

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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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.

PETITION FOR A WRIT OF CERTIORARI

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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), SCRPC, 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), SCRPC, 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), SCRPC, 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

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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,

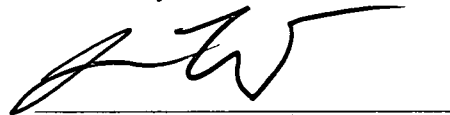
v.

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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