginia. (PCR. 483-85). She also asserted other documentation regarding Mahdi's depression dated back to 2001, when Mahdi denied he had been treated for mental illness and denied he had attempted suicide in his evaluation in the Virginia DOC. (PCR. 486). Dr. Schwartz-Watts admitted there was no evidence in any of Mahdi's adult prison records indicating he either complained of or received treatment for depression. (PCR. 487-90). Dr. Schwartz-Watts stated Mahdi may not have been suffering from major depression on the day he shot Myers, but Mahdi would still have been affected by the condition. (PCR. 493-94). She noted the only illness that probably had anything to do with the crime was Mahdi's anxiety disorder. (PCR. 496-97).

deRossett Myers, Ph.D., a clinical psychologist qualified as an expert in child and adolescent psychology, evaluated Mahdi for developmental concerns he alleged were evident from his life as a juvenile. (PCR. 419). Myers was struck by the extent of poverty of Mahdi's

family, the number of times Mahdi moved in a short period of time, and the amount of violence in the family. (PCR. 420). Myers indicated these were factors that put Mahdi at risk for mental health problems. (PCR 421). He opined Mahdi suffered from major depression and severe attachment disorder. (PCR 421).

Myers noted Mahdi was first formally diagnosed with major depression, single episode, when admitted to the Carter Center in Baltimore. (PCR. 424, 428-29, 442). Post-traumatic stress disorder was ruled out. (PCR. 428-29). He testified a diagnosis of major depression in a nine year old was rare. (PCR. 426, 429). Myers also indicated there was evidence to support a diagnosis of oppositional defiant disorder, and he interpreted the Carter Center's decision not to diagnose Mahdi as such indicated the staff believed Mahdi's behavior was symptomatic of depression. (PCR. 442-43). He noted Mahdi was not treated with medication. (PCR. 430). In Myer's opinion, the diagnosis of major depression was consistent with the records; (PCR. 430). He believed Mahdi would have been a good candidate for a group home or going back to the Burwells with a lot of support. He added he would have prescribed antidepressant medication to Mahdi even though he was nine years old. (PCR. 439-40).

Myers testified that Mahdi was found eligible for special education, but there was not much evidence Mahdi received mental health intervention after he left the Carter Center. (PCR. 443-45). His review of the records indicated Mahdi's home environment with his father was highly unstructured and un-nurturing. (PCR. 440). Additionally, Mahdi's father took him out of public school. (PCR. 446).

Myers noted a psychologist during Mahdi's first stint at DJJ recommended Mahdi be placed in an out-of-home placement like a group home or residential treatment facility. Myers believed Shareef Mahdi's home did not comport with the recommendations. (PCR. 447-48). Myers believed the observations made in the psychological testing during Mahdi's second stint

at DJJ were consistent with attachment disorder and depression. (PCR. 450-52). He recalled in the DJJ records, someone indicated Mahdi would be very difficult to deal with in the future unless he got the treatment he needed. (PCR. 457). Myers noted the same individual indicated an untreated Mahdi would likely end up in adult prison, and Mahdi had aged well beyond his years in terms of some of his criminal behaviors. (PCR. 457).

Myers's focus in reviewing the records was on Mahdi's life as a juvenile. (PCR. 455-56). He did not review Mahdi's adult prison records carefully. (PCR. 456). Myers stated the Virginia DOC's diagnosis Mahdi had antisocial personality disorder was justifiable at that time but alleged it would not provide a full picture of what Mahdi was like before adult prison. (PCR. 455-56).

The Lack of Merit of this Allegation

This Court finds counsel was not deficient in failing to call Dr. Schwartz-Watts or Dr. Myers. First, Dr. Schwartz-Watts admitted during her testimony that Mahdi's history of depression had nothing to do with the murder of Myers. (PCR. 495-96). Additionally, she testified the only illness he suffered from that could have had anything to do with the murder of Myers was the generalized anxiety disorder she diagnosed him as having. (PCR. 495-97). She based this determination mainly on the fact Mahdi told her he was anxious at the time he murdered Myers. However, she admitted Mahdi had broken into Myers's cabin, and it would be expected he would be anxious when he saw Myers entering his cabin and about to discover Mahdi unlawfully inside his shed. (PCR. 496-97). This Court does not find this significantly mitigating given the circumstances. Further, while Dr. Martin's notes indicate Mahdi told him he was anxious and paranoid in Virginia, because he was being investigated for a homicide he committed, he stated he was no longer anxious or paranoid after he left Virginia. (Resp. Ex. 8). Dr. Martin took a detailed history from Mahdi, which Dr. Schwartz-Watts relied on, and Martin

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did not diagnose Mahdi with generalized anxiety disorder. Additionally, at the time of the PCR hearing, the record showed Mahdi had been in the South Carolina DOC for six to seven years and had not been treated for any anxiety disorder or any mental illness including depression. (PCR. 488-91). Mahdi had received no psychotropic medications or attempted suicide since his arrest in 2004. (PCR. 488-91). Mahdi did go on a hunger strike prior to trial, but this was due to his objection to being kept as a safe-keeper prior to trial, i.e. his conditions of confinement. (PCR. 489-90). Mahdi also denies he has any mental illness. (PCR. 490). Mahdi was also examined by Dr. Michael Cross and Dr. Randy Pickens prior to trial for competency to stand trial. Dr. Cross found no evidence of any mental illness. (R. 131, 136 & Court's Ex. 2). Dr. McKee also ran tests on Mahdi and took a history from him and did not diagnose him with generalized anxiety disorder.

Dr. Schwartz-Watts admitted Mahdi did not provide her with a lot of information and was not as forthcoming with her as he was with Drs. Martin and McKee. (PCR. 479). She was forced to admit there are no records from the South Carolina DOC where Mahdi has been treated for depression or any mental illness since his arrest for Myers's murder. (PCR. 488-491). Dr. Schwartz-Watts claimed there was evidence in the DOC records Mahdi was suffering from depression; however, there are other reasons to explain his behavior. She was forced to admit Mahdi's hunger-strike was related to his being kept as a safe-keeper prior to trial, i.e. his conditions of confinement. (PCR. 489-90). Furthermore, his physical complaint was for just not feeling well, i.e. tired and run down. (PCR. 488-89). This Court does not find Mahdi's aggressive and threatening conduct is definitive evidence of depression, because it is also consistent with Mahdi's repeated diagnoses of anti-social personality disorder. (PCR. 489). Dr. Schwartz-Watts also admitted Mahdi has stated over the past six years there is nothing wrong with him. (PCR. 491-92). She further admitted he has not been given any medications for any

mental illness. (PCR. 491). This Court would also note at his guilty plea on the current charge, Mahdi told Judge Newman he was not suffering from any mental illness. Dr. Cross found no evidence of any mental illness. (R. 131, 136; Court's Ex. 2). Dr. Schwartz-Watts also admitted that upon entry to Virginia's DOC in 2001, Mahdi was not diagnosed as suffering from depression but intermittent explosive disorder and anti-social personality disorder. (PCR. 486-487). She admitted there was nothing in Mahdi's adult prison records from Virginia, where he resided from 2001 to 2004, showing Mahdi was suffering from or was being treated for depression. (PCR. 487). She also admitted there was no documentation by a doctor, psychologist, parole officer, or any professional that Mahdi was suffering from depression before he left Virginia and committed this current crime. (PCR. 487). She further admitted there was no record of Mahdi being treated for depression or complaining of depression from his arrest in Florida until his return to South Carolina to face these charges. (PCR. 487-488). She also admitted that Mahdi admitted his suicidal gesture in Virginia's DJJ was manipulative behavior on his part in order to obtain better living conditions and more recreation time. (PCR. 490; Resp. Ex. 4). Dr. Schwartz-Watts further admitted it did not appear Mahdi was depressed the day of Myers's murder, based on his actions, and he may not have been depressed at all. ²⁶ (PCR. 493).

In addition to the facts cited above, Mahdi's cold, calculated, and intelligent actions over several days from Virginia, to North Carolina, to Columbia, to Calhoun County, and finally to Florida, do not indicate Mahdi was depressed. Mahdi burglarized a neighbor's home in Virginia and stole a gun. He then stole a license plate from one establishment, a car from another, and

²⁶ Dr. Schwartz-Watts relied in large part in her diagnosis of depression at the time of the crime on the statements Mahdi made to a co-defendant in one Virginia homicide. The co-defendant stated Mahdi stated "he didn't have shit to live for," and Mahdi had a belief in a foreshortened future. Again, if these statements of this co-defendant are even credible, they are due to Mahdi's involvement in a robbery and a murder in Virginia and his belief that he was about to be arrested for his criminal activities while on supervised probation. This Court does not find this significantly mitigating and this Court finds Judge Newman would not have found this mitigating either.

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left Virginia to escape police who were investigating him for a homicide. Mahdi drove the stolen vehicle to Winston-Salem, North Carolina, entered a convenience store and pretended to be a patron, and when the clerk was distracted checking his I.D. to buy alcohol, Mahdi drew the stolen pistol and shot the clerk. He then shot the clerk again to render him helpless and attempted to rob the store's cash register. Mahdi then drove to Columbia, South Carolina. While here, he pretended to be a homeless person and stayed at the Oliver Gospel Mission. Mahdi then pretended to be a homosexual person so he could car-jack a vehicle and did so. He then switched the license plate on the car-jacked vehicle with the license plate he stole from Virginia. He then drove to Calhoun County and attempted to pass a stolen credit card, but the card had been cancelled. Mahdi then fled when he realized police were going to apprehend him. He then burglarized Myers's shed and while there altered a shotgun into a sawed off shogun and painted it black. Mahdi then murdered Myers and attempted to burn his body to destroy evidence of the crime. He then stole Myers's truck, but switched license plates on the vehicle before fleeing to Florida. He then drove all the way to Jacksonville, Florida where he sold the murder weapons used in North Carolina and South Carolina; however, Mahdi retained the assault rifle and sawed-off shotgun he had stolen from Myers's shed. He then impersonated a police officer when approached by a citizen in Florida. Mahdi then attempted to flee from police in Satellite Beach, Florida, and was arrested only after the use of a police dog.

Further, Dr. Martin and Dr. McKee, based in part on their interviews with Mahdi, found Mahdi was not suffering from any mental illness at the time of Myers's murder. They diagnosed Mahdi as having anti-social personality disorder. This Court finds their testimony credible given this record. While Mahdi may have suffered some recurrent depression in his childhood and adolescence, this Court finds Mahdi was not depressed at the time of Myers's murder.

Additionally, this Court does not find counsel was ineffective in failing to retain Dr. Myers, a clinical psychologist, or elicit the testimony he provided. Dr. Myers testified to many things that were not favorable to Mahdi and would not have helped his case in mitigation before Judge Newman. Specifically, Dr. Myers testified the Carter Center records reflected either a *diagnosis* of oppositional defiant disorder or a *rule out* oppositional defiant disorder, which Meyers admitted was a precursor to antisocial personality disorder. (PCR. 442-43). Myers also noted Mahdi had a history of being oppositional and a history of behaviorally acting out with aggression. (PCR. 443). While Myers testified his interpretation of the Carter Center records was the staff attributed Mahdi's oppositional behavior to his depression, Myers admitted a diagnosis of conduct disorder/oppositional defiant disorder is based exclusively on observation of overt behavior. (PCR. 443). Myers also related that when Mahdi returned to school in Lawrenceville he was tested because he was not doing well in school and his behavior wasn't particularly good at school. Myers also admitted that after Mahdi was committed to Virginia's DJJ, Mahdi was described as an angry, alienated, tough youth. (PCR. 447). Myers testified that at that time Mahdi had already been involved in an altercation in a cottage he was housed in. (PCR. 447). Myers testified the DJJ psychologist noted Mahdi had a lot of negative attitudes towards authority, did not like rules, did not like limits, was poorly socialized, and was not sensitive to the rights and privileges of others. (PCR. 447). Myers related the psychologist termed Mahdi's problem a *conduct disorder*. (PCR. 447). Mahdi only stayed out of DJJ two weeks before he was involved in a stand-off with police and was recommitted to DJJ where he was diagnosed with *conduct disorder*. (PCR. 449-450). Myers further admitted Mahdi was noted to be disruptive at DJJ and also engaged in oppositional defiance. (PCR. 451). Myers also admitted it was noted in DJJ records Mahdi had aged well beyond his years in terms of his criminal behaviors. (PCR. 457). Myers testified Mahdi's diagnosis of anti-social personality

disorder in the adult DOC was justified at the time based on the record. (PCR, 456). Myers also agreed Mahdi's I.Q. of 118 was an accurate level of his intelligence. (PCR, 457).

More importantly, it is not what Dr. Schwartz-Watts or Dr. Myers allegedly found six to seven years after trial that is critical to the issue before this Court. *Reed v. Florida Dept. of Corrections*, 593 F.3d 1219 (11th Cir. 2010) (fact that expert retained at trial and expert retained later at PCR differed, does not prove trial counsel was ineffective); *Davis v. Singletary*, 19 F.3d 1471, 1475 (11th Cir. 1997) ("the mere fact that a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial."). This Court notes none of Mahdi's appointed attorneys, Mr. Grant, Mr. Walters, or Mr. Koger are psychiatrists or psychologists. They retained qualified experts to investigate this area of mitigation on Mahdi's behalf and relied on what their experts told them. Counsel had a right to rely on what their experts told them. See *Poyner v. Murray*, 964 F.2d 1404, 1419 (4th Cir. 1992) (Petitioner cannot establish ineffective assistance because counsel did not expert shop until one could be found who would testify favorably).

Counsel retained Dr. Thomas Martin, a forensic psychiatrist, who has testified in several capital cases, to evaluate Mahdi and determine if he suffered from any mental illness that would serve as mitigation. Dr. Martin found Mahdi had some history of recurrent depression, but there was no evidence he suffered from a mental illness at the time of the commission of the crimes against Myers. The only thing Dr. Martin found was Mahdi has anti-social personality disorder. That diagnosis is fully supported by the record. When Mahdi was admitted to Virginia's DOC, he was diagnosed with intermittent explosive disorder and anti-social personality disorder. At PCR, Dr. Martin testified Mahdi had no difficulty talking about killing people if necessary in order to achieve independence, and he appeared to have no remorse

regarding any of his past violent acts. Dr. Martin related to counsel on several occasions what his findings were and they would not be helpful to Mahdi. Additionally, in conducting his evaluation, Dr. Martin took a history from Mahdi. Martin discussed with Mahdi the circumstances of the crimes against Myers and why Mahdi left Virginia in the first place. Mahdi related to Dr. Martin he left Virginia because he was involved in the homicide of a drug dealer, and detectives there were closing in on him. Mahdi also related to Martin he was involved in another homicide in which police had yet to find the body. Mahdi also related to Martin he shot Myers in the chest and head, and after Myers was on the floor of his cabin, Mahdi shot him several more times in the head to make sure he was dead. (PCR. 508-23).

Counsel also retained a *forensic psychologist*, Dr. Geoffrey McKee, to evaluate Mahdi with regard to mental health mitigation. Dr. McKee took a detailed history from Mahdi, conducted tests on Mahdi, and reviewed records including Mahdi's psychiatric records from when he was age nine. McKee found Mahdi was very intelligent and he suffered from no major mental illness at the time of the crime. McKee found, independent of Dr. Martin, Mahdi had anti-social personality disorder. McKee found nothing else. Mahdi also related to McKee he left Virginia because he was involved in the homicide of a drug dealer and police were closing in on him for that crime. (PCR. 545-561). McKee also related his findings to counsel. (PCR. 689-90, 626-27).

Counsel testified they made a strategic decision not call either psychiatric or psychological expert in the sentencing hearing before Judge Newman, because their testimony would not be helpful and damaging information would have come out if these witnesses were subject to cross-examination. (PCR. 689-90, 626-27). This Court finds this was an objectively reasonable strategic decision under the circumstances and is not subject to a claim of ineffective

assistance of counsel. See *Strickland, supra*; *Wong, supra*; *Council, supra*.²⁷ This Court finds had either of these experts been called to testify, they would have been cross-examined by the Solicitor on the fact they took a history from Mahdi and what Mahdi related about why he stole a car and left Virginia and about the murder of Myers. Each expert's testimony would not have been helpful but would have been devastating to Mahdi's mitigation case because it would have revealed other homicides Mahdi had committed in addition to the Boggs's murder and Myers's murder. The testimony would have also revealed Mahdi shot Myers again after he was helpless on the floor. *Wong, supra* (calling mitigation witness would have exposed defendant to admission of evidence of other homicide not previously before the sentencing authority). Additionally, the experts would had to have related they found Mahdi was suffering from no major mental illness and had anti-social personality disorder. This would not have been helpful to the defense mitigation case. See *Cullen, supra* (it was a reasonable penalty phase strategy to pursue evoking sympathy for mother where psychiatrist found defendant had no signs or symptoms of mental disorder other than his "psychopathic personality traits"); *Byrum v. Ozmint*, 339 F.3d 203, 210 (4th Cir. 2003) (counsel not ineffective in failing to present testimony by a psychiatrist and psychologist because the suggestions of antisocial behavior which experts found could have been harmful to the defense); *Satcher v. Pruett*, 126 F.3d 561 572 (4th Cir. 1997) (counsel not ineffective for not presenting testimony by a psychologist and psychiatrist who examined defendant for purpose of developing mitigating evidence where they found no

²⁷The fact Mahdi committed another homicide would clearly have been admissible at sentencing before Judge Newman. See *State v. George*, 476 S.E.2d 903, 913 (fact defendant had attempted to commit similar crime in past was proper as evidence of individual characteristics and pre-disposition to commit similar crimes); *State v. Owens*, 552 S.E.2d 745 (2001) (confession to another murder during 24 hour waiting period was admissible in penalty phase since it went to defendant's character); *State v. Ray*, 498 S.E.2d 640, 641-42 (photographs of prior victim in ABIK admissible in penalty phase); *State v. Green*, 392 S.E.2d 157, 162-63 (1990) (prior crimes of defendant admissible in penalty phase); *State v. Howard*, 389 S.E.2d 132, 295 S.C. 462 (1988) (*cert. denied*, 490 U.S. 1113).

psychiatric or neurological disorders, but also found antisocial personality disorder that might make defendant a "future danger"); *Reed v. Florida Dept. of Corrections*, 593 F.3d 1217 (11th Cir. 2010) (counsel made objectively reasonable trial strategy decision not to offer antisocial personality disorder diagnosis); *Fulks v. United States*, Slip Copy, 2010 WL 3069390 (D.S.C. 2010)²⁸ (attorneys not ineffective in avoiding testimony defendant met criteria of anti-social personality disorder); see *Truesdale v. Moore*, 142 F.3d 749, 755 (4th Cir. 1998) (mental health evidence is a "double edged sword that might as easily condemn a defendant to death as excuse his actions."); *St. Pierre v. Walls*, 297 F.3d 617, 633 (7th Cir. 2002) (facts showing defendant has a condition or proclivity toward violence are often aggravating, not redeeming or mitigating factors).²⁹

Once Mahdi's psychiatric and psychological experts returned to counsel with their opinion regarding Mahdi, counsel was under no obligation to expert shop and find another psychiatrist or psychologist who might find something more palatable to a sentencing court. *Poyner*, 964 F.2d at 1419 (4th Cir. 1992) (petitioner could not establish ineffective assistance because counsel did not "expert shop" until one could be found who would testify favorably). Counsel was under no duty to search out and find Drs. Schwartz-Watts or Myers. See *Harrington*, *supra* 562 U.S. ____ (2011) (slip op. at 17) ("Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective

²⁸ In *Fulks*, U.S. District Judge Joseph Anderson cited several articles written by attorney John Blume discussing antisocial personality disorder being a diagnosis to be avoided. See John H. Blume & David Voisin, *Avoiding or Challenging a Diagnosis of Antisocial Personality Disorder*, 24 *Champion* 69 (Apr. 2000) (antisocial personality disorder diagnosis "can be the kiss of death, because to many people, and most judges, this means that the defendant is little more than a remorseless sociopath."). *Fulks*, at p. 18, n. 21.

²⁹ This Court recognizes a diagnosis of anti-social personality disorder would entitle a defendant to a jury charge on certain statutory mitigating circumstances. See *State v. Caldwell*, 308 S.C. 494, 388 S.E.2d 816 (1990). However, as the above cited authority shows, that does not mean counsel is deficient for failing to offer testimony their client suffers from anti-social personality disorder. Furthermore, there was no real contention at PCR, counsel was deficient in failing to call Dr. Martin or Dr. McKee in this regard.

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trial tactics and strategies." Mahdi has failed to show deficient performance on the part of counsel. See *Strickland, supra*; *Wong, supra*.

Furthermore, even if counsel had retained and called Drs. Schwartz-Watts and Myers at sentencing, the devastating evidence of Mahdi's involvement in the Virginia homicides would have been elicited at trial, as it was at PCR. Dr. Schwartz-Watts's report lists Dr. Martin's and Dr. McKee's records as part of the materials she relied upon in conducting her evaluation. She admitted at PCR she relied, in part, and reviewed Dr. Martin's and Dr. McKee's files in rendering her opinion. She admitted Mahdi told Dr. Martin and Dr. McKee the reason he left Virginia was because police were closing in on him for a homicide he was involved with there. (PCR. 481). This would have been devastating to any mitigation case counsel was trying to present. *Wong, supra*.

Finally, Dr. Schwartz-Watts and Dr. Myers also diagnosed Mahdi with antisocial personality disorder. As previously discussed, this testimony would not have been helpful to the mitigation case. *Cullen*, 131 S.Ct. 1388 (reasonable penalty phase strategy to pursue evoking sympathy for mother where psychiatrist found defendant had no signs or symptoms of mental disorder other than "psychopathic personality traits"); *Byrum*, 339 F.3d at 210 (counsel not ineffective in failing to present testimony by psychiatrist and psychologist because the suggestions of antisocial behavior which experts found could have been harmful); *Satcher*, 126 F.3d at 572 (counsel not ineffective for not presenting testimony by psychologist and psychiatrist who examined defendant for the purpose of developing mitigating evidence where they found no psychiatric or neurological disorders, but found antisocial personality disorder that might make him a "future danger"); *Reed*, 593 F.3d 1217 (counsel made objectively reasonable strategy decision not to offer antisocial personality disorder diagnosis); *Fulks, supra* (no ineffective assistance in avoiding testimony defendant met criteria of antisocial personality disorder). See

Truesdale, 142 F.3d at 755 (mental health evidence is a “double edged sword that might as easily condemn a defendant to death as excuse his actions.”); *St. Pierre*, 297 F.3d at 633 (fact that a defendant has a condition or proclivity toward violence is often aggravating, not redeeming or mitigating).³⁰

Furthermore, this Court finds Mahdi has failed to prove counsel was deficient in failing to have Dr. Martin or Dr. McKee diagnose Mahdi with depression, generalized anxiety disorder, or paranoid personality disorder.³¹ While Mahdi called two new experts who said Mahdi suffered from depression, one in his childhood, and the other in his childhood and as an adult, and Dr. Schwartz-Watts testified Mahdi had paranoid personality disorder and generalized anxiety disorder, this was not sufficient to prove counsel was deficient in this regard. *Reed*, *supra* (fact that expert retained at trial and expert retained later at PCR differed, does not prove trial counsel was ineffective); *Davis*, 19 F.3d at 1475 (“mere fact that a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial.”). It was incumbent upon Mahdi to show, had counsel provided additional documents or information to their experts, they would have reached a different diagnosis. *Von Dohlen*, 360 S.C. at 606-07, 602 S.E.2d at 742-43 (counsel was ineffective in failing to adequately prepare and present evidence in penalty phase defendant suffered from severe, chronic depression at the time of the murder given counsel

³⁰ Again, this Court recognizes testimony of an expert that a defendant suffers from antisocial personality disorder would entitle a defendant to a charge on certain statutory mitigating circumstances. *Caldwell*, *supra*. However, as the above authority shows, this does not mean counsel is deficient in failing to offer such testimony. This Court finds this testimony would have been harmful to the defense mitigation case had this testimony been presented before Judge Newman and counsel made an objectively reasonable trial strategy decision not to offer this evidence from their retained psychiatrist and psychologist. See *Strickland*, *supra*; *Council*, *supra*.

³¹ Dr. Martin did diagnose Mahdi has having some recurrent depression during his life but not at the time of the offense. Counsel could not call Dr. Martin because of the other negative things he would had to have related to Judge Newman, including his diagnosis of antisocial personality disorder and things Mahdi had told him including committing two homicides in Virginia.

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failed to provide their expert witness with crucial medical records and related information which prevented *that witness* from conveying accurate diagnosis of defendant's mental condition to the jury). Specifically, at PCR, Mahdi did not call Dr. Martin or Dr. McKee and prove, had they been provided with certain additional records or information, their diagnosis would have been different, i.e. they would have diagnosed Mahdi with depression, paranoid personality disorder, and/or generalized anxiety disorder. *Von Dohlen, supra.* In fact, the State called Dr. Martin and Dr. McKee at the PCR hearing, and Mahdi did not establish through either expert that if they had been shown certain additional records or information their diagnosis would have been any of the above. *Id.* As a result, Mahdi has failed to meet his burden of proof to show ineffective assistance in this regard. *Id.* In fact, Dr. Martin testified based on the records he saw and what he had heard at the PCR hearing, his diagnosis would not have been any different. Dr. McKee also testified he did not need any further records to make the diagnosis he made. Neither expert testified their opinion had changed. As a result, this Court finds Mahdi has failed to meet his burden in this regard. *See Butler, supra; Von Dohlen, supra; Reed, supra* (fact that expert retained at trial and expert retained later at PCR differed, does not prove counsel was ineffective); *Davis, supra* (mere fact a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate counsel was ineffective for failing to produce that expert at trial).³²

Furthermore, this Court finds Mahdi has failed to prove counsel deficient in failing to

32 This finding includes Mahdi's allegation counsel was deficient in failing to provide their experts Dr. Martin and Dr. McKee with Mahdi's father's military, medical/psychiatric, and criminal records. *See Von Dohlen, supra; Butler, supra.* Further, Dr. Martin and Dr. McKee testified they were present at team meetings with counsel, the mitigation investigator, the forensic social worker, and the private investigator where the information gathered in the mitigation investigation was shared with them. This would have included the information contained in these particular records, i.e. that Mahdi's father had been discharged from the military under less than honorable conditions, Mahdi's father suffered from depression and could not get along with others including members of his own family, Mahdi's father could not hold a job or support his family or parent his children, and Mahdi's father had a criminal record of assaults. Mahdi has failed to show deficient performance in this regard. *Id.*

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have Dr. Martin or Dr. McKee diagnose Mahdi with reactive attachment disorder. Mahdi called two new experts, Dr. Schwartz-Watts and Dr. Myers, who testified Mahdi either had reactive attachment disorder or the evidence indicated Mahdi had reactive attachment disorder. This Court first notes that this diagnosis is questionable. The DSM IV TR provides that onset of reactive attachment disorder must be before age five. There is no evidence in this case that there was onset of reactive attachment disorder before the age of five. DSM-IV-TR, 4th edition, pp. 127-130.

More importantly, Mahdi did not prove *counsel* did not provide *their experts* with records or information that would have led *them* to diagnose Mahdi as having reactive attachment disorder. *Von Dohlen*, 360 S.C. at 606-07, 602 S.E.2d at 742-43. Specifically, Mahdi did not call Dr. Martin or McKee and prove had they been provided with certain additional records or information, their diagnosis would have been different, i.e. reactive attachment disorder. *Von Dohlen, supra*. In fact, the State called Dr. Martin and Dr. McKee at the PCR hearing, and Mahdi did not establish through either expert that if they had been shown certain additional records or information their diagnosis would have been reactive attachment disorder. *Id.* As a result, Mahdi has failed to meet his burden of proof to show ineffective assistance in this regard. *Id.* In fact, Dr. Martin testified that based on the records he saw and what he had heard at the PCR hearing, his diagnosis would not have been any different. McKee also testified that he did not need any further records to make the diagnosis he made. Neither testified, if they had been shown additional records, they would have diagnosed reactive attachment disorder. This Court finds Mahdi has failed to meet his burden in this regard. *See Butler, supra; Von Dohlen, supra; Reed, supra* (fact expert retained at trial and expert retained at PCR differed, does not prove counsel was ineffective); *Davis, supra* (mere fact a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate counsel was

ineffective for failing to produce that expert at trial.). As a result of the above, counsel was not deficient in failing to investigate, develop, and present mental health mitigation evidence. See *Pinholster, supra*; *Van Hook, supra*; *Rompilla, supra*; *Wiggins, supra*; *Strickland, supra*; *Rosemond, supra*.

(e) The DJJ Records

Mahdi alleges counsel should have introduced Mahdi's records from Virginia's DJJ at sentencing. He argues these records contained some mitigating evidence, that he was noted to be suffering from depression while in DJJ. Mahdi introduced these DJJ records at the PCR hearing, and the State did as well, and this Court has reviewed them carefully. Counsel was not deficient in failing to introduce these records.

The Lack of Merit of this Allegation

At Mahdi's sentencing hearing before Judge Newman, the State introduced a minimal amount of Mahdi's DJJ records. (See R., Vol. IV. and IV.). Those records document just a few of Mahdi's disciplinary violations; however, they do not document the extensive and aggravated nature of his disciplinary violations while in Virginia's DJJ.

The record shows counsel obtained Mahdi's DJJ records through the efforts of their mitigation investigator Ms. Tarr. (PCR. 585). Mahdi had over forty disciplinary violations within Virginia's DJJ including assaults on guards, teachers, and inmates. (PCR. 684). He was also involved in destroying property on several occasions. Mahdi also led an escape attempt by assaulting a female guard, taking her radio away from her, and demanding keys from another guard. Mahdi also threatened if he was not released from DJJ when he thought he should be released, he would go around "acting crazy." The records show Mahdi later admitted faking a suicidal gesture in an attempt to manipulate the DJJ prison system into gaining more recreation

time. The records, if admitted at sentencing, would also have shown Mahdi did not think he should have been incarcerated for any of his offenses, and threatened to assault other inmates or guards or harm himself if he was not released from DJJ when he thought he should be. The records also show Mahdi received various treatment programs provided to inmates by Virginia's DJJ, but he did not practice what he had learned such as anger management. In fact, Mahdi was kicked out of the anger management program for disruptive behavior. In the same records, on January 14, 1998, it was reported Mahdi described his own criminal behavior "in a very calculated, almost professional way that is alarming." The records indicated Mahdi "is behaving and developing like a teenager much older" than he was. Mahdi also admitted to DJJ staff he had difficulties in school adjustment, had been frequently suspended, had a history of verbal and physical aggression, conflicts with educational authorities, and difficulties getting along with classmates. (DJJ record M00416). He also admitted he had injured someone in a fight, and hit or attacked someone who was not in his family. (DJJ record M00495). One DJJ official indicated Mahdi was very dangerous *if he did not get his way*. (DJJ record M00511). Counsel was not deficient in failing to introduce Mahdi's DJJ records. *Wong, supra*. There were numerous unfavorable reports about Mahdi that would have been revealed to Judge Newman if these records had been introduced. If counsel had introduced only select portions of the records, the State would have introduced all of Mahdi's DJJ records, which included his numerous disciplinary violations and his admission to faking a suicide gesture to manipulate the prison system. This Court also finds counsel's not introducing Mahdi's DJJ records was an objectively reasonable trial strategy decision. *See Strickland, supra; Council, supra*. This evidence would have further advanced the State's argument Mahdi has a bad character and further advanced proof of his future dangerousness. *State v. Hughes*, 336 S.C. 585, 521 S.E.2d 500 (1999) (behavior in prison is admissible in capital sentencing because it bears on defendant's

character and future dangerousness); *State v. Whipple*, 324 S.C. 43, 476 S.E.2d 683 (1996). It would also have further undercut Mahdi's prison adaptability expert's testimony. *See Hughes, supra*; *State v. Woomer*, 278 S.C. 468, 299 S.E.2d 317 (1982) (prior escape refuted evidence of good conduct while in prison).

This allegation has no merit. Counsel was not deficient in failing to introduce Mahdi's DJJ records. *See Pinholster, supra*; *Van Hook, supra*; *Rompilla, supra*; *Wiggins, supra*; *Strickland, supra*; *Rosemond, supra*.

Mahdi also alleges counsel was ineffective in failing to provide his psychiatric and psychological experts with his DJJ records because there was some evidence in those records he suffered from depression while he was in DJJ. This allegation also has no merit for several reasons.

Both Dr. Martin and Dr. McKee had reviewed Mahdi's psychiatric records of his commitment to the Walter Carter Center. Both knew Mahdi had been diagnosed with major depression as a child. Dr. Martin testified he also interviewed Mahdi, and based on his interviews with Mahdi and his participation in the mitigation team meetings where the other experts shared their background information on Mahdi, he determined Mahdi had a history of recurrent depression in his life.³³ However, even with this determination, Dr. Martin testified he found that Mahdi was not suffering from any mental illness at the time the crime was committed. Therefore, even with this information from DJJ, Dr. Martin's diagnosis would not change because he was already aware Mahdi had a history of recurrent depression during his life.

Additionally, as previously set forth above, this Court does not find credible the claim that Mahdi was suffering from depression at the time of Myers's murder. The evidence

³³Ms. Tarr testified at the PCR hearing that she received the DJJ records.

introduced at trial and the PCR does not support a conclusion Mahdi was depressed or was suffering from depression at the time he murdered Myers.

Additionally, even if counsel had provided these documents to their psychiatric experts, they could not call either Dr. Martin or Dr. McKee in the sentencing phase because of what Mahdi told both doctors that would have come out on cross-examination and their diagnosis of antisocial personality disorder. *Wong, supra*. Counsel could not call Dr. Martin to testify to Mahdi's history of recurrent depression for several reasons: (1) Martin did not find Mahdi was suffering from depression at the time of the crime; (2) Martin diagnosed Mahdi with antisocial personality disorder, and (3) Mahdi told Dr. Martin he had committed two homicides in Virginia, and he fled from Virginia to get away from detectives who were closing in on him for one of the homicides. Again, this was an objectively reasonable trial strategy decision under the circumstances, and providing the DJJ records to Dr. Martin would not have changed these negative factors that led to this strategic decision. Mahdi has failed to show deficient performance here.

Additionally, Dr. McKee also diagnosed Mahi with antisocial personality disorder. Mahdi also informed McKee that he left Virginia to escape from homicide detectives who were closing in on him. Counsel did not and could not call Dr. McKee to testify for these two reasons, which this Court finds were objectively reasonable trial strategy decisions under the circumstances. Providing the DJJ records to Dr. McKee would not have changed these negative factors that led to this strategic decision. Mahdi has failed to show deficient performance here.

Finally, Mahdi failed to meet his burden of proof with regard to this specific allegation. Both Dr. Martin and Dr. McKee testified at the PCR hearing. Mahdi did not show either Dr. Martin or Dr. McKee the DJJ records and ask them if these records would have changed their

opinion in this case.³⁴ *Von Dohlen, supra.* As a result, Mahdi has failed to meet his burden of proof to show counsel was deficient in this regard. *Butler, supra.*

(f) The School Records and School Witnesses

Mahdi also alleges counsel was ineffective for failing to introduce Mahdi's school records and in not calling elementary school officials. At PCR, Mahdi introduced school records, called several school officials, and provided the affidavit of another school official. These individuals either taught Mahdi or were involved in the decision to place him in special education. This Court has carefully reviewed the school records submitted, the testimony of the school officials who testified at PCR, and the one witness who submitted an affidavit. There is no merit to this allegation.

The Lack of Merit of this Allegation

The record and credible evidence at the merits hearing shows counsel retained a qualified mitigation investigator, Ms. Tarr, to investigate and develop mitigation in this case. Tarr had previously been a mitigation investigator in thirty to forty capital cases. Tarr testified as part of her investigation she requested school records of Mahdi. (PCR. 565). Although she no longer had her file in this case, she testified it was her common practice to request records from any school Mahdi or his family informed her Mahdi had attended. (PCR. 565). She also testified she went to the schools Mahdi attended. (PCR. 585). She also testified she spoke with teachers in Lawrenceville who were familiar with Mahdi; however, these teachers had not spent a lot of time with Mahdi. (PCR. 586). She also testified she spoke with individuals from a school

³⁴In fact, Dr. Martin testified that based on what he saw and heard discussed at the PCR hearing, his opinion regarding Mahdi's mental state had not changed. Dr. McKee testified he did not need to see any additional records to make his diagnosis in this case. Neither testified that had they been shown the DJJ records their diagnosis would have been different.

Mahdi attended in Baltimore. (PCR. 586). Tarr testified she routinely provides summaries of school records in capital cases. (PCR. 587). She also testified if she had done a summary of school records in this case, she would have included all pertinent information she thought was helpful to Mahdi. (PCR. 586-87). The record shows a summary of the school records was done in this case and introduced at the sentencing hearing before Judge Newman. Counsel testified they relied on Tarr and also Hammock, the forensic social worker, to get all of the information with regards to Mahdi's school and education. (PCR. 629-30). Counsel also testified there were team meetings where the mitigation investigator and social worker shared with them and their experts what they had found in their investigation. (PCR. 631, 700). Counsel testified he was aware Mahdi was in special education. (PCR. 629). Dr. Martin and Dr. McKee also testified they were aware Mahdi was in special education. Counsel also testified they would have forwarded any records they received to their experts.

At Mahdi's sentencing proceeding before Judge Newman, Hammock testified to Mahdi's difficulties in school. She testified in her expert opinion Mahdi's education was disrupted many times, and this was reflected in the school records. (R. 1752, 1756). Mahdi had to move several times. (Def. Ex. 2). Mahdi was forced to change elementary schools five times. (Def. Ex. 3). The records also noted lateness and absences. (R. 1756). Mahdi started kindergarten at Sister Clara Muhammad School in Richmond and completed part of kindergarten at Totaro Elementary School in Lawrenceville. Mahdi then moved back to Richmond and attended Chamberlayne Elementary School for part of a year. Then he was removed from there and sent to Baltimore, where he attended Scotts Branch Elementary School for two years. Then he was removed from that school while in the Carter Center, and ultimately returned back to Lawrenceville to live with his father. (R. 1754-56). Even in his pre-teen years there was a lack of stability in terms of Mahdi's attending school, and it was reflected in the kinds of reports he

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received. (R. 1760-61).

Hammock testified Mahdi constantly had difficulty in school. (R. 1752). He was considered bright but did not perform well. (R. 1752-53). He was particularly a poor reader. (R. 1753). Both Carson and Lawanda Burwell reported Mahdi had difficulty in school. (R. 1753). Carson reported Mahdi could not read when he came to live with them at age 8. Carson and Lawanda reported there was constant conflict in getting Mahdi to deal with his academic limitations. (R. 1754). When Mahdi was involuntarily committed to the Carter Center his initial diagnosis included "Developmental Reading Disorder." (Def. Ex. 2). Mahdi's had difficulties in school particularly in reading, and writing, which remained at below grade level throughout elementary school. (Def. Ex. 3, R. 1755). Mahdi had numerous absences while in school. (Def. Ex. 3). School records during this time were consistent with this report. (R. 1754). Mahdi had uneven skills in school. (R. 1755). He was in the average math program, but in the below average reading program. (R. 1755). While he excelled in science, his reading, vocabulary, and spelling remained below average. (R. 1756). Mahdi needed improvement in a number of areas, including standards for behavior and showing respect for authority. (R. 1755). Mahdi was described as having poor self-esteem throughout his academic time. (R. 1753). It was noted several places he had poor self-esteem and had difficulty in relationships with others. (R. 1756). Mahdi's father removed him from school in the 5th grade to home school him, but there was no information this home schooling had ever occurred. (Def. Ex. 3). Mahdi's educational history was one of poor school progress. (R. 1762). While counsel did not introduce the records themselves, counsel conducted a reasonable investigation of Mahdi's school history and presented the same before Judge Newman. See *Pinholster, supra*; *Van Hook, supra*; *Rompilla, supra*; *Wiggins, supra*; *Strickland, supra*; *Rosemond, supra*; *Simpson, supra*.

The school records themselves reveal damaging information about Mahdi and his

character, even at an early age. Mahdi was referred for special services not because he was mentally retarded, but because of "...behavior problems. He exhibits inappropriate and disruptive behavior." (Brunswick County Public Schools, 3/25/99). The same record also indicates Mahdi had a negative attitude about being corrected, did not always get along with other children, his behavior with adults was inappropriate at times, and most of his problems seemed to be getting along with people. The records indicate Mahdi had an I.Q. of 118, but had episodic acting-out behavior and an unwillingness to deal with difficult school tasks. (Confidential Psychological Evaluation). The records also indicate Mahdi was referred for special services because of "behavioral difficulties; such as leaving his seat inappropriately, physically and verbally aggressive towards others at times, talks out of turn, preoccupied, anxious, easily frustrated or angered, lacks respect for authority, and daydreams, (Educational evaluation)(emphasis added). A Burk's Behavior Rating Scale revealed very significant factors for poor impulse control, poor anger control, and excessive resistance. (Appendix Y). The records also indicate Mahdi's "intellectual functioning" was "in the high average range." (M000065). Introducing Mahdi's school records would have introduced unfavorable information about Mahdi to Judge Newman. It would also have introduced before Judge Newman that Mahdi's intellectual functioning was not impaired. This Court finds counsel was not deficient in failing to introduce Mahdi's school records. Counsel introduced, through Hammock's testimony and through exhibits, Mahdi's problems in school without introducing the bad things he did while in school. Counsel's performance was not deficient in this regard. Wong, supra.

Mahdi further argues counsel should have introduced Mahdi's school records and called school witnesses to show Mahdi was diagnosed by school officials in the fourth grade as emotionally disturbed. However, the record shows Mahdi's emotional disturbance diagnosis

was based in large part on his inappropriate behavior in school such as defiance and aggressiveness toward other students. Further, there was expert testimony in this case that a diagnosis of emotional disturbance many times means simply a misbehaving child. (PCR. 542). This testimony would have further exposed testimony regarding Mahdi's oppositional defiant disorder/intermittent explosive disorder and his conduct disorder, which is a pre-cursor to antisocial personality disorder, which would not have been favorable to Mahdi. Additionally, Mahdi was also referred for special education services because of his inability to read, which Judge Newman already knew about through Hammock's testimony and the exhibits counsel introduced.

Additionally, the records contain information that would have undercut counsel's attempt to present mitigation. The records themselves indicate Mahdi was living in his grandmother Nancy Burwell's home, a modern three bedroom brick home with all facilities. The home was equipped with a stereo, television, and other educational materials for family use. There was a family support system for Mahdi's immediate family including grandparents and other relatives and friends. Mahdi met all developmental milestones at the appropriate age. Mahdi received prompt medical attention for any physical problems growing up. Mahdi's father was a high-school graduate who completed two years of community college, and Mahdi's mother had completed two years of college. Mahdi's father was involved in Mahdi's school evaluation process and believed Mahdi's behavior problems in school were due in large part because he was behind in reading, i.e. he became frustrated when he tried to read. Mahdi's father was willing to work with the public schools for his son's benefit. There were several notations in the records Mahdi's father was supportive, involved, and was seeking to help his son overcome his problems. The the records also indicate Mahdi's relationship with his father was excellent. (Resp. Ex. 1 & 2). In essence, the records do not portray Mahdi's home life in as bad a light as

counsel was able to portray Mahdi's childhood home life before Judge Newman at sentencing.

Furthermore, Mahdi's own mitigation witnesses undercut the validity of Mahdi's being placed in special education. Dr. Cooper-Lewter testified Mahdi himself informed him that he should not have been placed in special education. Mahdi informed Cooper-Lewter that after being placed in special education he put forth no effort, because he did not belong there. Cooper-Lewter basically agreed with Mahdi's assessment. Lawanda Burwell, Mahdi's aunt, and a credentialed school administrator, also testified she did not believe Mahdi should have been in special education.³⁵ This ground has no merit. Counsel was not deficient under this allegation. See *Pinholster, supra*; *Van Hook, supra*; *Rompilla, supra*; *Wiggins, supra*; *Strickland, supra*; *Rosemond, supra*; *Simpson, supra*; *Jones, supra*.

As previously discussed, Mahdi also claims counsel was ineffective in failing to provide his psychiatric/psychological experts, Dr. Martin and Dr. McKee with records from Mahdi's school history, specifically the records regarding Mahdi being placed in special education classes. However, both Martin and McKee testified these records would not have changed their ultimate diagnosis. (PCR. 544, 561). Dr. Martin also testified at the PCR hearing that Mahdi informed him he had been placed in special education. (PCR. 515). Dr. Martin also testified Mahdi told him he should not have been placed in special education. (PCR. 515). Mahdi told Dr. Martin he begged the school principal to take him out of special education, but this was unsuccessful. (PCR. 516). He also asked his father to take him out of special education, and his father eventually pulled him out of public school and home schooled him. (PCR. 516). Dr. Martin also testified students are classified as emotionally disturbed and placed in special

³⁵ Mahdi also told Drs. Martin and McKee that he should not have been in special education. Mahdi also told Dr. Martin he became ODD (Oppositional Defiant Disorder) after being placed in special education because he did not belong there. (Respondent's Ex. 8).

education classes because they are behavioral problems. (PCR. 542). Dr. Martin testified that sometimes this behavior is fueled by depression, sometimes its incorrigible behavior, or sometimes they are truant or having problems with conduct disorder. (PCR. 542). Dr. Martin also testified Mahdi's acting-out behaviors such as irritability, talking back to teachers, and disrespectful attitude were in other reports he did review and also in information Mahdi provided to him. (PCR. 542). This Court had the opportunity to view the testimony of Dr. Martin and Dr. McKee and finds their testimony on this issue to be credible. Mahdi has failed to show counsel was deficient in failing to provide Dr. Martin or Dr. McKee with Mahdi's school records. *See Von Dohlen, supra.*

Mahdi also claims counsel was ineffective for failing to provide their experts with these specific records of Mahdi being placed in special education because they showed evidence of Mahdi's depression. This ground has no merit for several reasons.

Dr. Martin testified he extensively reviewed Mahdi records from the Walter Carter Center that documented his diagnosis of major depression at age nine. He reviewed the summary prepared by Ms. Tarr of these records and the records themselves. Dr. McKee likewise reviewed Mahdi's commitment records from the Walter Carter Center at age nine. Both experts knew Mahdi had been diagnosed with major depression as a child. The special education records were generated approximately eighteen months after Mahdi's release from the Carter Center. Dr. Martin further testified he interviewed Mahdi about his life. Mahdi informed him he had been placed in special education classes. Mahdi also indicated he had suffered from recurrent depression in his life. Dr. Martin further testified he participated in several team meetings where the findings of other members of the mitigation team were shared with him, including Mahdi's developmental and social history. Dr. McKee testified likewise. As previously stated, Ms. Tarr had subpoenaed Mahdi's school records and interviewed

individuals who worked at two different elementary schools Mahdi attended. Based on his interviews with Mahdi regarding his life, and his review of the Carter Center records, along with the information he received from the mitigation investigators, Dr. Martin determined Mahdi had suffered from recurrent depression during his life. Dr. Martin further testified at PCR that the records Mahdi presented at PCR, the special education records, would not change his opinion in this case. Dr. McKee also testified he was aware Mahdi had been placed in special education as a child. Dr. McKee also testified he did not need any further records to make his diagnosis in this case. (PCR Tr. 508-45, 545-61). As a result, Mahdi has not shown deficient performance on the part of counsel for failing to provide Dr. Martin or Dr. McKee with Mahdi's school records regarding special education. *Von Dohlen, supra.*

Additionally, Mahdi cannot show deficient performance from the failure to provide these records because counsel could not call either of these witnesses because they found Mahdi had antisocial personality disorder, and Mahdi had related to both Dr. Martin and Dr. McKee that he had been involved in at least one homicide in Virginia. Mahdi also related to Dr. Martin other damaging things: (1) Dr. Martin noted Mahdi had no difficulty talking about killing people if necessary to achieve independence; (2) Mahdi informed Dr. Martin of another homicide he had committed in Virginia, where police had yet to find the body; (3) Dr. Martin testified Mahdi's outlook on life was quite violent and his interactions with others were hostile, aggressive, and sometimes quite violent. (PCR. Tr. 508-61). As previously stated above, this Court finds counsels' decision not to call these witnesses in mitigation was an objectively reasonable trial strategy decision under the circumstances, and providing these experts with Mahdi's special education records would not change the negative factors that motivated this decision. *See Strickland, supra; Council, supra.*

Dr. Martin also testified there was no evidence Mahdi was depressed at the time he

committed Myers' murder. Mahdi did not state he was depressed or psychotic at the time. There was no evidence of depression from the way Mahdi described the events surrounding Myers's murder. Mahdi's description of the events of Myers's murder were quite coherent. He described very clearly to Dr. Martin what he was feeling and perceiving at the time of Myers's murder. Mahdi described extensive details regarding his actions during Myers's murder. Mahdi described murdering Myers because Myers discovered Mahdi in Myers's cabin, and Mahdi thought Myers's was going to shoot him. Mahdi also described burning Myers's body to cover-up or destroy evidence. Mahdi was coherent and had no problem remembering events. As a result, Dr. Martin opined at the time of the offense, Mahdi only had a personality disorder, antisocial personality disorder. Likewise, Dr. McKee found no evidence Mahdi was suffering from depression at the time of Myers's murder. Dr. Martin testified the special education records would not change his opinion in this case. Dr. McKee testified that he did not need to see any other records to make his diagnosis in this case. (PCR. Tr. 508-561).

Finally, Mahdi has failed to meet his burden of proof with regard to this specific allegation. See *Butler, supra*. Dr. Martin was shown Mahdi's special education records at PCR and testified they would not change his opinion in this case. Additionally, Mahdi did not show Dr. McKee the special education records and even ask him if they would have changed his opinion in this case. As a result, Mahdi has failed to show counsel was deficient in failing to provide the special education records to their psychiatric/psychological experts. See *Von Dohlen, supra*; *Reed, supra* (fact expert retained at trial and expert retained later at PCR differed, does not prove trial counsel was ineffective); *Davis, supra* (mere fact a defendant can find, years later, a mental health expert who will testify favorably for him, does not demonstrate counsel was ineffective for failing to produce that expert at trial.); *Poyner, supra* (petitioner cannot establish ineffective assistance because counsel did not expert shop until one could be found who

would testify favorably).

As a result of all of the above, this Court finds Mahdi has failed to show deficient performance in counsel's failure to introduce Mahdi's school records, failure to call school officials as witnesses, or failure to provide his school records to his psychiatric/psychological experts. *See Pinholster, supra; Van Hook, supra; Rompilla, supra; Wiggins, supra; Strickland, supra; Rosemond, supra; Simpson, supra; Jones, supra.* As a result, this ground must be dismissed with prejudice.

(g) The Walter Carter Center Records

Mahdi also alleges counsel was ineffective for failing to introduce Mahdi's records from the Walter Carter Center. There is no merit to this ground.

The Lack of Merit of this Allegation

First, the record shows counsel had possession of these records, and Ms. Tarr summarized them for counsel and the experts. (**Resp. Ex. 11; PCR. 565-66**). Counsel's experts, Dr. Martin and Dr. McKee, also had the actual records from the Carter Center. (**PCR. 511-12, 553-54**). They reviewed them in conducting their evaluation of Mahdi. (**PCR. 511-12, 553-54**).

The sentencing phase record shows, Ms. Hammock testified regarding Mahdi's commitment to the Walter Carter Center, his diagnosis there, and his discharge diagnosis. An exhibit introduced detailed Mahdi's involuntary commitment and diagnosis at the Carter Center. Judge Newman was well aware Mahdi was committed to the Carter Center at age nine for depression and suicidal ideation. Judge Newman was also well aware Mahdi was diagnosed with major depression at this age, and it came on the heels of his being separated from his family, and being forced to move to Baltimore to live with his aunt and uncle. Judge Newman was also

well aware Mahdi was confined at the Carter Center for sixty days, and he was discharged to his aunt and uncle. Counsel chose not to introduce the records themselves. (R. 1739-63, Def. Ex. 2). This Court has reviewed the Carter Center records thoroughly. The records themselves are cumulative to the testimony of Hammock at sentencing and the exhibit introduced through her.

Additionally, the records themselves contain damaging information about Mahdi. Mahdi was placed in isolation several times at the Carter Center due to his disruptive or inappropriate behavior. The records also show Mahdi assaulted other patients, assaulted staff, was verbally threatening or aggressive towards staff, and attempted to escape from the facility. On several occasions, Mahdi threw chairs or tables and attempted to damage property of the hospital. On one occasion, Mahdi falsely pulled a fire alarm. Mahdi also cursed staff members. On another occasion, Mahdi threatened to suffocate a staff member with a pillow. Additionally, the records detail Mahdi's making a false claim of child abuse against his aunt Lawanda, a fact Judge Newman was not aware of. The records show the claim of child abuse against Lawanda was determined to be unfounded, and Mahdi admitted he only threatened suicide when he didn't get his way. The records also show the aunt reported Mahdi only talked about suicide when he didn't get his way or did something wrong, and Mahdi also admitted threatening suicide as a way of getting attention. These records would have undercut the mitigation value of and brought into question the diagnosis of major depression at the Carter Center that was testified to before Judge Newman. The records also indicate Mahdi had antisocial behavior and conduct disorder. Counsel was not deficient in failing to introduce the records themselves when unfavorable things were contained within the records that would have been damaging to their client. (See **Walter Carter Center Records & Resp. Ex. 7**). *Wong, supra*. Counsel appropriately presented the Carter Center mitigation information to the sentencing court through Hammock, without the negative information about Mahdi that would

have been before the sentencing court had the records themselves been introduced. *Id.*; *Strickland, supra*. This allegation has no merit must be dismissed with prejudice. *See Pinholster, supra; Van Hook, supra; Rompilla, supra; Wiggins, supra; Rosemond, supra; Simpson, supra; Jones, supra.*

(h) The Father's Records

Mahdi alleges counsel was deficient in failing to introduce his father's military, medical/psychiatric, and criminal records.

The Lack of Merit of this Allegation

To the extent counsel did not obtain these records, counsel's mitigation investigation revealed, and counsel presented the main information contained in these records at sentencing through Ms. Hammock. Judge Newman was aware Mahdi's father had been discharged from the military under less than honorable conditions; Mahdi's father had a history of mental illness, i.e. depression during his lifetime, and he could not hold a job, support his family, get along with others, and effectively parent; and, Mahdi's father had a criminal record for assaults on his own family including his wife and his mother. Additional records and testimony at sentencing established Mahdi's father had been arrested for assaults on his family, escape, and malicious damage to property. (See DJJ records introduced at sentencing & Testimony of Sheriff James Woodley at sentencing). The State did not contest any of this information. Therefore, Mahdi has failed to prove deficient performance, and there is no merit to this allegation. *See Van Hook, supra; Simpson, supra; Jones, supra.*

Conclusion to Deficiency Analysis

For the reasons stated above, this Court finds Mahdi has not met his burden of proof to

show deficient performance under this ground. See *Strickland, supra*; *Pinholster, supra*; *Van Hook, supra*; *Wong, supra*. Counsel conducted an adequate, thorough, and reasonable investigation of mitigation evidence, and presented what mitigation evidence counsel could present that was favorable to Mahdi under the circumstances at the time of sentencing. See *Pinholster, supra*; *Van Hook, supra*; *Strickland, supra*; *Rompilla, supra*; *Wiggins, supra*; *Rosemond, supra*; *Council, supra*; *Simpson, supra*; *Jones, supra*.

THE PREJUDICE PRONG

Regardless, Mahdi has not met the second prong of the test articulated in *Strickland* and *Cherry* and discussed hereinabove. Considering the horrible facts of this murder, the aggravating circumstances, the mitigation presented at sentencing, the additional mitigation evidence presented at the PCR hearing, and the aggravating evidence that would almost certainly have come in with the new mitigation, this Court finds there is no reasonable probability Judge Newman would have returned with a different sentence. See *Wong, supra*; *Jones*, 332 S.C. at 333, 504 S.E.2d at 823.

When determining if want of mitigation evidence resulted in prejudice, the Court must determine whether the mitigation evidence, taken as a whole, might well have influenced the judge's appraisal of Mahdi's culpability. *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009), quoting *Wiggins*, 539 U.S. at 538, quoting *Williams*, 529 U.S. at 398; see also *Rompilla*, 545 U.S. at 393. Accordingly, if counsel's failure to present mitigation evidence undermines confidence in the outcome, then Mahdi suffered prejudice. *Rosemond, supra* (finding counsel's complete failure to present mitigation evidence undermined confidence in the outcome where the jury deliberated over two days before reaching a death sentence).

The United States Supreme Court made clear in *Wong, supra*, the burden is not on the

State to show the lack of prejudice, but the burden is on *the applicant* to show prejudice. *Id.* To establish prejudice, Mahdi must show a reasonable probability that had Judge Newman been confronted with the new mitigating evidence, there is a reasonable probability he would have returned with a different sentence. *Id.*, quoting *Wiggins*, 539 U.S. at 535-36. "In evaluating that question, it is necessary to consider *all* the relevant evidence that [the judge] would have had before [him]" if Mahdi "had pursued the different path - not just the mitigation evidence" Mahdi could have presented, but also" the aggravating evidence "that almost certainly would have come in with it." *Id.*, referencing *Strickland*, at 695-696, 700 (emphasis in original). See also *Porter v. McCollum*, 558 U.S. ____ (2009); *Sears v. Upton*, 130 S.Ct. 3259 (2010), quoting *Porter*, 130 S.Ct. at 453-54; *Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008), citing *Jones*, 332 S.C. at 333, 504 S.E.2d at 824.³⁶ This Court has analyzed Mahdi's claims of prejudice under this ground pursuant to the above cited standards and finds Mahdi has not met his burden of proof to show prejudice.

The Evidence in Aggravation

The amount of evidence in aggravation the State presented at the guilty plea and in the penalty phase was overwhelming. See *Plath v. Moore*, 130 F.3d 595, 602 (4th Cir. 1997) (considering the sheer magnitude of the aggravating evidence, defendant failed to show prejudice from counsel's failure to present certain mitigating evidence). As detailed in the record, and Judge Newman's sentencing order, the evidence of Mahdi's guilt, the aggravating circumstances (both statutory and non-statutory) of this murder; and Mahdi's bad character, characteristics, prison misconduct, and propensities for violence was overwhelming.

³⁶ "That same standard applies and will necessarily require a court to 'speculate' as to the effect of the new evidence-regardless of how much or how little mitigation evidence was presented during the initial penalty phase. Indeed, it is exactly this kind of probing inquiry that ... the [lower court] failed to do. In all circumstances, this is the proper prejudice standard for evaluating a claim of ineffective representation in the context of penalty phase mitigation investigation." *Sears v. Upton*, 130 S.Ct. 3259 (2010).

The Guilty Plea

First, Mahdi admitted he murdered James Myers, burglarized his cabin before murdering him, and stole his guns and police issued truck after murdering him. There is no question Mahdi is the person who murdered Myers; he was alone when he murdered him, and he acted completely alone. Mahdi also admitted he murdered Myers during the entering or remaining in the cabin after the burglary and stole his guns and truck. Mahdi also admitted the facts surrounding the murder as recited by the Solicitor were correct. (R. 1254-84, 1336-43).

The Sentencing Proceeding

In the sentencing phase, the State established the following evidence in aggravation. Mahdi burglarized the home of Amanda Weaver in Virginia and stole a chrome .380 pistol. Mahdi then stole a license plate from a car rental agency and a station wagon from a nearby car lot. He drove this vehicle eventually to Columbia, South Carolina, where he abandoned it in a church parking lot. Mahdi then car-jacked a Ford Expedition at gunpoint and drove to the Wilco Plaza in Calhoun County. He replaced the tag on the Expedition with the tag he stole in Virginia. He attempted to use a stolen credit card at the Wilco station and fled into some nearby woods when he believed police were about to apprehend him. Mahdi came upon Myers' shed/cabin and burglarized it using some type of tool. While inside, Mahdi manufactured a sawed-off shotgun, painted it black, and also armed himself with Myers's loaded .22 rifle. When Myers went to his cabin/shed, late on the evening of June 16, 2004, Mahdi was lying in wait. Mahdi murdered Myers by shooting him nine times with the .22 rifle. Mahdi shot Myers several times in the head after he was helpless on the floor of the cabin/shed. Mahdi stole Myers's truck keys, his guns, and his police issued truck and fled South Carolina. Before leaving, Mahdi attempted to burn Myers's body and his shed to conceal evidence.

Myers's wife had the unfortunate circumstance of finding her husband's burned and bullet riddled body; she screamed for an unknown period of time before she was able to call 911, and she remained at the cabin, with her husband's body for approximately thirty minutes waiting on police and emergency workers to arrive.

Mahdi drove to Jacksonville, Florida and sold the .380 caliber pistol he stole from Virginia and the .22 rifle he used to murder Myers; however, Mahdi retained several other weapons including the assault rifle and the sawed-off shotgun. Mahdi was not captured until an extensive police chase, after which he fled from Myers's stolen truck, and the use of a police dog, and Mahdi considered shooting officers before being arrested. Myers's stolen assault rifle and stolen shotgun were recovered in or near the truck Mahdi had been driving before his capture.

The State also established Mahdi's bad character and characteristics. Mahdi had previously been adjudicated delinquent as a juvenile for car-breaking, petty larceny, escape from custody, breaking and entering (two counts), obstruction of justice, and contempt of court. As an adult, Mahdi was convicted of malicious wounding, for the brutal stabbing of Moises Rivera, after Mahdi tried to burglarize an apartment in the complex where Rivera worked. Mahdi stabbed Rivera approximately five or six times and severely injured Rivera. Rivera's heart actually stopped in the ambulance, and he had to be revived. He was hospitalized for several days and out of work for approximately six weeks because of Mahdi's actions.

The State also established the murder of Myers was not Mahdi's first murder. Mahdi had murdered Christopher Boggs, a convenience store clerk, on his way to South Carolina from Virginia. Mahdi brutally murdered Boggs by shooting him in the face, and then shooting him again in the head after Boggs fell helpless on the floor. Store surveillance video portrays the heinousness of this murder, with Mahdi leaning over the counter to fire another bullet into

Boggs's head. After murdering Boggs, Mahdi tried to rob the store's cash register. There is no question Mahdi committed this murder because his actions were captured clearly on the store's video-camera, his fingerprints were found on the store's counter, Mahdi's friends and relatives identified him in the videotape, and the weapon used to murder Boggs, the .380, was sold by Mahdi in Jacksonville and forensically matched to Boggs's murder by ballistics testing.

The State also established Mahdi's bad prison behavior by introducing some of Mahdi's disciplinary violations while in Virginia's DJJ and all of Mahdi's disciplinary violations while in Virginia's adult DOC. The State also introduced Mahdi's disciplinary violations in the South Carolina DOC, including assaulting a guard and threatening other guards. Finally the State introduced Mahdi's escape attempt during the trial itself by the use of a homemade handcuff key Mahdi had fashioned while in maximum security and which he kept secreted in his mouth during the trial.

The State also introduced extensive victim impact testimony regarding Myers as a human being and valued member of the community. Judge Newman heard from Myers's widow, his father, Myers's daughter, and Myers's best friend.

The PCR Evidence

Mahdi's PCR mitigation presentation centered on family members' testimony, community member testimony mainly regarding Mahdi's father, expert witnesses' testimony regarding Mahdi's mentality, and documents not introduced by counsel at his sentencing proceeding.

(Family Members and Community Members)

Mahdi's family members and community members testified to the history of the family, particularly with regard to Mahdi's father, and his difficulties in life, and the difficulties Mahdi

had to overcome in life. With regard to the family member testimony, it was largely cumulative to the testimony presented by counsel before Judge Newman through their forensic social worker. The family and community members described the difficulties Mahdi's father had in growing up, particularly that he was unwanted by his mother, he was forced to go to an integrated school that was traumatic, and he suffered from depression after his wife left he, Mahdi, and Mahdi's brother Saleem. The family and community members also described Mahdi's father's inability to get along with others, to parent effectively, to obey the law, and to hold a job. The family and community members also testified to the domestic violence within Mahdi's immediate family committed by Mahdi's father on both his wife and mother. This same evidence was presented at the sentencing hearing through Hammock's testimony before Judge Newman, and the time-line of Mahdi's life introduced through her. (R. 1739-63; Def. Ex. 2). In fact, many of the details testified to by family members at PCR were related by Hammock in her sworn testimony or are set forth in the Exhibit detailing Mahdi's family history. Her testimony was not challenged by the Solicitor at sentencing, nor was the Exhibit chronicling Mahdi's family and life history.

The family members at PCR also described how Mahdi was abandoned by his mother at a young age, around 4 or 5 years of age, and Mahdi's father was unable to care for Mahdi and his brother. They described how Mahdi had to fend for himself at a young age, and eventually was separated from his father and brother because of his father's inability to care for the children. They also testified to Mahdi witnessing domestic violence committed by their father on Mahdi's mother and on their grandmother. The family and community members also described Mahdi's father's defiant behavior in the community. They also described Mahdi's difficulties in school and his commitment to the Walter Carter Center at age nine.

This same evidence was also presented at the sentencing hearing before Judge Newman

through Hammock in her sworn testimony and in the Exhibits chronicling Mahdi's family's life and his own life, and chronicling his school difficulties. Judge Newman was well-aware Mahdi had a life of deprivation, including being abandoned by his mother around the age of five. Judge Newman was also aware Mahdi's father could not provide for the children, and as a result Mahdi and his brother were sent to live with different aunts and uncles. Judge Newman was fully aware Mahdi's family was split up because of these difficulties, and shortly thereafter, Mahdi was committed to the Walter Carter Center and diagnosed as suffering from major depression and suicidal ideation. Hammock also testified to Mahdi's father's defiant behavior in the community and the fact he had converted to Islam at a young age. Judge Newman was also fully aware Mahdi and his brother witnessed their father assaulting their mother and their grandmother. Judge Newman was also aware Mahdi had difficulties in school, and he had particular difficulty in learning to read. Hammock also testified to Mahdi's lack of a proper role model, and Judge Newman was aware Mahdi's father suffered from depression and had a criminal record. (R. 1739-63, Def. Ex. 2). The evidence presented by Mahdi from his family and community members was largely cumulative and would not entitle Mahdi to relief. *Wong*, 130 S.Ct. at 387-88 (when substantial mitigation case was presented, evidence that is merely cumulative to the evidence actually presented fails to demonstrate the prejudice necessary to meet the prejudice prong of *Strickland*); *Buckner v. Polk*, 453 F.3d 195, 206 (4th Cir. 2006) (counsel's failure to present merely cumulative mitigating evidence does not prejudice a defendant's case); *Simpson v. Moore*, 367 S.C. 587, 627 S.E.2d 701 (2006) (finding where substantial mitigation case was presented, applicant had failed to show prejudice from failure to call other mitigation witnesses that were in essence cumulative); *Jones v. State*, 332 S.C. 329, 504 S.E.2d 822 (1998) (holding that "fancier mitigation case" does not render the prior case inadequate).

Furthermore, this Court cannot divorce from its prejudice analysis the unfavorable information that would have come in through the family witnesses, had they been called at the sentencing hearing as Mahdi proposes. *Wong, supra* (in making prejudice determination, the Court must consider the bad information that in all likelihood would have come in with the good mitigation evidence). Mahdi's family members were aware of bad things regarding Mahdi, and this Court finds these bad things in all likelihood would have come in on cross-examination or reply. Carson and Lawanda Burwell were aware that as an adult Mahdi had to move out of his grandmother's home because he would not abide by the rules of the home set down by his uncle Nathan. This occurred shortly after Mahdi's release from adult prison and while he was on supervised probation. Carson related to Mahdi's North Carolina attorneys Mahdi "was a demon." Carson also related to counsel here, if he were called to testify, he would have bad things to say about Mahdi. Since this was Carson's mind-set at that time, these bad matters would have come out on the stand as they did at PCR. Both Lawanda and Carson admitted Mahdi almost had them arrested by making a false claim of child abuse and manufacturing false evidence of the abuse. Both also related Mahdi acted out at the Carter Center and had to be placed in isolation. Carson related to Tarr that Mahdi was manipulative in their home. Lawanda related Mahdi acted out and had to be returned to live with his father. Both related Mahdi would only talk about suicide when he did not get his way or did something wrong, more manipulative behavior. Carson also related to counsel Mahdi's statement to the responding officer that led to his commitment to the Carter Center was not real but more of Mahdi's manipulative behavior. Lawanda likewise testified she did not believe Mahdi was suicidal.

These negative things about Mahdi would not have been helpful to Mahdi's mitigation case. If counsel had called Carson and Lawanda as Mahdi contends, then Mahdi's manipulative behavior, specifically making a false claim of child abuse to police, which almost had Carson

and Lawanda Burwell arrested, would have been admitted. Further, Mahdi's disruptive behavior at the Carter Center, would have been brought out, such as Mahdi hitting other patients, attempting to escape from the facility, cursing staff, falsely pulling a fire alarm, and throwing chairs. Due to Mahdi's disruptive behavior at the Carter Center, he had to be placed in isolation on several occasions. Additionally, testimony that Mahdi talked about suicide only when he didn't get his way or did something wrong, and was about to be punished, would have been brought out, i.e. additional manipulative behavior on Mahdi's part. Further, Mahdi's disruptive behavior within the Burwell home, which Mahdi wanted to cause, and which eventually did cause his return to his father, would have been elicited on cross-examination, further underscoring Mahdi's manipulative behavior and nature. Testimony would also have been elicited from Carson that Mahdi could not obey the rules of Nathan's home when he resided there as an adult, and was eventually asked to leave. Carson was also aware of an incident where Mahdi, his brother Saleem, and their father were involved in maliciously damaging an aunt's motor vehicle. Mahdi through a cement block through the aunt's car window. It is clear this negative testimony would have been elicited. The State had introduced this event through one of the police officers during the penalty phase. Further, emphasis before Judge Newman would not have helped the mitigation case. *Wong, supra.* Mahdi's aunt, Sophie Gee, was also aware of Mahdi slashing his mother's car tires. She testified at PCR Mahdi slashed his mother's tires simply because she would not let him use the car. This information would have been brought out on cross-examination had she testified at sentencing and would have further emphasized this incident before Judge Newman. *Wong, supra.*

(The New Social Worker)

Dr. Nicolas Cooper-Lewter's testimony would have been before Judge Newman;

however, most of the information related by Cooper Lewter was before Judge Newman through Hammock's testimony and the exhibits introduced through her. This Court finds the information related by Cooper-Lewter that was not presented by Hammock does not change the sentencing equation. *See, Wong, supra; Rosemond, supra.* Further, if counsel had called Cooper-Lewter, on cross-examination the State would have introduced Mahdi's numerous disciplinary violations [over 40] within Virginia's DJJ. *Wong, supra.* Cooper-Lewter specifically relied on these records in forming his assessment and was cross-examined about these at the PCR hearing. The violations included Mahdi assaulting a teacher, assaulting guards on numerous occasions, assaulting other inmates, leading an escape attempt, refusing to follow orders, refusing to be disciplined, cursing staff, and damaging and destroying property. Cooper-Lewter would also have been cross-examined about Mahdi's numerous disciplinary violations within Virginia's adult DOC including setting fire to a cell, possession of contraband, failure to follow orders, and assaulting a non-inmate. Cooper-Lewter admitted at the PCR hearing, Mahdi was confined to Wallens's Ridge Prison in Virginia because of his behavior in other facilities. Cooper-Lewter could also have been questioned about Mahdi's statements to Cooper-Lewter that he never should have been placed in special education in elementary school, because he did not belong there. Cooper-Lewter also admitted Mahdi had an I.Q. of 118, obtained his GED after his release from adult prison, had held several jobs, and obtained college credits from a local college in Lawrenceville, Virginia.

(Mahdi's Father's Records)

Mahdi's father's military, medical/psychiatric, and criminal records would have been before Judge Newman; however, the main information contained in those records was presented to Judge Newman in Ms. Hammock's sentencing proceeding testimony. Judge Newman was

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aware Mahdi's father had been discharged from the military under less than honorable conditions. Judge Newman was aware Mahdi's father had a history of depression and inability to get along with others, including his own family. Judge Newman was aware Mahdi's father could not hold a job or support his family, and he was not equipped to parent because his personal issues. Judge Newman was aware of Mahdi's father's history of criminal assaults and racially motivated crimes, including assaulting his wife on several occasions and assaulting his own mother. (See also DJJ records introduced at sentencing & Testimony of James Woodley at sentencing). Further, Mahdi failed to establish at the PCR hearing that any of these records would have changed his experts' opinions at sentencing. *Von Dohlen, supra*.

(Dr. Haney's testimony)

Haney's PCR testimony would have been before the sentencing Court; however, as set forth in the deficiency section under this ground, Haney's claim Mahdi is an impulsive actor who does not victimize others or that Mahdi is a product of his incarceration at Wallens Ridge, and to a lesser extent, at other facilities, would have been impeached. The testimony is simply not credible or supported by the record.

The record shows Mahdi is not an impulsive actor but committed many criminal offenses in a premeditated and planned fashion simply because he could and to benefit himself. Furthermore, Mahdi repeatedly victimized others in premeditated assaults or attacks.

Further, Mahdi was a violent, manipulative, and disruptive individual before he was incarcerated at Wallens Ridge. He was violent, disruptive, and manipulative when he was incarcerated the first time in Virginia's DJJ. He was violent, disruptive, and manipulative during his second incarceration in DJJ. He continued his violent behavior after being released from DJJ, seriously wounding Moises Rivera during a burglary attempt. After this incident, as in

the present case, Mahdi had to be captured with the use of a police dog. Mahdi continued his violent and disruptive behavior in the adult prison system resulting in his eventual incarceration at Wallens Ridge and he continued to violate institutional rules at Wallens Ridge. Rather than conforming his behavior when he was released from Wallens Ridge, so he would never have to go back to a maximum security prison, Mahdi repeatedly violated, not only the law, but the rules of his supervised probation. Mahdi sold drugs, possessed handguns, used marijuana, and committed two homicides in Virginia. Mahdi burglarized a home, stole a handgun, stole a car and a license plate, and left Virginia. Mahdi then committed two additional murders during his flight through the southeastern United States. In addition, Mahdi has engaged in the same or similar conduct while incarcerated in South Carolina, over and over again.

Further, Mahdi engaged in criminal conduct before he was ever incarcerated. In fact, he was placed on juvenile probation for his first series of crimes and continued to engage in criminal conduct, burglarizing a home and stealing firearms. After each incarceration, he committed even more violent offenses. While Mahdi was incarcerated he attacked guards and inmates. The record shows Mahdi has had an impact on each institution he has been detained in, not the opposite. Mahdi has not changed his conduct to avoid going back to a harsh prison environment, but engaged in more serious and violent offenses.

Additionally, Haney's attempt to blame all of Mahdi's criminal behavior on alleged undiagnosed or untreated mental illnesses or the failures of the criminal justice system would also have been impeached and is not credible. Mahdi informed Judge Newman he had no mental illnesses. Dr. Michael Cross also found Mahdi had no mental illnesses. The record shows Mahdi engaged in criminal activity such as stealing because he could and believed he would not get caught. Mahdi assaulted other individuals because it was in his own self-interest. Mahdi was not victimized in DJJ as Haney contends, but Mahdi victimized others including

inmates and guards and attempted to manipulate the juvenile prison system. Mahdi's actions over several days from Virginia, to North Carolina, to South Carolina, and to Florida, show he was not suffering from any mental illness.

Further, if Haney had testified at sentencing, the State would have brought out through him all of Mahdi's disciplinary violations in Virginia's DJJ and re-emphasized all of Mahdi's disciplinary violations in Virginia's adult DOC along with his numerous disciplinary violations in the South Carolina DOC. *Wong, supra.*

(The Virginia DJJ Records)

Additionally, had Mahdi's juvenile records been introduced as Mahdi alleges they should have been, Mahdi's long list of forty disciplinary violations in Virginia's DJJ would have been before Judge Newman. As previously stated, those records indicate Mahdi repeatedly assaulted other inmates, assaulted staff, destroyed property, led an escape attempt, and engaged in manipulative behavior. (**Resp. Ex. 6**). While there was some indication in these records that Mahdi was treated for depression while at DJJ, the records also indicate Mahdi later admitted he fabricated a suicidal gesture in order to gain additional privileges in DJJ, i.e. was attempting to manipulate the DJJ prison system. Furthermore, Mahdi failed to establish at the PCR hearing that these records would have changed any of his experts' opinions at sentencing. *Von Dohlen, supra.*

(The School Records and School Officials)

This Court carefully reviewed Mahdi's school records and the testimony of school officials. It must be first noted Judge Newman was familiar with Mahdi's school difficulties through the testimony of the forensic social worker and the exhibit chronically his school difficulties. Judge Newman was aware Mahdi's schooling was interrupted several times, Mahdi

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had many absences, and his father pulled him out of school after the fifth grade to home school Mahdi, and there was no indication this had occurred. Judge Newman was also aware Mahdi had difficulty in reading throughout his school history. While the records show he was placed in special education, Mahdi was not mentally retarded but had an I.Q. of 118 and functioned on grade level or higher in all classes except reading, spelling, and writing. While the records indicate Mahdi was diagnosed as emotionally disturbed, and had some depressive symptoms at that time, the records also show Mahdi was placed in special education or classified as emotionally disturbed based in large part on his misconduct and aggressive behavior in school, including toward other students, and his inability to read. Judge Newman already knew of Mahdi's inability to read. Judge Newman was also already aware Mahdi had been committed to a psychiatric facility approximately eighteen months before for major depression, and Mahdi told the sentencing court at his guilty plea that he was not suffering from any mental illness. Further, the mitigating impact of these records is minimal given Dr. Cooper Lewter testified Mahdi should not have been in special education and this had a negative impact on Mahdi's school performance. Lawanda Burwell also testified she did not believe Mahdi should have been placed in special education. Importantly, the records also included negative things about Mahdi. Had Mahdi's school records been introduced or the school officials testified, further evidence of Mahdi's bad behavior would have been before Judge Newman, including Mahdi's misbehavior and aggressiveness and assaults on other children and resistance to authority. Furthermore, Mahdi failed to establish at the PCR hearing that his experts' opinions would have changed at sentencing if they had been provided these records. *Von Dohlen, supra*

(The Walter Carter Center Records)

While the Walter Carter Center records themselves would have been before Judge

Newman, Judge Newman already knew of Mahdi's commitment there, diagnosis, and length of stay. The records themselves detail Mahdi's disruptive and manipulative behavior. Mahdi assaulted other patients, attempted to escape, admitted he fabricated a child abuse claim, damaged property, and used profanity against staff of the hospital. Mahdi also threw furniture at hospital staff, falsely pulled a fire alarm, and threatened to suffocate a staff member with a pillow. These records also indicate Mahdi's anti-social behavior and conduct disorder. Mahdi's commitment to the Walter Carter Center, the reason for his commitment there, and his length of commitment was before Judge Newman, without the negative and damaging information contained in those records. Furthermore, Mahdi failed to establish at the PCR hearing that his experts' opinions would have changed if they had been provided with these records. *Von Dohlen, supra.*

Dr. Schwartz-Watts's and Dr. Myers's testimony

If Dr. Schwartz-Watts and Dr. Myers had testified at Mahdi's sentencing proceeding before Judge Newman, Schwartz-Watts's diagnosis of depression, reactive attachment disorder, paranoid personality disorder, and generalized anxiety disorder and Myers's diagnosis of major depression in childhood or adolescence and reactive attachment disorder would have been before the sentencing Court; however, Mahdi's commission of the Virginia drug dealer homicide would have been brought out before Judge Newman. Dr. Schwartz-Watts admitted she reviewed Dr. Martin's notes, and Mahdi told Martin he left Virginia because he was involved in a homicide there. This would have been devastating to the mitigation case. *Wong, supra.*

Furthermore, Dr. Schwartz-Watts's diagnosis of anxiety disorder at the time of this murder would have been impeached by the Solicitor. Dr. Schwartz-Watts's diagnosis that Mahdi had depression but was not suffering from it at the time of Myers's murder would have

been impeached by the State and contradicted by the evidence and testimony. Additionally, her diagnoses would have been contradicted by Mahdi's sworn testimony before Judge Newman during his guilty plea, and the testimony of Dr. Cross during the *Blair* hearings (R. 1329-39, 1343-68, 125-40, 1339-43). Further, Dr. Schwartz-Watts admitted Mahdi's mental illnesses or personality disorders did not rise to the level of a statutory mitigator. Additionally, Dr. Myers's testimony regarding bad characteristics of Mahdi contained in the DJJ records, including conduct disorder, would have been brought out on cross-examination. Mahdi's previous diagnosis of intermittent explosive disorder and anti-social personality disorder in the Virginia DOC would also have been emphasized before Judge Newman with either of these two witnesses. Finally, both Dr. Schwartz-Watts and Dr. Meyers concurred in the diagnosis of Mahdi having anti-social personality disorder. This information would not have been helpful before Judge Newman.

Considering the evidence in aggravation, which was overwhelming, along with all the evidence in mitigation Mahdi alleges should have been presented, along with the aggravating evidence that would have almost certainly come in on cross-examination, rebuttal, or contained within the evidence itself, and the mitigation evidence presented at the sentencing hearing before Judge Newman, this Court finds there is no reasonable probability Judge Newman would have returned with a different sentence. *See Wong, supra; Seasar, supra; Strickland, supra; Rosemond, supra; Council, supra; Jones, supra.* Mahdi has failed to prove prejudice. *Id.* This ground must be dismissed with prejudice.

Ground 10(a)/11(a)(iv).

11(a)(iv) Counsel failed to assert that applicant's death sentence violates the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution due to Applicant's developmental deficits.

On this allegation, Applicant has failed to state a claim upon which relief may be granted. Assuming Mahdi is referring to his alleged "mental age" allegation in Ground

10(b)/11(b)[below], the record shows Mahdi was 21 years old at the time of the crime. *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183 (2005) (Eighth Amendment prohibits execution of those under the age of 18 at the time of the crime). The record also shows Mahdi is not mentally retarded. (See *Blair* hearing testimony and testimony of R&E evaluation).³⁷ *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242 (2001) (Eighth Amendment prohibits the execution of mentally retarded); *State v. Laney*, 367 S.C. 639, 627 S.E.2d 726 (2006); *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003) (defining mental retardation). There is no testimony in the record that Mahdi was insane at the time of the crime, is insane now, or is incompetent to be executed. *Ford v. Wainwright*, 477 U.S. 399 (1986) (Eighth Amendment precludes the execution of one who is insane); *Singleton v. State*, 313 S.C. 75, 437 S.E.2d 53 (1993) (setting forth the standard for competency to be executed). Mahdi has failed to show he fits under any class of persons recognized by the United States Supreme Court or the South Carolina Supreme Court as being excluded from application of the death penalty. See *Atkins, supra*; *Roper, supra*; *Ford, supra*. Counsel could not have been ineffective in failing to object to his sentence on a ground not recognized by the law. The Court is unaware of any state or federal authority for such an objection by trial counsel. See e.g. *State v. Irick*, 320 S.W.3d 284, 297-98 (Tenn. 2010); *Mays v. State*, 318 S.W.3d 368, 379-80 (Tex. Crim. App. 2010); *Johnson v. State*, 27 So.3d 11, 26-27 (Fla. 2010). See also e.g. *Shisinday v. Quarterman*, 511 F.3d 514 (5th Cir. 2007); *In re Neville*, 440 F.3d 220, 221 (5th Cir. 2006) citing *In re Woods*, 155 Fed. Appx. 132, 136, 2005 WL 3087882, *3 (5th Cir. Nov. 17, 2005) (unpublished); *State v. Ketterer*, 111 Ohio St. 3d 70, 855 N.E.2d 48 (2006); *Matheney v. State*, 833 N.E.2d 454 (Ind. 2005); *Hall v. Brannan*, 284 Ga. 716, 670 S.E.2d 87 (2008); *Coleman v. State*, No. W2007-0267-CCA-R3-PD, 2010 WL

³⁷ Mahdi's I.Q. was tested twice, with scores of 108 at age fourteen and 118 at an earlier age (R. 1437-39). Mahdi introduced no other I.Q. scores at the PCR merits hearing and made no claim that he was mentally retarded.

118696 (Tenn. Crim. App. Jan 13, 2010) (unpublished).

Applicant has failed to show that he had, at the time of the murders, any mental impairment so severe that he is necessarily and categorically less morally culpable than those who are not mentally disabled. *Mays, supra*.

There is no merit to this ground factually. Counsel had Mahdi evaluated by order of the circuit court for competency. (R. 8-10). As a result of that examination, it was determined Mahdi had no mental illness and was not mentally retarded. (R. 131; Court's Exhibit 2). It was determined Mahdi was competent to stand trial. (R. 139-140). Mahdi was twenty-three years old at the time of his guilty plea, had obtained his GED, and had attended some community college. (R. 1346). Mahdi had been previously employed in mostly roofing and brick laying. (R. 1346). Mahdi denied ever having been treated for abuse of alcohol, drugs or for any mental disease. (R. 1346). Ms. Hammock testified that Mahdi had been hospitalized on one occasion as an adolescent, a voluntary admission to a mental health facility, and Mahdi was released. (R. 1747; 1756). Mahdi was competent to plead guilty. (R. 1342). He understood the charges he faced, including murder, and the legal consequences of a conviction, including the death penalty. (R. 1339-68). Mahdi denied any emotional or nervous problem that might prevent him from understanding what he was doing when he pled guilty. (R. 1347). Mahdi had a good understanding of the legal process and the legal system. (R. 1340-41).

Mahdi cannot show counsel was deficient in failing to object to the imposition of the death penalty against him for the above stated reason, given the law and this record, nor can he show prejudice under *Strickland* and *Wong*, because the law does not recognize Mahdi's contention and the record demonstrates Mahdi is educated, has an above average I.Q., is streetwise, was twenty-one years old at the time of the murder, and has a criminal mentality. Mahdi cannot show a reasonable probability that, had counsel objected to the sentence on the

asserted grounds, the objection would have been sustained and there would have been a different sentence. The record and credible evidence demonstrates that Mahdi does not have a juvenile mentality, if this is what Mahdi is referring to in this ground, but an adult criminal mentality and bad character. This ground must be dismissed with prejudice.

10(b)/11(b)

(10)(b) Applicant's death sentence violates the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution due to Applicant's developmental deficits.

11(b) At the time of the offenses, Applicant was developmentally impaired such that he had the "mental age" of a juvenile due to his atrocious background of deprivation, neglect, abuse, and institutionalization. The Cruel and Unusual Punishment Clause precludes the infliction of the death penalty upon him, just as it precludes execution of those under the age of 18 at the time of the offenses, because of these grave developmental deficits. *See Roper v. Simmons*, 543 U.S. 551 (2005).

There is no merit to this ground. First, this is a claim of trial court error, and a direct appeal issue that was not preserved for appellate review because there was no objection at sentencing,³⁸ not raised in the direct appeal, and, being a direct appeal claim, is not cognizable in a PCR action. *Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001)(citations omitted) ("Allegations of trial court error are not cognizable on PCR. In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel."); *Drayton v. Evatt*, 312 S.C. 4, 430 S.E.2d 517 (1993) (issues that could have been raised at trial or on direct appeal cannot be raised in a PCR application absent a claim of ineffective assistance of counsel), citing *S.C. Code Ann. Section 17-27-20(b)* (1985); *Hyman v. State*, 278 S.C. 501, 299 S.E.2d 330 (1983); *Peeler v. State*, 277 S.C. 70, 283 S.E.2d 826 (1981); *Simmons v. State*, 264 S.C. 417, 215 S.E.2d 883 (1975), also referencing *Cummings v. State*, 274 S.C. 26, 260 S.E.2d 187 (1979); *Ashley v. State*, 260 S.C. 436, 196 S.E.2d 501

³⁸ See *Mahdi v. State*, 383 S.C. 135, 678 S.E.2d 807 (2009).

(1973); *Sellers v. Boone*, 261 S.C. 462, 200 S.E.2d 686 (1973). As a result, this ground is dismissed with prejudice.

Second, this ground was waived and abandoned at sentencing and on direct appeal. (See ROA & Brief of Appellant). *Parks v. Morris Homes Corp*, 245 S.C. 461, 471, 141 S.E.2d 129, 134 (1965) (litigant's failure to bring to the court's attention any perceived error amounts to a waiver of the issue). Applicant waived this alleged error by failing to bring it to the attention of the sentencing court or the S.C. Supreme Court in his appeal. See *Gibbs v. Kimbrell*, 311 S.C. 261, 267, 428 S.E.2d 725, 729 (Ct. App. 1993) (discussing waiver). As a result, this ground must be dismissed with prejudice.

Third, applicant has failed to state a claim upon which relief may be granted. The record shows Mahdi was twenty-one years old and not mentally retarded at the time of the crime. As set forth above, there is no evidence in the record that Mahdi was insane at the time of the crime, is insane now, or is not competent to be executed, nor that he fits under any class of persons recognized by the United States Supreme Court or the South Carolina Supreme Court as being excluded from application of the death penalty. This ground must be dismissed.

No federal or state authority would support such an objection by trial counsel. See e.g. *State v. Irick*, 320 S.W.3d 284, 297-98 (Tenn. 2010); *Mays v. State*, 318 S.W.3d 368, 379-80 (Tex. Crim. App. 2010); *Johnson v. State*, 27 So.3d 11, 26-27 (Fla. 2010). See also e.g. *Shisinday v. Quarterman*, 511 F.3d 514 (5th Cir. 2007); *In re Neville*, 440 F.3d 220, 221 (5th Cir. 2006), citing *In re Woods*, 155 Fed. Appx. 132, 136, 2005 WL 3087882, *3 (5th Cir. Nov. 17, 2005)(unpublished); *State v. Ketterer*, 111 Ohio ST. 3d 70, 855 N.E.2d 48 (2006); *Matheney v. State*, 833 N.E.2d 454 (Ind. 2005); *Hall v. Brannan*, 284 Ga. 716, 670 S.E.2d 87 (2008); *Coleman v. State*, No. W2007-0267-CCA-R3-PD, 2010 WL 118696 (Tenn. Crim. App. Jan 13, 2010)(unpublished). Furthermore, even if applicant could show he suffers from a mental illness,

this would not prevent his execution, where our Supreme Court has rejected a similar argument and held that a defendant found guilty but mentally ill may be sentenced to death. *State v. Weik*, 356 S.C. 76, 587 S.E.2d 683 (2002), *cert. denied* June 16, 2003; *State v. Wilson*, 306 S.C. 498, 413 S.E.2d 19 (1992).

The record also shows Mahdi knew and understood that use of illegal drugs or possession of a weapon would result in violation of his adult probation. (R. 1487-91). The record shows he chose to engage in such conduct anyway. (R. 1492-1511). Mahdi's crimes in Virginia, North Carolina, and South Carolina, his acts surrounding Myers's murder, and his conduct as a pretrial detainee (including his homemade handcuff key) reveal that he has above-average intelligence, is streetwise, and has a keen criminal mentality. Mahdi does not have a juvenile mentality, as alleged, but an adult criminal mentality and bad character.

Mahdi was evaluated by two psychiatric or psychological experts retained by trial/plea counsel (the defense). Both Dr. Thomas Martin, a psychiatrist, and Dr. Geoffrey McKee, a psychologist, found Mahdi had anti-social personality disorder, which is not a mental illness. Both mental health professionals found Mahdi was not suffering from any mental illness at the time he committed the offenses against Myers. Both testified at the PCR hearing that Mahdi was very intelligent. Neither testified that Mahdi was immature or had a "juvenile mentality." (PCR Tr. 508-61).

This Court had the opportunity to view the testimony of Dr. Martin and Dr. McKee and to judge their credibility. This Court finds their testimony regarding Mahdi's mentality to be credible.

Mahdi was also examined by Dr. Donna Schwartz-Watts prior to the PCR hearing. While Dr. Schwartz-Watts testified Mahdi's immaturity was cross-referenced in the records, she did not testify Mahdi had a "juvenile mentality" nor did she testify to what mental age Mahdi

was, nor his mentality at the time of Myers's murder. There is absolutely no evidence in the record Mahdi has a "juvenile mentality." Mahdi has failed to meet his burden of proof on this issue. *Butler, supra.*

Contrary to his assertion, the Virginia DJJ records reveal Mahdi had matured beyond his age, especially with regard to his criminal activities. As a teenager, Mahdi stated his friends were other fourteen and fifteen year olds, and he was a "leader among his peers," and was his "own person." (Va. DJJ Records MOO431). At the Virginia DJJ, Mahdi admitted his criminal behaviors involved a great deal of thought and planning. (Va. DJJ records). A counselor noted: "He described his current criminal charges in a very calculated, almost professional way that is alarming." (Va. DJJ records M000410). "He is developing and behaving like a teenager much older." (See Va. DJJ records M000410). Mahdi was described as a teenager with many negative attitudes toward authority, rules, limits, and rights and privileges of others. (See Va. DJJ records M00410).

While in the Virginia DJJ system, Mahdi planned an assault on another inmate and enlisted the support of other juveniles in this assault. (DJJ records M00425). The victim was injured in this assault. Mahdi exhibited a negative attitude with staff, and stated the attitude would continue until he got his way. Mahdi cursed staff profusely. (DJJ records M00425).

Mahdi was found age appropriate with regard to his maturity level during his intake evaluation. (See DJJ records M00418, line 4). Another record indicated that Mahdi's teachers should be aware that "he has demonstrated the capacity to plot, and carry out, apparently unprovoked assaults on peers. He requires extraordinarily close supervision." (See DJJ records M00426).

Mahdi was tested in 1994 when he was in the fourth grade and his overall level of functioning was at a mid-fourth grade level. At that time, his current level of educational

functioning fell in the average range. His mathematics equivalent yielded a grade equivalent of 5.8. Other tests showed his general information skills at a 6.8 grade level. Mahdi did struggle with reading during this time; however, psychological data revealed Mahdi's intellectual functioning was in the high average range. (See Brunswick County School Records).

Trial counsel testified at the PCR merits hearing, that Mahdi was very intelligent, recounting that Mahdi informed him that he had hatched a plan when he lived in Virginia whereby he would eliminate all other drug dealers in his area, resulting in a "false drought" of drugs. As a result, Mahdi would make more money selling drugs because everyone would have to come to him for the illegal product. Mahdi also related to trial counsel that he left Virginia because homicide detectives were closing in on him for a homicide committed in the Richmond, Virginia area. Trial counsel testified they had no problems communicating with Mahdi. Counsel testified Mahdi was calculating and intelligent in being able to disguise himself as someone else. Counsel related Mahdi impersonated a homeless person in Columbia in order to gain entrance into the Oliver Gospel Mission when the car he originally stole from Virginia broke down. Counsel related Mahdi was able to pretend to be a homosexual in order to accomplish the carjacking. Counsel related that Mahdi impersonated a police officer while in Florida, including investigating a crime reported by a citizen. Trial counsel did not believe Mahdi had a "juvenile mind" or mentality. (PCR Tr. 592-93, 603-11, 688-90). This Court had an opportunity to view counsel's testimony on this issue and judge their credibility accordingly. This Court finds counsel's testimony on this issue to be credible. This Court also finds counsel's testimony on this issue to be supported by the credible evidence in the record.

This Court finds Mahdi did not present any credible testimony or evidence on this issue, and therefore he failed to meet his burden of proof regarding this issue. *Butler, supra.* Mahdi has not convinced this Court by a preponderance of the evidence that he has a "juvenile mind" or

mentality. In fact, the credible evidence shows, Mahdi has an adult mentality, and an adult criminal mentality. This ground has no merit and must be dismissed with prejudice.

Ground 10(a)/11(a)(v):

11(a)(v) Counsel failed to assert that S.C. Code Section 16-3-20 is unconstitutional in that it automatically precludes jury sentencing following a guilty plea in violation of the Sixth, Eighth, and Fourteenth Amendments as addressed in *Ring v. Arizona*, 536 U.S. 584 (2002). Moreover, this statute forces a capital defendant to choose between his right to a jury trial and his right to present mitigating evidence, namely that he has accepted responsibility for the crime. While this issue has been rejected by state courts, see *State v. Downs*, 361 S.C. 141, 604 S.E.2d 377 (2004), it has not been reviewed by federal courts and counsel were thus ineffective in failing to adequately preserve the record for subsequent litigation.

In this ground Mahdi alleges trial counsel was ineffective for failing to assert that S.C. Code Section Ann. Section 16-3-20 is unconstitutional in that it automatically precludes jury sentencing following a guilty plea. There is no merit to this ground for several reasons.

The South Carolina Supreme Court has, on several occasions, rejected the claim that the statute is unconstitutional. *State v. Inman*, Shearhouse Advance Sheets Opinion 27081 (filed December 28, 2011); *State v. Allen*, 386 S.C. 93, 697 S.E.2d 21 (2009), cert. denied; *State v. Crisp*, 362 S.C. 412, 608 S.E.2d 429 (2005); *State v. Downs*, 361 S.C. 141, 604 S.E.2d 377 (2004); *State v. Wood*, 362 S.C. 135, 607 S.E.2d 57 (2004).³⁹ Therefore, counsel could not have been deficient in failing to preserve an issue that has no merit under the law. Mahdi has failed to show any prejudice because any such objection would have been overruled by Judge Newman and our state Supreme Court would have found this issue to be without any merit as it has on several occasions.

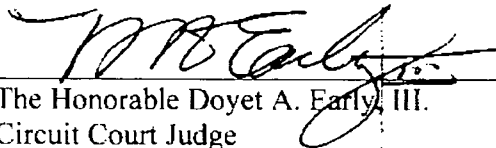
Furthermore, counsel testified at the PCR hearing Mahdi did not want to plead guilty and

³⁹ The South Carolina Supreme Court recently recognized this issue has no merit and has been repeatedly rejected by the Court. *State v. Inman*, Shearhouse Advance Sheets, Opinion No. 27081 (Filed December 28, 2011).

have the jury sentence him. (PCR Tr. 682-84). Mahdi had selected 12 jurors and 4 alternates to hear his trial and decide his sentence. Mahdi decided to plead guilty because Mahdi believed he had a better chance of receiving a life sentence from Judge Newman than from the jury he had selected. (PCR Tr. 682-84). As counsel correctly testified at the PCR hearing, the jury, composed of ordinary citizens, would not have been accustomed to seeing murders, as Judge Newman, an experienced circuit judge, and when confronted with the brutality of Mahdi's murder of Myers, and the videotape of the murder in North Carolina and its brutality, would in all likelihood have sentenced Mahdi to death for the murder of Myers. Additionally, the jury would have heard Mahdi's extensive criminal record, both adult and juvenile; and, the jury would have heard Mahdi's horrible prison behavior record while in the Virginia DJJ, the Virginia DOC, and the South Carolina DOC. This Court had the opportunity to view the witnesses and hear their testimony on this issue. This Court finds trial counsel's testimony on these issues to be credible. Mahdi offered no testimony to contradict trial counsel's testimony on these issues. This Court finds based on trial counsel's credible testimony and the record in this case, Mahdi wanted to be sentenced by Judge Newman, not the jury he had initially selected and impaneled. Therefore, it would have made no sense for Mahdi to have objected to the constitutionality of the statute and insist on pleading guilty and being sentenced by the jury, and counsel was not ineffective in failing to object to the constitutionality of *Section 16-3-20*. Mahdi has failed to show deficient performance or prejudice on the part of counsel in this regard. *Strickland, supra*. This ground must be dismissed with prejudice.

VI. CONCLUSION

For the above stated reasons, the application for post-conviction relief is denied and dismissed with prejudice. Applicant Mahdi is remanded to the custody of Respondent for the completion and carrying out of his sentences.


The Honorable Doyet A. Early, III.
Circuit Court Judge
1st Judicial Circuit

August 18, 2014

STATE OF SOUTH CAROLINA)

COUNTY OF CALHOUN)

Mikal D. Mahdi, #5238,)

Applicant)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS
Civil Action No. 09-CP-09-164

ORDER

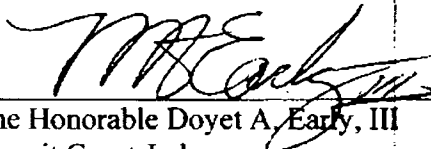
KENNETH HASTY
CLERK OF COURT
CALHOUN COUNTY
SOUTH CAROLINA

2014 SEP 12 P 2:22

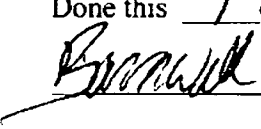
FILED

After careful review of the Motion to Alter or amend the Judgment in the Amended Order of Dismissal, dated August 20, 2014, in the above-referenced case, the Applicant's Motion is hereby DENIED.

AND IT IS SO ORDERED.


The Honorable Doyet A. Early, III
Circuit Court Judge

Done this 9 day of Sept 2014

, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF CALHOUN)

Mikal D. Mahdi, #5238,

Applicant)

v.)

State of South Carolina,

Respondent.)

IN THE COURT OF COMMON PLEAS
Civil Action No. 09-CP-09-164

ORDER

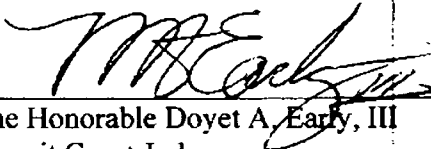
KENNETH HASTY
CLERK OF COURT
CALHOUN COUNTY
SOUTH CAROLINA

2014 SEP 12 P 2:22

FILED

After careful review of the Motion to Alter or amend the Judgment in the Amended Order of Dismissal, dated August 20, 2014, in the above-referenced case, the Applicant's Motion is hereby DENIED.

AND IT IS SO ORDERED.


The Honorable Doyet A. Early, III
Circuit Court Judge

Done this 9 day of Sept 2014

, South Carolina

ATTACHMENT NO. 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON/GREENWOOD DIVISION

Mikal D. Mahdi, #5238,	)	
	)	
Petitioner,	)	C/A No. 8:16-3911-TMC
	)	
vs.	)	OPINION & ORDER
	)	
Bryan Stirling, Commissioner, South	)	
Carolina Department of Corrections;	)	
Willie D. Davis, Warden, Kirkland	)	
Correctional Institution,	)	
	)	
Respondents.	)	
	)	

This matter is before the court on Respondents’ motion for summary judgment (ECF No. 105) and motion to strike (ECF No. 125). Petitioner Mikal D. Mahdi (“Mahdi”) is a death-sentenced state prisoner who seeks relief under 28 U.S.C. § 2254. Pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B), and Local Civil Rule 73.02(B)(2), D.S.C., pre-trial proceedings were referred to a magistrate judge. On September 24, 2018, the court withdrew the reference of this matter and now enters an order on the pending motions. (ECF No. 137). Having carefully considered the parties’ submissions and the record in this case, the court grants Respondents’ motion for summary judgment. (ECF No. 105). In addition, Respondents’ motion to strike (ECF No. 125) is granted in part and denied in part.

BACKGROUND

The following facts are recited, verbatim, from South Carolina Supreme Court Chief Justice

Jean Hoefer Toal’s concurring opinion in Mahdi’s direct appeal:

On July 14, 2004, Petitioner, then a resident of Virginia, embarked on a crime spree that would span four states. Petitioner stole a .380 caliber pistol from his neighbor, a set of Virginia license plates, and a station wagon. Petitioner left Virginia and headed to North Carolina.

On July 15, Petitioner entered an Exxon gas station in Winston-Salem, North Carolina armed with the .380 pistol. Petitioner took a can of beer from a cooler and placed it on the counter. The store clerk, Christopher Jason Boggs, asked Petitioner for identification. As Boggs was checking Petitioner's identification, Petitioner fatally shot him at point-blank range. Petitioner fired another shot into Boggs as he lay on the floor. Petitioner then attempted unsuccessfully to open the store's cash register. Petitioner left the store with the can of beer, and headed to South Carolina.¹

Early in the morning of July 17, Petitioner approached Corey Pitts as he sat at a traffic light in downtown Columbia, South Carolina. Petitioner stuck his gun in Pitts' face, forced him out of his car, and stole Pitts' Ford Expedition. Petitioner replaced the Expedition's license plates with the plates he had stolen in Virginia, and headed southeast on I-26.

About thirty-five minutes down the road, Petitioner stopped at a Wilco Hess gas station in Calhoun County and attempted to buy gas with a credit card. The pump rejected the card, and Petitioner spent forty-five minutes to an hour attempting to get the pump to work. Due to his suspicious behavior, the store clerks called the police. Aware that the clerks' suspicions had been alerted, Petitioner left the Expedition at the station and fled on foot through the woods behind the station.

About a quarter to half mile from the station, Petitioner came upon a farm owned by Captain James Myers, a thirty-one year veteran law enforcement officer and fireman. Petitioner broke into a work shop on the Myers property. Once inside the work shop, Petitioner watched television and examined Myers' gun collection. Petitioner found Myers' shotgun and used the tools in the shop to saw off the barrel and paint it black. Petitioner also took Myers' .22 caliber rifle and laid in wait for Myers.

That day, Myers had been at the beach celebrating the birthdays of his wife, sister, and daughter. Myers had visited with his father before returning to his farm. Upon arriving at the farm, Myers stopped by the work shop, where he was confronted by Petitioner. Petitioner shot Myers nine times with the .22 rifle. Petitioner then poured diesel fuel on Myer's [sic] body and set the body on fire. Petitioner stole Myers' police-issued truck, and left with Myers' shotgun, his .22 rifle, and Myers'

¹Mahdi has since pled guilty to first-degree murder in the death of Mr. Boggs and received a life sentence in North Carolina. (ECF No. 51-1 at 56 n.4).

police-issued assault rifle.

Later that evening, Myers' wife, also a law enforcement officer, became worried when Myers did not return home. Mrs. Myers drove to the work shop and discovered Myers' burned body lying in a pool of blood.

Petitioner escaped to Florida, where he was spotted by police on July 21 driving Myers' truck. Fleeing the police, Petitioner abandoned the truck [and proceeded] on foot in possession of the assault rifle. When cornered by police, Petitioner abandoned the rifle and was eventually taken into custody.

Mahdi v. State, 678 S.E.2d 807, 809 (S.C. 2009) (Toal, C.J., concurring) (footnote added).

PROCEDURAL HISTORY

Guilty Plea & Sentencing

On August 23, 2004, the Calhoun County grand jury indicted Mahdi for murder, grand larceny, and second degree burglary, and the State filed its Notice of Intent to Seek the Death Penalty. (ROA 1829-35).² The South Carolina Supreme Court ordered South Carolina Circuit Court Judge Clifton Newman to preside over Mahdi's case. (ROA 1841). Judge Newman appointed attorneys Carl Grant and Glenn Walters to represent Mahdi. (ROA 8). However, in 2016, upon Grant's motion and with the State and Mahdi's consent, the court relieved Mr. Grant as counsel because he had sustained a serious injury in a motorcycle accident. (ROA 104-05). Mr. Walters replaced Mr. Grant as lead counsel and the court appointed Joshua Koger, Jr., as second chair counsel. (ROA 109).

From November 26th to 29th, 2006, the parties engaged in individual *voir dire* and selected a capital jury. (ROA 207-1318). However, on November 30th, prior to the jury being sworn, Mahdi waived his right to a jury trial and pled guilty to all charges. (ROA 1336-68). Following the

²The Record on Appeal can be found at ECF Nos. 31-5 to 31-12.

mandatory twenty-four hour statutory waiting period, Mahdi's sentencing proceeding before Judge Newman began on December 4, 2006. (ROA 1372). As aggravating circumstances, the State alleged that Mahdi: (1) committed the murder during the commission of a burglary; (2) committed the murder during the commission of a larceny with a deadly weapon; (3) committed the murder during the commission of a robbery while armed with a deadly weapon; and (4) murdered a law enforcement officer during or because of the performance of his official duties. (ROA 1838). Judge Newman found the State proved the first two aggravating circumstances beyond a reasonable doubt and, after carefully considering all of the evidence, sentenced Mahdi to death. (ROA 1810-26).

Direct Appeal

On direct appeal, Mahdi raised one issue:

Did the trial judge improperly consider Mikal Mahdi's initial exercise of his constitutional right to a trial by jury in imposing a death sentence?

(ECF No. 31-1 at 3). On June 15, 2009, the South Carolina Supreme Court affirmed Mahdi's sentence. *See Mahdi v. State*, 678 S.E.2d 807 (S.C. 2009). (App. A000193).³ Mahdi did not appeal this decision, but moved for a stay of execution in order to pursue post-conviction relief ("PCR"). On July 23, 2009, the South Carolina Supreme Court granted Mahdi's motion and assigned South Carolina Circuit Court Judge Doyet A. Early, III, to preside over Mahdi's PCR action.

First PCR Action

On August 18, 2009, Mahdi filed his initial PCR application *pro se*. (App. A000853-59). Through appointed counsel, Teresa Norris and Robert Lominack, Mahdi amended his application and raised the following grounds:

³The Appendix can be found at ECF Nos. 32-1 through 34-2.

10(a) *Applicant was denied the effective assistance of counsel during the sentencing phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution.*

11(a)(I) Trial counsel failed to object when the trial judge improperly based his decision to impose a death sentence on petitioner's assertion of his right to a jury trial, thereby effectively punishing him for exercising this constitutional right. Counsel's deficient performance in failing to preserve the issue for appellate review deprived petitioner of the right to effective assistance of counsel.

(ii) Counsel failed to adequately advise Applicant of the advantages of jury sentencing, which resulted in the Applicant pleading guilty and purporting to waive his right to jury sentencing.

(iii) Counsel failed to adequately investigate, develop, and present mitigation evidence concerning Applicant's family, social, institutional, and mental health history.

(iv) Counsel failed to assert that Applicant's death sentence violates the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution due to Applicant's developmental deficits.

(v) Counsel failed to assert that S.C. Code § 16-3-20 is unconstitutional in that it automatically precludes jury sentencing following a guilty plea in violation of the Sixth, Eighth, and Fourteenth Amendments as addressed in *Ring v. Arizona*, 536 U.S. 584 (2002). Moreover, this statute forces a capital defendant to choose between his right to a jury trial and his right to present mitigating evidence, namely that he has accepted responsibility for the crime. While this issue has been rejected by state courts, *see State v. Downs*, 361 S.C. 141, 604 S.E.2d 377 (2004), it has not been reviewed by federal courts and counsel were thus ineffective in failing to adequately preserve the record for subsequent litigation.

Counsel's conduct in each instance separately and cumulatively was both unreasonable and prejudicial in sentencing. *Strickland v. Washington*, 466 U.S. 668 (1984); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008).

10(b) *Applicant's death sentence violates the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution due to Applicant's developmental deficits.*

11(b) At the time of the offenses, Applicant was developmentally impaired such that he had the "mental age" of a juvenile due to his atrocious background of

deprivation, neglect, abuse, and institutionalization. The Cruel and Unusual Punishment Clause precludes the infliction of the death penalty upon him, just as it precludes execution of those under the age of 18 at the time of the offenses, because of these grave developmental deficits. *See Roper v. Simmons*, 543 U.S. 551 (2005).

(App. A000458-62) (emphasis in original).

From March 9th to 11th, 2011, the PCR court held an evidentiary hearing on Mahdi's application. (App. A001240-1960). After considering all of the evidence, the PCR court dismissed Mahdi's application. (App. A000011-58). In Ground 10(a)/11(a)(iii), the PCR court found trial counsel failed to conduct an adequate mitigation investigation, but that this deficiency did not prejudice Mahdi. The State moved to alter or amend that finding (*see* App. A000787-852); the PCR court heard argument on the State's motion (App. A001204-1232); and, on August 20, 2014, the PCR court filed an amended order of dismissal, finding trial counsel had adequately investigated potential mitigating evidence. (App. A000059-191 ("PCR Order")). On August 27, 2014, Mahdi moved to alter or amend the amended order (App. A000257-59), and the PCR court denied Mahdi's motion on September 9, 2014 (App. A000192).

PCR Appeal

Mahdi, through counsel Seth C. Farber, Brandon W. Duke, and Teresa L. Norris, appealed the PCR court's decision by filing a petition for a writ of certiorari to the South Carolina Supreme Court raising one issue:

Was Petitioner denied the effective assistance of counsel at his capital sentencing proceeding by trial counsel's decision to rely entirely on a single expert witness to present mitigating evidence about petitioner's background instead of calling available lay witnesses who could have provided detailed and specific testimony in mitigation?

(ECF No. 31-18 at 5). On September 8, 2016, after full briefing by the parties, the Supreme Court of South Carolina denied the petition. (ECF No. 31-21). Remittitur issued on September 26, 2016.

(ECF No. 31-22).

Mahdi petitioned the United States Supreme Court for certiorari review of the South Carolina Supreme Court's decision, presenting virtually the same issue:

Whether counsel in a capital sentencing proceeding can, consistent with this Court's holdings in *Williams v. Taylor*, 529 U.S. 362 (2000), and its progeny, properly rely exclusively on expert testimony and forgo calling available lay witnesses with detailed, firsthand information about mitigating circumstances in the defendant's background.

(ECF No. 51-1 at 2). The United States Supreme Court denied certiorari on February 21, 2017.

(ECF No. 51-4).

Second PCR Action

On January 10, 2017, after filing the instant federal habeas petition, Mahdi through his federal habeas counsel filed a second PCR application, raising the following grounds:

10) Statement of grounds for relief:

a) S.C. Code Ann. § 16-3-20, which requires a judge to sentence the defendant following a guilty plea, violates the Sixth Amendment of the United States Constitution, which is applicable to the states through the Fourteenth Amendment, because a judge rather than a jury finds facts required for imposition of a death sentence. *Hurst v. Florida*, __U.S.__, 136 S.Ct. 616 (2016).

b) Mr. Mahdi was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution—during the guilt-or-innocence phase of his capital trial because his trial counsel advised him that the guilty plea would be considered as mitigation.

c) Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), Mr. Mahdi seeks an appeal on the following grounds for relief and supporting facts raised in his initial application for post-conviction relief (Case No. 2009-CP-09-164), as amended:

- Applicant was denied the effective assistance of counsel during the sentencing phase of his trial in violation of South Carolina law and

the Sixth and Fourteenth Amendments to the United States Constitution.

- Trial counsel failed to object when the trial judge improperly based his decision to impose a death sentence on petitioner's assertion of his right to a jury trial, thereby effectively punishing him for exercising this constitutional right. Counsel's deficient performance in failing to preserve the issue for appellate review deprived petitioner of the right to effective assistance of counsel.
- Counsel failed to adequately advise Applicant of the advantages of jury sentencing, which resulted in the Applicant pleading guilty and purporting to waive his right to jury sentencing.
- Counsel failed to adequately investigate, develop, and present mitigation evidence concerning Applicant's family, social, institutional, and mental health history.
- Counsel failed to assert that Applicant's death sentence violates the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution due to Applicant's developmental deficits.
- Counsel failed to assert that S.C. Code Section 16-3-20 is unconstitutional in that it automatically precludes jury sentencing following a guilty plea in violation of the Sixth, Eighth, and Fourteenth Amendments as addressed in *Ring v. Arizona*, 536 U.S. 584 (2002). Moreover, this statute forces a capital defendant to choose between his right to a jury trial and his right to present mitigating evidence, namely that he has accepted responsibility for the crime. While this issue has been rejected by state courts, *see State v. Downs*, 361 S.C. 141, 604 S.E.2d 377 (2004), it has not been reviewed by federal courts and counsel were thus ineffective in failing to adequately preserve the record for subsequent litigation.
- Applicant's death sentence violates the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution due to Applicant's developmental deficits.
- At the time of the offenses, Applicant was developmentally

impaired such that he had the “mental age” of a juvenile due to his atrocious background of deprivation, neglect, abuse, and institutionalization. The Cruel and Unusual Punishment Clause precludes the infliction of the death penalty upon him, just as it precludes execution of those under the age of 18 at the time of the offenses, because of these grave developmental deficits. *See Roper v. Simmons*, 543 U.S. 551 (2005).

d) If the State contends that any of the grounds for relief identified in paragraph 10(c) were not ruled on by the initial post-conviction relief judge, then Mr. Mahdi seeks a ruling so that he may appeal.

(ECF No. 46-1 at 2-4).

The State responded to Mahdi’s application, asserting that it should be dismissed as improperly successive and time barred. (*See* ECF No. 46-2). The second PCR court heard argument on the State’s motion and, on June 29, 2017, dismissed Mahdi’s application on procedural grounds. (ECF No. 66-1). Mahdi moved to alter or amend the court’s order (ECF No. 103-6), and the court denied that motion (ECF No. 79-1).

Mahdi appealed the second PCR court’s order. (ECF No. 103-8). On April 19, 2018, the South Carolina Supreme Court found Mahdi had failed to show an arguable basis for asserting the lower court’s determination was improper and dismissed the matter. (ECF No. 126-1). Mahdi filed a petition for rehearing (ECF No. 135-1), which the South Carolina Supreme Court denied on June 27, 2018 (ECF No. 135-2). Remittitur issued the same day. (ECF No. 135-3).

Federal Habeas Corpus

On September 26, 2016, Mahdi filed this habeas petition under § 2255. (ECF No. 1). He filed an amended petition (the “Amended Petition”) on September 7, 2017, raising the following grounds for relief:

- I. Mr. Mahdi was denied his right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments when trial counsel failed to object to the State's use of full body restraints, both at the detention center and in the courtroom, when the restraints were an uncomfortable "torture" and "torment" at the detention center and would be highly visible to the jurors in the courtroom, in violation of *Deck v. Missouri*, 544 U.S. 622 (2005), thereby rendering Mr. Mahdi's guilty plea involuntary in violation of *Boykin v. Alabama*, 395 U.S. 238 (1969).
- II. Mr. Mahdi was denied the right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution at the sentencing phase of his trial when trial counsel failed to adequately investigate, develop, and present mitigation evidence.
- III. S.C. Code Ann. § 16-3-20 is unconstitutional in that it automatically precludes jury sentencing following a guilty plea in violation of the Sixth and Fourteenth Amendments to the United States Constitution as addressed in *Hurst v. Florida*, __U.S.__, 136 S. Ct. 616 (2016), which is a new rule of constitutional law that applies retroactively to Mr. Mahdi's death sentence.
- IV. Mr. Mahdi was denied his right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments when trial counsel failed to assert that S.C. Code Ann. § 16-3-20 is unconstitutional in that it automatically precludes jury sentencing following a guilty plea in violation of the Sixth, Eighth, and Fourteenth Amendments as addressed in *Ring v. Arizona*, 536 U.S. 584 (2002).
- V. Mr. Mahdi was denied his right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments when trial counsel failed to adequately advise him of the advantages of jury sentencing, which resulted in Mr. Mahdi pleading guilty and purporting to waive his right to jury sentencing.
- VI. Mr. Mahdi was denied the right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments when trial counsel advised him that the guilty plea would be considered as mitigation.
- VII. Mr. Mahdi was denied his right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments when trial counsel failed to object when the trial judge improperly based his decision to impose a death sentence on Mr. Mahdi's assertion of his right to a jury trial, thereby effectively punishing him for exercising this constitutional right.

(ECF No. 75 at 9-41).

APPLICABLE LAW

Summary Judgment Standard

Rule 56 of the Federal Rules of Civil Procedure states, as to a party who has moved for summary judgment:

The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(a). A fact is “material” if proof of its existence or non-existence would affect disposition of the case under applicable law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of material fact is “genuine” if the evidence offered is such that a reasonable jury might return a verdict for the non-movant. *Id.* at 257. When determining whether a genuine factual issue has been raised, the court must construe all inferences and ambiguities against the movant and in favor of the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

The party seeking summary judgment shoulders the initial burden of demonstrating to the court that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has made this threshold demonstration, the nonmoving party, to survive the motion for summary judgment, may not rest on the allegations averred in his pleadings. *Id.* at 324. Rather, the nonmoving party must identify specific, material facts that give rise to a triable issue of material fact. *Id.* Under this standard, the existence of a mere scintilla of evidence in support of the nonmovant’s position is insufficient to withstand the summary judgment motion. *Anderson*, 477 U.S. at 252. Likewise, conclusory allegations or denials, without more, are insufficient to preclude granting the summary judgment motion. *Id.* at 248. “Only disputes over

facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.”

Id. Further, Rule 56 provides in pertinent part:

A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1).

Habeas Corpus

Because Mahdi filed the Petition after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), review of his claims is governed by 28 U.S.C. § 2254(d). *Lindh v. Murphy*, 521 U.S. 320 (1997); *Breard v. Pruett*, 134 F.3d 615 (4th Cir. 1998). Under the AEDPA, federal courts may not grant habeas corpus relief unless the underlying state adjudication

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). “[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly

established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.” *Williams v. Taylor*, 529 U.S. 362, 411 (2000). “A state court’s determination that a claim lacks merit precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on the correctness of the state court’s decision,” and “even a strong case for relief does not mean the state court’s contrary conclusion was unreasonable.” *Harrington v. Richter*, 562 U.S. 86, 101–02 (2011) (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). Moreover, state court factual determinations are presumed to be correct, and the petitioner has the burden of rebutting this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

Exhaustion & Procedural Bar

A habeas corpus petitioner may obtain relief in federal court only after he has exhausted his state court remedies. 28 U.S.C. § 2254(b)(1)(A). “To satisfy the exhaustion requirement, a habeas petitioner must present his claims to the state’s highest court.” *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir. 1997), abrogated on other grounds by *United States v. Barnette*, 644 F.3d 192 (4th Cir. 2011); *see also In re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases*, 471 S.E.2d 454, 454 (S.C. 1990) (holding that “when the claim has been presented to the Court of Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies”). To exhaust his available state court remedies, a petitioner must “fairly present[] to the state court both the operative facts and the controlling legal principles associated with each claim.” *Longworth v. Ozmint*, 377 F.3d 437, 448 (4th Cir. 2004) (internal quotation marks and citation omitted). Thus, a federal court may consider only those issues which have been properly presented to the state appellate courts with jurisdiction to decide them. Generally, a federal habeas court should not review the merits of claims that would be found to be

procedurally defaulted (or barred) under independent and adequate state procedural rules. *Lawrence v. Branker*, 517 F.3d 700, 714 (4th Cir. 2008); *Longworth*, 377 F.3d 437; *see also Coleman v. Thompson*, 501 U.S. 722 (1991). For a procedurally defaulted claim to be properly considered by a federal habeas court, the petitioner must “demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.” *Coleman*, 501 U.S. at 750.

In South Carolina, a person in custody has two primary means of attacking the validity of his conviction: (1) through a direct appeal or (2) by filing an application for PCR. State law requires that all grounds for relief be stated in the direct appeal or PCR application. S.C. App. Ct. R. 203; S.C. Code Ann. § 17-27-90; *Blakeley v. Rabon*, 221 S.E.2d 767, 770 (S.C. 1976). If the PCR court fails to address a claim as required by S.C. Code Ann. § 17-27-80, counsel for the applicant must make a motion to alter or amend the judgment. S.C. R. Civ. P. 59(e). Failure to do so will result in the application of a procedural bar to that claim by the Supreme Court of South Carolina. *Marlar v. State*, 653 S.E.2d 266 (S.C. 2007).⁴

In addition, the Supreme Court of South Carolina will refuse to consider claims raised in a second appeal that could have been raised at an earlier time. *See* S.C. Code Ann. § 17-27-90; *Aice v. State*, 409 S.E.2d 392, 394 (S.C. 1991). Further, if a prisoner has failed to file a direct appeal or a PCR application and the deadlines for filing have passed, he is barred from proceeding in state

⁴In *Bostick v. Stevenson*, 589 F.3d 160 (4th Cir. 2009), the Fourth Circuit found that, prior to the Supreme Court of South Carolina’s November 5, 2007 decision in *Marlar*, South Carolina courts had not uniformly and strictly enforced the failure to file a motion pursuant to Rule 59(e) as a procedural bar. 589 F.3d at 162-65. Accordingly, for matters in which there was a PCR ruling prior to November 5, 2007, the court will not consider any failure to raise issues pursuant to Rule 59(e) to effect a procedural bar.

court. S.C. App. Ct. R. 203(d)(3), 243. If the state courts have applied a procedural bar to a claim because of an earlier default in the state courts, the federal court honors that bar. *See Reed v. Ross*, 468 U.S. 1, 11 (1984); *see also Kornahrens v. Evatt*, 66 F.3d 1350, 1357 (4th Cir. 1995). As the United States Supreme Court explained:

. . . [State procedural rules promote] not only the accuracy and efficiency of judicial decisions, but also the finality of those decisions, by forcing the defendant to litigate all of his claims together, as quickly after trial as the docket will allow, and while the attention of the appellate court is focused on his case.

Reed, 468 U.S. at 10-11.

Ineffective Assistance of Counsel

In *Strickland v. Washington*, the United States Supreme Court established that to challenge a conviction based on ineffective assistance of counsel, a prisoner must prove two elements: (1) his counsel was deficient in his representation and (2) he was prejudiced as a result. 466 U.S. 668, 687 (1984). To satisfy the first prong, a prisoner must show that “counsel’s representation fell below an objective standard of reasonableness.” *Id.* at 688. To satisfy the second prong, a prisoner must show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 692. The Court cautioned that “[j]udicial scrutiny of counsel’s performance must be highly deferential,” and “[b]ecause of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Id.* at 689.

In the specific context of a guilty plea, the prejudice prong of *Strickland* requires the prisoner to show that “there is a reasonable probability that, but for counsel’s errors, [the prisoner] would not have pleaded guilty and would have insisted on going to trial.” *Hill v. Lockhart*, 474 U.S. 52, 59

(1985). The Supreme Court further explained,

In many guilty plea cases, the “prejudice” inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial. For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error “prejudiced” the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial. . . . As we explained in *Strickland v. Washington*, these predictions of the outcome at a possible trial, where necessary, should be made objectively, without regard for the “idiosyncrasies of the particular decisionmaker.”

Hill, 474 U.S. at 59-60 (citations omitted).

When evaluating a habeas petition based on a claim of ineffective assistance of counsel, “[t]he pivotal question is whether the state court’s application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel’s performance fell below *Strickland*’s standard.” *Richter*, 562 U.S. at 101. “A state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself.” *Id.*; see also *Yarborough v. Gentry*, 540 U.S. at 6 (stating judicial review of counsel’s performance is “doubly deferential when it is conducted through the lens of federal habeas”). If a state court decision questionably constitutes an unreasonable application of federal law, the “state court’s determination that a claim lacks merit precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on the correctness of the state court’s decision.” *Richter*, 562 U.S. at 101 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). Thus, in such situations, the habeas court must determine whether it is possible for fairminded jurists to disagree that the arguments or theories supporting the state court’s decision are inconsistent with Supreme Court precedent. *Id.*

DISCUSSION

Before diving into the intricacies of the parties’ substantive arguments, the court must address some preliminary matters raised in the briefs.

In his Response, Mahdi requests an evidentiary hearing under Rule 8 of the Rules Governing Section 2254 Cases in the United States District Courts on all of his habeas grounds. (ECF No. 113 at 2).⁵ Under the AEDPA, evidentiary hearings are generally prohibited even when a habeas petitioner has failed to develop the factual basis of a claim in his state court proceedings. 28 U.S.C. § 2254(e)(2); *see Cullen v. Pinholster*, 563 U.S. 170, 181-84 (2011) (recognizing both that “review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits” and also that for claims for which the factual basis was not developed in state court “§ 2254(e)(2) bars a federal court from holding an evidentiary hearing, unless the applicant meets certain statutory requirements”). However, the statute itself creates an exception to the general rule if the petitioner can show that the claim relies on a new, retroactive rule of constitutional law or “a factual predicate that could not have been previously discovered through due diligence[,]” and that “the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.” *Id.*

Thus, the Fourth Circuit has recognized:

A petitioner who has diligently pursued his habeas corpus claim in state court is entitled to an evidentiary hearing in federal court, on facts not previously developed in the state court proceedings, if the facts alleged would entitle him to relief, and if

⁵Rule 8 states: “If the petition is not dismissed, the judge must review the answer, any transcripts and records of state-court proceedings, and any materials submitted under Rule 7 to determine whether an evidentiary hearing is warranted.”

he satisfies one of the six factors enumerated by the Supreme Court in *Townsend v. Sain*, 372 U.S. 293, 313 (1963).

Juniper v. Zook, 876 F.3d 551, 563 (4th Cir. 2017) (quoting *Conaway v. Polk*, 453 F.3d 567, 582 (4th Cir. 2006)). The six *Townsend* factors are:

(1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Townsend, 372 U.S. at 313. For the reasons that follow, the court finds Mahdi has failed to show he is entitled to an evidentiary hearing on any of his preserved claims under this standard. Mahdi has also requested a hearing on his defaulted claims, and the court will address those requests when it analyzes the merits of each related ground.

In addition, Mahdi has requested expansion of the record under Rule 7 of the Rules Governing Section 2254 Cases in the United States District Courts.⁶ (ECF No. 113 at 2). Mahdi attached five extra-record exhibits to his Response—an affidavit from habeas counsel’s mitigation investigator, emails from habeas counsel requesting a transcript from the second PCR hearing, a 2012 affidavit from PCR counsel regarding guilty pleas in capital cases, and affidavits from each PCR attorney regarding actions taken in PCR proceedings after the release of two Supreme Court decisions.⁷ (ECF Nos. 113-1 through 113-5). Respondents oppose the court’s consideration of the

⁶Rule 7 states: “If the petition is not dismissed, the judge may direct the parties to expand the record by submitting additional materials relating to the petition. The judge may require that these materials be authenticated.”

⁷In addition, Mahdi noted he was “in the process of procuring affidavits from Mr. Mahdi and Mr. Mahdi’s North Carolina counsel that [would] be consistent with, and support, the arguments and

attached affidavits⁸ and have moved to strike those exhibits. (ECF No. 125). The court will address Mahdi's request to expand the record and Respondents' motion to strike in its discussion of the grounds to which they apply.

Finally, Mahdi contends the PCR court wrongfully "ced[ed] its factfinding authority to the State by" adopting, nearly wholesale, the State's proposed order, thus undercutting the reasonableness of the PCR court's factual determinations. (ECF No. 113 at 5-6). In federal habeas proceedings, a state court's factual determinations are presumed correct and the petitioner has the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). The Supreme Court has questioned a state court's factfinding procedures based on its verbatim adoption of one party's proposed order. *Jefferson v. Upton*, 560 U.S. 284, 292 (2010). However, in *Jefferson*, the state court solicited the proposed order ex parte, did not provide the opposing party an opportunity to criticize the order's findings or submit his own, and adopted findings that contained evidence not before the court. *See id.* at 294. And, the Court noted that although it had previously stated "that a court's 'verbatim adoption of findings of fact prepared by prevailing parties' should be treated as findings of the court," it had "also criticized that practice." *Id.* at 293-94 (quoting *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 572 (1985)).

In this case, the PCR court's initial order of dismissal included findings favorable to Mahdi.

factual background" in the Response and that he would file those affidavits once he received them. (ECF No. 113 at 2 n.1). However, no additional affidavits appear on the docket and Mahdi has not referenced any in later filings.

⁸Respondents express no opinion on Exhibit 2, habeas counsel's emails. (*See* ECF No. 125 at 1).

(*See* App. A000011-58). The State moved to alter or amend those findings and the PCR court held a hearing on the State’s motion. At the end of the hearing, the PCR court directed the State to submit a proposed amended order of dismissal. The State submitted a 148-page proposed order, copying opposing counsel. (*See* App. A000616-783). Mahdi filed objections to the State’s proposed order (App. A001012-23) and the PCR court ultimately issued its 133-page decision (App. A000059-190). This record suggests the PCR court considered both parties’ arguments and reviewed and edited the State’s order before adopting the majority of it. While adopting a party’s proposed order is a disfavored practice, especially in a capital case, Mahdi has failed to show by clear and convincing evidence that the PCR court’s factual findings are not entitled to a presumption of correctness.

GROUND ONE – THE SHACKLES

In Ground One, Mahdi asserts his trial counsel were ineffective for failing to object to the use of full body restraints both at the detention center and in the courtroom. (ECF No. 75 at 9-14). Mahdi contends the full body restraints were an unnecessary form of torture and torment and their use influenced his decision to plead guilty, thereby rendering his plea involuntary. (ECF No. 75 at 13). Respondents counter that the restraints were justified, and trial counsel had no basis for an objection because Mahdi told the trial court the restraints did not influence his plea. (ECF No. 104 at 37-42). This claim was not raised in state court and is, therefore, defaulted. However, Mahdi argues cause and prejudice under *Martinez v. Ryan*, 566 U.S. 1 (2012), asserting the ineffectiveness of his PCR counsel for failing to present this claim in his PCR application.

Inadequate assistance of counsel “at initial-review collateral review proceedings may establish cause for a prisoner’s procedural default of a claim of ineffective assistance at trial,” *id.* at 9, where:

(1) the claim of “ineffective assistance of trial counsel” was a “substantial” claim; (2) the “cause” consisted of there being “no counsel” or only “ineffective” counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the “initial” review proceeding in respect to the “ineffective-assistance-of-trial-counsel claim”; and (4) state law requires that an “ineffective assistance of trial counsel [claim] . . . be raised in an initial-review collateral proceeding.”

Trevino v. Thaler, 564 U.S. 413, 423 (2013) (quoting *Martinez*, 566 U.S. at 14, 17-18).

Thus, Mahdi must “demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that . . . the claim has some merit,” *Martinez*, 566 U.S. at 14 (comparing *Miller-El v. Cockrell*, 537 U.S. 322 (2003) (describing standards for certificates of appealability)), and that his PCR counsel were ineffective under *Strickland* for not raising that claim. As applied to guilty pleas, *Strickland*’s deficiency prong remains the same, but to prove prejudice, Mahdi must show that “there is a reasonable probability that, but for counsel’s errors, [he] would not have pleaded guilty and would have insisted on going to trial.” *Hill v. Lockhart*, 474 U.S. at 59.

Mahdi began his court proceedings in leg braces, which were strapped onto his legs and locked into place, and worn under Mahdi’s clothing. (App. A003540). However, after one day in the leg braces, Mahdi requested leg irons, which are described as “oversized handcuffs that fit around the ankles with a chain in between.” (App. A003196, A003540). The sheriff discussed Mahdi’s request with his attorneys and the court, and then switched Mahdi to leg irons. (App. A003540). Mahdi had no other restraints. (App. A003543).

After voir dire and related motions, outside the presence of the jury, Solicitor Pascoe informed the court the security team had found a handmade handcuff key in Mahdi’s pocket. (App. A003194). Mahdi admitted to making the key at the detention center. (App. A003195, A003542-

43). He hid the key in his mouth and brought it to the courthouse on multiple days, but was unable to get the key from his mouth to his hand until he had a private meeting with his attorneys, outside the presence of deputies. (App. A003194-95, A003542). Security officers found the key during a search after that meeting and before Mahdi returned to the courtroom. (App. A003541). Mahdi admitted to trying to use the key to remove his leg irons.⁹ (App. A003194, A003195). As a result, the sheriff recommended that the court consider securing Mahdi's hands, but indicated handcuffs would be visible if Mahdi placed his hands on top of the defense table. (App. A003195, A003196-97).

Judge Newman asked for input from both the solicitor and defense counsel. Solicitor Pascoe agreed with the sheriff and endorsed shackling Mahdi's hands and legs and using "any means possible to make sure the courthouse is secure." (App. A003195). Mr. Walters stated:

Your Honor, certainly, we want to keep the public safe. And the events that have just occurred were just brought to my attention by the Sheriff. And, of course, I haven't conferred with my client to discuss exactly what he said to the Sheriff, but, evidently, they had a conversation.

At this point, we would abide by any rulings of the Court. And I appreciate the Sheriff brought it to my attention and - - I was talking to the Solicitor and it was brought to our attention. And, certainly, I understand their position of putting it on the record. What more can be said.

(App. A003196).

Judge Newman then instructed the sheriff:

Sheriff, at this point, I will certainly agree that security is imperative. . . .

I believe that if you would use the leg irons, in addition to the chains, but, at this point, I would not want to have him shackled in the presence of the jury with his

⁹The sheriff tested the key that day and was able to open two out of three pairs of handcuffs. (App. A003543).

shackles being visible due to the effect that it may have on his right to a fair trial. We'll step up the measures and if anything further happens, I'm sure you'll be on top of it and we can address it from there. Thank you very much.

(App. A003197). The court then brought the jurors back in and dismissed them for the night. (App. 3198-3200). After the jury's dismissal, in an ex parte meeting, Mr. Walters indicated Mahdi was considering pleading guilty, but wanted additional time to think about it and consult with his grandmother. (App. A003207-08). The next day, before the jury arrived, Mr. Walters indicated Mahdi wanted to plead guilty to all charges. (App. A003212). The court held a brief competency hearing (App. A003215-19), and then began the plea colloquy (App. A003219).

As part of the colloquy, the court asked Mahdi if he had any complaints about his lawyers, the solicitor, or any of the police officers involved in his case (App. A003229), prompting the following exchange:

DEFENDANT MAHDI: I was kept in full body restraints all night last night. And I was told that I was going to be kept in full body restraints through the whole trial all day, all night, Your Honor. And that's my complaint.

While I'm in a secure cell at the detention center, there is completely no need for me to be in full body restraints while in the cell. That's my only complaint, Your Honor.

THE COURT: And has that fact had any bearing whatsoever on your decision to plead guilty?

DEFENDANT MAHDI: I'd be lying if I said I didn't.

THE COURT: Sir?

DEFENDANT MAHDI: I'd be lying if I said it didn't.

THE COURT: The fact that you have been placed in a full body restraint, has - -

DEFENDANT MAHDI: All night.

THE COURT: All night - -

DEFENDANT MAHDI: Yes, sir.

THE COURT: Has that caused you to decide to plead guilty?

DEFENDANT MAHDI: Your Honor, there wasn't no - - it wasn't a very, you know, very big reasons. It's a small like a slight diversion, you know.

THE COURT: A slight diversion?

DEFENDANT MAHDI: Yeah, a slight diversion, but it's not nothing - - it's nothing major. There was no major persuasive mood. It's mostly irritating, extremely irritating. And I felt it was unnecessary. I'm in a secure cell, a secure location and it's just a means to hassle me, that's what I felt it was.

THE COURT: Means to do what?

DEFENDANT MAHDI: It's a means to hassle me.

THE COURT: To hassle you?

DEFENDANT MAHDI: Yeah. Yes, sir, Your Honor. But I, in no way, feel that that, you know, it's almost petty, you know, it's childish to me that the director of the Orangeburg Detention Center will resort to that childish ways, you know.

Yeah, and I said that on television. The Orangeburg director of the detention center is childish. He resorted to childish ways, okay, Your Honor, and - - but in no way, did that persuade me to plead guilty. It's just irritating. And I feel that - - I feel that it was unnecessary, Your Honor. It was extremely unnecessary.

But as far as Calhoun County, they did not mistreat me. I was not coerced in any way by this county to plead guilty.

THE COURT: Do you wish to proceed with the guilty plea?

DEFENDANT MAHDI: Yes, Your Honor. I just felt it was necessary to mention that.

THE COURT: Are you, in fact, guilty of the charges against you.

DEFENDANT MAHDI: Yes, sir, Your Honor.

(App. 003229-31). Contrary to the record, Mahdi now contends that he pled guilty because of the

full body restraints.

Mahdi first contends that “[i]f trial counsel had objected pursuant to *Deck v. Missouri*, 544 U.S. 622 (2005), then the trial judge would have inquired further into the matter.” (ECF No. 113 at 12). “[T]he Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial.” *Deck*, 544 U.S. at 629. Here, after security discovered Mahdi’s homemade key, Judge Newman reasonably determined that Mahdi should be more securely restrained. Thus, Judge Newman made a case-specific determination, on the record, because of a security problem and risk of escape, that shackling Mahdi was necessary. This is exactly the type of individualized security determination contemplated in *Deck*. *See id.* (“Such a determination may of course take into account the factors that courts have traditionally relied on in gauging potential security problems and the risk of escape at trial.”); *id.* at 632 (“We do not underestimate the need to restrain dangerous defendants to prevent courtroom attacks, or the need to give trial courts latitude in making individualized security determinations. We are mindful of the tragedy that can result if judges are not able to protect themselves and their courtrooms.”). However, Judge Newman also expressed his concern regarding Mahdi’s due process rights and indicated he should not be shackled “in the presence of the jury.” (App. A003197).

Judge Newman found Mahdi’s escape plan justified “stepping up” Mahdi’s restraints, but that those restraints should not be used in front of the jury. (*See* App. A003197 (“I believe that if you would use the leg irons, in addition to the chains, but, at this point, I would not want to have him shackled in the presence of the jury with his shackles being visible . . .”)). And, the record indicates

the potential jurors never saw Mahdi's restraints.¹⁰ Trial counsel had no reason to object pursuant to the holding in *Deck*.¹¹

Mahdi also argues that the use of full body restraints while at the detention center was intended to "hassle" Mahdi and caused him to plead guilty. (ECF Nos. 113 at 15-16). Mahdi contends that trial counsel should have objected on the ground that these enhanced security measures exceeded the scope of Judge Newman's order, and requested another hearing to determine whether full body restraints were necessary at the detention center. (ECF No. 113 at 13, 16).

Even if trial counsel were somehow deficient, Mahdi has not offered any evidence, other than his own conclusory and self-serving statements, to establish that he would not have pled guilty if he had not been restrained. Mahdi has not shown any reason for this court to doubt his representation to Judge Newman made under oath during the plea colloquy that his restraints had no bearing on his decision to plead guilty. *See Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977) ("[T]he representations of the defendant . . . [during the plea hearing], as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible."). In addition, the record shows Mahdi began to consider pleading guilty before the ex parte meeting with Judge Newman, which was

¹⁰The court notes that Mahdi's sentencing ultimately took place before Judge Newman, not a jury, which eliminates the risk that the jury could have inferred "that court authorities consider the offender a danger to the community." *Deck*, 544 U.S. at 633.

¹¹Moreover, as even Mahdi has admitted, Judge Newman's ruling complied with *Deck*. (See ECF No. 113 at 15 ("[Judge Newman's] ruling, *if followed*, would have prevented a violation of *Deck*.")) (emphasis in original)).

before he was fully restrained. Moreover, uncontested testimony from trial counsel during the PCR evidentiary hearing suggests Mahdi chose to plead guilty as a matter of trial strategy. (*See* App. A001921-23).

For these reasons, Mahdi's underlying claim of ineffective assistance of trial counsel lacks merit and Mahdi cannot excuse the procedural default of Ground One under *Martinez*. Accordingly, Mahdi is not entitled to relief on Ground One.¹²

GROUND TWO – MITIGATING EVIDENCE

In Ground Two, Mahdi alleges his trial counsel were ineffective in failing to adequately investigate, develop, and present mitigating evidence. (ECF No. 75 at 14-29). Mahdi raised this claim in his PCR application as Ground 10(a)/11(a)(iii) (*see* App. A000236) and the PCR court addressed this claim on the merits (App. A000085-181). The PCR Order divided Mahdi's claim into five different allegations of ineffective assistance of counsel: (1) Counsel should have interviewed and called at sentencing several of Mahdi's extended family members and also community members to testify to his family, social, scholastic, and mental health history; (2) Counsel should have presented the testimony PCR counsel presented at PCR through a different forensic social worker than the one counsel used at sentencing; (3) Counsel should have introduced testimony from an expert regarding the effect of Mahdi's life of incarceration on Mahdi; (4) Counsel failed to adequately investigate, develop, and present evidence concerning Mahdi's mental health history or

¹²In addition, because Mahdi has failed to show his underlying ineffective assistance of trial counsel claim is substantial or to properly allege facts that, if proven, would entitle him to relief, the court denies Mahdi's request for an evidentiary hearing on this ground. *See Schriro v. Landrigan*, 550 U.S. 465, 474 (2007) ("In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief.").

mentality; and (5) Counsel failed to introduce certain documents at sentencing such as certain school records, Mahdi's DJJ records, records from Mahdi's commitment to the Walter Carter Center at age nine, and his father's records, and counsel failed to call school officials. (App. A000085-86).

On PCR appeal, Mahdi presented one question: Was Petitioner denied the effective assistance of counsel at his capital sentencing proceeding by trial counsel's decision to rely entirely on a single expert witness to present mitigating evidence about Petitioner's background instead of calling available lay witnesses who could have provided detailed and specific testimony in mitigation. (ECF No. 31-18 at 5). Accordingly, after a thorough review of Mahdi's petition for writ of certiorari (ECF No. 31-18), the State's return (ECF No. 31-19), and Mahdi's reply (ECF No. 31-20), the court finds the following allegation preserved and will address it under § 2254(d): trial counsel were ineffective in failing to investigate and present mitigating evidence from non-family lay witnesses.¹³

Mahdi did not raise the remaining claims in Ground Two in his PCR appeal. However, in his second PCR action, Mahdi sought to appeal this ground, as presented in his initial PCR application, pursuant to *Austin v. State*, 409 S.E.2d at 395.¹⁴ (ECF No. 46-1 at 2-3). In finding Mahdi was not entitled to an *Austin* appeal, the second PCR court noted, "*Austin* is only applicable

¹³See Reply to Return to Petition for a Writ of Certiorari, ECF No. 31-20 at 5 ("Mahdi contends that the PCR court erred in denying his claim that available non-family members, *i.e.*, members of the community, including his former teachers, should have been called as witnesses.")

¹⁴In *Austin*, the state court denied petitioner's PCR application and PCR counsel failed to seek appellate review. 409 S.E.2d at 396. Petitioner filed a second application alleging only that his PCR counsel were ineffective for failing to appeal and that application was summarily dismissed. *Id.* On a petition for rehearing, the Supreme Court of South Carolina noted its previous recognition of a prisoner's right to the assistance of appellate counsel in seeking review of the denial of PCR, found petitioner sufficiently stated a claim of ineffective assistance of counsel, and remanded for an evidentiary hearing. *Id.*

where the applicant wished to appeal from the denial of PCR but was denied the opportunity to seek appellate review or the right to appellate review of a previous PCR order was not knowingly and intelligently waived.” (ECF No. 66-1 at 29). Neither of those situations was present in this case, where Mahdi “already had a full round of PCR remedies,” *id.* at 10, and was represented on PCR appeal by qualified counsel. Further, the court stated ineffective assistance of PCR appellate counsel was not a recognized exception allowing a petitioner to file a second or successive PCR application. *Id.* at 29. Mahdi appealed that decision to the South Carolina Supreme Court, which dismissed his appeal and denied his petition for rehearing. (See ECF No. 126-1 (April 19, 2018, order dismissing appeal); ECF No. 135-2 (June 27, 2018, order denying petition for rehearing); ECF No. 135-3 (June 27, 2018, remittitur)).

Although the state courts denied Mahdi’s second PCR application on procedural grounds, Mahdi has fairly presented his allegations to the state’s highest court and has thus technically exhausted the remaining claims in Ground Two. However, because these claims were not properly preserved, they are procedurally barred. See *Matthews v. Evatt*, 105 F.3d 907, 915 (4th Cir. 1997), *abrogated on other grounds by United States v. Barnette*, 644 F.3d 907 (4th Cir. 2011). Mahdi asserts several arguments to overcome the procedural bar, all of which the court will address after it considers the preserved portion of Ground Two.

Under *Strickland*,

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

reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

466 U.S. at 690-91. Thus, counsel must conduct a reasonable investigation, thorough enough to make an informed decision regarding which mitigating evidence to present. In assessing counsel's investigation, the court "must conduct an objective review of their performance, measured for 'reasonableness under prevailing professional norms,' which includes a context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time.'" *Wiggins v. Smith*, 539 U.S. 510, 523 (2009) (quoting *Strickland*, 466 U.S. at 688, 689).

Further, to establish a Sixth Amendment violation, Mahdi "must show that but for his counsel's deficiency, there is a reasonable probability he would have received a different sentence." *Porter v. McCollum*, 558 U.S. 30, 41 (2009). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. To assess that probability, the court must "evaluate the totality of the evidence—'both that adduced at trial, and the evidence adduced in the habeas proceeding'—and 'reweig[h] it against the evidence in aggravation.'" *Porter*, 558 U.S. at 41 (quoting *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000)).

Relevant Background

The Evidence at Sentencing

The State presented an extensive case in aggravation, consisting of twenty-eight witnesses and an in-person visit to the crime scene. (*See* App. A003253-3579). The trial judge heard moving victim impact evidence from Captain Myers's wife, Amy Trip Myers (App. A003271-3301); father, Edward Myers (App. A003554-3562); daughter, Meredith Myers Firestone (App. A003562-3568); and several of his former co-workers and friends at the Orangeburg Department of Public Safety,

including Lieutenant William Alexander Cartwright, III (App. A003472-3475), Captain Michael Anthony Adams (App. A003476-3484), and Chief Wendell Davis (App. A003546-3553).

In addition, the State detailed Mahdi's history of trouble with law enforcement. Sheriff James R. Woodley, from Brunswick County, Virginia, described attempting to serve a juvenile detention order on Mahdi when he was fifteen years old. (App. A003302-3311). Mahdi had been convicted of breaking and entering in Mecklenburg County, North Carolina, and had failed to appear for sentencing. (App. A003304). When Sheriff Woodley approached Mahdi's house, Mahdi and his father locked themselves inside and refused to come out for approximately eight hours. (App. A003306). When Mahdi finally came out and the police had him in custody, fifteen-year-old Mahdi stated, "I'm going to kill a cop before I die." (App. A003307).

Mahdi then spent time at the Virginia Department of Juvenile Justice ("DJJ"). Linda Lee Coulson, a counselor at the DJJ Reception and Diagnostic Center for Children, evaluated Mahdi, and testified regarding her assessment. (App. A003311-28). In addition, the State admitted Ms. Coulson's evaluation into evidence. (App. A003314 (evaluation admitted); ROA 1867-75 (Coulson Evaluation)). In her evaluation, Ms. Coulson indicated Mahdi lived with his father, who was unemployed and reportedly had a criminal record for vandalism and escape. (ROA 1869). She stated Mahdi's mother was a nurse in Richmond, Virginia, and that Mahdi had infrequent contact with her, but denied that as a source of anxiety. *Id.* Ms. Coulson reported Mahdi's brother had joined Job Corps and was pursuing vocational training. *Id.* at 1869-70. Mahdi told Ms. Coulson he was closer to his brother than to any other family member. *Id.* at 1870.

Based on her conversations with Mahdi and information provided by the court and contained in his records, Ms. Coulson found Mahdi was "the product of a dysfunctional single parent family

characterized by a lack of involvement with his mother, an absence of a positive adult role model, instability, unemployment, and a lack of structure and supervision.” *Id.* She went on to note:

While Mikal advised that he and his father have a positive relationship, it appears that his father has placed little emphasis on supervision of Mikal, and has even provided a poor adult role model for his son. Information provided by the court and by Mikal would indicate that his father has made little attempt to reinforce Mikal’s receiving an education, and his father refused to comply with court requests during Mikal’s court involvement. Reports note that court workers were required to have a show cause issued in order to compel his father’s cooperation. While Mikal claimed that he views his family as nurturing and supportive, it appears that Mikal has not been closely involved with either parent and has not been held accountable for his behavior. Mikal advised this counselor that his father showed minimal reaction when he learned that Mikal was involved with larceny of firearms.

Id. When Ms. Coulson asked Mahdi to describe himself, he stated he was “a quiet person who ‘is always up to something’” and denied any strengths other than “‘robbing people.’” *Id.*

In addition, while discussing previous charges and an attempt to escape from police, Mahdi indicated he did not “feel all that bad about stealing” and Ms. Coulson noted he “appeared to consider that attempting to escape was to be expected.” (ROA 1873). Ms. Coulson stated that, while Mahdi admitted to his crimes, he viewed his commitment as unfair and “failed to accept complete responsibility for his behavior.” *Id.* Based on his comments, Ms. Coulson concluded Mahdi had “no respect for the rights and property of others,” was “without remorse,” had “little empathy for the impact of his behavior upon others,” and “did not appear to be motivated to avoid future court involvement.” *Id.* In considering a placement recommendation, Ms. Coulson noted, during his time at the reception center, Mahdi had not adjusted well, had remained self-focused, bragged about the past, and exhibited aggressive behavior toward his peers. (ROA 1875). That aggressive behavior apparently included assaulting another youth at the facility. (App. A003317-18). Ms. Coulson recommended supportive services to provide more adequate structure and supervision

after his release and a highly structured environment while in state care, “where he could address the following issues: substance abuse services, values clarification, assertiveness training, self-esteem, family services, and problem solving skills.” (ROA 1873-74).

The State also admitted into evidence portions of Mahdi’s DJJ running case record. (App. A003489 (records admitted); ROA 2137-85 (DJJ record)). According to the record, Mahdi attended and participated in a weekly anger management group. (ROA 2137, 2138, 2139, 2140). However, Mahdi was expelled from the anger management group due to “aggressive and inappropriate behavior.” (ROA 2141). When his counselor informed Mahdi he had been removed from the group, Mahdi threatened that if he was not released on time, he would “fuck people up and go around acting crazy.” (ROA 2141). Counseling notes indicate, at some point, Mahdi was charged with attempting to assault a guard and was placed in isolation. (ROA 2139-40). He also made suicidal and homicidal threats. (ROA 2144-45). The record contains numerous references to Mahdi’s refusal or inability to take responsibility for his actions. (ROA 2141 (“Mahdi stated that he is not responsible for his actions.”), 2144 (“Mahdi fails to realize that he is responsible for his own actions.”), 2145 (“It is this counselor’s opinion that Mahdi is ‘self-entitled’ as he takes no responsibility for his own actions.”)). The record also references concerned phone calls from Mahdi’s father and grandmother. (ROA 2137, 2138, 2141-42, 2145-47). In one phone call, Mahdi’s father accused the system of being prejudiced and trying to break Mahdi’s spirit and stated “Virginia is full of white supremacists” (ROA 2146).

Officer Michael Koehler, with the Richmond City Police Department in Richmond, Virginia, also testified and described another incident that took place on November 23, 2000, when Mahdi was seventeen years old. (App. A003333-3346). Officer Koehler was dispatched to Mahdi’s father’s

house to serve a summons on Mahdi for slashing his mother's tires and to execute an outstanding detention order. (App. A003334). Mahdi got upset and Officer Koehler had to wrestle him to the ground. (App. A003335). While on the ground, Mahdi attempted to reach for another officer's gun. *Id.* Mahdi's father tried to intervene on his son's behalf and Officer Koehler had to pepper spray Mahdi and his father and use his asp baton on both to regain control of the situation. (App. A003335-36). After the officers detained him, Mahdi stated he slashed his mother's tires because she would not come to the door when he knocked, referred to her as a "crazy bitch," and said he should have killed her. (App. A003336-37). He also asked the officers to shoot him. (App. A003337).

Judge Newman also heard testimony from Moises Rivera, whom Mahdi almost stabbed to death in Richmond, Virginia, on April 17, 2001. (App. A003347-3359). Mr. Rivera was a maintenance supervisor at an apartment building in Richmond. (App. A003348-49). His supervisor asked him to see about a large group of young people behind one of the buildings. (App. A003349). On his way, he ran into Mahdi, who was looking into an apartment window. (App. A003349-50). Mr. Rivera asked Mahdi what he was doing and Mahdi jumped him. (App. A003350). Mahdi stabbed Mr. Rivera five times in the back and once in the arm and then ran away. *Id.* Rivera testified he actually died in the ambulance and had to be revived. (App. A003351). He suffered a punctured lung, had to be hospitalized for six days, and his pain and injuries kept him out of work for two months. (App. A003350-51). Mahdi was subsequently arrested and convicted of malicious wounding, a felony in Virginia. (App. A003361). He was sentenced to 180 months, with 141 months suspended, conditioned on a period of supervised probation up to fifteen years upon his release. (App. A003361-62). Mahdi was released on May 12, 2004. (App. A003362). His conditions of probation included not leaving Virginia; obeying all federal, state, and local laws; not using,

possessing, or distributing controlled substances; and not using, owning, possessing, transporting, or carrying any firearm. (App. A003363-64).

Amanda Jean Weaver, Mahdi's grandmother's next door neighbor, testified that shortly after his release, Mahdi told her he was selling marijuana. (App. A003376). Mahdi also, reportedly, asked Ms. Weaver to help him assemble a black nine millimeter handgun. (App. A003377). And, Mahdi stole Ms. Weaver's .380 semiautomatic pistol, which he eventually used in the series of crimes leading to his South Carolina conviction. (*See* App. A003379-80, A003468-72).

Judge Newman also heard testimony about the series of crimes that culminated in Captain Myers's murder and Mahdi's eventual capture in Florida. Michael S. Poe and Phillip Seats, officers in Winston-Salem, North Carolina, testified regarding their investigation of the murder of Christopher Jason Boggs, a cashier at an Exxon gas station, on July 15, 2004. (*See* App. A003443-66). A surveillance video showed Mahdi placing a forty ounce beer on the counter, shooting Mr. Boggs in the face, then getting on the counter, pointing his gun down at Mr. Boggs lying on the floor, and firing a second shot. (Test. of Michael S. Poe, App. A003447). The surveillance tape was admitted into evidence and played, in its entirety, for the court. (App. A003455-56). In addition, a fingerprint analysis and comparison expert matched the fingerprints at the scene to Mahdi's fingerprints (Test. of Phillip Seats, App. A003458-66), and a firearm analysis expert testified the gun used to kill Mr. Boggs was the same gun stolen from Ms. Weaver (Test. of Neal Morin, App. A003471).

Corey T. Pitts testified that Mahdi car-jacked him at gunpoint in downtown Columbia, South Carolina, on July 18, 2004. (App. A003406-07).

Stephen Curtis, an agent with the South Carolina State Law Enforcement Division ("SLED")

in Columbia, testified about responding to the Myers murder scene and going to Florida to process the truck Mahdi escaped in. (App. A003417-41). He described the scene and the condition of Captain Myers's body and identified crime scene photos for introduction into evidence. Dr. Janice Edwards Ross, the forensic pathology expert who performed Captain Myers's autopsy, described Captain Myers's body and gave her findings. (App. A003569-79). She testified that Captain Myers had nine gunshot wounds—three in his head, five in his chest and abdomen, and one in his hand. (App. A003573-74). Dr. Ross also found evidence that Captain Myers had been set on fire. (App. A003572).

Sargent Darren Frost, from the Satellite Beach, Florida, police department, testified about capturing Mahdi and taking him into custody. (App. A003253-3271). The police attempted to stop Mahdi for driving erratically, but he jumped out of the moving truck, dropped a fully loaded assault rifle, and fled to a nearby condominium complex. (App. A003255-64). Sargent Frost tracked Mahdi with a canine unit and, after some struggle, was able to detain him. (App. A003264-67). Once back at the station, Sargent Frost thanked Mahdi for dropping his gun and not shooting him. (App. A003270). Mahdi looked at him and said the selector was stuck on a three shot and he did not think he could shoot both officers and the dog. *Id.*

The State also presented evidence of Mahdi's behavior since his arrest. Mahdi was housed in Lee Correctional Institution in Bishopville, South Carolina, from July 2004 until June 17, 2005. On January 18, 2005, Mahdi was subject to a disciplinary hearing for striking Officer G. Tony. (Test. of Henry Lee Johnson, App. A003491-92). During the disciplinary hearing, Mahdi stated the next chance he got, he was going to "kill that mother fucking officer." (App. A003492). On February 9, 2005, officers left Mahdi alone in a conference room briefly after an interview. (Test.

of Wickliffe McPherson, App. A003497-98). When they returned and searched the room, the officers found that the cover to a wall socket had been removed and metal pieces were missing. (App. A003498). Officers searched Mahdi and found he had the metal pieces. (App. A003499). The officers then searched Mahdi's cell and found a rope made with sheets that was about fifteen feet long. (App. A003500). On March 10, 2005, a routine cell search turned up a thirteen foot long rope and pieces of metal. (Test. of Henry Lee Johnson, App. A003492-94). And on May 6, 2005, a routine cell search revealed hidden pieces of metal. (Test. of Terrance Prioleau, App. A003503-04).

On June 7, 2005, Mahdi submitted an inmate grievance form regarding the grievance coordinator's delayed response time. (Test. of Janet Driggers, App. A003508-09). The grievance form read: "I cannot be diplomatic with you people, so my last action would be to kill you. Why not? You're not good to anybody. I could easily get someone to murder you. What is wrong with you, bitch? I bet you'll respond quick to this, won't you? You people think this shit is a game." (App. A003509). Mahdi was charged with threatening to inflict harm on an employee. *Id.* At Mahdi's June 14, 2005 disciplinary hearing for this charge, he continued to threaten the grievance coordinator. (Test. of Annie Sellers, App. A003521-22). The hearing officer had to recess the hearing and remove Mahdi from the hearing room. (App. A003523-24). Even while being removed from the room and escorted down the hallway, Mahdi continued to make threats. (App. A003524). The State played a tape of this hearing for the court. (App. A003523).

Mahdi was transferred to Kirkland Correctional Institution in Columbia, South Carolina, shortly after this disciplinary hearing. Gary Lane, Captain at Kirkland, described the institution and two incidents with Mahdi. (App. A003526-38). Captain Lane testified that Kirkland gets the worst

of the worst inmates. (App. A003527). It is a fifty-bed maximum security institution where inmates are housed individually and are kept in full restraints and escorted by two officers at all times. *Id.* On March 29, 2006, officers discovered a hammer-like weapon in Mahdi's cell constructed of a piece of drain cover, two toothbrushes, a string from his mattress, and a paper form. (App. A003529-30). After this discovery, Captain Lane moved Mahdi to the High D Wing, where the six highest security risk inmates in Kirkland are housed, because he was concerned for his staff's safety. (App. A003528, A003531). In the High D Wing, the lights are kept on twenty four hours a day and there are cameras in every cell. (App. A003528). This is the most secure area within the South Carolina Department of Corrections ("SCDC"). (App. A003538). On May 19, 2006, Captain Lane noticed through surveillance footage that Mahdi had been spending time under an area where the televisions were kept. (App. A003531). He sent a team to Mahdi's cell and they found two pieces of metal, one sharpened to a point, and a piece of knotted rope. (App. A003533).

And, as discussed in Ground One, the trial court heard from Sheriff Thomas S. Summers, who was in charge of courthouse security for the trial, regarding Mahdi's homemade handcuff key. (App. A003538-3546). Sheriff Summers' testimony indicated Mahdi made the key while housed in High D Wing; requested Sheriff Summers switch his leg braces to leg irons, with which the key would more likely work; brought the key from his cell to the courthouse on multiple days, hidden in his mouth; and failed to use it only because courthouse security denied him the opportunity. (*See* App. A003539-43).

On cross-examination of the State's prison employee witnesses, trial counsel elicited testimony emphasizing that SCDC was well-equipped to handle each situation, finding contraband was fairly routine in a prison setting, and Mahdi had not escaped or used the contraband to hurt

anyone. (*See* App. A003502, A003505-06, A003534-37).

Trial counsel reinforced this idea by presenting James Aiken, an expert in prison adaptability. (*See* App. A003580-3615). Mr. Aiken testified that, in his expert opinion, SCDC had managed Mahdi “for several years in an adequate manner.” (App. A003593). Regarding Mahdi’s behavior and contraband infractions, Mr. Aiken said the severity of those infractions was reduced when considered in the context of the prison population and that such infractions were fairly routine in high security areas. (App. A003592-93). Mr. Aiken painted a picture of Mahdi as an immature boy with no backup in a prison full of violent predators and gangs. (App. A003596-97). He suggested Mahdi would be victimized and possibly resort to self-mutilation or suicide. (App. A003597). Mr. Aiken described the force continuum available to SCDC to control Mahdi’s movements or punish bad behaviors. (App. A003598-601). Mr. Aiken concluded:

Mr. Mahdi is an immature person that’s done some terrible things in the community and as a result, he will remain in a prison environment for the rest of his life. And that prison system can adequately manage him with the type of security, technology, rules, regulations, training, physical structures, et cetera for the remainder of his life without causing an undue risk to staff, inmates, as well as the general public. And even if they deem it appropriate that they don’t want to supervise him, there are other prison systems, such as the federal level, that can adequately manage any type of inmate.

(App. A003602).

Defense counsel’s only other witness was Marjorie Hammock, an expert in clinical social work, who conducted a biopsychosocial assessment. (*See* App. A003615-39). Ms. Hammock testified that to conduct her assessment she interviewed: Rose Burwell, Mahdi’s paternal grandmother; Nathan Burwell, Mahdi’s paternal uncle; Carson and Lawanda Burwell, Mahdi’s

paternal uncle and aunt; Vera Mahdi, Mahdi's mother;¹⁵ Corlis Ardis and Sophia Gee, Mahdi's maternal aunts; and an unnamed member of the community who did not know much about Mahdi.¹⁶ (App. A003622-23). In addition, Ms. Hammock reviewed a synopsis of Mahdi's school records and a mental health report from his commitment to a mental health institution in Baltimore, Maryland. (App. A003623). Ms. Hammock presented her findings in a two page time line and a half page school experience summary, both of which were admitted into evidence. (*See* App. A003623 (time line admitted into evidence), A003630 (school experience summary admitted into evidence), A007543–44 (time line),¹⁷ A007515 (school experience summary)).

Ms. Hammock testified that Mahdi's father, Shareef, was an extremely troubled child. (App.

¹⁵Vera is also referred to as "Tilea" throughout the record. Mahdi's father changed her name to Tilea when they married. (App. A004188). For ease of reference, the court will refer to her as Vera in this order.

¹⁶From Ms. Hammock's testimony at the sentencing and testimony from trial counsel's mitigation investigator offered at the PCR evidentiary hearing, it appears Ms. Hammock also interviewed Shareef Mahdi, Mahdi's father. (*See* App. A001805 (trial counsel's mitigation investigator testifying she and "a social work expert" traveled to Philadelphia, where Shareef was living at the time)).

¹⁷The time line admitted into evidence contains the following information not included in Ms. Hammock's oral testimony: "1975 Sareef [sic] involved in a series of misdemeanors locally all said to be racially motivated"; "1988 Vera (Tilea) is taken to Lawrenceville from Richmond by Sareef [sic] who abuses her. Nathan rescues Vera. Mikal and Saleem witness more abuse and violence"; "8/23/92 Mikal involuntary admission in a psychiatric facility after suicide threat/gesture and Mikal hospitalized Admission DX Axis I, Major Depression with suicidal ideation, adjustment disorder, R/O Adjustment Disorder, Axis II Developmental Reading Disorder, Axis III Hx of right arm and right leg fractures"; "10/19/92 Mikel [sic] discharged from Walter P. Carter Mental Health. Discharge DX Axis I Major Depression, Single Episode[.] Mikal also becomes more disruptive in his uncle's home in order to force his return to Lawrenceville to join his father and brother. He has become even more defiant after he learns that his brother has joined his father. The three reunite and live on Burwell property with the boys. This was an isolated place in the country and they often had no food, heat or money." The time line ends in April 2001, when Mahdi was transferred to the Virginia Department of Corrections. (App. A007544).

A003625). Shareef attended the local, formerly white, school shortly after desegregation and recalled being traumatized by the experience. (App. A003626). He was constantly in conflict with and alienated from those around him and considered himself unwanted. *Id.* Ms. Hammock stated there was alcoholism and neglect in Shareef's family. *Id.* Shareef was the only one of his siblings to not finish school; instead, he joined the Marines. *Id.* After he was discharged from the Marines, Shareef converted to Islam and changed his name. (App. A003626-27). He had odd jobs, but was not able to function well, struggled with depression, and had a number of incidents with local law enforcement. (App. A003627).

Shareef was twenty-seven and Vera was sixteen when they had an arranged marriage. *Id.* Ms. Hammock described the marriage as full of conflict, very unstable, and chaotic. *Id.* Shareef was unable to support his family and they moved several times, eventually living with Mahdi's grandmother in Lawrenceville, Virginia. *Id.* Ms. Hammock testified Mahdi and his older brother, Saleem, witnessed a "great deal of conflict" between their mother and father and that, when Mahdi was four or five, Vera left the family to "get away from the abuse." (App. A003627-28).

After Vera left, Shareef struggled to take care of the boys. (App. A003628). Mahdi's grandmother tried to help, but she and Shareef had a very confrontational relationship. *Id.* At some point, Shareef forced Vera to return to Lawrenceville from Richmond. *Id.* Ms. Hammock testified Vera returned "ostensibly to see the boys, but that result[ed] in, again, some physical conflict. And she le[ft] again not to see her son for a number of years." *Id.*

Ms. Hammock stated Mahdi had difficulty in school. *Id.* He was considered bright, but did not perform well, was a poor reader, and struggled with his self-esteem. (App. A003628-29).

In 1991, Shareef sent Mahdi to live with his aunt and uncle, Carson and Lawanda Burwell,

in Baltimore, Maryland. (App. A003629). Carson and Lawanda described Mahdi as a bright and energetic young boy, but very, very troubled and indicated he had difficulty in school. *Id.* Carson told Ms. Hammock that Mahdi could not read at all when he came to live with them. *Id.*

Regarding Mahdi's education, Ms. Hammock listed the schools he attended¹⁸ and summarized parts of his records from second and third grade. (App. A003630-32). In second grade, records indicate Mahdi had uneven skills—he was placed in an average math program, but a below average reading program—and needed improvement in his standards for behavior and showing respect for authority. (App. A003631). In third grade, Mahdi was outstanding in science, but below average in reading, vocabulary, and spelling. (App. A003631-32). The records also indicate Mahdi struggled with self-esteem and had difficulty with relationships with others. (App. A003632). Ms. Hammock also noted Mahdi's education was disrupted several times by moves and, ultimately, by his father removing Mahdi from school in order to homeschool him. *Id.*

Ms. Hammock testified Vera was very withdrawn, did not want to participate in the interview, and seemed frightened of being involved with the family again. (App. A003632-33). Vera and others described Vera's abusive relationship with Shareef, but Ms. Hammock did not relate any specifics. (*See* App. A003633). Mahdi lived with Vera for a short time when he was released

¹⁸She testified Mahdi began kindergarten at Sister Clara Muhammad School in Richmond, Virginia, but also attended kindergarten at Totaro Elementary School in Lawrenceville, Virginia. (App. A003630-31). She stated records were not available, or were not legible, from Sister Clara and there were not narrative records from Totaro. (App. A003631). Mahdi then started first grade at Chamberlayne Elementary School in Richmond, Virginia. *Id.* Ms. Hammock stated records were not available from Chamberlayne either. *Id.* Then, Mahdi was sent to Baltimore, Maryland, where he attended Scotts Branch Elementary for second and third grade. *Id.* According to the school experience summary, Mahdi attended Totaro Elementary for fourth grade and part of fifth grade, until Shareef removed him in order to homeschool him. (App. A007515). The experience summary also indicates Mahdi did not appear motivated in fourth grade and his potential was stifled. *Id.*

from DJJ. Ms. Hammock described this as “not a good reunion,” said Vera and Mahdi “did not get along at all,” and Vera said she and Mahdi “had very different kinds of ideas about his living with her.” (App. A003634).

Ms. Hammock testified Mahdi’s child development was greatly impacted by his father’s inability to properly parent. (App. A003635). Mahdi’s childhood was marked by conflict, chaos, and a lack of stability. (App. A003636-37). During adolescence, Mahdi was exposed to his father’s outbursts and problems, including his conflicts with his own family, the community, and law enforcement. (App. A003637). She stated that more than anything, Mahdi wanted an intact family and an ongoing relationship, but he never received consistent help from his mother or father in growing up and developing good skills and a sense of values. *Id.* Ms. Hammock opined Mahdi had suffered emotional trauma throughout his early life, which “had an impact on his inability to make good choices, to have a good sense of himself and others and to behave according to societal norms.” (App. A003638). She stated Mahdi had the following risk factors: abuse and neglect; abandonment; lack of proper socialization; poor self-esteem; poor history of school progress; and poor sense of himself. *Id.*

Ms. Hammock concluded:

[S]omeone who is neglected, was abandoned, who suffers from poor parenting is likely to end up in a situation where he’s out of control and he does damage to himself and others. This is - - we find this profile all too frequently in people who end up in this kind of situation. He never had really a chance to develop appropriately.

(App. A003638-39).

In addition to these two witnesses, it appears trial counsel intended to call Mahdi’s grandmother, who was present in the courtroom, but, after speaking with her during a break, counsel

did not call her and, instead, rested. (*See* App. A003639).

The Sentencing Order

Judge Newman read his twelve page sentencing order into the record. (*See* App. A003686-3702). After reciting the facts, Judge Newman found the State had proven the existence of two aggravating circumstances beyond a reasonable doubt, thus allowing him to consider the death penalty. (App. A003691). Judge Newman then considered the nonstatutory aggravating circumstance of Mahdi's prior and subsequent bad acts, which were "relevant to show his bad character, evil nature, and malignant heart," and found the State had established Mahdi's bad character and propensities by clear and convincing evidence. (App. A003692-95). Judge Newman considered the mitigating circumstances argued by the defense and any mitigating circumstances supported by the evidence, including Mahdi's youth, "turbulent and transient childhood and upbringing," prison adaptability, and acceptance of responsibility through pleading guilty. (App. A003695-99). Judge Newman found none of these mitigating circumstances deserving of significant weight. (App. A003696-99). Judge Newman also considered victim impact evidence. (App. A003699).

In sentencing Mahdi to death, Judge Newman stated:

My challenge and my commitment throughout my judicial career has been to temper justice with mercy and to seek to find the humanity in every defendant that I sentence. That sense of humanity seems not to exist in Mikal Deen Mahdi.

. . . .

Today, the defendant also seeks mercy, the same mercy that perhaps Captain James E. Myers sought for an instant before Mikal Deen Mahdi fired nine bullets into Captain Myers' body from one of Captain Myers' prized weapons before setting his body on fire with matches and diesel fuel belonging to Captain Myers. In extinguishing the life, hope and dreams of Captain Myers in such a wicked, depraved

and unconscious manner, the defendant, Mikal Deen Mahdi, also extinguished any justifiable claim to receive the mercy he seeks from this Court.

(App. A003700-01).

The Evidence at PCR

Mahdi's PCR counsel presented an extensive and thorough account of Mahdi's background, including his family history, upbringing, mental health, and incarcerations. Counsel presented five family members. Carson Burwell, Mahdi's paternal uncle, and his wife, Lawanda Burwell, provided insight into Mahdi's time spent in Brunswick County, Virginia, and Lawrenceville in particular. (*See* App. A001260-61, A001481). They testified regarding the Burwell family's background and history, including their racial views and family tensions. (*See* App. A001262-66, A001269-70, A001484-85, A001487-89). Carson described his upbringing and how he and Shareef related to their parents, how Shareef changed after attending a desegregated school, Shareef's marriage to Vera, and Shareef's parenting of Mahdi and Saleem. (*See* App. A001267-82). Both also testified regarding the period of time when Mahdi lived with them in Baltimore, Maryland. (*See* App. A001282-92, A001494-1513). Lawanda, who has a doctorate in maternal child health from the Harvard School of Public Health, described Mahdi's emotional issues around learning and how they were attempting to overcome the gaps in his education. (*See* App. A001499-1503).

Both Lawanda and Carson recounted Mahdi's abuse allegation against Lawanda in August 1992 when he was approximately ten years old. (App. A001286-92, A001503-08). After a spanking from Lawanda, Mahdi put soot from the fireplace and ketchup on himself to give the appearance of severe injuries and called the police. At some point, Mahdi asked one of the responding officers for his gun so he could shoot himself and was immediately taken to the Walter Carter Center, a mental

health facility, where he was admitted for around sixty days. After Mahdi was released, Carson and Lawanda continued to take him to counseling for several months, but he would not participate in the therapy and seemed to be doing well at that time, so they stopped. Lawanda testified at the end of third grade, Mahdi was in a good place. (App. A001508). But, that summer, Mahdi discovered Saleem had moved back in with Shareef and he wanted to be with his father and brother, so he began acting out again. When Mahdi returned to Lawrenceville to live with his father, Shareef was not in any better condition to take care of the boys than he had been when Carson took Mahdi and sent Saleem to Texas. (App. A001514). Carson did not recall ever being interviewed by Mahdi's defense team and stated he definitely would have testified had he been asked. (App. A001294-95). Lawanda remembered being interviewed by Ms. Hammock and Paige Tarr, the defense team's mitigation investigator, but she was not asked to testify. (App. A001514). She stated she was not sure she would have agreed to testify if they had asked, but maybe she could have been convinced. (App. A001515).

Sandra Wynn Burwell, who was married to Mahdi's uncle, Nathan Burwell, Jr., from 1972 to 1983, and grew up in Brunswick County, provided an affidavit. Her affidavit also discussed the Burwell family, Shareef's background, and Shareef's relationship with Vera. (App. A004154-55). She provided more information on Vera and the end of Shareef and Vera's relationship. (App. A004155). According to Sandra, while living with Shareef and raising the boys, Vera managed to get her GED and complete a nursing program at a junior college. *Id.* She then convinced Shareef, who was unemployed, that she should join the military. *Id.* When she returned home from the military, she informed Shareef she wanted a divorce and was taking the boys. *Id.* Shareef would not allow that and Vera left without her sons. Shareef repeatedly told Mahdi and Saleem their mother

abandoned them and did not love them. *Id.* Sandra attended the hearing when Mahdi was first sent to DJJ after the stand-off with police. *Id.* She stated the failure to report was not Mahdi's fault, Shareef would not let her visit Mahdi in jail, and she felt so sorry for Mahdi that she considered adopting him. *Id.*

Mahdi's maternal aunts, Rose M. Gupton and Sophia A. Gee, testified regarding Vera's childhood, background, relationship with Shareef, and what she was like as a mother. (*See* Rose M. Gupton Test., App. A001316-30; Sophia A. Gee Test., App. A001331-47). In addition, when Mahdi was a teenager, he would periodically come by Sophia's house. (App. A001339). She stated Mahdi was always nice to her and was "a loving, respectable, typical teenager." *Id.* Rose stated nobody from the defense team ever contacted her and she did not know Mahdi had been arrested for murder until he was convicted. (App. A001327-28). Rose indicated she would have testified at Mahdi's sentencing if asked because he deserved mercy and never had a chance. (App. A001328). Sophia, and her sister, Corliss, were interviewed by the defense team. (App. A001341-42). However, the defense team did not ask Sophia how to get in touch with other family members or to testify on Mahdi's behalf. (App. A001342-43). Sophia said she would have testified if asked because Mahdi's parents failed him from the beginning. (App. A001343).

In addition, PCR counsel presented evidence from seven community witnesses, including three of Mahdi's teachers. In third grade, after he was released from the Walter Carter Center, Mahdi's school placed him in Myra R. Harris's class. (App. A001348-49). Ms. Harris testified her class contained the troubled kids, or the kids who had not been successful in other classrooms. (App. A001349-50). She said, initially, Mahdi was withdrawn and not friendly, but she was able to draw him out by listening to him and giving him a voice. (App. A001351-52). He had some discipline

problems in other classrooms, but not in hers. (App. A001351). He had a lot of trouble with homework and struggled with change and transitions. (App. A001354-55). By the end of the school year, Mahdi would give Ms. Harris hugs, was smiling, had some friends, and was just like the rest of the kids. (App. A001353, 1356). He had performed well academically and even received two awards: outstanding achievement in art and a certificate for academic achievement. (App. A001358-59). Ms. Harris did not know Mahdi had been sentenced to death until she was contacted by PCR counsel. (App. A001359). She stated she would have testified at his sentencing if asked. (App. A001360).

For most of fourth grade, Mahdi returned to Totaro Elementary School in Lawrenceville, where Dora G. Wynn was the principal. Ms. Wynn submitted an affidavit and stated Mahdi had emotional difficulties, was frequently brought to her office, was withdrawn, had trust issues, refused to do his work or eat, and would, on occasion, simply walk away from school. (App. A004146). During his fourth grade year, Mahdi was recommended for placement in special education. *Id.*

Carol E. Wilson was chair of the child study team that evaluated Mahdi for special education placement and also Mahdi's fifth grade teacher. (App. A001367-68). Ms. Wilson testified that, in order to assess Mahdi's eligibility for special education, a team conducted a full child study, including a psychological evaluation, educational diagnostics, recommendation from a guidance counselor, and classroom observations. (App. A001368). After the assessments were complete, the team held an eligibility meeting to discuss their findings. (App. A001370-71). Ms. Wilson recalled Shareef attended that meeting, but cursed at everyone and stormed out when Mr. Vecker began reading his psychological findings. (App. A001371). Mr. Vecker was Caucasian and Shareef said he did not want any white man writing negative reports about his son. *Id.*

Ms. Wilson reviewed each section of the report from the assessment meeting. On the Burks Rating Scale, a behavior assessment, Mahdi scored “very significant [with] excessive self-blame, poor impulse control, and excessive resistance.” (App. A001373). He also exhibited periods of extreme sadness. (App. A001373). Ms. Wilson concluded that he appeared to be unable to cope with his self-esteem problems and that made Mahdi unable to function and effectively learn in school. (App. A001373-74). On the medical portion, Mahdi was noted to be overweight and anemic. (App. A001374-75). Psychologically, Mahdi had a full scale IQ of 118, but testing showed psychological blocking and characteristics of children who present academic problems, particularly in language arts. (App. A001375). Mr. Vecker found Mahdi’s projectives revealed depressive and victimization themes, feelings of helplessness, withdrawal, denial, and lack of self-esteem. (App. A001375-76). Ultimately, the team found Mahdi eligible for the emotionally disabled program and recommended he continue counseling and receive assistance in reading. (App. A001379).

Shareef eventually signed Mahdi’s individual education program and Mahdi entered Ms. Wilson’s special education class in fifth grade. (App. A001381). Ms. Wilson recalled Mahdi was never disrespectful, but was depressed and very sad. (App. A001382). He liked to draw and would draw black and white pictures of people hanging. (App. A001383). Ms. Wilson described Mahdi as flat and lacking in joy, interest, or motivation. (App. A001384). He was quiet and had little interaction with other students, but he was not a behavior problem. *Id.*

While Mahdi was in the fourth and fifth grades, Shareef was working as a substitute teacher in the Brunswick County school system. (*See* App. A001383; Wynn Aff., App. A004146). While substituting in a fifth grade class, Shareef told the girls to get fitted for birth control, use condoms, and to not have illegitimate children or get on welfare. (App. A001386). The school system fired

Shareef and he withdrew Mahdi, supposedly to homeschool him. *Id.* After that, Mahdi “fell through the cracks.” *Id.*

When asked if she was surprised Mahdi had been charged with murder, Ms. Wilson responded, “with everything the way that it was going and with his father, I couldn’t expect anything else.” (App. A001387). She testified that she was never contacted by trial counsel, but would have testified and asked the judge for mercy if given the chance. (App. A001388).

The remainder of the community witness testimony focused on Shareef. George R. Smith, who managed the blacks-only swimming pool in Lawrenceville for a time, remembered Shareef bringing Saleem and Mahdi to the pool almost every day when the boys were young. (App. A001408). Shareef was clean-cut at the time and there was nothing particularly remarkable about him and the boys. (App. A001408-09). Then, in the 1980s, Mr. Smith won a voting rights case against Brunswick County and became known as a civil rights activist. (App. A001409). After that, Shareef admired Mr. Smith and would periodically contact him. *Id.* Mr. Smith testified Shareef hated white people “with a passion” and recalled him speaking approvingly of Hitler killing “those Jews.” (App. A001410). Mr. Smith did not think Shareef had a job and believed Mahdi’s grandmother was supporting the boys. (App. A001411-12).

Mr. Smith also described an incident where Shareef jumped into the whites-only swimming pool and refused to get out. (App. A001412-15). The sheriff’s office called Mr. Smith to assist and he drove to the pool. (App. A001412). When he arrived, Shareef was swimming around, using vile language, and talking about why O.J. Simpson had killed Nicole Brown Simpson. (App. A001412-13). Shareef eventually agreed to come out of the pool, but only if Mr. Smith walked between him and the officers the 100 yards to the sheriff’s office. (App. A001414). Mr. Smith and the officers

agreed, and everyone walked to the sheriff's office, which is also where the jail was located. (App. A001414-15). Mr. Smith went into the cell with Shareef. (App. A0014150). According to Mr. Smith, once Shareef was locked in the cell, "he just went wild," throwing chairs against the wall and breaking tables. *Id.* Mr. Smith said it was "just as violent as anything [he] ha[d] ever seen in [his] life," and he left. *Id.*

Mr. Smith also accompanied Shareef to Mahdi's hearing after the stand-off with police. (App. A001416). He remembered the judge commenting that Mahdi was a smart kid and his problem was his father. (App. A001417). The defense team did not contact Mr. Smith. (App. A001415). He stated that if asked, he would have testified and probably would have asked the judge for mercy because of the "rampant rumors about what was going on in that household." (A001415-16).

Sharon C. Pond, a psychologist at Brunswick Behavioral Health Center, testified regarding any records she could find related to Mahdi and Shareef.¹⁹ (App. A001419-23). Mahdi's intake was on February 24, 1994, and his case was closed on September 14, 1994. (App. A001420). Shareef was seen as a mental health outpatient on March 4, 1994, discharged on May 16, 1994, seen for emergency services on July 9, 1994, and his case was closed on September 1, 1994. (App. A001421). Ms. Pond did not have a clear personal recollection of Shareef, but would have directly supervised whomever worked with him. (App. A001422). She testified that, after the pool incident, the sheriff's office called one of her emergency workers to assess Shareef. (App. A001422-23). The emergency worker found Shareef had a mental illness and was imminently dangerous to himself or

¹⁹The detailed records had been purged due to age, so she only had "face sheets" with each person's personal data and dates and circumstances of contact. (*See* App. A001419-20).

others. (*See* App. A001423). That assessment resulted in Shareef's involuntary commitment to Central State Hospital Forensic Unit. *Id.*

Ms. Pond stated Nancy Burwell, Mahdi's grandmother, was on the community services board of the Brunswick Behavioral Health Center at the time of Shareef's commitment. (App. A001423). Nancy spoke with Ms. Pond regarding Shareef's problems and blamed herself for involving him in the movement to integrate the public schools. (App. A001423-24). Nancy felt, although it was the right thing to do civically and morally, it was the absolute wrong thing to do for Shareef and the experience left him very damaged and hurt. *Id.* Mahdi's defense team did not contact Ms. Pond. (App. A001424).

Douglas R. Pond, Ms. Pond's husband, current mayor of Lawrenceville, and former chief of police, also submitted an affidavit. (App. A004148). Mr. Pond grew up with Shareef and remembered him as a fairly normal child. *Id.* However, Mr. Pond stated that after his conversion to Islam, Shareef became eccentric and radicalized. *Id.* Shareef did not like white people and there was a racial overtone to his statements and actions. *Id.* Mr. Pond was the chief of police at the time of the pool incident and remembered Shareef saying things like "come on, white boy," when officers would ask him to get out of the pool. *Id.* Mr. Pond also stated he knew Nancy Burwell from the community and that she had always been "eccentric and somewhat goofy" and routinely got confused about when her water bill was due. *Id.* Mahdi's defense team did not contact Mr. Pond, but he stated he would have been willing to testify or provide the above information. *Id.*

Finally, James R. Woodley, former Sheriff of Brunswick County, who testified for the State during Mahdi's sentencing, provided an affidavit on Mahdi's behalf in his PCR proceeding. (App. A004149-51). Mr. Woodley grew up with the Burwells and, while he did not know Shareef as well

as the older children, he remembered him as easy going and relatively normal until he began attending an integrated school. (App. A004149). Mr. Woodley described Nancy Burwell as someone with “all the lights [] on, but nobody’s home.” *Id.* He indicated Shareef had always seemed dominant and domineering and had no respect for women. *Id.* Mr. Woodley testified that he remembered one time Nancy told him that Shareef had beaten her with a belt buckle while Saleem and Mahdi watched. *Id.* Nancy wanted Shareef to get help, so Mr. Woodley arrested him and referred him for mental health treatment. *Id.* After the mental health evaluation, Shareef returned to jail, where no charges were filed because Nancy would not testify. (App. A004149-50).

Mr. Woodley also filled in details about what happened when Shareef attempted to force Vera to return to Lawrenceville. (App. A004150). Shareef took Saleem and Mahdi to visit their mother, told Vera they would all go get ice cream, and, once she was in the truck, told her he was taking her back to Lawrenceville to kill her. *Id.* When they returned to Lawrenceville, the boys went into the house with Nancy and another female relative and Shareef and Vera remained outside. *Id.* Nancy and the boys heard screaming and ran outside to see Shareef trying to kill Vera. *Id.* Vera managed to escape, but later declined to press charges, saying she wanted to put the incident, Shareef, and the boys behind her. *Id.*

Mr. Woodley recalled incidents where Shareef threw a brick at his sister, Kathy, and damaged his sister Loretta’s car. *Id.* He stated he personally complained to the Brunswick County Department of Social Services and the school board when he realized Shareef was not actually homeschooling the boys, but nothing ever came of it. *Id.* And finally, Mr. Woodley described Shareef’s standoff with police in connection with the public pool incident and attached a related article from the local paper. (App. A004150-51). He indicated Mahdi’s defense team did not

interview him and he was surprised Nancy was the only family member present at the trial. (App. A004151).

PCR counsel also called four experts: Dr. Nicholas C. Cooper-Lewter, Dr. Craig Haney, Dr. DeRosset Myers, Jr., and Dr. Donna M. Schwartz-Watts. Dr. Cooper-Lewter, an expert in clinical social work and psycho-social assessment, performed a new psycho-social assessment. (App. A001426-77, 1537-92). Dr. Cooper-Lewter's testimony followed the same format as Ms. Hammock's, but illuminated in greater detail Mahdi's childhood, traumas, education, mental health, and general history, which had been provided by the other PCR witnesses.

Dr. Haney, an expert in social psychology, testified regarding the likely effects on Mahdi of his extensive time in prisons. (App. A001592-1655). Based on his review of Mahdi's records, Dr. Haney testified that Mahdi "was institutionalized for approximately eight and a half out of every 10 days of his life after the age of 14," amounting to about eighty-six percent of his life. (App. A001608). Dr. Haney described similar risk factors in DJJ to those Mahdi experienced in his early life, including: abandonment, neglect, witnessing violence, instability, and unpredictability. (App. A001609). He indicated that, in order to avoid victimization in an institution, people who have been hurt by these experiences will project or develop a tough, angry exterior. (App. A001610). Dr. Haney attributed Mahdi's "maladaptive" and "impulsive" behavior in DJJ to this form of self-preservation (App. A001611-12) and opined Mahdi left DJJ "with the same problems arguably worsened by the fact that he had been in this institutional setting and had developed in part as a way of trying to adjust in this setting an even more defiant and oppositional approach to conflict and to interactions" (App. A001618).

Regarding Mahdi's time in adult prison in Virginia, Dr. Haney testified that the prison system

failed to address Mahdi's underlying psychological problems. (App. A001620). Dr. Haney stated untreated underlying psychological problems can often lead inmates to rack up disciplinary infractions for minor irrational and impulsive behaviors, and those infractions result in time in isolation or a transfer to a super-max facility. (App. A001621). Dr. Haney described studies suggesting prisoners subjected to extended solitary confinement can experience anxiety and mental deterioration and "lose their ability to initiate behavior or make responsible judgments about their own behavior." (App. A001623-24). In addition, Dr. Haney stated "[i]f a prisoner suffers from depression that depression almost certainly will deepen inside a super-max prison." (App. A001624). And the frustrating nature of the environment and lack of "pro-social avenues for the release of that frustration" can lead prisoners in super-max facilities to lash out impulsively and irrationally. (App. A001624-25). Dr. Haney opined these factors significantly contributed to Mahdi's institutional behavior and that, after his time at the super-max facility in Virginia, without a transitional process or psychiatric treatment, Mahdi would have had a very difficult time reentering free society. (App. A001630-33).

Dr. Myers, an expert in child and adolescent psychology, assessed developmental issues in the first sixteen to seventeen years of Mahdi's life. (App. A001656-97). Dr. Myers reviewed Mahdi's records and portions of the trial transcript and found Mahdi suffered from major depression and severe attachment disorder in his childhood and adolescence. (App. A001659-60). In discussing Mahdi's records from the Walter Carter Center, Dr. Myers noted it was very unusual for a nine year old to be admitted to a psychiatric ward and rare for someone that young to receive a diagnosis of major depression. (App. A001665-66, 1668). Dr. Myers testified Mahdi's Walter Carter Center records, special education eligibility assessment, and DJJ psychological evaluation consistently

suggested Mahdi's oppositional behavior stemmed from his major depression. (*See* App. A001682, A001684, A001690-91). He noted that a number of people along the way recognized that Mahdi needed help and made cogent recommendations, but Mahdi never received the ongoing support he needed. (App. A001691-92).

Dr. Schwartz-Watts, a forensic psychiatrist, evaluated Mahdi and diagnosed him with: (1) major depression, recurrent, with psychotic features, in remission; (2) anxiety disorder; (3) reactive attachment disorder of childhood, inhibited type; (4) paranoid personality disorder; and (5) antisocial personality disorder. (App. A001700). Dr. Schwartz-Watts opined that Mahdi's depression could have manifested as aggression and irritability (App. A001701-02) and linked her diagnoses of depression and antisocial personality disorder (App. A001705-06). In her report, Dr. Schwartz-Watts concluded Mahdi's age and mentality at the time of the crime were mitigating factors, based on the fact that he was twenty-one when he committed the crime and documentation suggesting his emotional immaturity. (App. A006972). However, at the evidentiary hearing, she testified that despite the presence of mental illnesses, Mahdi's capacity was not diminished at the time of the crime, he was able to know right from wrong, and she did not believe his mentality supported a statutory mitigating circumstance. (App. A001713-14). However, she stated his anxiety disorder could have contributed to his decision to shoot Captain Myers. (App. A001714). Dr. Schwartz-Watts also testified that Mahdi expressed remorse to her, indicating: "he said it was unnecessary to kill the man and he felt very badly about it and the other thing that he said [was that] killing someone is selfish and it shows a lack of discipline." (App. A001715).

The State then presented testimony from Mahdi's trial attorneys and defense team, which included: James Gordon, the private investigator (App. A001742-47); Paige M. Haas, the mitigation

investigator (App. A001800-26); Dr. Thomas V. Martin, the forensic psychiatrist (App. A001747-84); and Dr. Geoffrey R. McKee, the forensic psychologist (App. A001784-1800). The attorneys and investigators testified regarding the investigation, sharing information in periodic team meetings, consulting with the attorneys assigned to Mahdi's North Carolina murder case, and personal interactions with uncooperative family members and potential witnesses. Dr. Martin discussed his findings that Mahdi had a violent outlook, expressed no remorse, and was manipulative. (App. A001755-56).²⁰ Those findings led Dr. Martin to diagnose Mahdi with antisocial personality disorder. (App. A001756) Dr. McKee agreed and diagnosed Mahdi with antisocial personality disorder with a history of alcohol abuse. (App. A001790). Both doctors indicated none of the information they heard or reviewed during the evidentiary hearing would have changed their opinions and, in fact, the DJJ records, which they had not previously reviewed, were consistent with their diagnoses. (App. A001783-84, A001799-1800).

Analysis

Non-Family Lay Witnesses

In this preserved portion of Ground Two, Mahdi asserts his trial counsel were ineffective in failing to contact and present evidence from community lay witnesses, specifically: Mahdi's teachers, Myra Harris and Carol Wilson; elementary school principal, Dora Wynn; and community members who knew the Burwell family—George Smith, Sharon Pond, James Woodley, and Douglas Pond. To succeed on this claim, Mahdi must show that the PCR court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law," as determined by the

²⁰Mahdi told Dr. Martin that his actions were "justified" and that "people only understand force." (App. A001761).

United States Supreme Court, 28 U.S.C. § 2254(d)(1), or “was based on an unreasonable determination of the facts in light of the evidence” before it, 28 U.S.C. § 2254(d)(2).

In reaching its conclusions, the PCR court applied *Strickland, Wiggins v. Smith*, 539 U.S. 510 (2003), *Rompilla v. Beard*, 545 U.S. 374 (2005), their progeny, and their South Carolina state law equivalents. (See App. A000086-90, A000166-67). The PCR court found Mahdi had “not shown that counsel was deficient in failing to investigate, develop, or present mitigation evidence from his family members or community witnesses” and that trial counsel “conducted a reasonable and thorough mitigation investigation and presented what mitigation they could that was favorable to Mahdi at the time of the sentencing proceeding.” (App. A000118). The court concluded “Mahdi ha[d] failed to demonstrate deficient performance here because much, if not all, of the evidence Mahdi offered at PCR regarding his family and social history, whether through family or community witnesses, was cumulative to the evidence presented in Mahdi’s capital sentencing proceeding.” (App. A000114, A000165 (specifically noting Judge Newman knew all the pertinent information about Mahdi’s father)). And, the PCR Order included a specific finding that trial counsel were not ineffective for not calling elementary school officials. (App. A000154).

After a thorough review of the aggravating and mitigating evidence (App. A000166-81), the PCR court also found Mahdi had failed to prove prejudice (App. A000181). Given the “horrible facts of the murder” and the “overwhelming” evidence of Mahdi’s bad character, characteristics, prison misconduct, and propensities for violence, the PCR court found there was “no reasonable probability Judge Newman would have returned with a different sentence” if presented with the additional mitigating evidence at PCR. (App. A000166, A000167).

Mahdi alleges two specific errors regarding the PCR court’s determination: (1) the PCR court

erred by rejecting the application of the *American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (2003) (“ABA Guidelines”) and (2) the PCR court erred in finding the mitigation evidence offered in PCR was cumulative to the evidence offered at sentencing.²¹ (ECF No. 113 at 39 n.13, 43-45). The ABA Guidelines state that: “capital counsel must investigate a client’s social history; locate and interview all potential witnesses; locate available and relevant records; and investigate and rebut the Government’s evidence in aggravation,” and that “[b]ecause the sentencer in a capital case must consider in mitigation, anything in the life of a defendant which might militate against the appropriateness of the death penalty for that defendant, penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history.” (ECF No. 113 at 39) (citing ABA Guidelines 10.7 and 10.11 and 10.6 Commentary).

In the PCR court’s original order, in addition to applicable case law, the court considered the ABA Guidelines in assessing reasonable performance. (*See App. A000039-45*). Under this analysis,

²¹Mahdi also alleges the following errors in the PCR Order: (1) the PCR court erred in finding trial counsel made a reasonable strategic decision not to present certain mitigating evidence in order to avoid the admission of additional evidence in aggravation and (2) the PCR court made erroneous credibility determinations. (ECF No. 113 at 39, 42). However, the PCR court’s finding that trial counsel made an objectively reasonable strategic decision pertained to counsel’s decision not to call Mahdi’s family members as mitigation witnesses, specifically Carson Burwell, Lawanda Burwell, and Sophia Gee. (*See App. A000115-17*). Accordingly, the propriety of that finding is not relevant to this portion of Ground Two. In addition, it does not appear the PCR court made specific credibility determinations regarding the non-family lay witnesses. (*See App. A000110-14* (finding: witnesses’ present statements about previous willingness to testify not credible; Mahdi’s aunts and uncles were not willing to come to South Carolina and testify on Mahdi’s behalf in 2006; the record showed Mahdi had engaged in conduct within his own family which would have caused, and did cause, family members to be reluctant to assist him in his mitigation case; and counsel and the defense team attempted to develop live mitigation evidence from Mahdi’s family, but were met with reluctance, refusal, or inability to testify in a helpful manner)). Thus, the PCR court’s credibility findings do not directly impact the court’s consideration of this portion of Ground Two.

the PCR court found trial counsel deficient for failing to interview potential witnesses outside of Mahdi's family. (App. A000047). However, given the aggravating circumstances in this case, the court found Mahdi had failed to show prejudice. *Id.*

In the amended PCR Order, the PCR court carefully and expressly reconsidered the applicability of the ABA Guidelines. (*See* App. A000087-90). Notably, the PCR court did not find the guidelines inapplicable or irrelevant, but cited case law indicating the ABA Guidelines are just that—guidelines—and reiterating the ultimate deficiency determination turns on the much broader concept of reasonableness. (*See* App. A000088-89) (citing *Bobby v. Van Hook*, 558 U.S. 4 (2009); *Cullen v. Pinholster*, 131 S.Ct. 1388 (2011)). While the United States Supreme Court has looked to the ABA Guidelines in analyzing attorney performance under similar circumstances,²² there is no requirement that courts are bound to follow the ABA Guidelines or must grant the guidelines any weight. *See Van Hook*, 558 U.S. at 7-8. As Justice Alito noted in his concurring opinion in *Van Hook*, the ABA is a private group with limited membership, and “[i]t is the responsibility of the courts to determine the nature of the work that a defense attorney must do in a capital case in order to meet the obligations imposed by the Constitution,” and there is therefore “no reason why the ABA Guidelines should be given a privileged position in making that determination.” *Van Hook*, 558 U.S. at 13 (Alito, J. concurring). Thus, the PCR court's decision not to base its analysis on the advisory ABA guidelines was not contrary to clearly established federal law.

In support of his argument that the PCR court erred in finding the PCR evidence cumulative of the sentencing evidence, Mahdi asserts: (1) even if the information was the same, receiving the information through family and lay-witness first-hand accounts is more impactful than through

²²*See, e.g., Strickland*, 466 U.S. at 688; *Wiggins*, 539 U.S. at 510; *Rompilla*, 545 U.S. at 387.

expert testimony; (2) the information presented at the PCR proceedings was not cumulative; and (3) the inclusion of testimony from school teachers and community members during the PCR proceedings succeeded in humanizing Mahdi, something Judge Newman specifically found the presentation at sentencing had failed to do. (ECF No. 113 at 43-45).

First, this preserved portion of Ground Two only concerns counsel's alleged failure to develop and present evidence from non-family lay witnesses and does not address the decision to present mitigating evidence through an expert, rather than a series of character witnesses. Accordingly, the court declines to dive into a discussion of best practices in capital sentencing, at least at this point.

Second, the court has thoroughly reviewed the testimony and exhibits offered at sentencing and in the PCR proceedings and finds the PCR court's determination that the PCR evidence was cumulative is not unreasonable. While the PCR evidence certainly expanded on and added depth to Ms. Hammock's testimony and the other evidence offered at sentencing, it would not have significantly "altered the sentencing profile presented to the sentencing judge." *Strickland*, 466 U.S. at 700. As discussed above, the school and community PCR witnesses testified about Mahdi's behavior and performance in school; special education evaluation; father's background, racial views, mental health, and incidents of violence against other family members and racial protests; and grandmother Nancy Burwell's occasionally off-kilter behavior.

At sentencing, Ms. Hammock testified regarding Mahdi's education, noting that Mahdi's education was disrupted several times, he had trouble reading, he suffered from poor self-esteem, and he struggled to relate to others. (App. A003630-32). Ms. Hammock's School Experience

Summary indicated Mahdi attended special reading classes and qualified for Chapter 1²³ while in school in Baltimore. (App. A007515). In addition, Ms. Hammock’s School Experience Summary noted that, in fifth grade, Mahdi’s father “removed [him] in order to home school.” *Id.*²⁴ Ms. Hammock also noted, in third grade, Mahdi was outstanding in science and worked well in small groups. *Id.* Overall, though concise and lacking the detail presented at the PCR hearing, Judge Newman had before him the same basic information presented by Mahdi’s teachers.²⁵

In addition, while Ms. Hammock’s description of Shareef’s background was brief, she did note the trauma he experienced while attending a desegregated school, his depression, a number of incidents with local law enforcement, and his physical abuse of Vera. (App. A003625-28). The time line admitted into evidence reinforced Ms. Hammock’s testimony and provided additional details. (*See* App. A007543-44). The time line revealed that Shareef was described as a disturbed young child, that his mother was not emotionally available to him, and that he was involved in incidents

²³This refers to Chapter 1 of the Educational Consolidation Improvement Act, which provided federal funding for supplementary programs in basic skills for low-income students who qualified based on achievement.

²⁴The following sentence is incomplete, but states, “There was no information that this schooling had.” (App. A007515). Through the benefit of hindsight, the court assumes Ms. Hammock meant to state there was no information that Shareef ever actually homeschooled Mahdi.

²⁵One notable exception is Mahdi’s special education evaluation. The evaluation, detailed by Carol Wilson during the PCR evidentiary hearing, was not discussed at trial. Based on evidence at PCR, it is questionable whether trial counsel had seen the evaluation. However, trial counsel’s mitigation investigator testified her common practice was to request records from every school a defendant attended and pass those records on to counsel. (App. A001803). She also testified that, in this case, she summarized Mahdi’s school records and presented relevant information to counsel and other experts during their periodic team meetings. (App. A001813, A001825-26). Notably, counsel’s possession of the special education evaluation is not specifically contested in the briefs, is not covered by this portion of Ground Two, and is not material to the court’s evaluation of Mahdi’s claims.

with law enforcement, which were “said to be racially motivated.” (App. A007543). The time line also described Shareef kidnapping Vera and physically abusing her in front of Mahdi and Saleem and stated Shareef attacked his mother, Nancy. (App. A007543-44). In addition, Ms. Coulson’s DJJ evaluation, which the State admitted into evidence during the sentencing phase, described Shareef as a poor adult role model and attributed much of Mahdi’s apparent behavioral problems to Shareef’s dysfunctional parenting. (ROA 1870). And the portion of Mahdi’s DJJ records the State admitted into evidence references Shareef’s statement that “Virginia is full of white supremacists.” (ROA 2146). Thus, while trial counsel’s mitigation presentation was brief, the court cannot find unreasonable the PCR court’s determination that the evidence at PCR on these topics was cumulative.

In addition, the record suggests trial counsel considered calling Nancy Burwell to testify during sentencing. (*See* App. A003639, A001859-60). Counsel could, quite reasonably, have decided not to present information suggesting this character witness had some quirks. The decisions concerning the calling of witnesses are matters of strategy left to the attorney, which ordinarily cannot constitute ineffective assistance. *Jones v. Barnes*, 463 U.S. 745, 808 (1983).

Further, to Mahdi’s broad challenge to the PCR court’s finding that trial counsel conducted a reasonable investigation, despite not interviewing the teachers and community witnesses presented at PCR, the court does not find that decision contrary to, or an unreasonable application of, clearly established federal law or based on an unreasonable determination of the facts.

The record shows trial counsel assembled a team of qualified experts to assist in Mahdi’s defense and specifically to investigate potential mitigating evidence. Members of the team traveled to Lawrenceville, Virginia; Richmond, Virginia; Baltimore, Maryland; and Philadelphia,

Pennsylvania. (App. A001805-06). They interviewed Mahdi and several of his family members, including: Nancy; Mahdi's uncle, Nathaniel; Vera; Shareef; Mahdi's maternal aunts, Corliss Artis and Sophia Gee; Carson and Lawanda Burwell; and Mahdi's paternal aunt, Kathy. (App. A001806-08). And, the team consulted with Mahdi's North Carolina attorneys and their mitigation investigator, who had already spent time gathering information from Mahdi's family. (App. A001808). In addition, Paige Haas, the team's mitigation investigator, testified that she attempted to speak with Saleem, but was not successful. (App. A001809).

The attorneys and experts had periodic team meetings where everyone would share information. (*See* App. A001834-35). And, after meeting with Mahdi's North Carolina defense team, Mahdi's attorney, Carl Grant, moved to continue Mahdi's South Carolina trial for almost one year. (App. A001836-37). Mr. Grant stated after talking with the North Carolina team, he "discovered that there was going to be a whole lot more information that [he] would need in order to adequately present Mahdi's case," primarily regarding Mahdi's background and family. (App. A001836). Judge Newman granted the motion and continued the trial from January to November 2006. (App. A007968-69).

Further, Ms. Haas testified she visited Mahdi's elementary school in Lawrenceville and spoke with teachers there. (App. A001824-25). She indicated the teachers she spoke with remembered Mahdi and were familiar with him, but they had not spent "lots and lots of time" with him. (App. A001825). Ms. Haas also spoke by phone with individuals from Madhi's school in Baltimore. *Id.* And, she recalled requesting records from several schools and testified it was her common practice to request records from any school she knew the defendant attended. (App. A001803-04). Ms. Haas stated she would have made notes from her interactions, including names and contact information,

passed on those notes to the attorneys, and included any pertinent information in a school record summary she prepared for Ms. Hammock. (App. A001813, A001825-26).²⁶

When asked why he did not talk with community members or teachers, Mahdi's attorney, Mr. Walters, stated he normally relied on a defendant's family to identify other potential witnesses. (App. A001877). However, in this case, Mahdi's family was not helpful. *Id.* In addition, by Mahdi's own admission, and confirmed by his records, Mahdi was somewhat dysfunctional within the school system. (App. A001876). So, Mr. Walters stated he was not under the impression that witnesses from Mahdi's schools would testify favorably, or would not be subject to harmful cross-examination. (App. A001876-77). Mr. Walters also emphasized his reliance on the qualified experts on his team. (*See* App. A001874, A001876, A001886).

It is not unreasonable or against prevailing professional norms for counsel to rely on a qualified mitigation investigator and other experts. *See Rhodes v. Hall*, 582 F.3d 1273, 1283 (11th Cir. 2009) ("Since . . . counsel hired investigators who interviewed potential witnesses and shared all of their information with counsel, we cannot say that counsel performed deficiently by delegating the mitigation investigation to them."). In addition, as the Supreme Court has recognized, "there comes a point at which [more evidence] can reasonably be expected to be only cumulative, and the search for it distractive from more important duties." *Van Hook*, 558 U.S. at 11; *see also Rompilla*, 545 U.S. at 389 ("Questioning a few more family members and searching for old records can promise less than looking for a needle in a haystack, when a lawyer truly has reason to doubt there is any needle there."). Thus, trial counsel are not required to "investigate every conceivable line of

²⁶Ms. Haas's notes reflected an interview with a Ms. Pearson, whom she thought must have been one of Mahdi's teachers. (App. A001806).

mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing,” *Wiggins*, 539 U.S. at 533, but, rather, must uphold their “duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary,” *Strickland*, 466 U.S. at 691.

Based on the court’s review of the evidence and relevant precedent, and as evidenced by the PCR court’s reversal of its position on this issue after reconsideration, the court finds “fairminded jurists could disagree” that the record here supports the PCR court’s conclusion. *See Richter*, 562 U.S. at 101. However, the PCR court’s decision does not “lie well outside the boundaries of permissible difference of opinion.” *See Tice v. Johnson*, 647 F.3d 87, 108 (4th Cir. 2011) (holding “[m]indful of the deference owed under AEDPA, we will not discern an unreasonable application of federal law unless ‘the state court’s decision lies well outside the boundaries of permissible differences of opinion.’”) (quoting *Goodman v. Bertrand*, 467 F.3d 1022, 1028 (7th Cir. 2006)). Accordingly, granting the PCR court the appropriate latitude and deference, the court finds Mahdi has not shown the PCR court’s determination was contrary to, or an unreasonable application of, clearly established federal law or based on an unreasonable determination of the facts. *See id.* at 105 (“The standards created by *Strickland* and § 2254(d) are both ‘highly deferential,’ and when the two apply in tandem, review is ‘doubly’ so.”) (citations omitted).

Other Allegations of Deficiency

As discussed above, Mahdi did not raise the remaining portions of Ground Two in his PCR appeal, but did raise them in his second PCR application. Thus, they are technically exhausted, but procedurally defaulted. Mahdi advances six theories to overcome the procedural default: (1) the issue presented in Mahdi’s state certiorari petition encompasses all of Ground Two; (2) new

information discovered during federal habeas counsel's investigation has fundamentally altered Ground Two; (3) cause and prejudice under *Martinez*; (4) the court should excuse the default because PCR appellate counsel were required to brief all arguable issues; (5) ineffective assistance of PCR appellate counsel; and (6) failure to hear his claims would constitute a fundamental miscarriage of justice. (*See* ECF No. 113 at 45–52).

The court has already found that Mahdi's state petition for a writ of certiorari presented a narrower claim than presented here and the court has addressed that claim. Accordingly, Mahdi's first argument fails. Mahdi's fourth argument, that PCR appellate counsel were required to brief all arguable issues, relies entirely on state law (*see* ECF No. 113 at 50-51) and has now been denied by the state courts (*see* ECF No. 66-1). Accordingly, it is not a cognizable federal habeas claim. *See Wilson v. Corcoran*, 562 U.S. 1, 5 (2010) (“[I]t is only noncompliance with federal law that renders a State’s criminal judgment susceptible to collateral attack in the federal courts.”); *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (“[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, law, or treaties of the United States.”) (citations omitted).

Regarding Mahdi's fifth argument, the *Martinez* exception does not cover claims of ineffective assistance of PCR appellate counsel. *See Martinez*, 566 U.S. at 16 (expressly declining to “extend [its holding] to attorney errors in any proceeding beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial”); *Davila v. Davis*, ___ U.S. ___, 137 S. Ct. 2058, 2065 (2017) (“Petitioner asks us to extend *Martinez* to allow a federal court to hear a substantial, but procedurally defaulted, claim of ineffective assistance of appellate counsel when

a prisoner's state postconviction counsel provides ineffective assistance by failing to raise that claim. We decline to do so.”).

And, the court is unpersuaded by Mahdi's sixth argument, that failure to hear his claims would constitute a fundamental miscarriage of justice, which he advances in one sentence in a footnote. (*See* ECF No. 113 at 49 n.15). A fundamental miscarriage of justice requires a showing that Mahdi is actually innocent. *See Murray v. Carrier*, 477 U.S. 478, 496 (1986). Here, Mahdi pled guilty and, other than this conclusory sentence in a footnote, has not asserted his innocence.

Cause and Prejudice under *Martinez v. Ryan*

Pursuant to *Martinez*, Mahdi claims he can show cause to excuse the procedural default because his PCR counsel were ineffective for failing to investigate certain evidence uncovered by federal habeas counsel, namely: (1) Mahdi's race-based trauma; (2) Mahdi's physical abuse by his father; (3) Mahdi's father's mental illness and admissions to instilling violence in his children; (4) Mahdi's attempts to get his life together during the summer of 2004, before committing the instant offenses; and (5) Mahdi's grandmother's letters to North Carolina counsel, suggesting South Carolina trial counsel were not engaging with her. (ECF No. 113 at 49-50).

To support his argument, Mahdi offers the affidavit of Samuel Wiita Dworkin, federal habeas counsel's mitigation investigator. (*See* ECF No. 113-1). In their reply and motion to strike, Respondents argue the court cannot properly consider this affidavit under § 2254(e)(2).²⁷ (*See* ECF

²⁷ 28 U.S.C. § 2254(e)(2) states:

If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that - -

(A) the claim relies on - -

No. 123 at 5-9; ECF No. 125 at 1-6). Respondents also note that *Martinez* “does not directly provide the authority for a petitioner to expand the record in order to further develop facts that could have been presented in the state court proceedings.” (ECF No. 125 at 5-6 (quoting *Fielder v. Stevenson*, No. 2:12-cv-412-JMC, 2013 WL 593657, at *6 (D.S.C. Feb. 14, 2013))).

Respondents are correct that “[s]ection 2254(e)(2) sets limits on a petitioner’s ability to expand the record in a federal habeas proceeding. . . . However, courts have held that § 2254(e)(2) does not similarly constrain the court’s discretion to expand the record to establish cause and prejudice to excuse a petitioner’s procedural defaults.” *Fielder*, No. 2:12-cv-412-JMC, 2013 WL 593657, at *3 (citing *Cristin v. Brennan*, 281 F.3d 404, 416 (3d Cir. 2002)). Thus, where a petitioner relies on *Martinez* to show cause and prejudice, a court may find additional evidentiary development necessary to adequately consider whether PCR counsel were deficient and whether prejudice resulted from the errors and may exercise its discretion to expand the record to consider new evidence in that context. The court finds this is one of those cases and grants Mahdi’s request to expand the record with respect to Mr. Dworkin’s affidavit.²⁸ The court notes, however, its consideration of the affidavit extends solely to its evaluation of Mahdi’s assertion of cause and prejudice.

(I) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

²⁸Consequently, the court denies Respondents’ motion to strike (ECF No. 125) as to this exhibit.

Race-Based Trauma

In his affidavit, Mr. Dworkin states his investigation revealed “significant race-based trauma and a racial history story that is a core component of mitigation in [Mahdi’s] case, including knowing who [Mahdi] is, where he comes from, and how the experiences of his, and his family’s, past directly form mitigating information.” (ECF No. 113-1 at 2). Mr. Dworkin’s affidavit goes on to describe Mahdi’s lineage, descending from a relationship between a slave and slave-owner; mention prominent family members; and discuss the family’s roots in an area of pre-Civil War Virginia that experienced racially-motivated violence. *Id.* at 2-3. Mr. Dworkin suggests Mahdi’s prominent familial history, “and the burden that that carries, likely made [Mahdi’s] ‘fall’ so much more devastating” and that Mahdi’s father’s mental illness, and resulting damage to Mahdi, could be seen in Mahdi’s pain at watching his cousins go on to college and become successful. *Id.* at 3-4.

Mr. Dworkin indicates race-based trauma can result in stress reactions, including suicidal ideation. *Id.* at 9. In addition, he avers that race-based trauma can have implications for an individual’s behavior toward authority, something Mr. Dworkin suggests would be worth exploring in this case involving the murder of a white officer by a younger person of color.²⁹ (ECF No. 113-1 at 9). Mr. Dworkin states all of Mahdi’s family history was readily available to trial and PCR counsel, but was not developed or investigated. (ECF No. 113-1 at 2).

²⁹The court notes, as Judge Newman found, that the State had not proven beyond a reasonable doubt that Captain Myers’s murder stemmed from his job as a police officer. In fact, evidence at PCR suggested Mahdi did not know Captain Myers was a police officer until he got into Captain Myers’s truck, after the murder. (*See, e.g.*, App. A001759 (“[Mahdi] said he realized [Captain Myers] was a police officer when he got in the individual’s vehicle that he took from the cabin and he could see it was an unmarked police vehicle.”)). In addition, the court notes nothing in the record suggests Mahdi’s crime was racially motivated. However, the court recognizes the value of presenting a full picture of a petitioner’s history in capital sentencing and PCR proceedings.

The record, however, suggests otherwise. While PCR counsel may not have traced Mahdi's lineage all the way back to 1648, as Mr. Dworkin did, they did present evidence regarding Mahdi's family's history, racial views, and significant experiences with racism, and the very segregated nature of their environment. (*See, e.g.*, App. A00126061 (describing Brunswick County as "very southern, very gracious, very segregated, very entrenched in maintaining that and keeping it that way"); App. A001268 (impact on Mahdi of attending desegregated school and description of desegregation in Virginia); App. A001270 (Nancy Burwell's views of race issues and skin tone); App. A001481 ("[Brunswick County] was a very segregated community"); App. A001484-85 (Burwell family's use of slave terms); App. A001487-89 (Burwell family's attitudes about skin tone); App. A001533-36 (discussion regarding great-great-grandfather who may have gone to Harvard University); App. A001543 (Mahdi's preoccupation with conspiracy theories along racial lines product of father's influence); App. A001571 (Mahdi indicated he reached a point where he stopped listening to his father's rants about racial injustice)). Thus, while PCR counsel did not specifically proffer an argument grounded in race-based trauma, race and its implications for, and impact on, Mahdi and his mixed-race family in rural, segregated Virginia was woven throughout much of the testimony and evidence presented to the state PCR court.

"Effective assistance of appellate counsel 'does not require the presentation of all issues on appeal that may have merit.'" *United States v. Mason*, 774 F.3d 824, 828-29 (4th Cir. 2014) (quoting *Lawrence v. Branker*, 517 F.3d 700, 709 (4th Cir. 2008)). Rather, the court should find ineffective assistance for failure to pursue a claim "only when ignored issues are clearly stronger than those presented." *Smith v. Robbins*, 528 U.S. 259, 288 (2000) (citation omitted). And "[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for

tactical reasons rather than through sheer neglect.” *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003). Mahdi has not provided any information suggesting PCR counsel’s failure to pursue this claim was not strategic and the court cannot find that PCR counsel were deficient for not raising this specific claim in light of a record indicating thorough and zealous representation, including presenting the facts on which this claim would have been based.

Physical Abuse

In an interview with Mr. Dworkin, Nate Burwell, IV, Mahdi’s first cousin, recalled Mahdi’s father, Shareef, beating both Mahdi and Saleem. (*See* ECF No. 113-1 at 6). Neither trial nor PCR counsel interviewed Nate Burwell. However, trial and PCR counsel’s teams did interview Shareef and had continuing contact with Mahdi. It would be “unreasonable to discount to irrelevance the evidence of [Mahdi’s] abusive childhood.” *Porter*, 558 U.S. at 43. However, “[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Strickland*, 466 U.S. at 689. Here, the record shows that counsel and the mitigation team had significant contact with two people who would have known about the abuse—Shareef and Mahdi—and neither disclosed this information. Counsel cannot now be held accountable for information Mahdi and his father, though interviewed, failed to provide at the time of sentencing or PCR proceedings. *See DeCastro v. Branker*, 642 F.3d 442, 456 (4th Cir. 2011) (“Regardless, the state court did not act unreasonably in refusing Petitioner’s attempt to upend his conviction and sentence based on the information that he failed to timely provide to counsel.”).

Shareef

In speaking with Mr. Dworkin, Shareef indicated that race and the family's slave roots were an important part of his identity. (ECF No. 113-1 at 4). He stated he changed his name from Thomas Burwell because, "They don't own us anymore." *Id.* Shareef described ascribing to a Jihadist mentality when the boys were young, imparting those radical views to his sons, and subjecting them to religious and racial rants. *Id.* at 5. Mr. Dworkin also mentions Shareef's mental illness, attempted murder of Vera in front of the boys, and removal of Mahdi from school. *Id.* at 4-5. Shareef stated he failed Mahdi and did not know how either of his sons survived. *Id.* at 5.

Both trial and PCR counsel's mitigation teams interviewed Shareef. However, as discussed above, counsel are not at fault if Shareef failed to provide pertinent information at the time of those interviews. In addition, the court notes that Shareef, although interviewed, did not testify, or provide an affidavit, or otherwise assist counsel at Mahdi's trial or at the PCR hearing. (*See* App. A001811 (Ms. Haas testifying Shareef was more focused on his personal beliefs than providing helpful information about Mahdi); App. A001875 (Mr. Walters testifying Shareef "refused to participate or his position was sort of standoffish and he didn't want to be involved")); Moreover, PCR counsel presented all of the information described in this portion of Mr. Dworkin's affidavit at the evidentiary hearing through other witnesses. (*See, e.g.,* App. A001464 (Shareef depressed, ranting and raving, hatred for white people); App. A001465 (Mahdi had to take care of Shareef and Saleem); App. A001467 (Shareef's home schooling consisted of teaching Mahdi how to be a warrior—"They practiced shooting and using knives and moving about in the countryside as if there was an enemy and how you could distract people and to do whatever you feel you need to do to the enemy. They were being taught that regularly on a daily basis."); App. A001421-23 (Sharon Pond testimony on

Shareef's involuntary commitment to mental health facility); App. A004148 (Douglas Pond stating Shareef became eccentric and radicalized after his conversion to Islam); App. A004149-51 (James Woodley's affidavit describing sending Shareef for mental health treatment and detailing Shareef's attempted murder of Vera)). Thus, Mahdi has failed to show exactly how PCR counsel were deficient in this regard.

Summer 2004

Next, Mr. Dworkin describes Mahdi's activities during the summer of 2004 after he was released from the Virginia Department of Corrections, including applying for food stamps, applying for a job, and making plans to complete his GED and attend a two-year college. (ECF No. 113-1 at 7-8). According to Mr. Dworkin, "These are steps one does not take if they are truly disengaged from society." *Id.* at 8. He suggests these actions show an attempt by Mahdi to break with Shareef's indoctrination and to take his second chance at life outside of prison seriously. *Id.* Mr. Dworkin indicates Mahdi's efforts were thwarted when his support system evaporated—when Shareef moved to Philadelphia and his grandmother and uncle no longer allowed him to live with them. *Id.*

However, while Mahdi may have engaged in these positive activities, the record and Mahdi's own statements to counsel and their experts indicate he also spent that summer attempting to create an artificial drug drought to advance his own drug distribution operation by killing, or arranging the killing of, other drug dealers. (*See, e.g.*, App. A001752-53 (Mahdi told Dr. Martin he had murdered someone in a bad drug deal in Virginia and that he left to avoid homicide detectives); App. A001788-89 (Mahdi told Dr. McKee he left Virginia because there was a rumor he killed someone and that someone had died in a drug deal, but he was not the trigger man); App. A001831-32 (Mahdi told Mr. Grant he left Virginia because he was involved in an incident where someone was killed

or stabbed); App. A001843 (Mahdi told Mr. Walters he wanted to create an artificial drought by killing a number of drug dealers so everyone would have to buy drugs from Mahdi and his associates and, in the process of implementing this plan, someone was killed)). In addition, at sentencing, trial counsel objected to testimony by a State witness that Mahdi was pedaling drugs and “knocking off” young dealers between May and July 2004. (App. A003376, 3386-87).

Thus, trial counsel could have made a reasonable strategic decision not to introduce evidence that Mahdi attempted to re-engage with society after being released from prison, which would have opened the floodgates to the introduction of even more evidence in aggravation, particularly evidence that Mahdi was dealing drugs and may have committed or been involved in another murder. *See Wong v. Belmontes*, 558 U.S. 15, 25 (2009) (“The type of ‘more-evidence-is-better’ approach advocated by Belmontes and the Court of Appeals might seem appealing—after all, what is there to lose? But here there was a lot to lose. A heavyhanded case to portray Belmontes in a positive light, with or without experts, would have invited the strongest possible evidence in rebuttal—the evidence that Belmontes was responsible for not one but two murders.”); *Moody v. Polk*, 408 F.3d 141, 151-52, 154 (4th Cir. 2005) (finding no prejudice where additional evidence was “double-edged,” as likely to harm the petitioner as to help him). Counsel’s choices are presumptively reasonable, *Pinholster*, 131 S.Ct. at 1404, and “there is a strong presumption that [counsel took certain actions] for tactical reasons rather than through sheer neglect.” *Id.* at 1404 (quoting *Strickland*, 466 U.S. at 690). *See also Byram v. Ozmint*, 339 F.3d 203, 209 (4th Cir.2003) (“[R]eview of counsels’ strategic decisions as to which evidence to present at trial is ‘highly deferential,’ and there is a presumption that ‘counsels’ conduct falls within the wide range of reasonable professional assistance.’ “ (quoting *Strickland*, 466 U.S. at 689). The court cannot find

PCR counsel ineffective for failing to raise this meritless issue.

Nancy Burwell's Letters

Mr. Dworkin also offers evidence that Mahdi's trial counsel disengaged from the Burwell family, despite the family's desire to help with the case. (ECF No. 113-1 at 8-9). Specifically, he mentions letters from Nancy Burwell to Mahdi's North Carolina attorneys in 2005 indicating she could not reach South Carolina counsel and felt "idle in the dark." *Id.* Nancy also wrote to North Carolina counsel in March 2006, requesting they prep her for testimony. *Id.* at 9. And, in October 2006, Nancy asked North Carolina counsel to send her the name and phone number of the South Carolina attorney who took over for Mr. Grant. *Id.*

To the extent Mahdi argues PCR counsel should have presented evidence that trial counsel did not adequately engage with Mahdi's family, this claim is without merit. PCR counsel specifically argued that trial counsel did not interview enough family members, did not adequately interview the ones they did interview, and did not maintain contact with the family throughout the investigation. In furtherance of this argument, PCR counsel asked each witness whether and to what extent trial counsel, or their mitigation team, spoke with them. (*See, e.g.*, App. A001294, A001327-28, A001341-42, A001359-60, A001387-88).

Further, if Mahdi's argument is that PCR counsel should have asserted trial counsel were ineffective in failing to maintain contact with Nancy or failing to call her at sentencing, that claim also lacks merit. Trial counsel's mitigation team interviewed Nancy and had enough contact with her that she attended Mahdi's sentencing. Further, it appears trial counsel intended to call Nancy as a witness and spoke with her throughout sentencing to prepare her testimony. However, counsel testified that Nancy continued to focus on her family's accolades and would not get to the meat of

Mahdi's upbringing, or any particularly helpful information, so they made a strategic decision not to call her. (*See* App. A001859-60). Decisions concerning the calling of witnesses are matters of strategy left to the attorney, which ordinarily cannot constitute ineffective assistance. *Jones v. Barnes*, 463 U.S. at 808. *See also* *Byram*, 339 F.3d at 209 (“[R]eview of counsel's strategic decisions as to which evidence to present at trial is ‘highly deferential,’ and there is a presumption that ‘counsel's conduct falls within the wide range of reasonable professional assistance.’ “ (*quoting Strickland*, 466 U.S. at 689)). Again, counsel's choices are presumptively reasonable, *Pinholster*, 131 S.Ct. at 1404, and “there is a strong presumption that [counsel took certain actions] for tactical reasons rather than through sheer neglect.” *Id.* at 1404 (*quoting Strickland*, 466 U.S. at 690). Based on the evidence in the record, there was a reasonable basis to not call Nancy as a witness.

For the foregoing reasons, Mahdi has failed to show that PCR counsel's performance was deficient. Accordingly, Mahdi has failed to show cause under *Martinez* and these portions of Ground Two remain defaulted.

Fundamentally Altered

Finally, Mahdi asserts the new information included in Mr. Dworkin's affidavit fundamentally alters Ground Two such that “it is no longer the same claim that was presented to and adjudicated by the state courts” and is procedurally unexhausted. (ECF No. 113 at 47). New evidence in a federal habeas matter fundamentally alters a claim where the petitioner did not offer any evidence to the state courts supporting the existence of a material fact. *See Winston v. Kelly*, 592 F.3d 535, 550 (4th Cir. 2010) (“Suppose, for example, that a petitioner on federal habeas introduces new evidence to establish the existence of a fact X, a fact required to prove his claim. The claim will inevitably be stronger, regardless of the evidence the petitioner presented to the state courts.

However, if the petitioner presented *no evidence* to the state courts to establish the existence of fact X, the claim will be fundamentally altered by the new evidence presented to the district court.”) (emphasis in original).

Mahdi argues PCR counsel offered no evidence to support claims of race-based trauma or the extent of Shareef’s abuse and, therefore, “no reasonable fact-finder . . . could have found the facts necessary to support [these] claim[s] from the evidence presented to the state courts.” (ECF No. 113 at 48 (quoting *Winston*, 592 F.3d at 551)). However, as discussed above, the evidence in Mr. Dworkin’s affidavit was included, to various degrees, in the PCR evidentiary hearing. Thus, while Mr. Dworkin’s affidavit “has perhaps strengthened [Mahdi’s] claim, . . . it has not ‘fundamentally altered’ it.” *See Gray v. Zook*, 806 F.3d 783, 799 (2015). The heart of the claim remains the same: Mahdi’s trial attorneys should have investigated and presented more mitigating evidence regarding Mahdi’s background. *See id.* Accordingly, Mahdi’s new evidence has not fundamentally altered Ground Two and the claims remain exhausted and subject to deferential review.

Prejudice

The court is keenly aware of the fundamental importance of this matter and the weight of this ground in particular. It has, accordingly, conducted an exhaustive and meticulous review of the record and the parties’ filings. However, it is clear that PCR counsel and the PCR court carefully and thoroughly presented and reviewed this claim. This claim encompassed the bulk of the evidence presented in the three-day evidentiary hearing and ninety-six pages of the PCR Order.³⁰ And, after its own independent review, the court cannot find the PCR court’s decision was contrary to, or an

³⁰The court notes this not as proof of the correctness of the PCR court’s findings, but as evidence of the extent and depth of its consideration of Mahdi’s claims in this ground.

unreasonable application of, Supreme Court precedent, or based on an unreasonable determination of the facts as presented in the state court proceedings.

Further, even if the court accepts as true Mahdi's assertions that the PCR court made erroneous credibility determinations, the mitigating evidence presented at PCR was not cumulative of the sentencing evidence, and trial counsel did not have a reasonable strategic reason for limiting their mitigation presentation, Mahdi has not shown prejudice.

Mahdi contends additional mitigating evidence would have given context to the State's aggravating evidence, humanized Mahdi, and generally influenced Judge Newman's appraisal of Mahdi's culpability such that he could have struck a different balance and imposed a life sentence. (*See* ECF No. 113 at 41-42). The court disagrees. More humanizing information about Mahdi's unstable and troubled childhood, glimpses of his potential from elementary school teachers, and a clearer picture of his father's negative and abusive influence could not counterbalance the overwhelming evidence in aggravation, including: a video of Mahdi shooting a convenience store clerk in the face twice and casually walking out with a beer; evidence that Mahdi shot Captain Myers nine times, set fire to his body, and stole his truck and gun to run from police; Mahdi's statements to police when captured in Florida; Mahdi's extensive history of disciplinary violations in prison, including violence and threats of violence against employees and escape attempts, even when contained in SCDC's most secure unit; and the fact that Mahdi planned to effectuate an escape in Judge Newman's own courtroom.³¹

Further, along with the new mitigating information presented at the PCR evidentiary hearing

³¹There is also evidence of Mahdi's apparent lack of remorse in the record. *See supra* p. 57. *But see also supra* p. 56.

came new aggravating information.³² At least three mental health professionals had diagnosed Mahdi with antisocial personality disorder. (ROA 1899 (Virginia Department of Corrections psychological evaluation diagnosing Mahdi with antisocial personality disorder and intermittent explosive disorder); App. A001700, A001705 (Dr. Schwartz-Watts's diagnoses, including major depression, anxiety disorder, reactive attachment disorder, paranoid personality disorder, and antisocial personality disorder and explanation of antisocial personality disorder); App. A001756 (Dr. Martin's findings)³³; App. A001790 (Dr. McKee's findings)). Mahdi's brother, who grew up

³²The court notes that in the record there is also new additional aggravating information, which was not available at Mahdi's sentencing. For example, the PCR hearing itself had to take place in a parole hearing room at Broad River Correctional Institution, rather than an open courtroom, due to security concerns after Mahdi and another death row inmate brutally assaulted a guard in 2009. (*See* App. 001247; ECF No. 104 at 10 n.11; SCDC Inmate Search Detail Report for Mikal D. Mahdi (listing a disciplinary infraction on December 2, 2009, for Assault and Battery of an Employee with Intent to Kill or Injure), *available at* <https://public.doc.state.sc.us/scdc-public>; *see also* Glenn Smith, Assaulted Lieber Prison Guard Loses Job - Corrections Officer Stabbed 14 Times Unable to Work Due to PTSD, *The Post and Courier* (July 27, 2013), *available at* https://www.postandcourier.com/archives/assaulted-lieber-prison-guard-loses-job-corrections-officer-stabbed-times/article_1b8403dc-b5a8-5ed3-85f1-98f4b46d920d.html). While the court has not included this new information in its current analysis, this information would most likely be presented at any re-sentencing. *See, e.g., United States v. Stitt*, 760 F. Supp. 2d 570, 580 (E.D. Va. 2010) (noting, in the context of a re-sentencing trial in a capital case, that "new evidence in support of a properly drafted aggravating factor . . . is appropriate and acceptable").

³³Dr. Martin's findings seem particularly measured and illuminating:

I believe - - and this is somewhat consistent with what I found in the Carter Center reports is that [Mahdi] had a behavioral problem that led to a lot of failed relationships, interactions that were hostile aggressive, sometimes quite violent in nature, and that he had some depressive issues that were, I believe, to be subsequently recurrent due to failure to integrate into society.

I found that he was a loner; that he had - - He actually attributed a lot of his attitude and outlooks on life to his father almost in a condemning way and that he was essentially becoming a racist militant in his own way. His outlook on life was quite violent. His way of surviving is by force. He seemed to have no difficulty talking about killing people if necessary in order to achieve independence.

under the same circumstances as Mahdi, witnessed the same violence, was subject to the same indoctrination and alleged abuse at the hands of their father, and acted out as a child, went into Job Corps and then the United States Army, rather than embarking on a life of crime and violence. (App. A001524 (Lawanda Burwell testifying Saleem was in the U.S. Army and had served two tours in Afghanistan); App. A001556–58 (Dr. Cooper-Lewter testifying Saleem went into Job Corps)). PCR testimony and exhibits also introduced more evidence of Mahdi’s history and continued exhibition of serious disciplinary infractions, including violence, while incarcerated.³⁴

And the PCR evidence illuminated some new less-than-favorable details about Mahdi’s Virginia–North Carolina–South Carolina–Florida crime spree.³⁵ In particular, the PCR court learned that Mahdi fled from possible murder charges in Virginia after his involvement in a bad drug deal. (*See, e.g.*, App. A001843). Prior to carjacking Mr. Pitts at gunpoint, Mahdi pretended to be

. . . .

And so I put with the information I gathered from the team meetings where he was very manipulative in his family and society making recurrent suicidal threats. I believe even his uncle reportedly had said he does this all the time to get his way; that his ability to follow social norms, adhere to authority was pretty much difficult to impossible at times. So I actually made the diagnosis of antisocial personality disorder for Mr. Mahdi as the primary diagnosis.

(App. A001755-56).

³⁴Mahdi’s complete DJJ records list over forty disciplinary violations, including assaults on teachers, guards, and other incarcerated youth and leading an escape attempt. (*See* PCR Def. Exh. 6, DJJ Discipline Information, App. A007545-862). While incarcerated in the Virginia prison system as an adult, Mahdi assaulted staff and set fire to his cell. (*See* ROA 1865; ROA 1876-2136). Mahdi was also transferred within the Virginia Department of Corrections due to his “continued poor institutional adjustment and increase in security level.” (ROA 1865).

³⁵The following information comes from Mr. Walters’s account of information he learned through conversations with Mahdi and through his investigation.

homeless in order to take advantage of a homeless shelter's facilities and resources. (App. A001845). While staying at the homeless shelter, Mahdi realized a nearby street was used for prostitution at night, so he devised a plan to impersonate a prostitute in order to execute a carjacking. (App. A001845). On his way to Florida, in Captain Myers's truck, Mahdi stopped for gas and somehow rigged a gas pump so that the cashier would not realize he had finished pumping his gas and taken off. (App. A001847). And, when he arrived in Florida, Mahdi put on Captain Myers's uniform and investigated a crime reported by a woman who saw him on the street and assumed he was a real police officer. (App. A001847-48).

The PCR court properly weighed all of this aggravating and mitigating evidence and reasonably concluded the additional evidence offered at PCR did not create a reasonable probability Mahdi would have received a different sentence. (*See* App. A000166-81). Thus, the court cannot find the PCR court's conclusion that Mahdi failed to show prejudice was contrary to, or involved an unreasonable application of, clearly established federal law or was based on an unreasonable determination of the facts.

Further, from this court's own independent review of all of the evidence offered throughout the course of this matter, including the evidence at trial, the evidence at PCR, and the new federal habeas evidence, the court finds the scales remain tipped in the State's favor. The record at every stage has continued to suggest that Mahdi is violent, intelligent, manipulative, and only barely contained within our prison system. On direct appeal, then Chief Justice Toal felt so strongly about this case that she wrote a separate concurring opinion to highlight the "heinous" and "egregious" nature of Mahdi's acts. *See Mahdi v. State*, 678 S.E.2d at 808-09. After reciting the facts of Mahdi's crime, Chief Justice Toal, at that time a twenty-one year veteran of the court, concluded: "In my time

on this Court, I have seen few cases where the extraordinary penalty of death was so deserved.” *Id.* at 809.

Therefore, even assuming that counsel were deficient in all the ways Mahdi alleges, after independently reweighing all of the aggravating and mitigating evidence, the court concludes that, absent the alleged errors, there is no reasonable probability that Judge Newman would have reached a different sentencing decision and the court remains confident in this case’s outcome. *See Strickland*, 466 U.S. at 700 (“Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed.”); *Plath v. Moore*, 130 F.3d 595 (4th Cir. 1997) (finding “when considered against the sheer magnitude of the aggravating evidence against [the petitioner], it is difficult to see the allegedly unreasonable omission of this mitigating evidence as prejudicial”).

Request for an Evidentiary Hearing

The court has granted Mahdi’s request to expand the record and has considered the evidence offered in Mr. Dworkin’s affidavit. However, for the reasons above, Mahdi has failed to show cause and prejudice to excuse the defaulted portions of Ground Two. In addition, Mahdi has not alleged any new facts that would warrant habeas relief if proven. *See Schriro*, 550 U.S. at 474 (“In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition’s factual allegations, which, if true, would entitle the applicant to federal habeas relief.”). Moreover, in this case, Mahdi has already received a full hearing, which included the presentation of the pertinent evidence offered in support of his claims and he has not shown, and the court has not found, any reason to question the fairness of that

hearing. Thus, the court finds no reason to expend additional judicial resources and upend the finality of the state court's determination. Accordingly, the court denies Mahdi's request for an evidentiary hearing on Ground Two.

***GROUND THREE & FOUR – CONSTITUTIONALITY OF SOUTH CAROLINA'S
DEATH PENALTY STATUTE***

In Ground Three, Mahdi claims South Carolina's death penalty statute, S.C. Code Ann. § 16-3-20, is unconstitutional because it automatically precludes jury sentencing following a guilty plea.³⁶ Although this claim was not presented in Mahdi's original PCR application, Mahdi asserts it is appropriate for habeas review because the United States Supreme Court's decision in *Hurst v. Florida*, ___ U.S. ___, 136 S.Ct. 616 (2016), established a new constitutional rule requiring jurors to make all factual findings necessary for imposition of the death penalty and that rule applies retroactively to Mahdi's sentence. Respondents contend *Hurst* did not create a new rule of constitutional law, but was an application of *Ring v. Arizona*, 536 U.S. 584 (2002), to Florida's capital sentencing scheme.

The court previously addressed this issue in its order denying Mahdi's motion to stay (ECF No. 91) and agreed with Respondents, finding "[t]he holding in *Hurst* was not a significant change

³⁶Mahdi first presented this claim in his second PCR application as an independent ground, arguing that the United States Supreme Court's decision in *Hurst v. Florida*, ___ U.S. ___, 136 S.Ct. 616 (2016), announced a new rule of constitutional law that applied retroactively to his death sentence. Mahdi contends the second PCR court decided this claim on the merits. But, Respondents assert the second PCR court dismissed the claim as time-barred and improperly successive on adequate and independent state law grounds. The court will not decide this procedural dispute, but instead addresses this ground on the merits.

in the law as the Supreme Court simply applied prior precedent, its holdings in *Ring* and *Apprendi*,³⁷ to Florida’s capital sentencing statutes.” (ECF No. 91 at 4); *see also Hurst*, 136 S.Ct. at 621–22 (granting certiorari “to resolve whether Florida’s capital sentencing scheme violates the Sixth Amendment in light of *Ring*” and analyzing Florida’s statute under *Ring*’s framework). In addition, the court found the holding in *Hurst* did not apply retroactively. (ECF No. 91 at 4-5 (citing *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004) (holding that “*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review”); *United States v. Sanders*, 247 F.3d 139 (4th Cir. 2001) (holding the new rule announced in *Apprendi* not retroactively applicable to cases on collateral review); *Tyler v. Cain*, 533 U.S. 656, 663 (2001) (holding that a “new rule of constitutional law” is “made retroactive to cases on collateral review by the Supreme Court” only if the Supreme Court holds as much)). Mahdi has not provided the court with reason to alter these findings.

Further, the court finds South Carolina’s capital sentencing procedures have not violated Mahdi’s constitutional rights. In *Ring*, the Supreme Court found that Arizona’s capital sentencing structure violated the Sixth Amendment right to a jury trial in capital prosecutions. Under Arizona’s statute, “following a jury adjudication of a defendant’s guilt of first-degree murder, the trial judge, sitting alone, determine[d] the presence or absence of the aggravating factors required” to impose the death penalty. *Ring*, 536 U.S. at 588. Applying its reasoning from *Apprendi*, the Court found that “[b]ecause Arizona’s enumerated aggravating factors operate as ‘the functional equivalent of an element of a greater offense,’” a defendant has a right to submit those factors to a jury for

³⁷*Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt”).

determination. *Id.* at 609. Thus, *Ring* established that when a defendant exercises his right to a jury trial on a capital offense, he is entitled to have a jury determine any aggravating factors necessary to impose a death sentence.

In *Hurst*, the Court applied its reasoning in *Ring* to Florida’s capital sentencing scheme. In Florida, “[a] person who ha[d] been convicted of a capital felony [would] be punished by death” only if an additional sentencing proceeding “result[d] in findings by the court that such person [would] be punished by death.” Fla. Stat. § 775.082(1) (2010) (amended 2016). Under this statute, if a jury convicted the defendant of a capital felony, a sentencing judge would conduct an evidentiary hearing before the jury and the jury would issue an “‘advisory sentence’ of life or death without specifying the factual basis of its recommendation.” *Hurst*, 136 S.Ct. at 620 (citing Fla. Stat. § 921.141(1)–(2) (2010) (amended 2016)). “Notwithstanding the recommendation of the jury, the court, after weighing the aggravating and mitigating circumstances, [would then] enter a sentence of life imprisonment or death.” Fla. Stat. § 921.141(3) (2010) (amended 2016). Thus, although the court afforded some weight to the jury’s recommendation, “[l]ike Arizona at the time of *Ring*, Florida [did] not require the jury to make the critical findings necessary to impose the death penalty.” *Hurst*, 136 S.Ct. at 622. Because this procedure allowed a judge to increase a defendant’s maximum penalty based on his own factfinding, the Court held *Hurst*’s sentence violated the Sixth Amendment. *Id.*

The South Carolina Supreme Court has distinguished South Carolina’s statute from Arizona’s (and Florida’s) because, in South Carolina, “a defendant convicted by a jury can be sentenced to death only if the jury also finds an aggravating circumstance and recommends the death penalty.” *State v. Downs*, 604 S.E.2d 377, 380 (S.C. 2004); *State v. Wood*, 607 S.E.2d 57, 61 (S.C. 2004). Thus, if a capital defendant in South Carolina exercises his right to a jury trial, a jury must

determine both his guilt and sentence. However, if a capital defendant pleads guilty, and waives his right to a jury trial, *Ring* is not applicable. *See id.* (finding *Ring* “did not involve jury-trial waivers and is not implicated when a defendant pleads guilty” under South Carolina’s death penalty statute); *Lewis v. Wheeler*, 609 F.3d 291, 309 (4th Cir. 2010) (discussing a challenge to Virginia’s capital sentencing scheme, which is functionally equivalent to South Carolina’s,³⁸ and finding *Ring* did not hold “that a defendant who pleads guilty to capital murder and waives a jury trial under the state’s capital sentencing scheme retains a constitutional right to have a jury determine aggravating factors”).

During his colloquy with Judge Newman, Mahdi expressed, under oath, an understanding of his right to a jury trial and sentencing; what that trial and sentencing would require, including the State’s burden of proof; the nature of the charges against him and possible sentences, including death; and that if he pled guilty, Judge Newman would determine his sentence, not a jury. (*See App. A003219–32*). Along with waiving his right to a jury trial (*App. A003227*), Mahdi expressly and voluntarily waived his right to jury sentencing (*App. A003225*). In addition, Mahdi admitted to the facts of the crime as stated by the Solicitor. (*App. A003233-43*).

Mahdi argues that, although he pled guilty to grand larceny and second-degree burglary and admitted to the relevant facts, in order to find the related statutory aggravating circumstances and impose the death penalty, Judge Newman had to find the additional fact that Mahdi murdered Captain Myers while committing these crimes with the use of a deadly weapon. (*ECF No. 75 at 31*).

³⁸Under Virginia’s capital sentencing scheme, when a defendant is charged with a death-eligible offense, the trial court first submits the issue of guilt or innocence to a jury. If the defendant is found guilty, then the same jury decides the penalty. However, if a defendant pleads guilty and waives his right to a jury determination of guilt, a judge conducts the sentencing proceeding alone and determines the existence of any aggravating factors. *See Va. Code Ann. § 19.2-257*.

However, Mahdi specifically admitted to this fact during his guilty plea:

THE COURT: And did you, on or about July 18th, 2004, at around the same time and date as the murder, enter the building belonging to James E. Myers and Amy Tripp Myers without their consent, with intent to commit a crime therein? And while in the building or during the immediate flight or leaving the building, were you armed with a deadly weapon? And did you cause physical injury, including the killing of Mr. Myers with the pistol during this same burglary?

DEFENDANT MAHDI: Yes, sir, Your Honor.

THE COURT: And did you steal the officer's - - the 2003 Dodge Ram truck in the possession of the officer and owned by the City of Orangeburg?

DEFENDANT MAHDI: Yes, sir, Your Honor.

(App. A003243-44).

Mahdi also asserts *Hurst* requires jurors to consider “statutory and non-statutory mitigating factors, the specific circumstances of the crime, [and] the character of the defendant.” (ECF No. 75 at 32). This argument misses the central holding of *Apprendi*, *Ring*, and *Hurst* — juries must find facts necessary to *increase* a defendant’s penalty. These cases do not address mitigation.

Given Mahdi’s voluntary waiver and admission to the relevant facts, judicial sentencing did not violate Mahdi’s Sixth Amendment rights. *See Blakely v. Washington*, 542 U.S. 296, 303, 310 (2004) (holding that under *Apprendi*, a judge may impose any sentence authorized “on the basis of the facts . . . admitted by the defendant” and noting “nothing prevents a defendant from waiving his *Apprendi* rights”). Accordingly, Mahdi’s constitutional challenge to South Carolina’s death penalty statute fails on the merits.

In Ground Four, Mahdi asserts his trial counsel were ineffective for failing to challenge the

constitutionality of South Carolina’s death penalty statute under *Apprendi*, *Ring*, and *Blakely*.³⁹ Having found South Carolina’s death penalty statute constitutionally sound under these standards, the court finds trial counsel were not ineffective for failing to raise a meritless claim.⁴⁰ Accordingly, Mahdi is not entitled to habeas relief on Grounds Three or Four.⁴¹

GROUND FIVE, SIX, & SEVEN – THE GUILTY PLEA

In Grounds Five, Six, and Seven, Mahdi contends he involuntarily pled guilty due to trial counsel’s bad advice (Grounds Five and Six) and that trial counsel were ineffective in failing to object to Judge Newman allegedly penalizing Mahdi for initially exercising his right to a jury trial (Ground Seven).⁴² The Sixth Amendment’s guarantee of effective assistance of counsel applies with

³⁹Mahdi raised this ground in his initial PCR application and, pursuant to *Austin v. State*, 409 S.E.2d 395, in his second PCR application and asserts he can overcome any procedural default under *Martinez v. Ryan*. (ECF No. 75 at 36-37). Because the court decides this claim on the merits, it will not address the parties’ procedural arguments.

⁴⁰This is especially true given the state of the law at the time of Mahdi’s trial. In the two years prior to Mahdi’s trial, the Supreme Court of South Carolina decided three cases expressly finding the death penalty statute constitutional and noting *Ring* was not implicated when a capital defendant pled guilty. *See State v. Crisp*, 608 S.E.2d 429, 432-33 (S.C. 2005); *State v. Downs*, 604 S.E.2d 377, 380 (S.C. 2004); *State v. Wood*, 607 S.E.2d 57, 61 (S.C. 2004).

⁴¹In addition, the court denies Mahdi’s request for an evidentiary hearing on these grounds. The court sees no basis for a hearing on these record-based claims that turn on legal interpretation and Mahdi has failed to show that his claims in Grounds Three and Four rely on “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court” or that “the facts underlying the claim[s] would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense” or would have imposed the death penalty. § 2254(e)(2)(A)(I), (B). Further, regarding Ground Four, Mahdi raised this ground in his original PCR application, had a full opportunity to present any supporting evidence at the PCR evidentiary hearing, and has not alleged the discovery of any new facts since that hearing.

⁴²Mahdi raised Grounds Five and Seven in his initial PCR application and in his second application pursuant to *Austin v. State*, 409 S.E.2d at 395. He only raised Ground Six in his second application. Because the court decides these claims on the merits, it will not address the parties’

equal force to critical pretrial matters, including deciding whether to plead guilty. *See Lafler v. Cooper*, 566 U.S. 156, 165 (2012); *Hill v. Lockhart*, 474 U.S. at 58. *Strickland*'s two-part test governs the court's analysis, but here, the prejudice prong "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill v. Lockhart*, 474 U.S. at 59. "In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* This inquiry "focuses on a defendant's decisionmaking" and does not turn on the outcome of a defendant's actual criminal proceeding or potential outcome had a defendant chosen to proceed to trial. *Lee v. United States.*, __ U.S. __, 137 S.Ct. 1958, 1966 (2017).

Mahdi asserts his trial counsel were ineffective for failing to adequately advise him of the advantages of jury sentencing (Ground Five) and for indicating Judge Newman would consider his guilty plea as mitigating evidence (Ground Six). The court finds Mahdi's assertions are directly contradicted by the record.

After the jury was impaneled, but before it was sworn, Mahdi and Mr. Walters had an ex parte meeting with Judge Newman to inform the court Mahdi was considering pleading guilty. At this meeting, Mr. Walters indicated he and Mahdi had discussed the implications of Mahdi's decision, including the "pluses and minuses" of jury sentencing and Judge Newman's policy of not agreeing to a certain sentence based on a plea:

procedural arguments. However, the court notes its findings here are consistent with the PCR court's findings on Grounds Five and Seven (*see* App. A000080-85) and the court's conclusion that Ground Six lacks merit forecloses Mahdi's argument that its default can be excused under *Martinez*. Thus, under either standard of review, these grounds are subject to summary judgment.

Your Honor, I've discussed with my client options that are available with regards to this case. Mr. Mahdi is very intelligent and in conveying the options to him, of course, he's aware of the fact that there are two phases to a trial, the guilt phase and also the sentencing phase, if it should get to that point.

....

What's been conveyed to Mr. Mahdi is, is that there are no guarantees with regards to either process. We have a jury that's been empanelled [sic] and there are certain pluses and minuses with that jury. And, of course, Mr. Mahdi's in a position where he's saying, well, what about the Judge. And, of course, Your Honor's conveyed from the beginning that there is no policy by this Court that they will agree to a plea or agree to a certain sentence being reduced.

So I've explained to him that there are no guarantees wherever you go. And, of course, he's pondering the issue of whether he should proceed forward with trial or whether he should go in front of Your Honor and plead guilty.

Of course, with the second phase with regards to the sentencing phase, he has been informed that the State will have to put up their case and information and, of course, he'll be allowed to put up information. The question is whether he will do that in front of a jury or whether he will do that in front of a judge. And, again, there are no guarantees and there are pluses and minuses with regards to either option that he pursues.

(App. A003205-06). In addition, Judge Newman reiterated to Mahdi and Mr. Walters his "long-term policy" of considering all of the evidence in a case before determining the outcome, rather than "decid[ing] a case in chambers" based on a guilty plea. (App. A003209).

After this exchange, Mahdi had the rest of the day and the next morning to speak with counsel and his grandmother and think about his decision. (App. A003207-09). In court the next day, Mr. Walters stated he had thoroughly discussed the case with Mahdi and continued to counsel him after the ex parte meeting and again the following morning regarding his decision to plead guilty. (App. A003212). During his plea colloquy, Mahdi indicated that he understood how a jury trial and sentencing would proceed and the rights he was choosing to waive. (App. A003223-27).

Further, Mahdi stated he had enough time to discuss his decision with his attorneys, understood those discussions, and was completely satisfied with his attorneys' services. (App. A003227-29).

Mr. Walters offered additional insight into Mahdi's decision at the PCR evidentiary hearing, stating definitively that they wanted Judge Newman to sentence Mahdi because there was a better chance a judge would be able to remain focused on the issues, even after viewing the videotape of Mahdi murdering Mr. Boggs, and because it was close to Christmas and they were concerned an antsy jury might rush its decision. (App. A001922-23). This is the extent of the evidence in the record regarding conversations between Mahdi and trial counsel regarding the decision to plead guilty. The court finds nothing in this evidence to rebut the presumption that trial counsel provided effective representation and adequately advised Mahdi so that he could make a fully-informed decision to plead guilty.

In his response to the motion for summary judgment, Mahdi suggests for the first time that trial counsel were ineffective for advising him to plead guilty without obtaining a written guarantee that his plea would result in a life sentence. (ECF No. 113 at 64). In support, Mahdi cites to the ABA Guidelines⁴³ and a 2012 affidavit from PCR counsel, Teresa Norris, both of which instruct counsel to be wary of participating in a client's waiver of his trial rights without a written guarantee that death will not be imposed after a guilty plea. *Id.* at 65. However, other than these brief references to advisory authorities, Mahdi offers nothing to overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466

⁴³Mahdi specifically cites to the Commentary to the ABA Guideline 10.9.2, which provides, "If no written guarantee can be obtained that death will not be imposed following a plea of guilty, counsel should be extremely reluctant to participate in a waiver of the client's trial rights." (ECF No. 113 at 65).

U.S. at 689.⁴⁴ Thus, not only is this claim clearly procedurally barred, but Mahdi fails to show counsel's failure to obtain a written plea agreement amounts to constitutional ineffectiveness.

Mahdi also contends trial counsel "affirmatively misadvised" him that Judge Newman would consider his guilty plea in mitigation, leading Mahdi to believe he would not receive a death sentence if he pled guilty. (ECF No. 113 at 68-69). The court finds trial counsel are not at fault for Mahdi's alleged misunderstanding that his guilty plea would automatically preclude a death sentence. The record suggests Mr. Walters explicitly informed Mahdi that pleading guilty did not guarantee a life sentence. (App. A003205-06). Or, at the very least, Mahdi was present when Mr. Walters made this statement to Judge Newman. And, Judge Newman instructed Mahdi that he would decide between the two possible sentences after considering all of the evidence both at the ex parte meeting (App. A003209) and during the plea colloquy (App. A003223 (Mahdi stating he understands that the possible sentences in the case, if Judge Newman accepts his guilty plea, are life without the possibility of parole or death); A003224-25 (expressing understanding of what jury sentencing would entail and voluntarily waiving his right))).

Further, trial counsel's advice was not incorrect. Mr. Koger opened the defense's penalty phase case by pointing to Mahdi's full acceptance of responsibility by admitting guilt. (App. A003251). Judge Newman expressly incorporated the guilty plea into the penalty phase. (App. A003253). In his closing argument, Mr. Walters continued to emphasize Mahdi's acceptance of responsibility and admission of guilt. (App. A003677, 3683, 3684). Counsel argued Judge Newman should consider Mahdi's guilty plea as a nonstatutory mitigating circumstance. (App. A003698).

⁴⁴The court finds these sources fall short of establishing obtaining written sentence guarantees in capital cases as a prevailing professional norm. As discussed earlier, the ABA Guidelines are merely guidelines. *See supra* p. 60.

And, in his sentencing order, Judge Newman stated:

The defendant's guilty plea occurred during the fourth day of his trial following jury selection, but prior to the jury being sworn. This was one day following his attempted escape through the use of a homemade key. In addition, Mr. Mahdi has failed to demonstrate any remorse for his actions at any point in time known to this Court. Therefore, I conclude that no significant weight should be given to this nonstatutory mitigating circumstance and the Court's ultimate decision as to the sentence to be imposed.

(App. A003698-99).

Mahdi asserts this portion of the sentencing order shows Judge Newman not only did not consider Mahdi's guilty plea as mitigating evidence, but actually penalized Mahdi for exercising his right to a jury trial before deciding to plead guilty. The court disagrees. In considering a guilty plea as mitigation for sentencing, the judge is also evaluating the defendant's acceptance of responsibility for his crime. Acceptance of responsibility can also be evidenced through expressions of remorse or actions suggesting a genuine desire to submit to an appropriate penalty or make positive behavioral changes.

Here, Judge Newman considered Mahdi's guilty plea, but in context. Waiting to plead guilty until after the selection of a jury could suggest a decision that is more strategic in nature. And Mahdi's attempted escape one day prior to pleading guilty is inconsistent with an acceptance of responsibility for his crime. Judge Newman, who was in a unique position to assess these factors, did not refuse to consider Mahdi's guilty plea or penalize him for the timing. Instead, he properly assessed how the plea, in context, reflected Mahdi's character and, in particular, his alleged acceptance of responsibility. This is exactly the type of individualized consideration required in capital sentencing. *See Lockett v. Ohio*, 438 U.S. 586, 605 (1978) ("Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the

conclusion that an individualized decision is essential in capital cases.”).

The Supreme Court has cautioned that, because “the strong societal interest in finality has ‘special force with respect to convictions based on guilty pleas,’ . . . [c]ourts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for an attorney’s deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant’s expressed preferences.” *Lee*, 137 S.Ct. at 1967 (quoting *United States v. Timmreck*, 441 U.S. 780, 784 (1979)). Having carefully considered the contemporaneous record evidence, the court finds Mahdi has failed to show deficiency or prejudice under *Strickland* and *Hill*.

To support Grounds Five through Seven, Mahdi has requested an evidentiary hearing “regarding the facts and circumstances that led to Mr. Mahdi pleading guilty, including the nature and extent of the advice provided to Mr. Mahdi by his trial counsel.” (ECF No. 113 at 70). However, although presented with the opportunity, Mahdi did not offer evidence supporting Grounds Five and Seven in state court. And, he offers none now. Mahdi has not supported any of his conclusory allegations in these grounds with evidence, such as affidavits from previous counsel or from Mahdi himself regarding communications surrounding the decision to plead guilty.⁴⁵

⁴⁵Mahdi does provide two affidavits from his PCR counsel, both of which state that *Lafler v. Cooper*, 566 U.S. 156 (2012), and *Missouri v. Frye*, 566 U.S. 134 (2012), were decided after the evidentiary hearing, but before the PCR court’s order of dismissal, that PCR counsel did not discuss moving to re-open the evidentiary hearing or otherwise supplement the record after those decisions, and that counsel did not discuss *Lafler* or *Frye* with Mahdi. (ECF Nos. 113-4, 113-5). These affidavits hint at allegations of ineffective assistance of PCR counsel. However, because the court decides these claims on the merits, it does not reach the issue of cause and prejudice to excuse default. Moreover, the Supreme Court has not held that the holdings in these cases established a new right retroactively applicable to cases on collateral review, and these cases are distinguishable as they involved the rejection of a plea offer, which is inapplicable to Mahdi’s case as there were no plea negotiations (ROA 1355-56). See *Lafler*, 566 U. S. at 172 (holding that Sixth Amendment right to counsel is violated when a defendant receives a harsher sentence as a result of counsel’s deficient advice to reject a plea bargain); *Frye*, 566 U.S. at 147 (holding that Sixth Amendment right to

Further, Mahdi has not alleged specific facts he could bring to light through an evidentiary hearing that would contradict the record evidence or alter the court's analysis of these issues. *See Schriro v. Landrigan*, 550 U.S. 465, 474 (2007) ("In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief."). In addition, because Mahdi has failed to show his defaulted claims in Ground Six are substantial, he is not entitled to an evidentiary hearing on those claims. Accordingly, the court finds Mahdi is not entitled to relief on Grounds Five, Six, and Seven and denies Mahdi's request for an evidentiary hearing on these grounds.

CONCLUSION

After a thorough review of the record and the filings in this case pursuant to the standards set forth above, the court finds Mahdi's Petition without merit. Accordingly, Respondents' motion for summary judgment (ECF No. 105) is **GRANTED**; Respondents' motion to strike (ECF No. 125) is **GRANTED in part AND DENIED in part**; and the Petition (ECF No. 75) is **DENIED with prejudice**.

A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A prisoner satisfies this standard by demonstrating that reasonable jurists would find both that his constitutional claims are debatable and that any dispositive procedural rulings by the district court are also debatable or wrong. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *Rose v. Lee*, 252 F.3d 676, 683 (4th Cir. 2001). In the instant

counsel is violated when counsel failed to inform the defendant of a plea offer from the government). Accordingly, Respondents' motion to strike (ECF No. 125) is granted as to these two exhibits.

matter, the court finds that Petitioner has failed to make “a substantial showing of the denial of a constitutional right.” Accordingly, the court declines to issue a certificate of appealability.

IT IS SO ORDERED.

s/Timothy M. Cain
United States District Judge

September 24, 2018
Anderson, South Carolina

ATTACHMENT NO. 3

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

JAN 21 2015

APPEAL FROM CALHOUN COUNTY
Court of Common Pleas

S.C. Supreme Court

Doyet A. Early, III, Circuit Court Judge

Case No. 2014- 002131

Mikal D. Mahdi, #5238

Petitioner,

v.

State of South Carolina,

Respondent.

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QUESTION PRESENTED

Was Petitioner denied the effective assistance of counsel at his capital sentencing proceeding by trial counsel's decision to rely entirely on a single expert witness to present mitigating evidence about petitioner's background instead of calling available lay witnesses who could have provided detailed and specific testimony in mitigation?

STATEMENT OF THE CASE

On June 21, 2004, Petitioner, Mikal D. Mahdi, was arrested in Florida on a fugitive from justice warrant. Mahdi waived extradition, was returned to South Carolina, and was charged with the murder of James E. Myers, grand larceny, and burglary. On August 23, 2004, Mahdi was indicted by the Calhoun County grand jury for murder, second degree burglary, and grand larceny. The State sought the death penalty, and this Court assigned the case to the Honorable Clifton Newman, Circuit Court Judge.

On November 30, 2006, Mahdi pleaded guilty to all charges. From December 4-6, 2006, Judge Newman conducted a sentencing hearing without a jury. Following that hearing, on December 8, 2006, Judge Newman issued a written sentencing order and sentenced Mahdi to death for murder, 15 years for burglary, and 10 years for grand larceny. On direct appeal, his sentence was affirmed by this Court on June 15, 2009. *Mahdi v. State*, 383 S.C. 135, 678 S.E.2d 807 (2009); A000193.

On June 23, 2009, Mahdi filed a Motion for Stay of Execution before this Court to pursue potential post-conviction relief ("PCR") remedies. On July 23, 2009, this Court issued an Order granting the stay and assigned the Honorable Doyet A. Early, III, Circuit Court Judge, to hear Mahdi's PCR application.

Mahdi filed a *pro se* PCR application on August 18, 2009, prior to the appointment of PCR counsel. The PCR application was amended twice with the assistance of counsel, with a Final Application filed on July 29, 2010. (A000231;

A000235.) On March 3, 2011, Mahdi moved to amend the Final Application to add one additional allegation, which Judge Early granted. (A000456.)

In the Final Amended Application, Mahdi alleged six grounds for PCR: 1) his trial counsel failed to object when the judge improperly based Mahdi's death sentence on his decision to invoke his right to a jury trial; 2) his trial counsel failed to adequately advise him of the advantages of jury sentencing; 3) his trial counsel failed to adequately investigate and present mitigation evidence; 4) his counsel failed to assert that his death sentence violates the Eighth Amendment of the United States Constitution; 5) his sentence violates the Eighth Amendment because he is developmentally disabled; and 6) his counsel failed to assert that South Carolina Code § 16-3-20 is unconstitutional. (A000458.)

An evidentiary hearing was held on March 9 to 11, 2011, and on December 18, 2012, Judge Early issued an Order of Dismissal, filed January 8, 2013, denying and dismissing the allegations of the Final Amended Application with prejudice. (A000010.) On January 28, 2013, Mahdi filed a notice of appeal.

The State subsequently filed a Rule 59(e), SCRCP, Motion to Alter or Amend one of the findings in the Order of Dismissal.¹ (A000786.) Judge Early heard arguments on the State's Rule 59 Motion on February 11, 2013. On August 18, 2014, Judge Early granted the State's Rule 59 Motion and entered an Amended Order of Dismissal, filed August 20, 2014, denying and dismissing the allegations of the Final Application with prejudice (the "Amended Order"). (A000059.) On August 27, 2014, Mahdi filed a Rule 59(e), SCRCP, Motion to Alter or Amend the Judgment. (A000257.) Judge Early denied

¹ The State also filed a Motion to Stay the appeal and remand to the circuit court for a ruling on the State's Rule 59(e), SCRCP, Motion. On March 4, 2013, this Court dismissed Mahdi's notice of appeal without prejudice.

Mahdi's Rule 59 Motion on September 9, 2014. (A000192.) On October 8, 2014, the Notice of Appeal was timely filed with this Court. (A000548.)

Mahdi now seeks a writ of certiorari to review the denial of his application for post-conviction relief with respect to the third ground of his application -- the allegation that trial counsel failed to adequately investigate and present mitigation evidence.

STATEMENT OF FACTS

A. The Offense

On July 14, 2004, Mahdi, who was living in Virginia, stole a pistol from the home of Amanda Weaver. (Sent. Tr. A003458-3487.) Mahdi then stole a car and drove south towards Florida. On July 15, 2004, in North Carolina, Mahdi robbed a gas station, shooting the store clerk. Mahdi continued south to South Carolina. Mahdi carjacked the car of Corey Pitts at a traffic light on July 17, 2004. After stealing Pitts's car, Mahdi drove to Calhoun County, abandoned the car, and went on foot to the work shed of James E. Myers, a Captain in the Orangeburg Department of Public Safety. On June 18, 2014, when Captain Myers came to his shed, Mahdi shot and killed him. Mahdi then drove Captain Myers' Dodge truck to Satellite Beach, Florida, where he was arrested.

B. The Guilty Plea

Mahdi was arrested on July 21, 2004, in Florida. He was extradited to South Carolina and charged with Myers's murder, grand larceny of Myers's truck, and burglarizing Myers's work shed. On November 26, 2006, jury selection began before Judge Newman in the Calhoun Court of General Sessions. After jury selection was completed on November 29, 2006, Mahdi waived his right to a jury trial and changed his plea to guilty. (Am. Op. A000060; Sent. Tr. A003218-44.) On November 30, 2006, Mahdi entered his guilty plea to murder, grand larceny over \$5,000, and burglary in the

second degree. (*Id.*) Judge Newman found Mahdi competent to plead guilty, and accepted Mahdi's guilty pleas as to all charges. (*Id.*)

C. The Sentencing Proceeding

Following Mahdi's guilty plea, Judge Newman conducted a three-day sentencing proceeding that commenced on December 4, 2006. The State presented testimony from 28 witnesses: fact witnesses to the crimes to which Mahdi pled guilty, witnesses who testified to Mahdi's character and prior bad acts, and victim impact witnesses testifying to the loss of James Myers.

Mahdi's counsel called only two witnesses. James Aiken, an expert witness, testified to Mahdi's adaptability to prison. (Sent. Tr. A003580-614.) Marjorie Hammock, a clinical social worker, presented a "biopsychosocial assessment" of Mahdi. (Sent. Tr. A003615-39.) Ms. Hammock testified that she had interviewed Mahdi's paternal grandmother, Rose Burwell; his paternal uncles, Carson and Nathan Burwell; his aunt-in law, Lawanda Burwell; his mother, Vera Mahdi; and his maternal aunts, Corlis Ardis and Sophia Gee. (Sent. Tr. A003622-23.) Hammock added that she had also reviewed a synopsis of his school records and a report on his mental health from his voluntary admission to a hospital in Baltimore. (Sent. Tr. A003623.) Based on this information, Ms. Hammock testified generally about Mahdi's experiences in school, where he was a below-average student and had low self-esteem, and his upbringing generally. Her testimony on these subjects spanned just 24 pages in the trial transcript.

Judge Newman read his sentencing order into the record on December 8, 2014. Judge Newman found that the state had proved two statutory aggravating factors: 1) that the murder was committed during the commission of grand larceny; and 2) that the murder was committed during the commission of a burglary. (Sent. Or. A008588.)

Judge Newman also found that the State had failed to prove beyond a reasonable doubt that Mahdi committed the murder during an armed robbery and that Captain Myers was killed because he was a police officer. (Sent. Or. A008558-9)

Judge Newman further found that Mahdi had committed prior and subsequent bad acts, which showed his bad character, including housebreaking, stealing guns, robbery, selling crack cocaine, vandalism, and wounding of another human being. He concluded that the state had established Mahdi's bad character and propensities by clear and convincing evidence, but did not consider the evidence as proof of any aggravating circumstance. (Sent. Or. A008559-61.)

Judge Newman considered the statutory mitigating circumstance of Mahdi's youth, but did not afford it great weight, noting that Mahdi "began his criminal career at an early age," was experienced in the world of crime, and, therefore, was "well aware of the severity of his crimes and the possible consequences." (Sent. Or. A008561-2.)

Judge Newman also considered non-statutory mitigating circumstances. Judge Newman first addressed "what the defense contends to be the Defendant's turbulent and transient childhood and upbringing." (Sent. Or. A008562.) In doing so, he noted that there was no testimony from his clinical social worker that he had suffered any physical or sexual abuse. (*Id.*)

He then noted that Virginia Department of Juvenile Justice Records indicated that Mahdi's father and other family members "continually expressed great care and concern for his well-being." (*Id.*) He concluded "while Mr. Mahdi's family life may have been less than ideal particularly without the presence of a loving and caring mother, I do not believe that his difficult childhood and family life contributed in any significant way to

his senseless criminal activities.” (*Id.*)

Judge Newman also considered the argument that Mahdi would be adaptable to prison life as testified to by James Aiken, the prison adaptability expert. Judge Newman observed that Mahdi had been disruptive while incarcerated, had threatened to kill prison employees, had maintained weapons and other contraband in his cell and had smuggled a homemade hand cuff key into the courthouse. As a result, Judge Newman concluded that Mahdi was not sufficiently adaptable to prison life for this nonstatutory mitigating circumstance to be given any significant weight. (Sent. Or. A008562-3.) Finally, Judge Newman declined to give significant weight to Mahdi’s decision to plead guilty. (Sent. Or. A008563.) Judge Newman explained that Mahdi had no remorse for his actions, as evidenced by the fact that Mahdi had smuggled the key into the courthouse in an attempt to escape. (Sent. Or. A008563.)

Stating that his judicial commitment “has been to temper justice with mercy and to seek to find the humanity in every defendant that I sentence,” Judge Newman nonetheless sentenced Mahdi to death, finding that a “sense of humanity seems not to exist” in Mahdi. (Sent. Or. A008565.)

D. The PCR Proceedings

Following the filing of Mahdi’s Final Amended Application, a PCR hearing was held on March 9 to 11, 2011. At the PCR hearing, Mahdi presented evidence from family members, members of the community and additional experts, humanizing Mahdi in a way that his sentencing proceeding did not.

1. Mahdi’s Family and Upbringing

At his sentencing, not a single member of Mahdi’s family testified on his behalf, and only his grandmother Nancy Burwell was in the courtroom. (PCR Tr. A001251.) At

his PCR hearing, Mahdi presented testimony from his uncle, Carson Burwell; his aunt, Rose Marie Gupton; his aunt, Sophia Gee; and his paternal aunt, Lawanda Burwell. Far from the “less than ideal” upbringing described by Judge Newman, Mahdi’s family described the abusive, troubled relationship into which Mahdi was born and the fractured, abusive upbringing that resulted.

Mahdi’s mother, Vera, married his father Shareef (who was 23 years old) at the age of 14. (PCR Tr. A001322.) Shareef was an angry, radical person, according to his brother Carson. (PCR Tr. A001273.) He was abusive towards Mahdi’s mother, and at one point, Mahdi and his brother Saleem witnessed their father pull their mother by the hair and slam her into a glass table. (PCR Tr. A004190.) When Mahdi pled with him to stop, his father told him to “shut up” and accused him of being “soft.” (*Id.*)

As Mahdi’s maternal aunts Sophia and Rose explained, Vera was forced to flee the abusive relationship when Mahdi was only four or five years old. (PCR Tr. A003711-2.) She told Shareef that she was taking Mahdi and his brother Saleem. Shareef told her that he would kill Mahdi and Saleem before letting her flee with them. (PCR Tr. A001326, A001335-6.) Vera fled without the children, who were later told that she fled because she did not love them. (PCR Tr. A001337.) Shareef did not allow Vera to visit her sons and eventually told them that Vera was dead. (PCR Tr. A001339)

Having forced his wife to flee, Shareef became a single parent for his two sons, a job for which he was entirely unequipped. As his brother Carson testified, Shareef was depressed, constantly moving, and unable to keep a job. (PCR Tr. A001279.) He left the boys completely unsupervised, and Mahdi was forced to care for himself. (*Id.*) Shareef exhibited no regard for his sons’ stability, and moved them constantly from school to

school. Mahdi attended five schools during first and second grade and was unable to make any progress academically or socially. (Mikhal Madhi Social Assessment, A004193.)

Because Shareef could not care for his sons, Saleem went to Texas to live with relatives, and Mahdi was sent to Baltimore to live with his uncle and aunt, Carson and Lawanda Burwell, when he was eight. (PCR Tr. A001282.) While in school in Baltimore, Mahdi exhibited suicidal ideas, for which school officials recommended psychiatric treatment that he did not receive. (PCR Tr. A001286; Carson Burwell Ex. 9, A004159.) Things got worse from there.

The summer after Mahdi left to live with Carson and Lawanda in Baltimore, he returned to Virginia to spend a month with his father. He learned that his mother was in fact alive. His father, Shareef, used Mahdi and his brother as bait to see Vera. When Shareef saw Vera, he immediately started to abuse and threaten her in front of his sons. Shareef then took Vera to the woods and assaulted her. She was only able to escape Shareef with outside intervention. (PCR Tr. A001441, Woodley Aff. at ¶7, A004150.) At the age of nine, after staying with his father for a month, Mahdi returned to live with Lawanda and Carson. Mahdi again started making suicidal statements and was admitted into a psychiatric hospital, where he told a psychiatrist that he wanted to jump off a bridge. (Mikal Mahdi Social History Assessment, A004197.)

From there, Mahdi spiraled downhill. At 14, he was arrested for grand larceny. He spent 86% of his life from ages 14 to 21 in jail. (PCR Tr. A001608.)

2. Community Members

At the PCR hearing, Mahdi also presented the testimony of a number of non-family, lay witnesses. Those witnesses included Mahdi's teachers (Myra Harris and Carol

Wilson), his elementary school principal Dora Wynn (by affidavit) and various community members, including George Smith and Sharon Pond. All had been available to testify at sentencing but were never interviewed by trial counsel. Mahdi also offered testimony by affidavit from Sheriff James Woodley, a witness for the State at the sentencing hearing who, like the other community member witnesses, was never interviewed by trial counsel. These witnesses provided detailed testimony about Mahdi's educational potential and how Mahdi's father quashed that potential. In addition, these lay witnesses offered specific examples of crazed and violently abusive behavior by Mahdi's father. That testimony established that Shareef Mahdi had a pathological hatred of white people that affected his behavior generally and his supervision of Mikal Mahdi, in particular. The testimony also revealed the violent abuse that Mikal Mahdi witnessed, including his father's attempt to murder his mother in front of him.

3. The PCR Decision

With respect to Mahdi's allegation that trial counsel was ineffective for failing to present testimony from family and community members, Judge Early found that counsels' decision not to present such testimony was neither deficient nor prejudicial because "basically the same information" was introduced through the defense expert, Ms. Hammock, and her exhibits. (PCR Tr. A001295, A001351-53.) Accordingly, Judge Early denied relief.

ARGUMENT

The State's evidence at sentencing focused on the lurid facts of Mahdi's crimes, their effects on the victim and the victim's family, and Mahdi's apparent lack of remorse and misconduct while incarcerated. Defense counsel at trial had the opportunity to present a completely different picture of Mahdi but failed to do so. As the PCR hearing

demonstrated, there were available witnesses who could have offered compelling, first-person testimony of the potential that Mikal Mahdi had as a young boy and how that potential was quashed and twisted by his deranged and abusive father. Trial counsel did not even interview non-family members as witnesses; as a result, they missed the opportunity to provide evidence from, among others, Mahdi's teachers, who could have explained the heartbreaking details of his childhood, and other community members, who could have testified about his father's violence. Instead, trial counsel relied entirely on a summary expert witness to present Mahdi's social history. That witness (Marjorie Hammock, a social worker) offered only vague conclusions and none of the rich detail of first-hand observations that would have made an impact on the sentencing judge. The sterile, two-page timeline that she submitted (A007543) was no substitute for such testimony.

In short, trial counsel was deficient for failing adequately to investigate an entire category of witnesses (non-family members) and failing to present the mitigating testimony that several of them would have offered. The PCR record established that these witnesses were available and that there were no strategic reasons for not calling them. Moreover, the failure to present this testimony was prejudicial to Mahdi because its absence meant that a powerful mitigating factor was inadequately presented. Had this evidence been before the sentencing judge – who found no mitigating factors worth any significant weight and who sought “to find the humanity in every defendant” but concluded that “sense of humanity seems not [to] exist in Mikal Deen Mahdi,” (Sent. Or. A008565) – there is a reasonable probability that the sentencing verdict would have been different. Accordingly, the PCR Court erred in denying Mahdi's claim for relief for

ineffective assistance of counsel.

A. Trial Counsel Were Ineffective Because of Their Failure to Develop and Present Mitigating Evidence

In reviewing the Circuit Court's findings, this Court must reverse the PCR judge's decision when there is no evidence of probative value supporting it. *Palacio v. State*, 333 S.C. 506, 512, 511 S.E.2d 62, 65 (1999); *see also Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989). The Court must also reverse the PCR judge's decision when it is controlled by an error of law. *Pierce v. State*, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000).

The test for a Sixth Amendment claim of ineffective assistance of counsel is "whether counsels' conduct so undermined the proper functioning of the adversarial process that one cannot rely upon the trial as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). The *Strickland* standard is satisfied if a petitioner establishes both that his attorneys' representation "fell below an objective standard of reasonableness" measured "under prevailing professional norms," *id.* at 688, and that the petitioner was "prejudiced" by his attorneys' substandard performance, *id.* at 692. The focus is upon "reasonable probability," such that "[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.* at 694. *See also Wiggins v. Smith*, 539 U.S. 510, 537 (2003) (petitioner must show "there is a reasonable probability that at least one juror would have struck a difference balance"); *Council v. State*, 380 S.C. 159, 179 n.7, 670 S.E.2d 356, 366 n.7 (2008) ("We cannot say beyond a reasonable doubt that the undiscovered mitigating evidence, taken as a whole, would not have influenced at least one juror to recommend a life sentence").

1. Trial Counsel's Performance Was Deficient

In the context of a capital sentencing, reasonable representation requires “thoroughly investigating and presenting mitigating evidence.” *Weik v. State*, 409 S.C. 214, 234, 761 S.E.2d 757, 767 (2014). As this Court noted, a proper mitigation investigation must include the defendant’s social history. *Id.* In addition, how that history is presented matters as much as what is presented – a vague or general overview of the defendant’s background that fails to convey the true nature or degree of the mitigating circumstances may be constitutionally ineffective, for that reason alone. *Id.* at 19.

In this case, the only evidence that trial counsel presented of Mahdi’s tortured social and family history was the expert testimony of social worker Marjorie Hammock. Hammock had no firsthand knowledge of Mahdi’s past and her substantive testimony (which comprises only 24 pages of transcript) is correspondingly general and colorless. Thus, while Hammock described Mahdi as having “a lot of chaos in his life,” (Sent. Tr. A003625), having witnessed “a great deal of conflict” between his parents, (Sent. Tr. A003627), and having “constantly ha[d] difficulty in school,” (Sent. Tr. A003628), she could offer no details, examples, or specific stories to illustrate her points. As a result, her testimony lacked force, so much so that the State did not even bother to cross-examine her. (*Id.* at A003629.)

Trial counsel could have and should have done more. Specifically, while expert witnesses are important, experts often speak only “in generalities that lack [] any details of the severe abuse and abject poverty” of a defendant’s “formative years.” *Sowell v. Anderson*, 663 F.3d 783, 795 (6th Cir. 2011). In contrast, family members and other lay witnesses can offer “first-hand, eyewitness accounts of specific examples of extreme

poverty and abuse. These specifics ha[ve] far more evidentiary power than the abstractions and oblique references” often contained in expert reports and testimony. *Id.* See also *Powell v. Collins*, 332 F.3d 376, 400 (6th Cir. 1987) (Family members and friends should testify to “first-hand accounts from those who [know] [the defendant] best”). The PCR court, therefore, erred when it concluded that trial counsel’s performance was not deficient because “[t]he forensic social worker [Hammond] presented through her testimony and the exhibits introduced through her basically the same information before Judge Newman [as] presented at PCR through Mahdi’s extended family and community members.” See Am. Op. at A000114; *Weik*, 409 S.C. at 235 (trial counsel ineffective for presenting defendant’s social history exclusively through an expert who could provide only testimony “which was general, vague, and offered no detail or insight into the degree of abuse [defendant] suffered as a child.”)

Mahdi’s mitigation case lacked such evidentiary detail because trial counsel unreasonably limited their investigation of Mahdi’s background to focus almost exclusively on family members. (PCR Tr. A001851-3.) As evidence at the PCR hearing revealed, several non-family witnesses who could have provided powerful evidence were available to testify but were not even contacted by the defense team.

a. Available, Uncalled Witnesses, Such as Mahdi’s Teachers, Would Have Offered Important Mitigation Testimony.

At sentencing, trial counsel introduced a one-page chart entitled “School Experience Summary” which merely listed the schools attended with brief summary notations of Mahdi’s performance at each one. (School Experience Summary, A007515) Based on her review of those records, Ms. Hammock testified that “his education was disrupted many times,” (Sent. Tr. A003632), but could offer no detail or narratives about

Mahdi's education.

i. Myra Ramsey Harris

Myra Ramsey Harris was Mahdi's third-grade teacher. (PCR Tr. A001348.) Harris was never contacted by trial counsel and thus, although available and willing to do so, did not testify at Mahdi's sentencing hearing. (PCR Tr. A001359-60.)

Harris did testify at the PCR hearing. There, she explained that when Mahdi entered her class, he was at first "withdrawn," but his socialization improved and she "developed a relationship with him where we would sit and talk." (PCR Tr. A001351.) Notably, during third grade, Mahdi lived with his aunt and uncle in Baltimore and not with his father. Removed from the harmful effects of his father's supervision and assisted by the supportive environment of Ms. Harris's classroom, Mahdi began to thrive. As Ms. Harris testified at PCR:

Q And did you hug Mikal - -

A Yes, I did.

Q -- when you were his teacher? Did he hug you back?

A Not at first, no. He was not the easiest one to get a hug from, but because the environment was warm and friendly and he saw others, eventually, yes, we were able to do that.

(PCR Tr. A001353.)

Over the course of the school year, Mahdi's progress was significant:

Q Do you recall Mikal's general demeanor when he came to you at the beginning?

A Yea. Removed, you known, solemn.

Q And how was it at the end of the year with you?

A He was smiling. He was your typical young -- getting ready to enter into fourth grade. He had some friends and, you know, he was just like all the rest of the kids. There was nothing different.

Q Do you recall what your final observations of Mikal were in his records?

A I believe that he received grades that reflected his performance on grade level testing as well as behaviorally because one of the things was reward in my classroom the student who do achieve, and, so, therefore, he responded to that very well. When you gave him compliments he worked to continue to get those compliments, and, so, he was definitely a success – success story.

Q Was he sort of leaps and bounds from what he had been when he came to you?

A Very much so.

(PCR Tr. A001356.)

ii. Carol Wilson

The progress that Mahdi made in third grade was lost when family members sent him back to his father in Brunswick County, Virginia. Carol Wilson was Mahdi's fifth-grade teacher there, (PCR Tr. A001367), and, like Harris, was willing and available to testify at sentencing but never contacted by the defense team. (PCR Tr. A001387.)

At the PCR hearing, Wilson provided a grim description of Mahdi's condition at the start of that school year, when he was under his father's care:

– very significant and excessive self-blame, poor impulse control, and excessive resistance. He has also exhibited periods of extreme sadness at times.

(PCR Tr. A001373.)

At the same time, the evidence at the PCR hearing established that Ms. Wilson was a special education teacher who was equipped to give Mahdi the assistance that he needed in order to overcome his dysfunctional family situation. Her PCR testimony vividly illustrated how Mahdi's father thwarted her efforts from the start. As she explained, Mahdi's father disrupted the very first school assessment team meeting that

was called to determine what special education services Mahdi might need:

When [the school psychologist] read his psychological findings [Mahdi's father] became very angry and [the director of pupil personnel] and [the principal] tried to calm him down because the meeting wasn't even half over and he got up and he cursed us and he left because [the psychologist] is Caucasian and [Mahdi's father] said he didn't want any white man writing any negative reports about his son.

(PCR Tr. A001371.)

Ms. Wilson further testified that Mahdi's father refused to permit Mahdi to receive recommended mental health counseling. (PCR Tr. A001379.) Ms. Wilson nonetheless recognized that "Mahdi had the ability to go ahead and do well, even to excel." (PCR Tr. A001382.) However, his profound sadness and depression made it difficult for him to progress. She testified:

Q When Mikal joined your class do you have any specific memory of what he was like early on?

A Yes. I will never forget him. He did like to draw and he was able to do well, but it came a point of time that I had to sit him next to me in order for him to get his work done. He was never disrespectful. The thing that I noticed about Mikal was that he was depressed and he was very sad.

(*Id.*)

That sadness and depression made it difficult for Ms. Wilson to help Mahdi and, as she testified, her efforts were hampered by Mahdi's father:

A I just felt that it was very hard for me to approach him. I felt that he did not trust. I wanted to help him as much as I could. See, what made it difficult a little bit, too, is that Mr. Mahdi – Mikal's father – would request to come in and observe my classroom.

Q And what would happen then?

A Then I think that Mikal was sort of tight. I don't know if he was nervous, but that didn't last too long because Ms. Wynn

[the principal] did put a stop to it, but I felt he was flat. I felt Mikal – You couldn't get any real like joy out of him, any interest, any motivation. He was just like always to his self and quiet, little interaction with the other students. He was not a behavior problem. I just had him next to me to keep him on task, but he was never disrespectful or anything like that.

Q So, even though he had come to you having problems in classes, with you he wasn't a behavior problem?

A No. I think it was the depression that just kept him very low key.

(PCR Tr. A001384.)

Mahdi made a powerful impression on Ms. Wilson. As she explained at the PCR hearing:

Q How is it that you are able to recall Mikal so clearly after all of these years of students? Did he stand out in some way to you?

A From the time that I started teaching in '84 – and even taught at a prison up through '06 – I will never forget Mikal. He just – I felt that we could have help [sic] him because really and truly Mr. Vecker [the school psychologist] really wanted to help Mikal and I just feel so lost about the fact that I wasn't able to materialize because after Mikal was just I felt he was sort of yanked out of my class by his dad and I would see his dad and his dad would say, Look, I am homeschooling him, you know.

(PCR Tr. A001385.) Of course, Mahdi never was home-schooled, (Woodley Aff. ¶ 10, A004150); instead, in Ms. Wilson's words, "he just got lost in the cracks." (PCR Tr. A001386.)

Finally, Ms. Wilson described an incident which illustrated how ill-suited Mahdi's father was to supervise children. While working as a substitute fifth-grade teacher, Mahdi's father "told the girls to get fitted for birth control, use condoms, don't have illegitimate children and get on welfare." (*Id.*)

b. Other Community Members Also Would Have Provided Powerful Mitigating Information

i. George Smith

George Smith was a lifelong resident of Brunswick County who could have provided further testimony of specific bizarre and violent behavior by Mahdi's father. Smith was willing and available to testify at sentencing, but was never contacted by trial counsel. (PCR Tr. A001415.) Because he had known Shareef Mahdi for many years, Smith could have offered both testimony about the father's pathological hatred of whites generally and a specific example of the wild, erratic behavior that resulted from this hatred.

At the PCR hearing, Smith testified:

[H]e hated white people. I mean, he just hated them with a passion, and, you know, I remember once – I watch the military channel sometime. I am not fascinated with Hitler, but I am interested in him, you know, and sometimes I wonder, you know, to myself how he led these people to destruction being the kind of person he was and I remember once he [Shareef] told me, when he killed those Jews he knew what he was doing – something to that effect.

(PCR Tr. A001410.)

Smith also recounted an incident where Smith had to assist the state police in removing Mahdi's father from a country club swimming pool where he was causing a disturbance. Smith testified that when he arrived on the scene, he saw Mahdi's father:

He was in the pool swimming around and cursing, using extremely vile language, and I do remember it was in the timeframe of maybe after the O.J. Simpson trial and he was making disparaging remarks about Nicole and why he killed her and cursing and hollering as loud as he possibly could as to try to inflame these policemen that were standing around.

(PCR Tr. A001412-14.)

Mahdi's father was arrested and Smith went with him into his jail cell. Smith's testimony about Shareef Mahdi's behavior in that cell vividly illustrated Shareef's crazed and violent nature:

When we got into the cell he just went wild. He took the furniture and started throwing the chairs against the wall, breaking the tables, not directed at any individual at the time, but it was just wild, you know. I wondered why I had gone in there because I hadn't seen that side of him before, but it was just as violent as anything I have ever seen in my life.

(PCR Tr. A001416.)

ii. James Woodley

James Woodley was the former Sheriff of Brunswick County and a witness for the State at Mahdi's sentencing hearing. At the sentencing, Woodley offered damaging testimony about a "standoff" when Woodley attempted to execute warrants to arrest Mahdi and his father at their home. (Sent. Tr. A003303-07.) Woodley testified about officers "putting on their gear, the bullet proof vests and getting weapons out," (Sent. Tr. A003306), and engaging in a nine-hour standoff before going into the residence and subduing Mahdi and his father. (*Id.*) Woodley also testified that after Mahdi was in custody, Mahdi said, "I'm going to kill a cop before I die." (Sent. Tr. A003307.)

Trial counsel's cross-examination of Woodley failed to blunt the force of this testimony. As a result, the State emphasized Mahdi's statement in its closing, (Sent. Tr. A003657), and Judge Newman referenced it in his sentencing order, as well. (Sent. Or. A008560.)

Trial counsel could have defused Woodley's harmful testimony but were unable to do so because they failed to interview Woodley before trial, (Woodley Aff. ¶ 15, A004151), and thus did not know what questions to ask him on cross-examination. In an

affirmation submitted as part of the PCR hearing, Woodley testified about the additional details that he would have described to trial counsel had they spoken with him. (*Id.*) Among other things, Woodley's affirmation made clear that Mahdi's father was the architect of the standoff and that the incident ended peacefully, as there were no weapons in the house and no resistance to the officers when they eventually entered the house. (Woodley Aff. ¶ 13, A004150-51.) Had trial counsel interviewed Woodley, they also would have known that Woodley would have testified that Mahdi "probably got [his "I'm going to kill a cop before I die" statement] from his father, who had no respect for authority and who had begun the standoff that day." (*Id.*) Instead, trial counsel failed to elicit that explanation on cross-examination and, accordingly, the sentencing judge was left with a misleading view of Mahdi. *Rompilla v. Beard*, 545 U.S. 374, 387 n.7 (2005) (counsel's duties include duty to develop "evidence to rebut any evidence that may be introduced by the Prosecutor").

Trial counsel's failure to interview Woodley also meant that they were unable to elicit mitigating information from him about Mahdi's father, including evidence of Mahdi's father preventing Mahdi from receiving an education and of violent abuse by Mahdi's father. With regard to Mahdi's education, Woodley would have complemented the testimony of Mahdi's teachers. In his affidavit, Woodley testified both that Mahdi's father took Mahdi out of school for purported home schooling but did not in fact teach him and that neither the Brunswick County Department of Social Services nor the School Board ever remedied the situation. (*Id.*) As a result, Mahdi "just got lost in the cracks," (PCR Tr. A001386), as Ms. Wilson testified, and was left with no education at all.

Woodley also would have offered specific, detailed evidence of violent abuse of

family members that Mahdi witnessed. For example, in his affidavit, Woodley testified:

[Shareef Mahdi] had no respect for women including his mother, Nancy Burwell. I recall an instance when Mrs. Burwell came to me expressing concerns that he was “sick” and saying that he needed help. I suspected at the time that he had been abusive to her and asked her about it. She showed me bruises on her legs and thighs and told me that he had beaten her with the buckle end of a belt while his sons, Saleem and Mikal, [were] watching.

(Woodley Aff. ¶ 6, A004149.)

Woodley also would have testified about Mahdi’s witnessing his father kidnap and attempt to kill his mother:

Around this same time, I learned, mostly directly from Shareef and Mrs. Burwell, that he had kidnaped and beaten his wife after she left him. Shareef took Saleem and Mikal to Petersburg to visit their mother. He used a pretense of taking her and the boys to get ice cream or something, but once she got in the pickup truck Shareef told her he was going to take her back to Lawrenceville and kill her. Once they were back at the house in Brodnax, Shareef and his wife remained outside while the boys went in the house with their grandmother and a female relative visiting from Maryland. Mrs. Burwell, the other woman, and the boys heard screaming and ran outside to see Shareef trying to kill the boys’ mother.

(Woodley Aff. ¶ 7, A004150.) Such mitigating testimony would have been particularly powerful, as it would have come from a law enforcement officer who was a State witness and not merely a paid defense expert.

2. There Was No Valid, Strategic Reason for Not Offering Testimony From These Witnesses

The PCR hearing established that trial counsel had no strategic reason not to call Mahdi’s former teachers or George Smith as witnesses. Instead, trial counsel’s consideration of lay mitigation witnesses focused almost entirely on family members. (PCR Tr. A001851-63.) When trial counsel concluded that the family members would not be helpful, they decided to rely entirely on their expert witness, Ms. Hammock, to

present the mitigating factors in Mahdi's social and life history. (PCR Tr. A001863.) Thus, there was no consideration given to calling non-family lay witnesses. Although defense investigator Paige Tarr Hass Munn had identified potentially relevant lay witnesses, (PCR Tr. A001825), trial counsel neglected to follow upon these leads. Indeed, trial counsel never even spoke to Harris, Wilson, or Smith. *See* PCR Tr. A001360-61 (Harris), A001388-9 (Wilson), A001415 (Smith); A001868 (admission of trial counsel that he never spoke to Mahdi's special education teachers); *Wiggins v. Smith*, 539 U.S. 510, 524 (Counsel's performance deficient because "counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources."); *Weik*, 409 S.C. at 236 (trial counsel's performance deficient where "decision to call only [expert] in mitigation resulted from counsel's inattention, not reasoned strategic judgment.")

Trial counsel did attempt to offer a generalized strategic rationale for not contacting Sheriff Woodley before trial: a concern that "the witness may not want to talk to you and may engender a greater resentment towards your client and they may be more adamant on the stand, more visceral on the stand." (PCR Tr. A001911.) This explanation – which, if accepted, would excuse any defense attorney from any obligation to interview any witness with adverse information – was objectively unreasonable. In fact, the United States Supreme Court has made clear that trial counsel's "investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities." *Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (quoting 1 ABA Standards for Criminal Justice 4-4-1 (2d ed. 1982 Supp.)). In this case, trial counsel could identify nothing specific about Sheriff Woodley that led trial counsel to

conclude that merely attempting to contact Woodley would have been likely to transform Woodley into a more harmful witness. Because trial counsel's concern is rooted in general stereotype rather than specific fact, and because deference to such a concern would eviscerate trial counsel's responsibility under *Rompilla* to seek information from available law enforcement witnesses, counsel's decision not to contact Woodley was objectively unreasonable. *Council v. State*, 670 S.E. 2d 356, 364, 380 S.C. 159, 175 (S.C. 2008) ("strategic choices made by counsel after an incomplete investigation are reasonable 'only to the extent that reasonable professional judgment supports the limitations on the investigation.'")

3. Trial Counsel's Deficient Performance Prejudiced Mahdi

At the PCR hearing, trial counsel Glenn Waters testified,

I believe what you want to show to the jury is that Mikal Mahdi didn't have a chance in life and perhaps you shouldn't take his life. In this particular case we've had people that were just simply indifferent about him.

(PCR Tr. A001867.)

In fact, Waters could have made precisely this showing to the jury had he presented testimony from the non-family members who testified at the PCR hearing. In particular, Mrs. Harris and Ms. Wilson provided testimony that demonstrated that Mahdi's chance for success was torn away by his unstable and abusive father. The testimony from Smith and Woodley about specific incidents of irrational and violent behavior by Shareef Mahdi would have forcefully confirmed that point.

Nor would such evidence have been merely cumulative. There was no evidence at all at sentencing regarding Mahdi's demonstrated educational potential and no evidence of how Mahdi's father's paranoid hatred of whites caused him to interfere with,

and ultimately terminate, Mahdi's education. Moreover, although there was general, conclusory testimony about Mahdi's father being "not really able to function well," (Sent. Tr. A003627), and being abusive, (*Id.*), that evidence lacked force, for it contained no details and no narrative examples. In addition, the evidence came solely from an expert (the social worker, Marjorie Hammock) not members of the community, such as Mr. Smith and Mr. Woodley. Finally, and most importantly, there was no evidence at sentencing about the effect of Shareef Mahdi's abusive behavior on his son. In contrast, the witnesses at PCR described violent abuse that Mahdi himself had to witness as a child, including his father's attempted murder of Mahdi's own mother. (*E.g.* Woodley Aff. ¶7, A004150.)

Trial counsel's unreasonable reliance on expert testimony as the exclusive source of information about Mahdi's social history further prejudiced Mahdi, as it resulted in no one with any personal connection to Mahdi testifying on his behalf at sentencing. The State seized on that void in its summation, arguing that "their own expert, who gets paid to testify in death penalty trials . . . [and] Defense Exhibit 2 [the timeline] is the best and only thing they could come up with [in] regards to getting any mitigation on this defendant's life." (Sent. Tr. A003659.) Indeed, in his Sentencing Order, Judge Newman characterized Mahdi's argument as a "plea . . . for mercy," (Sent. Or. A008566), but, as the Solicitor noted, no witness with any personal connection to Mahdi appeared on his behalf of sentencing to seek mercy. With not a single person testifying to the value that he or she placed on Mahdi's life, it is not surprising that Judge Newman was unmoved by this argument and sentenced Mahdi to death. Had Ms. Harris and Ms. Wilson testified, they not only would have asked for mercy on his behalf, (PCR Tr. A001360, A001388),

but their testimony would have provided the evidence of that “sense of humanity” that Judge Newman said he sought to find in Mahdi but concluded “seems not [to] exist” in him. (Sent. Or. A008565); *see Marquez-Burrola v. State*, 1157 P.3d 749, 766-67 (Okla. 2007) (recognizing added mitigating force of testimony from “third parties [who] offer the jury *more objective and specific* examples of *why* the defendant’s life should be spared” as opposed to family members who have a natural bias to the defendant) (emphasis in original).

Nonetheless, the PCR court held that Mahdi was not prejudiced by the absence of lay witnesses because “this same evidence was presented at the sentencing hearing through Hammock’s testimony before Judge Newman, and the timeline of Mahdi’s life introduced through her.” (Am. Or. A000172-73.) That holding was erroneous because it failed to recognize the evidentiary importance of both lay testimony and specific, detailed information. A mitigation case that unnecessarily omits those elements and relies instead solely on expert testimony is dramatically weaker. The PCR court’s failure to recognize the prejudice resulting from this approach was erroneous as a matter of law. *See Weik*, 409 S.C. at 239; *Sowell*, 663 F.3d at 795.

Trial counsel’s failure to adduce available evidence about Mahdi’s exposure to his father’s violent and abusive behavior and about his father’s corrosive influence on his upbringing also prejudiced Mahdi. That failure of proof resulted in Judge Newman having an incomplete and distorted view of Mahdi’s upbringing. Thus, although Judge Newman recognized that Mahdi had a “difficult childhood and family life,” Judge Newman’s only conclusion regarding Mahdi’s father was that he “continually expressed great care and concern for [Mahdi’s] well-being.” (Sent. Or. A008563.) Similarly, in his

Sentencing Order, Judge Newman echoed the State's argument that there was "no reference to physical or sexual abuse suffered by [Mahdi]" in the trial testimony. (*Id.*; *see also* Sent. Tr. A003658.) In fact, there was substantial evidence – presented at the PCR hearing but not at sentencing – of violent physical abuse of Mahdi's mother and grandmother that Mahdi had to witness at a young age. The obvious traumatic effect of those incidents on Mahdi would have been a significant mitigating circumstance had it been presented.

CONCLUSION

Trial counsel's mitigation case presented only a shallow and impersonal picture of Mahdi's deeply troubled upbringing. The PCR hearing told a different story. Had trial counsel called available lay witnesses, the sentencing judge would have seen that Mahdi endured childhood at the hands of a father whom he witnessed attempt to murder his own mother and who prevented Mahdi from getting both an education and needed counseling – a far different image than the one of a father who "continually expressed great care and concern for his [son's] well-being." (Sent. Or. A008563.)

Trial counsel's failure to present this evidence was deficient performance, without reasonable strategic justification. Because there is a reasonable probability that the sentencing judge would not have sentenced Mahdi to death had he heard the available mitigating evidence, Mahdi's claim of ineffective assistance of counsel should have been granted. Accordingly, the Circuit Court's order denying his claim was erroneous and should be reversed and the case remanded for a new sentencing hearing.

For the reasons stated, Petitioner asks this Court to grant the petition for a writ of certiorari.

January 5, 2015

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

JAN 21 2015

APPEAL FROM CALHOUN COUNTY
Court of Common Pleas

S.C. Supreme Court

Doyet A. Early, III, Circuit Court Judge

Case No. 09-CP-09-164

Mikal D. Mahdi, #5238, ...Appellant,

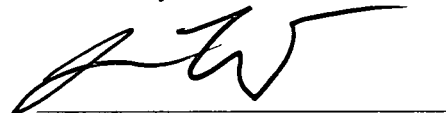
v.

State of South Carolina, ...Respondent.

PROOF OF SERVICE

I certify that I have served the Petition for Writ of Certiorari on Respondent by depositing a copy of it in the United States Mail, postage prepaid, on January 5, 2015, addressed to Respondent's counsel of record, Anthony Mabry, Assistant Attorney General, Post Office Box 11549, Columbia, SC 29211.

January 5, 2015



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ATTACHMENT NO. 4

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

RECEIVED

JUL - 8 2015

Appeal from Calhoun County
The Honorable Doyet A. Early, III, Circuit Court Judge

S.C. Supreme Court

Appellate Case No. 2014-002131

MIKAL D. MAHDI,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTION PRESENTED

Was Petitioner denied the effective assistance of counsel at his capital sentencing proceeding by trial counsels' decision to rely entirely on a single expert witness to present mitigating evidence about Petitioner's background instead of calling available lay witnesses who could have provided detailed and specific testimony in mitigation?

STATEMENT OF THE CASE

This is an appeal from the denial of post-conviction relief (PCR) to death row inmate Mikal D. Mahdi ("Mahdi"). The application was denied by the Honorable Doyet A. Early, III.

Mahdi murdered James E. Myers on June 18, 2004 in Calhoun County. Mahdi was arrested on June 21, 2004 in Florida on a fugitive warrant, returned to South Carolina, and charged with Myers' murder, the theft of his truck, and the burglary of his shed/cabin.¹ Mahdi was indicted by the Calhoun County grand jury on August 23, 2004 for murder, grand larceny > \$5,000, and burglary 2nd degree (violent) (2004-GS-09-243 - 244). The State sought the death penalty. Carl Grant and Glenn Walters, Esquires, were appointed to represent Mahdi. This Court assigned the Honorable Clifton Newman, to preside over the capital trial. The case was originally scheduled for trial in January of 2006. Mahdi's capital counsel moved for a continuance based on the need for more time to complete their mitigation investigation. (PCR 597-98)(See Resp. Ex. 16). Judge Newman granted the continuance request, and the trial was moved from January to November of 2006. (PCR 597-98 & Resp. Ex. 17).² From November 26-29, 2006, jury selection was completed with a jury and 4 alternates impaneled. Prior to the swearing of the jury, on November 30, 2006, Mahdi waived his right to a jury trial and entered pleas of guilty to all charges. (R 123-1336).³

¹ The building described as the "shed" is more like a workshop or cabin. It is located on the victim's farm. Myers and his wife were married there. Myers' wife had an office inside the "shed". A television and chairs were also located in the "shed." (R 1357-67, 1395-1425).

² Mr. Grant was involved in a motorcycle accident in the early summer of 2006 and suffered a serious injury and was relieved as counsel. Glenn Walters was substituted as 1st chair counsel and Josh Kroger, Esquire was appointed to replace Mr. Walters as 2nd chair counsel.

³ Prior to his pleas, Mahdi was re-examined by Dr. Michael Cross, and determined to be competent to plead guilty. (R 1254-59, 1336-43). Mahdi was previously evaluated by court order for competency to stand trial. (R 8-10). It was determined Mahdi had no mental illness, was not mentally retarded, and was competent. (R 131, 139-40; Court's Ex. 2). Mahdi was 23 years old at the time of his pleas, had obtained his GED, and had attended some community college. He was previously employed in mostly roofing and brick laying. Mahdi denied ever having been treated for abuse of alcohol, drugs, or any mental disease. (R 1346). He had been hospitalized on 1 occasion as an adolescent to a mental health facility, and was released. (R 1747, 1756). Mahdi understood the charges he faced, including murder, and the legal consequences of a conviction, including the death penalty. (R 1339-68). He denied any emotional or nervous problem that might prevent him from understanding what he was doing when he pled guilty. (R 1347). Mahdi had a

Judge Newman accepted Mahdi's pleas and ensured they were knowingly, voluntarily, and intelligently entered by extensive questioning of Mahdi under oath. (R 1259-84).⁴ After the 24 hour waiting period, the sentencing proceeding was conducted December 1-5, 2006, and final arguments on December 6th. On December 8, 2006, Judge Newman issued his sentencing decision by reading into the record his written sentencing order, filed the same date. (R 1726-42, 1810-26, 1842-53; Order 1-12). Judge Newman found 2 statutory aggravating circumstances proven beyond a reasonable doubt: (1) the murder was committed in the commission of a grand larceny; and (2) the murder was committed in the commission of a burglary. (R 1730-31, 1814-15, 1845; Order 4). After considering all of the evidence in extenuation, aggravation, and mitigation of punishment, Judge Newman sentenced Mahdi to death for the murder of James Myers. (R 1726-42, 1810-26).⁵

Mahdi appealed his death sentence to this Court. On June 15, 2009, this Court affirmed. Mahdi v. State, 383 S.C. 135, 678 S.E.2d 807 (2009). Mahdi did not seek certiorari to the U.S. Supreme Court. Mahdi filed a Motion for Stay of Execution to pursue PCR. On July 23, 2009, this Court granted the stay assigning Judge Early to hear the application.

Mahdi filed a PCR application on August 18, 2009 and subsequent amended applications. The State filed a Return to each. On March 9, 2011, an evidentiary merits hearing was convened at the Broad River Correctional Institution.⁶ Present were Mahdi, his PCR attorneys, along with the Attorney General's Office and the victim's widow. Mahdi called several witnesses to testify at the hearing: Carson Burwell, Rose Gupton, Sophie Gee, Myra Harris, Carol Wilson, George Smith, Sharon Pond, Lawanda Burwell, Doctors Craig Haney, DeRossett Myers, Nicholas Cooper-Lewter, and Donna M. Schwartz-Watts. Mahdi also submitted sworn affidavits of James

good understanding of the legal process and the legal system. Judge Newman found Mahdi was competent to plead guilty. (R 1258-59, 1342-43).

⁴ After acceptance of the pleas, the impaneled unsworn jury and alternates were dismissed.

⁵ Mahdi was sentenced to 15 years for burglary 2nd degree and 10 years for grand larceny, to run consecutively to one another and to the murder sentence. (R 1741, 1825).

⁶ The PCR hearing was held in Broad River prison due to security concerns regarding Mahdi. Mahdi and a fellow death row inmate were charged with stabbing a guard while on death row.

Woodley, Dora Wynn, Doug Pond, and Sandra Burwell. Mahdi did not testify at the PCR hearing. Respondent called the following witnesses at the evidentiary hearing: Carl Grant, Esq., Glenn Walters, Esq., Josh Koger, Esq., Paige Tarr Haas Munn, James Gordan, Doctors Thomas Martin and Geoffrey McKee. Additionally, exhibits were introduced by both parties. At the evidentiary hearing, Judge Early had the opportunity to view and hear the witnesses who testified in person, and make a credibility assessment with regard to each witness.

On December 18, 2012, after reviewing the record, including trial record and exhibits, and after reviewing all of the evidence submitted in this case, including the testimony of each witness and the PCR exhibits, and after making a credibility assessment regarding the witnesses and evidence introduced, Judge Early found the application to be without merit and denied and dismissed the application with prejudice in an Order of Dismissal, filed January 8, 2013. The State filed a timely Rule 59, SCRCP, Motion to Alter or Amend 1 of the findings in the Order.⁷ On February 11, 2013, Judge Early heard argument on the Rule 59 Motion. After careful consideration of the entire record, the arguments of Respondent and Mahdi, and after careful reconsideration of the law and all of the evidence and testimony in the case, Judge Early granted the State's Rule 59 Motion as to that 1 portion of the Order and entered an Amended Order of Dismissal as the Final Order in this case. Mahdi's Petition for Writ of Certiorari followed.

RESPONDENT'S STATEMENT OF FACTS

Mahdi murdered James Myers, an off-duty police officer, on July 18, 2004 in Calhoun County. Myers had 31 years of service as both a fireman and as a police officer, with the rank of Captain. Mahdi was a fugitive wanted for several crimes he committed outside South Carolina. (R 1341-68).

⁷ In its Rule 59 Motion, the State objected to the Court's finding of deficient performance under Ground 10(a)/11(a)iii. The State's reasons for the Motion are fully set forth in its Motion to Alter or Amend. The State did not object to the Court's finding Mahdi had not established prejudice under the same ground.

A. Crimes

Virginia

On July 14, 2004 in Lawrenceville, VA, *Mahdi*, a resident of Virginia, burglarized a home stealing a .380 caliber chrome pistol. The same day, he stole license plates from a car at a car rental agency, and then stole a Mercury Sable station wagon from a nearby car lot. Mahdi then left Virginia, where homicide detectives were pursuing him for his involvement in the murder of a drug dealer. Mahdi would later indicate he was involved in another homicide in which the body was never discovered.⁸ Mahdi was traveling to Florida, where he had friends. (R 1498-1527, 1357-67, PCR 480-82, 513, 514, 550, 604, 688-89).

North Carolina

On July 15, 2004, about 7:00 p.m., Mahdi entered an Exxon station in Winston-Salem, N.C. armed with the stolen .380 pistol. He took a beer from the cooler and placed it on the counter. While the clerk verified Mahdi's age, Mahdi pulled out the gun, shot the clerk, and leaned over the counter and shot the clerk again as he lay on the floor. The event was captured clearly on surveillance video, and Mahdi's fingerprints were found on a mat lying on the store's counter. After shooting the clerk, Mahdi attempted to rob the cash register, but was unable to open it. He then left the store with only the beer. The clerk, Christopher Boggs, died. (R 1483-98, 1567-96, 1693-94, 1777-78; State's Ex. 94).⁹

South Carolina (Columbia)

At 3:30 a.m. on July 17, 2004, Corey Pitts was sitting at a traffic light at Bull and Washington Streets in Columbia, S.C., when Mahdi car-jacked him of his red 2000 Ford Expedition. Pitts' description of his assailant was consistent with Mahdi's appearance. Pitts told police the assailant was carrying a chrome pistol. Pitts identified Mahdi at sentencing as the man

⁸This information was not presented at the plea or sentencing proceeding. Mahdi's involvement in homicides in Virginia was developed at the PCR hearing as a result of Mahdi's allegations.

⁹ Subsequent to the PCR hearing, Mahdi pled guilty to 1st degree murder for Boggs' death.

who stuck the gun in his face, forced him out of his SUV, and stole his vehicle.¹⁰ (R 1528-40).

(Calhoun County)

About 30 minutes later, Mahdi drove the stolen Expedition to the Wilco Hess station at Exit 139 off I-26 in Calhoun County. The SUV now bore the stolen license plate from Virginia. Mahdi's fingerprints were found inside the SUV, and on the tag and the frame surrounding it. Mahdi attempted for about 50 minutes to use a credit card at 1 of the Wilco gas pumps, but it would not accept the card. Due to this suspicious behavior, store clerks notified police. Mahdi abandoned the SUV behind the station; and, as police arrived, fled into woods nearby. Police searched for Mahdi and concluded he had obtained a ride at a nearby restaurant. Mahdi was, instead, on foot in the woods near the store, headed toward victim James Myers' farm. (R 1360-62).

James Myers owned a farm approximately 1/3 of a mile from the Wilco station. While fleeing on foot, Mahdi came upon Myers' shed and broke into it. While there, he watched T.V., converted Myers's shotgun into a sawed off shotgun, and painted it black. He went through SLED investigation files maintained by Myers' wife, a SLED agent. He armed himself with Myers' .22 caliber rifle, which was kept in the shed with other guns. (R 1362, 1399-1401, 1411, 1603-04, 1414-16).

Myers was off work June 18, 2004, having returned with his wife from Edisto, after celebrating the birthdays of his wife, sister, and daughter. After returning home, Myers drove to his father's home, as he routinely did, to visit and help his father with the loss of Myers' mother, who had died 2 years earlier. After visiting with his father, Myers left around 6:45 p.m. and headed to his farm, where Mahdi was lying in wait at the shed. Mahdi confronted Myers in the shed, and shot him 9 times with the victim's own .22 caliber rifle, killing him.¹¹ Mahdi then

¹⁰The Mercury Sable station wagon stolen from Lawrenceville, VA was found in the parking lot of Washington Street United Methodist Church near the scene of the car-jacking. (R 1359).

¹¹There is evidence after Mahdi confronted Myers at the cabin, he forced Myers to empty his pockets on a table or chair inside the cabin. (R 1419-21, 1774). It is also possible Mahdi emptied Myers' pockets after he murdered him.

poured diesel fuel on and around the body and set it on fire. He then stole Myers' police issued Dodge truck and a license plate from another vehicle located near the shed. In addition to the .22 rifle, Mahdi stole Captain Myers' police issued Ruger assault rifle and the converted shotgun. (R 1402-25, 1363-65, 1541-66, 1696)

Myers' wife began missing him around 9:00 p.m., when he did not come home. She called and paged him, with no response. Finally, she contacted Myers' father and discovered what time Myers left his father's home. Mrs. Myers drove to their farm, and finding the gate to the property open, drove to the shed and found her husband's truck missing. She then went into the shed and found her husband's burned and bullet riddled body lying in a pool of blood. She knew immediately he was dead and screamed for an unknown period of time. When she finally calmed down enough to use her phone, she called 911 and waited for police. (R 1395-1425).

In the shop within feet of Myers' body, police found the keys to Corey Pitts' stolen Ford Expedition. Also found at the scene were multiple, fired .22 caliber shell casings and 7 fired .22 bullets. Police also found evidence Mahdi had tried to hot-wire the victim's other truck. (R 1365, 1541-65, 1413-14).

Florida

On July 21, 2004, in Satellite Beach, FLA, Mahdi was spotted by police in Myers' truck.¹² He jumped out of the truck while moving and fled. Mahdi ran for the beach, carrying the fully-loaded Ruger assault rifle. Police were about to use deadly force when Mahdi dropped the gun and continued running into a condominium complex and was eventually apprehended on the 5th floor with the use of a police dog. While transporting Mahdi to jail, the arresting officer thanked him for not shooting him with the assault rifle, to which Mahdi responded the gun was "stuck on a three shot." Mahdi said with "cold eyes," "I don't think I could have got you - - I

¹²By this time, police in Virginia and S.C. had connected the crimes there and here to Mahdi. A nationwide BOLO was issued for Mahdi's arrest. Florida police noticed Mahdi's erratic driving and thought he might be a drunk driver and began following him. Mahdi refused to stop for police. He eventually ran over a stop sign near the end of the pursuit. (R 1365-66, 1379-82).

couldn't have shot you, the other cop, and excuse my language, that fucking dog.” (R 1377-94).

After Mahdi's arrest, police discovered the license plate on Myers' police-issued Dodge truck had been replaced with the plate off Myers' personal GMC truck. Clothing found inside the Dodge truck matched clothing Mahdi was wearing at the Wilco station in Calhoun County. Shorts found in the truck matched shorts worn by Mahdi in the video of the murder in N.C. Shoes found in the truck matched footwear impressions found near the scene of Myers' murder. The Ruger assault rifle was recovered, and the sawed off shotgun and ammunition were found in the truck, as was an "Atlas" taken from Myers' shop, with Mahdi's fingerprints on the Jacksonville, FLA map page. This led police to 2 witnesses in Jacksonville, who purchased a .380 pistol and a .22 rifle from Mahdi shortly after Myers' murder. The witnesses identified Myers' Dodge truck as the vehicle Mahdi was driving at the time, and identified Mahdi in a photo lineup, as the person who sold them the .380 and the .22. The only personal item belonging to Myers never recovered was his police badge, which he kept in his truck or his pants pocket. Ballistics confirmed the recovered .380 pistol was the gun used to murder Christopher Boggs in Winston-Salem, and the .22 rifle was used to murder Myers. (R 1559-62, 1394-95, 1366, 1565, 1418-21 1592-96).

The autopsy determined Myers died from multiple gunshot wounds, after being shot 9 times, including 4 in the chest and 3 in the head. The pathologist, Dr. Janice Ross, opined Myers was shot first in the chest and possibly once in the head. After he collapsed to the floor of the shed, he possibly raised his head and was shot again, and then was shot again in the head while his head was lying on the floor. (R 1702).

B. Aggravation Factors

(Mahdi's Prior Criminal Acts)

During the sentencing hearing, in addition to the facts and circumstances of the crime, Judge Newman heard evidence in aggravation, including Mahdi's prior crimes as a juvenile and an adult. Mahdi's initial involvement with police stemmed from an arrest and adjudication for car-breaking, petit larceny, and escape from custody. He was placed on probation. Mahdi was

committed to Virginia's Department of Juvenile Justice (DJJ) at age 14 for 2 counts of breaking and entering and 2 counts of grand larceny. He admittedly was involved in the sale of crack cocaine at the same age. He was charged with assaulting and causing bodily injury to another inmate in DJJ. Mahdi told DJJ authorities 1 of his strengths was "robbing people." During 1 of the break-ins he committed, Mahdi stole a .44 magnum pistol. When Brunswick County police attempted to arrest Mahdi on a detention order for that charge, he and his father refused to come out of their home. An 8 hour standoff ensued. Sheriff James Woodley heard Mahdi say: "Them motherfuckers got guns." Mahdi also told police after he was arrested: "I'm going to kill a cop before I die." (R 1437, 1440-42, 1428-29, 1431).

At age 17, Mahdi was arrested for slashing his mother's tires and for resisting arrest. During this arrest, Mahdi grabbed the holstered pistol of 1 of the police officers. He later told 1 of the officers he should have killed "that bitch," referring to his own mother. Mahdi was also convicted as a juvenile of contempt of court and obstruction of justice. (R 1457-62, 1612).

As an adult, Mahdi was convicted and served 3 years in prison, for brutally stabbing Moises Rivera, a maintenance supervisor at an apartment complex in Richmond, VA, 5 times in the back with a knife, after Rivera investigated a disturbance at the complex and came upon Mahdi trying to break in an apartment on April 17, 2001. Rivera's lung was punctured, and he arrested in the ambulance but was revived by EMS. Rivera was hospitalized for 6 days and out of work for 2 months as a result of the stabbing. (R 1473-75).

Mahdi was released from prison on May 12, 2004. At the time of Myers' murder, Mahdi was on supervised probation for the Rivera assault, with requirements he not to leave Virginia, violate any laws, or possess a gun. Mahdi tried to get a neighbor to help him assemble a 9mm pistol. He bragged to her he was dabbling in drug dealing to make money, and was going to knock off some drug dealers. On June 14, 2004, the day before the .380 pistol was stolen, as a condition of his supervised probation, Mahdi was required to submit to a drug screen. The test showed he was using marijuana less than 2 months after getting out of prison. He then stole the gun, the

Mercury Sable, and the license tag and drove to North Carolina. (R 1483-97, 1500-02).

(Mahdi's Prison Conduct)

Judge Newman also received evidence regarding Mahdi's prior behavior in prison. During Mahdi's juvenile incarceration, he assaulted another inmate causing bodily injury. Mahdi was incarcerated in Virginia's DJJ from August 1999 until May 2000, for contempt of court and obstruction of justice. His record while incarcerated was plagued by maladaptive behavior. Records from DJJ also document his committing several assaults during this incarceration. (R 1435-52, 1612-13; State's Ex. 95).¹³

As an adult, Mahdi was incarcerated in the Virginia Department of Corrections (DOC) from October 11, 2001, to May 12, 2004, repeatedly disobeying corrections officers' orders. He had numerous disciplinary infractions, including repeatedly using profanity or vulgar language toward employees, and threatening an officer on November 25, 2002. Due to his poor institutional adjustment and increased security level, Mahdi was transferred from Nottaway Prison to Wallen's Ridge Prison, where his behavior did not improve. While in Virginia's DOC, Mahdi was charged with setting a fire, giving false information to an employee, destroying state property, and assault on a non-inmate. (R 1453-56; 1485-86; State's Ex. 86).

As a South Carolina pre-trial detainee, Mahdi was charged with assaulting a correctional officer, who sustained a concussion. At the disciplinary hearing, Mahdi looked at the officer and said, the next chance he got, he would kill the "motherfucking officer." During a search of Mahdi's cell, officers found a 3-4 foot piece of rope and some pieces of metal. Mahdi was housed by himself. He was caught damaging a conference room and hiding metal fragments from a wall socket on his person. On another occasion, Mahdi was found with a 15 foot rope made of blankets. Another piece of metal was found in his cell on a different occasion. Mahdi also wrote

¹³At the plea and sentencing hearing, the State did not introduce all of Mahdi's disciplinary violations in DJJ, only a small number. At PCR, in response Mahdi's allegations, the State introduced all of Mahdi's disciplinary violations in DJJ. They totaled over 40.

a grievance discussing killing DOC' employees. Mahdi made additional threats toward a DOC' employee at the disciplinary hearing. Capt. Gary Lane testified that at the time of trial, Mahdi was kept on the High D Wing of the super-max portion of Kirkland prison. This facility houses the 6 most difficult to manage inmates in the entire DOC. These inmates are kept differently than the other 23,000 inmates in the DOC. Their cells are more secure than death-row. While in 1 of these super-secure cells, Mahdi made a rope and obtained 2 pieces of contraband metal, of which 1 was sharpened to a point. Mahdi was transferred to the High D Wing, from the High C Wing, because of a history of making objects and a "hammer-like" weapon was found in his cell. (R 1616-19, 1622-24, 1627-29, 1646-48, 1652-53, 1661-62, 1655-57).

During jury selection before Judge Newman, a homemade handcuff key was found in Mahdi's possession, after he had persuaded his security detail to remove leg braces or irons and replace them with shackles. Mahdi admitted he made the key in the DOC, kept it secreted in his mouth during the trial, and took it out when he was away from guards for a meeting with his attorneys. Mahdi had attempted to use it in the county jail but had not had an opportunity to use it in the courtroom, due to the guards' watchfulness. Sheriff Summers testified he tried the handcuff key on 3 handcuff sets, and was able to open 2 of them. He testified Mahdi could have easily used the key to remove his restraints and assault someone in the courtroom. (R 1319-21, 1664-70).

C. The Sentencing Order

On December 8, 2006, Judge Newman issued his 12-page sentencing order, which he read into the record. He found the State proved 2 aggravating circumstances beyond a reasonable doubt: (1) the murder of Myers was committed during the commission of a larceny; and (2) the murder was committed during the commission of a burglary. (R 1845; Order, p. 4).¹⁴

Judge Newman found the State presented compelling evidence of prior and subsequent bad

¹⁴ Judge Newman also found while there was strong evidence of 2 other alleged aggravating circumstances, the State did not prove those circumstances beyond a reasonable doubt. These 2 alleged circumstances were the murder was committed during the commission of an armed robbery and Myers was murdered because he was a policeman. Therefore, he did not consider or give any weight to these alleged circumstances. (R 1845-46; Order 4-5).

acts which showed Mahdi's bad character, evil nature, and malignant heart. Judge Newman found these acts covered a period of 8 years and included housebreaking, stealing guns, robbing people, selling crack, vandalism, and malicious wounding of another person. Judge Newman summarized these acts in detail. He found the State had established Mahdi's bad character and propensities by clear and convincing evidence but did not consider this evidence as proof of any statutory aggravating circumstance. (R 1846-48; Order, p. 5-7).

Judge Newman noted he had considered all statutory mitigating circumstances and non-statutory mitigating circumstances argued by Mahdi, as well as other mitigating circumstances supported by the evidence. (R 1848; Order, p. 7).

Judge Newman considered Mahdi's age (21) and mentality at the time of this murder. Judge Newman noted the last time Mahdi's I.Q. was tested, at age 14, his I.Q. was 108, slightly above average. While he considered this statutory mitigating circumstance, he did not give it great weight because Mahdi began his criminal career at an early age, 14. At 21, Mahdi was experienced in the world of crime. By the time Mahdi committed these crimes, he was aware of the severity of his crimes and the possible consequences. Judge Newman found given the evidence in this case, there was nothing in Mahdi's age or mentality that in any way mitigated, excused, or lessened his culpability, nor should it be given any significant weight in his ultimate decision as to the appropriate sentence. (R 1848-49; Order 7-8).

Judge Newman also considered what the defense contended to be Mahdi's turbulent and transient childhood and upbringing. Judge Newman noted there was no testimony from Mahdi's clinical social worker Mahdi ever suffered any physical or sexual abuse. Also, records from Virginia's DJJ showed Mahdi's father, brother, and grandmother continually expressed great care and concern for his well-being. Judge Newman found that while Mahdi's family life may have been less than ideal, particularly without the presence of a loving and caring mother, he did not find that Mahdi's difficult childhood and family life contributed in any significant way to his senseless criminal activities. Therefore, while he considered this non-statutory mitigating

circumstance, he did not believe that it should be given any significant weight in his ultimate sentencing determination. (R 1849; Order 8).

Judge Newman also considered Mahdi's offered testimony of prison adaptability. While he considered the testimony of expert James Aiken, Judge Newman pointed out he had reviewed and considered Mahdi's records regarding his prior behavior in various prisons. Judge Newman found Mahdi had consistently been disruptive and uncooperative and had threatened to kill prison employees, and prison officers had repeatedly found homemade weapons, ropes, and other contraband in Mahdi's cells. Judge Newman also found and pointed out during this very trial, Mahdi brought a homemade handcuff key into the courthouse with the intent to use it, if possible to escape, thus posing a serious threat to courtroom security. Judge Newman noted Mahdi admitted to the elected Sheriff he made the key while housed and monitored at the State's highest security level prison. While Judge Newman believed Aiken was highly credentialed and gave impressive testimony, based on Mahdi's behavior in correctional institutions throughout his adolescence and adult years, he did not believe Mahdi was sufficiently adaptable to prison for this non-statutory mitigating circumstance to be given any significant weight in his ultimate decision as to the appropriate sentence. (R 1849-50; Order 8-9).

Mahdi requested, and Judge Newman considered Mahdi's guilty plea as a non-statutory, mitigating circumstance to determine the appropriate sentence to be imposed. Judge Newman noted that the plea occurred on the fourth day of the trial, following jury selection but prior to the jury being sworn. Judge Newman pointed out this was 1 day following the discovery of Mahdi's homemade handcuff key. Additionally, Judge Newman found Mahdi had failed to demonstrate any remorse for his actions. Therefore, while he considered the guilty plea, Judge Newman concluded no significant weight should be given to it in his ultimate decision as to the sentence to be imposed. (R 1850; Order, 9).

Judge Newman also considered the impact of the crime upon the victim's family and the community. He found the victim, James Myers, was a husband, father, grandfather, son and friend

to many. He found Myers was a well-respected police officer, an outdoorsman, a mentor, and a treasured member of humanity. Further, he found Mahdi burglarized Myers's shed and stole his family's sense of security and serenity. Moreover, he found Mahdi, by committing these crimes, robbed Myers' family and friends of their right to peaceful enjoyment of life. (R 1851; Order, 10).

In his final decision, Judge Newman noted he was acutely aware of the decision before him, and he stated that he did not take it lightly. He noted he considered Mahdi's plea for mercy and the State's plea for justice. In evaluating these 2 ideals, Judge Newman was reminded of his sworn duty to preserve, protect, and defend the Constitution of this State and the United States. Further, Judge Newman stated this obligation was not only to Mahdi, but of equal importance, to the citizens of South Carolina. In concluding his Order, Judge Newman stated as follows:

In extinguishing the life, hope and dreams of Captain Myers in such a wicked, depraved, and conscienceless manner, the defendant, Mikal Dean Mahdi, also extinguished any justifiable claim to receive the mercy he seeks from this Court. (R 1852).

In considering all of the evidence in this case, I have concluded that the only appropriate punishment for the murder of Captain James E. Myers is death. (R 1825, 1852).

I find as an affirmative fact that the evidence in this case warrants the imposition of the death penalty and that its imposition is not the result of prejudice, passion, or any other arbitrary factor. (R 1852).

Judge Newman then formally sentenced Mahdi to death. (R 1853; Order, 12).

ARGUMENT

The evidence in the record supports Judge Early's findings of fact and conclusions of law that Mahdi was not entitled to post-conviction relief.

Standard of Review ***(Appellate)***

“This Court gives great deference to the PCR court’s findings of fact and conclusions of law.” Miller v. State, 379 S.C. 108, 115, 665 S.E.2d 596, 599 (2008). The existence in the appendix of any evidence of probative value is sufficient to uphold the PCR Court’s ruling. Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000). If matters of credibility are involved, this

Court gives deference to the PCR court's findings because this Court lacks the opportunity to directly observe the witnesses. Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999). This Court will affirm the PCR Court's denial of an application for post-conviction relief if there is any evidence of probative value in the record to support the PCR Court's ruling. Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014). This Court will reverse the decision of the PCR Court when it is controlled by an error of law. Id.; Goins v. State, 397 S.C. 568, 726 S.E.2d 1 (2012).

(The PCR Court)

In a PCR action, the applicant has the burden of proving his allegations by a preponderance of the evidence. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler, *supra*. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler. An applicant must overcome this presumption to prevail on PCR. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Second, counsel's deficient performance must have prejudiced the applicant, such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, *citing* Strickland.

"Surmounting Strickland's high bar is never an easy task[.]" Premo v. Moore, 131 S.Ct. 733 (2011) *citing* Harrington v. Richter, 131 S.Ct. 770 (2011), *quoting* Padilla v. Kentucky, 130 S.Ct. 1473 (2010). "It is 'all too tempting' to 'second-guess counsel's assistance after conviction

or adverse sentence.” Harrington v. Richter, 131 S.Ct. 770 (2011), *citations omitted*. “The question is whether an attorney’s representation amounted to incompetence under ‘prevailing professional norms,’ not whether it deviated from best practices or most common custom.” Id.; Strickland, 466 U.S. at 690.¹⁵

Mahdi challenges counsel’s performance in the penalty phase before Judge Newman. In the context of sentencing phase issues, the applicant must also prove deficient performance as defined above. Strickland; Harrington.

Mahdi must also prove prejudice. To show prejudice, the applicant must show that “there is a reasonable probability that ... the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.” Strickland, 466 U.S. at 695; *see also* Wiggins, 539 U.S. at 537; Jones v. State, 332 S.C. 329, 344-45, 504 S.E.2d 822, 829-30 (1998). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Jones, 504 S.E.2d at 823-824.

The United States Supreme Court has made clear the burden is *not on the State* to show the lack of prejudice, but **the burden is on the applicant to show prejudice**. Wong v. Belmontes, 130 S.Ct. 383 (2009), *citing* Strickland. The applicant must prove had counsel acted competently there is a reasonable probability a different sentence would have resulted. Id.; Wiggins v. Smith, 539 U.S. 510, 535, 536 (2003); *see also* Terry v. State, 394 S.C. 62, 714 S.E.2d 326 (2011).¹⁶ Therefore, the appropriate standard for prejudice in this case is whether considering the new mitigation evidence presented at PCR, along with the original mitigation evidence, along with the

¹⁵ In the context of a guilty plea, the applicant also must establish deficient performance and prejudice. Hill v. Lockhart, 474 U.S. 52, 59 (1985). Mahdi does not challenge his guilty pleas on appeal from the denial of PCR. (BOA).

¹⁶ In his petition, Mahdi repeatedly cites prior holdings of the U.S. Supreme Court and this Court that the standard for prejudice in the penalty phase is if one (1) juror might have found the balance of aggravating and mitigating factors favored a life sentence (BOA); however, this is not the proper standard in this case. Mahdi **pled guilty** and was **sentenced by Judge Newman** not a jury of 12 individuals.

evidence in aggravation produced at the sentencing hearing, and the aggravating evidence that would likely come in with the new mitigation evidence, is there a reasonable probability *Judge Newman* would have returned with a different sentence. Sears v. Upton; Wong v. Belmontes. Such a showing “requires a substantial, not just conceivable, likelihood of a different result.” Cullen v. Pinholster, 131 S.Ct. 1388, 1403 (2011), *citing* Harrington, 131 S.Ct. at 791 (2011).

The Lack of Merit of Mahdi’s Petition

In his final amended Application, Mahdi alleged the following ground:

A. Ground 10(a)/11(a)(iii)

Counsel failed to adequately investigate, develop, and present mitigation evidence concerning Applicant’s *family, social, institutional, and mental health history*.

(Final Application). In fact, this is the ground Mahdi focused on at the PCR hearing.¹⁷ At the PCR hearing, under this ground, Mahdi raised several different specific allegations of ineffective assistance of counsel:

- a) Counsel should have interviewed and called at sentencing several of Mahdi’s extended family members and also community members to testify to his family, social, scholastic, and mental health history.
- b) Counsel should have presented the testimony Mahdi presented [at PCR] through a different forensic social worker than the one counsel used at sentencing.
- c) Counsel should have introduced testimony from an expert regarding the effect of Mahdi’s life of incarceration on Mahdi.
- d) Counsel failed to adequately investigate, develop, and present evidence concerning his mental health history or mentality; specifically, counsel should have discovered and presented the testimony Mahdi presented through Drs. Schwartz-Watts and Myers [at PCR], and counsel failed to provide certain records to their own psychiatric/psychological experts;
- e) Finally, counsel failed to introduce certain documents and records at sentencing such as his school records, his DJJ records, records from his commitment to the Walter Carter Center at age 9, and his father’s records.

¹⁷ As Mahdi admits in his Petition, he has now abandoned all other grounds in his PCR application raised to Judge Early; and, as will be discussed below, he now raises only a subpart of this ground to this Court.

At the PCR hearing before Judge Early, the vast majority of the testimony and evidence in support of these allegations came from *Mahdi's extended family members*,¹⁸ *several PCR experts*,¹⁹ *and records of Mahdi's commitment to the Walter Carter Center, to DJJ, and his school records*.²⁰ Mahdi has now abandoned all of these witnesses' testimony, the records themselves, and the above claims, except one (1), and only raises *a subpart of that one (1) claim*. Mahdi alleges counsel was ineffective for not calling *community members / school officials* from Mahdi's earlier life.

Mahdi has abandoned the other claims under this Ground because the credible testimony at PCR established (1) Mahdi's immediate and extended family was not cooperative with counsel, except for providing background information, and refused to testify or would say bad things about Mahdi if called to testify; (2) calling the experts Mahdi presented at PCR would have resulted in testimony before Judge Newman that Mahdi was involved in other homicides before the Boggs' and Myers' murders along with a diagnosis of anti-social personality disorder (ASPD);²¹ and, (3) introduction of the records would have resulted in the introduction of Mahdi's bad behavior in

18 At the PCR hearing, Mahdi called several aunts and 1 uncle to testify, and offered the affidavit of another aunt, on Mahdi's and his family's background. Mahdi called Carson Burwell (a paternal uncle), Rose Gupton (a maternal aunt), Sophie Gee (a maternal aunt), and Lawanda Burwell (a paternal aunt and Carson's wife). Mahdi offered the affidavit of Sandra Burwell (a paternal aunt). Mahdi did not call at PCR his father, mother, or brother. Nor were any affidavits offered by them.

19 Mahdi retained for the purpose of the PCR hearing and called: Dr. Donna Schwartz-Watts, Dr. deRossett Myers, Dr. Craig Haney, and Dr. Nicholas Cooper-Lewter.

20 Mahdi introduced at PCR his records from his commitment to the Walter Carter Center, all of his DJJ records, and his school records.

21 Dr. Donna Schwartz-Watts, a PCR psychiatry expert, testified in forming her opinion she relied on records from Dr. McKee [the trial psychological expert]. (PCR 458-60). She interviewed Mahdi 3 times; however, he did not trust her or provide her much information. (PCR 460, 478). She obtained more information on Mahdi's thought process after he left Virginia prison from Dr. Martin's and Dr. McKee's notes [trial experts]. (PCR 478-80). She admitted Mahdi told Drs. Martin and McKee he had committed another homicide in Virginia. Dr. DeRossett Myers [another PCR expert] stated the Virginia DOC's diagnosis Mahdi had ASPD was justifiable at the time. (PCR 455-56). Dr. Craig Haney [another PCR expert] reviewed Mahdi's DJJ records and his adult prison records. Mahdi had 41 disciplinary violations in DJJ, and Haney admitted Mahdi was diagnosed with intermittent explosive disorder and ASPD in Virginia's DOC.

school,²² extensive testimony of his disciplinary violations in DJJ,²³ and his horrible behavior in the Carter Center.²⁴

22 The school records reveal damaging information about Mahdi and his character, even at an early age. Mahdi was referred for special services not because he was mentally retarded, but because of “..behavior problems. He exhibits inappropriate and disruptive behavior.” (**App. 007536**). The same record indicates Mahdi had a negative attitude about being corrected, did not always get along with other children, his behavior with adults was inappropriate at times, and most of his problems seemed to be getting along with people. The records indicate Mahdi had an I.Q. of 118, but had episodic acting-out behavior and an unwillingness to deal with difficult school tasks. (**App. 007533**). The records also indicate Mahdi was referred for special education because of “*behavioral difficulties; such as leaving his seat inappropriately, physically and verbally aggressive towards others at times, talks out of turn, preoccupied, anxious, easily frustrated or angered, lacks respect for authority, and daydreams.*” (**App. 005498**)(**emphasis added**). A Burk’s Behavior Rating Scale revealed very significant factors for poor impulse control, poor anger control, and excessive resistance. (**App. 007535**). The records also indicate Mahdi’s “intellectual functioning” was “in the high average range.” (**App. 004345**). To have introduced Mahdi’s school records would have introduced bad things about Mahdi to Judge Newman. It would also have introduced that Mahdi’s intellectual functioning was not impaired. Counsel was not deficient in failing to introduce Mahdi’s school records which contained bad things about Mahdi. Counsel artfully introduced through Hammock’s *testimony* and through *exhibits* Mahdi’s problems in school without introducing the bad things he had done while in school. Wong, supra.

23 At the sentencing hearing before Judge Newman, the State introduced a minimal amount of Mahdi’s DJJ records. (**See ROA**). Those records document just a few of Mahdi’s disciplinary violations; however they do not document the extensive and aggravated nature of his violations in DJJ. Counsel obtained Mahdi’s DJJ records through the efforts of their mitigation investigator. (**PCR 585**). They did not introduce them because Mahdi had over 40 disciplinary violations in DJJ including assaults on *guards, teachers, and inmates*. (**PCR 684**). He was involved in destroying property multiple times. He led an escape attempt by assaulting a female guard, taking her radio away, and demanding keys from another guard. He also admitted faking a suicide attempt to gain better conditions of confinement.

24 Counsel had possession of these records, and Tarr summarized them for counsel and the experts. (**Resp. Ex. 11; App. 007884, PCR 565-66**). Drs. Martin and McKee also had the actual records. (**PCR 511-12, 553-54**). They reviewed them in conducting their evaluation of Mahdi. (**PCR 511-12, 553-54**). The records contain damaging information about Mahdi. Mahdi was placed in isolation several times at the Carter Center due to his disruptive or inappropriate behavior. Mahdi assaulted other patients, assaulted staff, was verbally threatening or aggressive towards staff, and attempted to escape from the facility. On several occasions, Mahdi threw chairs or tables and attempted to damage property of the hospital. On 1 occasion, Mahdi falsely pulled a fire alarm. He also cursed staff. On another occasion, Mahdi threatened to suffocate a staff member with a pillow. Also, the records detail Mahdi’s making a false claim of child abuse against his aunt Lawanda, a fact Judge Newman was not aware of. The records show the claim of abuse was determined to be unfounded, and Mahdi admitted he only threatened suicide when he didn’t get his way. Lawanda also reported Mahdi only talked about suicide when he didn’t get his way or did something wrong, and Mahdi also admitted threatening suicide as a way of getting attention. These records would have undercut the mitigation value of and brought into question the diagnosis of major depression at the Carter Center testified to before Judge Newman. The records also indicate Mahdi had anti-social behavior and conduct disorder. Counsel was not deficient in

Mahdi now asks this Court to grant certiorari *alleging* Judge Early erred in finding counsel was not deficient in its mitigation investigation and presentation, where Judge Early based his decision **on all of the mitigation evidence Mahdi presented at PCR**, not just the select portion he now raises on appeal, which contained much aggravating evidence that would have come in with the additional mitigation evidence. *See Sears v. Upton, supra.* Mahdi also alleges Judge Early erred in finding he failed to prove prejudice, while only raising a select portion of the mitigation evidence he presented at the PCR hearing and not the entirety of the mitigation evidence he presented which contained much aggravating evidence, **which Judge Early was required to consider** in determining whether Mahdi had shown prejudice. *See Sears; Wong v. Belmontes.*

In his Petition, in order to create a coherent mitigation narrative, Mahdi has also now “cherry picked” from the testimony of extended family members and expert witnesses he called at PCR **but whom he does not now claim on appeal counsel should have called.** Mahdi has done this in an attempt to show deficient performance *and* prejudice under this newly limited ground. **(Petition for Certiorari, pp. 6-8).**²⁵

Analysis

This Court has analyzed claims of failure to investigate, discover, and present mitigation evidence under *Strickland*, *Wiggins* and its progeny.²⁶ To establish deficient performance, a

failing to introduce the records themselves when bad things were contained within them damaging to their client. (See **App. 007884 & App. 007863**). *Wong, supra.* Counsel appropriately presented the Carter Center mitigation information to the sentencing court through Hammock, without the negative information about Mahdi that would have been before Judge Newman had the records been introduced. *Id.*; *Strickland*; *Pinholster*; *Van Hook*; *Wiggins*.

²⁵ In his Petition, Mahdi glosses over the fact it is undisputed his immediate family [his father, mother, and brother] were uncooperative with trial counsel and Mahdi’s extended family was uncooperative or knew bad things about Mahdi that would have come out had they testified before Judge Newman.

²⁶ *See Weik v. State*, 409 S.C. 214, 761 S.E.2d 757 (2014); *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009)(failure to present any mental health testimony in mitigation where counsel thought he could not present such evidence where defendant was competent and not insane or GBMI); *Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008)(relying on *Wiggins* and *Rompilla v. Beard*, 545 U.S. 374 (2005), finding counsel deficient and defendant prejudiced by failure to investigate, develop, or present any mitigation evidence regarding defendant’s violent upbringing, abuse at home, and mental illness other than limited testimony by his mother); *Nance v. Ozmint*,

person challenging a sentence must show “counsel’s representation fell below an objective standard of reasonableness.” Strickland, 466 U.S. at 688. A court considering a claim of ineffective assistance must apply a “strong presumption” counsel’s representation was within the “wide range” of reasonable professional assistance. Id. at 689. The challenger’s burden is to show “that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Id. at 687.

The Strickland standard must be applied with scrupulous care, lest “intrusive post-trial inquiry” threaten the integrity of the very adversary process the right to counsel is meant to serve. Id. at 689-90. It is “all too tempting” to “second-guess counsel’s assistance after ... adverse sentence.” Id. at 689. The question is whether an attorney’s representation amounted to incompetence under “prevailing professional norms,” not whether it deviated from best practices or most common custom. Id. at 690. Strickland does not guarantee perfect representation, only a “reasonably competent attorney.” Id. at 687; Harrington v. Richter, 131 S.Ct. 770 (2011).

This standard is necessarily a general one. Bobby v. Van Hook, 558 U.S. 4 (2009). “No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.” Strickland, 466 U.S. at 688-689. “Restatements of professional standards, we have recognized can be useful ‘guides’ to what reasonableness entails, but only to the extent they describe the professional norms prevailing when the representation took place.”

367 S.C. 547, 557 n. 8, 626 S.E.2d 878, 883 n. 8 (2006)(citing Wiggins and concluding counsel should have investigated and presented evidence of adaptability to prison and mitigating social history evidence outlining defendant’s troubled childhood and mental illness); Von Dohlen v. State, 360 S.C. 598, 606-07, 602 S.E.2d 738, 742-43 (2004)(counsel ineffective in failing to adequately prepare and present evidence in penalty phase defendant suffered from severe, chronic depression at time of murder given he failed to provide expert witness with crucial medical records and related information which prevented expert from conveying an accurate diagnosis of defendant’s mental condition); Simpson v. Moore, 367 S.C. 587, 605-07, 627 S.E.2d 701, 711-12 (2006)(reversing PCR court’s decision defendant suffered prejudice from failure to offer sufficient social history mitigation where record showed counsel did in fact do adequate investigation and presented similar mitigation evidence); Jones v. State, 332 S.C. 329,344-45, 504 S.E.2d 822, 829-30 (1998)(fancier mitigation case does not establish ineffective assistance of counsel).

Van Hook; Strickland, at 688. The ABA Guidelines for Appointment and Performance of Defense Counsel in Death Penalty Cases are not the definition of what reasonableness means under Strickland, and they are not “inexorable commands with which all capital defense counsel must comply.” Van Hook.²⁷ In fact, as Justice Alito pointed out in his concurring opinion in Van Hook:

I join the Court’s *per curiam* opinion but emphasize my understanding that the opinion in no way suggests that the American Bar Association’s Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003)(2003 Guidelines or ABA Guidelines) have special relevance in determining whether an attorney’s performance meets the standard required by the Sixth Amendment. The ABA is a venerable organization with a history of service to the bar, but it is, after all, a private group with limited membership. The views of the association’s members, not to mention the views of the members of the advisory committee that formulated the 2003 Guidelines, do not necessarily reflect the views of the American bar as a whole. It is the responsibility of courts to determine the nature of the work that a defense attorney must do in a capital case in order to meet the obligations imposed by the Constitution, and I see no reason why the ABA Guidelines should be given a privileged position in making that determination.²⁸

While the ABA Guidelines provide noble standards for legal representation in capital cases and are intended to improve that representation, they are not minimum constitutional standards, which counsel must follow or they are ineffective. Yarborough v. Johnson, 520 F.3d 329 (4th Cir. 2008); Walker v. True, 401 F.3d 574, 583 n. 7 (4th Cir. 2005)(Strickland inquiry “does not entail the application of *per se* rules derived from ABA standards), *vacated on other grounds*, 546 U.S. 1086

27 As the Court pointed out in Van Hook, the original ABA standards were very brief and described defense counsel’s duty to investigate both the merits and mitigating circumstances in general terms. However, the 2003 ABA Guidelines were quite different; they were *131 pages long*, were directives that expanded what had been a broad outline of counsel’s duties in all criminal cases into detailed prescriptions for legal representation of capital defendants. They discuss the duty to investigate mitigating evidence in exhaustive detail, specifying what attorneys should look for, where to look, and when to begin. They include, for example, the requirement that counsel’s investigation cover every period of the defendant’s life from the moment of conception and that counsel contact *virtually everyone* who knew the defendant and his family and obtain records concerning not only the client, but also his parents, grandparents, siblings and children.

28 Chief Justice Toal and Justice Burnett noted similarly in their dissenting opinion in Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007), the ABA Guidelines are not the standard for ineffective assistance of counsel, but the standard remained reasonableness under Strickland. Their position has been supported by recent decisions of the U.S. Supreme Court. *See generally* State v. Blakely, 402 S.C. 650, 742 S.E.2d 29 (Ct. App. 2013), *citing* Rompilla, 545 U.S. at 400, *citing* Strickland. *See also* Medlin v. State, 276 S.C. 540, 544, 280 S.E.2d 648, 650 (1981)(Littlejohn and Gregory, JJ, concurring in part and dissenting in part)(ABA Standards are not controlling or dispositive of an issue). *And see* Weik v. State (not citing ABA Standards at all).

(2006). See Roe v. Flores-Ortega, 528 U.S. 470, 479 (2000); Strickland, 466 U.S. 688-89 (cautioning against the fallacy of treating guidelines as a “checklist for judicial evaluation of attorney performance”). Subsequent to Van Hook, the Court handed down Cullen v. Pinholster, 131 S.Ct. 1388 (2011) in which it reiterated the determination of whether counsel’s performance was deficient and ultimately ineffective cannot be made based on specific guidelines. Id. In fact, the Court pointed out “[b]eyond the general requirement of reasonableness, ‘specific guidelines are not appropriate.’” Id., citing Strickland at 688. The Court went on to state: “No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions...” Id., quoting Strickland, at 688-89. The Pinholster Court went further in stating:

Strickland itself rejected the notion that the same investigation will be required in every case. Id., at 691, 104 S.Ct. 2052 (“Counsel has a duty to make reasonable investigations *or* to make a reasonable decision that makes particular investigations unnecessary” (emphasis added)). It is “[r]are” that constitutionally competent representation will require “any one technique or approach.” Richter, 562 U.S. at ___, 131 S.Ct. at 779. The Court of Appeals erred in attributing strict rules to this Court’s recent case law. [FN 17 The Court of Appeals was not necessarily wrong in looking to other precedents of this Court for guidance, but “the Strickland test ‘of necessity requires a case-by-case examination of the evidence.’” Terry Williams, 529 U.S. 362, 391, 120 S.Ct. 1495, 146 L.Ed. 389 (2000)(quoting Wright v. West, 505 U.S. 277, 308, 112 S.Ct. 2482, 120 L.Ed. 225 (1992)(KENNEDY, J., concurring in judgment).]

As a result, it is clear that since the decisions by the United States Supreme Court and this Court referencing the ABA guidelines, the Supreme Court has made clear the mere fact an attorney did not follow the ABA Guidelines in general or specific ABA Guidelines does not mean counsel’s performance was deficient in performing a mitigation investigation in a capital case. Pinholster; Van Hook; Strickland. What the Sixth Amendment requires is counsel in a capital case conduct a reasonable and thorough investigation into mitigation evidence and present the same at sentencing. Wiggins v. Smith, 539 U.S. 510 (2003); Williams v. Taylor, 529 U.S. 362, 296 (2000); Strickland.

The PCR Court reviewed Mahdi's allegations under this ground under the above cited standards. (Final Order of Dismissal). The Court correctly found Mahdi had failed to show deficient performance, and Mahdi had also failed to show prejudice for the reasons set forth below. As a result, there is no merit to this issue. The Petition for Writ of Certiorari should be denied.

The Alleged Failure to Present Community Witnesses/School Officials

At the PCR hearing, Mahdi offered the testimony of 2 community witnesses and the affidavits of 2 community witnesses on this issue. Mahdi also called 2 school official and the affidavit of 1 school official. Mahdi now contends counsel was deficient only in failing to call these *community witnesses / school officials* at sentencing before Judge Newman, and he alleges he was prejudiced by this. Specifically, at PCR, Mahdi called a community activist, George Smith, and another member of Mahdi's community, Virginia Pond. Mahdi also offered affidavits from Sheriff James Woodley, who testified for the State in the penalty phase, and Douglas Pond, 2 more members of Mahdi's community. Mahdi called Myra Harris and Carrol Wilson, 2 of Mahdi's elementary school teachers, and offered the affidavit of Dora Wynn, Mahdi's kindergarten teacher and elementary school principal for a period of time.

At PCR, George Smith, by affidavit James Woodley, by affidavit of Vernon Pond, and Sharon Pond testified to Mahdi's father's behavior in the community. Both Smith, Mr. Pond [by affidavit], Ms. Pond, and Mr. Woodley [by affidavit] testified or averred to an incident where Mahdi's father jumped into a segregated [all white] swimming pool and would not leave in protest. Mahdi's father is African-American. He was arrested and began throwing items at the jail. As a result, he was sent for a mental evaluation. That evaluation eventually determined Mahdi's father had no major mental illness. Mr. Smith also testified Mahdi's father did not like white people and he especially disliked Jews, though Mr. Smith thought this might be because Mahdi's father was a Muslim. Mr. Woodley also averred to Mahdi's father's conversion to Islam, his defiant behavior in the community, his inability to hold a job, and his physically abusive behavior and acts toward his wife and his mother which were witnessed by Mahdi and his brother. Woodley did not

witness this domestic violence, he found out this information from others. **(PCR 166-86 & Affidavits of James Woodley and Vernon Pond).**

The school officials testified as follows: Myra Harris testified she was Mahdi's 3rd grade teacher after he was released from the Walter Carter Center for what she termed a suicide attempt.²⁹ She testified she worked with Mahdi, and he improved over the course of the year. She admitted Mahdi was a discipline problem in her class at the beginning of the year but she was able to correct that. Mahdi remained a discipline problem in other classrooms, and she would often see him in detention. If she would have been called as a witness at sentencing she would have asked Judge Newman for mercy. She admitted when Mahdi was not in her class, he would refuse to do his work or was defiant, he would engage in angry outbursts in other classrooms or in the hallway, including making loud verbal gestures, and he would leave the classroom without permission. She admitted she was not surprised Mahdi's I.Q. was tested as high at 118. She admitted her classroom was one in which children with discipline problems were placed. **(PCR 109-27).**

Carol Wilson testified Mahdi was in her class in the 5th grade. She taught special education, but Mahdi was not mentally retarded as he had an I.Q. of 118 and was very intelligent. Mahdi was classified as emotionally disabled (ED) and referred for services in reading and language skills. She admitted his emotional outbursts and refusal to do school work were probably the reason he was evaluated and referred to her class, and records showed he had difficulty in reading, which could cause him to be frustrated with school work and then become angry. Counseling was also recommended. She testified he was sad/depressed at times, when in her class, but she did not know the reason for the sadness.³⁰ Mahdi had low self-esteem, and

29 Carson and Lawanda Burwell [Mahdi's uncle and aunt with whom he resided at the time of his commitment] informed counsel Mahdi's commitment to the Carter Center was not a real suicide attempt but more of Mahdi's manipulative behavior, which will be discussed further herein.

30 Mahdi informed counsel and Dr. Martin [trial psychiatric expert] he never should have been in special education, and he basically quit working in school when he was placed there. He told Dr. Martin he became ODD (Oppositional Defiant Disorder) when he was placed in special education,

officials believed his changing school numerous times may have contributed to his school difficulties. She had to put Mahdi's desk next to hers to make him do his school work. She testified Mahdi's father initially was adamant and upset school officials wanted to place him in special education, but he eventually acquiesced and agreed to the placement. Mahdi was eventually pulled out of her class by Mr. Mahdi to home school him. Mahdi's father was fired as a substitute teacher after he told 5th grade girls in a class he was teaching they should use birth control, not have babies out of wedlock, and end up on welfare. Wilson believed Mahdi fell through the cracks, and she would have asked Judge Newman for mercy if called to testify because she felt Mahdi's father interrupted Mahdi's schooling. She admitted however the records generated by the school district showed Mahdi's father was strongly concerned about Mahdi. She contradicted other witnesses, who testified at PCR there was not enough food in Mahdi's home, describing Mahdi as plump, chubby, and overweight when in her class.

Ms. Wynn averred when Mahdi was in her kindergarten class, he was a bright child, but quiet and shy. He was more of an observer than participant, and she had to encourage him to engage with other children. When Mahdi was in the 4th grade, she was his principal. Mahdi misbehaved often and was regularly in her office. She believed Mahdi had trust issues. He refused to do his work, refused to eat, and would just walk away from school. She also described him as angry. He was recommended for placement in special education. Mahdi was not in special education long before his father pulled him out of school. She also averred Mahdi's father was a substitute teacher but she stopped him from teaching because he was engaging in what she termed "irrational behavior" and was cursing students.

and he begged the principal and his father to take him out of special education, and his father finally did and home schooled him. Madhi told a PCR expert something similar.

Respondent's presentation at PCR

At the PCR merits hearing, Respondent called the following witnesses in response to the allegation counsel failed to investigate and present mitigation evidence: Carl Grant, Esq., Glenn Walters, Esq., Josh Kroger, Esq., Paige Tarr Haas Munn ("Tarr"), James Gordon, Dr. Thomas Martin, and Dr. Geoffrey McKee. Respondent also introduced the testimony of Marjorie Hammock from the sentencing proceeding before Judge Newman, several exhibits introduced through Ms. Hammock in Mahdi's sentencing proceeding, and several exhibits generated during counsel's mitigation investigation.

Counsels' Mitigation Investigation

The record shows counsel (Mr. Grant and Mr. Walters) retained a mitigation investigator (Tarr), a forensic social worker (Marjorie Hammock), and a private investigator (James Gordon), to investigate and develop Mahdi's family and social history for mitigation evidence to be presented at sentencing. Counsel also retained 2 experts, Dr. Thomas Martin (a forensic psychiatrist) and Dr. Geoffrey McKee (a forensic psychologist), to investigate Mahdi's psychiatric history and mentality at the time of the crime *and* uncover any mental deficiencies or disorders that would mitigate punishment. **(PCR. 503-710)**. The record shows the mitigation investigator and forensic social worker interviewed numerous members of Mahdi's family, a member of Mahdi's community, and school officials, and counsel also interviewed potential mitigation witnesses themselves. **(R. 1746-47, PCR. 503-710)**. Counsel and the investigators also consulted with Mahdi's North Carolina defense team [on the Boggs' murder] and obtained from them mitigation evidence they had uncovered. **(PCR. 503-710)**. Counsel also moved for, and obtained, a continuance for almost 1 year in order to completely and thoroughly investigate and develop the mitigation case on Mahdi's behalf. **(PCR 597-98, Resp. Ex. 16[Continuance Motion], Resp. Ex. 17 [Continuance Order])**.

The mitigation investigator, Tarr, was retained by Carl Grant on the recommendation of Jeff Bloom, an experienced capital defense attorney. **(PCR. 589)**. Tarr had previously served as

mitigation investigator or specialist in 30 to 40 capital cases. **(PCR. 562-63)**. As a result, she was thoroughly familiar with the necessity of, and how to conduct, a capital mitigation investigation.

Tarr investigated Mahdi's social, family, school, institutional, and mental health history by interviewing Mahdi, his father, mother, grandmother, paternal uncle Carson, paternal aunt Lawanda, paternal aunt Kathy Burwell, maternal aunt Sophie Gee, maternal aunt Corlis Artis, paternal uncle Nathan, and school officials, and by obtaining records of Mahdi's background including his DJJ records, his *school records*, and his records of commitment to a psychiatric facility (the Walter Carter Center) in Baltimore at age 9. **(PCR 563-75; Resp. Ex. 12)**. Tarr also summarized these particular psychiatric records for counsel and their retained experts. **(PCR 565-66)**. Tarr also summarized Mahdi's *school records* for counsel and the retained experts.

As part of her investigation, Tarr requested Mahdi's school records. **(PCR 565)**. Although she no longer had her file in this case, she testified it was her common practice to request records from any school Mahdi or his family informed her Mahdi had attended. **(PCR 565)**. She also testified she went to the schools Mahdi attended. She spoke with teachers in Lawrenceville who were familiar with Mahdi; however, these teachers had not spent a lot of time with Mahdi. She also testified she spoke with individuals from a school Mahdi attended in Baltimore. Tarr testified she routinely provides summaries of school records in capital cases. She also testified if she had done a summary of school records in this case, she would have included all pertinent information she thought *was helpful* to Mahdi. **(PCR 585-87)**. A summary of the school records was done in this case and introduced at the sentencing hearing before Judge Newman.

Tarr also traveled to North Carolina and met with Mahdi's attorneys representing him on the Boggs' murder; because, they had conducted a mitigation investigation themselves on Mahdi's behalf, and their information was shared with Tarr. **(PCR 569-75; Resp. Ex. 12)**.³¹ Tarr learned from the N.C. attorneys Mahdi's Uncle Carson had told them Mahdi was a "demon" when he lived

³¹Mahdi's N.C. attorneys were present at the PCR hearing and did not contradict this testimony.

with Carson and Lawanda. This fact was established by a document generated by Tarr after meeting with those attorneys and shared with counsel in this case. **(PCR 503-05, Resp. Ex. 7).**

Tarr also traveled to Lawrenceville, VA and made contact with Mahdi's grandmother Nancy and Uncle Nathan, and traveled to Baltimore, MD and made contact with Mahdi's Aunt Lawanda, Uncle Carson, and Aunt Kathy. Tarr also located Mahdi's maternal aunts Corliss Artis and Sophie Gee in Richmond, VA. Tarr also located Mahdi's mother, Vera Telea Artis, from whom Mahdi was estranged. Tarr also attempted to speak with Mahdi's brother, Saleem, however, he was repeatedly unavailable to speak with Tarr. **(PCR 563-75).** Tarr provided counsel with summaries of these witnesses' potential testimony and relayed to counsel the information collected by her. **(PCR 574).** She returned to Virginia, Maryland, and Pennsylvania with the forensic social worker, Hammock, where they were able to interview members of Mahdi's immediate and extended family. As of November 6, 2006, a month before sentencing, Tarr had spent about 170 hours interviewing witnesses, collecting documents, and producing data in her quest to put together an appropriate mitigation presentation at sentencing. At that time, she anticipated working an additional 75 hours in preparing the case for trial. **(Resp. Ex. 10).**

The record shows Marjorie Hammock, a forensic social worker, retained by Carl Grant, had previously worked as a forensic social worker in numerous capital cases in several states including South Carolina. At the time of sentencing, Hammock had testified and been qualified as an expert in clinical social work in approximately 14 cases, worked on 25 capital cases, and, was working on another 5 capital cases, here, in Florida, and Alabama. **(R 1739-63).**

Hammock traveled with Tarr the 2nd occasion to Lawrenceville, to meet with Mahdi's paternal grandmother Nancy and Uncle Nathan. She interviewed both. Hammock also traveled to Richmond and attempted to speak in person with Mahdi's mother, who was not cooperative, and was finally able to speak with her but only by phone. Hammock also interviewed a family friend. She also interviewed Mahdi's maternal aunts Sophie Gee and Corlis Artis. She also traveled to Baltimore where she interviewed Mahdi's uncle and aunt, Carson and Lawanda Burwell. She also

interviewed Mahdi's father, Shareef Mahdi, while in Philadelphia, PA. (**R 1739-63, PCR 563-75**).

Counsel also participated in the mitigation investigation. Counsel traveled to N.C. and met with Mahdi's attorneys and mitigation team on the Boggs' case, who shared with counsel the results of their investigation. Counsel testified there were team meetings at which their own mitigation investigator, social worker, retained psychiatric/psychological experts, and counsel were present, and each shared what their investigation had uncovered. (**PCR 595-97, 612**).

Counsel testified they also interviewed Mahdi with regard to mitigation information or evidence.³² Mahdi was intelligent, and they had no problems communicating with him. Counsel testified they were aware Mahdi had been placed in special education classes in elementary school, but Mahdi also informed them he never should have been placed in special education classes. (**PCR 592-93, 603-11, 629, 688-90**). As previously stated, counsel had obtained Mahdi's DJJ records through Tarr. In those records, Mahdi admitted he had difficulties in school adjustment, had been frequently suspended, had a history of verbal and physical aggression, conflicts with educational authorities, and difficulties getting along with classmates. (**DJJ record M00416**). He also admitted he had injured someone in a fight and had hit or attacked someone who was not in his family. (**DJJ record M00495**). Counsel testified they relied on Tarr and also Hammock, the forensic social worker, to get all of the information with regards to Mahdi's school and education. (**PCR 629-30**). Counsel testified Mahdi was dysfunctional in the school system and from Mahdi's own statements to counsel he had problems within the school system. (**PCR 637, ll. 22-26**). Counsel also testified there were team meetings where the mitigation investigator and

³² Counsel Walters testified Mahdi was very intelligent, recounting Mahdi informed him that he had hatched a plan when he lived in Virginia whereby he would eliminate all other drug dealers in his area, resulting in a "false drought" of drugs. As a result, Mahdi would make more money selling drugs because everyone would have to come to him for the illegal product. Mahdi also related to counsel he left Virginia because detectives were closing in on him for a homicide committed in the Richmond area. Counsel testified Mahdi was calculating and intelligent in being able to disguise himself as someone else. Mahdi informed counsel he impersonated a homeless person in Columbia in order to gain entrance into the Oliver Gospel Mission when the car he stole from Virginia broke down; Mahdi pretended to be a homosexual in order to accomplish the carjacking here; Mahdi impersonated a police officer in Florida, including investigating a crime reported by a citizen.

social worker shared with them and their experts what they had found in their investigation. (PCR 631, 700). Counsel also testified they would have forwarded any records they received to their experts. Drs. Martin and McKee also testified they were aware Mahdi was in special education.

Counsel also traveled to Virginia and spoke with Mahdi's grandmother Nancy and his Uncle Nathan. Nathan was not cooperative in their mitigation investigation, and counsel was hesitant to call Nathan as a witness because he assisted police in identifying Mahdi from the video of the N.C. murder and was proud of that fact.³³ Counsel testified Mahdi's grandmother was cooperative in their mitigation investigation, and they had her present at sentencing to testify, but she was unwilling to assist Mahdi regarding mitigation testimony, stating she was there [at sentencing] to defend the Burwell family name.

Counsel also talked with Mahdi's Uncle Carson and Aunt Lawanda. While Carson and Lawanda were cooperative in providing background information on Mahdi and his family, Carson informed counsel he would not be helpful to Mahdi if he testified. Carson informed counsel Mahdi was defiant and manipulative in their home. Carson related Mahdi almost had he and Lawanda arrested when Mahdi made a false claim of child abuse and manufactured false evidence of abuse. Carson and Lawanda's position was they were glad Mahdi was out of their home. Carson also told counsel he and his wife were not going to help Mahdi. Carson told counsel if he were called to testify he would have bad things to say about Mahdi. (PCR 618-20, 627-28, 649-50, 693-97). Lawanda testified at PCR she would have been reluctant to testify at Mahdi's sentencing proceeding in 2006. Carson admitted at PCR he may have told Mahdi's N.C. attorneys Mahdi was a "demon" because of Mahdi's disruptive conduct in their home. Also, at PCR, Tarr produced her notes detailing exactly what Carson told her, that Mahdi was manipulative *and* the incident leading to Mahdi's commitment to the Carter Center was more of Mahdi's

³³Tarr also related to Judge Early that Mahdi's Uncle Nathan was not helpful in the mitigation investigation. (PCR 576).

manipulative behavior, not a real suicide attempt. **(PCR 572-74).**³⁴

Counsel also interviewed Mahdi's aunt Kathy Burwell, and she indicated she did not wish to participate in Mahdi's sentencing hearing. Counsel also interviewed Mahdi's brother, Saleem; however, he was not particularly helpful or interested in testifying.³⁵ Counsel testified Mahdi's father was not cooperative ("standoffish") and did not want to be involved. **(PCR 636).** Counsel testified Mahdi himself indicated to them he did not want his father involved in his trial or sentencing proceeding. Counsel testified Mahdi's mother was completely uncooperative and did not want to participate in Mahdi's sentencing proceeding. **(PCR 602-710).** Neither Mahdi's mother, nor father, or brother testified at the PCR hearing or offered any affidavits. **(PCR 1-720).**

Both Dr. Martin and Dr. McKee, counsel's psychiatric and psychological experts, also took a social history from Mahdi, and also a psychiatric history. Both Martin and McKee were aware of Mahdi's commitment to a psychiatric facility when age 9 and reviewed those records in detail. Dr. Martin also reviewed Tarr's interview summaries with Mahdi's family members. Dr. Martin also testified at the PCR hearing that Mahdi informed him he had been placed in special education. Mahdi told him he should not have been placed in special education. **(PCR 515).** Mahdi also told Dr. Martin he became ODD (Oppositional Defiant Disorder) after being placed in special education because he did not belong there. **(Resp. Ex. 8).** Mahdi begged the school principal to take him out of special education, but this was unsuccessful. **(PCR 516).** And, he also asked his father to take him out of special education, and his father eventually pulled him out of public school and home schooled him. **(PCR 516).** Dr. Martin also testified students are classified as emotionally disabled and placed in special education classes because they are

³⁴ Mahdi's aunt Lawanda informed Mahdi's PCR experts Nicholas Cooper-Lewter and Dr. Haney that in their home Mahdi would threaten to harm himself when he did not get his way. Mahdi also informed personnel at the Carter Center he only wanted to hurt himself when he did not get his way.

³⁵ Collateral counsel's forensic social worker, Nicholas Cooper-Lewter, admitted at PCR Mahdi's brother, Saleem, would not talk to him either. **(PCR 317-18).**

behavioral problems. **(PCR 542)**. Sometimes this behavior is fueled by depression, sometimes its incorrigible behavior, or sometimes they are truant or having problems with conduct disorder. **(PCR 542)**. Martin testified Mahdi's acting-out behaviors such as irritability, talking back to teachers, and disrespectful attitude were in other reports he did review and also in information Mahdi provided to him. **(PCR 542)**. Dr. McKee also testified he was aware Mahdi had been placed in special education as a child. Both testified there were team meetings where they shared their findings with counsel and the other experts.

The PCR Court had the opportunity to view the testimony of counsel, their investigators and experts and found their testimony on this issue to be credible. Both Martin and McKee were present at defense team meetings where information was shared regarding the joint investigation into Mahdi's past. Both Drs. Martin and McKee found separately Mahdi was not suffering from any major mental illness at the time he committed Myers' murder, and they diagnosed him with ASPD at the time of this murder. While Dr. Martin testified he found Mahdi had suffered from some recurrent depression in his life, he did not find any evidence Mahdi was suffering from any depression at the time he committed Myers' murder. Dr. Martin testified at the PCR hearing the records introduced by Mahdi at PCR would not change his diagnosis. Dr. McKee testified at the PCR hearing he did not need additional records to make his diagnosis or issue his report. Neither Dr. Martin nor Dr. McKee changed their diagnosis based on records shown them by Mahdi at PCR. **(PCR 508-61)**.³⁶ Both also testified at the PCR hearing Mahdi was very intelligent. **(PCR 508-61)**. Both also related Mahdi informed them he left Virginia, before the Boggs' and Myers' murders, because detectives were closing in on him for the murder of a drug dealer. Mahdi also related to 1 of the doctors he was involved in another homicide where the body had yet to be

36 Von Dohlen v. State, 360 S.C. 598, 606-07, 602 S.E.2d 738, 742-43 (2004)(holding counsel was ineffective in failing to adequately prepare and present evidence in penalty phase defendant suffered from severe, chronic depression at the time of the murder given counsel failed to provide *their expert* witness with crucial medical records and related information which prevented *that witness* from conveying accurate diagnosis of defendant's mental condition to the jury).

found.³⁷

Counsel testified they wanted a family member at the sentencing hearing to testify on Mahdi's behalf regarding his family and social history mitigation; however, the only person who was willing to come and testify was Mahdi's grandmother Nancy; the rest of the family, including aunts, were not willing to participate. (PCR 636, ll. 12-25, 638, ll. 10-21, 649-50, 693-94, 696-97, 691). Counsel testified they had the grandmother present at trial to testify and worked with her; however, she did not want to discuss Mahdi and how he came to be where he was; she wanted to talk about all of the accolades of the family, and even though Mahdi committed these horrible crimes, the Burwell family was still a good family. (PCR 620-21, 691-92). Counsel also testified their mitigation investigation revealed Mahdi was in trouble in school. As a result of the lack of

37 Mahdi's diagnosis of ASPD is fully supported by the record. When admitted to Virginia's DOC, Mahdi was diagnosed with intermittent explosive disorder and ASPD. At PCR, Dr. Martin testified Mahdi had no difficulty talking about killing people if necessary in order to achieve independence and appeared to have no remorse regarding any of his past violent acts. Martin related to counsel what his findings were *and* they would not be helpful to Mahdi. Also, in conducting his evaluation, Dr. Martin took a history from Mahdi and discussed with him the circumstances of the crimes against Myers and why Mahdi left Virginia. Mahdi related *he left Virginia because of the drug dealer homicide*, and he was involved in another homicide where the body had not been found. Mahdi also related he shot Myers in the chest and head, and after Myers was on the floor of his cabin, Mahdi shot him several more times in the head to make sure he was dead. (PCR 508-23). Dr. McKee took a detailed history from Mahdi, conducted tests on Mahdi, and reviewed records including Mahdi's psychiatric records from when he was 9. McKee found Mahdi was very intelligent and did not suffer from a major mental illness at the time of the crime. McKee found, independent of Dr. Martin, Mahdi had ASPD. McKee found nothing else. Mahdi also related to McKee he left Virginia because he was involved in the homicide of a drug dealer and police were closing in on him. (PCR 545-561). McKee also related his findings to counsel. (PCR 689-90, 626-27). Counsel testified they made a strategic decision not call either expert at sentencing before Judge Newman, because their testimony would not be helpful and damaging information would have come out on cross-examination. (PCR 689-90, 626-27). This was objectively reasonable under the circumstances. Strickland; Council. Wong, *supra* (calling mitigation witness would have exposed defendant to admission of evidence of other homicide not before the sentencing authority); *See Cullen, supra* (reasonable penalty phase strategy to pursue evoking sympathy for mother where psychiatrist found defendant had no signs or symptoms of mental disorder other than his ASPD traits); Byrum v. Ozmint, 339 F.3d 203, 210 (4th Cir. 2003)(counsel not ineffective in failing to present testimony by a psychiatrist and psychologist because the suggestions of ASPD which experts found could have been harmful to the defense); Satcher v. Pruett, 126 F.3d 561 572 (4th Cir. 1997)(similar); Reed v. Florida Dept. of Corrections, 593 F.3d 1217 (11th Cir. 2010)(similar); Fulks v. United States, *Slip Copy*, 2010 WL 3069390 (D.S.C. 2010)(similar).

cooperation from the family, including extended family, counsel presented the mitigation evidence including Mahdi's family, social, scholastic, and mental health history through their forensic social worker. **(PCR 624, II. 17-22).**

The Mitigation Presentation at Sentencing

Marjorie Hammock conducted a bio-social assessment of Mahdi's life and family history and presented the same in the sentencing proceeding. **(R 1739-63).** Hammock informed Judge Newman she interviewed Madhi's grandmother Nancy, his uncle Carson, his uncle Nathan, his aunt Lawanda, his mother Vera Telea Artis, his aunt Sophie Gee, another aunt Corliss Artis, Mahdi's father Shareef, and a family friend. **(R 1746-47).** She conducted her bio-social assessment by interviewing family members, reviewing records, interviewing Mahdi, and taking information from anyone who would give information about him, his life, and his development. **(R 1762).** She also reviewed a synopsis of Madhi's school records [prepared by Tarr] and reviewed a report from his admission in Baltimore to the Walter Carter Center psychiatric facility at age 9. **(R 1746-47, 1762).** Hammock presented, through her testimony and the exhibits introduced through her, the following mitigation evidence at sentencing before Judge Newman:

Like the family witnesses presented at PCR, Hammock informed Judge Newman of the problems within Mahdi's family. It looked like an intact family, but there were problems under the surface. There was alcoholism in the family and some neglect on the part of Mahdi's grandfather. **(R 1750).** Madhi's grandmother, Nancy Burwell, was not allowed to have her fallopian tubes tied after the birth of 1 of the siblings born before Mahdi's father was born. **(Def. Ex. 2/Resp. Ex. 5).** As a result, Mahdi's grandmother, Nancy, was not emotionally available to Mahdi's father or his younger sister, Kathy. **(Def. Ex. 2).** And, Mahdi's father considered himself an unwanted child. **(R 1750).**

Mahdi's father, like Mahdi, was extremely troubled as a child. Mahdi's father was described as disturbed as a young child, and he threw tantrums. Mahdi's father's childhood was difficult, and he grew up in a situation feeling alienated from everyone around him. **(R 1750).**

Mahdi's father was traumatized by his attending desegregated schools as a young child. **(R 1750)**. This experience was destructive to Mahdi's father; he was ridiculed, isolated, challenged physically by classmates, ignored, or received negative feedback from some of the instructors at the desegregated school. **(Def. Ex. 2)**.

Mahdi's father was unable to get along with his own family and others in the community and was constantly in conflict with those around him. Mahdi's father had committed assaults on some of his own family members. Mahdi's father did not finish high school; he was the only sibling not to graduate, and this was a source of consternation between him and his family. Mahdi's father was unable to hold a job, and he eventually converted to Islam. His conversion and changing his name from Thomas Burwell to Shareef Mahdi brought grief to the Burwell family. **(R 1750-51, 1433)**.

Mahdi's father was suffering from depression as early as 1971. Mahdi's father was discharged from the Marines under less than honorable conditions. Mahdi's father was not able to function well, and there was some description of Mahdi's father suffering continuing depression. There were a number of incidents involving Mahdi's father with local law enforcement. He was involved in a series of misdemeanors, all said to be racially motivated. **(1750-51, 1433, Def. Ex. 2)**.³⁸ And, Mahdi's father's involvement in the 8 hour stand-off with police was testified to before Judge Newman.

Mahdi's mother was different. She was *very, very withdrawn* and did not want to talk to Hammock at all. It appeared Mahdi's mother was frightened about being involved with the Burwell family again because of her previous experiences with Mahdi's father. While Mahdi's mother did eventually educate herself, join the military, and at the present time worked and took care of herself, she was totally isolated from her own family, as well as Mahdi's father's family.

38 Dr. Nicholas Cooper-Lewter, Mahdi's PCR social work expert admitted Mahdi indicated to him he was embarrassed by his father's "rantings." **(PCR 331-32)**. He noted Mahdi indicated his father's rants would go on and on, and there was a point where Mahdi just stopped listening to his father. **(PCR 332)**.

While she may occasionally speak to some members of the family, there was a disconnection. The information regarding Mahdi's mother came from Mahdi's mother, her siblings, and the Burwell family and was all consistent. **(R 1756-57).**

Mahdi's parent's marriage was a pre-arranged marriage to which Mahdi's mother did not agree, and Mahdi's father was much older at the time of the marriage than Mahdi's mother, who was just 16. The marriage was arranged by Mahdi's maternal grandmother, and Mahdi's father was 27 at the time. Mahdi's mother had no choice but to join the marriage, and there was conflict in the marriage from its beginning. After the wedding, Mahdi's father changed Mahdi's mother's birth name, Vera, to Tilea. Mahdi's father was physically abusive to Mahdi's mother, and Mahdi's mother eventually left the home to escape from the abuse. Mahdi's mother was in what she described *and others described* as an abusive relationship, and she decided to leave because she could no longer stay with Mahdi's father even though it meant leaving her own children. **(R 1751, Def. Ex. 2, 1757).**

Mahdi's childhood was chaotic. Mahdi and his brother were born into a very unstable family. The 2 boys were born within a 24 month period of time. Mahdi's father could not provide for or take care of the family. The family moved several times, ultimately ending up back in Lawrenceville living with Mahdi's grandmother. Once again, Mahdi's father was unable to sustain himself. **(R 1751, 1757).**

There was a great deal of conflict between Mahdi's father and mother, and Mahdi and his brother witnessed this. Mahdi and his brother witnessed domestic violence committed by their father against their mother. Mahdi's mother eventually left Mahdi's father and her children trying to get away from the abuse committed by Mahdi's father. Mahdi's mother was forced to leave because of the abuse. And, Mahdi's mother left Mahdi and his brother when Mahdi was just 4 or 5 years old. **(R 1751-52, Def. Ex. 2, 1757-58).**

After Mahdi's mother left, the chaos continued. Mahdi's father tried to take care of the children, and the grandmother, Nancy, also tried to provide assistance during this time, but the

relationship between Mahdi's father and the grandmother and the rest of the family was constantly confrontational. Mahdi and his brother witnessed their father commit domestic violence on their grandmother, Nancy. During this period of time, there were several moves in terms of schooling for Mahdi from Lawrenceville to Richmond and back to Lawrenceville. **(R 1751-52, Def. Ex. 2).**

Judge Newman was aware of the incident described by family members at PCR and by Sheriff Woodley in his affidavit where Mahdi's father forced Mahdi's mother to return to Lawrenceville and assaulted her. After Mahdi's mother left initially to escape from the abuse, Mahdi's mother was taken from Richmond to Lawrenceville by Mahdi's father, who then assaulted and abused Mahdi's mother. Mahdi's uncle Nathan actually rescued Mahdi's mother, but as a result of this incident, Mahdi witnessed more abuse and violence, specifically his father committing domestic violence on his mother. After this incident, Mahdi's mother moved to Pottsdale, without the children, in order to again escape from Mahdi's father. **(R. 1752, Def. Ex. 2).**³⁹

Ultimately, Mahdi's father was unable to take care of Mahdi at all. Mahdi's father suffered from depression. At this point in time, when he was age 8, Mahdi was sent to live with his aunt and uncle in Baltimore, and his brother was sent to live with another aunt in Texas. As a result, Mahdi and his brother were separated from each other, and from their father. **(R 1753, Def. Ex. 2).**

Mahdi had to live with his aunt and uncle because of his father's inability to care for him. Lawanda and Carson related Mahdi was a bright and energetic young boy, but very, very troubled, who had difficulty in school. Carson related that when Mahdi came to live with them he could not read. And, there was conflict at this time in getting Mahdi to deal with the fact he had academic limitations. **(R 1753-54).**

39 Sheriff Woodley in his affidavit describes this incident as an attempted murder. However, at the sentencing hearing before Judge Newman, under oath, Sheriff Woodley testified the only violations of the criminal law Mahdi's father had committed that he was aware of were "simple assaults" on family members. Sheriff Woodley did not appear at the PCR hearing and subject himself to cross-examination on his affidavit. Nor did he witness this incident.

Mahdi was hospitalized, psychiatrically, in Baltimore for 2 months [60 days].⁴⁰ Mahdi was committed involuntarily to the Walter Carter Center psychiatric facility, after being separated from his brother and father, where he was diagnosed with Major Depression with suicidal ideation, adjustment disorder, R/O Adjustment Disorder, Developmental Reading Disorder, and history of right arm and leg fractures.⁴¹ After Mahdi was released from the facility, he stayed only a short time with his aunt and uncle, because he was anxious to be reunited with his father and brother. Mahdi's behavior in Carson and Lawanda's home was defiant and became even more defiant when Mahdi learned his brother had already re-united with his father. As a result, Mahdi had to be returned to live with his father. **(R 1747-49, 1756, Def. Ex. 1, Def. Ex. 2).**

Mahdi, his brother, and his father were re-united on the Burwell family property, an isolated place in the country. They often had no food, heat, or money. Mahdi had difficulty in his adolescence which eventually resulted in his incarceration. Mahdi re-united with his mother after being released from DJJ after his 1st stint of incarceration. While they reunited, it was not a successful or good reunion. Mahdi and his mother did not get along and both had very different ideas about his living with her. They eventually parted ways, and Mahdi and his mother had not spoken to each other since. **(Def. Ex. 2, 1749, Def. Ex. 1, 1758).**

Mahdi's education was disrupted many times. This was reflected in the school records. The records also noted lateness and absences, but this was not consistent through the whole record. Mahdi also had to change residences several times. Mahdi was forced to change elementary

⁴⁰The testimony at the original Blair hearing was Mahdi was not suffering from any mental illness. **(R 131).** Mahdi also stated at his guilty plea under oath, that he had not been previously treated for alcohol abuse, drug abuse or mental illness. **(R 1346).** When asked if he had any physical, emotional or nervous problem that might keep him from understanding what he was doing, Mahdi stated "I have none of those problems, Your Honor." **(R 1347).**

⁴¹Mahdi suffered broken bones as child while riding a bicycle and falling off of monkey bars. There was no contention at PCR that Mahdi was ever physically or sexually abused by anyone. **(PCR 571-72).**

schools 5 times.⁴² Even in his pre-teen years there was a lack of stability in terms of Mahdi's attending school, and it was reflected in the kinds of reports he received. **(R 1752, 1756, Def. Ex. 2, Def. Ex. 3, R 1760-61).**

Mahdi constantly had difficulty in school academically. He was considered bright, but did not perform well. He was a particularly poor reader. Both Carson and Lawanda reported Mahdi had difficulty in school, could not read, and there was constant conflict in getting Mahdi to deal with his academic limitations. The school records during this time were consistent with this report. Mahdi had uneven skills in school. He was in the average math program, but in the below average reading program. While he excelled in science, his reading, vocabulary, and spelling remained below average. When he was involuntarily committed to the Carter Center, Mahdi's initial diagnosis included "Developmental Reading Disorder." Mahdi's difficulties in reading and writing remained at or below grade level throughout elementary school. Mahdi needed improvement in a number of areas, including standards for behavior and showing respect for authority. And, Mahdi had poor self-esteem throughout his academic time. It was noted several places in the records Mahdi had poor self-esteem and difficulty in relationships with others. Mahdi had numerous absences in school, and Mahdi's father removed him from school in the 5th grade to home school him; however, there was no information the home schooling actually occurred. In summary, Mahdi's educational history was one of poor school progress. **(R 1752-56, Def. Ex. 2, Def. Ex. 3, 1762).**

Mahdi did not receive proper parenting while growing up. Mahdi's father was not equipped to provide consistency, positive reinforcement, support, care giving, to teach social values in the community, and how to develop relationships with others, i.e. those things a child

42 Mahdi started out kindergarten at Sister Clara Muhammad School in Richmond, and he completed part of kindergarten at Totoro Elementary School in Lawrenceville. He was moved back to Richmond and attended Chamberlayne Elementary School for part of that year. Then he was removed from there and sent to Baltimore where he attended Scotts Branch Elementary School for 2 years. Then he was removed from that school while in the Carter Center, and ultimately returned to Lawrenceville to live with his father. **(R 1754-56).**

needs to grow up healthy. Mahdi's father had his own personal issues, which prohibited him from being a good father. Mahdi's father and mother were not really available to Mahdi on any kind of consistent basis while growing up. Mahdi was exposed to a lot of conflict and chaos. In his preteen years, Mahdi was exposed to more chaos, more movement, more change, a lack of stability even in terms of his attending school, and this was reflected in the school reports he received. In his adolescent years, Mahdi was exposed to more chaos. He was exposed to his father's outbursts and problems. His father was known to be at odds with people in the community, with his own family, and with law enforcement. While Mahdi cares about his father, wanted more than anything else to have an intact family and an ongoing relationship, it simply did not happen. Mahdi did not receive from his mother or father consistent help in growing up, developing good skills, or a sense of value. While some people in Mahdi's life tried to provide these things, it was not consistent enough for him to learn how to do these things. **(R 1759-61).**

Mahdi had been traumatized throughout his early life, and this had an impact on his ability to make good choices. This affected his ability to have a good sense of himself and others. And, it impacted his ability to behave according to societal norms. **(R 1762).**

During her investigation of Mahdi's life, Hammock assessed whether certain risk factors were present or not. She testified before Judge Newman certain risk factors were present. Mahdi had been abused and neglected. Mahdi suffered from abandonment. Mahdi was never exposed to the right kind of socialization. And, he has poor self-esteem. He also has a poor history of school progress and a poor sense of self. Mahdi was someone who had been neglected, abandoned, suffered from poor parenting, and as a result was likely to end up in a situation where he was out of control and did damage to himself and others. Mahdi fit the typical profile of persons who end up in the kind of situation before Judge Newman, because Mahdi never really had a chance to develop appropriately. **(R 1762-63)**

The State did not cross-examine Hammock or challenge her mitigation testimony. The State did not challenge the accuracy of the exhibits introduced through Hammock. **(R 1739-63).**

All of this evidence was before Judge Newman [the sentencing court] uncontested.

Further, while the State introduced portions of Mahdi's DJJ records during sentencing as evidence of Mahdi's character, the records also confirmed much of what Hammock testified to before Judge Newman regarding Mahdi's upbringing and family. The records indicated Mahdi lacked appropriate parental discipline and support, and he was not supervised as a child or given appropriate structure and guidelines. (**State's Ex. 85 & See R 1440, 1442, 1869-70, 1873-74**). Mahdi began smoking marijuana at age 12, had been smoking marijuana every day since, and he began selling crack cocaine at age 14. (**R 1440**). Mahdi needed self-esteem training, family services, and values clarification. Mahdi suffered from the lack of a mother. (**R 1446**). Mahdi's father was not involved in his life; his father had a criminal record for malicious damage to property and escape; Mahdi had no supervision, no curfew, and Mahdi's father did not care about Mahdi's criminal behavior. (**R 1869-70, 73-74**). Mahdi came from a dis-functional 1 parent family. Mahdi's father believed the criminal justice system was prejudiced, and he also voiced his belief there were many white supremacists in the area. (**R 2146**). And, a young Mahdi also made similar racial comments. (**R 2154**).

The Lack of Merit of this Allegation

With regard to this Ground alleged in the application, Judge Early carefully reviewed *the mitigation evidence presented at the PCR hearing* in comparison with *the mitigation evidence presented at the sentencing hearing*, and considered counsels', their mitigation specialist's, private investigator's, and experts' testimony regarding their mitigation investigation, and counsels' testimony why they presented the mitigation evidence they did present, and why they did not present other mitigation evidence. The record supports counsel in this case conducted a reasonable and thorough mitigation investigation and presented what mitigation they could that was favorable to Mahdi at the time of the sentencing proceeding. Van Hook; Pinholster; Wiggins; Rompilla; Williams; Rosemond; Council; Simpson; Jones. Based on the entire record, and the credible evidence presented, Judge Early correctly and reasonably found Mahdi had not met his

burden of proof to show counsel's performance was deficient in this regard. Van Hook; Pinholster; Strickland; Wiggins; Rompilla; Wong; Rosemond; Council; Simpson; Jones.

Judge Early viewed the witnesses in this case, listened to their testimony, observed their demeanor, and judged their credibility accordingly. The Court found the testimony of counsel and their defense team on the above Ground *to be credible* and the present testimony of Mahdi's witnesses regarding their previous willingness to testify *to be not credible*. Accordingly, the Court found Mahdi had failed to meet his burden of proof on this particular allegation, and had failed to show counsel was deficient. Butler; Wiggins; Council.⁴³

43 Judge Early found Carson Burwell's testimony not credible regarding his willingness to come and testify on Mahdi's behalf at the time of sentencing for several reasons. First, Carson could not recall talking to any attorneys or investigators from South Carolina prior to Mahdi's sentencing proceeding; the implication being counsel and their investigators did not speak with him, and therefore, they were deficient in their mitigation investigation. However, the record clearly showed counsel's Hammock spoke to Carson before Mahdi's sentencing proceeding and obtained background information from him. Tarr also confirmed at PCR she spoke with Carson on more than 1 occasion and Hammock traveled with her to Baltimore and interviewed Carson. Counsel also testified Carson was interviewed prior to trial. Also, Tarr produced her notes which detailed exactly what Carson told her, that Mahdi was manipulative *and* the incident which led to Mahdi's commitment to the Carter Center was more of Mahdi's manipulative behavior, not a real suicide attempt. (PCR 572-74). Counsel testified they spoke with Carson prior to the sentencing, and Carson told them if he were called as a witness he would have bad things to say about Mahdi. Carson informed counsel he and Lawanda, were not going to help Mahdi in his sentencing proceeding. (PCR 618-20, 627-28, 649-50, 693-97). Likewise, the Court did not find credible Carson's wife's testimony that even though she was reluctant to testify at the time of trial, she could have been coaxed into coming to testify at sentencing. Again, Tarr and Hammock met with Lawanda, and counsel also talked to her as well. Carson and Lawanda indicated they did not want to be involved. Carson indicated to the N.C. attorneys that when Mahdi lived with them he was a "demon." Carson and Lawanda communicated to counsel they were glad Mahdi was out of their home. Carson admitted Mahdi was defiant and manipulative. Both Lawanda and Carson admitted Mahdi made a false claim of child abuse against Lawanda which accompanied Mahdi's statement to the responding officer that led to his commitment to the Carter Center. Carson communicated to counsel prior to sentencing he and his wife Lawanda were not going to help Mahdi. Similarly, the Court did not find credible Rose Gupton's testimony she did not know about Mahdi's criminal charges for this murder or his trial until after he was sentenced to death. Counsel or their mitigation experts interviewed 2 of her sisters, Sophie Gee and Corliss Artis, regarding this very case, and Gupton testified she spoke with those sisters every day. The Court did not find credible her claim that if she had known about the sentencing proceeding she would have testified, because her claim she did not know about Mahdi's charges was simply not credible. Further, counsel's credible testimony at PCR was even Mahdi's aunts were not willing to assist in testifying. As a result, the Court correctly found Mahdi's aunts and uncles were not willing to come here and testify on Mahdi's behalf in 2006. Mahdi does not challenge this finding of the PCR Court, and it is the law of the case.

The circumstances counsel faced are similar to those faced by counsel in Rutherford v. Crosby, 385 F.3d 1300 (11th Cir. 2000). In that case, the defendant's family was uncooperative at the time of trial. The behavior of Mahdi's family is understandable in this type of case. When the crime has been recently committed and the community and those who knew the victim are still outraged, the defendant's family and friends are likewise shocked, angry, embarrassed, and disappointed in the defendant's behavior. In this case, as in others, they are in no mood to assist the defendant in escaping responsibility for his crimes at the time of trial. (See PCR 619, II. 19-24, 636, II. 20-25). It is only after the passage of many years, when the case is on post-conviction relief, and the case is no longer in the forefront of the community's or the victim's family's mind, and the defendant's family's anger and embarrassment has dissipated, that witnesses become cooperative and insist they would have cooperated at the time of trial, when in fact they were originally hesitant, did not want to be involved, or refused to testify. Along the same lines, the record in this case shows Mahdi had engaged in conduct within his own family which would have caused and did cause family members to be reluctant to assist him. Mahdi had faked a claim child abuse against Carson and Lawanda, almost resulting in their arrest. Mahdi had slashed his own mother's tires. Mahdi was involved in the destruction of another aunt's automobile.

The PCR Court correctly found counsel, its mitigation investigator, and forensic social worker attempted to develop live mitigation evidence witnesses from Mahdi's family, including extended family, but were unable to do so due to the family members' reluctance and/or refusal to testify at the time of trial, or refusal or inability to testify in a helpful fashion. (PCR 503-710). The Court further found counsel and their investigators conducted a reasonable mitigation investigation, which included talking with all of Mahdi's immediate family, several members of his extended family, including several aunts and uncles, and a family friend, regarding Mahdi's family and social background. Pinholster; Van Hook; Wiggins; Rompilla. See Wiggins (Strickland does not require counsel to investigate every conceivable line of mitigation evidence no matter how unlikely the effort would be to assist the defendant at sentencing).

Based on the record, the Court also correctly found Mahdi had failed to demonstrate deficient performance here because much, if not all, of the evidence Mahdi offered at PCR regarding his family and social history, whether through family or community witnesses, was cumulative to the evidence presented in Mahdi's capital sentencing proceeding. The forensic social worker presented through her testimony and the exhibits introduced through her basically the same information before Judge Newman presented at PCR through Mahdi's extended family and community members. In fact, the mitigation evidence presented by Hammock was from many of the same people who testified at PCR. *See generally* Huffington v. Nuff, 140 F.3d 572 (4th Cir. 1998)(even if counsel was ineffective for failing to contact impeachment witnesses identified by defendant, there was no prejudice in part because testimony was cumulative); Simpson v. Moore, 367 S.C. at 605-07, 627 S.E.2d at 711-12 (counsel did in fact do adequate investigation and presented similar mitigation evidence); Jones v. State, 504 S.E.2d 822 (mitigation evidence presented at PCR was not that different from evidence presented at trial).

Additionally, Sheriff Woodley testified under oath at the sentencing proceeding. His affidavit presented to the PCR Court contains serious credibility problems. In the affidavit, he attempts to blame the 8 hour standoff with police on Mahdi's father; however, at trial under oath he blamed the standoff on both Mahdi and his father. He also speculates throughout the affidavit, which would not have been admissible at trial. Further, in his affidavit, Woodley refers to the incident where Mahdi's mother was kidnapped as an attempted murder; however, at trial under oath he testified he was only aware of prior "simple assaults" on family members by Mahdi's father. Woodley was anything but a cooperative witness at sentencing. Finally, Woodley did not witness any of these events.

Further, the mitigating value of the incident related by community members where Mahdi's father jumped into a segregated swimming pool is negligible. Mahdi's father was protesting the wrongful segregation of that facility and was determined at that time not to suffer from any major mental illness.

Furthermore, if counsel did not present certain evidence Mahdi presented at PCR, there was an objectively reasonable strategic reason for not doing so. Strickland; Council. Mahdi presented several extended family members at the PCR hearing who were interviewed by Tarr, Hammock, and/or counsel prior to the sentencing proceeding, but not called before Judge Newman. Counsel testified that at the time of the sentencing proceeding these witnesses were not cooperative, were unwilling to testify at the sentencing proceeding, or the witnesses related or their investigation uncovered the witnesses would say bad things about Mahdi.⁴⁴

Counsel was not ineffective in failing to call witnesses from whom bad things could be elicited about Mahdi, or who indicated they were not going to be helpful to Mahdi. Judge Early properly found it was an objectively reasonable trial strategy decision for counsel not to call Carson or Lawanda Burwell or Sophie Gee, who could be asked on cross-examination about instances of bad conduct by Mahdi and would have been required to answer truthfully to such

⁴⁴ Carson related to the N.C. attorneys Mahdi “was a demon.” This fact was proved by a document generated by Tarr after meeting with those attorneys and shared with counsel in this case. (**PCR 503-05, Resp. Ex. 7**). Carson also related to counsel if he were called to testify he would have bad things to say about Mahdi. (**PCR 618-19**). Carson indicated Mahdi was manipulative and faked abuse and suicidal gestures. (**PCR 572-74, 64**). Both Lawanda and Carson admitted Mahdi almost had them arrested by police when he made a false claim of child abuse and manufactured false evidence of that abuse. (**PCR 572-74, 58-61, 63-64, 266-67, 287-88, 290**). And, Mahdi acted out while at the Carter Center, and had to be placed in isolation. (**PCR 66-67, 292**). Carson also related to Tarr that Mahdi was manipulative. (**PCR 572-74**). Both Carson and Lawanda related Mahdi acted out after being released from the Carter Center and had to be returned to live with his father. (**PCR 68-69, 293-94, 618-619**). Both related Mahdi would only talk about suicide when he did not get his way or did something wrong and was going to be punished. (**PCR 572-74, 64-66, 288-89, 618-19**). Carson related the incident which led to Mahdi’s commitment to the Carter Center was more of Mahdi’s manipulative behavior and was not a real suicide attempt. Lawanda testified at PCR she did not believe Mahdi was actually suicidal and made similar statements in their home when he did not get his way or got in trouble. This testimony would have directly undercut the mitigation evidence presented before Judge Newman regarding Mahdi’s commitment and diagnosis at the Carter Center. (**Def. Ex. 2**). Carson was also aware of an incident where Mahdi was involved in maliciously destroying Carson’s sister’s car. (**PCR 69**). Carson and Lawanda stated when Mahdi lived with his uncle Nathan as an adult, he could not abide by the rules of the home, and was forced to leave. (**PCR 70, 278**). Sophie Gee was aware of the incident where Mahdi slashed his mother’s tires. Gee testified Mahdi slashed his mother’s tires because she would not let him use the car. She was also aware Mahdi was arrested for this incident. (**PCR 105-06**). If she had been called at sentencing, she would have been questioned about this incident, further underscoring this incident to the sentencing court, and also informing the court Mahdi slashed his mother’s tires simply because she would not let him use her car.

questions. Reed v. Florida Department of Corrections, 393 F.3d 1217 (11th Cir. 2010)(attorneys not ineffective in failing to call family members who would have opened the door to bad things about defendant's past); Rutherford, *supra* (attorneys' strategic decision not to call witnesses on alcoholism of defendant was objectively reasonable where it would have opened door to prior violent behavior of defendant the jury had not heard). *See* Bell v. Kelly, 260 Fed. App. 599 (4th Cir. 2008)(*Unpublished*)(state court's determination petitioner failed to prove prejudice was not unreasonable where he alleged counsel was ineffective for failing to investigate and present family members mitigation evidence where family members could have been cross-examined about defendant's prior bad conduct such as infidelity, abandonment of his children, wife, and girlfriend, domestic abuse, and failure to pay child support), *citing* Barnes v. Thompson, 58 F.3d 571 (1995)(counsel not ineffective in capital case in failing to offer family members who constituted "cross-purpose evidence."); Moody v. Polk, 408 F.3d 141, 154 (4th Cir. 2005)(to the extent affidavits presented new information, they were "double edged.").

Further, calling Mahdi's family members as mitigation witnesses during the sentencing proceeding would have exposed Mahdi to testimony that none of Mahdi's cousins had engaged in violent criminal activity against another. **(PCR 278-82, 284-85)**. *See* Reed, *supra* (similar). In fact, Mahdi's own brother Saleem grew up in the same household as Mahdi, under similar circumstances, and had not engaged in, been arrested for, or convicted of any violent behavior toward other persons during his life. **(PCR 284-85, 318-19)**. *Id.* Further, the record shows Mahdi's family is well-educated with many family members employed as professionals or educators, and 1 distant relative having graduated from Harvard. If Mahdi's family members had been called as witnesses, the State could have contrasted Mahdi's criminal history with other family members who were successful and did not engage in criminal conduct.

Judge Early had the opportunity to view the witnesses' testimony at the merits hearing, and make a credibility assessment accordingly, and found the testimony of counsel to be credible on this issue. Counsel's testimony on this issue is also supported and corroborated by the evidence

and testimony introduced at the PCR hearing. Counsel made an objectively reasonable trial strategy decision to not present witnesses who were uncooperative, refusing to testify, or had bad things to say about Mahdi or from whom bad information about Mahdi could have been elicited on cross-examination. Strickland (objectively reasonable trial strategy decisions are not subject to claims of ineffective assistance of counsel); Wong (it was an objectively reasonable trial strategy decision for counsel not to call witnesses who would expose on cross-examination bad character evidence about the defendant); Council (counsel's strategic decisions will be judged on an objective standard of reasonableness).

The PCR Court found Mahdi had not shown counsel was deficient in failing to investigate, develop, or present mitigation evidence from his family members or community witnesses. Counsel conducted a reasonable and thorough investigation regarding mitigation evidence and presented what evidence it could at the sentencing proceeding that was favorable to Mahdi through Hammock and other witnesses or evidence without exposing Mahdi to negative character evidence. Van Hook; Pinholster; Wiggins; Rosemond. This allegation is without merit.

Mahdi has also failed to show counsel was ineffective for failing to call elementary school officials. At PCR, Mahdi introduced school records, called several school officials, and provided the affidavit of another school official. These individuals either taught Mahdi or were involved in the decision to place him in special education. Judge Early carefully reviewed the school records submitted, the testimony of the school officials who testified at PCR, and the 1 witness who submitted an affidavit. Judge Early correctly found there was no merit to this allegation. Mahdi now alleges only that counsel should have called the school officials and has dropped the claim counsel should have introduced his school records.

As previously set forth, counsel obtained Mahdi's school records. Tarr also interviewed school officials at various schools Mahdi attended. Counsel also obtained Mahdi's DJJ records. Counsel and their experts also interviewed Mahdi regarding his time in school. Counsel discovered through their investigation, *including talking to Mahdi*, that Mahdi was a discipline

problem in the school system. Strickland (what investigation decisions are reasonable depends critically on *such information*); DeCastro v. Branker, 642 F.3d 442, 456 (4th Cir. 2011); Soria v. Johnson, 207 F.3d 232, 251 (5th Cir. 2000) Sims v. Singletary, 155 F.3d 1297, 1316 (11th Cir. 1998). See United States v. Pellerito, 878 F.2d 1535, 1543 (1st Cir. 1989) (“If counsel was ineffective in any sense, it was only because the client rendered him so That is not the sort of “ineffectiveness” for which relief can be granted”). The school records reflect the same, the DJJ records reflect this, and this is what Mahdi told counsel and his experts. Mahdi also related to counsel and his experts he never should have been placed in special education. Mahdi was placed in special education mainly because of his misconduct or bad behavior in school. Mahdi’s I.Q. was 118 and he was not mentally retarded. Counsel made a reasonable and thorough investigation into Mahdi’s school experience and was entitled to stop its investigation at this point as it did not believe it would produce favorable evidence for Mahdi. Van Hook. Further, it was objectively reasonable for counsel to use surrogates, such as Tarr and Hammock, to attempt to locate and interview potential witnesses. *E.g.*, Walls v. Bowersox, 151 F.3d 827, 834, n. 4 (8th Cir. 1998) (interviews conducted by second chair and social worker); Rhode v. Hall, 582 F.3d 1273, 1283-84 (11th Cir. 2009) (counsel utilized investigators, reviewed their investigative product, and thereby satisfied investigative responsibilities).

At Mahdi’s sentencing proceeding before Judge Newman, Hammock testified in detail to Mahdi’s difficulties in school. She testified how his education was disrupted many times, how Mahdi struggled in reading and language skills, how he suffered from low self-esteem, and needed instruction in behavior and getting along with others. She also testified to Mahdi’s father pulling Mahdi out of school in the 5th grade to home school him, and there was no evidence this homeschooling ever occurred. What she did not testify to was Mahdi’s extensive misconduct and bad behavior in school.

While counsel did not call the 2 elementary school teachers, the 1 who provided an affidavit, or introduce the school records themselves, counsel conducted a reasonable investigation

of Mahdi's school history and presented the same before Judge Newman. Pinholster; Van Hook; Rompilla; Wiggins; Strickland; Rosemond; Simpson.

The school records themselves reveal damaging information about Mahdi and his character. Mahdi was referred for special services not because he was mentally retarded, but because of "...behavior problems. He exhibits inappropriate and disruptive behavior." (**App. 007536**). The same record indicates Mahdi had a negative attitude about being corrected, did not always get along with other children, his behavior with adults was inappropriate at times, and most of his problems seemed to be getting along with people. The records indicate Mahdi had an I.Q. of 118, but had episodic acting-out behavior and an unwillingness to deal with difficult school tasks. (**App. 007533**). The records also indicate Mahdi was referred for special education because of "*behavioral difficulties*; such as leaving his seat inappropriately, *physically and verbally aggressive towards others* at times, talks out of turn, preoccupied, anxious, *easily frustrated or angered, lacks respect for authority*, and daydreams." (**App. 005498**)(**emphasis added**). A Burk's Behavior Rating Scale revealed very significant factors for poor impulse control, poor anger control, and excessive resistance. (**App. 007535**). The records also indicate Mahdi's "intellectual functioning" was "in the high average range." (**App. 004345**).

To have introduced Mahdi's school records would have introduced bad things about Mahdi to Judge Newman. It would also have introduced Mahdi's intellectual functioning was not impaired. Judge Early properly found counsel was not deficient in failing to introduce Mahdi's school records which contained bad things about Mahdi. **Mahdi now concedes this on appeal.** Counsel artfully introduced through Hammock's testimony and through *exhibits* Mahdi's problems in school without introducing the bad things he had done while in school. Counsel's performance was not deficient in this regard. Wong, supra.

Mahdi further argued below counsel should have introduced Mahdi's school records and called school witnesses to show Mahdi was diagnosed by school officials in the 4th grade as ED. However, the record shows Mahdi's ED diagnosis was based in large part on his inappropriate

behavior in school such as defiance and aggressiveness toward other students. Further, there was expert testimony in this case a diagnosis of ED many times means simply a misbehaving child. **(PCR 542)**. This testimony would have further exposed testimony regarding Mahdi's oppositional defiant disorder/intermittent explosive disorder and his conduct disorder, which is a pre-cursor to ASPD, which counsel believed would not have been favorable to Mahdi. Additionally, Mahdi was also referred for special education services because of his inability to read, which Judge Newman already knew about through Hammock's testimony and the exhibits counsel introduced.

Additionally, the records contain information that would have undercut counsel's attempt to present mitigation. The records themselves indicate Mahdi was living in his grandmother Nancy's home, a modern 3 bedroom brick home with all facilities. The home was equipped with a stereo, television, and other educational materials for family use. There was a family support system for Mahdi's immediate family including grandparents and other relatives and friends. Mahdi met all developmental milestones at the appropriate age. Mahdi received prompt medical attention for any physical problems growing up. Mahdi's father was a high-school graduate who completed 2 years of community college, and Mahdi's mother had completed 2 years of college. Mahdi's father was involved in Mahdi's school evaluation process and believed Mahdi's behavior problems in school were due in large part because he was behind in reading, i.e. he became frustrated when he tried to read. Mahdi's father was willing to work with the public schools for his son's benefit. There were several notations in the records Mahdi's father was supportive, involved, and was seeking to help his son overcome his problems. And, the records also indicate Mahdi's relationship with his father was excellent. **(Resp. Ex. 1 & 2)**. In essence, the records do not portray Mahdi's home life in as bad a light as counsel was able to portray Mahdi's childhood home life before Judge Newman at sentencing.

Further, Mahdi's own PCR witnesses undercut the validity of Mahdi's being placed in special education. Dr. Cooper-Lewter testified Mahdi himself informed him that he should not have been placed in special education. Mahdi informed Cooper-Lewter that after being placed in

special education he put forth no effort, because he did not belong there. Cooper-Lewter basically agreed with Mahdi's assessment. Lawanda Burwell, Mahdi's aunt, and a credentialed school administrator, who has a master's degree from Harvard, also testified she did not believe Mahdi should have been in special education.⁴⁵ Similarly, Dr. Martin [the trial psychiatric expert] also testified at the PCR hearing Mahdi informed him he had been placed in special education and should not have been placed in special education. **(PCR 515)**. Mahdi told Dr. Martin he begged the school principal to take him out of special education, but this was unsuccessful. **(PCR 516)**. And, he also asked his father to take him out of special education, and his father eventually pulled him out of public school and home schooled him. **(PCR 516)**. Dr. Martin also testified students are classified as ED and placed in special education classes because they are behavioral problems. **(PCR 542)**. Martin testified sometimes this behavior is fueled by depression, sometimes its incorrigible behavior, or sometimes they are truant or having problems with conduct disorder. **(PCR 542)**. Dr. Martin also testified Mahdi's acting-out behaviors such as irritability, talking back to teachers, and disrespectful attitude were in other reports he did review and also in information Mahdi provided to him. **(PCR 542)**. Dr. McKee [the trial psychological expert] also testified he was aware Mahdi had been placed in special education as a child. These experts were at team meeting with counsel and the defense team and shared their findings with counsel. The PCR Court had the opportunity to view the testimony of Dr. Martin and Dr. McKee and found their testimony on this issue to be credible.

Further, the school officials' testimony at PCR was not all favorable. All indicated Mahdi had behavioral problems in school. He was often in the principal's office or detention. He engaged in angry outbursts and left class without permission. He was placed in a class for children with disciplinary problems and still misbehaved in other classes. Counsel made an

⁴⁵ Mahdi also told Dr. Martin he became ODD (Oppositional Defiant Disorder) after being placed in special education because he did not belong there. **(Resp. Ex. 8)**.

objectively reasonable decision to present Mahdi's school difficulties through Hammock in a sanitized fashion that removed Mahdi's bad school behavior.

As a result of all of the above, Mahdi has failed to show deficient performance in counsel's failure to call school officials as witnesses. Pinholster; Van Hook; Rompilla; Wiggins; Strickland; Rosemond; Simpson; Jones. As a result, this ground must be dismissed with prejudice.

Conclusion to Deficiency Analysis

For the reasons stated above, Judge Early correctly found Mahdi had not met his burden of proof to show deficient performance under this ground. Strickland; Pinholster; Van Hook; Wong. Counsel conducted an adequate, thorough, and reasonable investigation of mitigation evidence, and presented what mitigation evidence counsel could present that was favorable to Mahdi under the circumstances at the time of sentencing. Pinholster; Van Hook; Belmontes; Strickland; Rompilla; Wiggins; Rosemond; Council; Simpson; Jones.

THE PREJUDICE PRONG

Regardless, Mahdi has not met the 2nd prong of the test articulated in Strickland and Jones. Considering the horrible facts of this murder, the aggravating circumstances, the mitigation presented at sentencing, the additional mitigation evidence presented at the PCR hearing, and the aggravating evidence that would almost certainly have come in with the new mitigation, Judge Early did not err in finding there was no reasonable probability Judge Newman would have returned with a different sentence. Wong, *supra*; Jones, *supra*.

When determining if want of mitigation evidence resulted in prejudice, the Court must determine whether the mitigation evidence, taken as a whole, might well have influenced Judge Newman's appraisal of Mahdi's culpability. Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009), *quoting* Wiggins, 539 U.S. at 538, *quoting* Williams, 529 U.S. at 398; *see also* Rompilla, 545 U.S. at 393. Accordingly, if counsel's failure to present mitigation evidence undermines confidence in the outcome, then Mahdi suffered prejudice. Rosemond (finding counsel's

complete failure to present mitigation evidence undermined confidence in the outcome where the jury deliberated over 2 days before reaching a death sentence).

The United States Supreme Court made clear in Wong, supra, the burden *is not* on the State to show the lack of prejudice, but **the burden is on the applicant to show prejudice**. Id. To establish prejudice, Mahdi must show that had Judge Newman been confronted with the new mitigating evidence, there is a reasonable probability he would have returned with a different sentence. Id., *quoting Wiggins*, 539 U.S. at 535-36. “In evaluating that question, it is necessary to consider *all* the relevant evidence that [Judge Newman] would have had before [him]” if Mahdi “had pursued the different path - not just the mitigation evidence” Mahdi could have presented, but also” the aggravating evidence “that almost certainly would have come in with it.” Id., *referencing Strickland*, at 695-696, 700 (emphasis in original). *See also* Sears v. Upton, 130 S.Ct. 3259 (2010), *quoting* Porter v. McCollum, 130 S.Ct. at 453-54 (2009); Council v. State, 380 S.C. 159, 670 S.E.2d 356 (2008), *citing* Jones, 332 S.C. at 333, 504 S.E.2d at 824.

It must be noted here Judge Early [the PCR Court] was required to reweigh the evidence in aggravation against all the new evidence in mitigation, along with the mitigation evidence presented at the original sentencing hearing, along with any additional evidence in aggravation that would likely have come in with the new mitigation evidence. Sears. Judge Early did not simply ***weigh the new mitigation Mahdi raises on appeal*** from the denial of PCR [*community/school witnesses*], but all of the mitigation evidence presented at the PCR hearing including Mahdi’s extended family members, Mahdi’s PCR experts and the records from the Carter Center, DJJ, and the school records, along with any evidence in aggravation that would in all likelihood have come in with the new mitigation evidence presented at PCR, which would have included Mahdi’s involvement in 2 additional homicides in Virginia, his manipulative and disruptive behavior in Carson’s home, his faking of suicidal gestures including 1 that led to his commitment to the Walter Carter Center, Madhi’s extensive record of 40 disciplinary infractions in DJJ including leading an escape attempt and faking a suicidal gesture to manipulate the DJJ

prison system, his bad behavior in school, and his horrible behavior at the Carter Center.⁴⁶ Sears; Wong. Judge Early correctly analyzed Mahdi's claims of prejudice under this ground pursuant to the above cited standards and found Mahdi had not met his burden of proof to show prejudice. As a result, the petition for certiorari should be denied. And, even only considering *the select mitigation Mahdi now raises on appeal*, Mahdi cannot establish prejudice.

The Evidence in Aggravation

The amount of evidence in aggravation presented at the guilty plea and in the penalty phase/sentencing proceeding before Judge Newman was extensive. See Plath v. Moore, 130 F.3d 595, 602 (4th Cir. 1997)(considering the sheer magnitude of the aggravating evidence, defendant failed to show prejudice from counsel's failure to present certain mitigating evidence). As detailed in the record, and Judge Newman's sentencing order, the evidence of Mahdi's guilt, the aggravating circumstances (both statutory and non-statutory) of this murder; and Mahdi's bad character, characteristics, prison misconduct, and propensities for violence was overwhelming. Id.

The Guilty Plea

First, Mahdi admitted he murdered James Myers, burglarized his cabin before murdering him, and stole his guns and police issued truck after murdering him. There is no question Mahdi is the person who murdered Myers; he was alone when he murdered him, and he acted completely alone. Mahdi also admitted he murdered Myers during the entering or remaining in the cabin after the burglary and stole Myers' guns and truck, the statutory aggravating circumstances.

46 Mahdi asks this Court to grant certiorari arguing Judge Early erred in finding he failed to prove Strickland prejudice; however, Mahdi asks this Court to ignore the fact Judge Early was required in making this determination to reweigh *all of the new mitigation evidence Mahdi presented at PCR*, against all of the aggravating evidence, including *any aggravating* evidence that would have likely come in *with all the new mitigation evidence he presented at PCR*. By only raising the failure to call community/school witnesses in mitigation, Mahdi has implicitly conceded the other mitigation evidence he introduced at PCR, which would include his extended family, PCR experts, and the records, including those from DJJ, school, and the Carter Center, would have come at the expense of horrible aggravation evidence. Judge Early did not and could not limit himself to just the mitigation evidence Mahdi now raises on appeal, because Mahdi did not abandon the other mitigation before the PCR Court. (Final Order of Dismissal). Sears v. Upton. As a result, Judge Early could not have erred in this determination as Mahdi now argues.

Mahdi also admitted the facts surrounding the murder as recited by the Solicitor were correct. (R. 1254-84, 1336-43).

The Sentencing Proceeding

In the sentencing phase, the State established the following evidence in aggravation: Mahdi burglarized a home in Virginia and stole a chrome .380 pistol. Mahdi then stole a license plate from a car rental agency and a station wagon from a nearby car lot. He drove this vehicle eventually to Columbia, S.C., where he abandoned it. Mahdi then car-jacked a Ford Expedition at gunpoint and drove to the Wilco Plaza in Calhoun County. He replaced the tag on the Expedition with the tag he stole in Virginia. He attempted to use a stolen credit card at the Wilco station and fled into some nearby woods when he realized police were about to apprehend him. Mahdi came upon Myers' shed/cabin and burglarized it using some type of tool. While inside, Mahdi manufactured a sawed-off shotgun, painted it black, and also armed himself with Myers' loaded .22 rifle. When Myers went to his cabin/shed on June 16, 2004, Mahdi was lying in wait. Mahdi murdered Myers by shooting him 9 times with the .22 rifle. Mahdi shot Myers several times in the head after he was helpless on the floor of the cabin/shed. Before leaving, Mahdi attempted to burn Myers' body and his shed to conceal evidence. Mahdi stole Myers' truck keys, his guns, and his police issued truck and fled South Carolina. Mahdi also replaced the tag on Myers' police issued truck with a tag Mahdi stole from Myers' personal truck.

Myers' wife had the unfortunate circumstance of finding her husband's burned and bullet riddled body. She screamed for an unknown period of time before she was able to call 911, and she remained at the cabin with her husband's body for approximately 30 minutes waiting on police and emergency workers to arrive.

Mahdi drove to Jacksonville, FLA and sold the .380 pistol he stole from Virginia and the .22 rifle he used to murder Myers; however, Mahdi retained several other weapons including the assault rifle and the sawed-off shotgun. Mahdi was not captured until an extensive police chase, after which he fled from Myers' stolen truck, and the use of a police dog, and Mahdi considered

shooting officers before being arrested. Myers' stolen shotgun and other incriminating evidence were recovered in or near the truck Mahdi had been driving before his capture.

The State also established Mahdi's bad character and characteristics. Mahdi had previously been adjudicated for car-breaking, petty larceny, escape from custody, breaking and entering (2 counts), grand larceny, obstruction of justice, and contempt of court. As an adult, Mahdi was convicted of malicious wounding, for the brutal stabbing of Moises Rivera, after Mahdi tried to burglarize an apartment in the complex where Rivera worked. Mahdi stabbed Rivera approximately 5-6 times and severely injured Rivera. Rivera's heart actually stopped in the ambulance, and he had to be revived. He was hospitalized for several days and out of work for 6 weeks because of Mahdi's actions. Mahdi served time in adult prison for this offense but was not rehabilitated.

Upon his release from prison, Mahdi was placed on supervised probation. The record shows Mahdi knew and understood that use of illegal drugs, criminal activity, or possession of a weapon would result in violation of his adult probation. **(R 1487-91)**. The record shows he chose to engage in such conduct anyway. **(R 1492-1511)**.

The State also proved the murder of Myers was not Mahdi's first murder. Mahdi murdered Christopher Boggs, a convenience store clerk, on Mahdi's way to South Carolina from Virginia. Mahdi brutally murdered Boggs by shooting him in the face, and then shooting him again in the head after Boggs fell helpless on the floor. Store surveillance video portrays the heinousness of this murder, with Mahdi leaning over the counter to fire another bullet into Boggs' head. After murdering Boggs, Mahdi tried to rob the store's cash register. Mahdi did not even give Boggs the opportunity to comply with the armed robbery, but murdered him first. There is no question Mahdi committed this murder because his actions were captured clearly on video, his fingerprints were found on the store's counter, Mahdi's friends and relatives identified him in the video, and the weapon used to murder Boggs, the .380, was sold by Mahdi in Jacksonville and matched to Boggs' murder by ballistics testing.

The State also proved Mahdi's bad character by introducing some of Mahdi's DJJ records. Mahdi stated his only strength was robbing people. Mahdi admitted he was previously engaged in the sale of crack cocaine. Mahdi was described as a teenager with many negative attitudes toward authority, rules, limits, and rights and privileges of others.

The State also proved Mahdi's bad prison behavior through the introduction of some of Mahdi's DJJ records. These records contained just a few of his disciplinary violations in DJJ. Mahdi assaulted another inmate almost immediately upon entry into DJJ. Mahdi assaulted guards on several occasions and cursed DJJ staff and threatened staff.⁴⁷

The State also introduced all of Mahdi's disciplinary violations while in Virginia's adult DOC. These included setting fire to his cell, refusing to obey orders, and assault on a non-inmate. Mahdi's poor institutional behavior led to his being confined at a maximum security institution where his disciplinary violations continued. Mahdi was diagnosed in the adult DOC with

47 Had counsel introduced all of Mahdi's DJJ records as Mahdi contended below, the evidence in aggravation would have only gotten worse. Mahdi committed over 40 disciplinary violations in DJJ including assaulting a teacher; assaulting guards on numerous occasions; assaulting other inmates, leading an escape attempt, refusing to follow orders; refusing to be disciplined, cursing staff, and damaging and destroying property. (**PCR 684**). Mahdi faked a suicide attempt at DJJ in order to manipulate the system to gain better conditions of confinement. Mahdi planned an assault on another inmate and enlisted the support of other juveniles in this assault. (**App. 004709**). The victim was injured in this assault. Mahdi exhibited a negative attitude with staff, and stated the attitude would continue until he got his way. Mahdi cursed staff profusely. Another record indicated Mahdi's teachers should be aware that "he has demonstrated the capacity to plot, and carry out, apparently unprovoked assaults on peers. He requires extraordinarily close supervision." (**App. 004710**). Mahdi assaulted a DJJ inmate on April 11, 1999 by hitting the victim in the head with a broom. Mahdi had 12 major institutional violations and 12 moderate violations while at one institution. Mahdi had anger management training but did not practice what he learned; he was kicked out of that program. Mahdi punched a DJJ guard in the face on September 29, 1999, assaulted a staff person on November 18, 1999, and another staff person on December 5, 1999. He was also involved in destroying property on several occasions. In the escape attempt he assaulted a female guard, taking her radio away from her, and demanded keys from another guard. Mahdi also threatened if he was not released from DJJ when he thought he should be released, he would go around "acting crazy." Mahdi did not think he should have been incarcerated for any of his offenses, and threatened to assault other inmates or guards or harm himself if he was not released from DJJ when he thought he should be. This evidence would have further established Mahdi's future dangerousness and also further undercut Mahdi's prison adaptability expert. *State v. Hughes*, 336 S.C. 585, 521 S.E.2d 500 (1999); *State v. Woomer*, 278 S.C. 468, 299 S.E.2d 317 (1982)(prior escape refuted evidence of good conduct while in prison).

intermittent explosive disorder and ASPD.

The State also introduced Mahdi's disciplinary violations in the S.C. DOC including assaulting a guard, threatening to kill a guard, making a hammer type weapon, and threatening other guards. Finally the State introduced Mahdi's escape attempt during the trial itself by the use of a homemade handcuff key Mahdi had fashioned while in maximum security and which he kept secreted in his mouth during the trial. The State thoroughly proved Mahdi was not adaptable to prison and was a danger to guards, inmates, and prison personnel. State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999)(behavior in prison is admissible in sentencing because it bears on character and future dangerousness); State v. Whipple, 324 S.C. 43, 476 S.E.2d 683 (1996).

The State also introduced victim impact testimony regarding Myers as a human being and valued member of the community. Judge Newman heard from Myers' widow, his father, Myers' daughter, and Myers' best friend.

Mahdi's crimes in Virginia, North Carolina, and South Carolina, his acts surrounding Myers' murder, and his conduct in prison and as a pretrial detainee reveal he has above-average intelligence, is streetwise, and has a keen criminal mentality. The record of the sentencing shows Mahdi stole items from victims because he wanted to and did not think he would get caught. Mahdi stabbed Moises Rivera because Rivera caught him breaking into an apartment as an adult.⁴⁸ Mahdi burglarized a home in Virginia so he could steal a gun. Mahdi stole a license plate and a car to leave Virginia in part because his supervised probation was going to be revoked, and he would return to prison. Mahdi murdered Christopher Boggs to rob the Exxon in Winston-Salem. Mahdi car-jacked a car in Columbia, S.C. because his other car, the one stolen in Virginia, had broken down. Mahdi murdered Captain Myers because Mahdi had burglarized Myers' shed, and Myers came in on Mahdi inside the shed. Mahdi attempted to burn Myers' body to destroy

⁴⁸ The record of the PCR hearing shows Mahdi murdered drug dealers in Virginia to create a false drought so he could make more money selling drugs himself. And, Mahdi stole the license plate and the station wagon and fled Virginia because police were closing in on him for 1 of the homicides he committed there. And, counsels' testimony, along with that of Dr. Martin and Dr. McKee at PCR, shows Mahdi plans out criminal behavior when necessary to benefit himself.

evidence. And, Mahdi stole Myers' truck to escape from S.C. The record shows Mahdi is willing to commit crimes and committed crimes if necessary for his own personal benefit.

Further, Mahdi's Virginia DJJ and DOC records show without question he is a person who victimizes others and manipulates the system for his own benefit. Mahdi repeatedly assaulted guards in both DJJ and adult prisons in Virginia. Mahdi almost killed Moises Rivera. Further, Mahdi's records from the SCDOC show Mahdi has repeatedly assaulted guards and threatened to assault guards. Additionally, Mahdi's conduct in murdering Christopher Boggs in N.C. shows his plan was to murder Boggs simply so he could rob the store's cash register.

The State also introduced the 8 hour standoff with police after which Mahdi prophetically stated: "I'm going to kill a police officer before I die." While Mahdi attempts to blame his father for this stand-off, Mahdi could have walked out of his home at any time during the standoff. When the stand-off ended, police found Mahdi in a back room of the house watching television.

The State proved Mahdi's actions over several days from Virginia, to North Carolina, to Columbia, to Calhoun County, and finally to Florida were cold, calculated, premeditated, and intelligent. These criminal acts included a burglary in Virginia, the theft of a firearm, the theft of a license plate and an automobile, the murder of a store clerk and the attempted armed robbery of a convenience store, the carjacking of another vehicle, the attempt to pass a stolen credit card, and finally the burglary of Myers' shed and the murder of Myers and the theft of his guns and truck.

The PCR Evidence

Mahdi's PCR mitigation presentation centered on extended family members' testimony, expert witness' testimony regarding Mahdi's mentality, and documents not introduced by counsel at sentencing including records from the Carter Center, DJJ, and school records. As previously stated, Mahdi has now abandoned on appeal his claim counsel should have presented this mitigation. Mahdi does not contend on appeal that any of this mitigation changes the sentencing

equation, because he does not raise it.⁴⁹

However, Judge Early could not ignore Mahdi's claim below that counsel should have investigated, uncovered, and presented extended family members, experts, or records in conducting his prejudice analysis because Mahdi did not abandon this mitigation below. Sears v. Upton. In determining prejudice, Judge Early also had to consider the aggravating evidence that would have come in with all the new mitigation. Id.; Wong (in making prejudice determination, the Court must consider the bad information that in all likelihood would have come in with the new mitigation evidence). By raising only a select portion of the mitigation he raised below, Mahdi is asking this Court to find Judge Early erred in making a decision he did not make.

If counsel had called Mahdi's extended family members, his PCR experts, or introduced the records he offered below the following evidence in aggravation would have come out. Mahdi was "a demon" when he lived with Carson and Lawanda and engaged in manipulative behavior and only talked of suicide or hurting himself when he did not get his way or was about to be punished. Mahdi's "suicide attempt" was not a real suicide attempt but more manipulative behavior that Mahdi engaged in while in Carson and Lawanda Burwell's home, undercutting Mahdi's diagnosis at the Carter Center which counsel offered in mitigation. Mahdi almost had Carson and Lawanda arrested based on a false claim of child abuse and evidence manufactured by Mahdi. Mahdi engaged in disruptive behavior at the Carter Center such as hitting other patients, attempting to escape from the facility, cursing staff, falsely pulling a fire alarm, throwing chairs, and threatening to suffocate someone. When Mahdi was released from the Carter Center he engaged in more manipulative behavior to force his return to this father. Later, Mahdi threw a cement block through an aunt's car window. Mahdi slashed his mother's tires because she would not let him use her car. Mahdi never should have been placed in special education in elementary school, because he did not belong there. Mahdi had over 40 disciplinary violations in DJJ

⁴⁹ Mahdi only raises on appeal the fail to call community members / school officials he called below or submitted affidavits. (Petition for Writ of Certiorari).

including assaulting a teacher; assaulting guards on numerous occasions, assaulting other inmates, leading an escape attempt, refusing to follow orders; refusing to be disciplined, cursing staff, and damaging and destroying property. Mahdi was diagnosed in DJJ with conduct disorder. Mahdi had numerous disciplinary violations within Virginia's adult DOC including setting fire to a cell, possession of contraband, failure to follow orders, and assaulting a non-inmate. Mahdi was diagnosed in the adult prison system with intermittent explosive disorder and ASPD. Mahdi was moved to a maximum security prison in Virginia because of his bad prison conduct. After being released from adult prison, Mahdi had to move out of his grandmother's home because he would not abide by the rules of the home set down by his uncle Nathan. Mahdi had a high I.Q., 118, obtained his GED, had held several jobs, and obtained college credits at a college in Lawrenceville, but rather than maintain gainful employment, chose to deal drugs and commit 2 additional murders in Virginia. Mahdi is not an impulsive actor but committed many criminal offenses in a premeditated and planned fashion simply because he could and to benefit himself. And, Mahdi repeatedly victimized others in premeditated assaults or attacks. Further, Mahdi was a violent, manipulative, and disruptive individual before he was incarcerated in prison, when he was incarcerated the 1st time in DJJ, during his 2nd stint in DJJ, after his release from DJJ, seriously wounding Moises Rivera during a burglary attempt, continued his violent and disruptive behavior in the adult prison system, and rather than conforming his behavior when he was released, Mahdi repeatedly violated not only the law but the rules of his supervised probation. He sold drugs, possessed handguns, used marijuana, and committed 2 homicides in Virginia. Mahdi burglarized a home, stole a handgun, stole a car and a license plate, and left Virginia. Mahdi then committed 2 additional murders during his flight through the southeastern United States. And, Mahdi has engaged in the same or similar conduct while incarcerated in South Carolina, over and over again. Further, Mahdi engaged in criminal conduct before he was ever incarcerated. In fact, he was placed on juvenile probation for his first series of crimes and continued to engage in criminal conduct, burglarizing a home and stealing firearms. And, after each incarceration, he

committed even more and more violent offenses. Mahdi engaged in criminal activity such as stealing because he could and believed he would not get caught. Mahdi assaulted other individuals because it was in his own self-interests. Mahdi was not victimized but Mahdi victimized others including inmates and guards and attempted to manipulate the juvenile prison system. And, Mahdi's actions over several days from Virginia, to North Carolina, to South Carolina, and to Florida, show he was not suffering from any mental illness.

With regard to the testimony Mahdi now raises, it was largely cumulative to the testimony presented by counsel before Judge Newman through their forensic social worker. The community members described the difficulties Mahdi's father had in growing up, particularly that he was unwanted by his mother; he was forced to go to an integrated school that was traumatic; and he suffered from depression after his wife left he, Mahdi, and Mahdi's brother. The community members also described Mahdi's father's inability to get along with others, to parent effectively, to obey the law, and to hold a job. The community members also testified to the domestic violence within Mahdi's immediate family committed by Mahdi's father on both his wife and mother. This same evidence was presented at the sentencing hearing through Hammock's testimony before Judge Newman, and the time-line of Mahdi's life introduced through her. **(R 1739-63; Def. Ex. 2)**. In fact, many of the details testified to by community members at PCR were related by Hammock in her sworn testimony or are set forth in the Exhibit detailing Mahdi's family history. Her testimony was not challenged, nor was the Exhibit chronicling Mahdi's family and life history.

The community members and school officials also described Mahdi's father's defiant behavior in the community. They also described Mahdi's difficulties in school. This same evidence was also presented at the sentencing hearing before Judge Newman through Hammock in her sworn testimony and in the Exhibits chronicling Mahdi's family's life and his own life, and chronicling his school difficulties. Judge Newman was well-aware Mahdi had a life of deprivation, including being abandoned by his mother around the age of 5. Judge Newman was also aware Mahdi's father could not provide for the children, and as a result Mahdi and his brother

were sent to live with different aunts and uncles. Judge Newman was fully aware Mahdi's family was split up because of these difficulties, and shortly thereafter, Mahdi was committed to the Carter Center and diagnosed as suffering from major depression and suicidal ideation. Hammock also testified to Mahdi's father's defiant behavior in the community and the fact he had converted to Islam at a young age. Judge Newman was also fully aware Mahdi and his brother witnessed their father assaulting their mother and their grandmother. Judge Newman was also aware Mahdi had difficulties in school, and he had particular difficulty in learning to read. Hammock also testified to Mahdi's lack of a proper role model, and Judge Newman was aware Mahdi's father suffered from depression and had a criminal record. (**R 1739-63, Def. Ex. 2**). The evidence presented by Mahdi from his community members was largely cumulative and would not entitle Mahdi to relief. Wong, 130 S.Ct. at 387-88 (when substantial mitigation case was presented, evidence that is merely cumulative to the evidence actually presented fails to demonstrate the prejudice necessary to meet the prejudice prong of Strickland); Buckner v. Polk, 453 F.3d 195, 206 (4th Cir. 2006)(counsel's failure to present merely cumulative mitigating evidence does not prejudice a defendant's case); Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (finding where substantial mitigation case was presented, applicant had failed to show prejudice from failure to call other mitigation witnesses that were in essence cumulative); Jones v. State, 332 S.C. 329, 504 S.E.2d 822 (holding "fancier mitigation case" does not render the prior case inadequate).

The school officials also added aggravating evidence. They admitted Mahdi was a discipline problem in school and was in the principal's office or detention often. He was aggressive with other students and prone to outbursts, and would leave class without permission. As a result, he was placed in a class for children with discipline problems. Judge Newman was not aware of this aggravating evidence.

Judge Early carefully reviewed Mahdi's school records and the testimony of school officials. It must be first noted Judge Newman was familiar with Mahdi's school difficulties through the testimony of the forensic social worker and the exhibit chronically his school

difficulties. Judge Newman was aware Mahdi's schooling was interrupted several times; Mahdi had many absences, and his father pulled him out of school after the 5th grade to home school Mahdi, and there was no indication this had occurred. Judge Newman was also aware Mahdi had difficulty in reading throughout his school history. Mahdi was tested in 1994 when he was in the 4th grade and his overall level of functioning was at a mid-fourth grade level. At that time, his current level of educational functioning fell in the average range. His mathematics equivalent yielded a grade equivalent of 5.8. Other tests showed his general information skills at a 6.8 grade level. Mahdi did struggle with reading during this time; however, psychological data revealed Mahdi's intellectual functioning was in the high average range. (See Brunswick County School Records). While the records show he was placed in special education, Mahdi was not mentally retarded but had an I.Q. of 118 and functioned on grade level or higher in all classes except reading, spelling, and writing. And while the records indicate Mahdi was diagnosed as emotionally disabled, and had some depressive symptoms at that time, the records also show Mahdi was placed in special education or classified as ED based in large part on his misconduct and aggressive behavior in school, including toward other students, and his inability to read. Judge Newman was already aware Mahdi had been committed to a psychiatric facility approximately 18 months before for major depression, and Mahdi told the sentencing court, at his guilty plea, he was not suffering from any mental illness. And, Judge Newman already knew of Mahdi's inability to read. Further, the mitigating impact of these records is minimal given Dr. Cooper Lewter testified Mahdi should not have been in special education and this had a negative impact on Mahdi's school performance. Lawanda Burwell, Mahdi's aunt, and a credentialed school administrator, also testified she did not believe Mahdi should have been placed in special education. Importantly, the records also included bad things about Mahdi. Had Mahdi's school records been introduced or the school officials testified, further evidence of Mahdi's bad behavior would have been before Judge Newman, including Mahdi's misbehavior and aggressiveness and assaults on other children and resistance to authority. Furthermore, Mahdi failed to establish at the

PCR hearing that his experts' [Dr. Martin and Dr. Morgan] opinions would have changed at sentencing if they had been provided these records. Von Dohlen, *supra*.

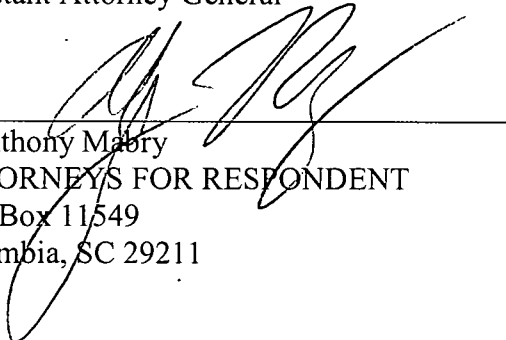
Considering the evidence in aggravation, which was overwhelming, along with all the evidence in mitigation Mahdi alleged below should have been presented, along with the aggravating evidence that would have almost certainly come in on cross-examination, rebuttal, or contained within the evidence itself, and the mitigation evidence presented at sentencing before Judge Newman, there is no reasonable probability Judge Newman would have returned with a different sentence. Wong; Sears; Strickland, Rosemond; Council; Jones. Mahdi has failed to meet his burden of proof to prove prejudice. Id. As a result, this petition must be dismissed.

CONCLUSION

For the above stated reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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July 8, 2015

CERTIFICATE OF SERVICE

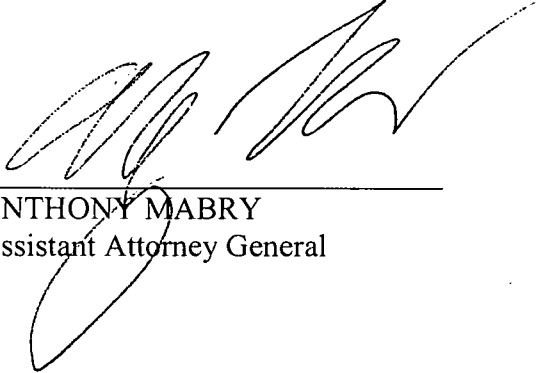
I, **Anthony Mabry**, hereby certify that I have served *Return to Petition for Writ of Certiorari* in the foregoing action by depositing copies in the United States Mail to:

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900 Elmwood Avenue, Suite 101
Columbia, SC 29201

This 8th day of July, 2015.



ANTHONY MABRY
Assistant Attorney General

ATTACHMENT NO. 5

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL
SESSIONS

COUNTY OF CALHOUN)

The State of South Carolina)

Indictment Nos.: 2004-GS-09-242
2004-GS-09-243
2004-GS-09-244

v.)

Mikal Deen Mahdi,)

Defendant.)

SENTENCING ORDER

Thank you. Please be seated.

Good Afternoon.

First, I commend Solicitor Pascoe, Deputy Solicitor Sorenson, and Defense Counsel Mr. Walters and Mr. Koger for your professional advocacy and efficient manner in which you have handled this case. I also thank the Clerk, Mr. Hasty, and the Courthouse staff, law enforcement and all of the witnesses for the courtesies and respect shown the Court during this arduous proceeding. I especially thank the approximately 400 citizens of Calhoun County who were summoned to jury duty and responded by appearing for this extremely important and essential civic responsibility.

I advise all present against any outbursts of expression. Some will agree. Some will disagree. The decorum of the Court, however, must be maintained at all times.

The Defendant, Mikal Deen Mahdi, was indicted by the Grand Jury of Calhoun County for murder, burglary second degree and grand larceny of a motor vehicle valued in excess of five thousand dollars (\$5000.00).

ATTEST: TRUE COPY
Kenneth Hasty
KENNETH HASTY
CLERK OF COURT
CALHOUN COUNTY

Pursuant to South Carolina Code § 16-3-26, the Solicitor timely notified the Defendant that he intended to seek the death penalty as punishment for the murder of James E. Myers. On November 30, 2006, the Defendant waived his right to a jury trial and pled guilty to all charges after the jury was seated but not yet sworn. Mr. Mahdi acknowledged that he understood that as a consequence of his guilty plea to murder while in the commission of a burglary and grand larceny that the Court would conduct a separate sentencing proceeding and determine whether he should be sentenced to life imprisonment without the possibility of parole or death.

From December 4 – 6, 2006, the Court heard additional evidence in extenuation, mitigation, or aggravation of the punishment. The Court also heard the arguments of counsel for or against the sentence to be imposed. Mr. Mahdi waived his right to testify and to have the final closing argument regarding the sentence to be imposed.

On December 6, 2006, the Court requested and subsequently received memoranda from both counsel for the State and counsel for the Defendant listing all statutory and non-statutory aggravating and mitigating factors believed to have been established by the evidence.

This Order is as a result of the guilty plea and the separate sentencing proceeding to determine whether the sentence of the Defendant, Mikal Deen Mahdi, for the murder of James E. Myers should be life imprisonment without the possibility of parole or death.

FACTS

In the early morning of July 18, 2004, after carjacking a vehicle in Columbia, South Carolina, the defendant pulled into the Wilco Travel Plaza off Interstate 26 in

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Calhoun County and attempted to use stolen credit and/or check cards. Employees at the Travel Plaza called the Calhoun County Sheriff's Office reporting that the defendant was acting in a suspicious manner. When the Sheriff's deputy arrived at the Travel Plaza, the defendant fled into the woods and eventually entered upon land owned by James E. Myers and Amy Tripp Myers. Mr. Myers was an Orangeburg Department of Public Safety Captain, who was off duty, but on call at the time. Mr. Mahdi forcefully entered a shed located on the land. When Captain Myers arrived at his property, Mr. Mahdi was lying in wait.

Earlier that afternoon, Captain Myers and his wife Amy returned to their home in Orangeburg County from Edisto Beach after celebrating the birthdays of Amy, his sister and his daughter. After returning home, he visited his father who lived a short distance away. Captain Myers left his father's home and stopped by his farm in Calhoun County. He went to the shed located on the farm as he had done many times before. This shed was where he and his wife were married; this shed was their place of peace and serenity; and this shed held treasured memories and dreams of Captain Myers and his wife. On the premises was Mikal Deen Mahdi who shot Captain Myers nine times, with a .22 caliber semiautomatic rifle that was stored in the shed. Three of the bullets were to the head. The defendant poured diesel fuel over Captain Myers's body and lit him on fire. The defendant then stole Captain Myers's city issued truck and rifles and fled to Florida. On July 21, 2004, the police department in Satellite Beach, Florida apprehended the defendant after a chase. He was driving Captain Myers's truck.

Based upon the defendant's guilty plea, testimony presented, and other evidence in the case, the court finds and concludes as follows:

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AGGRAVATING CIRCUMSTANCES

The State alleges the following statutory aggravating circumstances:

1. **The murder of Captain James E. Myers was committed while in the commission of burglary in the 2nd degree.**
2. **The murder of Captain James E. Myers was committed while in the commission of larceny with use of a deadly weapon.**

Mikal Mahdi pled guilty to Murder, Burglary in the 2nd degree and Grand Larceny. The State presented additional evidence during the sentencing proceedings concerning the manner in which the murder of James E. Myers occurred while the Defendant was committing these crimes. Further evidence was presented indicating that the Defendant stole from the victim his police issued vehicle and two rifles – one of which was used to kill the victim. I find that these two aggravating circumstances were proven beyond a reasonable doubt.

The State alleges the following as additional statutory aggravating circumstances:

3. **The murder of Captain James E. Myers was committed while in the commission of robbery while armed with a deadly weapon.**
4. **The murder of a Captain James E. Myers occurred during or because of the performance of his official duties.**

There is strong evidence to suggest that items were taken from the person of Captain Myers, particularly his police badge that was never recovered. The evidence also suggests that a South Carolina Law Enforcement Division (SLED) investigative file on the premises being worked on by Amy Tripp-Myers, then a SLED agent, had been disturbed during the time the Defendant was alone in the shed. This is evidence that the Defendant knew or should have known that he was on the premises of a person or

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persons involved in law enforcement. I conclude, however, that the State has failed to prove these two aggravating circumstances beyond a reasonable doubt. Therefore, I have neither considered nor given any weight to these two allegations as aggravating circumstances.

The State also alleges the following non-statutory aggravating circumstances:

Characteristics of the Defendant

The State presented compelling evidence of prior and subsequent bad acts of the Defendant which are relevant to show his bad character, evil nature and malignant heart. These incidents covered a period over eight years showing the Defendant committing a series of crimes, including housebreaking, stealing guns, robbing people, selling crack cocaine, vandalism and malicious wounding. These bad acts are summarized as follows:

On January 7, 1998, while in the Virginia Department of Juvenile Justice for grand larceny and breaking and entering, Mr. Mahdi, then 14 years of age, conveyed to a counselor during an evaluation profile, that his only strength was robbing people. On June 30, 1998, Mr. Mahdi, then 15 years old, was involved in an over 9 (nine) hour standoff with the Brunswick County Virginia Sheriff's Department who was attempting to execute an Order to return the Defendant to a juvenile detention facility, when Mr. Mahdi made the comment according to Brunswick County Sheriff James Woodley that "I'm gonna kill a cop before I die." On November 23, 2000, the Defendant then 17 years of age, attempted to grab the gun of a Richmond, Virginia, police officer who was attempting to arrest Mr. Mahdi on a vandalism charge for slashing his mothers automobile tires. During this arrest, Mr. Mahdi commented, according to Officer Mike

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Koehler that he "should have killed that crazy bitch," referring to his mother. On April 17, 2001, then 18 years old, while attempting to break into an apartment in Richmond, Virginia, Mr. Mahdi stabbed Moises Rivera, a maintenance supervisor, five (5) times, resulting in a felony conviction for malicious wounding. Mr. Mahdi received a fifteen (15) year prison sentence suspended to the service of thirty-nine (39) months to be followed by fifteen (15) years of probation.

During each of these periods of incarceration, Mr. Mahdi's behavior was maladaptive, assaultive, and demonstrated an utter disrespect for authority, including threatening the life of a Detention officer.

Following Mr. Mahdi's release on probation on May 12, 2004, his criminal activities escalated during a crime spree that resulted in his killing Christopher Jason Boggs during a robbery of an Exxon Station in Winston Salem, North Carolina on July 15, 2004. Mr. Mahdi shot Mr. Boggs twice in the face at point blank range with a weapon that had been stolen from his grandmother's neighbor's house in Lawrenceville, Virginia. On July 18, 2004, three days later at approximately 3:30 a.m., Mr. Mahdi carjacked Corey Pitts in Columbia, South Carolina using a chrome plated handgun. Following his murder of Captain Myers, Mr. Mahdi was apprehended on July 21, 2004 in Satellite Beach, Florida after jumping out of Captain Myers city-issued truck armed with a Ruger .223 assault rifle belonging to the Orangeburg Department of Public Safety. Following his arrest, Mr. Mahdi stated according Sergeant Darren Frost of the Satellite Beach Police Department that he did not shoot Sergeant Frost only because the gun was stuck in a three shot burst and he did not think he could shoot him, the other cop, referring to the other police officer, and the f'ing dog. While in safekeeping in the South

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Carolina Department of Corrections awaiting this trial, Mr. Mahdi made numerous threats to kill various Department employees.

I find that The State has established by clear and convincing evidence the Defendant's bad character and propensities. This evidence is an important consideration to the Court in assessing the Defendant's characteristics, but not as proof of any alleged statutory aggravating circumstance.

MITIGATING CIRCUMSTANCES

I have considered all statutory mitigating circumstances and non-statutory mitigating circumstances argued by the Defense as well as other mitigating circumstances supported by the evidence.

Statutory Mitigating Circumstance

Defense counsel argues that the Defendant's youth should be considered by the court in determining the appropriate sentence to be imposed. Mikal Deen Mahdi was twenty-one (21) years old at the time of the murder of Captain Myers. When last tested at age 14, the Defendant's IQ was 108 – slightly above average. While this is a young age for such a serious crime, Mikal Deen Mahdi began his criminal career at an early age, having entered the Virginia Department of Juvenile Justice at age 14. He is experienced in the world of crime. By the time he committed these crimes, Mr. Mahdi was well aware of the severity of his crimes and the possible consequences.

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I have considered the defendant's young age, but I have not afforded it great weight in reaching my decision. There is nothing about Mr. Mahdi's age or mentality that in any way mitigates, excuses, or lessens his culpability and neither should it be given any significant weight in the Court's ultimate decision as to his sentence.

Non-Statutory Mitigating Circumstances

I have also given consideration to what the defense contends to be the Defendant's turbulent and transient childhood and upbringing. In reviewing the testimony of Margie Hammock, the Defense's clinical social worker expert, there is no reference to physical or sexual abuse suffered by the Defendant. In addition, records of the Virginia Department of Juvenile Justice indicate that the Defendant's father, brother, and grandmother continually expressed great care and concern for his well-being. While Mr. Mahdi's family life may have been less than ideal particularly without the presence of a loving and caring mother, I do not believe that his difficult childhood and family life contributed in any significant way to his senseless criminal activities. Therefore while I have considered this non-statutory mitigating circumstance, I do not believe that it should be given any significant weight in the Court's ultimate decision as to the sentence to be imposed.

The Defense presented testimony from Mr. James Aiken, a prison adaptability expert. Mr. Aiken, a highly credentialed expert, testified concerning Mr. Mahdi's potential adaptability to prison life.

I have reviewed and considered Mr. Mahdi's records regarding his prior behavior in various correctional institutions. He has consistently been disruptive and

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uncooperative and has threatened to kill prison employees. Officers have repeatedly found homemade weapons, ropes and other contraband in the Defendant's cell. During this trial, the Defendant brought a homemade handcuff key into the courthouse with the intent to use it, if possible to escape, thus posing a serious threat to courtroom security. The Sheriff of Calhoun County testified that Mr. Mahdi stated to him that he made the key while being housed and monitored at the State's highest security level facility.

While Mr. Aiken gave impressive testimony, based on Mr. Mahdi's behavior in correctional institutions throughout his adolescence and adult years, I do not believe that he is sufficiently adaptable to prison life for this non-mitigating circumstance to be given any significant weight in the Court's ultimate decision as to the sentence to be imposed.

The defense further argues as a non-statutory mitigating circumstance that the Court should consider the Defendant's guilty plea in determining the appropriate sentence to be imposed. The Defendant's guilty plea occurred during the fourth day of his trial, following jury selection but prior to the jury being sworn. This was one day following his attempted escape through the use of the homemade key. In addition, Mr. Mahdi has failed to demonstrate any remorse for his actions at any point in time known to the Court. Therefore, I conclude that no significant weight should be given to this non-statutory mitigating circumstance in the Court's ultimate decision as to the sentence to be imposed.

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VICTIM IMPACT

Mikal Deen Mahdi murdered a husband, father, grandfather, son, and friend to many. Captain Myers was a well-respected police officer, an outdoorsman, a mentor and a treasured jewel of humanity. Mikal Deen Mahdi burglarized Captain Myers's farm shed and stole his family's sense of security and serenity. He robbed the Myers family and their many colleagues and friends of their right to peaceful enjoyment of life.

SENTENCING RATIONALE

In considering the appropriate sentence to be imposed, I am acutely aware that I am being called upon to determine what few of my brethren and sisters on the bench have been called upon to do. It is being the sole judge of whether Mr. Mahdi should be sentenced to life in prison without the possibility of parole or death by electrocution or lethal injection. It is an awesome task – which I do not take lightly.

United States Supreme Court Justice Potter Stewart referred to the penalty of death in the case of Furman v. Georgia as being different from all other forms of criminal punishment, not in degrees but in kind. It is unique in its total irrevocability; it is unique in its rejection of rehabilitation as a basic purpose of criminal justice; and it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

My challenge and commitment throughout my judicial career has been to temper justice with mercy and to seek to find the humanity in every defendant that I sentence. That sense of humanity seems not exist in Mikal Deen Mahdi.

The State pleads for justice- Mr. Mahdi's plea is for mercy.

In evaluating these two ideals, I am reminded of my duly sworn oath to preserve, protect, and defend the Constitution of this State and the United States of America. This obligation that I have applies not only to Mikal Dean Mahdi but as importantly it is an obligation that I have to all the citizens of the State of South Carolina.

The State and the Defendant are entitled to justice. Today, the Defendant also seeks mercy- the same mercy that perhaps Captain James E. Myers sought for an instant before Mikal Deen Mahdi fired nine bullets into Captain Myers' body from one of Captain Myers's prized weapons, before setting his body on fire with matches and diesel fuel belonging to Captain Myers.

In extinguishing the life, hope, and dreams of Captain Myers in such a wicked, depraved and conscienceless manner, the Defendant Mikal Deen Mahdi also extinguished any justifiable claim to receive the mercy he seeks from this Court.

In considering all of the evidence in this case, I have concluded that the only appropriate punishment for the murder of Captain James E. Myers is death. As to Burglary 2nd degree and Grand Larceny, the sentence is fifteen years and ten years, respectively, consecutive to the sentence for murder and consecutive to each other.

AFFIRMATIVE FINDING

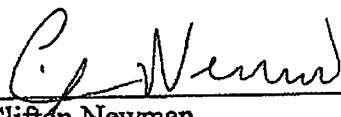
I find as an affirmative fact that the evidence in this case warrants the imposition of the death penalty and that its imposition is not a result of prejudice, passion, or any other arbitrary factor.

It is therefore the judgment of the law and the sentence of the Court that you the Defendant Mikal Deen Mahdi be taken to the South Carolina Department of Corrections, henceforth to be kept in close and safe confinement, until the 8th day of February 2007, upon which day, between the hours of 6:00 a.m. and 6:00 p.m., that you the Defendant Mikal Deen Mahdi shall suffer death in the manner provided by law. May God have mercy on your soul.

The execution of the sentence will be stayed pending the automatic appeals and reviews as required by law.

THIS COURT IS ADJOURNED.

December 8, 2006



Clifton Newman
Presiding Judge

ATTACHMENT NO. 6

1 disciplinary infraction is in prison. For the people who
2 work there they're all serious. There are irritants and
3 then more and he was irritable. He was irritable and
4 irritating to a lot of the people who were around him and
5 at times it was much more than that. It was worse than
6 that, but most of these offenses are irrational offenses
7 and the overwhelming majority of them are minor, but what
8 happens to people who have underlying psychological
9 problems in these environments is that they simply can't
10 control themselves and they don't control themselves and
11 they rack up a lot of disciplinary infractions for
12 irrational pointless things and sometimes if those
13 underlying problems aren't dealt with they make their way
14 into or they earn their way into a super-max facility --
15 not because they're the worst of the worst, not because
16 they're so dangerous that the other facilities can't
17 manage them or handle them, but because they are so
18 irritating and disruptive in their behavior that
19 eventually the prison -- main line prison or the typical
20 prison simply throws up its hand and says we don't know
21 what to do with this guy. Let's put him in isolation.
22 Let's send him to super-max.

23 Q All right. We'll get to Wallens Ridge in a moment.
24 Just tell us what a super-max prison is.

25 A It's a prison where for the most part prisoners are

1 held in single cells for 23 hours out of every day.
2 They're typically subjected to very high security.
3 Whenever they are taken out of their cell they are placed
4 in restraints. Typically before the cell doors are even
5 opened they're placed in restraints. They're moved
6 individually around the institution like in the very brief
7 periods of time during which they're permitted out of the
8 cells.

9 These are facilities that have essentially no
10 programming. The prisoners stay in their cells either by
11 themselves or in some facilities there are actually double
12 cells so there will be two people in a cell being kept
13 under these conditions, and they are essentially periods
14 of or places where extended solitary confinement is
15 imposed on people.

16 Q And have there been studies done on the effects of
17 extensive solitary confinement?

18 A Yes. There have been over the years many, many
19 studies done on solitary confinement dating nearly back to
20 the 19th century when solitary confinement was used on a
21 more widespread basis in the United States. It was
22 essentially done away with because of what was understood
23 to be the harmful psychological and psychiatric effects of
24 it when practiced on a long-term basis. Since the 19th
25 century there have been studies in the United States and

1 other countries about what happens to people when they're
2 in solitary confinement. I've done some of these myself.

3 Q And what do those studies establish happens to
4 somebody who is subjected to prolonged isolation?

5 A Well, let me say at the outset that not everybody is
6 the same. So, not everybody experiences all of these
7 things and some people experience very few of these
8 reactions, but many people experience many if not most of
9 these reactions. Solitary confinement is an
10 extraordinarily stressful environment for people to be in.
11 There is nothing to do and prisoners simply sit idly
12 throughout the day and try to manage whatever kinds of
13 anxiety they're feeling as a result of the environment in
14 which they're being kept.

15 Some prisoners are overcome with the anxiety so there
16 is in the literature what's called isolation panic. Some
17 prisoners can only handle this on a very, very short-term
18 basis and they have full-blown anxiety reactions,
19 emotional reactions. Oftentimes they're removed from the
20 institution to receive treatment and placed back in the
21 environment. Prisoners begin to deteriorate mentally.
22 Because they don't use their cognitive capacities those
23 capacities begin to atrophy. So, prisoners find it
24 difficult to think. They find it difficult to reason.

25 They're forced understandably so by the institution

1 to become entirely dependent upon the institution to
2 regulate or control their behavior. So, they begin to
3 lose their ability to initiate behavior or make
4 responsible judgments about their own behavior because
5 literally everything they do is controlled by the
6 institution. Again, they rarely even come out of their
7 cells. They're typically fed this their cells and there
8 are limited opportunities for exercise and no opportunity
9 for programming.

10 So, they become very dependent on the institution and
11 really unable to control their own behavior or to control
12 themselves absent these very significant external
13 constraints that are placed on them. If a prisoner
14 suffers from depression that depression almost certainly
15 will deepen inside a super-max prison. There is a
16 sameness to these institutions. Every day is like the one
17 before and the one that follows, and, indeed, in the
18 studies that I've done many people who were not depressed
19 before they went in to super-max prisons are depressed and
20 sometimes even clinically depressed while they're there
21 and sometimes even afterwards.

22 Sometimes the environment is so frustrating that
23 prisoners begin to fill with frustration and the
24 frustration turns to anger and even can turn to rage and
25 so prisoners in super-max prisons sometimes lash out