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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CALHOUN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2014- 002131

Mikal D. Mahdi, #5238

Petitioner,

v.

State of South Carolina,

Respondent.

APPENDIX

Vol. II of XXVIII

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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Calhoun County

Doyett A. Early, III, Circuit Court Judge

MIKAL D. MAHDI,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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QUESTION PRESENTED

Whether the PCR court erred in compelling Petitioner's collateral counsel to produce expert-witness files where the files were necessary for trial counsel to respond to allegations that counsel was ineffective.

INTRODUCTION

This action arises from an oral discovery order issued by the Honorable Doyett A. Early, III, on February 23, 2011.¹ Specifically, Judge Early ordered Petitioner, Mikal D. Mahdi's collateral counsel, Teresa Norris and Robert Lominack, to produce the files of psychiatrist, Dr. Thomas Martin and psychologist, Dr. Geoffrey McKee as they were relevant to defend against various ineffective assistance of counsel claims asserted in Petitioner's Final Amended Application for post-conviction relief ("PCR").

For reasons set out within this response, it is clear that the Applicant has waived both the attorney client privilege and work product protections over the items included within the records of Dr. McKee and Dr. Martin – retained experts *and agents of the original defense*:

- The specific allegations in the amended application assert counsel was ineffective in failing to adequately investigate, develop, and present mitigation evidence concerning Mahdi's family, social, institutional, and mental health history and claims that Mahdi is developmentally impaired;
- Original Counsel retained Dr. Martin and Dr. McKee to perform a psychological and Psychiatric assessment of Mahdi in preparation of the trial and defense;
- The expert witnesses prepared records, documents, and writings as part of their testing and evaluation for the defense team;
- Although the purported defense counsel file has been disclosed, this extended data by the expert witnesses and agent of the original defense team has been withheld despite timely discovery request;
- However, Applicant has already disclosed the apparent result of Dr. Martin's opinion and communication with counsel in its discovery response: See Attachment #5(E), Discovery Disclosure. Included within the notes are the statements "[d]oes not suffer major mental illness . . ." and "[m]ajor depressive _____[.]"
- Applicant's discovery responses reveal an intent to raise mental health issues and testimony including, but not limited to: "**Donna Schwartz-Watts** will provide her expert opinion regarding Mr. Mahdi's mental health, especially about the effects of his childhood experiences and how

¹ A proposed order was sent to Judge Early at approximately 10:00 AM on February 24, 2011.

these experiences limited emotional development and resulted in diagnosable depression, anxiety, PTSD, and other mental health disorders" among other disclosures.

- Trial Counsel Glenn Walters has authorized disclosure of the files of his retained experts and agents – Dr. Martin and Dr. McKee for purposes of this litigation against his competency – to address the allegations concerning the adequacy of his representation of Mahdi.

STATEMENT OF THE CASE

On March 19, 2010, Petitioner via current collateral counsel, filed an Amended Application for PCR. In this application, Petitioner reasserted his original ground for relief (trial counsel was ineffective in failing to object where the trial court improperly imposed a death sentence on Petitioner as a result of his asserting his right to a jury trial) and added two additional claims. In particular, Petitioner alleged trial counsel was ineffective for failing to adequately investigate, develop, and present mitigation evidence concerning Petitioner's familial, social, institutional and mental health history citing Strickland v. Washington, 466 U.S. 668 (1984); Wiggins v. Smith, 539 U.S. 510 (2003); Rompilla v. Beard, 545 U.S. 374 (2005); and Council v. State, 380 S.C. 159, 670 S.E.2d 356 (2008).

Thereafter, on July 29, 2010, Petitioner filed a Final Amended Application for PCR. The application reasserted the claims discussed above and added two additional claims, including an ineffective assistance of counsel claim. Thus, Petitioner's Final Amended Application for PCR alleged, the following as it relates to ineffective assistance of counsel:²

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

² While Petitioner contends the initial PCR application controls the extent of § 17-27-130's waiver according to Binney, the State notes the Binney court's holding in this regard was clearly limited to the facts of the case. See Binney, 384 S.C. at 544, 683 S.E.2d at 480 ("In so far as it applies to this case, we find that Petitioner's waiver of the attorney-client privilege was automatic upon the filing of his [initial] application."). Rather, the rule from Binney, is that the broadest claims asserted by Petitioner are controlling for purposes of § 17-27-130 and the scope of that waiver "cannot be whittled down by the subsequent amendment of the application." Id.

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.

See Attachment #1, Petitioner's Final Amended Application. Among other things, Petitioner included within the supporting facts of his PCR claims, the following:

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 (2003).

See Attachment #1, Petitioner's Final Amended Application.

On October 4, 2010, the State served Petitioner with Interrogatories and Requests for Production. See Attachment #2, Respondent's Interrogatories to the Applicant; Attachment #3, Respondent's Request for Production of Documents. In their responses to discovery, collateral counsel failed to disclose that they were in possession of the files of psychiatrist, Dr. Thomas Martin, and psychologist, Dr. Geoffrey McKee.³ See Attachment #5(A), Applicant's Answers to Respondent's First Set of Interrogatories; Attachment #5(B), Applicant's Responses to Respondent's Request for Production of Documents; Attachment #5(C), Applicant's Supplemental Answers to Respondent's First Set of Interrogatories; Attachment #5(D), Applicant's Second Supplemental Answers to Respondent's First Set of Interrogatories. However, collateral counsel did disclose the following information regarding expert witnesses that they proposed to use at the hearing:

Should be called to testify, **Craig Haney** will testify regarding the effects of incarceration on Mr. Mahdi, especially the effects of his confinement at Wallens Ridge State Prison in Virginia.

³ The State also requested collateral counsel provide it with a privilege log on two separate occasions regarding any files or documents which they believed were privileged, however, collateral counsel failed to do so. See Attachment #4(A), E-Mail Request for Privilege Log; 4(B) Letter Requesting Privilege Log.

Should be called to testify, **Donna Schwartz-Watts** will provide her expert opinion regarding Mr. Mahdi's mental health, especially about the effects of his childhood experiences and how these experiences limited emotional development and resulted in diagnosable depression, anxiety, PTSD, and other mental health disorders.

Should be called to testify, **Dr. Nicholas Cooper-Lewter** will provide a comprehensive social history and provide his expert opinion regarding the risk factors in Mr. Mahdi's life and how these factors affected Mr. Mahdi's psychological and emotional development.

Should be called to testify, **Dr. deRossett Myers** will provide his expert opinion regarding Mr. Mahdi's childhood experiences and how these experiences affected his psychological development. Dr. Myers will opine that Mr. Mahdi's emotional development was significantly impacted by the experiences of his childhood.

See Attachment #5(D), Applicant's Second Supplemental Answers to Respondent's First Set of Interrogatories.

Additionally, in reviewing documents disclosed by collateral counsel, pursuant to the State requests for Production of Documents, a note was found evidencing that trial counsel met with Dr. Martin twice. See Attachment #5(E), Discovery Disclosure. Included within the notes are the statements "[d]oes not suffer major mental illness . . ." and "[m]ajor depressive _____[.]" See Attachment #5(E), Discovery Disclosure.

In light of the above-cited facts, the State specifically requested a copy of both Dr. Martin and McKee's files. See Attachment #6, E-Mail Requesting Dr. Martin and McKee's Files. In response, collateral counsel objected and refused to produce the files claiming their contents were irrelevant and privileged. See Attachment #7, E-Mail Objecting to Conference Call. Accordingly, on February 18, 2011, the State filed a Motion to Compel.⁴ See Attachment #8, Memorandum in Support of Motion to Compel. Due to the eminent date of the hearing and its

⁴ A conference call was conducted on February 22, 2010, however, collateral counsel objected to holding a hearing via conference call, and a decision was made to hold the hearing on the record the following day.

need for the contents of the files to competently defend against the allegations contained within Petitioner's Final Amended Application for PCR, the State requested an expedited hearing.

On February 23, 2011, the State's Motion to Compel was heard before Judge Early at the Aiken County Courthouse. Petitioner was represented by collateral counsel Teresa Norris and Robert Lominack, while the State was represented by Assistant Attorney General Anthony Mabry. During the hearing, both the State and Petitioner submitted memoranda of law concerning the Motion to Compel. Additionally, the State submitted the affidavit of trial counsel, Glenn Walters.⁵ See Attachment #9, Affidavit of Glenn Walters, Esq. In the affidavit, Walters consented to the disclosure of Dr. Martin and McKee's files, as he believed they were required in order for counsel to adequately respond to Petitioner's ineffective assistance of counsel claims contained within Petitioner's PCR application. See Attachment #9, Affidavit of Glenn Walters, Esq. At the conclusion of the hearing, Judge Early found the files were relevant to claims presented in Petitioner's Final Amended Application and any claim of attorney-client privilege was waived by Petitioner with the filing of the Final Amended Application pursuant to section 17-27-130 of the South Carolina Code. As a result, collateral counsel was ordered to produce Dr. Martin and McKee's files by 1:30 PM the following day, February 24, 2011. A proposed order was drafted and submitted to Judge Early that same day. See Attachment #10, Proposed Order to Compel Production. It is unknown whether Judge Early signed the order.⁶

At approximately 1:30 PM, Petitioner filed a Notice of Appeal seeking review of Judge Early's ruling. See Attachment #11, Notice of Appeal. While this Court dismissed Petitioner's appeal as interlocutory, a stay was issued giving Petitioner until the 25th of February to file either a writ of certiorari or a writ of supersedeas. See Attachment #12, Order in #2009-CP-09-0164.

⁵ Walters was lead counsel during trial.

⁶ Judge Early, via conference call at approximately noon today, told the State and Petitioner's collateral counsel that he would not sign the proposed order as a stay had been issued.

In compliance with this Court's order, Petitioner filed a writ of certiorari seeking review of Judge Early's ruling. The State's Return follows.

STANDARD OF REVIEW

In Binney v. State, 384 S.C. 539, 543, 683 S.E.2d 478, 480 (2009), this Court granted a writ of certiorari due to extraordinary circumstances to review whether Binney's filing broad claims of ineffective assistance of counsel in both the guilt and sentencing phases of trial resulted in the waiver of the attorney-client privilege. In so doing, the Binney court utilized the "any evidence" standard enunciated in Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) explaining, "[i]f the PCR court's findings are supported by any evidence of probative value in the record, they should be upheld." Binney, 384 S.C. at 543, 683 S.E.2d at 480 citing Cherry, 300 S.C. at 119, 386 S.E.2d at 626.

ARGUMENTS

- I. Section 14-3-330(2) of the South Carolina Code deals only with the Supreme Court of South Carolina's Appellate Jurisdiction and as Petitioner's Appeal was Dismissed as Interlocutory, this Court's Authority to Grant Certiorari is Governed by Common Law Certiorari Principles

Petitioner contends this Court may grant certiorari because the lower court's order to disclose files is immediately appealable pursuant to section 14-3-330(2) of the South Carolina Code as it "affects a substantial right." The State notes Petitioner's argument ignores the fact this Court dismissed Petitioner's appeal as interlocutory, and the question is now before the Court in its' capacity to grant a writ of certiorari due to "exceptional circumstances" as opposed to its' appellate jurisdiction. See Binney v. State, 384 S.C. 539, 541 n. 1, 683 S.E.2d 478, 479 n.1 (2009) ("The issue presented by this matter is novel and capable of arising in every PCR proceeding. We granted a writ of certiorari in this case due to these exceptional circumstances.") citing In re: Breast Implant Product Liability Litigation, 331 S.C. 540, 543 n.2, 503 S.E.2d 445,

447 n.2 (1998); Lafitte v. Bridgestone Corp., 381 S.C. 460, 464, 674 S.E.2d 154, 156 (2009). Accordingly, the State submits, S.C. Code § 14-3-330(2) and the interpretation thereof, are irrelevant to the review of Judge Early's order as § 14-3-330 merely defines this Court's appellate jurisdiction. Rather, common law certiorari principles inform this Court's decision as to whether grant or deny certiorari, and thus, the Court is left to determine whether exceptional circumstances exist so as to warrant issuance of the writ. See Binney, 384 S.C. at 541 n.1, 683 S.E.2d at 479 n.1 (issuing writ of certiorari due to exceptional circumstances where the matter is novel and capable of repetition); Lafitte, 381 S.C. at 464, 674 S.E.2d at 156 (explaining certiorari was granted due to exceptional circumstances as the issue was a novel question of law and judicial economy would be best served by resolution of the issue); In re: Breast Implant Product Liability Litigation, 331 S.C. at 543 n.2, 503 S.E.2d at 447 n.2 (granting a writ of certiorari due to exceptional circumstances where novel questions of law concerning issues of significant public interest exist and a decision would serve the interest of judicial economy); Rowe v. City of West Columbia, 334 S.C. 400, 404, 513 S.E.2d 379, 381 (Ct. App. 1999) (holding a writ of certiorari is an extraordinary form of relief that generally is used only in the absence of other effective remedies); City of Columbia v. Pub. Serv. Commn., 242 S.C. 528, 533, 131 S.E.2d 705, 707 (1963) (explaining the writ of certiorari primarily issues to test jurisdiction and is not a means to correct abuses of discretion).

II. Certiorari should be Denied as no Extraordinary Circumstances Exist as this Court in Binney v. State, 384 S.C. 539, 683 S.E.2d 478 (2009) found Section 17-27-130 of the South Carolina Code, was Plain and Unambiguous in Explaining the Extent of the Automatic Waiver of Attorney-Client Privilege Related to Ineffective Assistance of Counsel Claims

Petitioner also argues certiorari should be granted as it is consistent with this Court's review in other cases, specifically, Binney v. State, 384 S.C. 539, 683 S.E.2d 478 (2009).

However, Petitioner's argument misses the mark insofar as it ignores this Court's reasoning in granting certiorari in Binney. As discussed above, the Binney court granted a writ of certiorari due to exceptional circumstances finding, the "matter was novel and capable of arising in every PCR proceeding." 384 S.C. at 541 n. 1, 683 S.E.2d at 479 n.1. In so doing, the Binney court cited to Lafitte v. Bridgestone Corp., 381 S.C. 460, 674 S.E.2d 154 (2009) and In re: Breast Implant Liability Litigation, 331 S.C. 540, 503 S.E.2d at 445 (1998) two cases in which exceptional circumstances warranted issuance of the writ as they implicated issues of judicial economy. See Lafitte, 381 S.C. at 464, 674 S.E.2d at 156 (explaining certiorari was granted due to exceptional circumstances as the issue was a novel question of law and judicial economy would be best served by resolution of the issue); In re: Breast Implant Product Liability Litigation, 331 S.C. at 543 n.2, 503 S.E.2d at 447 n.2 (granting a writ of certiorari due to exceptional circumstances where novel questions of law concerning issues of significant public interest exist and where a decision would best serve the interest of judicial economy). Thus, despite Petitioner's assertions to the contrary, granting certiorari would be inconsistent with this Court's ruling in Binney as the purpose of granting certiorari in Binney was to minimize future litigation concerning the extent of § 17-27-130's automatic waiver of privilege for ineffective assistance of counsel claims in PCR proceedings.⁷ See Binney, 384 S.C. at 541 n. 1, 683 S.E.2d at 479 n.1 ("The issue presented by this matter is novel and capable of arising in every PCR proceeding. We granted a writ of certiorari in this case due to these exceptional circumstances.").

Moreover, despite Petitioner's characterization of the State's position as an attempt to extend this Court's holding in Binney, such a contention is simply incorrect. Specifically,

⁷ The State further notes that a writ of certiorari should not be granted simply because the circuit court is presented with a difficult question. See In re: Breast Implant Product Liability Litigation, 331 S.C. at 543 n.2, 503 S.E.2d at 447 n.2. ("We reiterate that this Court will not issue a writ of certiorari merely to relieve a circuit court's burden of deciding difficult issues").

Petitioner maintains the issue before the Court is “whether the statute and Binney should be extended to reach the files of experts retained by the defense, even if the information in those files” were unknown to trial counsel.⁸ Yet, this statement ignores that Binney already decided the extent to which the statute waives attorney-client privilege, explaining § 17-27-130 “makes clear that the General Assembly intended for the scope of the automatic waiver to be directly proportional to the breadth of the allegations made in each individual PCR application.” 384 S.C. at 544-45, 683 S.E.2d at 481. Elaborating on the proportionality of the waiver, the Binney court stated “[t]his provision [§ 17-27-130] permits prior counsel, when faced with extremely broad allegations of ineffectiveness,⁹ to provide representatives of the State with *any information* he deems necessary for the defense of his representation.” Binney, 384 S.C. at 545, 683 S.E.2d at 481 (footnote added) (emphasis added) Binney further explained that counsel is “free to discuss and disclose *any aspect* of the representation with representatives of the State for purposes of defending against the allegations of ineffectiveness to the extent necessary for prior counsel to respond to the allegation.” See Binney, 384 S.C. at 545, 683 S.E.2d at 481 quoting S.C. Code Ann. § 17-27-130 (“Counsel alleged to have been defective is free to discuss and disclose any aspect of the representation with representatives of the State for purposes of defending against the allegations of ineffectiveness to the extent necessary for prior counsel to respond to the allegation.”) (emphasis added above). Finally, the Binney court found § 17-27-130’s language was “plain and unambiguous” in stating that “an applicant’s ‘waiver of the attorney-client privilege shall be deemed automatic upon the filing of the application alleging

⁸ The State, based upon review of Attachment #5(E), Discovery Disclosure, disputes whether counsel knew of the information contained within Dr. Martin and McKee’s files and submits this is an issue of fact to be determined by the PCR court. See Lafitte, 381 S.C. at 472, 674 S.E.2d at 161 (“On certiorari, review by the Court is confined to the correction of errors of law.”).

⁹ The State notes collateral counsel in both Binney and the present case raised ineffective assistance of counsel claims alleging trial counsel was ineffective for failing to investigate, develop and present mitigation evidence in the sentencing phase. See Binney, 384 S.C. at 542, 683 S.E.2d at 479 (“Petitioner alleged that trial counsel failed to investigate, develop, and present all available, relevant, and admissible mitigating evidence.”).

ineffective assistance of prior counsel” and that trial counsel ultimately determines the extent of the waiver. 384 S.C. at 544-45, 683 S.E.2d at 480-81.

Likewise, Petitioner’s argument for granting certiorari ignores its statement of the issue in the second sentence of his petition which explains, “the issue before this Court boils down to a straightforward application of the attorney-client privilege and the implied waiver of that privilege in the context of capital post-conviction relief proceedings.” As discussed above, the State maintains this was the exact issue litigated in Binney, and as such, Binney is controlling thereby making a grant of certiorari unnecessary. Accordingly, as the present case deals with the same issues dealt with by the Binney court, namely the extent of § 17-27-130’s automatic waiver, and who controls waiver of the privilege for purposes of the statute, the issue is no longer novel and thus, the grant of certiorari would serve no purpose.

III. The PCR Court Properly Ordered Petitioner to Produce Dr. Martin and Dr. McKee’s Files as the Attorney-Client Privilege was Waived According to Section 17-27-130 of the South Carolina Code

Petitioner argues the PCR court erred in concluding his ineffective assistance of counsel claims automatically waived the attorney-client privilege pursuant to § 17-27-130 as there was no evidence trial counsel ever saw the files at issue.¹⁰ The State disagrees and submits the PCR court correctly found Petitioner’s allegations automatically waived attorney-client privilege.

¹⁰ As detailed above, in footnote seven, the State, based upon review of Attachment #5(E), Discovery Disclosure, disputes whether counsel knew of the information contained within Dr. Martin and McKee’s files and submits this is an issue of fact to be determined by the PCR court. See Lafitte, 381 S.C. at 472, 674 S.E.2d at 161 (“On certiorari, review by the Court is confined to the correction of errors of law.”). Furthermore, the State notes the question of whether counsel saw Dr. Martin and McKee’s files has no bearing on whether such files are necessary for trial counsel to respond to the allegations, as both experts were agents of counsel. See State v. Hitopoulos, 279 S.C. 549, 550, 309 S.E.2d 747, 748 (1983) (holding mental health expert is an agent of defense counsel). In Hitopoulos, this Court determined the attorney-client privilege extended to a psychiatrist retained by counsel in preparation for trial as the psychiatrist was the attorney’s agent for the transmission of confidential facts. 279 S.C. at 550, 309 S.E.2d at 748. Accordingly, the State submits the same agency relationship applies to waiver of the attorney-client privilege under § 17-27-130, meaning Dr. Martin and McKee’s files, are considered part of counsel’s files and the attorney-client privilege is therefore automatically waived based upon Petitioner’s allegations.

Section 17-27-130 of the South Carolina Code describes a PCR applicant's waiver of the attorney-client privilege, stating:

Where a defendant alleges ineffective assistance of prior trial counsel ... as a ground for post-conviction relief ... the applicant shall be deemed to have waived the attorney-client privilege with respect to both oral and written communications between counsel and the defendant, and between retained or appointed experts and the defendant, to the extent necessary for prior counsel to respond to the allegation. This waiver of the attorney client privilege shall be deemed automatic upon the filing of the application alleging ineffective assistance of prior counsel and the court need not enter an order waiving the privilege. Thereafter, counsel alleged to have been ineffective is free to discuss and disclose any aspect of the representation with representatives of the State for purposes of defending against the allegations of ineffectiveness, to the extent necessary for prior counsel to respond to the allegation.

Binney, 384 S.C. at 543-44, 683 S.E.2d at 480 quoting S.C. Code Ann. § 17-27-130 (1996).

Here, the State believes Petitioner's allegations automatically waived attorney-client privilege under §17-27-130. In his Final Amended Application for PCR, Petitioner alleged, as it relates to ineffective assistance of counsel, the following:

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

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.

See Attachment #1, Petitioner's Final Amended Application. In addition, Petitioner's collateral counsel included the following supporting facts:

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 (2003).

See Attachment #1, Petitioner's Final Amended Application. Thus, the State submits Petitioner's claims created an issue of whether counsel investigated, developed and presented mitigation evidence concerning Petitioner's familial history, social history, institutional history, mental age and mental health and thus waived the attorney-client privilege as to these issues as detailed in § 17-27-130. This belief is further augmented by trial counsel, Glenn Walters affidavit which consented to the disclosure of Dr. Martin and McKee's files as he believed they were required in order to adequately respond to Petitioner's ineffective assistance of counsel claims. Accordingly, the State submits the PCR court correctly concluded that § 17-27-130 mandated that collateral counsel disclose both doctors files.

IV. Even Assuming the Attorney-Client Privilege was not Waived by Petitioner's Allegations, Dr. Martin and Dr. McKee's Files are not Subject to the Attorney-Client Privilege to the Extent they do not Memorialize Communications between Petitioner and the Doctors

In the alternative, even if Petitioner's allegations did not waive the privilege, the State submits Petitioner's claim of privilege is overly inclusive as Petitioner's files are not subject to attorney-client privilege so long as the files do not memorialize communications between Petitioner and Doctors Martin and McKee.¹¹ As this Court recently explained in Tobaccoville, USA, Inc. v. McMaster, 387 S.C. 287, 293, 692 S.E.2d 526, 529-30 (2010), "[t]he attorney-client privilege protects against disclosure of confidential communications by a client to his attorney." Elaborating on the policy behind the privilege, the Court remarked. "[t]his privilege is based

¹¹ Petitioner is conflating claims of attorney-client privilege with that of the work-product doctrine, which does not apply here as trial counsel's work-product would not be in anticipation of PCR litigation but in preparation for trial. See Pope v. State, 207 S.W.3d 352, 358-59 (Tex. Crim. App. 2006) (material prepared by a consulting expert assisting defense in developing strategies and theories protected by work product doctrine when reflecting expert's thoughts regarding strength and weakness of a defense theory); State v. Tensley, 249 N.W.2d 659, 661-62 (Iowa 1977) (expert's conclusion as to the defendant's mental condition is not within the attorney-client privilege because it is not confidential); Edward J. Imwinkelried, The Applicability of the Attorney-Client Privilege to Non-Testifying Experts: Reestablishing the Boundaries Between the Attorney-Client Privilege and the Work Product Protection, 68 Wash. U.L.Q. 19, 28-29 (1990) (arguing that it is indefensible to apply the attorney-client privilege to expert information that comes from sources other than communications from the client).

upon a wise policy that considers that the interests of society are best promoted by inviting the utmost confidence on the part of the client in disclosing his secrets to this professional advisor....” Id. The Court then explained the extent of the privilege citing to State v. Doster, 276 S.C. 647, 284 S.E.2d 218, (1981) where the Court explained the attorney-client privilege as follows:

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) *the communications* relating to that purpose (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

Tobaccoville, 387 S.C. at 293, 692 S.E.2d at 529-30 quoting Doster, 276 S.C. at 651, 284 S.E.2d at 219-20 (emphasis added).

Here, the State submits the only material which may be protected by the attorney-client privilege, provided it is not waived pursuant to § 17-27-130, is that material which memorializes *confidential communications* between Petitioner and either doctor. In light of this fact, the State submits any diagnosis contained within the file which was made by either doctor regarding Petitioner’s mental health are discoverable so long as they comply with Rule 26(b)(1), SCRCP. Likewise, the State believes discovery related to both doctor’s testimony is permitted so long as they do not disclose *confidential communications* between Petitioner and themselves and comply with Rule 26(b)(1), SCRCP.

Rule 26(b)(1), SCACR provides as follows:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party including the existence, description, nature, custody, condition and location of any books documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the

information sought appears reasonably calculated to lead to the discovery of admissible evidence

Rule 26(b)(1), SCRCP. Accordingly, as the aforementioned information and materials would not be subject to attorney-client privilege, the only question pertinent to determining whether the files are necessary for trial counsel to respond to allegations regarding their ineffectiveness is whether the information being sought could lead to admissible evidence.

To this end, the State highlights that Petitioner alleged multiple ineffective assistance of counsel claims thereby creating an issue of whether counsel investigated, developed and presented mitigation evidence concerning Petitioner's familial history, social history, institutional history, mental age and mental health. Additionally, the following information was disclosed pursuant to the State's discovery requests concerning expert witnesses and their testimony:

Should be called to testify, **Craig Hancy** will testify regarding the effects of incarceration on Mr. Mahdi, especially the effects of his confinement at Wallens Ridge State Prison in Virginia.

Should be called to testify, **Donna Schwartz-Watts** will provide her expert opinion regarding Mr. Mahdi's mental health, especially about the effects of his childhood experiences and how these experiences limited emotional development and resulted in diagnosable depression, anxiety, PTSD, and other mental health disorders.

Should be called to testify, **Dr. Nicholas Cooper-Lewter** will provide a comprehensive social history and provide his expert opinion regarding the risk factors in Mr. Mahdi's life and how these factors affected Mr. Mahdi's psychological and emotional development.

Should be called to testify, **Dr. deRossett Myers** will provide his expert opinion regarding Mr. Mahdi's childhood experiences and how these experiences affected his psychological development. Dr. Myers will opine that Mr. Mahdi's emotional development was significantly impacted by the experiences of his childhood.

See Attachment #5(D), Applicant's Second Supplemental Answers to Respondent's First Set of Interrogatories. Finally, the State highlights counsel's notes concerning the documents disclosed

by collateral counsel, pursuant to the State requests for Production of Documents. Specifically, the note made by trial counsel memorializing that Petitioner "[d]oes not suffer major mental illness . . ." and "[m]ajor depressive _____[.]" See Attachment #5(E), Discovery Disclosure. Thus, the State believes disclosure of both doctors files could in fact lead to the discovery of admissible evidence as provided for in Rule 26(b)(1), SCACR.

Accordingly, should this Court find Petitioner's allegations did not waive the attorney-client privilege, the State submits it would still be entitled to production of Dr. Martin and McKee's files subject to the limited application of the attorney-client privilege.

CONCLUSION

Thus, because Binney has already decided the extent of 17-27-130's automatic waiver of the attorney-client privilege concerning ineffective assistance of counsel claims, and since the PCR court did not err in granting the State's Motion to Compel, and even if it did, the attorney-client privilege would be quite limited in barring discovery of such evidence, the State asks this Court to deny certiorari.

Respectfully Submitted,

ALAN WILSON
Attorney General

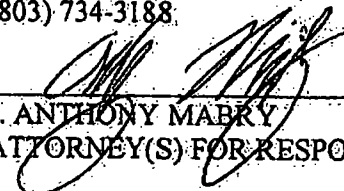
JOHN W. McINTOSH
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J. ANTHONY MABRY
ATTORNEY(S) FOR RESPONDENTS

February 28, 2011.

THE STATE OF SOUTH CAROLINA

In the Supreme Court

Appeal from Calhoun County
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2009-CP-09-164

Mikal D. Mahdi

Petitioner,

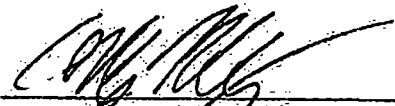
v.

State of South Carolina

Respondent.

PROOF OF SERVICE

I, J. Anthony Mabry, certify that I have served the Return to Petition for Writ of Certiorari on the Petitioner by depositing a copy of it in the United States Mail, postage prepaid, on February 28, 2011, addressed to the attorney of record, Teresa L. Norris, PO Box 11744, Columbia, SC 29211.



J. ANTHONY MABRY
Attorney for Respondent

Attachment 1

STATE OF SOUTH CAROLINA)
COUNTY OF CALHOUN)
MIKAL D. MAHDI (SK #5238),)
Applicant,)
vs.)
STATE OF SOUTH CAROLINA,)
Respondent.)

IN THE COURT OF COMMON PLEAS

09-CP-09-164

AMENDED APPLICATION FOR
POST-CONVICTION RELIEF

[Note: This application follows SCRCF Appendix of Forms, Form 5, as required by Rule 71.1(b), SCRCF.]

1. Applicant is detained at the Maximum Security Unit, Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210.
2. He was convicted and sentenced in the Calhoun County Court of General Sessions.
3. There were no co-defendants.
4. Applicant was indicted for murder (04-GS-09-0243), burglary (04-GS-09-244), and grand larceny (04-GS-09-242).
5. On December 8, 2006, Applicant was sentenced to death for murder, 15 years' imprisonment for burglary, and 10 years' imprisonment for grand larceny.
6. Findings of guilty were made by The Honorable Clifton Newman after pleas of guilty.
7. The Applicant appealed from the judgment of conviction and sentence.
8. The Applicant appealed to the South Carolina Supreme Court. The court affirmed the convictions and sentences on June 15, 2009. *Mahdi v. State*, 383 S.C. 135, 678 S.E.2d 807 (2009).
9. Not applicable.

10 & 11.

GROUND FOR RELIEF WITH SUPPORTING FACTS

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.

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).

12 & 13. Applicant filed the original application for post-conviction relief on August 18, 2009 in the Court of Common Pleas for Calhoun County. This application is an amendment of the original application, which is still pending. Applicant has not otherwise previously filed a petition for a writ of habeas corpus or post-conviction relief in state or federal court from these convictions and sentences. Other than the petitions, motions, or applications, addressed here and already specified in paragraph 8, Applicant has not filed any other actions related to his convictions and sentences.

14 & 15. None of the grounds set forth in paragraphs 10 & 11 have been previously presented to this or any other Court, State or Federal, except in the original application filed in 2009, which is still pending and is hereby amended.

16. The grounds set forth in paragraphs 10 and 11 have not previously been presented to any court, state or federal, because these grounds rely on additional facts outside the record which was before the previous courts and, under state law, Applicant could not assert the claims of ineffective assistance of counsel on direct appeal. *See State v. Kornahrens*, 290 S.C. 281, 287, 350 S.E.2d 180, 184 (1986).

17&18. Applicant was represented during his trial and sentencing, by Glenn Walters and Joshua Koger, Jr., of the Orangeburg Bar. During the direct appeal, Applicant was represented by Katherine H. Hudgins of the S.C. Commission on Indigent Defense.

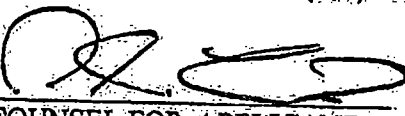
19. Applicant seeks the vacation of his convictions and/or sentences.

20. Applicant is not under sentence from any other court.

Respectfully submitted,

ROBERT LOMINACK
Law Offices of Robert Lommack, PC
P.O. Box 5508
Columbia, SC 29250
(803) 771-7271

TERESA L. NORRIS
Blume Weyble & Norris, LLC
P.O. Box 11744
Columbia, SC 29211
(803) 765-1044

By: 
COUNSEL FOR APPLICANT

July 29, 2010.

STATE OF SOUTH CAROLINA)

COUNTY OF CALHOUN)

Mikal D. Mahdi,
Applicant,

v.)

State of South Carolina,
Respondent.

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

Certificate of Service

I do hereby certify that I have served the Amended Application for Post-Conviction Relief, in the above-referenced case, on the attorney for the Respondent by depositing a copy of the same in the United States mail, first class, postage prepaid, addressed as follows:

Anthony Mabry
Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

This the 29th day of July, 2010.


Robert Lominack

Attachment 2

STATE OF SOUTH CAROLINA)
COUNTY OF CALHOUN)

IN THE COURT OF COMMON PLEAS

Mikal D. Mahdi, #5238,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

C/A No.: 2009-CP-09-164
(Capital PCR Action)

RESPONDENT'S INTERROGATORIES
TO THE APPLICANT

TO: Teresa L. Norris
Blume, Weyble, & Norris, LLC
1247 Sumter Street, Second Floor
Columbia, SC 29201
P. O. Box 11744
Columbia, SC 29211

Robert E. Lominack
Law Offices of Robert E. Lominack
P.O. Box 5508
Columbia, SC 29250

To follow are initial interrogatories directed to the applicant in this matter pursuant to Rule 33 of the South Carolina Rules of Civil Procedure and S.C. Code § 17-27-150(B) ("A party in a capital post-conviction relief proceeding shall be entitled to invoke the processes of discovery available under the South Carolina Rules of Civil Procedure.") The responses to these interrogatories should be served upon Assistant Attorney General J. Anthony Mabry, at Post Office Box 11549, Columbia, South Carolina, 29211. Please note that the scope of interrogatories is governed by Rules 26(b) and 33(d) of the South Carolina Rules of Civil Procedure.

Also, please note that Rule 33(a) provides that "[e]ach interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for

objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The parties submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory."

Also please note that pursuant to Rule 33(b), these "interrogatories shall be deemed to continue from the time of service, until the time of trial of the action so that information sought, which comes to the knowledge of a party, or his representative or attorney, after original answers to interrogatories have been submitted, shall be promptly transmitted to the other party." The interrogatories are as follow:

(1) Give the names and addresses of the persons known to the parties or counsel to be witnesses concerning the facts of the case (i.e. the post-conviction relief case), and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

(2) Set forth a list of photographs, plats, sketches or other prepared documents in possession of the party (or the party's attorneys) that relate to any claim or defense in the case (i.e. the post-conviction relief case).

(3) [Standard interrogatory referencing personal injury cases not applicable].

(4) [Standard interrogatory referencing liability insurance not applicable].

(5) [Standard interrogatory regarding itemized statement of damages not applicable].

(6) List the names and addresses of any expert witnesses whom the party proposes to use as a witness at the trial (i.e. hearing) of the case (i.e. the post-conviction relief case).

(7) For each person known to the parties or counsel to be a witness concerning the facts of the case (i.e. the post-conviction relief case), set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

Respectfully submitted,

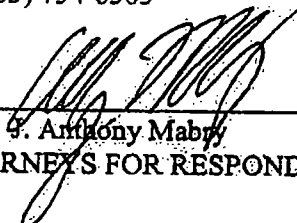
HENRY D. MCMASTER
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

J. ANTHONY MABRY
Assistant Attorney General

P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

BY: 

J. Anthony Mabry

ATTORNEYS FOR RESPONDENTS

October 4, 2010

STATE OF SOUTH CAROLINA)
COUNTY OF CALHOUN)

IN THE COURT OF COMMON PLEAS

Mikal D. Mahdi, #5238,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

C/A No.: 2009-CP-09-164
(Capital PCR Action)

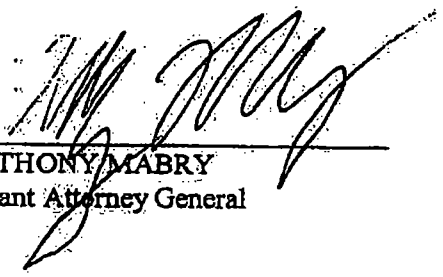
CERTIFICATE OF SERVICE

The undersigned certifies that a copy of *Respondent's Request for Production of Documents and Respondents Interrogatories to Applicant* was served on Counsel for the Applicant by depositing same in the United States mail, postage prepaid, addressed as follows:

Teresa L. Norris
Blume, Weyble & Norris, LLC
1247 Sumter Street, Second Floor
Columbia, SC 29201
P.O. Box 11744
Columbia SC 29211

Robert E. Lominack
Law Offices of Robert E. Lominack
P.O. Box 5508
Columbia, SC 29250

This 4th day of October, 2010.



J. ANTHONY MABRY
Assistant Attorney General

Attachment 3

STATE OF SOUTH CAROLINA)
COUNTY OF CALHOUN)

IN THE COURT OF COMMON PLEAS

Mikal D. Mahdi, #5238,

v. Applicant,

State of South Carolina,

Respondent.

C/A No.: 2009-CP-09-164
(Capital PCR Action)

RESPONDENT'S REQUEST FOR
PRODUCTION OF DOCUMENTS

TO: Teresa L. Norris
Blume, Weyble & Norris, LLC
1247 Sumter Street, Second Floor
Columbia, SC 29201
P.O. Box 11744
Columbia SC 29211

Robert E. Lominack
Law Offices of Robert E. Lominack
P.O. Box 5508
Columbia, SC 29250

To follow are requests for production of documents directed to the applicant in this matter pursuant to Rule 34 of the South Carolina Rules of Civil Procedure and S.C. Code § 17-27-150(B) ("A party in a capital post-conviction relief proceeding shall be entitled to invoke the processes of discovery available under the South Carolina Rules of Civil Procedure.") The responses should be served upon Assistant Attorney General J. Anthony Mabry, at Post Office Box 11549, Columbia, South Carolina, 29211. Please note that the scope of interrogatories is governed by Rules 26(b) and 34(a) of the South Carolina Rules of Civil Procedure.

Also, please note that Rule 34(b) provides that "[t]he party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant

may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested. A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request."

If any document is withheld on the grounds that the document is subject to a claim of privilege, confidentiality, or that the document(s) are not in the custody or control of Applicant or for any other reason: (a) state the reason for withholding the document; (b) identify the person(s) who have knowledge about the information being withheld and their relationship to the Applicant; (c) identify by document the author, date, and subject matter and identify each person who received a copy of the document (identification will not be considered as a waiver of your claim of privilege or confidentiality); and, (d) identify the present custodian of the document, their relationship to the Applicant, and the document's present location.

The requests for production of documents are as follow:

1. Any and all documents or correspondence provided to Applicant which relate to a claim or defense which has been raised or will be raised in this case. Documents or correspondence which have been provided to Applicant from the Office of the Attorney General are excluded from this request.

2. Any documents or correspondence provided pursuant to a Freedom of Information Act or similar request made by Applicant of any government agency, subdivision, or political entity whether state or federal.

3. The reports and or summaries of the experts retained and consulted in preparation for Applicant's capital trial or his post-conviction relief case, who are expected to testify at the post-conviction relief hearing, and any all documents, notes, files, reports, tests and or other written or recorded materials upon which the expert has relied in reaching his or her opinion.

4. A current *curriculum vitae* of all experts expected to testify at the post-conviction relief hearing.

Respectfully submitted,

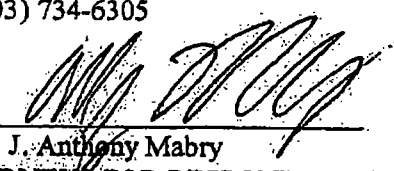
HENRY D. MCMASTER
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

J. ANTHONY MABRY
Assistant Attorney General

P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

BY: 
J. Anthony Mabry
ATTORNEYS FOR RESPONDENTS

October 4, 2010

Attachment 4 (a)



ALAN WILSON
ATTORNEY GENERAL

January 6, 2011

Teresa Norris, Esquire
Blume, Weyble, & Norris
P.O. Box 11744
Columbia, SC 29211

Re: Mikal Mahdi v. State (Capital PCR).

Dear Teresa:

I very much appreciate you allowing me to copy *trial counsel's file* at my office rather than at yours. The copying should be near completion, and I will have your copies returned to you.

In one of my last e-mails to you before Christmas, I asked that you call me. I understand that with the crush of business and the holidays you may have forgotten to return my call or were unable to do so. The reason I asked you to call me is to resolve a discovery matter short of filing a motion.

I have reviewed your responses to my Interrogatories and Requests for Production in comparison with your final amended PCR application, and your responses are insufficient and inconsistent with the history of this case and your representations to the Court. You listed no witnesses you intend to call at the PCR merits hearing, other than a general reference to the trial transcript, or any experts that you will rely upon. You provided no expert reports, witnesses statements, etc.

Previously, you requested a continuance from Judge Early for the specific reason that you would be relying on experts or evidence from the North Carolina case developed in their mitigation investigation, and if this PCR case were not continued, it would cause great expense to the State of South Carolina's Indigent Defense Fund. In fact, as I recall, you stated *one expert witness* could not be available on a certain date, in one of your continuance requests or discussions with the Court. Judge Early graciously granted your continuance request *a few weeks before the trial date* of

Teresa Norris, Esquire
January 6, 2011

Page -2-



ALAN WILSON
ATTORNEY GENERAL

December 6th, 2009. Additionally, Mr. Lominack informed the Supreme Court in November and December that you have identified an expert or experts and obtained funding for the same. Furthermore, you have alleged in your Final Amended Application that Mahdi suffers from a "juvenile" mind, and counsel failed to present mitigation evidence.

Therefore, I request that you provide me with Amended Responses to my Interrogatories and Requests to Produce by Thursday of next week, indicating the witnesses you intend to rely upon to substantiate *Mahdi's claims*, and listing all of the experts you intend to rely on, whether from the North Carolina case or in any other regard, and any witness statements or expert reports, including but not limited to any bio-social assessment. This would include any family members or any other mitigation witnesses you intend to call at the PCR merits hearing. As you already know, I am entitled to disclosure of this information pursuant to the SCRCF. I will also require you to provide me with a privilege log regarding any matters that you consider to be protected by attorney-client privilege or attorney-client work-product privilege, or any other applicable privilege, so I may decide whether I need to request the Court conduct an *in camera* review of the same or compel disclosure. Of course, I will move to strike any testimony or evidence at the merits hearing that is not properly disclosed.

If I do not receive a satisfactory response from you by close of business on Thursday, I will be forced to file a Motion to Compel, given your and Mr. Lominack's previous representations to the Court and the Supreme Court. As you know, this case is currently scheduled for trial March 7, 2011. In compliance with the Civil Rules of Procedure, this letter is written in an attempt to resolve this matter without resort to the filing of a motion or the necessity of a hearing.

Thank you for your assistance in this matter. I continue to look forward to working with you on this case. I hope we can resolve this matter short of a motion and a hearing. If you need anything from me, please do not hesitate to call.

Sincerely,

J. Anthony Mabry
Assistant Attorney General

JAM

cc: Robert Lominack, Esquire



ALAN WILSON
ATTORNEY GENERAL

January 6, 2011

Teresa Norris, Esquire
Blume, Weyble, & Norris
P.O. Box 11744
Columbia, SC 29211

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Teresa Norris, Esquire
January 6, 2011

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ALAN WILSON
ATTORNEY GENERAL



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Sincerely,

J. Anthony Mabry
Assistant Attorney General

JAM
cc: Robert Lominack, Esquire



ALAN WILSON
ATTORNEY GENERAL

January 6, 2011

Teresa Norris, Esquire
Blume, Weyble, & Norris
P.O. Box 11744
Columbia, SC 29211

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Teresa Norris, Esquire
January 6, 2011

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ALAN WILSON
ATTORNEY GENERAL



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Thank you for your assistance in this matter. I continue to look forward to working with you on this case. I hope we can resolve this matter short of a motion and a hearing. If you need anything from me, please do not hesitate to call.

Sincerely,

J. Anthony Mabry
Assistant Attorney General

JAM
cc: Robert Lominack, Esquire

Attachment 4 (b)

Anthony Mabry - RE: Teresa:

From: Anthony Mabry
To: Teresa Norris
Date: 1/6/2011 11:29 AM
Subject: RE: Teresa:
Attachments: Letter to Teresa Norris regarding discovery.wpd

Teresa:

See attached letter. After considering please reply.

Anthony

>>> "Teresa Norris" <teresa@blumelaw.com> 12/22/2010 2:05 PM >>>

Only 4 boxes. Two of the boxes back from Ikon were only half full so I combined.

After the holidays is fine.

Teresa L. Norris
Blume Weyble & Norris, LLC
P.O. Box 11744
Columbia, SC 29211
(803) 765-1044
(803) 765-1143 Fax

From: Anthony Mabry [mailto:AMabry@scag.gov]
Sent: Wednesday, December 22, 2010 2:01 PM
To: Teresa Norris
Subject: RE: Teresa:

Boxes are being copied now. Don't know when they will be done. We have a skeleton staff here through the holidays. I have told them not to lose anything and keep the boxes locked up at night. They have promised me they will.

We only picked up four boxes. Is there another box?

Anthony

>>> "Teresa Norris" <teresa@blumelaw.com> 12/20/2010 2:42 PM >>>

file:///C:/Documents and Settings/AMabry/Local Settings/Temp/XPgrpwise/4D25A7A6ago... 2/28/2011

A000392

Fine.

Teresa L. Norris
Blume Weyble & Norris, LLC
P.O. Box 11744
Columbia, SC 29211
(803) 765-1044
(803) 765-1143 Fax

From: Anthony Mabry [mailto:AMabry@scag.gov]
Sent: Monday, December 20, 2010 2:40 PM
To: Teresa Norris
Subject: RE: Teresa:

Teresa:

Tony will not be able to pick up the boxes until tomorrow due to his schedule today.

Anthony:

>>> "Teresa Norris" <teresa@blumelaw.com> 12/20/2010 12:41 PM >>>

We don't need anyone present for copying. Send someone on over today to pick them up if you like.

Teresa L. Norris
Blume Weyble & Norris, LLC
P.O. Box 11744
Columbia, SC 29211
(803) 765-1044
(803) 765-1143 Fax

From: Anthony Mabry [mailto:AMabry@scag.gov]
Sent: Monday, December 20, 2010 12:40 PM
To: Teresa Norris
Subject: RE: Teresa:

Thanks. I figured it was some kind of mix up. If you want a law clerk present or Jill, when we copy, I don't mind.

file:///C:/Documents and Settings/AMabry/Local Settings/Temp/XPgrpwise/4D25A7A6ago... 2/28/2011

A000393

Give me a call when you can.

I hope you have a good Christmas.

>>> "Teresa Norris" <teresa@blumelaw.com> 12/20/2010 9:23 AM >>>

Anthony,

Sorry about that. It was my understanding from our call more than a week ago that you were coming to review them. I heard nothing about picking them up and copying them. And last I heard from Jill (after you called and rescheduled several times) she told you she would not be here on Friday and to check with me before coming that day to see if I was here.

In any event, it is 4 boxes of trial counsel files. Marking on them from Kinkos says 5 boxes, but 2 of them were less than half full so I combined them.

Send your guy and we'll be happy to release them to you for copying.

Teresa L. Norris
Blume Weyble & Norris, LLC
P.O. Box 11744
Columbia, SC 29211
(803) 765-1044
(803) 765-1143 Fax

From: Anthony Mabry [mailto:AMabry@scag.gov]
Sent: Friday, December 17, 2010 1:13 PM
To: Teresa Norris
Subject: Teresa:

Teresa:

You may not be aware, but Tony from my office came to pick up the three boxes of discovery to copy and return to you. He was told your office would not release the boxes. We will need to have a conference call with Judge Early on the discovery issue. I am trying to avoid filing a motion to compel.

You previously agreed to allow me to look through the three boxes of discovery rather than you producing copies of them. I can understand why you would not want to go to the expense of making copies. However, all I am requesting is that Tony from my office be allowed to pick-up the three boxes, copy the three boxes, and return the originals to you, so I will have a copy of your discovery responses for my file. I see nothing inappropriate in that regard. Tony does not work in my section. He works for the A.G.'s support services.

Please discuss this with co-counsel and see if we can work something out short of calling Judge Early.

Anthony

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--- Scanned by M+ Guardian Messaging Firewall ---

--- Scanned by M+ Guardian Messaging Firewall ---

file://C:\Documents and Settings\AMabry\Local Settings\Temp\XPgrpwise\4D25A7A6ago.... 2/28/2011

A000395

Attachment 5 (a)

STATE OF SOUTH CAROLINA)
)
COUNTY OF CALHOUN)

MIKAL MAHDI,)
)
Applicant,)
)
v.)
)
STATE OF SOUTH CAROLINA,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
Case No.: 09-CP-09-164

Applicant's Answers to Respondent's First
Set of Interrogatories

Respondent has filed a set of interrogatories. The answers set forth herein are subject to the following express reservations and qualifications:

- a) Applicant does not waive the right to assert privileges, *i.e.*, the attorney-client privilege, the work-product doctrine, the physician-patient privilege, or any other confidentiality privileges, notwithstanding the submission of these answers.
- b) Applicant is continuing with trial preparation and will supplement these responses as required and allowed by the Rules.

1. **Give the names and addresses of the persons known to the parties or counsel to be witnesses concerning the facts of the case (i.e. the post-conviction relief case), and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.**

Answer: Applicant directs respondent's attention to the official transcript of record of applicant's trial for a complete list of fact witnesses, participating attorneys, and court personnel. Applicant has not taken written or recorded statements from any witness, nor does applicant possess any information concerning the witnesses' addresses that is not contained either in the trial record or in the records of law enforcement, to which respondent's access is equal to or greater than applicant's.

In the event additional witnesses become known to applicant, applicant will notify respondent of the identity of such witnesses in accordance with the Rules of Civil Procedure.

2. Set forth a list of photographs, plats, sketches, or other prepared documents in possession of the party (or the party's attorneys) that relate to any claim or defense in the case (i.e. the post-conviction relief case).

Answer: At this time, applicant has not formulated any claim or defense to which any photographs, plats, sketches, or other prepared documents in his or counsel's possession would relate. In the event applicant formulates any such claim or claims, he will provide a supplemental response to this interrogatory in accordance with applicable discovery rules.

3. [Standard interrogatory referencing personal injury cases not applicable.]
4. [Standard interrogatory referencing liability insurance not applicable.]
5. [Standard interrogatory referencing liability insurance not applicable.]
6. List the names and addresses of any expert witnesses whom the party proposes to use as a witness at the trial (i.e. hearing) of the case (i.e. the post-conviction relief case).

Answer: At this time, applicant is not aware of expert witnesses whom he intends to use at the hearing of this case. In the event expert witnesses become known to applicant, applicant will notify respondent of the identity of such witnesses in accordance with the Rules of Civil Procedure.

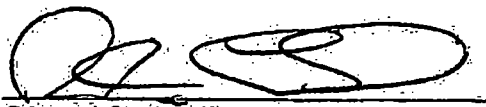
7. For each person known to the parties or counsel to be a witness concerning the facts of the case (i.e. the post-conviction relief case), set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

Answer: At this time, applicant is not aware of witnesses in addition to those found in the official record of this case. The record of this case sets forth the important facts known to or observed by these witnesses.

Respectfully submitted,

Teresa Norris
Blume, Weyble & Norris, LLC
Post Office Box 11744
Columbia, SC 29211
803-765-1044

Robert Lominack
Law Offices of Robert E. Lominack, P.C.
Post Office Box 5508
Columbia, SC 29250
803-771-7271

A handwritten signature in black ink, appearing to be "R. E. Lominack", written over a horizontal line.

Counsel for Applicant

November 3, 2010

STATE OF SOUTH CAROLINA

COUNTY OF CALHOUN

MIKAL MAHDI,

Applicant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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

CERTIFICATE OF SERVICE

I do hereby certify that I have served upon the attorney for Respondent Applicant's Answers to Respondent's First Set of Interrogatories, via US mail, first-class, postage pre-paid, at the following addresses:

Anthony Mabry
Assistant Attorney General
Office of the Attorney General
PO Box 11549
Columbia, SC 29211


Robert Lominack

Columbia, South Carolina

This 3rd day of November 2010

Attachment 5 (b)

STATE OF SOUTH CAROLINA)
)
COUNTY OF CALHOUN)
)
MIKAL MAHDI,)
)
Applicant,)
)
v.)
)
STATE OF SOUTH CAROLINA,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
Case No.: 09-CP-09-164

Applicant's Responses to Respondent's
Request for Production of Documents

Respondent has filed a request for production of documents. The responses set forth herein are subject to the following express reservations and qualifications:

a) Applicant does not waive the right to assert privileges, *i.e.*, the attorney-client privilege, the work-product doctrine, the physician-patient privilege, or any other confidentiality privileges, notwithstanding these responses.

b) Applicant is continuing with trial preparation and will supplement these responses as required and allowed by the Rules.

1. Any and all documents or correspondence provided to Applicant which relate to a claim or defense which has been raised or will be raised in this case. Documents or correspondence which have been provided to Applicant from the Office of the Attorney General are excluded from this request.

Response: All documents responsive to this request are available for inspection and copying upon request.

2. Any documents or correspondence provided pursuant to a Freedom of Information Act or similar request made by Applicant of any government agency, subdivision, or political entity whether state or federal.

Response: Applicant is not in possession of any documents responsive to this request.

3. The reports and or summaries of the experts retained and consulted in preparation for Applicant's capital trial or his post-conviction relief case, who are expected to testify at the post-conviction relief hearing, and any all [sic] documents, notes, files, reports, tests and or other written or recorded materials upon which the expert has relied in reaching his or her opinion.

Response: At this time, applicant is not aware of expert witnesses whom he intends to use at the hearing of this case.

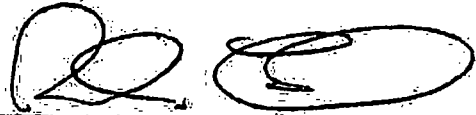
4. A current *curriculum vitae* of all experts expected to testify at the post-conviction relief hearing.

Response: At this time, applicant is not aware of expert witnesses whom he intends to use at the hearing of this case.

Respectfully submitted,

Teresa Norris
Blume, Weyble & Norris, LLC
Post Office Box 11744
Columbia, SC 29211
803-765-1044

Robert Lominack
Law Offices of Robert E. Lominack, P.C.
Post Office Box 5508
Columbia, SC 29250
803-771-7271



Counsel for Applicant

November 3, 2010

STATE OF SOUTH CAROLINA

COUNTY OF CALHOUN

MIKAL MAHDI,

Applicant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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

CERTIFICATE OF SERVICE

I do hereby certify that I have served upon the attorney for Respondent Applicant's Answers to Respondent's Request for Production of Documents, via US mail, first-class, postage pre-paid, at the following addresses:

Anthony Mabry
Assistant Attorney General
Office of the Attorney General
PO Box 11549
Columbia, SC 29211


Robert Lominack

Columbia, South Carolina

This 3rd day of November 2010

Attachment 5 (c)

STATE OF SOUTH CAROLINA)
COUNTY OF CALHOUN)
MIKAL MAHDI,)
Applicant,)
v.)
STATE OF SOUTH CAROLINA,)
Respondent.)

IN THE COURT OF COMMON PLEAS
Case No.: 09-CP-09-164

Applicant's Supplemental Answers to
Respondent's First Set of Interrogatories

Respondent filed a set of interrogatories. Below applicant supplements his previous answers. The answers set forth herein are subject to the following express reservations and qualifications:

a) Applicant does not waive the right to assert privileges, *i.e.*, the attorney-client privilege, the work-product doctrine, the physician-patient privilege, or any other confidentiality privileges, notwithstanding the submission of these answers.

b) Applicant is continuing with trial preparation and will supplement these responses as required and allowed by the Rules.

1. **Give the names and addresses of the persons known to the parties or counsel to be witnesses concerning the facts of the case (i.e. the post-conviction relief case), and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.**

Answer:

Mary Abdul: May have known or resided with applicant's biological father
1426 Golf Lane, Stone Mountain, GA

Hadejah Ahmed: Maternal aunt of applicant
Detroit, Michigan

Rose Artis: Maternal aunt of applicant

Gerald Boynton: Virginia Department of Juvenile Justice psychologist

Beverly Brewer: Director of DSS

Joan Brown: principal of Scott Branch Elementary School

Gerald Burke: Principal at Brunswick High School.
216 Meadow Lane, Lawrenceville, VA

Carson Burwell: Paternal uncle of applicant
5 Cotswald Court
Owings Mill, MD 21117

Lawanda Burwell: Paternal aunt of applicant
5 Cotswald Court
Owings Mill, MD 21117

Sandra Lynne Burwell: Former wife of applicant's paternal uncle
8211 Bevlynn Way
Henrico, VA 23229

Cynthia Chambers
544 Meredith Anne Court, #304
Raleigh, NC 27606

Lenwood Coleman: represented principal at Totaro Elementary school

Michael Cross: South Carolina Department of Mental Health examiner

Chanolia Davis: teaching aide of one of applicant's teachers
192 Green Acres Road
Lawrenceville, VA

Marnita Floyd: Virginia psychologist

Sophia Artis Gee: maternal aunt of applicant
605 Warwick Village Drive, Apt. E
Richmond, VA 23224

Loretta Gilead: sister of applicant's father
105 Oak Meadows Place
Covington, GA 30015

Rose Gupton: maternal aunt of applicant
3311 Terminal Avenue
Richmond, VA 23234

Woodrow Harris: probation officer who had contact with applicant

Livia Jansen: psychological supervisor

Dawn Jones: psychological intern with Behavioral Services Unit of Virginia DJJ

Michael Koehler: police officer who previously arrested applicant in Virginia

L. Wayne Law: administrator at Scott Branch Elementary School

Shareef Mahdi: applicant's biological father
6037 Overbrook Ave.
Philadelphia, PA 19131

Saleem Mahdi: applicant's brother
PO Box 72940
Fort Bragg, NC 28307

Vera Artis Mahdi: applicant's biological mother
2346 Afton Ave.
Richmond, VA 23224

Ms. Pearson: attended church with applicant.
Lawrenceville, VA

Douglas Pond: acquaintance of applicant's father
400 North Main Street
Lawrenceville, VA 23868

Armani Prescott: son of parents with whom applicant lived for a period of time

Charlie Prescott: person with whom applicant lived for a period of time

Frances Reed: maternal aunt of applicant
New Jersey

Doris Jean Artis Reiseg: maternal aunt of applicant
17 Warwick Court
Reading, PA

Janet Roberts: educational diagnostician at Totaro Elementary school
Greensville County Schools
105 Ruffin Street
Emporia, Virginia

Billy Smith: acquaintance of applicant's father

Emerson Smith: defense jury consultant
3315 Cannon Street
Columbia, SC 29205

Paige Tarr: defense mitigation specialist
Columbia, SC

Kent Washburn: major with Lawrenceville Sheriff's Department
120 E. Hicks Street
Lawrenceville, VA

Carol Wilson: learning disability resource counsel of applicant
86 Dry Bread Road
Bordnax, Virginia 23920

J.R. Woodley: sheriff at Brunswick County, Virginia
85 Sheriff Lane
Lawrenceville, VA

Dora Wynn: principal at Totaro Elementary school
Lunenburg County Schools
1001 Main Street
Kenbridge, Virginia 23944

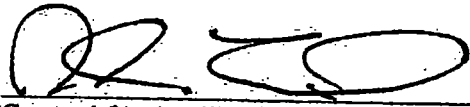
7. For each person known to the parties or counsel to be a witness concerning the facts of the case (i.e. the post-conviction relief case), set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

Answer: See answer to 1.

Respectfully submitted,

Teresa Norris
Blume, Weyble & Norris, LLC
Post Office Box 11744
Columbia, SC 29211
803-765-1044

Robert Lominack
Law Offices of Robert E. Lominack, P.C.
Post Office Box 5508
Columbia, SC 29250
803-771-7271



Counsel for Applicant

January 14, 2011

STATE OF SOUTH CAROLINA

COUNTY OF CALHOUN

MIKAL MAHDI,

Applicant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

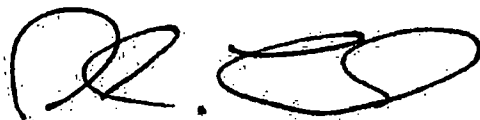
IN THE COURT OF COMMON PLEAS

CA No: 09-CP-09-164

CERTIFICATE OF SERVICE

I do hereby certify that I have served upon the attorney for Respondent Applicant's Answers to Respondent's First Set of Interrogatories, via US mail, first-class, postage pre-paid, at the following addresses:

Anthony Mabry
Assistant Attorney General
Office of the Attorney General
PO Box 11549
Columbia, SC 29211



Robert Lominack

Columbia, South Carolina

This 14th day of January 2011

Attachment 5

(d)

STATE OF SOUTH CAROLINA)
COUNTY OF CALHOUN)
MIKAL MAHDI,)
Applicant,)
v.)
STATE OF SOUTH CAROLINA,)
Respondent.)

ATTORNEY GENERAL'S OFFICE
RECEIVED 2-8-11

ADMINISTRATIVE INSTRUCTIONS
IN THE COURT OF COMMON PLEAS
Case No.: 09-CP-09-164 COPIES MADE
ROUTE TO: _____
ORDER: _____ TRANSCRIPT
PEN RECORDS _____ CLERK RECORDS
Applicant's Second Supplemental Answers
to Respondent's First Set of Interrogatories

Respondent filed a set of interrogatories. Below applicant supplements his previous answers. The answers set forth herein are subject to the following express reservations and qualifications:

a) Applicant does not waive the right to assert privileges, i.e., the attorney-client privilege, the work-product doctrine, the physician-patient privilege, or any other confidentiality privileges, notwithstanding the submission of these answers.

b) Applicant is continuing with trial preparation and will supplement these responses as required and allowed by the Rules.

1. Give the names and addresses of the persons known to the parties or counsel to be witnesses concerning the facts of the case (i.e. the post-conviction relief case), and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

Answer:

Sharon Pond: Examined Shareef Mahdi following an assault on his mother
Brunswick Behavioral Health Center

Myra Harris: Applicant's third grade teacher
Towson, MD

6. List the names and addresses of any expert witnesses whom the party proposes to use as a witness at the trial (i.e. hearing) of the case (i.e. the post-conviction relief case).

Answer:

Should he be called to testify, **Craig Haney** will testify regarding the effects of incarceration on Mr. Mahdi, especially the effects of his confinement at Wallens Ridge State Prison in Virginia.

Should she be called to testify, **Donna Schwartz-Watts** will provide her expert opinion regarding Mr. Mahdi's mental health, especially about the effects of his childhood experiences and how these experiences limited emotional development and resulted in diagnosable depression, anxiety, PTSD, and other mental health disorders.

Should he be called to testify, **Dr. Nicholas Cooper-Lewter** will provide a comprehensive social history and provide his expert opinion regarding the risk factors in Mr. Mahdi's life and how these factors affected Mr. Mahdi's psychological and emotional development.

Should he be called to testify, **Dr. deRossett Myers** will provide his expert opinion regarding Mr. Mahdi's childhood experiences and how these experiences affected his psychological development. Dr. Myers will opine that Mr. Mahdi's emotional development was significantly impacted by the experiences of his childhood.

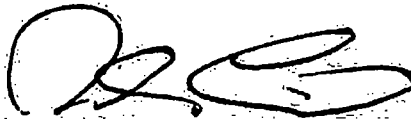
7. For each person known to the parties or counsel to be a witness concerning the facts of the case (i.e. the post-conviction relief case), set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

Answer: See answers to 1 and 6.

Respectfully submitted,

Teresa Norris
Blume, Weyble & Norris, LLC
Post Office Box 11744
Columbia, SC 29211
803-765-1044

Robert Lominack
Law Offices of Robert E. Lominack, P.C.
Post Office Box 5508
Columbia, SC 29250
803-771-7271



Counsel for Applicant

February 7, 2011

STATE OF SOUTH CAROLINA

COUNTY OF CALHOUN

MIKAL MAHDI,

Applicant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

CA No. 09-CP-09-164

CERTIFICATE OF SERVICE

I do hereby certify that I have served upon the attorney for Respondent Applicant's Second Supplemental Answers to Respondent's First Set of Interrogatories, via US mail, first-class, postage pre-paid, at the following addresses:

Anthony Mabry
Assistant Attorney General
Office of the Attorney General
PO Box 11549
Columbia, SC 29211


Robert Lominack

Columbia, South Carolina

This 7th day of February 2011

Attachment 5

(e)

(125.00)
(130.00)
Judge fees

Notes

1.) Jim Gordon

Mother - Richmond, Va. (address)
Uncle (Carson)

2. Paige

- Chronology based psych records
- ~~Various~~ memos
Various from family members

Met with
3.
twice

Dr. Martin

(1992 - 9 yrs. of age) - Hospitalization

Depression

- 1 Hospitalization

Nancy Burwell (2 times)

Father (twice)

met with twice

Does not suffer major mental illness

M. (1992) Major depressive

Recurrently suicidal

Will pass Blair hearing

Attachment 6

Anthony Mabry - RE: Mikal D. Mahdi v. State (PCR)

From: "Teresa Norris" <teresa@blumelaw.com>
To: "Anthony Mabry" <AMabry@scag.gov>
Date: 2/15/2011 1:23 AM
Subject: RE: Mikal D. Mahdi v. State (PCR)
CC: <robert@lominacklaw.com>

Anthony,

Sorry for taking a few days to respond. I was out of the office Friday and swamped today.

We believe that the Martin and McKee files are not discoverable. We will also object to any testimony by them as they did not testify during the trial proceedings. Thus, the attorney-client privilege was not waived.

Teresa L. Norris
Blume Weyble & Norris, LLC
P.O. Box 11744
Columbia, SC 29211
(803) 765-1044
(803) 765-1143 Fax

From: Anthony Mabry [mailto:AMabry@scag.gov]
Sent: Thursday, February 10, 2011 4:10 PM
To: Teresa Norris
Subject: RE: Mikal D. Mahdi v. State (PCR)

Teresa:

Do you have Doctor Martin and/or Dr. McKee's file?

Could you forward me a copy if you have?

Thank you for the copy of Marjorie's file.

Thanks

Anthony

>>> "Teresa Norris" <teresa@blumelaw.com> 2/9/2011 5:30 PM >>>

Again, you are welcome to schedule a deposition of Dr. Cooper-Lewter if you like. I would not oppose that. Alternatively, again, I hope to get a report from him hopefully by the 21st, which will be provided to you when I receive it.

Teresa L. Norris
Blume Weyble & Norris, LLC
P.O. Box 11744
Columbia, SC 29211
(803) 765-1044
(803) 765-1143 Fax

From: Anthony Mabry [mailto:AMabry@scag.gov]
Sent: Wednesday, February 09, 2011 5:00 PM
To: Teresa Norris
Subject: RE: Mikal D. Mahdi v. State (PCR)

Teresa:

Given your objection, I have not decided on whether to try and talk to your experts at this time. I *was trying to avoid the expense of depositions*, if possible. Will let you know before I attempt to do so, so you can register any objection with the Court. You may not have an objection at the time. I may not need to if I get a report soon enough. Can I talk to Cooper-Lewter since *you are* going to call him? The problem is, how can I even consider whether to get a counter-expert if I don't even know what these people are **really** going to testify to.

Please reply.

Anthony

>>> "Teresa Norris" <teresa@blumelaw.com> 2/9/2011 4:15 PM >>>

Anthony,

We do object to you calling our retained experts as their evaluations are not yet complete and, as I indicated in our prior conference call with the judge, we have not made a determination that they will testify, with the exception of Dr. Cooper-Lewter. The rules do allow you to schedule depositions, however, as you had previously indicated to the judge you were considering.

For your information, Dr. Cooper-Lewter will be producing a report within the next couple of weeks as he completes his review of records. This report will be provided to you when we get it.

Following his report, which will be provided to the other experts so that they may conclude their evaluations, Dr. Watts will also be concluding her evaluation and producing a written report which will be provided to you. At this point, I DO NOT intend to call her to testify. She was included in our notice solely so that you would be aware of her in the event we do decide to call her as things develop in the hearing itself.

Following these reports, the other doctors will conclude their evaluations. We do not anticipate written reports from Dr. Haney or Dr. Myers.

Finally, please find attached three more records files that will be provided to our experts: 1) DMH records; 2)

Southside Community Services Records; and 3) John F. Kennedy High School.

Teresa L. Norris
Blume Weyble & Norris, LLC
P.O. Box 11744
Columbia, SC 29211
(803) 765-1044
(803) 765-1143 Fax

From: Anthony Mabry [mailto:AMabry@scag.gov]
Sent: Tuesday, February 08, 2011 11:12 AM
To: Teresa Norris
Subject: RE: Mikal D. Mahdi v. State (PCR)

Dear Teresa:

I have received your supplemental discovery responses. Please forward addresses and telephone numbers of these experts.

I intend to speak to each expert unless you have some objection.

Anthony Mabry

--- Scanned by M+ Guardian Messaging Firewall ---
--- Scanned by M+ Guardian Messaging Firewall ---
--- Scanned by M+ Guardian Messaging Firewall ---

Attachment 7

BLUME WEYBLE & NORRIS, LLC

ATTORNEYS AT LAW

JOHN H. BLUME
KEIR M. WEYBLE
TERESA L. NORRIS
DAVID I. BRUCK *OF COUNSEL*

1247 SUMTER STREET, SECOND FLOOR
COLUMBIA, SOUTH CAROLINA 29201
MAILING ADDRESS:
POST OFFICE BOX 11744
COLUMBIA, SC 29211
PHONE: (803) 765-1044
FAX: (803) 765-1143

February 17, 2011

Via Email

The Honorable Doyet A. Early, III
Post Office Box 90
Bamberg, SC 29003

Re: *Mikal D. Mahdi v. State*, 09-CP-09-164 (Calhoun County Capital PCR)

Dear Judge Early:

I am writing to express my concerns about holding a conference call next Tuesday to resolve issues rather than to handle these matters with the actual filing of pleadings and holding hearings.

Specifically, the issue that I believe Mr. Mabry wants to address concerns discovery matters we discussed via emails. He asserts that he is entitled to obtain the files of two expert witnesses that were retained, but who did not testify in the trial proceedings, and to call them as witnesses. I disagree. He informed me he would file a motion to compel. Instead, he scheduled a conference call with you.

I object to this informal handling of such an important issue in this capital case. I have not objected previously when we were only addressing dates and scheduling of disclosures rather than substantive matters. With this particular issue, however, I believe that it should be handled in the proper fashion with Mr. Mabry actually filing his motion explaining why he believes he is entitled to these files, allowing us to respond appropriately, and holding a hearing on the matter. This will ensure that you have all of the information necessary before you to consider prior to ruling, which cannot possibly be done in a 15 minute call. It will also ensure that if either side has objection to your ruling, it will be preserved and on the record for further review.

Finally, please be advised that while Mr. Lominack and I have a number of lay witnesses coming in from out of state to testify, we will also be offering affidavits of approximately five or six out of state witnesses. These will, of course, be provided to Mr. Mabry when we receive them.

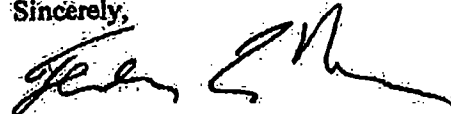
The Honorable Doyet A. Early, III

February 17, 2011

Page 2

Please do not hesitate to contact me if you have any questions in this matter or if I can provide you with any additional information.

Sincerely,



Teresa L. Norris

enc:

cc: The Honorable Kenneth Hasty
Anthony Mabry (Via Email)
Robert Lominack (Via Email)
Mikal Mahdi

Attachment 8

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

Memorandum in Support of Motion to
Compel Production

Applicant, Mikel Mahdi, ("Mahdi") has filed an application for post-conviction relief (PCR) with the Clerk of Court for Calhoun County (09-CP-09-164). In his final amended application, Mahdi alleged the following grounds:

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

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.

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 (2003).

Prior to the plea/sentencing proceeding of Mahdi in 2006, *trial counsel* (Glenn Walters and Joshua Koger) did, in fact, retain two (2) *mental health experts*, Doctor Thomas Martin (a psychiatrist) and Doctor Geoffrey McKee (a psychologist). Respondent is informed and believes Dr. Martin and Dr. McKee evaluated Mahdi at the request of *trial counsel*. Respondent is informed and

believes trial counsel had these experts examine Mahdi for among other purposes, to offer potential mitigation evidence at trial.

Respondent is informed and believes Mahdi's current collateral counsel is in possession of the files of Doctor Thomas Martin and Doctor Geoffrey McKee regarding their psychiatric or psychological evaluations of Mahdi and their findings regarding Mahdi.

The contents of these files are relevant, admissible, and necessary with regard to defense of *the issues raised by Mahdi* in his final amended PCR application. Mahdi waived any privilege with regard to the contents of these files with the filing of his application for post-conviction relief alleging the above grounds. See Binney v. State, 384 S.C. 539, 683 S.E.2d 478 (2009); S.C. Code Ann. Section 17-27-130.

S.C. Code Ann. Section 17-27-130 (1996), which describes a PCR applicant's waiver of the attorney-client privilege states in pertinent part:

Where a defendant alleges ineffective assistance of prior trial counsel . . . as a ground for post-conviction relief . . . the applicant shall be deemed to have waived the attorney-client privilege with respect to both oral and written communications between counsel and the defendant, and between retained or appointed experts and the defendant, to the extent necessary for prior counsel to respond to the allegation. This waiver of the attorney-client privilege shall be deemed automatic upon the filing of the application alleging ineffective assistance of prior counsel and the court need not enter an order waiving the privilege. Thereafter, counsel alleged to have been ineffective is free to discuss and disclose any aspect of the representation with representatives of the State for purposes of defending against the allegations of ineffectiveness, to the extent necessary for prior counsel to respond to the allegation.

Binney, 384 S.C. 539, 683 S.E.2d 478 (2009). In Binney, the Court also stated that: "We find that the plain language of Section 17-27-130 makes clear that the General Assembly intended the scope of the automatic waiver to be directly proportional to the breadth of the allegations made in each individual PCR application." Id.

Respondent served applicant through opposing counsel with Interrogatories and Requests for Production of Documents and Things on October 4, 2010. Applicant has failed to produce the files of Doctor Martin or Doctor McKee, after request, even though they are relevant and admissible in regard to the claims asserted by Mahdi, claiming privilege. Applicant has failed to provide Respondent with a privilege log regarding any matters claimed to be protected by privilege, after two (2) requests.

Furthermore, this matter has been pending and under investigation by applicant and his collateral attorneys since August of 2009. Collateral counsel notified the South Carolina Supreme Court on November 1, 2010 that they have "identified and received appropriate funding for appropriate expert assistance.." Collateral counsel has disclosed pursuant to discovery that they intend to call two (2) *mental health experts*, a psychologist, and a psychiatrist, and possibly a third (3rd) mental health expert (a psychiatrist) at the PCR merits hearing. Obviously, these experts will be called in an attempt to *substantiate Mahdi's allegations set forth above*.

This case is scheduled for trial March 7, 2011 before this Honorable Court. It is necessary that Respondent receive production of the files of Doctor Martin and Doctor McKee to adequately prepare for and *defend the allegations set forth in Mahdi's final amended application*. Respondent is informed and believes the files contain records of trial counsel's investigation of Mahdi's mental health and/or state of mind through their experts, Mahdi's statements to the retained or appointed experts regarding his mental health and/or state of mind, and the reasons trial counsel did not call Doctor Martin or Doctor McKee at Mahdi's plea/sentencing hearing in December of 2006. See Poyner v. Murray, 964 F.2d 1404, 1419 (4th Cir. 1992)(Petitioner could not establish ineffective assistance of counsel because counsel did not "expert shop" until one could be found who would testify favorably); Savino v. Murray, 82 F.3d 593, 599 (4th Cir. 1996(if there exists no reasonable

probability that a possible defense would have succeeded at trial, the alleged error in failing to disclose or pursue it cannot be prejudicial); Strickland v. Washington, 466 U.S. at 689 (objectively reasonable trial strategy decisions are not subject to claims of ineffective assistance of counsel). Therefore, Respondent's Motion to Compel production of these two (2) files should be granted.

Respectfully submitted,

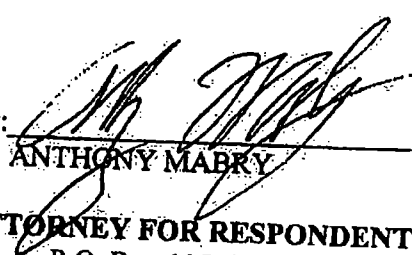
ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

J. ANTHONY MABRY
Assistant Attorney General

By:


ANTHONY MABRY

ATTORNEY FOR RESPONDENT

P.O. Box 11549
Columbia, SC 29211
January 18, 2011

February 23, 2011

Attachment 9

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

Affidavit of Glenn Walters

THE AFFIANT, AFTER BEING DULY SWORN, DOES DEPOSE AND STATE AS
FOLLOWS:

1. I, Glenn Walters, am an attorney practicing law in Orangeburg, South Carolina with the law firm of Glenn Walters & Associates, P.A.
2. Previously, I was appointed by the Court to represent Mikal Mahdi on the charges of Murder, Burglary 2nd Degree, and Grand Larceny.
3. The State sought the death penalty against Mr. Mahdi.
4. Mr. Mahdi eventually pled guilty to the charges and was sentenced to death by Judge Clifton Newman.
5. Prior to Mr. Mahdi's plea/sentencing hearing, I along with Joshua Koger, Esquire, retained two (2) psychiatric or psychological experts: Doctor Thomas Martin (a psychiatrist) and Doctor Geoffrey McKee (a psychologist) to assist in our preparation of the case on Mr. Mahdi's behalf.
6. Mr. Mahdi has filed a PCR application in Calhoun County, with the merits hearing on the matter scheduled for trial on March 9, 2011.

DEFENDANT'S
EXHIBIT

1 2-23-11
LD

7. In his application, Mr. Mahdi alleges the following grounds, among others:

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

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.

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.

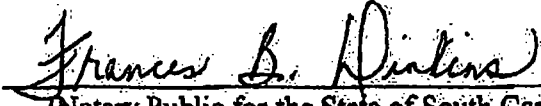
11(b) At the time of the offenses, Applicant was developmentally impaired such that he had the "mental age" of a juvenile due to his atrocious background of deprivation, neglect, abuse, and institutionalization. The Cruel and Unusual Punishment Clause precludes the infliction of the death penalty upon 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 (2003).

8. Given the above allegations filed by Mr. Mahdi, I consent to the disclosure of the files of Doctor Thomas Martin and Doctor Geoffrey McKee to the S.C. Attorney General's Office in order that I may adequately respond to the allegations Mr. Mahdi has alleged in his PCR application.

THE AFFLIANT FURTHER STATETH NOT.


Glenn Walters, Esquire
Glenn Walters & Associates, PA
P.O. Box 1346
Orangeburg, SC 29115-1346

Sworn to before me this 22nd day of February, 2011


(Notary Public for the State of South Carolina)
My commission expires: 9-24-2011

Case No. 2009-CP-02-164

-02-

Early

State/Plf. Atty.

Def's Atty

Trial Date: 2-23-11

Teresa Nottis
Robert E. Dominack

Received of Lisa Davenport, Court Reporter for the above case, these exhibits:

STATE /PLF

DEFENDANT

COURT.

This _____ day of _____, 20____

Page 1 of 1

By:

Aiken County Clerk of Court

exhibit form 1

10 01 07 csw

copy court reporter

Date _____

Given to Anthony Mabry.

Attachment 10

Order to Compel Production

A000436

were not relevant and subject to attorney-client privilege. In response, Respondent argued that any claim of attorney-client privilege was waived with the filing of the allegations in the PCR application.²

In his final amended application, Mahdi asserted the following grounds for relief:

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

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.

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 (2003).

This Court finds the aforementioned claims waived any privilege with regard to the contents of trial counsel's mental health experts files as the contents of the files are clearly relevant and necessary to defend against claims of ineffective assistance of counsel raised in the Mahdi's Final Amended Application. See *Binney v. State*, 384 S.C. 539, 544, 683 S.E.2d 478, 481 (2009) ("[T]he plain language of Section 17-27-130

²At the hearing on this issue, Respondent submitted the sworn affidavit of Glenn Walters, Esquire, who represented Mahdi at trial. In the affidavit, Mr. Walters consents to the disclosure of his mental health experts files in order to defend the allegations alleged in the Final Amended Application. Collateral counsel argued that Mr. Walters could not consent to the disclosure of trial counsel's mental health experts files. This Court did not rely on the affidavit; because it decided this issue based on interpreting the plain wording of the applicable statute.

makes clear that the General Assembly intended the scope of the automatic waiver to be directly proportional to the breadth of the allegations made in each individual PCR application."); S.C. Code Ann. Section 17-27-130 (explaining the filing of an ineffective assistance of counsel claim in PCR waives attorney-client privilege with respect to both oral and written communications between counsel and the defendant, and between retained or appointed experts and the defendant, to the extent necessary for prior counsel to respond to the allegation).

Section 17-27-130 of the South Carolina Code describes a PCR applicant's waiver of the attorney-client privilege stating in pertinent part:

Where a defendant alleges ineffective assistance of prior trial counsel . . . as a ground for post-conviction relief . . . the applicant shall be deemed to have waived the attorney-client privilege with respect to both oral and written communications between counsel and the defendant, and between retained or appointed experts and the defendant, to the extent necessary for prior counsel to respond to the allegation. This waiver of the attorney-client privilege shall be deemed automatic upon the filing of the application alleging ineffective assistance of prior counsel and the court need not enter an order waiving the privilege. Thereafter, counsel alleged to have been ineffective is free to discuss and disclose any aspect of the representation with representatives of the State for purposes of defending against the allegations of ineffectiveness, to the extent necessary for prior counsel to respond to the allegation.

S.C. Code Ann. § 17-27-130 (1996) (emphasis added); cited in Binney, 384 S.C. 539, 683 S.E.2d 478 (2009).

Here, the claims detailed above raise a question as to whether counsel was ineffective in failing to "adequately investigate, develop, and present mitigation evidence concerning Mahdi's family, social, institutional, and mental health history" and failing "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

Attachment 11

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

FEB 24 2011

APPEAL FROM CALHOUN COUNTY
Court of Common Pleas

S.C. Supreme Court

Doyet A. Early, III, Circuit Court Judge

Case No. 2009-CP-09-164

Mikal D. Mahdi, ... Appellant,

v.

State of South Carolina, ... Respondent.

NOTICE OF APPEAL

Mikal D. Mahdi appeals the order of the Honorable Doyet A. Early, III compelling Appellant to disclose information protected by the attorney-client privilege. This order was entered orally on February 23, 2011. As of the filing of this Notice of Appeal, Appellant has not been provided with a written order and is not aware that such an order has been filed.¹

Pursuant to Rule 241, SCACR, Appellant believes that the lower court's order is stayed until further action. In the alternative, Appellant requests that this Court stay the lower court order, which directs Appellant to act by 1:15 p.m. today.

¹ Because the lower court ordered the production of documents by 1:15 p.m. on February 24, 2011, Appellant believed it appropriate to file this Notice of Appeal even though a written order has not been filed. Appellant did request additional time from the lower court so that it could await a written order before filing the notice. That request was denied. As soon as a written order has been filed, Appellant will provide it to this Court. Because there is no written order at this time, Appellant has attached the Respondent's Motion to Compel and Appellant's response to this motion. (Attachments 1 and 2, respectively).

Appellant intends to petition this Court for either a Writ of Certiorari or a Writ of Supersedeas at a later date.

February 24, 2011



Robert E. Lominack
Law Offices of Robert E. Lominack, P.C.
Post Office Box 5508
Columbia, SC 29250
Attorney for Appellant

Other Counsel of Record:

Teresa Norris
Blume, Weyble & Norris, LLC
Post Office Box 11744
Columbia, SC 29211

STATE OF SOUTH CAROLINA)
)
COUNTY OF CALHOUN)

Mikal D. Mahdi,)
Applicant,)
)
v.)
)
State of South Carolina,)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
Case No. 2009-CP-09-164

Response to Respondent's
Motion to Compel

Introduction

Respondent has filed a Motion to Compel the production of the files of two mental health experts whom trial counsel retained in preparation for – but did not call as witnesses at – Mr. Mahdi's trial.¹ The issue before this Court boils down to a straightforward application of the attorney-client privilege and the implied waiver of that privilege in the context of capital post-conviction relief proceedings. The attorney-client privilege applies to all communications between a defendant and experts retained by his counsel in preparation for trial. When a defendant subsequently alleges that his counsel were ineffective at trial, he waives this privilege *only to the extent necessary for counsel to respond to the allegations*. Here,

¹ Respondent first sought discovery in October 2010. Despite respondent's dilatory request, undersigned counsel provided respondent with access to trial counsels' entire files. Counsel have also provided, *inter alia*, a copy of the file of the social worker who testified on behalf of the defense at Mr. Mahdi's trial. Respondent waited until February 10, 2011 to email a request for the files at issue in its Motion to Compel. Mr. Mabry emailed this motion to only one of Mr. Mahdi's counsel, on Friday, February 18. That counsel was out of the office both Friday, February 18 and Monday, February 21, a federal holiday. At 7:11 p.m. on February 22, with a hearing scheduled for 1:00 p.m. on February 23, Respondent faxed an affidavit (to one of Mr. Mahdi's counsel) from trial counsel purporting to "consent" to the release of the files of the retained trial experts.

neither expert testified at trial and their files were not provided to trial counsel. The question then for this Court is whether it should or can expand the implied waiver beyond that contemplated by the South Carolina legislature or the South Carolina Supreme Court to include information that has no bearing on the issues before it.

I. The attorney-client privilege

"The attorney-client privilege is based upon a public policy that the best interest of society is served by promoting a relationship between the attorney and the client whereby utmost confidence in the continuing secrecy of all confidential disclosures made by the client within the relationship is maintained." *Wilson v. Preson*, 378 S.C. 348, 359, 662 S.E.2d 580, 585 (2008); *see also State v. Doster*, 276 S.C. 647, 284 S.E.2d 218 (1981). Moreover the existence of the privilege furthers the broader public interests in the "observance of law and the administration of justice." *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998) (quotations omitted).

The attorney-client privilege applies to the statements and other information provided by Mr. Mahdi to the experts retained by his trial counsel. *State v. Hitopoulus*, 279 S.C. 549, 309 S.E.2d 747 (1983) (attorney-client privilege extends to communications from a defendant to a psychiatrist hired by counsel to aid in preparation of his defense); *see also State v. Thompson*, 329 S.C. 72, 495 S.E.2d 437 (1998) (same). Indeed, the Respondent seems to acknowledge as much. *See Motion to Compel* at para. 6.

II. The implicit waiver that accompanies the filing of a post-conviction relief action extends only to that information relevant to the claims to which defense counsel must respond

Whenever a defendant alleges that his trial counsel performed in a constitutionally-deficient manner, this Court must "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 v. Washington*, 466 U.S. 668, 669 (1984). This Court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, *viewed as of the time of counsel's conduct*." *Id.* at 690. Counsel's "actions may be determined or substantially influenced by the defendant's own statements or actions," which allows "*inquiry into counsel's conversations with the defendant*", *id.* at 691.

Thus, by alleging ineffective assistance of counsel, Mr. Mahdi implicitly waived his privilege but only to the extent necessary for his trial counsel to respond to the allegations. *Binney v. State*, 384 S.C. 539, 545, 683 S.E.2d 478, 481 (2009). Specifically, by the claims he alleged, counsel would be justified in allowing Respondent "a review of the entire trial file" in his possession to respond. Here, the files, notes, testing, etc., other than letters from counsel to the experts and invoices of the experts back to counsel were not contained in the trial file. There is no evidence that counsel ever saw this information. Consistent with *Binney*, the "entire trial file" provided to Mr. Mahdi's current counsel and considered by trial counsel was provided to Respondent's counsel.

Beyond the question of actual documents and files seen and relied on by trial

counsel, the waiver of the attorney-client privilege is confined to that information, which is necessary for counsel to respond and limited "to the extent necessary for prior counsel to respond to the allegation." S.C. Code § 17-27-130.

Therefore, the statute and *Binney* – the only case construing that statute – establish that in order for a court to find an implied waiver of the privilege, the information disclosed must actually be that which trial counsel could use to rebut the specific allegations of ineffectiveness. And, of course, counsel can only have relied on information if they were aware of it at the time of trial. In other words, for information to be relevant and discoverable at this stage it has to have been (1) known to defense counsel at trial and (2) relevant to the specific claims of ineffectiveness alleged by the counsel's former client. Put another way, if counsel were not aware of the information in the trial expert's files, then that information could not form the basis of counsel's defense of the allegations.

In dealing with this very legal issue North Carolina has held that a lower court erred in allowing unfettered access to all files and information simply because the defendant had alleged that his trial counsel was ineffective. *State v. Taylor*, 393 N.E.2d 801 (1990). "By alleging . . . that his [trial] attorney . . . rendered ineffective assistance of counsel during the trial and direct appeal of these cases, the defendant waived the benefits of both the attorney-client privilege and the work product privilege, but *only* with respect to matters relevant to his allegations of ineffective assistance of counsel." *Id.* 805 (emphasis in original). See also *Mason v. Mitchell*, 293 F.Supp.2d 819 (2003) (court refused to disclose statements about the crime that

the defendant had made to his trial counsel and a non-testifying defense-retained expert, because the court found that this information would not specifically relate to the claims of ineffectiveness); *Hunt v. Blackburn*, 128 U.S. 464 (1888) (when defendant in a civil case relied upon a defense that involved what she and her attorney had discussed, she waived the privilege but only insofar as the attorney could give his account of their discussions).

At bottom, information that was not known or communicated to defense counsel is not relevant to the ineffectiveness assistance of counsel claims and, therefore, not discoverable. Thus, the files of the experts, which were not contained in counsel's file AND there is no evidence that counsel ever saw them, are not discoverable. Likewise, the "consent to the disclosure of the files of Doctor Thomas Martin and Doctor Geoffrey McKee to the S.C. Attorney General's Office" is, at best, laughable as counsel never possessed and never saw those files. At worst, counsel's "consent" is unethical, as the attorney-client privilege belongs to the client not counsel. Even Mr. Mahdi's current counsel could not consent to the release of privileged information without his consent. Thus, prior counsel who never saw or possessed this information cannot possibly consent.

Likewise, the testimony or current statements of these experts is not discoverable or relevant AND the attorney-client privilege has not been waived. With respect to the discoverable or relevant nature of any statements or testimony they would provide now, the following must be considered:

- They did not testify in the trial proceedings.

- Their perspective now, or even this Court's perspective now, of what they might testify to is not relevant to the claims. What is relevant is "counsel's perspective at the time," and the information known to counsel *at the time* on which counsel based their strategies and decisions. *Strickland, supra*. Thus, trial counsel can testify to their "conversations" with these experts just as he can testify to conversations with Mr. Mahdi, *Strickland, supra*, where it is RELEVANT to the allegations.
- There is no allegation here that counsel was ineffective for failing to present the testimony of Dr. Martin or Dr. McKee.
- There is no allegation or possible constitutional assertion that these doctors were ineffective.
- The allegations are, in essence, that counsel failed to adequately investigate mitigation information through lay witness interviews and records collection. Thus, the allegations imply that this information, not discovered by trial counsel, could not have been considered by their retained experts. If it had been, as it has with current retained experts, the analysis, diagnosis, and conclusions would have been different.

With respect to whether attorney-client privilege has been waived allowing these retained experts to speak or testify about this case, the following must be considered:

- They did not testify at trial.
- They provided no written report to trial counsel.

- Mr. Mahdi DOES NOT consent to the disclosure of information from them,

CONCLUSION

Compelling the production of these files would be an unprecedented encroachment on the attorney-client privilege and one that is not supported by the law. Indeed, Respondent has not cited a single case that has ordered the disclosure of information provided to experts who did not testify at trial. Because the files of these two non-testifying mental experts are protected by attorney-client privilege and because the information in these files or currently in the minds of the experts would not be relevant to *trial counsels'* strategic decisions at trial, this Court should not grant the motion.

If this motion is not summarily denied based on this response and is to be considered at the hearing as scheduled for February 23, 2011, please note the following:

- 1) Mr. Mahdi OBJECTS to the rushed, blind-sided nature of the proceedings, due to Respondent's actions. Respondent never requested these files until less than two weeks ago. Respondent did not file a motion to compel (and whether it is officially filed by email to only one of two appointed counsel is doubtful) until less than five days ago. Respondent did not file the "affidavit" or "consent" by trial counsel with the motion. *See* Rule 6, SCRCPP. He faxed it at 7:11 p.m. (to only one of two appointed counsel) the night before a 1:00 p.m. hearing.

- 2) Mr. Mahdi OBJECTS to holding a hearing on this issue in his absence, as the attorney-client privilege and power to "consent" to release of files that were never in his possession belongs to him and not trial counsel.
- 3) Mr. Mahdi's counsel OBJECTS to proceeding with this motion unless trial counsel and these retained experts are present to testify concerning what if any portion of their files was disclosed to trial counsel.
- 4) Mr. Mahdi's counsel, on his behalf, OBJECTS to holding the hearing as scheduled unless Mr. Mahdi is present in Aiken County for the hearing AND at least two hours in advance of the hearing so that counsel will have the opportunity to discuss with and advise him appropriately.

Respectfully submitted,

TERESA NORRIS
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803-765-1044

ROBERT LOMINACK
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803-771-7271



Counsel for Applicant

February 23, 2011

STATE OF SOUTH CAROLINA)

COUNTY OF CALHOUN)

Mikal D. Mahdi,
Applicant,

v.

State of South Carolina,
Respondent.

IN THE COURT OF COMMON PLEAS

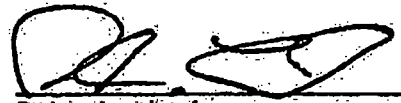
Case No. 2009-CP-09-164

Certificate of Service

I hereby certify that a copy of the foregoing Response to Respondent's Motion to Compel was served, via First Class, postage prepaid mail, to:

Anthony Mabry
SC Office of the Attorney General
PO Box 11549
Columbia, SC 29211

February 23, 2011


Robert Lominack

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CALHOUN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2009-CP-09-164

Mikal D. Mahdi, ...Appellant,

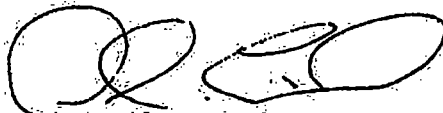
v.

State of South Carolina, ... Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the Respondent by depositing a copy of it in the United States Mail, postage prepaid, on February 24, 2011, addressed to the attorney of record, Anthony Mabry, P.O. Box 11549, Columbia, SC 29211.

February 24, 2011



Robert E. Lominack
Law Offices of Robert E. Lominack, P.C.
Post Office Box 5508
Columbia, SC 29250
Attorney for Appellant

Attachment 12

The Supreme Court of South Carolina

Mikal D. Mahdi,

Appellant,

v.

State of South Carolina,

Respondent.

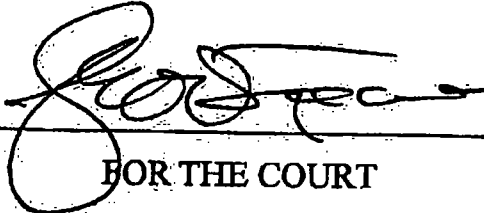
ORDER

Appellant has filed a notice of appeal from an oral ruling of the circuit court compelling appellant to disclose information appellant contends is protected by the attorney-client privilege. The circuit court directed appellant to comply with the ruling by 1:15 p.m. today. Appellant asserts the circuit court's ruling is stayed, pursuant to Rule 241, SCACR, by the filing of the notice of appeal, but requests a stay in the alternative. Finally, appellant states he intends to petition this Court for either a writ of certiorari or a writ of supersedeas "at a later date."

Because the ruling of the circuit court is interlocutory and not immediately appealable, the notice of appeal is hereby dismissed. Tucker v. Honda of South Carolina Mfg. Inc., 354 S.C. 574, 582 S.E.2d 405 (2003). However, because appellant has indicated he intends to file a petition for a

writ of certiorari and/or a petition for a writ of supersedeas, we stay the ruling of the circuit court to give appellant that opportunity. Appellant shall have until 5:00 p.m. on Friday, February 25, 2011, to serve and file any petition for a writ of certiorari or petition for a writ of supersedeas he plans to file. If appellant files any such petition, the State shall have until 5:00 p.m. on Monday, February 28, 2011, to serve and file a return. Appellant shall have until 12:00 p.m. on Tuesday, March 1, 2011, to serve and file a reply.

IT IS SO ORDERED.


C. J.
FOR THE COURT

Columbia, South Carolina

February 24, 2011

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CALHOUN	)	09-CP-09-164
	)	
MIKAL D. MAHDI (SK #5238),	)	
Applicant,	)	
	)	REQUEST FOR LEAVE OF COURT
vs.	)	TO AMEND THE APPLICATION
	)	
STATE OF SOUTH CAROLINA,	)	
Respondent.	)	

Comes now Applicant Mikal Mahdi, a death-sentenced inmate, and, pursuant to Rule 15(a), SCRCF, seeks leave of the Court to file a Second Amended Application, which is filed contemporaneously herewith. Specifically, Applicant seeks leave to assert the following additional claim as 11(a)(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.

Applicant submits that Respondent will suffer no prejudice by allowing this amendment. Absent any prejudice, "leave shall be freely given when justice so requires." Rule 15(a), SCRCF; *see also Soil & Material Engineers, Inc. V. Folly Associates*, 293 S.C. 498, 361 S.E.2d 779 (Ct. App. 1987) (abuse of discretion to deny an amendment absent showing of prejudice).

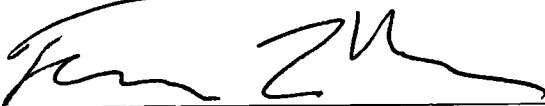
Conclusion

For these reasons, Applicant requests leave of this Court to file the Second Amended Application.

Respectfully submitted,

Teresa L. Norris
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803-765-1044

Robert Lominack
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803-771-7271



Attorney for Petitioner

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CALHOUN	)	09-CP-09-164
	)	
MIKAL D. MAHDI (SK #5238),	)	
Applicant,	)	
	)	AMENDED APPLICATION FOR
vs.	)	POST-CONVICTION RELIEF
	)	
STATE OF SOUTH CAROLINA,	)	
Respondent.	)	

[Note: This application follows SCRCF Appendix of Forms, Form 5, as required by Rule 71.1(b), SCRCF.]

1. Applicant is detained at the Maximum Security Unit, Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210.
2. He was convicted and sentenced in the Calhoun County Court of General Sessions.
3. There were no co-defendants.
4. Applicant was indicted for murder (04-GS-09-0243), burglary (04-GS-09-244), and grand larceny (04-GS-09-242).
5. On December 8, 2006, Applicant was sentenced to death for murder, 15 years' imprisonment for burglary, and 10 years' imprisonment for grand larceny.
6. Findings of guilty were made by The Honorable Clifton Newman after pleas of guilty.
7. The Applicant appealed from the judgment of conviction and sentence.
8. The Applicant appealed to the South Carolina Supreme Court. The court affirmed the convictions and sentences on June 15, 2009. *Mahdi v. State*, 383 S.C. 135, 678 S.E.2d 807 (2009).
9. Not applicable.

GROUND FOR RELIEF WITH SUPPORTING FACTS

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).

12 & 13. Applicant filed the original application for post-conviction relief on August 18, 2009 in the Court of Common Pleas for Calhoun County. The application was amended on July 29, 2010. This application is a second amendment of the original application, which is still pending. Applicant has not otherwise previously filed a petition for a writ of habeas corpus or post-conviction relief in state or federal court from these convictions and sentences. Other than the petitions, motions, or applications, addressed here and already specified in paragraph 8, Applicant has not filed any other actions related to his convictions and sentences.

14 & 15. None of the grounds set forth in paragraphs 10 & 11 have been previously presented to this or any other Court, State or Federal, except in the original application filed in 2009, which is still pending and is hereby amended.

16. The grounds set forth in paragraphs 10 and 11 have not previously been presented to any court, state or federal, because these grounds rely on additional facts outside the record which was before the previous courts and, under state law, Applicant could not assert the claims of ineffective assistance of counsel on direct appeal. *See State v. Kornahrens*, 290 S.C. 281, 287, 350 S.E.2d 180, 184 (1986).

17&18. Applicant was represented during his trial and sentencing, by Glenn Walters and Joshua Koger, Jr., of the Orangeburg Bar. During the direct appeal, Applicant was represented by Katherine H. Hudgins of the S.C. Commission on Indigent Defense.

19. Applicant seeks the vacation of his convictions and/or sentences.

20. Applicant is not under sentence from any other court.

Respectfully submitted,

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P.O. Box 5508
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(803) 771-7271

TERESA L. NORRIS
Blume Weyble & Norris, LLC
P.O. Box 11744
Columbia, SC 29211
(803) 765-1044

By: 

COUNSEL FOR APPLICANT

March 3, 2011

STATE OF SOUTH CAROLINA)
)
COUNTY OF CALHOUN)

MIKAL D. MAHDI (SK #5238),)
Applicant,)
)
vs.)
)
STATE OF SOUTH CAROLINA,)
Respondent.)

IN THE COURT OF COMMON PLEAS

09-CP-09-164

Certificate of Service

I do hereby certify that I have served the Request for Leave of Court to Amend the Application and Second Amended Application for Post-Conviction Relief, in the above-referenced case, on the attorney for the Respondent by depositing a copy of same in the United States Mail, first class, postage prepaid, addressed as follows:

Anthony Mabry
Assistant Attorney General
Office of the Attorney General
P.O. Box 11549
Columbia, South Carolina 29211

This the 3rd day of March, 2011, in Columbia, South Carolina.


TERESA L. NORRIS

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CALHOUN	)	
	)	
Mikal D. Mahdi, #5238,	)	C/A No. 2009-CP-09-0164
	)	
Applicant,	)	
	)	Response in Opposition of Applicant's
v.	)	Motion to Admit Affidavits into Evidence
	)	
State of South Carolina,	)	
	)	
Respondent,	)	
	)	

Comes now, Respondent, the State of South Carolina, and opposes Applicant Mikal D. Mahdi's Motion to Admit Affidavits into Evidence. In support of this motion, Respondent would assert the following:

As it relates to the admission of evidence in post-conviction relief ("PCR") hearings, section 17-27-80 of the South Carolina Code provides that "the court may receive proof by affidavits, depositions, oral testimony or other evidence." S.C. Code Ann. § 17-27-80 (1976). Nevertheless, the admission of such evidence lies within the discretion of the PCR court. Simpson v. Moore, 367 S.C. 587, 607, 627 S.E.2d 701, 712 (2006). In Simpson, the South Carolina Supreme Court found the PCR court did not abuse its' discretion in admitting twenty-two affidavits and over forty depositions where "most of the relevant witnesses testified at the PCR hearing and were cross-examined by the State" and "the court gave the State the opportunity to submit additional testimony and affidavits countering the evidence presented by Simpson." Id. at 608, 627 S.E.2d at 713.

Implicit within the Simpson court's ruling is the proposition that an abuse of discretion may occur where the statements contained within the affidavit are relevant to the applicant's claims for relief, and the party opposing relief has not had an opportunity to cross-examine the

affiant or had little or no opportunity to present contrary evidence. Id. Indeed, “vigorous cross-examination, [and] presentation of contrary evidence . . . are the traditional and appropriate means of attacking shaky but admissible evidence.” State v. Dinkins, 319 S.C. 415, 418, 462 S.E.2d 59, 61 (1995) *quoting* Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 596 (1993).

Here, the State submits it cannot cross-examine the affiants and has an extremely limited opportunity to present contrary evidence regarding the affidavits in question. As detailed by Applicant, the affiants detailed within his Motion to Admit Affidavits are all located in Virginia. Moreover, due to the civil nature of a PCR proceeding, budgetary constraints and the fact the State cannot compel the affiants cooperation or attendance in rebutting such evidence, the State believes this Court should exclude the admission of affidavits in this case. Applicant failed to inform the State *these witnesses* testimony would be offered by affidavit until approximately two (2) days ago.¹

Furthermore, it is clear the affidavits at issue are drafted for the benefit of Applicant and prevent the State from impeaching or cross-examining the witnesses regarding the truthfulness and reliability of their testimony. Similarly, the affidavits prevent the State from eliciting aggravating evidence, by means of cross-examination, against Applicant which this Court must consider in determining whether counsel was ineffective in failing to investigate, discover, or call these witnesses at the sentencing hearing. Wong v. Belmontes, ___ U.S. ___, 130 S.Ct. 383, 386, 390 (2009) (PCR Court must consider *not only* the evidence mitigating witness would have offered, *but also* what damaging testimony would have been elicited from this witness or

¹ While admittedly these witnesses were disclosed in a previous discovery request, the State submits they were among a long list of out-of-state witnesses whose relevance were yet to be determined. Due to the then-limited relevance of such witnesses, the State submits deposing the entirety of Applicant's witness list would result in a waste of significant state resources.

emphasized by the State had counsel called the witness at trial) (emphasis added).

In addition to the aforementioned concerns regarding the general issues with admitting affidavits in this case, the State specifically objects to the affidavit of James R. Woodley as it is neither signed nor sworn. At this point, the State has no notice concerning the contents of Mr. Woodley's revised affidavit thereby further limiting its opportunity to present contrary evidence. Moreover, Applicant is essentially asking this Court to allow for the admission of an affidavit which it has yet to review and which the State believes, based upon review of the draft attached to Applicant's motion, will contain otherwise inadmissible hearsay.

With regard to the Affidavit of Ms. Wynn, Respondent spoke with Ms. Wynn approximately two (2) weeks ago. At that time, she indicated that while she was previously contacted by the collateral defense team, no one had contacted her again, and she was not asked to be a witness in the case. Additionally, at the time the State spoke with Ms. Wynn, Applicant had not informed the State that they intended to offer her testimony by affidavit, and there was no reason to depose her as there was no indication Ms. Wynn would actually become a witness in this case. In fact, as noted above, the State was not notified her testimony would be offered by affidavit until two (2) days ago.

Perhaps more importantly, Ms. Wynn's affidavit conveniently leaves out significant details which must be explored by cross-examination. Specifically, while Ms. Wynn's affidavit indicates Applicant was frequently brought to her office for disciplinary reasons, the affidavit fails to indicate or discuss the acts Applicant committed which necessitated his being disciplined. Ms. Wynn's affidavit also fails to discuss why Applicant was recommended for Special Education Services, i.e. that he was not mentally retarded, but had difficulty in Reading and Language Arts. Furthermore, Ms. Wynn's affidavit contains otherwise inadmissible hearsay and

fails to indicate whether she would have testified, but only shared this information. The State believes these are critical details in this case and such details must be weighed against the State's limited opportunity to cross-examine Ms. Wynn regarding these issues. See Wong, __ U.S. at __, 130 S.Ct. at 386, 390 (PCR Court must consider *not only* the evidence mitigating witness would have offered, *but also* what damaging testimony would have been elicited from this witness or further emphasized by the State had counsel called the witness at trial) (emphasis added).

Moving to Mr. Pond's affidavit, the State notes Mr. Pond discusses Applicant's father and Grandmother, but fails to discuss Applicant's difficulties with law enforcement, both of which could be vigorously explored on cross-examination, and would have been by the Solicitor.

Id.

Accordingly, the Motion to Admit Affidavits should be denied and the witnesses should be present for trial so they can be subject to cross-examination and the truth revealed.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

J. ANTHONY MABRY
Assistant Attorney General

By: 

ANTHONY MABRY

ATTORNEY FOR RESPONDENT

P.O. Box 11549
Columbia, SC 29211

March 3, 2011

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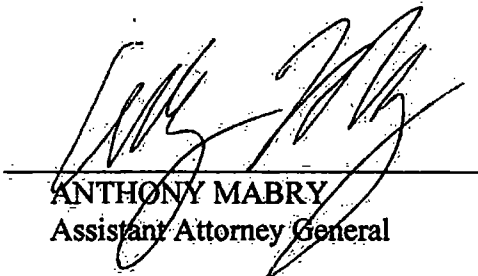
CERTIFICATE FOR SERVICE

I, Anthony Mabry, hereby certify that I have served the Respondent's *Response in Opposition of Applicant's Motion to Admit Affidavits into Evidence* in the foregoing action by depositing copies in the United States mail, postage prepaid, to the following:

Robert E. Lominack, Esquire
P.O. Box 5508
Columbia, SC 29250

Teresa L. Norris, Esquire
P.O. Box 11744
Columbia, SC 29211

This 3rd day of March, 2011.



ANTHONY MABRY
Assistant Attorney General

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

**MOTION TO RECONSIDER AND
OBJECTIONS TO PROPOSED ORDER
OF PROTECTION**

Respondent, by and through the Attorney General of South Carolina, moves this Honorable Court to reconsider its oral decision to enter an Order of Protection; and hereby objects to the *Proposed* Order of Protection provided to this Court on Monday, March 21, 2011. Respondent submits that the attorney-client privilege that would have protected the communications at issue was waived prior to the evidentiary hearing and through testimony at the evidentiary hearing. Once the attorney-client privilege was waived, the information was no longer protected, and collateral counsel did not timely seek a protective order, and the entry of a protective order at this time is not practicable. Furthermore, the proposed order submitted, exceeds the request made at the hearing. Respondent submits the proposed order of protection is not supported by Section 17-27-130 of the Code, and the admissibility of evidence to which the privilege once applied is a matter to be handled if a party seeks to have the evidence admitted before another tribunal. In support of this Motion and its Objections, Respondent would show the Court the following:

RELEVANT PROCEDURAL HISTORY

On July 29, 2010, applicant Mahdi filed his final Amended Application for Post-Conviction Relief, including an allegation that trial counsel was ineffective in failing to adequately investigate, develop, and present mitigation evidence concerning Applicant's family, social, institutional and

mental health history; and including an allegation that trial counsel failed to object to applicant's death sentence on the ground of his developmental deficits, defined in a subsequent ground as his "juvenile mentality."

On October 4, 2010, counsel for Respondent served Interrogatories and Requests for Production upon collateral counsel. In December of 2011, as part of Applicant's production of documents pursuant to Respondent's Request for Production, collateral counsel provided Respondent with a copy of trial counsel's case file.¹ On February 10, 2011, due to applicant's allegations in his final Amended Application, Respondent requested that collateral counsel provide a copy of the files of trial counsel's retained experts Drs. Martin and McKee. Collateral counsel objected, and this Court subsequently ordered production of the files of Drs. McKee and Martin on February 23, 2011, finding the attorney-client privilege was waived by operation of S.C. Code Ann. Section 17-27-130 and the filing of the PCR action and its grounds. Applicant appealed this order to the South Carolina Supreme Court, and certiorari was denied on Friday, March 4, 2011. Collateral counsel produced the files at issue on March 5, 2011, pursuant to this Court's oral order compelling production. This capital post-conviction relief ("PCR") case was tried by this Court from March 9th to March 11th, 2011 in Richland County. The case was tried at the Broad River Correctional Institution parole hearing room due to security concerns regarding applicant Mahdi.

After the trial of this case, on March 11th, 2011, applicant Mahdi moved orally for the first (1st) time for an Order of Protection from this Court protecting the contents of trial counsel's experts files and the testimony of Doctor Martin and Doctor McKee. The State objected. This Court

¹Trial counsel's file produced to Respondent in December 2010 did not include a copy of trial counsel's retained experts Drs. McKee and Martin's files.

verbally granted the request and asked collateral counsel to submit a proposed Order. Collateral counsel submitted a proposed Order on Monday, March 21, 2011. The proposed Order seeks to protect more than the contents of trial counsel's experts files or their testimony, and the Order is inappropriate for additional reasons. For the reasons listed below, Respondent submits this Order should not be signed.

Respondent's Grounds for Reconsideration and Objections

Respondent asks the Court to reconsider its initial decision to grant a protective order and objects to the *Proposed* Order submitted by collateral counsel for the following reasons:

1. *Any Claim of Attorney-Client Privilege has already been waived and the Request for a Protective Order is too late.*

a. **In December of 2010**, several months before the trial of this case, *collateral counsel*, not trial-counsel, *disclosed the entire contents of trial counsel's file to Respondent* through the discovery process. Within trial counsel's file, are notes of both trial attorneys, Glenn Walters, Esq. and Josh Koger, Esq., that Applicant Mahdi told them that he had committed another homicide in Virginia, and left Virginia because homicide detectives were closing in on him for the Virginia "drug dealer" homicide. Mahdi also told trial counsel of other crimes he had committed in Virginia or was planning to commit.

Despite disclosure of this information, *collateral counsel did not move for a protective order prior to disclosing the contents of trial counsel's file*, or seek or move in the months preceding trial of this case for a protective order. Likewise, despite having the option of filing a privilege log, collateral counsel did not assert a claim of privilege on any of these documents. Since there was no protective order, Respondent was free to discuss the contents of this file in preparation

for trial within or outside of the Attorney General's Office, and did so.

b. While the trial of this PCR occurred within the confines of Broad River Correctional Institution, it was conducted there only out of security concerns regarding applicant Mahdi. The merits hearing involving this PCR action was a public trial, and was not closed to the public who wished to attend, including the press. *Collateral counsel* never moved to close the hearing. The testimony of Doctor Schwartz-Watts, Doctor McKee, Doctor Martin, and trial counsel was publicly given.

c. *Collateral counsel* **did not move for a protective order** with regard to the contents of Drs. Martin and McKee's files (1) *after this Court ordered production of those files on February 23, 2011*, (2) *after the South Carolina Supreme Court denied certiorari on March 4, 2011*, or (3) *even during or immediately after Dr. Martin or Doctor McKee's testimony at the PCR Merits hearing*. It was only *at the conclusion of the evidentiary hearing*, that collateral counsel moved for a protective order with regard to the contents of Doctor Martin and Doctor McKee's files and with regard to their public testimony. As a result, the Attorney General's Office was free to discuss the contents of these files in preparation for trial within or outside the Attorney General's Office.

d. Additionally, numerous witnesses, DOC staff, victims, or victim's staff were present during the trial of this case. The witnesses were not sequestered, and numerous witnesses testified and left the courtroom prior to *collateral counsel* ever moving for a protective order. As a result, there are individuals who were present in the courtroom and heard the testimony of Doctor Schwartz-Watts, Doctor Martin, Doctor McKee, Mr. Walters, Mr. Koger and Mr. Grant, who left the courtroom without having heard the motion for a protective order (made at the conclusion of the

case) or the Court's initial ruling regarding the same.²

e. Furthermore, Mahdi waived any privilege by calling Doctor Donna Schwartz-Watts at the PCR hearing. Doctor Schwartz-Watts report and her testimony indicated she reviewed and relied on Doctor Martin and Doctor McKee's files in rendering her opinion, and she was cross-examined regarding the same. She testified she remembered that Mahdi had told Martin and McKee that he left Virginia because he was involved in a homicide there. Therefore, any privilege with regard to the contents of Doctor Martin and Doctor McKee's files was waived by *collateral counsel* at the PCR, in their case in chief, prior to any testimony by Martin, McKee, Walters, or Koger. See People v. Ledesma, 140 P.3d 657 (Cal. 2007)(finding attorney-client privilege was waived by calling expert at re-trial who had reviewed and considered testimony of non-testifying expert's testimony at PCR offered to rebut claim of ineffective assistance in mental capacity mitigation) *Headnote 54 & 55*; United States v. Gurtner, 474 F.2d 297 (9th Cir. 1973)(failure to assert the privilege when the evidence was first presented constituted a voluntary waiver & once the subject matter is disclosed by a knowing failure to object there is nothing to left to protect from disclosure). In addition, the failure to assert the privilege when the evidence was first presented constituted a voluntary waiver of the right. Steen v. First National Bank, 298 F. 36, 41 (8th Cir. 1924); United States v. Jacobs, 322 F.Supp. 1299, 1303 (C.D. Cal 1971). See also SCACR, Rule 407, Rule's of Professional Conduct, Rule 1.6. & Comment 15 (allowing counsel to move for a protective order prior to disclosure).

²Doctor Schwartz-Watts was applicant's witness and was questioned about what was in Dr. Martin and Dr. McKee's files because she reviewed them in preparation for giving her opinion and testimony. Counsel did not object to these questions, nor did counsel move to sequester any witnesses prior to Dr. Schwartz-Watts' testimony or move to close the hearing.

This Court had previously correctly determined that the attorney-client privilege was waived by the filing of the PCR application with the grounds therein and by operation of the statute. That was the law of the case. It was incumbent upon collateral counsel to request an order of protection at the earliest possible time to protect any matter it believed should not be disclosed outside of the litigants in this case and the tribunal. Collateral counsel did not do so. Collateral counsel disclosed trial counsel's file without requesting an order of protection. Collateral counsel produced the experts files without requesting an order of protection. To enter an Order of Protection now would be to enter an Order protecting matters on which the privilege was waived and on matters discussed outside of the courtroom before the hearing and in public testimony. The entry of an order of protection at this time is not practicable.

2. The Order of Protection Exceeds What Was Requested at the Evidentiary Hearing.

At the close of the evidentiary hearing, *for the first (1st) time*, collateral counsel moved for a protective order. Respondent is informed and believes that *collateral counsel* only moved for a protective order with regard to the contents of Doctor's Martin's and McKee's files, and with regard to the testimony of Doctors Martin and McKee. *Collateral counsel did not move for a protective order regarding the contents of trial counsel's file*, which had been disclosed months prior to the trial of this case, without request for a protective order, or with regard to trial counsel's testimony.³ *Collateral counsel* is now seeking to have something included within the protective order that was not included in its first and only motion for a protective order. This request must be denied.

³Respondent does not have a copy of the PCR trial transcript and is relying on its memory of the motion and this Court's questions regarding the same. The record will accurately reflect the extent of collateral counsel's request for a protective order.

3. *Collateral counsel misinterprets the applicable statute and Binney.*

As previously correctly found by this Court, the attorney-client privilege was waived with regard to the contents of trial counsel's experts files and communications of applicant to his experts with the filing of the PCR application and its grounds. S.C. Code Ann. Section 17-27-130; Binney v. State, 384 S.C. 539, 683 S.E.2d 478 (2009). That does not mean applicant can limit the waived material to only this PCR if the material is admitted at the PCR. Binney itself did not limit the future of use of any material deemed to have been waived by the filing of a PCR application and admitted at the PCR. Binney did not go that far. The statute, Binney, and trial counsel determined the waiver was appropriate given Applicant's allegations, and the proof he proposed to present at trial. However, once the attorney-client privilege was properly waived, it was waived for all purposes. See Dunn Chemical Co. et al. v. Sybron Corp., et al, 1975 WL 970, 1975-2 Trade Cases P 60, 561 (S.D.N.Y. 1975); United States v. Kelsey-Hayes, 15 F.R.D. 461 (E.D. Mich.1954); International Tel. & Tel. Corp v. United Tel. Co., 60 F.R.D. 177, 1973-2 Trade Cases P 74,647 (M.D. Fla. 1973). Collateral counsel cannot "put the genie back in the bottle," no matter how hard they try. See e.g. In re Ford Motor Co., 110 F.3d 954, 962-64 (3d Cir. 1997)("[T]he cat is already out of the bag... [T]here is no way to unscramble the egg scrambled by the disclosure..."); In re Cont'l Ill. Sec. Litig., 732 F.2d 1302, 1307-08 (7th Cir. 1984)("Once the Report was released any error in releasing it would be impossible to correct.").

4. *Applicant's Proposed Order is Over-broad.*

Applicant's proposed protective order seeks to limit the use of the materials to the appeal only from PCR, which may be read to prohibit a federal court from considering the evidence in this case in federal habeas corpus proceedings or any other related litigation; and may prohibit any other

tribunal from considering the evidence, such as in a state habeas application, or an attorney-grievance matter, or civil liability claim brought by or against Applicant Mahdi. This is clearly inappropriate.

Even authority cited by Applicant recognizes that the evidence adduced at the hearing may become admissible at another hearing or trial. See State v. Samuels, 965 S.W.2d 913 (Mo. Ct. App. 1998) (“However, there are a myriad circumstances under which a defendant’s statements, otherwise inadmissible, become admissible,...” “These same rules will continue to apply to the sort of statements that are the subject of this case.”).⁴ **Headnote 6.** See also Commonwealth v. Chmiel, 738 A.2d 406 (Penn. 1999), *Castille, J. & Newman, J. dissenting*.⁵ There is a better means of limiting the information rather than sealing the record or issuing a protective order, if the information should be limited at all. If Applicant is concerned about litigation in other state courts, those issues should be litigated at the time of those cases, under the rules of the admissibility of evidence in those jurisdictions, not by an order of this Court. For example see State v. Samuels, *supra*; Commonwealth v. Chmiel, *supra*; People v. Ledesma, *supra*. The rules for admissibility of such material are different based on which state the proceeding may occur in. See Edward J. Imwinkelried, The Applicability of the Attorney-Client Privilege to Non-Testifying Experts: Reestablishing the Boundaries Between the Attorney-Client Privilege and the Work-Product Protection, 68 Wash. U. L. Q. 19, 28-29 (1990). And, the admissibility of such material, if any, should be governed by the

⁴Mahdi cites Samuels in his proposed Order for the proposition that the evidence should be limited solely to the PCR and appeal; however, Samuels makes clear that upon re-trial of a criminal case if the Applicant were to testify falsely, his previous statements admitted at the PCR hearing could be used to impeach him to prevent a fraud on the court. Id.

⁵See also People v. Ledesma, 140 P.3d 657 (Cal. 2007)(State could impeach defense experts at re-trial who relied on or reviewed non-testifying experts testimony from ineffective assistance hearing, attorney-client privilege was waived by calling these experts), *Headnote 54 & 55.*

rules of evidence of the state in which any such case is tried. See Bittaker v. Woodford, 331 F.3d 715 (9th Cir 2003), *O'Scannlain, J. & Rawlinson, J. concurring in result only, citing Perez v. Ledesma*, 401 U.S. 82, 84-85 (1971)(holding that federal district court could not order the suppression of evidence in pending and future state obscenity trial: "The propriety of arrests and the admissibility of evidence in state criminal prosecutions are ordinarily matters to be resolved by state tribunals..."). If applicant is concerned about the admissibility of evidence at a re-sentencing proceeding, that decision could and should be made at the time of any re-sentencing hearing, by that trial judge under the South Carolina Rules of Evidence and the applicable precedent of the South Carolina Supreme Court, and is speculative at this point in any event. Applicant has not been granted relief.

The proposed order is also over-broad because it seeks to protect all information disclosed during the post-conviction proceedings. (See final paragraph of *Proposed Order*). This was not the subject of Applicant's motion at the PCR hearing, and is clearly over-reaching.

Conclusion

For the above stated reasons, the Court should reject the proposed Order, and not enter an Order of Protection in this case.

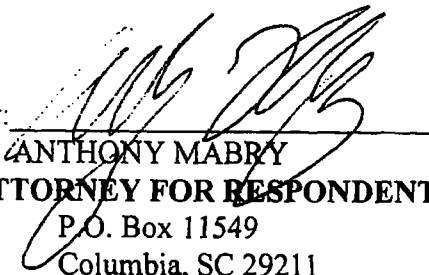
Respectfully submitted,

ALAN WILSON
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JOHN W. McINTOSH
Chief Deputy Attorney General

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Assistant Attorney General

By: 

ANTHONY MABRY
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March 26, 2011

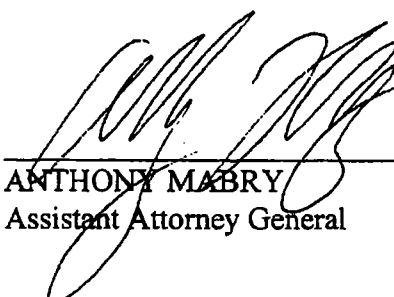
CERTIFICATE OF SERVICE

I, Anthony Mabry, hereby certify that I have served the *Motion to Reconsider and Objections to Proposed Order of Protection* in the foregoing action by depositing copies in the United States mail, postage prepaid, to the following:

Robert E. Lominack, Esquire
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This 26th day of March, 2011.



ANTHONY MABRY
Assistant Attorney General

BLUME WEYBLE & NORRIS, LLC

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March 1, 2011

The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
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S.C. Supreme Court

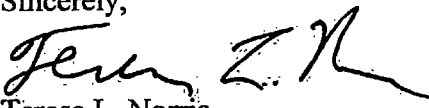
RE: *Mikal Mahdi v. State* (Calhoun County Capital Post-Conviction Relief Action)

Dear Mr. Shearouse:

Please find enclosed, with proof of service, the original and six copies of Mr. Mahdi's Reply to Respondents Return to Petition for Writ of Certiorari.

Please do not hesitate to contact me if you have any questions in this matter or if I can provide you with any additional information.

Sincerely,


Teresa L. Norris

cc: Anthony Mabry
Robert Lominack
Mikal Mahdi

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CALHOUN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2009-CP-09-164

RECEIVED

MAR 01 2011

S.C. Supreme Court

Mikal D. Mahdi,..... Petitioner,

v.

State of South Carolina,..... Respondent.

REPLY TO RESPONDENT'S RETURN TO
PETITION FOR WRIT OF CERTIORARI

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S.C. Code § 17-27-130 3

Boiled down, Respondent's arguments are that (1) the circumstances in this case are not "exceptional" and, therefore, do not warrant review, (2) this case is no different than the scenario addressed in *Binney v. State*, 384 S.C. 539, 545, 683 S.E.2d 478, 481 (2009), and; (3) to the extent that Mr. Mahdi may not have entirely waived his attorney-client privilege, some – but not all – materials should still be disclosed. Petitioner addresses these points in turn.¹

1. "Exceptional circumstances" exist in this case.²

Respondent concedes that this Court has the authority to review the PCR court's order in this case if "exceptional circumstances" exist. *See Return*

¹ It is worth noting one important point concerning Respondent's recitation of the procedural history. Respondent represents that it has twice requested privilege logs for the materials at issue here. *Return* at 7, n.3. At best, this distorts the actual facts. Respondent *never made* a formal request for the materials at issue prior to filing a Motion to Compel. Respondent made one request for production of documents that included an overly broad request for "documents or correspondence . . . which relate to a claim or defense" and a request related to experts "expected to testify" for the Applicant at the PCR hearing. *See Return*, Attachment 3. In response, trial counsel's entire file and all materials provided to the experts "expected to testify," along with the identity of the experts was disclosed. The first and only request for the materials at issue arrived in the form of an email on February 10, 2011. Eight days later Respondent emailed a Motion to Compel the production of the files of Dr. Martin and Dr. McKee. Two business days later the PCR court held a hearing and ordered disclosure within 24 hours of the oral order. In other words, less than 10 days elapsed from the first request for the experts' files (at issue here) to the lower court ordering disclosure of materials that were never formally requested before a Motion to Compel was filed.

² To the extent that a heading used in the Petition for Writ of Certiorari confused the issue of this Court's statutory appellate review and the common law writ of certiorari, Petitioner acknowledges that this Court's review at this point emanates from its authority to decide cases under "exceptional circumstances."

at 10-11. Indeed, Petitioner and Respondent agree that this Court has appropriately reviewed cases (1) that involved matters, which were capable of repetition, *Binney v. State, supra*, and *Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 674 S.E.2d 154 (2009) or (2) in which other effective remedies were not available, *Rowe v. City of West Columbia*, 334 S.C. 400, 404, 513 S.E.2d 379, 381 (Ct. App. 1999). See Return at 10-11.³

Mr. Mahdi's case contains both. Without some review of this ruling, it is reasonable to expect the state in virtually every capital post-conviction case to subpoena similar files as a matter of course. Given the breadth of Respondent's argument and the PCR court's order below, it is hard to imagine a case in which Respondent would not gain access to similar information. And yet, unless this Court accepts review pursuant to its authority under the common law writ of certiorari, this order – and other similar orders – will forever escape appellate scrutiny. In other words, under Respondent's reasoning the ruling in *Binney* will be extended to cover a very different scenario than the facts of that case but would never be reviewed or

³ This Court has also recognized that some discovery orders are subject to appellate review because the damage done by an erroneously compelled disclosure would be irreparable. See e.g., *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 8, 630 S.E.2d 464, 468 (2006) ("[W]e agree with courts which have been inclined to find such an order immediately appealable because, after a court file is unsealed and the information released, no appellate remedy is likely to repair any damage done by an improper disclosure). While these cases were heard pursuant to the Court's statutory authority, the rationale – that review is at times necessary to prevent irreparable harm – is no less applicable here.

ever have the potential for review until after irreparable harm had been suffered.

2. This case is not *Binney* revisited.

The scope of the disclosure ordered in this case goes beyond the facts or holding of *Binney* and the clear language of the statute. In *Binney* this Court permitted trial counsel to disclose their own files because it found that this disclosure of information known to trial counsel was necessary for counsel to respond to the claims of ineffectiveness. Here, however, trial counsel does not – and never did – have the files at issue. The order of the lower court compels *current counsel* to disclose material that has never been touched by trial counsel. This is not contemplated by *Binney* or the statute. Indeed, under the plain language of the statute a PCR applicant waives the attorney-client privilege only “to the extent necessary for prior counsel to respond to the allegation.” S.C. Code Ann. § 17-27-130 (2008). Therefore, counsel alleged to have been ineffective may discuss and disclose any aspect of the representation “to the extent necessary for prior counsel to respond to the allegation.” *Id.* By its plain language then, the statute does not permit indiscriminate disclosure of information, which trial counsel cannot use to rebut allegations of ineffectiveness.⁴ In other words, the actual allegations of

⁴ Of course, counsel acknowledged in the Petition, given the claims alleged here Respondent is free to elicit from trial counsel what he was told by the experts, what materials he provided to them, and why he decided not to present their testimony. But the testimony and information disclosed by trial

privilege and are, therefore, discoverable even if Mr. Mahdi's limited waiver does not extend to these files. Of course, this argument rests on the types of information in the experts' files. At the hurried hearing below Respondent simply argued – and the lower court found – that Mr. Mahdi had waived the privilege as to all the information in the experts' files. Contrary to this Court's guidance in other cases, the PCR court did not review these files *in camera* or seek to do so. In short, the PCR court made no findings about the substance of the experts' files. *See Tucker v. Honda of South Carolina Mfg., Inc.*, 354 S.C. 574, 582 S.E.2d 405 (2003) (instructions to lower courts to make specific findings when attorney-client privilege is raised).

CONCLUSION

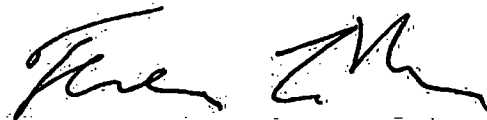
The PCR court order in this case is a first. Indeed, Respondent has not cited to the lower court or this Court a single instance in which similar disclosure has been ordered in a capital post-conviction case. But it surely will not be the last if the lower court order stands. The attorney-client privilege is too important and the nature of this case too consequential for the lower court order – made with little briefing, less argument, and no factual findings specific to the files at issue here – to stand without appropriate

review. Therefore, Petitioner requests that this Court grant certiorari and reverse the lower court order.⁸

Respectfully submitted,

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A handwritten signature in black ink, appearing to read 'Robert Lominack', is written over a horizontal line.

Attorney for Petitioner

⁸ In the alternative, given the hurried nature of the proceedings below and the lack of any findings or conclusions specific to the files at issue, Petitioner requests that this Court remand with instructions that a lower court make a threshold determination as to whether trial counsel ever saw or reviewed the experts' files and if so, which documents are actually relevant to the claims at issue here. Because the PCR court is the fact-finder relating to the claims set out in Petitioner's application for relief, Petitioner requests that any review of the actual files at issue be conducted by a different court.

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM CALHOUN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2009-CP-09-164

RECEIVED

MAR 01 2011

S.C. Supreme Court

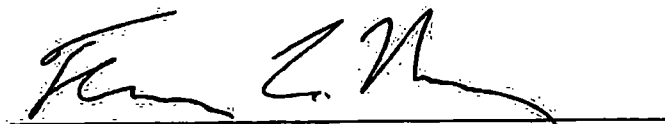
Mikal D. Mahdi,.....Petitioner,

v.

State of South Carolina,.....Respondent.

PROOF OF SERVICE

I certify that I have served the Reply to Respondents Return to Petition for Writ of Certiorari on the Respondent by depositing a copy of it in the United States Mail, postage prepaid, on March 1, 2011, addressed to the attorney of record, Anthony Mabry, P.O. Box 11549, Columbia, SC 29211.



Teresa L. Norris
Blume, Weyble & Norris, LLC
Post Office Box 11744
Columbia, SC 29211

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CALHOUN	)	
	)	
Mikal D. Mahdi, #5238,	)	C/A No. 09-CP-09-164
Applicant,	)	
	)	
v.	)	
	)	RESPONDENT'S RETURN
State of South Carolina,	)	TO AMENDED APPLICATION
	)	AND MOTION TO DISMISS
	)	
Respondent.	)	
	)	

The Respondent, above named, through below-signed counsel, hereby makes a Return to the Amended Application for Post-Conviction Relief filed on July 29, 2010 and received by Respondent on July 30, 2010. This proceeding is brought pursuant to S.C. Code Ann. Section 17-27-160 and the July 23, 2009 Order of the South Carolina Supreme Court staying any Order of Execution of Calhoun County death row inmate Mikal D. Mahdi to allow him to pursue potential state post-conviction relief (PCR) and assigning the Honorable Doyett A. Early, III., Circuit Court Judge, with continuing jurisdiction regardless of assignment and with the authority to schedule such hearings as may be necessary. Respondent denies the allegations of the (2nd or Final) Amended Application and moves to dismiss the Application for post-conviction relief with prejudice.

I.

The applicant, Mikal Mahdi, murdered James E. Myers on June 18, 2004. Mahdi was arrested on June 21, 2004 and charged with Myers' murder, the grand larceny of his truck, and the burglary of his work shed.¹ Mahdi was indicted by the Calhoun County grand jury on August 23,

¹The 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. 1357-1367, 1395-1425, Tr. pp. 1273-1283, 1311-1341).

2004 for murder (2004-GS-09-243), grand larceny greater than \$5,000 (2004-GS-09-242), and burglary in the second degree (violent)(2004-GS-09-244). The State sought the death penalty. Glen Walters, Esq. and Joshua Koger, Jr., Esq. were appointed to represent Mahdi. It was determined by the South Carolina Supreme Court that the Honorable Clifton Newman, Circuit Court Judge, would preside over this capital trial.

On November 26, 2006, jury selection began before Judge Newman. Voir dire and jury selection were completed on November 29, 2006 with a jury and alternates impaneled, however, prior to the swearing of the jury, Mahdi waived and gave up his right to a jury trial and changed his plea. (R. 207-1336, Tr. pp. 123-1252).

On November 30, 2006, Mahdi pled guilty before Judge Newman to murder, grand larceny over \$5,000, and burglary in the second degree (violent). Prior to his guilty plea, out of an abundance of caution, Mahdi was re-examined by Doctor Michael Cross regarding his competency to stand trial or plead guilty. (R. 125-140, 1336-1343, Tr. p. 41-56, 1254-1259). Doctor Cross had previously found Mahdi was competent to stand trial. (See R. 1336-37, Tr. pp. 1252-1253). Doctor Cross testified that Mahdi was competent to plead guilty. (R. 1336-1343, Tr. p. 1254-1259). Prior to the plea, Judge Newman found on the record that Mahdi was competent to plead guilty. (R. 1342-43, Tr. p. 1258-1259). Judge Newman accepted Mahdi's guilty plea(s) to all charges and ensured that Mahdi's plea(s) were knowingly, voluntarily, and intelligently entered by extensive and detailed questioning of Mahdi under oath. (R. 1343-1368, Tr. pp. 1259-1284). After acceptance of the plea(s), the impaneled unsworn jury and alternates were dismissed. Mahdi's guilty plea(s) concluded on the same day as entered, November 30, 2006.

After the required statutory twenty-four (24) hour waiting period, the sentencing proceeding

began on December 1, 2006. The presentation of evidence in the sentencing proceeding concluded on December 5, 2006. Final arguments were made on December 6, 2006.

On December 8, 2006, Judge Newman issued his sentencing decision by reading his written sentencing order into the record. (R. 1810-1826, Tr. pp. 1726-1742). His written sentencing order was also filed with the Calhoun County Clerk of Court on the same date. (R. 1842-1853, 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. 1814-15, 1845, Tr. pp. 1730-1731, 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. 1810-1826, Tr. pp. 1726-1742). Mahdi was sentenced to fifteen (15) years for burglary in the second degree violent and ten (10) years for grand larceny. Those sentences were consecutive to the sentence for murder and consecutive to each other. (R. 1825, Tr. p. 1741).

The Direct Appeal

Mahdi appealed his death sentence to the South Carolina Supreme Court. Mahdi was represented in his appeal by Katherine Hudgins of the South Carolina Commission on Indigent Defense, Division of Appellate Defense. In his appeal, Mahdi raised only one (1) 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 J. Anthony Mabry, filed a responsive brief. On June 15,

2009, the South Carolina Supreme Court affirmed Mahdi's conviction and death sentence. Mahdi v. State, ___ S.C. ___, 678 S.E.2d 807 (2009). The Remittitur was issued on July 1, 2009. Mahdi did not seek certiorari to the United States Supreme Court.

The PCR Action

Mahdi, through appellate counsel, Katherine Hudgins, filed a Motion for a Stay of Execution on June 23, 2009 before the South Carolina Supreme Court so that he could pursue potential post-conviction relief remedies. Pursuant to In Re Stays of Execution, the State filed a Return and did not oppose the Stay of Execution request to pursue *potential* post-conviction relief remedies. On July 23, 2009, the South Carolina Supreme Court issued its Order granting the stay request and assigning this Court to hear Mahdi's post-conviction relief (PCR) application.

On Tuesday, August 11, 2009, this Court convened a hearing in Beaufort, South Carolina at the Beaufort County Courthouse pursuant to the Order of the Supreme Court to determine the desires of Mahdi regarding counsel. Mr. Mahdi was present at the hearing. The Respondents were represented by Assistant Attorney General Mabry. At this Court's request, Lisa Kimbrough, Esq. was also present at the hearing. This Court made inquiry of Mr. Mahdi and found that he desired to have counsel appointed to represent him in the state post-conviction relief action. Mr. Mahdi indicated that he did wish to have counsel appointed but he wished to have Teresa Norris, Esq. to represent him in this matter not Ms. Kimbrough. Ms. Kimbrough indicated that she would prefer that Ms. Norris be appointed to represent Mr. Mahdi.

On August 19, 2009, this Court held a conference call with Ms. Norris, Robert Lominack, and Assistant Attorney General Anthony Mabry, regarding Ms. Norris and Mr. 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 on Appointment of Post-Conviction Relief Counsel and Scheduling Order appointing Ms. Kimbrough and Mr. Lominack to represent applicant Mahdi in this matter. The Order was filed August 28, 2009.

On March 29, 2010, Ms. Norris wrote this Court requesting that the deadlines imposed in the Scheduling Order be moved back one hundred and twenty (120) days. Upon investigation, this Court determined that the earliest the case could be called for trial was December 7, 2010. Therefore, this Court expressed its intent to enter an Amended Scheduling Order setting this case for trial December 7-9, 2010. This Court also expressed its intent to move the previously set scheduling deadlines back one hundred and twenty (120) days as requested by collateral counsel. Mr Mabry submitted a proposed Order to the Court to this effect and copied Ms. Norris on the same.

Prior to the issuance of this Court's original Order of Appointment and Scheduling Order, Mahdi filed his *pro se* Application. The State filed a Return and Motion to Dismiss. On March 29, 2010, collateral counsel filed an Amended Application for Post-Conviction Relief in combination with her request for a continuance. The State received the Amended Application on March 31, 2010. The State filed a Return and Motion to Dismiss the Amended Application. On July 29, 2010, collateral counsel filed what would have been the Final Amended Application according to the Court's original scheduling order which was titled "Amended Application for Post-Conviction Relief. According to the Court's previous Scheduling Order, Respondent's Return is due to filed today. Mahdi's Amended PCR Application (2009-CP-09-00164) is now before this Court. Respondent denies the allegations of the Amended Application and moves to dismiss the Application on the basis there is no merit to the issues raised therein.

Respondent reincorporates herein by reference the following materials previously attached

to its Return to the *pro se* Application for Post Conviction Relief:

1. Record on Appeal, the Honorable Clifton Newman (5 Volumes)
2. Final Brief of Appellant/Petitioner
3. Final Brief of Respondent
4. State v. Mahdi, ___ S.C. ___, 678 S.E.2d 807 (2009)
5. Remittitur
6. Petition for Stay of Execution
7. Return to Petition for Stay of Execution
8. Order of the South Carolina Supreme Court Granting Stay of Execution to pursue PCR
9. *Pro se* PCR Application
10. Amended Application filed in March of 2010.

Respondent also attaches and incorporates by reference the (2nd or Final) Amended Application for PCR filed July 29, 2010.

Respondent's Factual Summary

Applicant, Mikal Deen Mahdi ("Mahdi"), murdered James Myers, an off-duty police captain, on July 18, 2004 in Calhoun County, South Carolina.² (R. 1341-1368, Tr. pp. 1257-1284). At the time of the murder, Mahdi was a fugitive wanted for several crimes he committed outside South Carolina.

The Virginia Crimes

On July 14, 2004 in Lawrenceville, Virginia, Mahdi, a citizen and resident of the State of Virginia, stole a chrome .380 caliber pistol from the home of Amanda Weaver, his neighbor. (R.

²At the time of his murder, Myers had thirty-one (31) years of service as both a fireman and as a police officer. (R. 1357, Tr. p. 1273).

1498-1527, Tr. p. 1414-1443). On the same day, Mahdi stole a set of Virginia license plates from a vehicle located at a car rental agency in Lawrenceville, and Mahdi also stole a Mercury Sable station wagon from a car lot about a tenth of a mile from the car rental agency. (R. 1357-1367, Tr. pp. 1273-1283). After the theft of the gun, the license plate, and the car, Mahdi left the state of Virginia.

The North Carolina Murder

The following day, 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. The pistol was loaded. Mahdi took a beer from the store's cooler and placed it on the store's counter. While the store clerk was checking Mahdi's I.D., Mahdi pulled out the .380 caliber pistol and shot the store clerk. After the clerk fell to the floor, Mahdi leaned over the counter and fired another shot into the victim as he lay on the floor. (R. 1567-1596, Tr. pp. 1483-1512). The entire shooting was captured clearly on surveillance video and Mahdi's fingerprints were also recovered from a mat that lay on the store's counter. (R. 1589, Tr. p. 1505). After shooting the victim, Mahdi attempted to rob the store's cash register, however he was unable to open it. (R. 1567-1582, Tr. pp. 1483-1498, 1777-78, State's Exhibit # 94, 1693-1694). Mahdi then left the store with only the beer. (See State's Exhibit 94). The store clerk, Christopher Jason Boggs, died from the bullet wounds Mahdi inflicted. (R. 1567-1582, 1585, Tr. pp. 1483-1498, 1501).

The South Carolina Crimes

(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 Street and Washington Street here in Columbia, S.C. Mahdi car-jacked Pitts

of his red 2000 Ford Expedition while he was sitting at the traffic light. (R. 1528-1540, Tr. pp. 1444-1456). Pitts' description of his assailant to police was consistent with Mahdi's physical appearance. Pitts' also 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 car, and stole his 2000 Ford Expedition in the early morning hours of July 17, 2004.³ (R. 1532, Tr. p. 1448).

(Calhoun County)

Approximately thirty-five (35) minutes after the car-jacking, the stolen red Ford Expedition pulled into the Wilco Hess station at Exit 139 off I-26 in Calhoun County. (R. 1360, Tr. p. 1276). Mahdi was driving the SUV. The stolen Expedition now bore the stolen Virginia license plates from Lawrenceville, Virginia. (R. 1360-62, Tr. pp. 1276-1278). Mahdi's fingerprints were eventually lifted from the tag and from the frame around the tag. Mahdi's prints were also later found inside the stolen SUV. Mahdi had replaced the owner's tag with the tag Mahdi stole earlier from Lawrenceville.

Mahdi attempted to use a credit card at one of the Wilco gas pumps to fill up the Expedition. For some reason, the pump would not accept the credit card. Mahdi attempted to use the gas pump for forty-five (45) minutes to an hour. Due to this suspicious behavior, the Wilco store clerks notified police. Mahdi eventually pulled the stolen Expedition behind the station and left it there. (R. 1361, Tr. p. 1277). Almost simultaneously with the police arriving at the station, Mahdi fled on foot into the woods behind the station. (R. 1362, Tr. p. 1278). The police searched for Mahdi

³The Mercury Sable station wagon stolen from Lawrenceville, Virginia was found in the parking lot of the Washington Street United Methodist Church near the scene of the car-jacking. (R. 1359, Tr. p. 1275).

but could not locate him and eventually came to believe that he had obtained a ride from someone at a nearby Waffle House. Unbeknownst to police, Mahdi was on foot in the woods behind the store, headed toward Captain Myers' work shed.

The victim, James Myers, owned a farm approximately a quarter to half a mile through the woods from the Wilco station. (R. 1362, 1399-1401, Tr. pp. 1278, 1315-1317). While fleeing on foot from police, Mahdi eventually came upon the work shed of Captain Myers located on Myers' farm. (R. 1362, Tr. 1278). Mahdi took some type of tool and broke into the work shed/shop. (R. 1411, Tr. p. 1327). While inside the shed, Mahdi watched television and converted a shotgun that belonged to Captain Myers into a sawed off shotgun and painted the shotgun black. (R. 1603, Tr. p. 1519). Mahdi also went through Captain Myers' wife's SLED investigation files. (R. 1414-16, Tr. pp. 1330-1332). Mrs. Myers was a SLED agent at the time of the murder and sometimes kept files in the shed. Also while in the shed, Mahdi also armed himself with the victim's own .22 caliber rifle, which was kept in the shed with other guns. (R. 1604, Tr. p. 1520).

Captain Myers was off work the day he was murdered, June 18, 2004. On that date he and his wife returned to their home from Edisto Beach after celebrating the birthdays of his wife, his sister, and his daughter. (R. 1402-03, Tr. pp. 1318-1319). After returning home, Captain Myers stopped by his father's home to visit. Myers routinely visited his father to bond with him and to help his father with the loss of Myers' mother who had died two years previously. (R. 1404, Tr. p. 1320). After visiting with his father, Myers left his father's house around 6:45 p.m. headed to his farm and work shed. (R. 1403-06, Tr. pp. 1319-1322).

When the victim stopped by his shed that evening, Mahdi was lying in wait. (R. 1363-64, 1407-1425, Tr. pp. 1279-1280, 1323-1341). Mahdi confronted the victim at the shed. (R. 1364,

1541-1566, Tr. p. 1280, 1457-1482). Mahdi then shot the victim nine (9) times. (R. 1364, 1696, Tr. pp. 1280, 1612). Mahdi murdered Captain Myers by shooting Myers with Myers' own .22 caliber rifle. (R. 1364, Tr. p. 1280).⁴

After murdering Captain Myers, Mahdi poured diesel fuel on and around the victim's body and then set the body on fire. (R. 1364, 1696, Tr. pp. 1280, 1612). Mahdi then stole Captain Myers' police issued Dodge truck and also stole a license plate off of another vehicle located next to the shed. (R. 1365, 1414, 1418, Tr. pp. 1281, 1330, 1334). In addition to the .22 caliber rifle, Mahdi also stole Captain Myers' city issued Ruger assault rifle and the shotgun Mahdi had converted and painted black.

Captain Myers' 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 but there was still no answer. Finally, she contacted Myers' father and discovered what time he left his father's home. Captain Myers' wife drove to their farm and found the gate to the property open. She then drove to the shed and found her husband's truck missing. Mrs. Myers then went into the shed and found her husband's bullet riddled and burned body lying in a pool of blood. She knew immediately he was dead. Mrs. Myers testified that she 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, Tr. pp. 1311-1341).

In the shop within a few feet of Myers' body, police found the keys to Corey Pitts' stolen red Ford Expedition. (R. 1365, Tr. p. 1281). Found at the scene were multiple fired .22 caliber shell

⁴There 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, Tr. pp. 1335-1337, 1690). It is also possible Mahdi emptied Meyers' pockets after he murdered him.

casings and seven (7) fired .22 caliber bullets. (R. 1541-1565, Tr. pp. 1457-1481). Police also found evidence that Mahdi had tried to hot-wire the victim's other truck. (R. 1413-14, Tr. pp. 1329-1330). Mahdi escaped from South Carolina by using Captain Myers' police issued truck.

Florida

Three (3) days later, July 21, 2004, in Satellite Beach Florida, Mahdi was spotted by police in the victim's truck.⁵ Mahdi jumped out the truck and fled while the truck was still moving. Mahdi ran for the beach in possession of the Ruger assault rifle that contained a loaded clip. (R. 1377-1394, Tr. pp. 1293-1310). Police were at the point of shooting Mahdi when he dropped the gun and continued to run. Mahdi ran into a condominium complex and was eventually apprehended on the fifth floor of the condominium building with the use of a police dog.

While being transported to the police station, the officer who arrested Mahdi thanked Mahdi for not shooting him with the assault rifle. Mahdi responded that the gun was "stuck on a three shot". Mahdi said with "cold eyes": "I 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, Tr. p. 1310).

After his arrest, police discovered the license plate on Captain Myers' Dodge truck had been replaced with the license plate off of Captain Myers' personal GMC truck. (R. 1559-60, Tr. pp. 1475-1476). Clothing found by police inside the recovered Dodge truck matched clothing seen worn by Mahdi 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, and shoes

⁵By this time, police in Virginia and South Carolina had connected the crimes there and here to Mahdi. As a result, a nationwide BOLO was issued for Mahdi's arrest. (R. 1365-66, Tr. pp. 1281-1282). Florida police noticed Mahdi's erratic driving and thought Mahdi might be an impaired driver and began following him. Mahdi refused to stop for police. Mahdi eventually ran over a stop sign near the end of the pursuit. (R. 1379-1382, Tr. pp. 1295-1298).

found in the truck matched footwear impressions found near the scene of Captain Meyers' murder. The Ruger Mini 14 assault rifle was recovered and the sawed off shotgun was found in the truck along with ammunition. (R. 1394-95, 1561, Tr. pp. 1310-1311, 1477). Also found in the recovered truck was an Atlas Mahdi had taken from Captain Meyers' shop that contained Mahdi's fingerprints on the Jacksonville, Florida map page.

This led police to eventually locate two witnesses in Jacksonville, Florida who purchased a .380 caliber pistol and a .22 caliber rifle from Mahdi shortly after Captain Myers' murder. (R. 1366, 1565, Tr. p. 1282, 1481). The witnesses identified Captain Myers' Dodge truck as the vehicle Mahdi was driving at the time. The witnesses also identified Mahdi from a photographic lineup as the person who sold them the chrome .380 caliber pistol and the .22 caliber rifle. The only personal item of Captain Myers that was never recovered was his police badge. (R. 1420-21, Tr. pp. 1336-1337). The testimony established that Myers kept the badge in his truck or in the pocket of his pants. (R. 1418-1421, Tr. pp. 1334-1337).

Ballistics testing confirmed the recovered .380 caliber pistol was the weapon used to murder the store clerk, Christopher Jason Boggs, in Winston-Salem. (R. 1592-1596, Tr. p. 1508-1512). Ballistics testing also confirmed the .22 rifle was the weapon used to murder Captain Myers. (R. 1562, Tr. p. 1478).

The autopsy of Captain Myers' body determined that he died from multiple gunshot wounds. The victim was shot nine (9) times. He was shot in the chest four (4) times. (R. 1698, Tr. p. 1614). Captain Myers was shot three (3) times in the head. The pathologist, Dr. Janice Ross, opined that the victim was shot first in the chest and possibly once in the head. After the victim collapsed to the floor of the shop, he possibly raised his head and was shot again, and then he was shot again in the

head while his head was lying on the floor. (R. 1702, Tr. p. 1618).

Additional Evidence in Aggravation

(Mahdi's Prior Criminal Acts)

During the sentencing hearing, in addition to the facts and circumstances of the crime, Judge Newman heard additional evidence in aggravation. This included Mahdi's prior criminal activity as a juvenile and as an adult.

Mahdi was committed to the Virginia' juvenile justice system at the age of fourteen (14) for two (2) counts of breaking and entering and two (2) counts of grand larceny. (R. 1437, Tr. p. 1353). Mahdi admittedly was also involved in the sale of crack cocaine at the same age. (R. 1440, Tr. p. 1356). Mahdi was also charged with assaulting and causing bodily injury to another inmate in the juvenile justice system. (R. 1441-42, Tr. pp. 1357-1358). While in the juvenile justice system, Mahdi told juvenile authorities that one of his strengths was "robbing people." (R. 1440, Tr. p. 1356). At the age of fifteen (15), Mahdi was found delinquent for breaking and entering. During this break-in Mahdi stole a .44 magnum pistol. (R. 1428-29, Tr. pp. 1344-1345). When Brunswick County, Virginia police attempted to arrest Mahdi on a detention order for that charge, Mahdi and his father refused to come out of their home. An eight (8)-hour standoff ensued, during which Sheriff James Woodley heard Mahdi say: "Them motherfuckers got guns." Mahdi also told police after he was finally arrested that "I'm going to kill a cop before I die." (R. 1431, Tr. p. 1347, ll. 4-5).

At the age of seventeen (17), 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 police officers there to investigate. He later told one of the officers that he should have killed "that bitch," referring

to his own mother. (R. 1457-1462, Tr. p. 1373-1378). Mahdi was also convicted as a juvenile of contempt of court and obstruction of justice. (R. 1612, Tr. p. 1528).

As an adult, Mahdi was convicted of brutally stabbing Moises Rivera, a maintenance supervisor, at an apartment complex in Richmond, Virginia. (R. 1475, Tr. p. 1391). Mahdi stabbed Rivera approximately five (5) times in the back with a knife after Rivera investigated a disturbance at the apartment complex on April 17, 2001. (R. 1473-74, Tr. p. 1389-1390). Rivera came upon Mahdi apparently trying to break into an apartment. Rivera's lung was punctured by the stab wounds. Rivera actually died in the ambulance but was revived by EMS personnel. (R. 1475, Tr. p. 1391). Rivera was in the hospital for six (6) days and was out of work for two (2) months as a result of the assault. (R. 1474-75, Tr. p. 1390-1391). Mahdi served approximately (3) three years in prison for this assault. Mahdi was released from the Virginia prison system on May 12th, 2004. At the time Captain Myers was murdered, Mahdi was on supervised probation for the Rivera assault. (R. 1483-1497, Tr. p. 1399-1413). Part of the conditions of Mahdi's supervised probation were that Mahdi was not supposed to leave the state of Virginia, was not supposed to violate any state or federal law, and was not supposed to possess a firearm. (R. 1487-1493, Tr. p. 1403-1409).

After being released from the Virginia prison for the Rivera assault, Mahdi tried to get a neighbor, Amanda Weaver, to help him assemble a nine (9) mm pistol. (R. 1501-02, Tr. pp. 1417-1418). Mahdi also bragged to this same neighbor that he was dabbling in drug dealing to make money. (R. 1500, Tr. p. 1416). 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 the Virginia Department of Probation and Parole. The result of the test showed that Mahdi was using marijuana less than two months after being released from

prison. (R. 1491, Tr. p. 1407). Subsequent to submitting to the urine test, Mahdi stole the gun, the Mercury Sable, and the license plate and drove to North Carolina.

(Mahdi's Conduct in Prison)

Judge Newman also received evidence regarding Mahdi's previous behavior while in prison. Mahdi was first incarcerated in the Virginia Department of Juvenile Justice for two counts of breaking and entering and two counts of grand larceny. (R. 1435-1452, Tr. pp. 1351-1368). During this incarceration, Mahdi assaulted another inmate causing bodily injury. (R. 1441, Tr. pp. 1357 & State's Exhibit 85). Mahdi was incarcerated again in the Virginia Department of Juvenile Justice from August 1999 until May of 2000 for contempt of court and obstruction of justice. (R. 1612-13, Tr. pp. 1528-1529). His overall progress during this incarceration was plagued by maladaptive behavior. (R. 1612-13, Tr. pp. 1528-1529 & State's Exhibit #95). Records from the Department of Juvenile Justice also document several assaults during this incarceration. (R. 1441-42, Tr. pp. 1357-1358 & State's Exhibit 95).

As an adult, Mahdi was incarcerated in the Virginia Department of Corrections from October 11, 2001, to May 12, 2004. (R. 1485-86, Tr. pp. 1401-1402). During that time, Mahdi repeatedly disobeyed orders of corrections' employees. He repeatedly used profanity or vulgar language toward employees. Mahdi had numerous disciplinary infractions including 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. His institutional behavior did not improve. While in the Virginia prison system, Mahdi was charged with setting a fire. Mahdi was also charged with giving false information to an employee, destroying state property, and assault on a non-inmate. (R. 1453-1456, Tr. pp. 1369-1372 & State's Exhibit # 86).

While incarcerated in South Carolina prior to trial, Mahdi was charged with assaulting a correctional officer. The officer was taken to the hospital by E.M.S. (R. 1619, Tr. p. 1535). The officer received a mild concussion. (R. 1619, Tr. p. 1535). At the disciplinary hearing, Mahdi looked at the officer and said: "the next chance he gets, he's going to kill him, kill the mother fucking officer." (R. 1616, Tr. p. 1532, ll. 15-17). "The first chance he get, he would finish him off." (R. 1616, Tr. p. 1532, ll. 17-18).

During one search of Mahdi's cell, prison officials found a three (3) to four (4) foot piece of rope and some pieces of metal. (R. 1617, Tr. p. 1533). Mahdi was housed in this cell by himself. (R. 1618, Tr. p. 1534). Mahdi was also caught damaging a conference room and hiding metal fragments from a wall socket on his person. (R. 1622-23, Tr. p. 1538-1539). On another occasion, Mahdi was found with a fifteen (15) foot long rope made of blankets. (R. 1624, Tr. p. 1540). Another piece of metal was found in Mahdi's cell on a different occasion. (R. 1627-28, Tr. pp. 1543-1544). Mahdi also wrote a grievance in which he discussed killing Department of Corrections' employees. (R. 1629, Tr. p. 1549). Mahdi then made additional threats toward a Department of Corrections' employee at the disciplinary hearing. (R. 1646-48, Tr. p. 1562-1564).

Captain Gary Lane testified that at the time of trial, Mahdi was kept on the High D Wing of the super max portion of the Kirkland Correctional facility. This facility houses the six (6) most difficult to manage inmates in the entire South Carolina Department of Corrections. (R. 1652-53, Tr. p. 1568-1569). Previously, Mahdi had been on the High C Wing. While on the High C Wing a "hammer-like" weapon was found in Mahdi's cell. (R. 1653, Tr. p. 1569). Mahdi was transferred to one of the six (6) super-secure cells because of this weapon and his history of making similar objects. (R. 1655, Tr. p. 1571). According to the testimony during the sentencing hearing, these six

(6) inmates are kept differently than the other twenty-three thousand (23,000) inmates in the Department of Corrections. (R. 161661-62, Tr. p. 1577-1578). These six (6) cells are even more secure than death-row. (R. 1662, Tr. p. 1578). While in one of these super-secure cells, Mahdi made a rope and somehow obtained two pieces of contraband metal, of which one was sharpened to a point. (R. 1656-57, Tr. p. 1572-1573).

During the trial before Judge Newman, a homemade handcuff key was found in Mahdi's possession. (R. 1664-65, Tr. p. 1580-1581). The handcuff key was found after Mahdi had persuaded his courthouse security detail to remove leg braces or irons and replace them with shackles. (R. 1319-21, Tr. pp. 1235-1237). Mahdi admitted he had made the key in the Department of Corrections, 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, Tr. p. 1582-1583). 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 watchfulness of guards. (R. 1319-21, Tr. pp. 1235-1237). The Sheriff of Calhoun County testified that he tried the handcuff key on three pairs of handcuffs. Sheriff Summers was able to open two sets of handcuffs with the key. (R. 1667, Tr. p. 1583). Summers testified Mahdi could have easily used the key to take his restraints off and assaulted someone in the courtroom. (R. 1670, Tr. p. 1586).

The Sentencing Order

On December 8, 2006, Judge Newman issued his twelve (12) page sentencing order which he read into the record. The order was filed with the Calhoun County Clerk of Court the same day. 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, (2) the

murder of James Myers was committed during the commission of a burglary. (R. 1845, Sent. 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 these other two aggravating circumstances it had alleged beyond a reasonable doubt.⁶ Therefore, Judge Newman did not consider or give any weight to these two 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 showing Mahdi had committed a series of crimes including 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 that the State had established by clear and convincing evidence Mahdi's bad character and propensities. 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 and mentality at the time of this murder, twenty-one (21). Judge Newman noted that the last time Mahdi's I.Q. was tested at age fourteen (14), his I.Q.

⁶These 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 one hundred and eight (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 (14). Judge Newman found that at twenty-one (21) 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 and neither 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 Department of Juvenile Justice 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 determination as to the sentence to be imposed. (R. 1849, Sentencing Order, p. 8).

Judge Newman also considered the testimony offered by Mahdi of prison adaptability. While Judge Newman considered the testimony of the 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 that Mahdi had consistently been disruptive

and uncooperative and had threatened to kill prison employees. Judge Newman found that prison officers had repeatedly found homemade weapons, ropes, and other contraband in Mahdi's cell. 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 that 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).

Judge Newman also considered Mahdi's guilty plea(s) as a non-statutory mitigating circumstance in determining the appropriate sentence to be imposed. *Mahdi requested* that Judge Newman consider his guilty plea(s) as a non-statutory mitigating circumstance. 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 Mahdi's attempted escape through the use of the homemade key. Additionally, Judge Newman found that Mahdi had failed to demonstrate any remorse for his actions at any point in time known to the Court. Therefore, while he considered this non-statutory mitigating circumstance, 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 that the victim, James Myers, was a husband, father, grandfather, son and friend to many. Judge Newman found that Captain Myers was a well-respected police officer, an outdoors-man, a mentor, and a treasured member of humanity. Judge Newman found that Mahdi burglarized Captain Myers' farm shed and stole his family's sense of security and serenity. Judge Newman found Mahdi, in committing these crimes, robbed the Myers' family and their friends of their right to peaceful enjoyment of life. (R. 1851, Sentencing Order, p. 10).

Judge Newman, in setting forth his final decision, noted that he was acutely aware of the awesome decision he was being required to make, and he pointed out that he did not take it lightly. Judge Newman also noted that he considered Mahdi's plea for mercy and the State's plea for justice. In evaluating these two ideals, Judge Newman pointed out that he was reminded of his sworn duty to preserve, protect, and defend the Constitution of this State and the United States of America. Judge Newman pointed out that this obligation that he had was not only to Mikal Mahdi, but just as importantly, this was an obligation that he had to the citizens of the State 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 seems not to exist in Mikal Dean Mahdi.
(R. 1824, 1851, Tr. p. 1740, ll. 14-18, 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, Tr. p. 1741, Sentencing Order, p. 11). Judge Newman then stated as follows: “ 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, Order p. 11). Judge Newman then formally sentenced Mahdi to death. (R. 1853, Sentencing Order, p. 12).

II.

On August 18, 2009, possibly with the assistance of some counsel, Mahdi filed a *pro se* application for post-conviction relief (2009-CP-09-00164). In the Application, Mahdi alleged only one ground:

Ground: 10(a) Ineffective assistance of counsel

Supporting facts: 11(a) 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 under the Sixth and Fourteenth Amendments and Strickland v. Washington, 466 U.S. 668 (1984).

The State filed its Return on December 3, 2009 denying the allegations and moving to dismiss Mahdi’s PCR Application with prejudice.

On March 19, 2010, Mahdi, through collateral counsel, filed an Amended Application for Post-Conviction Relief. In this Application, Mahdi re-alleged Ground One above (see Ground 10(a)/11(a)(i) of the Amended Application) and alleged the following additional grounds⁷:

⁷In his Amended Application in March, and in his Amended Application in July Of 2010, Mahdi prefaced his grounds with the following language: 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*, rather than a simple allegation of “Ineffective assistance of counsel” allegation that was alleged in his *pro se* application.

(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.

(See Amended Application p. 2). Applicant alleges 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 92003); Rompilla v. Beard, 545 U.S. 374 (2005); Council v. State, 380 S.C. 159, 670 S.E.2d 356 (2008). The State filed its Return and moved to dismiss the application on April 30, 2010.

On July 29, 2010, in keeping with this Court's Scheduling Order, collateral counsel filed another (2nd or Final) Amended Application for post-conviction relief re-alleging Ground 11(a)(i) from his first *pro se* application, and Grounds 11(a)(ii) and (a)(iii) from his Amended Application of March 19, 2010. In addition to these previously alleged grounds, Mahdi also alleged the following two (2) grounds:

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

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.

Counsel's conduct in each instance, separately and cumulatively was [allegedly] both unreasonable

and prejudicial in sentencing. Strickland v. Washington, 466 U.S. 668 91984); 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).

III.

Standard of Review

In a post-conviction relief 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 that "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, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

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, 286 S.C. 441, 334 S.E.2d 813 (1985). An applicant must overcome this presumption to receive relief. 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." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). 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 117-18, 386 S.E.2d at 625. In the context of a guilty plea, the applicant also must establish prejudice by proving that "counsel's constitutionally ineffective performance affected the outcome of the plea process." Hill v. Lockhart, 474 U.S. 52, 59 (1985). In the guilty plea setting, in order to show prejudice, the applicant must show that 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. In order 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). Again, [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 in its recent decision in Wong v. Belmontes, ___ U.S. ___,

2009 WL 3805746 (2009) that 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, applicant “must show ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Id.*, quoting *Strickland*, 466 U.S. at 694.⁸ That showing requires applicant to establish that had counsel acted competently there is a reasonable probability that the jury [or judge, as in this case] would have returned with a different sentence. *Id.*, quoting *Wiggins v. Smith*, 539 U.S. 510, 535, 536, (2003).

The Lack of Merit of Mahdi’s Grounds

Ground 10(a)/11(a)(i) of the Final Amended Petition

There is no merit to this allegation above. Respondent denies this allegation and moves to dismiss this ground with prejudice. If this Court does not grant the motion to dismiss, Respondent denies the allegations of this ground and requires strict proof thereof.

Counsel was not ineffective in failing to object to the challenged portion of Judge Newman’s Sentencing Order, because 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 sentencing judge, Judge Newman, to consider his guilty plea(s) as a non-statutory mitigating circumstance. Judge Newman did consider the guilty plea(s) as a non-statutory mitigating circumstance, however Judge Newman chose not to give this non-statutory mitigating circumstance great weight. (R. 1848, 1850, See Sentencing Order, pp. 7 & 9). In his sentencing order which was read into the record, Judge Newman stated as follows:

The defense further argues a non statutory mitigating circumstance

⁸See also *Smith v. Spisak*, 558 U.S. ____ (2010).

-- 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 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. 1850, 1822-23, Sentencing Order, p. 9, Tr. pp. 1738-1739).

Mahdi engages in a strained reading of one sentence of this one paragraph of a twelve (12) page capital sentencing order in an attempt to vacate his death sentence. In his direct appeal brief, Mahdi removed this *one sentence* from this paragraph and alleged that sentence standing alone is evidence that the trial judge considered the initial exercise of Mahdi's right to a trial by jury as *a circumstance supporting the imposition of the death penalty*.⁹ (See Brief of Appellant, p. 9, ll. 18-21). Mahdi is clearly overreaching.

⁹Mahdi alleges the following sentence:

The defendant's guilty plea occurred during the fourth day of his trial following jury selection, but prior to the jury being sworn,
is evidence that Judge Newman considered his exercise of his right to a trial by jury as evidence in aggravation. (See Brief of Petitioner/Appellant).

A plain reading of the order and this paragraph shows nothing more than Judge Newman accurately recounted in his Order and for the South Carolina Supreme Court, or any reviewing court, when Mahdi's guilty plea occurred in response to *Mahdi's request* that he consider his guilty plea as a non-statutory mitigating circumstance. 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 (1993)(trial judges are presumed to know the law and apply a narrowing definition to this state's death penalty statute), referencing Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047 (1990).

Following this *one sentence*, Judge Newman then immediately pointed out that the guilty plea occurred just one day following Mahdi's escape attempt through the use of a homemade handcuff key. Judge Newman found this to be significant. It is important to note at this point that Judge Newman had earlier pointed out that this escape attempt was a significant evidentiary fact in his refusal to give great weight to another mitigating circumstance, Mahdi's argument that prison adaptability should mitigate toward his receiving a life sentence. (See Sentencing Order, pp. 8-9). Likewise, Judge Newman recited when the plea occurred so the Supreme Court or any reviewing court could clearly understand the sequence of events vis-a-vis Mahdi's escape attempt. Again, in considering Mahdi's plea as a non-statutory mitigating circumstance, as *Mahdi* requested, Judge Newman found that this fact should not be given great weight because the plea occurred one day after Mahdi's failed attempt to escape.¹⁰

Judge Newman could certainly infer from the timing of the guilty plea(s), i.e. after Mahdi's

¹⁰The notification of the court of the discovery of the handcuff key, in real time, is set forth at pages 1234-1237 & 1242 of the transcript. Sheriff Summers testified during the sentencing hearing about finding the handcuff key and the escape attempt. (R. 1663-1670, Tr. pp. 1579-1586).

escape attempt was discovered, that Mahdi realized he could not escape and there was no reason to further delay the proceedings. In the next sentence, Judge Newman also pointed out that Mahdi failed to demonstrate any remorse for his actions at any point in time known to him. Even though he considered the guilty plea(s) as a non-statutory mitigating circumstance, Judge Newman concluded that no significant weight should be given to this requested non-statutory mitigating circumstance given the fact that the plea occurred after a failed escape attempt and given the fact Mahdi showed no remorse whatsoever. Judge Newman could certainly have inferred from Mahdi's conduct during the plea and sentencing proceeding that Mahdi pled guilty because he thought he had a better chance of receiving a lighter sentence (a life sentence) before Judge Newman, not because he was sorry for what he had done or was accepting responsibility for his actions.¹¹

Judge Newman did not sentence Mahdi to death because he participated in voir dire and selected a jury. That inference cannot be found anywhere in this paragraph or anywhere in the twelve (12) page sentencing order.¹² Judge Newman simply refused to give the guilty plea(s) "significant weight" as a mitigating circumstance given that the plea(s) occurred one day after

¹¹Mahdi's argument is also not borne out by the grammar Judge Newman used in this paragraph in his sentencing order. Immediately following the sentence regarding the discovery of the handcuff key Judge Newman uses the prepositional phrase "[i]n addition" before discussing the fact that Mahdi showed no remorse during his plea(s). If Judge Newman had considered Mahdi's participation in jury selection as an aggravating circumstance, the prepositional phrase "[i]n addition" would have been immediately before the sentence discussing discovery of the handcuff key. The placing of this phrase before the sentence about remorse shows that Judge Newman considered two and only two factors in rejecting Mahdi's request to consider his plea(s) as non-statutory mitigating circumstances: (1) discovery of the escape attempt, (2) and Mahdi's lack of remorse during his plea proceedings.

¹²Mahdi cited several state and U.S. Supreme Court cases in his brief that stand for the proposition that in sentencing a defendant a trial judge may not punish a defendant for the exercise of a constitutional right including the right to a jury trial. Respondent agrees this is the law. Unfortunately for Mahdi, he has failed to show anywhere in the record that Judge Newman engaged in such conduct.

Mahdi's failed escape attempt and noting the fact that Mahdi did not express any remorse for his crimes during his guilty plea or sentencing proceeding. The fact that Judge Newman set forth when the plea took place does not mean he considered Mahdi's participation in voir dire and jury selection as an aggravating circumstance. Mahdi's strained reading of this one sentence of Judge Newman's order is simply not supported by the record. Mahdi is overreaching in an attempt to vacate the death sentence he deserved for this heinous murder.

It must be remembered that Judge Newman was *asked or requested* by Mahdi to consider his *guilty plea as a non-statutory mitigating circumstance*. As previously stated, this *one sentence* only sets forth for any reviewing court when the plea took place. Judge Newman's comments in the remainder of this paragraph of his order must be interpreted in the context they were made: in response to Mahdi's request that he consider his guilty plea(s) as a non-statutory mitigating circumstance. Therefore, they cannot be considered as findings of circumstances of aggravation as Mahdi alleges. The remainder of the paragraph clearly sets forth why Judge Newman refused to give great weight to the alleged non-statutory mitigating circumstance. Mahdi has taken the statements in this paragraph completely out of context. The inference he argues from this *one sentence* cannot be found in the sentence standing alone and certainly cannot be found if the sentence is placed in the context in which it was made.

Even assuming *arguendo* that Judge Newman was not just reciting factually what occurred below in this *one sentence* and instead considered the timing of the plea(s), Judge Newman did not sentence Mahdi to death for engaging in voir dire and selecting a jury. Even assuming *arguendo* Judge Newman considered the timing of the plea, it does not necessarily follow that considering the timing of the plea also means the judge punished Mahdi for engaging in voir dire and jury selection.

As previously stated, Judge Newman refused to give great weight to the plea(s) as a non-statutory mitigating circumstance for two reasons; (1) Mahdi did not plead guilty until the day after he was caught with a handcuff key and his escape attempt failed, and (2) he did not express remorse at any time during his plea. Judge Newman could also have determined that the guilty plea(s) should not be given great weight as a mitigating circumstance because Mahdi did not plead guilty until after he and his attorneys, or he alone, made a strategic decision, after seeing the composition of the jury that was selected and would decide his fate, that he had a better chance at obtaining a life sentence from Judge Newman. The fact that the plea(s) were a strategic decision is born out by the fact that Mahdi showed no remorse during his plea proceedings, indicating that his plea was nothing more than a calculated roll of the dice by him as to what was in his best interests.

All of the reasons listed above are valid reasons for not giving great or significant weight to the fact that Mahdi entered a guilty plea. In deciding whether to give weight to a non-statutory mitigating circumstance of a guilty plea, Judge Newman was entitled to take into account that Mahdi only pled guilty after having viewed the jury that was going to decide his sentence of life or death, and only then, decided his chances of receiving a life sentence were better with Judge Newman as the sentencing authority than with the jury he had selected. Given the circumstances of how the guilty plea came about, Judge Newman could certainly consider as one factor in whether to give the plea(s) great weight as a mitigating circumstance that Mahdi sought to be sentenced by the judge as the lesser of two evils, a *strategic decision*, after viewing the twelve jurors who would decide his fate. Considering such facts, Judge Newman was not punishing Mahdi for exercising his right to a trial by jury, but considering the reality and timing of how and why the plea(s) came about when they did, including the fact that the plea(s) were not an acceptance of responsibility by Mahdi for what

he had done, but a strategic decision by Mahdi of what was in his best interests. Given that the guilty plea(s) were not an acceptance of responsibility but a calculated roll of the dice by Mahdi as to what was in his best interests, Judge Newman was entitled to not give the guilty plea(s) significant weight as a non-statutory mitigating circumstance.

Also in this regard, even assuming *arguendo* Judge Newman considered the timing of the plea(s), Judge Newman was also entitled, when considering how much weight to give this *alleged* non-statutory mitigating circumstance, to consider the timing of the plea(s) in relation to the State's preparedness to try Mahdi's case. The record reflects that the State was prepared to proceed with both the guilt and penalty phase of Mahdi's trial, and was prepared to establish his guilt by overwhelming evidence. (R. 1357-1367, See Tr. pp. 1273-1283). The State was prepared to establish, before the jury already selected, that Mahdi stole the .380 pistol, a car tag, and a vehicle while in Virginia.¹³ The State was prepared to establish that Mahdi car-jacked the Ford Expedition, found approximately one (1) mile from Myers' body, from Columbia, S.C. using the same .380 pistol, and left the car he stole from Virginia in a parking lot near the scene of the car-jacking. The State was prepared to establish that Mahdi ditched the stolen Expedition behind the Wilco station located near Captain Myers' farm and that Madhi fled from the Wilco station and came upon Myers' shed and broke into it. The State was prepared to establish that Mahdi murdered Captain Myers and was later captured in Florida in Myers' truck that was stolen from the scene of Myers' murder. The State was also prepared to establish that Mahdi sold the murder weapon and the gun he used to car-jack the Expedition, in Jacksonville, Florida. In considering whether to give the guilty plea(s) great

¹³Judge Newman had ruled *in limine* that the jury would not be allowed to hear about the murder in North Carolina, only about the theft of the items from Virginia, because of their relation to the car-jacking in Columbia and the eventual murder of Captain Myers in South Carolina.

weight as a non-statutory mitigating circumstance, Judge Newman was entitled to consider that the State was prepared to and going to prove Mahdi guilty if he went forward with a jury trial, and Mahdi knew this. This was not punishing Mahdi for engaging in voir dire and jury selection, but considering the reality of how and why the guilty plea(s) came about.

After Mahdi's conviction, in the penalty phase to follow, the State was prepared to establish before the jury, that was seated but not sworn, that Mahdi had an extensive juvenile record in the State of Virginia. The State was also prepared to prove Mahdi had been convicted in Virginia of a serious assault as an adult. The State was also prepared to prove in the penalty phase that Mahdi had committed another murder in North Carolina. Finally, the State was prepared to prove to the jury that Mahdi had a terrible prison adaptability record, including an assault on another inmate, an assault on a correctional officer, threats to assault other correctional officers, and an escape attempt during jury selection. In considering whether to give the guilty plea(s) great weight as a non-statutory mitigating circumstance, Judge Newman was entitled to consider the State was prepared to and in fact did prove each of these facts in the penalty phase of the trial, and Mahdi knew they were prepared to and going to prove these facts to the jury. Considering these facts in deciding not to give great weight to the guilty plea(s) as a non-statutory mitigating circumstance was reasonable. It was not punishing Mahdi for participating in voir dire and selecting a jury. It was considering the reality of how and why the guilty plea(s) came about.

If Judge Newman did consider the timing of Mahdi's guilty plea in not giving the guilty plea(s) great weight as a non-statutory mitigating circumstance, he was certainly entitled to consider that the plea(s) were entered because Mahdi believed he would be convicted by the jury he had chosen, and he believed the jury would most likely sentence him to death given the evidence of his

character and future dangerousness the State was prepared and ready to enter into evidence in the penalty phase. Not giving great weight to the guilty plea(s) as a non-statutory mitigating circumstance was reasonable given the record before the court, and was not punishing Mahdi in any way for participating in voir dire or selecting a jury but considering the reality of how and why the guilty plea(s) came about.

Additionally, Judge Newman may have set forth when the plea(s) occurred so it would be clear to any reviewing authority that Mahdi entered his guilty plea(s) freely, voluntarily, intelligently, and knowingly. Judge Newman in setting forth when the plea(s) occurred makes perfectly clear Mahdi knew he was entitled to a trial by jury, because he had already chosen one, and Mahdi chose to waive and give up that right when he entered his guilty pleas. The inference Mahdi would have this Court accept from this *one sentence* in a twelve (12) page order is not supported by the record. See State v. Davis, 336 S.C. 329, 520 S.E.2d 801 (1999)(sentence reversed where judge's statements clearly revealed he improperly considered the defendant's exercise of his right to a trial by jury in sentencing the defendant); State v. Hazel, 317 S.C. 368, 453 S.E.2d 879 (1995)(sentence reversed where the record clearly showed the judge relied heavily on exercise of right to jury trial in rejecting YOA sentence); State v. Brouer, 346 S.C. 375, 386-88, 550 S.E.2d 915, 921-22 (Ct. App. 2001)(sentence reversed where judge's improper consideration of defendant's exercise of his right to a trial by jury was inherent in court's commentary and record failed to reveal an otherwise appropriate basis for disparate sentences).

The record in this case reveals Mahdi was sentenced to death only for appropriate reasons. State v. Burkhardt, 371 S.C. 482, 487-488, 640 S.E.2d 450, 453 (2007)(appropriate basis for sentencing someone to death is the circumstances of the crime and the character of the accused);

State v. Woomer, 278 S.C. 468, 471, 299 S.E.2d 317, 319 (1982)("[C]onsideration of the character and record of the individual offender and the circumstances of the particular offense" is considered, in fact, to be "a constitutionally indispensable part of the process of inflicting the penalty of death.") *quoting* Woodson v North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991 (1976). *See also* State v. Atkins, 303 S.C. 214, 220, 399 S.E.2d 760, 763 (1990)(appropriate punishment in a death penalty case should be based on the circumstances of the crime and the characteristics of the defendant).

The circumstances of the crime, Myers' murder, were horrendous. It was proved beyond a reasonable doubt that Mahdi murdered Captain James Myers during the commission of a burglary and during the commission of a grand larceny, both statutory aggravating circumstances. S.C. Code Ann. Section 16-3-20 (C)(a)(1)(c)&(e). It was proved that Myers was murdered on his own property inside his own work shed. Myers was shot nine (9) times with his own rifle, which Mahdi had appropriated for his own use. Myers was shot four (4) times in the chest and three (3) times in the head. After murdering Captain Myers, Mahdi poured diesel fuel on Myers' body and set it on fire. Mahdi then stole items belonging to Captain Myers including two of his guns and his truck. The circumstances of this horrendous crime are detailed in Judge Newman's sentencing order.

Mahdi's bad character was also firmly established by the State. It was proven that Mahdi previously burglarized buildings, robbed individuals, assaulted individuals including officers and inmates, sold drugs, and vandalized property. It was also proven that even in the most secure of prison facilities, Mahdi was able to fashion a handcuff key for an escape attempt. Finally, it was proven that Mahdi murdered another human being in North Carolina in a callous and evil fashion. Mahdi's bad character is also detailed in Judge Newman's sentencing order.

The record and Judge Newman's order establish Mahdi was sentenced to death only for the

legally recognized appropriate reasons. The record reveals and Judge Newman's sentencing order details that Mahdi was sentenced to death only for the circumstances of the crime he committed and his bad character or characteristics. Therefore, this ground has no merit and counsel could not have been ineffective in failing to object to this portion of the sentencing order. Furthermore, Mahdi cannot show prejudice because even if counsel would have objected to this one sentence in the sentencing order, Mahdi cannot show there is a reasonable probability Judge Newman would have changed his sentencing order or Mahdi's sentence, or that the South Carolina Supreme Court would have reversed his death sentence because of this one sentence.

Mahdi Did Not Exercise His Right to a Trial by Jury

Furthermore, Mahdi did not exercise his right to a jury trial but waived his right to a jury trial. State v. Downs, 361 S.C. 141, 604 S.E.2d 377 (2004). The right to a jury trial is the right to have a jury decide the issues in a case. See Ludwig v. Massachusetts, 427 U.S. 618, 96 S.Ct. 2781 (1976)(essential feature of right to jury trial is that group of laymen representative of cross-section of community should have duty and opportunity to deliberate, free from outside attempts at intimidation, on the question of a defendant's guilt); Baldwin v. New York, 399 U.S. 66, 90 S.Ct. 1886 (1970)(state may not deprive a defendant of his liberty for non-petty offenses without affording him an opportunity to have a jury determine his guilt). While it is true that the State and Mahdi had selected a jury to hear his case, the jury was not sworn, did not hear opening remarks by the trial judge or the attorneys, did not hear any evidence, did not hear closing arguments, did not deliberate, and did not decide Mahdi's guilt or innocence or what punishment he should receive. Simply stated, Mahdi waived his right to a jury trial before the actual trial began. Downs, supra (by pleading guilty

defendant waived his right to a trial by jury on guilt and sentencing).¹⁴ Judge Newman could not have erroneously considered Mahdi's exercise of his right to a trial by jury in sentencing Mahdi to death, because Mahdi did not exercise his right to a trial by jury, but waived that right and pled guilty.

Conclusion on this issue

Mahdi's allegation of ineffective assistance of counsel in this regard is baseless. Judge Newman did not sentence Mahdi to death for participating in voir dire and selecting a jury. Mahdi's assertion is not supported by Judge Newman's sentencing order or the record. Instead, Mahdi was sentenced to death only for the appropriate basis, 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. Strickland; Wong; Wiggins. This ground of this Amended Application should be dismissed with prejudice.

To the extent this Court denies Respondent's Motion to Dismiss this ground, Respondent denies the allegations of this ground and requires strict proof thereof.

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

Nor is there any merit to Mahdi's second allegation. Respondent denies this allegation and moves to dismiss this allegation with prejudice. To the extent this Court denies the motion to dismiss this allegation, Respondent denies this allegation and requires strict proof thereof.

This allegation is vague and ambiguous. Mahdi does not specify what advantages of jury

¹⁴While the U.S. Supreme Court has noted that participation in jury selection is an integral party of the right to a trial by jury, Mahdi waived that right and his initial participation in jury selection by pleading guilty.

sentencing he is referring to or how counsel's advise regarding advantages of jury sentencing was inadequate. This ground should be dismissed as vague and ambiguous.

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. pp. 1324-1368). After Mahdi indicated that he may choose to enter a guilty plea, court was 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. p. 1332-1336) The record reflects that discussions in this regard had already occurred before Mahdi indicated to the Court through counsel that he may enter a plea of guilty. (R. 1329-1332). 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 jurors and alternates had been seated but not sworn at the time Mahdi indicated he might enter a plea of guilty. (R. pp. 1370-1371). After having overnight to discuss these issues further with his attorneys, Mahdi told the Court he wanted to enter a plea of guilty. (R. p. 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 enter a plea of guilty. (R. pp. 1336-1343). Doctor Michael Cross testified that Mahdi understood what a guilty plea meant and he also understood the risks and benefits of entering into a plea and had a rational understanding of both, and what the possible consequences of each might be. (R. p. 1340). Mahdi also told the Court that he was competent to plead guilty and he wanted to move forward with the guilty plea. (R. p. 1342). Judge Newman found on the record that Mahdi was competent to plead guilty. (R. p. 1343).

During a lengthy colloquy with the Court, Mahdi was placed under oath. (R. p. 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. p. 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 (12) jurors would have to unanimously agree that he should be sentenced to death. (R. p. 1347-1348). Mahdi also stated under oath that he understood that by pleading guilty the Judge would solely determine the sentence, not all twelve (12) jurors. (R. p.1349). Mahdi also told Judge Newman that he had had enough time to discuss his decision to plead guilty with his attorneys as well as his family. (R. p. 1351). Mahdi stated he had no complaints against his attorneys, was fully satisfied with them, and he did not need any more time to discuss anything with them. (R. p. 1268). Mahdi also acknowledged that understanding the nature of the charges, the possible penalties, including the possible penalty of death, and the other possible consequences of his guilty plea, and understanding his constitutional rights, that he wanted to plead guilty. (R. p. 1356). The record shows *Mahdi* 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. pp. 1324- 1368). The record shows Mahdi made the decision, to enter a plea of guilty and have Judge Newman sentence him rather than the jury he had selected and impaneled, knowingly, intelligently, and voluntarily. (R. pp. 1324-1368). 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).

Given the vague allegations of this ground and the record, this ground should be dismissed with prejudice. Strickland; Hill.

As a result of this record, Respondent also submits Mahdi cannot show prejudice either.

Given this record, the advice Mahdi was given, and the evidence that would have been admitted against Mahdi before a jury, Mahdi cannot meet his burden of proof to show there is a reasonable probability he would not have pled guilty and would have proceeded to trial. Hill v. Lockhart. This ground must be dismissed.

Furthermore, Respondent is informed and believes that Mahdi was adequately advised by trial counsel of the advantages of jury sentencing, and with that knowledge and understanding, Mahdi chose to plead guilty freely, knowingly, and voluntarily. Mahdi cannot show deficient performance or prejudice in this regard. Strickland; Hill. Respondent denies this allegation and requires strict proof thereof.

To the extent this Court denies Respondent's Motion to Dismiss this ground, Respondent denies this allegation and requires strict proof thereof.

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

Nor is there any merit to Mahdi's third allegation. Respondent denies this allegation and moves to dismiss this allegation with prejudice. To the extent this Court denies the motion to dismiss this ground, Respondent denies this allegation or ground and requires strict proof thereof.

This ground is vague and ambiguous and should be dismissed. Mahdi has not alleged what mitigation evidence his trial attorneys failed to investigate, failed to uncover, or failed to present in the sentencing phase of this trial other than his vague reference to Mahdi's family, social, institutional, and mental health history. Nor has Mahdi alleged how counsel's investigation was deficient or how the failure to discover or introduce this evidence prejudiced him other than the same vague reference above. Therefore, this ground must be dismissed with prejudice.

Furthermore, the record supports that counsel did a thorough mitigation investigation and

presented what mitigation was favorable to Mahdi. (See Sentencing Phase Transcript). Mahdi will not be able to meet his burden of proof to show counsel's performance in this regard was deficient or meet his burden of proof to show prejudice. Strickland; Wiggins; Wong.

The record shows counsel did a thorough mitigation investigation including retaining and calling as a witness an expert in clinical social work, Marjorie Hammock, who did a bio-social assessment of Mahdi's life and family history. (R. p. 1747). Ms. Hammock interviewed Madhi's grandmother, his paternal uncle, another paternal uncle, his paternal aunt, his mother, his maternal aunt, and another maternal aunt. (R. p. 1746-1747). Ms. Hammock testified she conducted her bio-social assessment by interviewing family members, reviewing records, interviewing the defendant himself, and taking information from anyone who would give information about him, his life, and his development. (R. p. 1662). Ms. Hammock testified that she reviewed a synopsis of Madhi's school records and reviewed a report from his mental health and voluntary admission in Baltimore. (R. p. 1747).

Ms. Hammock testified to Mahdi's chaotic childhood which included his mother abandoning him at a young age, his father being unable to care for him, and his being separated from his brother. (R. pp. 1748-1749). Ms. Hammock also testified that Mahdi had to go to live with an aunt and uncle because of his father's inability to care for him, and that Mahdi had been hospitalized on one occasion as an adolescent. (R. p. 1747, 1749). Ms. Hammock testified this was a voluntary admission to a mental health facility and Mahdi was released. (R. p. 1756).¹⁵ Ms. Hammock also

¹⁵The testimony at the original Blair hearing was that Mahdi was not suffering from any mental illness. (R. p. 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. p. 1346). When asked if he had any physical, emotional or nervous problem that might keep him from understanding what he was doing, Mr. Mahdi stated "I have none of those problems, Your Honor." (R. p. 1347).

testified that Mahdi had difficulty in his adolescence which eventually resulted in his incarceration. (R. p. 1749). Ms. Hammock testified that Mahdi's family life was unstable and because of Mahdi's father's personal problems, he was not able to take care of the family. (R. p. 1751). Ms. Hammock testified there was conflict in the home between Mahdi's mother and Mahdi's father, and the children witnessed this. (R. p. 1751). Ms. Hammock told Judge Newman Mahdi's mother left to get away from the abuse. (R. p. 1751). Ms. Hammock testified that the family moved around, and Mahdi had difficulty in school. (R. p. 1752). Ms. Hammock testified that there was continued conflict between Mahdi's father and his own family, and more conflict with the mother when she returned, such that she had to leave again. (R. p. 1752). Ms. Hammock testified that Mahdi was a poor reader and he was described in school as having poor self-esteem. (R. p. 1753). The mitigation testimony showed that Mahdi eventually went to live with an aunt and uncle. (R. p. 1753). Mahdi's uncle described Mahdi as a bright and energetic boy but troubled and that Mahdi could not read. (R. p. 1753). Ms. Hammock's mitigation testimony continues for approximately nine (9) more pages which included Mahdi's lack of an appropriate role model and difficulties in school and difficulties living with his mother. (R. p. 1754-1762). Given Ms. Hammock's extensive testimony in mitigation, and due to Mahdi's vague allegations, this ground must be dismissed with prejudice.

Respondent is also informed and believes, based on the vague nature of this allegation and the record, that Mahdi will be unable to demonstrate prejudice here because much, if not all, of the evidence Mahdi will offer regarding his family, social, institutional, and mental health history will be cumulative to evidence presented in Mahdi's capital sentencing proceeding. (See Tr. of Sentencing Proceeding and exhibits). *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); Jones v. State, 504 S.E.2d 822 (S.C. 1998)(no prejudice shown where mitigation evidence presented at PCR was not that different from evidence presented at trial).

Furthermore, given this record, Mahdi will not be able to show prejudice with regard to this penalty phase issue. Wong v. Belmontes; Strickland v. Washington. Mahdi will not be able to show that but for counsel's alleged ineffective assistance, there is a reasonable probability that Judge Newman would have returned with a different sentence. Wong. 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. This ground should be dismissed with prejudice.

Based on the vague nature of these allegations and the record in this case, this ground has no merit and should be dismissed with prejudice.

Additionally, Respondent is informed and believes trial counsel conducted a proper mitigation investigation, however, many of Mahdi's family members were resistant and uncooperative in that investigation, and many of Mahdi's family members either refused to be involved and/or knew matters about Mahdi that would have been harmful to trial counsel's attempt to present a mitigation case on Mahdi's behalf. Respondent is also informed and believes that counsel made objectively reasonable trial strategy decisions not to call some mitigation witnesses or introduce certain evidence, and therefore, such decisions are not subject to a claim of ineffective assistance of counsel. Strickland, 466 U.S. at 689 (objectively reasonable trial strategy is not a basis

for ineffective assistance); Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995)(standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel, and petitioner must overcome presumption that the challenged actions were an appropriate and necessary trial strategy). Respondent is also informed and believes Mahdi will not be able to meet his burden of proof to show deficient performance or prejudice in this regard. Strickland; Wong.

Respondent is informed and believes that counsel conducted an adequate and thorough investigation of mitigation evidence, and presented what mitigation evidence counsel could present under the circumstances then and there presented at trial. Strickland v. Washington; Wiggins v. Smith. As a result, Respondent denies the allegations of this ground and requires strict proof thereof.

To the extent this Court denies Respondent's Motion to Dismiss this ground, Respondent denies this allegation and requires strict proof thereof.

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

Nor is there any merit to this fourth allegation. Respondent denies the allegations of this ground and requires strict proof thereof.

This ground is vague and ambiguous and should be dismissed. Within this ground, Mahdi does not assert what developmental deficits he is referring to. As such, the ground is vague and ambiguous and should be dismissed.

Second, applicant has failed to state a claim upon which relief may be granted. Assuming Mahdi's if referring to his alleged "mental age" allegation in Ground 10(b)/11(b), the record shows Mahdi was twenty-one (21) years old at the time of the crime. The record also shows Mahdi was not mentally retarded. (See Blair hearing testimony and testimony of R&E evaluation). 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. 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. Counsel could not have been ineffective in failing to object to his sentence on a ground not recognized by the law. This ground must be dismissed.

Nor is there any merit to this ground, counsel had Mahdi evaluated by order of the circuit court for competency. (ROA, pp. 8-10). As a result of that examination, it was determined Mahdi had no mental illness. (ROA, p. 131). It was also determined Mahdi was not mentally retarded. (ROA, p. 131). (See also Court's Exhibit 2). It was also determined Mahdi was competent to stand trial. (ROA, pp. 139-140). The record also shows Mahdi was twenty-three (23) years old at the time of his guilty plea. (ROA, p. 1346). The record also shows Mahdi obtained his GED. (ROA, p. 1346). The record also shows that in addition to obtaining his GED, Mahdi had attended some community college. (ROA, p. 1346). The record also shows Mahdi had been previously employed in mostly roofing and brick laying. (ROA, p. 1346). The record also shows Mahdi denied ever having been treated for abuse of alcohol, drugs or for any mental disease. (ROA, p. 1346). Ms. Hammock testified that Mahdi had been hospitalized on one occasion as an adolescent. (R. p. 1747). Ms. Hammock testified this was a voluntary admission to a mental health facility and Mahdi was released. (R. p. 1747,1756).¹⁶ The record also shows Mahdi denied any emotional or nervous problem that might prevent him from understanding what he was doing when he pled guilty. (ROA, p. 1347). The record also shows Mahdi had a good understanding of the legal process. (ROA, p.

¹⁶The testimony at the original Blair hearing was that Mahdi was not suffering from any mental illness. (R. p. 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. p. 1346). When asked if he had any physical, emotional or nervous problem that might keep him from understanding what he was doing, Mr. Mahdi stated "I have none of those problems, Your Honor." (R. p. 1347).

1341). The record also shows Mahdi had a factual knowledge of the legal system. (ROA, p. 1340). And, the record shows Mahdi was competent to plead guilty. (ROA, p. 1342). The Blair hearing record and the plea record also shows Mahdi understood the charges he was facing, including murder, and the legal consequences of being convicted of murder, including the death penalty. (ROA, pp. 1339-1368). At the time the murder of Captain Myers occurred, Mahdi was twenty-one (21) years old. (App. pp. 1357-1368, 1346, 1375). The record also shows that at the age of fourteen (14) years old Mahdi's I.Q. was determined to be 108. (ROA, pp. 1437-1439). In his evaluation at Virginia's DJJ, Mahdi described himself as a leader among his peers. (ROA, p. 1440). And, as his own person. (ROA, p. 1440). The record also shows Mahdi had previously been arrested for a serious assault as an adult and understood that such behavior was against the law and would subject him to punishment by the courts. (ROA, pp. 1472-1487). The record also shows Mahdi knew and understood that use of illegal drugs or possession of a weapon would result in a violation of his adult probation. (ROA, pp. 1487-1491). The record shows he chose to engage in such conduct anyway. (ROA, pp. 1492-1511). As previously stated in the factual recitation, the record also shows Mahdi abandoned the car he stole from Virginia, and commandeered another vehicle in Columbia, S.C. to drive to Calhoun County. The record also shows Mahdi switched tags on the vehicle he stole from Virginia, and placed the tag on the vehicle he stole from Columbia, S.C. After burglarizing Captain Myer's shed, Mahdi altered a shotgun into a sawed off shotgun. After murdering Captain Myers, the record also shows Mahdi burned Captain Myer's body, stole Captain Myer's vehicle, and switched the license plate tag on Captain Myers' vehicle. The record also shows Mahdi sold the murder weapon used in North Carolina in Florida. The record shows Mahdi is educated, has an above average I.Q., is streetwise, was twenty-one (21) years old at the time of the murder, and has

a criminal mentality.

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 this record. Nor can Mahdi show prejudice in this regard under Strickland and Wong v. Belmontes, because the record demonstrates Mahdi is educated, has an above average I.Q., is streetwise, was twenty-one (21) years old at the time of the murder, and has a criminal mentality. Mahdi cannot show there is a reasonable probability had counsel objected to the sentence on the above stated grounds the objection would have been sustained and there would have been a different sentence. This ground must be dismissed.

Respondent is also informed and believes the record 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 should be dismissed.

To the extent this Court denies Respondent's motion to dismiss, Respondent denies the allegations of this ground and requires strict proof thereof.

10(b)/11(b)

There is no merit to this ground either. Respondent denies the allegations of this ground and requires strict proof thereof. Respondent moves to dismiss this ground.

First, this is a claim of trial court error, and a direct appeal issue that is not cognizable on post conviction relief. Ground 10(b)/11(b) is a direct appeal claim that was not preserved for appellate review because there was no objection at sentencing, and this issue, being a direct appeal claim is not cognizable in post-conviction relief. 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.”). This issue is a direct appeal issue that was not preserved at trial and not raised on appeal to the South Carolina Supreme Court. (See Final Brief of Appellant, the Honorable Clifton Newman). Applicant did not raise any allegation at his sentencing proceeding that his sentence was unconstitutional and cruel and unusual punishment based on his “mental age”, nor did he raise this issue in his final brief to the South Carolina Supreme Court. Mahdi v. State. This ground, (10(b)/11(b)) must be dismissed as not cognizable in post-conviction relief. Id.; Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993), *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 (1973); Sellers v. Boone, 261 S.C. 462, 200 S.E.2d 686 (1973). This ground must be dismissed with prejudice.

Second, applicant has failed to state a claim upon which relief may be granted. The record shows Mahdi was twenty-one (21) years old at the time of the crime. The record also shows Mahdi was not mentally retarded. (See Blair hearing testimony and testimony of R&E evaluation). 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. 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. This ground must be dismissed.

Nor is there any factual merit to this ground. As previously stated, counsel had Mahdi evaluated by order of the circuit court for competency. (ROA, pp. 8-10). As a result of that examination, it was determined Mahdi had no mental illness. (ROA, p. 131). There is no testimony

in the record that Mahdi was insane. It was also determined Mahdi was not mentally retarded. (ROA, p. 131). (See also Court's Exhibit 2). It was also determined Madhi was competent to stand trial. (ROA, pp. 139-140). The record also shows Mahdi was twenty-three (23) years old at the time of his guilty plea. (ROA, p. 1346). The record also shows Mahdi obtained his GED. (ROA, p. 1346). The record also shows that in addition to obtaining his GED, Mahdi had attended some community college. (ROA, p. 1346). The record also shows Mahdi had been previously employed in mostly roofing and brick laying. (ROA, p. 1346). The record also shows Mahdi denied ever having been treated for abuse of alcohol, drugs or for any mental disease. (ROA, p. 1346). The record also shows Mahdi denied any emotional or nervous problem that might prevent him from understanding what he was doing when he pled guilty. (ROA, p. 1347). Ms. Hammock testified that Mahdi had been hospitalized on one occasion as an adolescent. (R. p. 1747). Ms. Hammock testified this was a voluntary admission to a mental health facility and Mahdi was released. (R. p. 1747, 1756).¹⁷ The record also shows Mahdi had a good understanding of the legal process. (ROA, p. 1341). The record also shows Mahdi had a factual knowledge of the legal system. (ROA, p. 1340). And, the record shows Mahdi was competent to plead guilty. (ROA, p. 1342). The Blair hearing record and the plea record also shows Mahdi understood the charges he was facing, including murder, and the legal consequences of being convicted of murder, including the death penalty. (ROA, pp. 1339-1368). At the time the murder of Captain Myers occurred, Mahdi was twenty-one (21) years old. (App. pp. 1357-1368, 1346, 1375). The record also shows that at the

¹⁷The testimony at the original Blair hearing was that Mahdi was not suffering from any mental illness. (R. p. 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. p. 1346). When asked if he had any physical, emotional or nervous problem that might keep him from understanding what he was doing, Mr. Mahdi stated "I have none of those problems, Your Honor." (R. p. 1347).

age of fourteen (14) years old Mahdi's I.Q. was determined to be 108. (ROA, pp. 1437-1439). In his evaluation at Virginia's DJJ, Mahdi described himself as a leader among his peers. (ROA, p. 1440). And, as his own person. (ROA, p. 1440). The record also shows Mahdi had previously been arrested for a serious assault as an adult and understood that such behavior was against the law and would subject him to punishment by the courts. (ROA, pp. 1472-1487). The record also shows Mahdi knew and understood that use of illegal drugs or possession of a weapon would result in a violation of his adult probation. (ROA, pp. 1487-1491). The record shows he chose to engage in such conduct anyway. (ROA, pp. 1492-1511). As previously stated in the factual recitation, the record also shows Mahdi abandoned the car he stole from Virginia, and commandeered another vehicle to drive to Calhoun County. The record also shows Mahdi switched tags on the vehicle he stole from Virginia, and placed the tag on the vehicle he stole from Columbia, S.C. After burglarizing Captain Myer's shed, Mahdi altered a shotgun into a sawed off shotgun. After murdering Captain Myers, the record also shows Mahdi burned Captain Myer's body, stole Captain Myer's vehicle and switched the license plate tag on Captain Myers' vehicle. Once in Florida, Mahdi sold the murder weapon used in the North Carolina murder. The record shows Mahdi is educated, has an above average I.Q., is streetwise, was twenty-one (21) years old at the time of the crime, and has a criminal mentality. This ground must be dismissed with prejudice.

Respondent is also informed and believes Mahdi does not have a juvenile mentality, as alleged, but an adult criminal mentality and bad character. And, the record demonstrates the same. This ground should be dismissed.

To the extent this Court denies Respondent's motion to dismiss, Respondent denies the allegations of this ground and requires strict proof thereof.

IV.

Each and every allegation contained within the (2nd or Final) Amended Application not hereinbefore either expressly admitted, qualified, or explained is expressly denied, and strict proof required thereof. To the extent this Court denies Respondent's motion to dismiss any of the allegations of this (2nd or Final) Amended Application with prejudice, Respondent requests this Court convene an evidentiary hearing into any ground not dismissed by this Court.

V.

WHEREFORE, having made Return, Respondent moves and requests that the (2nd or Final) Amended Application for post-conviction relief be dismissed with prejudice. In the alternative, to the extent this Court determines that Respondent is not entitled to dismissal of this action, based on Respondent's denial of these allegations and the record, Respondent asks this Court to convene an evidentiary hearing to fully resolve any issues of alleged ineffective assistance of counsel not dismissed or any other allegations not dismissed.

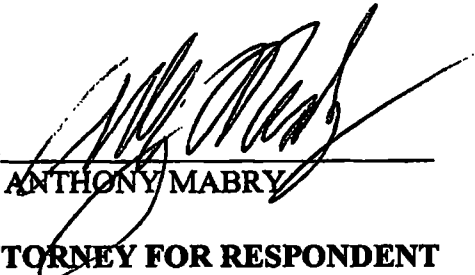
Respectfully submitted,

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August 30, 2010

STATE OF SOUTH CAROLINA

COUNTY OF CALHOUN

MIKAL D. MAHDI (SK #5238),
Applicant,

vs.

STATE OF SOUTH CAROLINA,
Respondent.

IN THE COURT OF COMMON PLEAS

09-CP-09-164

AMENDED APPLICATION FOR
POST-CONVICTION RELIEF

[Note: This application follows SCRCF Appendix of Forms, Form 5, as required by Rule 71.1(b), SCRCF.]

1. Applicant is detained at the Maximum Security Unit, Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210.
2. He was convicted and sentenced in the Calhoun County Court of General Sessions.
3. There were no co-defendants.
4. Applicant was indicted for murder (04-GS-09-0243), burglary (04-GS-09-244), and grand larceny (04-GS-09-242).
5. On December 8, 2006, Applicant was sentenced to death for murder, 15 years' imprisonment for burglary, and 10 years' imprisonment for grand larceny.
6. Findings of guilty were made by The Honorable Clifton Newman after pleas of guilty.
7. The Applicant appealed from the judgment of conviction and sentence.
8. The Applicant appealed to the South Carolina Supreme Court. The court affirmed the convictions and sentences on June 15, 2009. *Mahdi v. State*, 383 S.C. 135, 678 S.E.2d 807 (2009).
9. Not applicable.

10 & 11.

GROUND FOR RELIEF WITH SUPPORTING FACTS

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.

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).

12 & 13. Applicant filed the original application for post-conviction relief on August 18, 2009 in the Court of Common Pleas for Calhoun County. This application is an amendment of the original application, which is still pending. Applicant has not otherwise previously filed a petition for a writ of habeas corpus or post-conviction relief in state or federal court from these convictions and sentences. Other than the petitions, motions, or applications, addressed here and already specified in paragraph 8, Applicant has not filed any other actions related to his convictions and sentences.

14 & 15. None of the grounds set forth in paragraphs 10 & 11 have been previously presented to this or any other Court, State or Federal, except in the original application filed in 2009, which is still pending and is hereby amended.

16. The grounds set forth in paragraphs 10 and 11 have not previously been presented to any court, state or federal, because these grounds rely on additional facts outside the record which was before the previous courts and, under state law, Applicant could not assert the claims of ineffective assistance of counsel on direct appeal. *See State v. Kornahrens*, 290 S.C. 281, 287, 350 S.E.2d 180, 184 (1986).

17&18. Applicant was represented during his trial and sentencing, by Glenn Walters and Joshua Koger, Jr., of the Orangeburg Bar. During the direct appeal, Applicant was represented by Katherine H. Hudgins of the S.C. Commission on Indigent Defense.

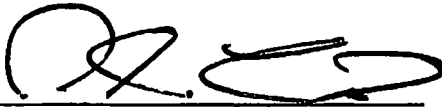
19. Applicant seeks the vacation of his convictions and/or sentences.

20. Applicant is not under sentence from any other court.

Respectfully submitted,

ROBERT LOMINACK
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TERESA L. NORRIS
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By: 
COUNSEL FOR APPLICANT

July 29, 2010.

STATE OF SOUTH CAROLINA

COUNTY OF CALHOUN

Mikal D. Mahdi,
Applicant,

v.

State of South Carolina,
Respondent.

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

Certificate of Service

I do hereby certify that I have served the Amended Application for Post-Conviction Relief, in the above-referenced case, on the attorney for the Respondent by depositing a copy of the same in the United States mail, first class, postage prepaid, addressed as follows:

Anthony Mabry
Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

This the 29th day of July, 2010.


Robert Lominack

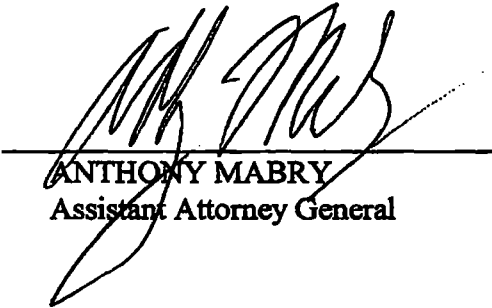
CERTIFICATE FOR SERVICE

I, Anthony Mabry, hereby certify that I have served the *Respondent's Return to the Amended Application and Motion to Dismiss* in the foregoing action by depositing copies in the United States mail, postage prepaid, to the following:

Robert E. Lominack, Esquire
P.O. Box 5508
Columbia, SC 29250

Teresa L. Norris, Esquire
P.O. Box 11744
Columbia, SC 29211

This 30th day of August, 2010.



ANTHONY MABRY
Assistant Attorney General

BLUME NORRIS & FRANKLIN-BEST, LLC

ATTORNEYS AT LAW

JOHN H. BLUME
TERESA L. NORRIS
Elizabeth Franklin-Best
KEIR M. WEYBLE *OF COUNSEL*
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900 Elmwood Avenue, Suite 101
COLUMBIA, SOUTH CAROLINA 29201
PHONE: (803) 765-1044
FAX: (803) 765-1143

October 8, 2014

The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

The Honorable Kenneth Hasty
Calhoun Clerk of Court
PO Box 709
St Matthews, SC 29135

RE: Mikal Mahdi v. State (Calhoun County Capital Post-Conviction Relief Action)

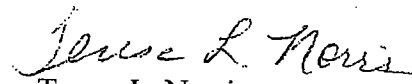
Dear Mr. Shearouse and Mr. Hasty:

Please find enclosed, with proof of service, Mr. Mahdi's Notice of Appeal.

Please be advised that I will continue to represent Mr. Mahdi in the PCR Appeal pro bono as local counsel for Seth C. Farber and Brandon W. Duke, both of whom were previously admitted *pro hac vice* by Order of the South Carolina Supreme Court on February 8, 2013.

Please do not hesitate to contact me if you have any questions in this matter or if I can provide you with any additional information.

Sincerely,


Teresa L. Norris

cc: Anthony Mabry
Seth C. Farber
Bob Dudek
Hugh Ryan
Mikal Mahdi

A000548

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CALHOUN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 09-CP-09-164

Mikal D. Mahdi, #5238, ...Appellant,

v.

State of South Carolina, ...Respondent.

NOTICE OF APPEAL

Mikal D. Mahdi appeals the Amended Order of Dismissal of the Honorable Doyet A. Early, III filed August 20, 2014. Mr. Mahdi's Motion to Alter or Amend the Judgment was denied in an Order filed September 12, 2014. The Orders are attached.

October 8, 2014



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(Admitted Pro Hac Vice)

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CALHOUN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 09-CP-09-164

Mikal D. Mahdi, #5238, ...Appellant,

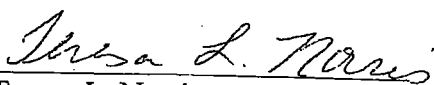
v.

State of South Carolina, ...Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Respondent by depositing a copy of it in the United States Mail, postage prepaid, on October 8, 2014, addressed to Respondent's counsel of record, Anthony Mabry, Assistant Attorney General, Post Office Box 11549, Columbia, SC 29211.

October 8, 2014


Teresa L. Norris
Blume Norris & Franklin-Best, LLC
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Attorney for Appellant

The Court requested that counsel discuss (1) the standards that govern capital trial counsel and (2) the particular failures of Mr. Mahdi's trial counsel. PCR Tr. 715-17. Therefore, below counsel set out the specific standards and principles applicable to trial counsels' efforts in every case and how Mr. Mahdi's counsel failed to meet these standards or adhere to these principles in this case. Finally, counsel summarize what a thorough mitigation investigation has now revealed.²

II. Mitigating Evidence

Due to the finality and irrevocability of the death penalty, the Supreme Court has stressed the "need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). To ensure appropriate sentences in capital cases, the Court has emphasized the importance of presenting to the sentencing body the fullest information possible concerning the defendant's life and characteristics. *See Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion) (holding that preventing the sentencer in a capital case from considering the defendant's characteristics "creates the [unacceptable] risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty"); *see also Jurek v. Texas*, 428 U.S. 262, 271 (1976) (asserting that the sentencing body must have before it all possible relevant information about the individual whose fate it must determine). In other words, for over three decades, the very foundation of a capital trial's fairness has rested on ensuring that the sentencing body be made aware of all mitigating information.

² Because this Court requested that counsel limit this submission to these specific areas, this memorandum does not constitute a complete discussion of the claims for relief.

III. Duties of Trial Counsel

In capital cases, defense counsel have a duty to vigorously investigate and present mitigating evidence.³ This duty requires that counsel “discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.” *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *see also Williams v. Taylor*, 529 U.S. 362, 393 (2000). In addition to the Supreme Court’s jurisprudence regarding the standards that govern trial counsel, in 1989 the American Bar Association promulgated guidelines that set out the standard of practice for defense counsel in capital cases. The ABA revised these guidelines in 2003. The United States Supreme Court and the state supreme court have recognized the ABA Guidelines as the standard of practice and as “guides to determining what is reasonable.” *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *see also Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008). These standards existed at the time of Mr. Mahdi’s trial and governed Mr. Walters’ and Mr. Koger’s efforts in this case. Below counsel discuss the most basic standards that inform any review of trial counsels’ conduct at trial.

A. Standard 1 - Counsel has a duty to investigate the client’s social history.

“It is unquestioned that under the prevailing professional norms . . . , counsel had an ‘obligation to conduct a thorough investigation of the defendant’s background.’” *Porter v.*

³ Mitigating evidence encompasses all information about a person’s background and characteristics, not simply information directly related to the offense itself. *See Lockett*, 438 U.S. at 608; *see also Bailey v. State*, 309 S.C. 455, 461, 424 S.E.2d 503, 507 (1992) (“[T]he [capital] defendant is entitled to produce evidence concerning his childhood and family background in mitigation of his criminal conduct . . .”); *Tennard v. Dretke*, 542 U.S. 274 (2004) (emphasizing that the relevance standard concerning mitigation should be viewed in expansive terms).

McCollum, 130 S.Ct. 447, 453 (2009), quoting *Williams v. Taylor*, 529 U.S. 362, 396 (2000). A

thorough investigation requires an assessment of the following:

- Medical history (including hospitalizations, mental and physical illness or injury, alcohol and drug use, pre-natal and birth trauma, malnutrition, developmental delays, and neurological damage).
- Family and social history (including physical, sexual or emotional abuse; family history of mental illness, cognitive impairments, substance abuse, or domestic violence; poverty, familial instability); other traumatic events such as exposure to criminal violence, the loss of a loved one or a natural disaster; experiences of racism; cultural or religious influences; failures of government or social intervention.
- Educational history and special educational needs.
- Prior juvenile and adult correctional experience.⁴

[ABA Guideline 10.7, *commentary* at 81-82]

A thorough social history is developed through witnesses – both expert and lay witnesses – and records. Therefore, counsel have a duty to locate witnesses and records, which will shed light on the defendant’s childhood and more generally, any other mitigating factors. As discussed *infra*, the failure to find available and relevant witnesses and records warrants reversal of the death sentence.

B. Standard 2 - Counsel must locate and interview all potential witnesses.

The United States Supreme Court and the South Carolina Supreme Court have both found counsel ineffective for their failure to locate relevant witnesses. Indeed, some of the

⁴ Moreover, if – as was the case here – the client was incarcerated, either as a juvenile or an adult, trial counsel should investigate the “possible effect of the facility’s conditions on the client’s contemporaneous and later conduct.” (ABA Guideline 10.7, *commentary* at 84).

failures in these cases bear remarkable resemblance to trial counsels' failures in Mr. Mahdi's case.

- *Williams v. Taylor*, 529 U.S. 362 (2000): Among other things, trial counsel failed to locate and interview potential mitigation witnesses, including a witness who left a telephone message for counsel.
- *Porter v. McCollum*, 130 S.Ct. 447 (2009): Trial counsel ineffective for failing to investigate and present evidence of abusive childhood (including witnessing violence of father against mother), the defendant's long-term substance abuse, and his mental health.
- *Sears v. Upton*, 130 S.Ct. 3259 (2010): Reiterated that a superficially reasonable mitigation presentation at penalty phase is not sufficient and agreed with lower court's finding of deficient performance where trial counsel failed to present evidence of the defendant's traumatic childhood and cognitive dysfunction.
- *Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2009): In its case in aggravation, the state relied on the circumstances of the murder as well as the defendant's numerous disciplinary infractions while incarcerated at as a juvenile and adult. In response the defense offered one witness – his mother – who provided a general social history of the defendant, including that he had attended some type of mental health counseling. Trial counsel had hired a forensic psychiatrist but only provided him an incomplete set of the defendant's school records and some state mental health hospital records. The psychiatrist was primarily focused on the defendant's competency and criminal responsibility. The Court held that even the "limited information obtained should have put counsel on notice that [the defendant's] background, with additional investigation, could potentially yield powerful mitigating evidence."
- *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009): Trial counsel presented the testimony of five witnesses, none of whom discussed the defendant's mental health. The state supreme court found trial counsel ineffective for failing to present the defendant's social history and evidence of his mental illness.

In order to develop information about a client's social history "it is necessary to locate and interview the client's family members . . . and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation, and parole officers, and others." ABA Guideline 10.7, *commentary* at 83. These witnesses can provide vivid first-hand accounts of the client's life. ABA Guideline 10.11,

commentary at 109. In the end, defense counsel are obligated to locate witnesses who are relevant to the client's social history, including:

- The client's friends, teachers, classmates, co-workers, employers, and those who served in the military with the client, as well as others who are familiar with the client's early and current development and functioning, medical history, environmental history, mental health history, educational history, employment and training history, military experience and religious, racial, and cultural experiences and influences upon the client or the client's family.
- Social service and treatment providers to the client and the client's family members, including doctors, nurses, other medical staff, social workers, and housing or welfare officials;
- Witnesses familiar with the client's prior juvenile and criminal justice and correctional experiences;
- Former and current neighbors of the client and the client's family, community members, and others familiar with the neighborhoods in which the client lived, including the type of housing, the economic status of the community, the availability of employment and the prevalence of violence;
- Witnesses who can testify about the adverse impact of the client's execution on the client's family and loved ones.

[ABA Guideline 10.11]

Of course, it is not enough to simply locate the witnesses and interview them once. The most compelling mitigation is often that which family members are most apt to hide. *See Rompilla v. Beard*, 545 U.S. 374 (2005). In *Rompilla* trial counsel believed that they had "established a good relationship" with the defendant and had conducted interviews with five members of his family. Yet, these interviews failed to uncover significant mitigating history, a history that was uncovered with a thorough and adequate investigation in post-conviction proceedings. *Rompilla*, 545 U.S. at 382. The Court recognized that most people will be reluctant to detail mental health problems and may, in fact, try to minimize mental illness in the client and his family. They may also engage in non-disclosure in an effort to cover up their own misdeeds. Therefore, the ability

to identify and overcome barriers to disclosure is necessary to a complete mitigation investigation. Defense teams overcome these common barriers by building rapport with the client and their family. This requires not just repeated visits but thoughtful discussions. All of this takes time. In fact, a congressional committee recognized that client communication is “vastly more time consuming and demanding in a death penalty case . . .” Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation, Committee on Defender Services, Judicial Conference of the United States, 1998, at 15.

C. Standard 3 - Counsel must locate available and relevant records.

The Supreme Court has also recognized that an exhaustive records collection effort is vital to a thorough – and reliable – social history investigation. Records – usually created prior to the crime – can provide powerful corroboration to the witness accounts. Counsel should obtain records not only about his client but also the client’s parents, grandparents, siblings, cousins, and children. This multi-generational investigation frequently discloses patterns of family dysfunction, which may help to establish or strengthen a particular theme in a client’s life. *See generally, Council v. State, supra.*

As with witnesses, courts have found counsel ineffective for their failure to obtain available records and provide the records to the appropriate experts.

- *Porter v. McCollum*, 130 S.Ct. 447 (2009): Trial counsel did not obtain school, medical, or military service records.
- *Williams v. Taylor*, 529 U.S. 362 (2000): Trial counsel found ineffective in part for failure to obtain records that described the defendant’s childhood, that established that the defendant was borderline mentally retarded, and that described the defendant’s good deeds while in jail.
- *Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008): The state supreme court found trial counsel ineffective in part for their failure to obtain relevant records. “[T]rial counsel[]

only obtained the DJJ and state hospital records before trial; did not request certain background records until the day of jury selection; . . . and provided [the only defense expert] with only limited records.” 380 S.C. at 172, 670 S.E.2d at 363. The Court held that counsels’ “conduct fell below the standards set by the ABA.” *Id.* (citing to 11.4.1(2)(C) (1989), requiring counsel to collect information relevant to medical, educational, family and social history, and prior adult or juvenile record). Particularly, the Court found it unreasonable for counsel not to obtain records relating to the defendant’s family.

- *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2004): The state supreme court found trial counsel ineffective for failing to provide records to a mental health expert. This failure resulted in an inaccurate and incomplete portrayal of the defendant’s mental health which allowed the prosecutor to argue in closing that the defendant did not suffer from a mental illness.

At the very least, counsel should attempt to obtain the following records:

- School records;
- Social service and welfare records;
- Medical records;
- Employment records;
- Military records
- Family Court records;
- Criminal and correctional records, and;
- Family birth, marriage, and death records.

[ABA Guidelines 10.7, *commentary* at 84, and 10.11.(F)]

Of course, obtaining the records serves no purpose if trial counsel and the experts do not read them. Counsel must ensure that appropriate records are provided to the mental health experts to ensure that their evaluation is reliable. The failure to provide records to the mental health experts skews their evaluation rendering their assessment unreliable. *Von Dohlen*, 360 S.C. at 606, 602 S.E.2d at 742.

D. Standard 4 – Counsel have a duty to investigate and rebut the government’s evidence in aggravation.

In addition to conducting a mitigation investigation, counsel must also investigate the state’s case in aggravation. After discovery of the evidence that the prosecution intends to introduce, counsel must “thoroughly investigate to determine whether this evidence can be excluded, rebutted or undercut.” ABA Guideline 10.11., commentary at 111. “The notion that defense counsel must obtain information that the State has and will use against the defendant is not simply a matter of common sense.” *Rompilla v. Beard*, 545 U.S. 374, 387 (2005). As the ABA Guidelines make clear, counsel “must also investigate prior convictions, adjudications, or unadjudicated offenses that could be used as aggravating circumstances or otherwise come into evidence.” ABA Guideline 10.7, *commentary* at 85. So, the Supreme Court held that “[E]ven when a capital defendant’s family members and the defendant himself have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of the trial.” *Rompilla*, 545 U.S. at 376.

IV. Trial counsel failed to develop and present available mitigating evidence, which would have provided a compelling reason to sentence Mr. Mahdi to life in prison, rather than to death, and would have provided powerful rebuttal to the state’s evidence in aggravation.

While there is no requirement that Mr. Mahdi establish the origin of trial counsels’ failures, the PCR hearing revealed that trial counsel were narrowly focused on Mr. Mahdi’s competency to stand trial and a diminished capacity defense, because they did not understand the

nature of mitigation.⁵ Mr. Walters seemed to believe that the universe of mitigation revolved around competency or insanity.

Every death penalty case you bring someone in to determine if there is an insanity defense, but in addition to that you want to know if this is any type of handicap that he suffered from. He was coherent. We went to the Blair hearing. He was reasonable. He was coherent. He had a clear understanding and there with [sic] no confusion. You could have a constructive dialogue and he understood the proceedings.

[PCR Tr. 610-11]

For his part, Mr. Koger explicitly linked their failure to present mitigation to his apparent belief that if it did not touch on competency or diminished capacity, it was not worth presenting. “[W]e didn’t have any type of question about the competency of Mr. Mahdi and his ability to participate in his particular defense and it was nothing in those reports of record that would show a . . . sentencing judge that he had diminished capacity. So, [presenting mitigation] was not advantageous in this particular case.” PCR Tr. 690.

The focus on Mr. Mahdi’s competence and mental state at the time of the crimes was also evidenced in the work of the defense experts, who were retained but not called to testify in the trial proceedings. For example, Dr. McKee – the psychologist hired by trial counsel – administered brief “screener” tests geared towards addressing competency or detecting malingering with both being “relevant to and specific to a court procedures [sic] and being in court.” PCR Tr. 551, 557. Dr. McKee candidly admitted that he would not rely on these tests to learn everything about a person’s life. PCR Tr. 557. For his part, Dr. Martin – the psychiatrist

⁵ See *Council v. State*, 380 S.C. at 173, 670 S.E.2d at 363 (trial counsel focused on competency to stand trial and criminal responsibility rather than a complete mitigation investigation).

hired by trial counsel – conceded that his evaluation was focused on Mr. Mahdi’s mental state at the time of the crime. PCR Tr. 543. Moreover, the records that the experts reviewed – and the records that they did not review – are consistent with a team narrowly focused on competency to stand trial or insanity issues. Drs. Martin and McKee principally reviewed discovery – police investigation file, necropsy and pathology reports – provided by the prosecution. PCR Tr. 511, 554. On the other hand neither doctor reviewed Mr. Mahdi’s school records, including his special education records (complete with psychological testing) or his juvenile or adult correctional records despite the fact that these records had been provided to trial counsel. PCR Tr. 530-32.

A. Trial counsel failed to obtain necessary and available records and provide them to expert witnesses focused on mitigation.

Trial counsels’ records collection effort was narrow and incomplete. The collection of Mr. Mahdi’s records was limited and except for the school and employment records of Mr. Mahdi’s brother, trial counsel did not attempt to gather the records of any of Mr. Mahdi’s family members. To make matters worse, some of the very few records trial counsel did gather were not reviewed by any of the defense experts, including the only testifying social history witness – Ms. Hammock. Trial counsels’ failures in this regard were threefold: (1) they failed to obtain relevant and available documents, (2) they failed to review documents that they did have, and (3) they failed to provide relevant documents in their possession to their experts.

Documents Obtained by Trial Counsel

- Incomplete set of Mr. Mahdi’s School Records
- Walter Carter Center Records Documenting Mr. Mahdi’s Hospitalization
- Virginia DJJ and DOC Records Provided by the Prosecution

Documents Not Obtained or Not Reviewed by Anyone

- Special Education School Records
- School Records⁶
- Criminal records regarding Shareef Mahdi
- Psychiatric records regarding Shareef Mahdi
- Military records regarding Shareef Mahdi
- Virginia DJJ or DOC Records

The first list of documents represents the sum total of trial counsels' records collection effort with the exception of materials provided to the defense through discovery. As discussed in detail *infra*, there were a large number of relevant records which trial counsel never obtained. So, even if the defense experts had reviewed all the mitigation records obtained by the defense, they would not have been well-informed. But not a single expert even reviewed the incomplete set of records trial counsel did manage to obtain. For her part, Ms. Hammock – again, the only witness to testify about Mr. Mahdi's social history – only reviewed a “synopsis” of Mr. Mahdi's school records and “a report” of his Walter Carter Center records. Trial Tr. 1747. Similarly, Drs. McKee and Martin reviewed only the Walter Carter Center records. They did not review his school records or his institutional records. PCR Tr. 530-32, 547, 554.

In addition to failing to provide important and relevant records to their experts, trial counsel failed to obtain available records, which were relevant to Mr. Mahdi's social history and were mitigating. Remarkably, it appears that trial counsel never obtained Mr. Mahdi's special education records. This file contained a full psychological assessment of Mr. Mahdi when he was in the fourth grade. On the basis of this assessment and teacher observations, the team found Mikal eligible for special education because he was emotionally disabled. Ms. Hammock provided the Court with a “School Experience Summary” that purported to detail Mr. Mahdi's schooling,

⁶ Drs. McKee and Martin did not review any school records. Dr. Hammock reviewed only a “synopsis” of the records.

but it failed to even note that Mr. Mahdi was placed in special education. As discussed infra, Mr. Mahdi's school and psychiatric records portray him as depressed and in need of significant assistance. Moreover, trial counsel never obtained criminal and military records regarding Shareef Mahdi, Mr. Mahdi's father. These records reveal that Shareef Mahdi was irrational, mentally ill to the point of being hospitalized, and violent.

B. Trial counsel failed to locate and interview available witnesses.

As with the records collection effort, the trial team fared no better when it came to interviews. In fact, the record now makes clear that trial counsel and the mitigation specialist did not conduct one interview outside Mr. Mahdi's family. This is so despite Walters' belief that the family members could not provide useful testimony. PCR Tr. 615, 618.

Family Interviews Conducted by Trial Counsel and Defense Team

- Rose Gupton (maternal aunt)
- Nathan Burwell (paternal uncle)
- Carson and Lawanda Burwell (paternal uncle and aunt)
- Vera Artis (mother)
- Shareef Mahdi (father)
- Corliss Artis (maternal aunt)
- Sophia Gee (maternal aunt)
- Nancy Burwell (paternal grandmother)

Non-Family Interviews Conducted by Trial Counsel and Defense Team

- None

Non-Family Interviews Conducted in Preparation for PCR Hearing⁷

- Sheriff James Woodley (affidavit)
- Dora Wynn (affidavit)

⁷ These interviews are in addition to repeated interviews of family members, including some of whom trial counsel never located, like Sandra Lynn Burwell, whose affidavit was admitted as evidence at the PCR hearing.

- Myra Harris
- Carol Wilson
- Mayor Douglas Pond (affidavit)
- George Smith
- Sharon Pond

C. Trial counsel failed to present powerful mitigating evidence about which they were aware.

Most strikingly, trial counsel failed to present the mitigating evidence they were able to uncover. For example and as discussed *infra*, Carson and Lawanda Burwell had significant contact with Mikal during a pivotal phase of his life. They were aware of Shareef Mahdi's inability to care for Mikal, and they saw first-hand the effects of Mikal's childhood. But they also gave voice to the hope they – and others – had for Mikal as he adjusted to their family.

V. What we know now.

With the benefit of a thorough mitigation investigation we now know that Mr. Mahdi was the product of a chaotic childhood filled with unrelenting violence, abandonment, and seclusion and most importantly, that his childhood affected his mental health in profound ways. While trial counsel conducted a small number of brief family interviews, a thorough investigation required more. The description, detail, and depth of abuse in Mr. Mahdi's background that was brought to light in the evidentiary hearing far exceeded what the trial court was told. The picture trial counsel painted for the trial court was vague, unsupported, and unreliable. While Ms. Hammock vaguely concluded that Mr. Mahdi's home life was "chaotic," to characterize her testimony as revealing a substantial part of Mr. Mahdi's childhood would be a great exaggeration.

Solicitor David Pascoe took full advantage of the defense's failure. Indeed, in closing argument he declared that there was "never any evidence of . . . physical abuse" or a mental

defect. Trial Tr. 1782. “[T]he only thing you find is a lack of supervision.” Trial Tr. 1782. Pascoe continued to denigrate the lackluster mitigation presentation: “their own expert, who gets paid to testify in death penalty trials, State’s Exhibit 2 – Defense Exhibit 2 [a one and a half page “time line”] is the best and only thing they could come up with regards to getting any mitigation on this defendant’s life.” Trial Tr. 1783.⁸ Of course, Pascoe’s portrayal was inaccurate. The evidence before this Court – from testimony, affidavits, and records – revealed Mikal’s traumatic childhood and his lifelong struggle with depression and other mental illnesses.

A. Mikal was born into a troubled relationship.

Mikal was born to Shareef and Vera Mahdi. When he was 23 years old Shareef arranged to marry Vera, who was only 14 years old at the time. The wedding ceremony was described as a very sad affair. Cooper-Lewter Report at 12⁹; PCR Tr. 83-84. Indeed, Vera later reported to a sister that Shareef had raped her on their wedding night. Cooper-Lewter Report at 12; PCR Tr. 85.

⁸ In addition to failing to conduct a thorough mitigation investigation trial counsel also failed to investigate and prepare for the aggravating evidence they knew would be admitted. This evidence came in virtually unchallenged even though we now know it could have been. For example, the prosecution’s centerpiece of evidence in aggravation revolved around the standoff between Mikal, his father and police when Mikal was 15 years old. Allegedly, after the 8-hour standoff had ended, Mr. Mahdi said to a police officer, “one day I will shoot a cop.” The prosecution then used this evidence to imply that the killing of Captain Myers was no mere coincidence. “But let me tell you what’s not a coincidence with regards to killing Captain Myers, a law enforcement officer. I don’t think it’s a coincidence that on June the 30th, 1998 in a standoff with the Brunswick County Sheriff’s Office, Sheriff Woodley came to testify on Monday that a 15-year-old Mikal Mahdi stated, I’m going to kill a cop some day before I die, 15 years old.” Trial Tr. 1773. The prosecutor went on to argue that Mr. Mahdi “hates the police” and that it was his “lifelong goal” to kill a police officer. Trial. Tr. 1774. Had trial counsel spoken to Sheriff Woodley, they would have learned that he was aware of Shareef’s violent tendencies and that Mikal’s post-arrest statement was something he merely “got from his father who had no respect for authority and who had begun the standoff that day.” Affidavit of James R. Woodley at 3.

⁹ Dr. Cooper-Lewter’s report was admitted into evidence at the PCR hearing as Exhibit 20. For the Court’s convenience it is attached to this memorandum as Attachment A.

Shareef had been troubled for years before the marriage. Born Thomas Burwell, he converted to Islam after a stint in the Marines. Shareef tried the Marines again but was discharged "under less than honorable conditions." Shareef was disobedient and complained of the Marines' "barbaric mannerisms." Cooper-Lewter Report at 12. His brother recalled that "something happened to him" during his second stint with the Marines. "[I]t made him a more radical person, angry person." PCR Tr. 34. As time went by Shareef became more violent and increasingly irrational.

Shareef and Vera constantly argued and Shareef frequently erupted into violence. On one occasion Mikal watched his father pull his mother by the hair and then body slam her into a glass table. Mikal and his brother, Saleem, were pleading with their father to stop hurting their mom. Shareef told them to "shut up" and accused them of being "soft." Cooper-Lewter Report at 14.

B. Mikal's Mother Leaves.

Eventually, when Vera could not bear any more of Shareef's abuse, she told him that she and the boys were leaving and she began to pack Mikal's and Saleem's clothes. This announcement resulted in another argument that turned violent. Shareef warned Vera that he would kill his sons before allowing her to take them. PCR Tr. 87, 96-97. Vera left without the boys. Mikal was four years old. Shareef told Mikal and Saleem that their mother had abandoned them because she did not love them. This was, of course, not true and Vera tried to see Saleem and Mikal, but Shareef would not allow it. Indeed, on one occasion he assaulted Vera when she attempted to see her children. PCR Tr. 98. Eventually, he told his sons that their mother was dead. Cooper-Lewter Report at 15; PCR Tr. 100.

In addition to the feeling of abandonment that Mikal now faced, he was left with his father who simply could not – and did not – adequately care for him. Mikal was virtually unsupervised and was responsible for caring for himself. Cooper-Lewter Report at 3; PCR Tr. 40. The rest of Mikal's history is littered with remnants of the hurt he experienced from this perceived abandonment.

By the time Mikal began school, he was beginning to exhibit the toll that the trauma had inflicted on him. The one page School Experience Summary relied upon by Ms. Hammock at trial certainly did not capture the reality of Mikal's educational experience. By the first grade Mikal was already at his third school. Mikal was struggling:

We're pleased to have Mikal at Chamberlayne. I do wish he were happier here. Mikal is making steady progress in math. His rate of achievement in reading makes it difficult for him to keep up with the class. If he does not improve in his reading we may need to discuss the possibility of retention. We need to work on self-control. This lack of self control is affecting him adversely both academically and socially.

[Cooper-Lewter Report at 17]

Shortly after this comment was written, Mikal was withdrawn and transferred to the University of Islam and then to another public elementary school – his fifth school in two years.

C. Mikal Goes to Live with Relatives

When Mikal was eight years old, it was apparent to relatives that Shareef was simply incapable of caring for his two sons. Mikal and his brother, Saleem, were split up with Saleem going to Texas to live with relatives and Mikal going to Baltimore to live with his aunt and uncle, Carson and Lawanda Burwell. PCR Tr. 43.

It was apparent to Lawanda that Mikal was still struggling with the loss of his mother. PCR Tr. 45. He blamed himself for his family's breakup and on one occasion said that his mother left because "I'm just stupid." PCR Tr. 257. Around this time he was overheard at school saying, "Why doesn't somebody just shoot me? If I had a gun, I would shoot myself." PCR Exh. 9; PCR Tr. 47. Alarmed by Mikal's statements, school officials recommended psychiatric treatment, but Carson and Lawanda did not pursue any counseling at the time.

During that summer, Mikal and Saleem spent a month with their father. Mikal learned for the first time that his mother was alive. Shareef used Mikal and Saleem as bait to lure Vera out of her sister's house and into his truck. Once she was in the truck – in her pajamas and without shoes – Shareef used a toy gun to threaten her. He drove her to his family home. On the way there he yelled at and repeatedly hit Vera. All the while Mikal and Saleem were begging their father to stop hitting her. Once they arrived at his family home, Shareef took Vera into the woods near a creek where he continued to assault her. Eventually, someone intervened and Vera escaped into a car. Shareef caught up to her and was trying to pull her out of the car. Mikal ran to his mother and tried to save her from Shareef. Later Shareef beat his own mother for her role in Vera's escape. Affidavit of James. R. Woodley at 2; PCR Tr. 202-03.

When Mikal returned to his aunt and uncle's home, Lawanda noticed that he appeared noticeably sadder than he was before the stay with Shareef. Cooper-Lewter Report at 20. Just two weeks after returning, Mikal ended up in a psychiatric hospital after making suicidal statements to a police officer who was called to the home to investigate a report of child abuse. Cooper-Lewter Report at 21. Once admitted to the hospital, 9-year-old Mikal told a psychiatrist, "I will jump off a bridge, shoot myself or kill myself with my bows and arrows." Cooper-Lewter Report

at 21. When the psychiatrist asked him to list three wishes – a standard question during an evaluation – he listed only one – “I want my family to be together, that’s all I wish for.” *Id.*

Psychological testing confirmed the sadness noticed by others. The testing revealed that Mikal was suffering from “profound depression, significant losses, and preoccupation with death, anxiety and . . . some unconventional loose and disorganized thinking and the possibility of past experiences with trauma . . .” Cooper-Lewter Report at 21-22. Mikal was diagnosed with Major Depression. Dr. Myers, a psychologist who had worked with children and adolescents at the William S. Hall Institute for 25 years, testified that a diagnosis of major depression in a child this young is rare. PCR Tr. 429.

Nevertheless, Mikal began to show improvement while in the hospital and after two months he was discharged. He returned to the third grade where – with the substantial help of his teacher, Myra Harris, – Mikal began to show real progress. When Mikal first joined Ms. Harris’ class, he was withdrawn and not willing to engage in activities. PCR Tr. 112, 117. However, Ms. Harris began to see significant improvement in his behavior. Mikal was turning in assignments and was warm and pleasant towards others. In short, Ms. Harris saw “leaps and bounds in progress” and viewed Mikal as a “success story.” PCR Tr. 117. At the end of third grade – with Ms. Harris – Mikal was “in a very good place” and had a successful year in school. PCR Tr. 269.

D. Mikal Returns to Live with Shareef

This progress, however, did not last once Mikal was in the fourth grade and removed from Ms. Harris’ substantial involvement. Lawanda Burwell described this as a “turning point.” PCR Tr. 269. At the same time Mikal learned that his brother Saleem was back with his father in Virginia, he made it clear he wanted to be there, too. PCR Tr. 52. In the middle of the school

year, Mikal was sent back to Shareef who was no more capable of caring for Mikal than he had been previously. PCR Tr. 53. Carson Burwell saw Mikal only one time after he returned to live with Shareef. PCR Tr. 53-54.

The principal of the elementary school recalled that when Mikal had started kindergarten there, he was a "cute little boy who was shy at first." But when he returned to school in the fourth grade, she noticed a change in Mikal. He rarely smiled and seemed angry. Affidavit of Dora G. Wynn at 1. The following year, Mikal was referred for a special education assessment. Consistent with his previous psychiatric hospitalization, the evaluation revealed "depressive tendencies, lack of self esteem and feelings of hopelessness." PCR Tr. 137. His teacher, Ms. Wilson, noted that Mikal was depressed and that he "exhibited periods of extreme sadness at times." PCR Tr. 134. Mikal was found eligible for special education in the emotionally disabled program. Mikal's fifth grade teacher noted that Mikal was never disrespectful but that he was very sad. PCR Tr. 143, 145.

Rather than allow the school to continue to help Mikal, Shareef took him out of school in the 5th grade. He was only 11 years old. No one from the school system followed up with Shareef or Mikal, a failure which Ms. Wilson characterized as Mikal getting "lost in the cracks." PCR Tr. 147.

The local sheriff, James Woodley, and a prosecution witness at trial, knew of Shareef's instability and was concerned when he learned that Mikal had been withdrawn from school. Sheriff Woodley made a referral to the Department of Social Services but DSS and school officials failed to follow up on the referral. Affidavit of James R. Woodley at 2.

Shareef became increasingly unstable. He raved about the "New World Order" and "white folks coming to kill him," and he articulated a very real hatred for white people. Cooper-Lewter Report at 26; PCR Tr. 171. One day Shareef jumped into an all white swimming pool and refused to come out. Eventually, the police asked a respected local black leader, George Smith, to assist. Mr. Smith was able to coax Shareef out of the pool and to the jail. There Mr. Smith witnessed Shareef's rage. "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 . . . it was just as violent as anything I have ever seen in my life." PCR Tr. 176. Shareef was taken to a psychiatric hospital. Evaluators noted his delusional and paranoid behavior but ultimately discharged him back to the jail with a personality disorder diagnosis.

Shareef's mental state continued to worsen. In April of 1997 he was arrested following an argument with his sister during which he smashed her car with a cinderblock. Cooper-Lewter Report at 28; PCR Tr. 33; Affidavit of James R. Woodley at 2. Following his arrest, Shareef attempted to escape from the jail. This earned him additional time in jail.

E. Mikal is arrested for the first time

When Mikal was just 14 years old he was arrested for grand larceny and tampering with a vehicle. As noted by Dr. Haney, from the time Mikal was 14 until he was 21, he would spend 86 out of every 100 days in an institution. PCR Tr. 369. During his DJJ evaluation, evaluators noted his "depressive tendencies, feelings of hopelessness, [and] problems with self-esteem" as well as "incompetent parenting and poor guidance, supervision and monitoring in an unstable nomadic dysfunctional family." Cooper-Lewter Report at 30. Mikal spent months in DJJ and was released in June 1998.

Just two weeks later, officers appeared at Shareef's house to arrest Mikal – wrongly as it became clear later – for failing to appear for court. Shareef insisted that they have a “standoff.” Shareef and Mikal remained holed up in the house for 8 hours while law enforcement was outside. Neighbors heard Shareef screaming religious slogans out the window. Shareef described Mikal as “frantic” during “the siege,” and said Mikal was praying. Cooper-Lewter Report at 31. Mikal was again incarcerated at DJJ for a year and a half. During this time Mikal was diagnosed with depression. Indeed, at times the evaluators felt that his depression was so overwhelming that Mikal became psychotic. Nevertheless, Mikal was released from DJJ custody without any requirement of therapy or group home placement or any other assistance or structure. PCR Tr. 377.

F. Wallens Ridge State Prison.

Five months after being released from DJJ, Mikal was arrested for a serious assault. He was sentenced to 15 years in adult prison. During this incarceration he had almost no psychological or psychiatric contact. PCR Tr. 381. A year and a half into his sentence Mikal was transferred to Wallens Ridge State Prison, a super maximum security prison known for employing the types of harsh techniques that have been repeatedly shown to cause psychological damage. PCR Tr. 387. The guards were predominantly white and the inmates were virtually all minority. Mikal frequently heard officers say things like, “I can't wait to kill me a nigger.” Some officers called Mikal “camel monkey” and “towelhead” because they said he looked like he was from Afghanistan. Cooper-Lewter Report at 36. He was again released without support or any aftercare plan but with the same lifelong problems.

G. Mikal Mahdi suffered from significant mental illnesses.

Dr. deRosset Myers and Dr. Donna Schwartz-Watts – a psychologist and psychiatrist, respectively – both evaluated Mr. Mahdi and both concluded that he has suffered from two life-long mental illnesses – major depression and attachment disorder. PCR Tr. 421-22, 460. Both of these illnesses were consistent with Mr. Mahdi's social history and helped to explain his behavior as a child and adolescent. Indeed, the inappropriate behavior and aggression revealed in Mr. Mahdi's records are very consistent with his childhood depression diagnosis. PCR Tr. 463, 467.

H. Missed Opportunities and Mercy.

In addition to information that was relevant to Mr. Mahdi's social history, the witnesses who testified at the PCR hearing told about periods of real hope but also missed opportunities in Mr. Mahdi's life. Teachers Carol Wilson and Myra Harris as well as Carson and Lawanda Burwell all provided a glimpse into the human side of Mr. Mahdi. When Mikal was two years old, Lawanda Burwell remembered him as an "active, bright little boy." PCR Tr. 253. Each of them testified about his real efforts to improve and to overcome his problems and how he was failed by the people in a position to help. Carol Wilson observed:

I felt that we could have helped him because really and truly [the school psychologist] really wanted to help Mikal and I just feel so lost about the fact that it 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. You can come over and see Mikal. But I never saw Mikal after that and it's just – I do wish I could have done more.

[PCR Tr. 146]

Based on their relationship with Mr. Mahdi each of them had a reason to ask for mercy. And each of them would have asked the sentencing judge for mercy had they been called as

witnesses at Mr. Mahdi's trial. This alone would have been a reason to spare Mr. Mahdi from the death penalty. *See Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009).

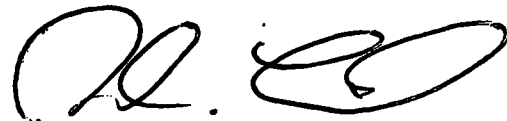
VI. Conclusion

The vague, incomplete, and inaccurate testimony of the one trial witness called to relate Mr. Mahdi's social history did not come close to telling the real story of Mr. Mahdi's life. Trial counsels' failure to investigate, develop, and present available mitigating evidence rendered the trial unreliable and unfair.

Respectfully submitted,

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A handwritten signature in black ink, appearing to be 'R. Lominack', written over a horizontal line.

Counsel for Mr. Mahdi

January 2, 2012

STATE OF SOUTH CAROLINA)
)
COUNTY OF CALHOUN)

IN THE COURT OF COMMON PLEAS
Case No. 2009-CP-09-164

Mikal D. Mahdi,)
)
)
Applicant,)

v.)

Certificate of Service

)
State of South Carolina,)
)
Respondent.)
)

I hereby certify that a copy of the foregoing Applicant's Post-Hearing Memorandum was served, via First Class, postage prepaid mail, to:

Anthony Mabry
SC Office of the Attorney General
PO Box 11549
Columbia, SC 29211

January 3, 2012



Robert Lominack

ATTACHMENT 1

Mikal Deen Mahdi Social History Assessment

Defendant: Mikal Deen Mahdi Interviewed

DOB: 03/20/1983

POB: Petersburg, Virginia

Ethnicity/Race: African American

County: Petersburg

Location: Crime- SC; Incarcerated- Broad River, Columbia, SC

Vital Statistics Reviewed

Birth Certificate

School Records Reviewed

School Records – Henrico County Schools (Elementary)

School Records – Baltimore County Schools (Elementary)

School Records -- Overby Sheppard – Richmond Public Schools

Certificate of Award for Academic Achievement – Baltimore/Scotts Branch Elementary

Certificate for Outstanding Achievement in Art – Baltimore/Scotts Branch Elementary

Brunswick County Public Schools Lawrenceville Virginia

Commonwealth of Virginia Department of Correctional Education - Hanover

Employment History

Credit History

Military Records Reviewed

Not Accepted by Marines

Arrest/Jail Records Reviewed

Incident Report Regarding Vandalism of Car

Court Record – Felonious Assault

Court record – Break and Enter

Crutchfield Statement

Brunswick County Sheriff's Office Consent to Search

Parole/Probation and Prison Records Reviewed

SCDC Grievance and Discovery Records

Juvenile Records Reviewed

Virginia Department of Corrections

DJJ Reception & Evaluation

Virginia DJJ Records

Kembridge Youth Development System Records

Virginia DJJ Correspondence

Mikal Deen Mahdi Social History Assessment

Medical Records Reviewed

Brunswick County Public School Sociocultural Report
DHMH Walter P. Carter Center Baltimore, Maryland
Virginia Department of Youth and Family Services
VA Documents Mental Health Screening
SC Department of Mental Health

Media Records

News Article regarding Police Standoff

Additional Records Reviewed

Court Records – Obstruction of Justice (Shareef Mahdi)
Psychological Records (Shareef Mahdi)
Criminal Court Records (Shareef Mahdi)
Military Records (Shareef Mahdi)
VA Hospital Records (Shareef Mahdi)
McGuire VA Medical Center Records (Shareef Mahdi)
Miscellaneous Information (Shareef Mahdi)
School Records – Brunswick Elementary and High School (Shareef Mahdi)
School Records (Saleem Mahdi)
Job Corps Records (Saleem Mahdi)

Immediate Family

MOTHER: Vera (Tilea) Annette Artis (Maiden Name) Interviewed

FATHER: Shareef Mahdi Interviewed

Carson Burwell – Paternal Uncle Interviewed

Lawanda Green Burwell – Wife of Paternal Uncle Interviewed

Frances Reid – Maternal Aunt Interviewed

Rose Gupton – Maternal Aunt Interviewed

Sophia Artis Gee – Maternal Aunt Interviewed

Sandra Wynn Burwell – Paternal Aunt by Marriage Interviewed

Deborah Grey, LCSW – Interviewed Paternal Grandmother Nancy Burwell Interviewed

Teacher's, Family and Friends

Pastor Myra Harris – Former Elementary School Teacher Interviewed

Carol Wilson -- Learning Disability Teacher Totaro Elem. School 4th/5th grades. Interviewed

Community and Demographic Profiles Reviewed:

Lawrenceville, Virginia (Including Saint Paul College)
Richmond, Virginia
Petersburg, Virginia
Baltimore, Maryland

Mikal Deen Mahdi Social History Assessment

SUMMARY OF FINDINGS

Mikal Deen Mahdi

I examined the life history of Mikal Deen Mahdi until his release from Wallens Ridge, Virginia.

I found evidence that Mikal's social history paints a picture of emotionally damaging experiences of severe "unpredictable" repeated losses and destabilizing "unexplained" repeated changes at key developmental times in his childhood.

Among the most damaging experiences were the abandonment by his mother around the age of five and the persistent disregard for Mikal's emotional needs for comfort, affection, and physical needs by his father. These risk factors were made worse by inter-generational alcoholism, major depressions, domestic violence, interpersonal brutality, child molestation, rape and bitter resentments about unfair issues of race.

Family and Cultural Context:

Mikal was born into an extended family of fragile people who were often overwhelmed by their efforts to find acceptance in society, especially in light of racial and socioeconomic issues. Beyond racial necessities, Mikal's extended and immediate family had their own traumas and damaged pasts, which impacted on their abilities to properly care for Mikal.

The Greatest Love and Loss in Mikal's Early Years – Age 5 Mother's Abandonment.

*"Exposure to trauma causes a rupture, a possible regression, and a state of being 'stuck' ...
(Danieli, 1998)*

*"Children under 8 years old tend to interpret most events in relation to the self.
(Black & Newman, 2000)*

Mikal's mother's "abandonment" of him and his brother overwhelmed a developmentally fragile Mikal (between four and almost five years of age). Too young to understand the loss of his mother, Mikal was devastated and yearned for his mother's return. The impact of these severe losses at key developmental times in Mikal's life was increased by the emotional instability and economic difficulties of his father. His father's unstable state of mind and inability to provide financially could be characterized as "a lack of regard for Mikal's emotional needs for comfort and affection." Too often, the physical needs of Mikal were left to Mikal. For example, Mikal from the ages of 5-8 years old was virtually unsupervised and responsible for taking care of, and figuring out life (comforting) himself. He was physically and emotionally isolated by a severely and chronically depressed father who would slide into suicidal ideation and rants of rage. This resulted in failed attempts to provide the resources to overcome Mikal's unresolved grief, and to create an environment of emotional safety and uplifting nurturance expected in healthy parenting. The frequent repeated changes that followed would not give Mikal

Mikal Deen Mahdi Social History Assessment

time to resolve his sense of loss and form new relationships.

The four almost five year old Mikal felt "robbed" of love from those who were supposed to love him (i.e. his mother and father). He yearned for a solution to the chaos and trauma of witnessing abuse (e.g. beatings, and seeing his father pull his mother's hair out). He went through predictable "changes," of feeling angry, becoming hypervigilant, numb (ambivalent), avoidant and resistant to comforting while yearning and searching for what would bring his mother back and cement the family back together.

At age 8, Mikal was surprised to find his mother was alive, but witnessed the kidnapping and possible "attempted murder" of his mother by his father. Mikal was further traumatized by the beating of his grandmother by her son, his father for "helping his mother escape."

Emotionally overwhelmed, Mikal started putting up a barrier to others, especially adults (and authority figures). He tried hard to please his father and gain his father's respect. He tried to protect his mother, and keep the family together. Traumatically, Mikal was unable to protect his mother, keep the family together or save himself from the pain of feeling "stupid" in the process. At the Walter Carter Psychiatric Center, at age 9, Mikal was asked to list three wishes. He listed one, "I want my family to be together, that's all I wish for."

One Bright Hope - Missed

At age 10, Mikal went to Baltimore to stay with his father's brother Carson and his wife Lawanda. Remarkably, Mikal who was still hurt and angry began to feel and do better. He had a teacher, Ms. Myra Harris whose specialty was working with challenged children. Ms. Harris listened to him and encouraged him without labeling and lecturing him. His best year in school and the possibility of future success ended when finding out his brother had returned home and wanting to be with his brother and father, he acted up until he was allowed to return to his father. Home schooling by his father meant growing up isolated and being lectured to by his father religiously and passionately about the "unfairness" of white people.

Disregard for Emotional Needs of Mikal – Emotional Abandonment & Betrayal by Father

By the age of 10 and clearly by age 13 he experienced a role reversal when he was "drafted" by his father and his father's inability to parent effectively to become the "provider and protector" for his father and older brother. Not feeling acceptable because of his race, emotionally deserted and betrayed by his father, isolated without consistent adult care, preached to religiously about the unfairness of white people, and abandoned by his mother at an early age, a severely grieving Mikal began to feel there were no solutions - only problems. He retreated from any situation or relationships that threatened to open him up for possible hurt, abandonment or betrayal.

Being a man, being tough, being a warrior against unfairness and injustice and not letting people take advantage of you and your family were common themes his father intensely taught on sometimes a daily basis. Yet, the teacher, his father Shareef repeatedly let his son down. The first time Mikal was to report to court as a juvenile, his father failed to take him. At age 15, the second juvenile justice encounter for Mikal in which he was being arrested for a crime he had

Mikal Deen Mahdi Social History Assessment

already served time resulted in a stand-off between his father and Mikal and law enforcement. Eventually, Mikal was arrested and his father told the authorities the stand-off was his son's idea. Again abandonment and betrayal were at the hands of those who are supposed to love you and you should be able to trust.

Socially Rejected -- Abandoned & Betrayed & Alone

In January of 2003, Mikal was transferred to Virginia's Wallens Ridge State Prison, known for harsh techniques to control the inmates. Wallens Ridge is a supermax facility in rural Appalachia. Mikal describes Wallens Ridge as an isolated rural place with a blighted local economy. The guards were largely locals, white men who had never dealt much with urban life or minorities. The overwhelming majority of the inmates were minorities while the overwhelming majority of the officers were white. The atmosphere was charged with racial tension. Mikal recalled that officers would often use racial epithets towards the inmates. Mikal would hear officers routinely say things like, "I can't wait to kill me a nigger." [*Mikal Mahdi*]. Wallens Ridge taught Mikal that everything his father had taught him was true. It became clear, there was little or no hope for Mikal. There would be no jobs waiting for him. Abandoned by his mother, betrayed by his father and fighting daily against all odds to survive, Mikal experienced the worse of the incarcerated life - repeated torture for infractions imagined and real by racist guards. His father's ranting and raging was correct. The world was not fair and did not want Shareef's son, Mikal.

What to look for in a child (initial trauma pre-school) "abandoned and betrayed," forced to watch violence against mother by father, desire to stop violence witnessed but impotent to stop beatings, broken family dynamics, a persistent disregard for Mikal's emotional needs for comfort, and affection, and physical needs and taught to hate and rage over racial and domestic "unfairness."

Low self-esteem, low self-worth, and a lack of self-efficacy
Hypervigilant, irritable, overly reactive - being "on the lookout" for danger, difficulty concentrating or paying attention, inability to trust others, fearful
Depression, social withdrawal, ambivalence, resistive, avoidant, and profound sadness
No outlet for anger often results in aggression, stealing, lying, self-harm, engaging in risky behaviors
Intense inner or emotional pain resulting in suicidal ideation or attempts at suicide
Upsetting emotional or physical reactions to reminders of the abuse experience.
Efforts to avoid talking, thinking, and having feelings about traumatic events, and avoiding any reminders of the event, numb feelings of detachment, social withdrawal.
Stunted emotional development.

Mikal's life was filled with risk factors that can explain how a child can be failed by family.

Full social history

A detailed social history assessment for Mikal and his family follows:

Mikal Deen Mahdi Social History Assessment

I. Mikal Deen Mahdi

Mikal Mahdi was born in Petersburg, Virginia on March 20, 1983, to 29 years old Shareef Mahdi (aka Thomas Lockwood Burwell) and 19 years old Vera Annette Artis (aka Tilea Mahdi). He has one older brother, Saleem Mahdi, who was born September 13, 1981.

According to his mother, Mikal "was a good and perfect baby, was her favorite, and was the happiest baby." Vera gave an example of the strength of their relationship and of how happy Mikal was as a baby. "He'd sing while he was eating, and I [would] sing along with him."

Family Culture and Societal Context:

Mikal Deen Mahdi was born into an extended family whose daily realities were over and over again overwhelming. Beyond the social limitations and frustrations of their cultural and racial relations growing up in the Jim Crow South, the family often lacked resources, such as enough money to buy goods and services. The daily realities also included dealing with chronic and severe depressions, alcoholism, inter-generational legacies of domestic disputes and violence, keeping secrets of interpersonal brutality, and bitter resentments.

Simply, Mikal was born into a family of fragile people who were often overwhelmed. His extended and immediate family had their own traumas and damaged pasts, which impacted on their abilities to properly care for Mikal.

II. Maternal Family History

Mikal's mother, Vera, is the daughter of George and Julia Mae Artis both of Sussex County, Virginia; however, it is widely believed in the family that George is not Vera's

Mikal Deen Mahdi Social History Assessment

biological father. He was incarcerated for alcohol related offenses during the time she would have been conceived. To make matters worse, on a daily basis George told everyone – including Vera – that she was not his child. [*Rose Gupton, Sophia Gee*]. For a time, Vera was sent to live with her grandmother in Pottsville, Virginia. She was staying there, when at about age five, she was sexually assaulted by a teenage boy from the neighborhood. [*Vera Mahdi*].

Vera's family was extremely impoverished much of the time, although circumstances improved for a few years when George was able to obtain a decent job and the family was able to buy a home. After only a few years, however, due to George's continued alcoholism, the family lost the home and returned to their impoverished life. Julia, fed up with life with George, divorced him when Vera was about 12 and moved the family to Petersburg, where she converted to Islam and did what she could to support the family, including "seeing men" and arranging the marriage for Vera. [*Rose Gupton, Sophia Gee*].

Vera is described by her own sisters as always being "odd and peculiar," "reclusive," and very much "a loner and stand offish," although she was "very smart and very artistic." [*Rose Gupton, Sophia Gee*].

III. Paternal Family History

Mikal's father was born Thomas Burwell on February 24, 1954. His maternal great-grandmother was a white woman from Brodnax, Virginia. She was impregnated by the family's black gardener who is believed to have been subsequently murdered by her family. The great-grandmother took her son, William Anderson "Buck" Thomas to live in Boston. He was well educated and attended Harvard University. He returned to Brodnax where he bought land and worked as a farmer and a veterinarian. It was reported that he had medical training but could not

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get medical license so he settled on practicing as a veterinarian. One of his daughters, Nancy, is Shareef's mother. [*Nancy Burwell, Mikal Mahdi*].

Shareef's father, Nathan Burwell, Sr., was a high school and then college professor at St. Paul's college in Lawrenceville. Nathan married, but his wife and child died in childbirth. He was devastated by this loss. Ultimately he ended up with Nancy who was 20 years younger and had been his high school student. Nancy would later inform her children and their spouses that he coerced her into sex or raped her. Regardless, Nancy became pregnant and her family insisted she and Nathan marry. [*Carson Burwell, Lawanda Burwell*]. Nathan initially resisted and moved to New York City where he worked as a butler for a year. He missed the prestige of life as a professor, however, and returned to Virginia where the school rehired him only on condition that he marry Nancy. [*Carson Burwell*]. From all accounts their marriage was always an unhappy one with each of the children born to them conceived in rape. [*Carson Burwell, Lawanda Burwell*].

Shareef was the fifth of six children born to Nancy and Nathan. Nancy had never wanted children and requested a hysterectomy only moments after Shareef was born. But Nathan would not allow it. [*Carson Burwell*]. Some people in the family believed that Nathan was trying to kill Nancy through childbirth. [*Lawanda Burwell*]. Nevertheless and despite having small children, Nancy completed college at St. Paul's, she later earned a Master's Degree from the University of Virginia, and taught junior and senior high school for 25 years. [*Carson Burwell, Lawanda Burwell*].

Nathan taught agriculture at St. Paul's. In the evenings he went out to help black Brunswick County farmers, and consequently was rarely home for dinner or to spend time with his children. [*Lawanda Burwell*]. When he was home, he had a toxic relationship with his wife, with the two barely speaking to each other, except to argue. Nathan always compared Nancy

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unfavorably to his first wife, while degrading her and being disrespectful in every possible way. Nancy's children, particularly her sons, generally shared their father's views of Nancy and all are still openly critical of her even in her presence. [*Carson Burwell, Lawanda Burwell*]. Not surprisingly, Nancy left Nathan several times taking the children with her to Baltimore but always returned to his house, because she could not support the children on her own. [*Shareef Mahdi*].

Nancy was also unavailable, at least emotionally, to the children. Her maternal grandmother and paternal grandfather were Caucasian – Nancy is very light skinned. In the Jim Crow South, a light or near white skin often meant privilege – “having a pass.” Nancy tried to pass for white, and wanted her children to pass for white. This caused resentment in some people in the community and she was labeled “color struck”. Intent to pass on “the privilege,” she pulled her children's noses and pinched their nostrils together in an attempt to keep them from widening. Nancy insisted that her children not spend time in the sun for fear that their skin would darken. Some of her children resented the idea that they were encouraged “to pass.” Nancy was extremely invested in status within the local community and spent a great deal of energy and time cultivating a “near white” proper image. Nancy would spend hours in front of the mirror practicing her diction, posture, and mannerisms so that she would always appear “proper.” [*Carson Burwell*]. She often talked about her family's emphasis on education and was very proud of the fact that her father had attended Harvard University. According to her children, she was far more consumed with blending in and being respected in the social scene than anything pertaining to her own home and family. [*Carson Burwell, Lawanda Burwell*].

Nancy was very depressed after Shareef's birth. Shareef's mother often ignored his cries for attention. Nancy was withdrawn and did not seem interested in nurturing Shareef. Shareef's

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reaction to being “rejected” was to constantly act out and throw tantrums to get attention. He became hypervigilant and extremely sensitive to perceived insults and rejection. [Carson Burwell]. In addition to having an emotionally distant mother, Shareef also suffered a number of traumas during his childhood. When he was only seven years old he witnessed the rape of his five-year-old sister, Kathy, by his friend. Witnessing this violence – and not doing anything to stop it -- was demoralizing to Shareef. [Shareef Mahdi]. Indeed, in 2003 he reported to mental health counselors that he wanted to kill himself when he was 7 years old. The personal shame and blame continued for Shareef throughout his high school years, which were also troubled by the same friend entering the home eight years later when he knew Kathy would be alone and raping her again. Shareef blamed himself for this event, and Kathy blamed Shareef too. Aside from his struggles within the family, Shareef also found constant conflict in the school system. At the age of 10, he was forced to participate in the integration of schools. Virginia law at the time gave families the option of integrating. Shareef wanted to continue attending the same (segregated) schools as his older siblings. Nancy and Nathan insisted that he enter the all-white school when he was in the fifth grade. There were very few black children attending the integrated school at that time. He was taunted and beaten by white students which increased his anger at how unfair “certain” people and life could be. [Carson Burwell, Shareef Mahdi].

Shareef was the only child in his family not to finish school. When he was 15 years old and around the time of Kathy’s second rape, Shareef had a confrontation with the school principal on the first day of *mandatory* integration. Although many in the family and a number of white people in the community agreed with the reason Shareef was upset and believed that he was “in the right” in confronting the principal’s racism, his parents did not support Shareef. They refused

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to support him because they believed it was more important to blend in and get along. [*Carson Burwell, Sandra Burwell*].

After experiencing the unfairness of the principal's racism and humiliation of being "in the right" but unsupported, Shareef welcomed being transferred to a school in Baltimore. His mother's reason for moving was another attempt to leave her husband Nathan. Nancy returned to Brunswick County with Shareef when he was 18. He was informed that he would have to attend one more semester to graduate. Shareef experienced this as another example of "the unfairness of things." He was sure he really had enough credits to graduate and was simply being "wronged." Believing things would never be fair, Shareef quit school and went to New Jersey where he stayed with relatives. "Racism and the 'unfairness' seemed to be everywhere." Shareef found himself involved in a standoff with frightened blacks on one end of a field and an angry white crowd on the other end separated only by law enforcement. Shareef remembered a helicopter with a machine gun pointed at the blacks. Hoping to escape the unfairness of racism, and strengthen his sense of self, he joined the Marine Corps months later. [*Shareef Mahdi*].

Shareef adapted well and enjoyed the experience of his first tour in the Marines. He remained in the Marines for 2 years before being honorably discharged. Returning home, Shareef described himself as being very depressed. Depressed and very upset about the status quo which supported "unfairness," he rejected the family traditions and their "do anything to blend in and get along ideals. One answer was to convert to Islam, and get rid of his "slave name" Thomas Burwell. He changed his name to Shareef Mahdi.

In 1976 – two years after being discharged – Shareef enlisted in the Marines again. This enlistment did not go well. Within only a few months, Shareef was court-martialed for disrespect and disobeying orders. After less than a year Shareef was discharged "Under Other than

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Honorable Conditions/Good of the Service" in 1977. This stint in the Marines was marked by Shareef's disobedience and his complaints about the atmosphere of the Marines, which according to him was filled with profane language, drug abuse and "barbaric mannerisms." Shareef admitted that his outlook on life had changed drastically since his last enlistment. "I found my mental and spiritual thinking had changed drastically since [my] first enlistment." Four years after his discharge, Shareef was not content with the status of his discharge status. He applied for a review of the discharge status. He argued that he had been the target of religious and racial discrimination. His request to amend his discharge status was denied. [*Shareef Mahdi Military Records*].

IV. Shareef and Vera Meet

Shareef met his future wife and her family in the small Muslim community of Petersburg, Virginia. Shareef was 23 when he met the Artis family. Vera, who was around fourteen at the time, was one of ten siblings and was third from the youngest. Shareef wanted to marry Doris, who was Vera's older sister, but Doris declined. Shareef then arranged with Vera's mother to marry Vera. [*Shareef Mahdi, Rose Gupton, Sophia Gee*].

Shareef and Vera Artis were married in 1980. Vera's hope was to escape her family's poverty and daily struggle to make ends meet. [*Vera Mahdi*] Vera's sister described the wedding ceremony as the "saddest wedding" she has ever witnessed. Vera kept her head down the entire ceremony, not even a hint of a smile graced her face. According to her sister, Vera reported Shareef raped her on their wedding night. Vera told a number of her sisters and Shareef that she never wanted him sexually after that. [*Rose Gupton*].

After the marriage, Shareef changed his wife's name to Tilea. Shareef immediately moved her to Lawrenceville to live in his mother's home in Brunswick County. [*Shareef Mahdi*,

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Vera Mahdi]. Vera was shocked and distraught as she would not have married Shareef if she had known his plan. [*Vera Mahdi*] They lived in the one-bedroom finished basement and Vera came upstairs only to eat. Shareef became known to all in the county, including law enforcement, as “radicalized” in his dislike and distrust of white people and for his domineering behavior particularly with women. Vera, was very timid and her reputation of being difficult to engage, increased. In spite of this she did continue her education, obtaining her GED and entering a nursing program at the local community college. [*Sandra Burwell, Lawanda Burwell*]. Her “outside interests” of education did not sit well with her husband. Shareef believed his wife should stay home even though he found it hard to find work and was not consistently providing for his family. He isolated Vera from her own family. Her family had so little interaction with her during her marriage to Shareef that they were not aware she was expecting a child and first learned of Saleem – Mikal’s older brother – when she visited the family after his birth. [*Rose Gupton, Sophia Gee*]. After Saleem was born, Vera left school to care for him. A year and a half later, Mikal was born. He was described by both parents as a happy baby. [*Shareef Mahdi, Vera Mahdi*].

IV. Mikal’s Childhood

Mikal’s Toddler Years: Repeated Trauma, Unexpected Severe Loss, Confusion, Chronic Domestic Violence

The family continued living in the Burwell’s basement until Mikal was around two years old. They then moved to an apartment in Lawrenceville. By February 1988, Shareef was not maintaining steady employment. Vera joined the Army, hoping for a better life. However, she did not complete her basic training. Vera was discharged for failing to perform required tasks satisfactorily. [*Vera Mahdi*].

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After Vera's return to Virginia when Mikal was barely five years old, the family moved back into the Burwell's basement. Things deteriorated quickly. Mikal recalled occasions when his parents would argue. One occasion vividly recalled by Mikal, he saw his father pulling his mother's hair. His father then picked his mother up and body slammed her into their glass kitchen table, which shattered. His father was shouting "bitch you wanted the goddamn table, you got it." Mikal and his brother Saleem were screaming "don't hurt mom." Shareef responded, "Shut the hell up, ya'll are soft." Shareef left and was gone for several days. Gone most of a week, he only returned briefly at night. [*Mikal Mahdi*].

Vera Attempts to Leave Shareef

Eventually, Vera informed Shareef that she was leaving him and taking her sons. Mikal recalled his mother going around the house and gathering her Mikal and Saleem's clothes to pack them. Then an "argument abruptly started." Arguments eventually became violent and were "always physical." [*Mikal Mahdi*]. The boys watched their father beat their mother. Shareef told Vera that if she left, he would find her and bring her back. Shareef promised he would kill his sons before allowing her to take them. Taking him at his word, Vera left the boys with Shareef and made her escape. Free of Shareef, she abandoned Islam and changed her name back to Vera. [*Rose Gupton, Sophia Gee*].

Vera first stayed with her sister Doris in Reading, Pennsylvania for about six months. She then moved in with her sister, Rose, in Richmond. Shareef called constantly, day and night, insisting that she return. They would block the numbers he used, but he would just keep using different phones. While Vera wanted no contact with Shareef, she did attempt to send cards and letters and wanted to have contact with her children, but Shareef insisted that if she wanted contact with her children, she should return. He refused the cards and letters. [*Rose Gupton,*

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Sophia Gee]. After Vera left, Shareef constantly told Mikal and Saleem that their mother abandoned them, she did not love them, and eventually that she was dead. [*Rose Gupton, Sophia Gee, Sandra Burwell*].

As a toddler, one of Vera's sisters recalled how Mikal would be dressed up in all white and made to sit still quietly. Sitting still and being quiet was more important in the presence of others than allowing Mikal, the toddler, to play. Mikal's mother had always provided basic care. As he grew older, the care was not always warm. This did not interfere with Mikal's hunger for his mother's love and attention. His mother just seemed to enjoy him more as an infant.

Mikal's mother's "abandonment" of him and his brother overwhelmed Mikal (between four and almost five years of age) who was developmentally fragile. Too young to understand the loss of his mother, Mikal was devastated and yearned for his mother's return. The impact of these severe losses at key times in Mikal's development was deepened by the emotional instability and economic difficulties of his father. The depth of his father's state of mind and inability to provide financially could be described as a lack of regard for Mikal's emotional needs for comfort and affection. Too often, the physical needs of Mikal was left to Mikal. For example, Mikal from the ages of 5-8 years old was virtually unsupervised and responsible for taking care of, figuring out life (comforting) himself. He was physically and emotionally isolated by a severely and chronically depressed father who failed to provide the resources to overcome Mikal's unresolved grief, and create an environment of emotional safety and uplifting nurturance expected in healthy parenting. The frequent repeated changes that were to follow would not give Mikal time to resolve his sense of loss and form new relationships.

Mikal understood his mother and father fought, but her leaving and not returning for he and his brother was an unfathomable personal loss from which he could not recover without damage

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to his sense of fairness and trust in people. The four almost five year old Mikal felt "robbed" of love from those who were supposed to love him (i.e. his mother and father) . He yearned for a solution to the chaos and trauma of witnessing abuse (e.g. seeing his father pull his mother's hair out). He went through predictable "changes," of feeling angry, becoming hypervigilant, numb (ambivalent), avoidant and resistant to comforting while yearning and searching for what would bring his mother back and cement the family back together.

At age 8, Mikal was surprised to discover his mother was alive, but witnessed the kidnapping and potential attempted "murder" of his mother by his father. Mikal was further traumatized by the strapping to a tree and beating of his grandmother by her son, his father for "helping his mother escape.

Mikal's brother Saleem was considered "his father's son" and Mikal was considered "his mother's child." Some in the family believed Mikal took the loss of mother and family the hardest. Emotionally overwhelmed, he started putting up a barrier to others, especially adults (and authority figures). He tried hard to please his father and gain his father's respect. He tried to protect his mother, and keep the family together. Mikal was unable to protect his mother, keep the family together or save himself from the pain of feeling "stupid" in the process. At the Walter Carter Psychiatric Center, at age 9, Mikal was asked to list three wishes. He listed one, " I want my family to be together, that's all I wish for." [*Mikal Mahdi, Shareef Mahdi, Carson Burwell, Lawanda Burwell*])

After Vera left, Shareef was consumed with depression and despair. He did not attend to the children, did not send them to school regularly and they were often left to fend for themselves. Mikal was grieved by the changes (losses), hopelessness, powerlessness, confusion and chronic

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preachments of his angry and depressed father. The constant preaching and raging of Shareef repeatedly begged one question, "What to do with righteously felt anger when dispossessed of outlets?" Mikal like his father before in his own childhood began to "act out." [*Shareef Mahdi, Carson Burwell, Mikal Mahdi*].

Mikal's Experiences with School - Tumultuous

Shareef and the boys moved to Richmond. Shareef enrolled them in the Sister Clara Mohammed School, a Nation of Islam School. Mikal was in kindergarten. Before Mikal completed a year of school, Shareef returned with the boys to Brunswick County and enrolled them in school at Totaro Elementary School. Shareef often did not have a vehicle or the emotional energy to get them to school, subsequently, the boys had a number of absences. During his partial year of kindergarten at Totaro, Mikal missed 23 days of school. [*Mikal Mahdi School Records*].

In January of 1990 – in the middle of what would be Mikal's first grade year – Mikal transferred to Chamberlayne Elementary School back in Richmond. According to his teachers, Mikal seemed to be struggling emotionally and academically.

We're pleased to have Mikal at Chamberlayne. I do wish he were happier here. Mikal is making steady progress in math. His rate of achievement in reading makes it difficult for him to keep up with the class. If he does not improve in his reading we may need to discuss the possibility of retention. We need to work on self control. This lack of self control is affecting him adversely both academically and socially.

Shortly after this notation was written on his progress report, Mikal was withdrawn from school following fifteen days of consecutive absenteeism. Mikal was transferred to the University of Islam for a short time before transferring to Short Pump Elementary School in November 1990. Both of these schools are in the Richmond area. Mikal was still in the first

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grade at this point and it appears that he only remained at this school until February 1991.

Teachers noted his significant reading struggles. [*Mikal Mahdi School Records*].

Mikal then transferred to Overby-Sheppard Elementary School in Richmond. His records there reveal that Shareef was "self-employed" and the family had a DSS caseworker as they lived on "welfare." Following only a portion of one semester at this school, Mikal left school and apparently did not attend school at all from the beginning of the summer session until late October 1991. [*Mikal Mahdi School Records*].

Mikal goes to live with relatives

In October 1991, Shareef's siblings intervened to care for his two sons because they became aware that Shareef did not have the boys in school and was not caring for them as they felt a father should. Saleem went with an aunt in Texas and Mikal went to Uncle Carson and Aunt Lawanda Burwell in Baltimore. Prior to this move, Shareef, Saleem, and Mikal were living in Section 8 housing and on welfare in Richmond. [*Carson Burwell, Lawanda Burwell*].

Mikal's physical circumstances improved a great deal. Carson and Lawanda were a middle class family with Carson making a decent living as a barber and Lawanda as a school administrator and educator. Mikal's bedroom was set up in a room that Lawanda also used as an office. Carson and Lawanda tried to help Mikal, who had trouble reading at that time. They provided the structure that was missing in Shareef's household. Mikal, however, wanted to be with his father and brother. [*Carson Burwell, Lawanda Burwell*].

Carson and his family insisted that Carson wanted Mikal and that Lawanda was resentful of Mikal's presence. Lawanda recalled it differently, as does Mikal. Mikal remembered Carson often told him, "I don't want you here." Lawanda and Mikal agree, Lawanda was the person who really tried to help him. [*Mikal Mahdi*]. Lawanda recalled Mikal as "an angry and hurt little boy"

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when he arrived and she attempted to treat him as her own. When her children were sent to summer camp, Mikal went as well. He was included in family vacations. When school officials sought a parent conference, Lawanda responded. The problem from her view was that Mikal "was a runner." Anytime he became upset with a situation, he would run away. He would run out of the school, the house, or a restaurant. Lawanda reported that the Burwell men did not really know how to have a warm relationship with a woman. The Burwell men grew up with their father belittling and degrading their mother. The Burwell men treated their own spouses similarly. This was the atmosphere from which Mikal came. From Lawanda's view, Mikal was doomed to this fate if no one intervened. Mikal became worse after his mother left and did not return. While Lawanda tried to fill the void, Mikal "wouldn't have it" and did not want her to be motherly ("his mother"). [*Lawanda Burwell*].

Lawanda recalled that Mikal talked about his dad all the time but mentioned his mother only once. Mikal believed his mother left the family because "I was too dumb." Mikal had lost his mother and became consumed with wanting his father. He thought "the sun and moon rose on Shareef" and he desperately wanted to be reunited with him. He constantly pined for him and repeatedly asked why he couldn't be with his father and his brother, Saleem. [*Lawanda Burwell*].

Although he should have been in the third grade, Mikal was enrolled as a second grader in Scott's Branch Elementary School in Baltimore in the fall of 1991. School officials wanted to test him and place him in special education courses but his Aunt Lawanda believed that his problems were only gaps in his learning due to the repeated moves and school changes. She also believed that Mikal, who already believed his mother did not want him because he "was dumb," would be traumatized and stigmatized by labeling him as a special education student. [*Lawanda Burwell*]. Mikal's reading struggles continued and he received Ds in language arts throughout

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the year. He also was described as needing to improve his behavior. The school became sufficiently concerned about Mikal's behavior and reading problems that it referred him for an Educational Management Team assessment.

In March of that school year the principal at Mikal's elementary school informed Carson and Lawanda that he had said, "Why doesn't somebody just shoot me? If I had a gun, I would shoot myself." School officials recommended psychiatric treatment, but the family did not pursue any treatment or counseling. [*Mikal Mahdi School Records*]. For about a month during the summer of 1992, Mikal returned to Brunswick County, Virginia, to visit his father, who was then living out in the country at a home provided for him by his mother. During this time, Shareef was also fixated on Vera's departure from the family and wanted to punish her and make her suffer as he and the boys had. He used the boys as bait to get Vera to come out of her sister's house in Richmond to his truck. She came out in her pajamas and was barefooted. He forced her into his truck by threatening her with a gun. The gun was a toy gun but no one but Shareef knew it was a toy. He drove her back to the family home in Brodnax. He hit her and verbally assaulted her throughout the drive with the boys begging their father not to hurt their mother. After they arrived at the family home, Shareef told the boys to go inside with their grandmother and took Vera into the woods near a creek. He tied her hands and was assaulting her, choking her, and drowning her until a family member intervened allowing Vera to escape to Shareef's cousin's car before Shareef could catch up with her. Mikal ran out of the house trying to save his mother. He was trying to pull her toward him while his father was pulling her out of the driver's seat through the passenger side of the car. She was finally able to escape when a family member drove her away. [*Shareef Mahdi*]. Although Vera was battered and bruised and her family encouraged her to report the incident to police, she did not. [*Sophia Gee*]. During this same visit home, with

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Mikal observing, Shareef assaulted his own mother by beating her legs with a leather belt. Some family members believe this was caused, in part, by Nancy helping Vera to escape from him. [Sandra Burwell]. Nancy filed charges against him and Shareef was taken to jail for a few weeks before his mother chose to dismiss the charges.

Mikal returned to his aunt and uncle's house soon after this incident and, according to Mikal's mental health records, his aunt noticed that he was noticeably sadder than before the visit and that he blamed himself for his family's break up.

Mikal is placed in a psychiatric hospital

Just two weeks after returning to his aunt and uncle's house, a police officer responded to the home to investigate Mikal's self-report of potential child abuse. Carson and Lawanda confirm that Lawanda had whipped Mikal with a belt for disobeying her and going outside, but both deny abuse. Mikal used some Halloween makeup to make sure he was believed by trying to create the appearance of bruises. [Carson Burwell, Lawanda Burwell]. While the officer was there, Mikal said that he had "nothing to live for and would like to die." He went on to ask the officer for his gun so that he could shoot himself. Mikal's uncle and aunt admitted to the officer that Mikal was frequently talking about suicide. [Mikal Mahdi School Records]. Mikal was admitted to a psychiatric hospital. After being admitted Mikal told the psychiatrist, "I will jump off a bridge, shoot myself or kill myself with my bow and arrows." When the psychiatrist asked him to list three wishes he had, he listed one – "I want my family to be together, that's all I wish for." [Walter Carter Center Records].

Psychological testing revealed a very sad boy who was suffering from "profound depression, significant losses, and preoccupation with death, anxiety and . . . some unconventional loose and disorganized thinking and the possibility of past experiences with

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trauma . . .” Indeed, Mikal’s depression and anxiety were significant enough that the psychologist believed that his IQ score – full scale of 95 – underestimated his ability. During the clinical interview “Mikal showed such a lack of self confidence and level of frustration. He easily became overwhelmed to the point that he would be openly oppositional and refuse to proceed.” But even when Mikal would act out, the interviewer noted that the underlying themes of depression and anxiety were prominent. For example, he refused to draw his dream house saying, “No, it will never happen.” It was noted that Mikal was at risk for impulsively acting out his sadness and anger because of possibly misinterpreting environmental cues and his negative thoughts about himself. Mikal was diagnosed with Major Depression, Single Episode; Oppositional Defiant Disorder; Post-Traumatic Stress Disorder, and; Bipolar Disorder. [*Walter Carter Center Records*].

Mikal leaves the hospital and goes back to school

After Mikal was discharged from the psychiatric hospital, he returned to Scott Branch in the third grade. In November of 1992, he was suspended for being disrespectful and openly defiant. Mikal was hypervigilant and sometimes ambivalent or avoidant or resistive and “always watchful”. His teacher, Myra Harris, took time with him and routinely spent lunch time listening to his concerns. Consistently she would take him out of detention after he reacted negatively to the lecture style of other teachers. Mikal had not liked his father’s unyielding preaching style lectures either. Mikal began to come around after school to see Ms. Harris. Ms. Harris said that behaviorally and academically Mikal was just like the other children in her care. She never brought up his past or previous hospitalization. He earned at least two certificates of achievement during his time in her class. Ms. Harris continued being firm, fair and listened to Mikal, subsequently he showed remarkable improvement. [*Myra Harris*]. His grades improved and his

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teacher commented that she was pleased with Mikal's "leaps and bounds in progress," Mikal was turning in assignments neat and accurate, that he was warm and pleasant, and worked well in small groups. [*Mikal Mahdi School Records*]. Lawanda also recalled being very proud of Mikal and his progress. In her view, he had transformed from a disruptive student to a fully engaged and enthusiastic student. In fact, she has a photo of a very happy looking Mikal dressed up for his third grade prom in this time period. [*Lawanda Burwell*]. When Mikal returned to school in the fall, he was placed in a class with a teacher who had only one year's experience. While Mikal did act out more than he had in the previous year, he still was progressing and behaving fairly well. When Saleem was sent home from Texas by his aunt to Shareef, the progress stopped. Although Mikal had always felt to some extent that neither parent wanted him, he was convinced then that his father did not want him but clearly wanted his brother, Saleem. Mikal began to display disruptive, angry and hurt behaviors. [*Carson Burwell, Lawanda Burwell*]. In the fall of 1993 Mikal was suspended for leaving the classroom without permission, disrupting the class, and refusing to cooperate. [*Mikal Mahdi School Records*]. The records indicate that Mikal would not be permitted back to school until a conference was held. Despite his behavior problems, a note indicated that "Mikal is an intelligent student who appears to be stifling his potential. He has the capacity to contribute and participate as an active learner but doesn't always appear motivated. Mikal began the year appearing more interested but seems to be in a rut . . ." [*Mikal Mahdi School Records*].

Rather than try to deal with the situation, Carson decided then, much to Lawanda's dismay, to send Mikal back to Shareef. [*Lawanda Burwell*]. He was withdrawn from school mid-semester in Baltimore and returned to Brodnax, Virginia, around Thanksgiving 1993 to live with

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his father and Saleem. He was re-enrolled at Totaro Elementary School where Shareef was actually teaching as a substitute teacher.

Dora Wynn, Mikal's kindergarten teacher, recalled that when his mother was still in the picture, Mikal was a "*cute little boy who was shy at first.*" She described him as a bright child and "more of an observer" who had to be encouraged to engage with other children. When he returned to Totaro in the fourth grade, Wynn was the school principal. *Mikal had changed.* He had developed emotional difficulties and was frequently brought to Wynn's office. Wynn recalled that upon his return he was withdrawn and had trust issues. On rare occasions she could get him to smile, but he would quickly return to his rigid stance. According to her, Mikal refused to do his work, refused to eat, and often just walked away from school. She recalled at least one occasion when she was in her car driving alongside Mikal while trying to get him to get into the car. He was always headed down the road to his grandmother's house. Wynn could never figure out why Mikal was "so angry." [*Dora Wynn*].

Mikal is found eligible for special education

In the spring of 1994 school records place Mikal in the Fifth Grade at Totaro Elementary School. [*Mikal Mahdi School Records*]. Mikal was referred for a special education assessment because of academic difficulties and behavioral problems. Psychological testing revealed a full scale IQ score of 118. The sociocultural report noted that Mikal had an outgoing personality when he was younger but that this had been replaced with low self-esteem and adjustment problems. The evaluators also noted the following tendencies in Mikal: negative attitude about being corrected; a preference to be with family rather than others; inappropriate behavior around adults; lack of fear and a failure to recognize dangerous situations, and; a decreased ability to retain information. [*Mikal Mahdi School Records*].

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Psychological testing administered as part of this assessment corroborated their observations. "Test findings indicate that Mikal is a very bright child who presents certain adjustment difficulties. These latter difficulties, engendered by family separation, various relocations, etc. have in turn reduced his feelings of self efficacy." [*Mikal Mahdi School Records*]. Projective testing consistently pointed to "depressive tendencies, lack of self esteem and feelings of hopelessness." In addition to the testing, a teacher, Carol Wilson, observed Mikal in the classroom. During the first couple of days of the observation, Mikal drew a picture of someone hanging himself. According to Wilson, Mikal was "just depressed, there was no reaching him," and he was "emotionally flat." Wilson noted that "Mikal has also exhibited periods of extreme sadness at times." [*Mikal Mahdi School Records*]. Mikal was recommended for special education and counseling. Despite his many problems, the staff believed that special education would be successful because of Mikal's intelligence and his positive personality traits. [*Carol Wilson*].

Based on the assessment Mikal was found to be eligible for the emotionally disabled program. Educators recalled that Shareef did not like hearing that Mikal had a severe emotional disturbance. Shareef was described as "difficult to deal with and disturbed." He responded to the view that Mikal needed special services as "bullshit" and stormed out of a meeting with school officials and teachers.

Rather than allow Mikal the special services and classes as recommended by school officials, teachers, and mental health experts, Shareef took Mikal out of school to "home school" him. [*Carol Wilson, Dora Wynn*]. Mikal left school at the end of the 5th grade when he was only 11 years old.

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Around the same time Mikal left school, Shareef was fired from his teaching position. Mikal recalled Shareef's teaching experience specifically as one of "ranting and raving" at students about anti-government, race, as well as what Mikal called "psychologically breaking them down." The other students would tell Mikal of the events and laugh about his "crazy" father. Mikal recalled three specific instances. One was a student who always had body odor. Shareef yelled and belittled him until he cried and a complaint was filed. Second was a girl that Shareef yelled at about "acting like an animal, defecating on the floor." Third was Shareef yelling at a lady who worked in the cafeteria about the salad being "bad." Mikal recalled that a big topic for a while was Shareef ranting "how do you fuck up a salad?" [Mikal Mahdi]. Carol Wilson, one of Mikal's teachers at the school, recalled that Shareef was terminated because Shareef yelled at some fifth grade girls, calling them "bitches" and "whores" and telling them to use birth control. [Carol Wilson].

Shareef's increasingly, unstable, bizarre behavior lands him in jail and a psychiatric hospital

When Mikal began his "home schooling," Shareef and his sons lived on Nancy Burwell's property in a home she provided in rural Brodnax, Virginia. Mikal describes Shareef generally as always "ranting and raving." That was "his thing." To Mikal and Saleem, "that's what father's did." He raved about the "New World Order" and "white folks coming to kill them." He did that before the move to an isolated, rural area and the "home schooling," but it intensified afterwards. He took the boys on trips to the woods to prepare them for this "New World Order." He taught them how to shoot guns, fight with knives, and how to fist-fight and box. [Shareef Mahdi, Mikal Mahdi].

Shareef did this ranting and raving and was "out of it all the time" throughout Mikal's childhood. It seemed to get worse when Mikal was around 11 and being "home schooled," which

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was more indoctrination of Shareef's beliefs than actual "schooling." Mikal does not know if it actually was worse or whether he just didn't notice it or think so much about it when he was younger. But from age 11 to 15, Mikal described a month as his father "being out of it 25 days and trying to be super dad the other 5 days." [*Mikal Mahdi*].

Within only a few months of Mikal leaving school, , Shareef was referred for mental health treatment following an incident when he jumped in an "all-white" private pool at an elite country club in the county. Law enforcement officers were called and they attempted to talk Shareef out of the pool. They considered draining it to get him out but ultimately got a respected black leader in the community to talk him out. At the jail, Shareef was noted to be "disoriented," "agitated and verbally abusive," and "paranoid and delusional." The Sheriff referred him for mental health evaluation. [*Central State Hospital Records*]. While the evaluators note that he engaged in delusional and paranoid behavior, they ultimately found that Shareef suffered from a personality disorder and discharged him back to the jail. [*Central State Hospital Records*].

Of the pool incident generally, Mikal recalled Shareef being on a "crusade" claiming that the pool was paid for by public money being funneled into private hands. He was raving about a corrupt county board and going to the newspapers about it, although they weren't printing it. As Mikal described it, they were "already socially isolated as Muslims and it just got worse" when Shareef became known basically as "the crazy guy" in town. [*Mikal Mahdi*].

While Shareef was in the jail/hospital, Mikal stayed with Ms. Dillworth, a friend of the family because his grandmother was renting out her house then and was staying in Baltimore or Philadelphia with family members. When Shareef got out of the hospital, Mikal went back to him and the "home-schooling." [*Mikal Mahdi*]. Although the sheriff of the county, who testified for the state in Mikal's capital sentencing hearing, recalled that he made a referral to the

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Department of Social Services due to the lack of any schooling and his concerns about Shareef's mental health, no record can be found of DSS or school officials ever following up on the situation. [*James Woodley*].

The remainder of Mikal's home-schooling experience

Aside from "learning" about the "New World Order" and how to use guns and knives, Mikal described the "home-schooling" experience as basically hours upon hours of Shareef's "ranting and raving" and giving him religious materials to read and digest. Shareef would constantly tell Mikal what he did wrong, but would provide him with no solutions. While he lectured on work ethic, he had no job and made no attempt to work. The family lived on public assistance, what his grandmother provided, and ultimately what Mikal could steal. While Shareef would spend hours lecturing Mikal about stealing being wrong, he would then "thank him" and keep the stolen property or funds. [*Mikal Mahdi*]. "My son took care of me and his brother."

[*Shareef Mahdi*]

Shareef recalled the "home-schooling" as going for walks in the forests or woods with Shareef teaching the boys "about the evil empire of robber barons" who stripped the land and stripped the poor and people of color of everything. He also taught Mikal about Islam –Radical Islam at first. [*Shareef Mahdi*].

Shareef's mental state deteriorates

Shareef's mental state continued its downward spiral. In April 1997, he was arrested following an argument with his sister Loretta during which he smashed out her car windshield and her back window with a cinderblock. Mikal recalled that Loretta had been staying with them for about a month and a half prior to the incident, as she was separated from her husband in Georgia. Loretta was used to a different lifestyle and complained about things that were routine

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to Shareef and the boys. She complained about them not having a phone. She also complained about "livestock" (goats and cattle) roaming freely around the yard and property. She complained generally about the "backwoods" nature of the way they lived and Shareef would retort by yelling about her "bourgeoisie lifestyle." As Mikal describes it, "the situation was bound to blow up" and the cinder block incident was the blow up. [*Mikal Mahdi*].

Following his arrest for the damage to Loretta's property, **Shareef also attempted escape from the jail**. He thus stayed in confinement for a few months. While he was confined on this occasion, Mikal stayed with the Prescotts, a Rastafarian family, on a nearby farm. When Shareef got out, things went back to "normal" with Mikal staying with Shareef. As Mikal described it though, he was basically on his own, stealing to survive and continuing to get the preaching/lectures from Shareef, followed by Shareef keeping the property and thanking him. [*Mikal Mahdi*].

Mikal is arrested for the first time

When Mikal was just 14 years old he was charged with grand larceny and tampering with a vehicle. This appears to be the first time Mikal was arrested or criminally charged. Although Shareef was instructed to bring him to court, Shareef failed to bring him to court on several occasions, which resulted in a detention order being issued for Mikal, who was then placed in confinement prior to his actual adjudication due as much to Shareef's behavior as his own. Mikal's intake evaluation suggested that he had a poor attention span, poor impulse control, and poor anger control. Psychological testing indicated that he was sullen, aggressive, withdrawn, and had a flat affect. This evaluation established that Mikal was still suffering from depression but it also suggests – as is common in boys who suffer from depression at a young age – that his depression manifested itself in inappropriate behavior. The court evaluation emphasized

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Shareef's lack of engagement and his detachment from Mikal as a father, in addition to his failure to even ensure Mikal's court appearance in order to avoid incarceration prior to his adjudication. "Mr. Shareef Mahdi has attempted to exert minimal control over his son and seems content to stay detached and uninvolved as long as Mikal is not causing problems for him. . . . Mr. Mahdi let his son drop out of school ostensibly under the pretense of allowing for home school instruction which apparently was never followed up with." [*Virginia DJJ Records*]. Indeed, Shareef refused to assist DJJ as they conducted their evaluation and eventually a show cause was issued. Despite Mikal's behaviors the evaluators believed that he "would respond well to a structured setting." [*Virginia DJJ Records*].

As the evaluation of Mikal continued over the next 10 days, the degree of problems he had endured became evident. He reported that he smoked eight cigarettes each day and drank alcohol twice per week. Moreover, he reported that he had previously smoked marijuana on a daily basis. Evaluators also noted that he described his parents in a "detached manner" and demonstrated "depressive tendencies, feelings of hopelessness, [and] problems with self-esteem." [*Kenbridge Youth Development School Records*]. Not surprisingly the evaluators also noted conduct disorder, which they traced to "incompetent parenting and poor guidance, supervision and monitoring in an unstable nomadic dysfunctional family." [*Kenbridge Youth Development School Records*].

Mikal was scared when he went into DJJ. He was small and was placed in confinement with older, bigger kids, some with gang affiliations and many with violent offenses. Because his father had always taught him to "be a man" and to establish himself, he believed that he had to do something early to make sure no one would think he was weak. Within just several weeks of entering DJJ, he had some words with a 17 year old who told Mikal that he would "fuck him up

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later.” Mikal waited for his opportunity and jumped the older kid first. Mikal took quite a beating with the older, larger juvenile slamming his head into the floor, but in Mikal’s view, he had established himself as “crazy” such that other “cadets” would leave him alone. In DJJ, he also “learned” that if he acted out, “they” as in the staff wouldn’t attack the “act.” Rather, they would attack his “character” in an effort to convince him that he was “nothing.” After a while, the fighting and reacting due to fear, lack of respect and character “assassination,” just became “a lifestyle.” [*Mikal Mahdi*].

Mikal is incarcerated again

Following Mikal’s release from DJJ on June 14, 1998, at age 15, Mikal returned to his father’s home. He was determined to go back to school and to try to refocus himself but his renewed energy and focus was short-lived as he went back into confinement only two weeks later on June 30, 1998, when officers came to his home with a failure to appear warrant saying that he had failed to appear for court on the offenses for which he had just been released from confinement. Shareef insisted that they were going to have a “standoff” and they stayed in the home for eight hours while law enforcement remained outside unsure of whether there were any weapons in the home. [*Mikal Mahdi*]. Neighbors interviewed by the local newspapers described hearing Shareef yelling religious “slogans” in response to attempts by officers to negotiate a resolution. Neighbors also described Shareef as “disturbed.” Shareef recalled that Mikal was “frantic” during “the siege,” constantly reading religious materials and praying. [*Shareef Mahdi*].

Mikal recalled this event as the occasion when his father “betrayed” him and “threw him under the bus” because when officers entered the home, Shareef blamed the whole event on Mikal and claimed that he (Shareef) had been asleep in the bedroom. Mikal felt betrayed by him and by the system as he had already served time on the charges for which he was being arrested.

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[*Mikal Mahdi*]. When he was arrested after the "standoff," he reportedly told the officer that he would kill a police officer one day.

Mikal was convicted of obstruction of justice and again incarcerated at DJJ for an indeterminate sentence. Despite being written up for failure to comply on several occasions, Mikal was reportedly cooperative with his counselor though he minimized his behavior. Moreover, he claimed that he had failed to appear in court because he had already been tried on that charge. [*Dep't of Youth and Family Services Records*]. As it turns out, Mikal's claim appears to be true and the evaluator – recognizing that Mikal did not seem to have any new charges – seemed to agree. This evaluation came to many of the same conclusions as the prior assessment. Testing indicated an "emotionally immature" adolescent who experienced emotional states "in a global, poorly differentiated manner." The evaluator also noted that Mikal relied on denial and repression to deal with his unresolved feelings of abandonment and rejection. Over the next year, Mikal received numerous write-ups for refusing to obey orders, threatening officers, or fighting. Nevertheless, Mikal was apparently progressing well in Anger Control Group until he was terminated from the group because of one of his disciplinary charges. [*Dep't of Youth and Family Services Records*].

In October 1999, Mikal was placed in protective custody on suicide watch because he was threatening to harm himself. According to his records, he was not seen by the prison's behavioral services unit until a month later. During this assessment two psychologists noted that Mikal's thought patterns were distorted and that he frequently perceived everyone to "be against him and tend[ed] to minimize and rationalize his negative behavior." Moreover, much like Shareef and in keeping with the indoctrination of Shareef's "home-schooling," Mikal was

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preoccupied with “conspiracy theories along racial and institutional lines, [which] seemed to have a paranoid quality to them.” [*Dep’t of Youth and Family Services Records*].

The juvenile officials at one point placed Mikal on 15 minute watch status. One day later Mikal tried to electrocute himself. However, the officials noted a positive change in his emotional state – which they characterized as “brighten[ed]” – when Mikal was placed in a cell with a window. Indeed, during this time Mikal talked “more fluently,” smiled occasionally, and engaged in constructive activities. [*Dep’t of Youth and Family Services Records*]. But then Mikal began to engage in destructive behavior – covering up the camera in his room and breaking the desk off his wall. Eventually, Mikal was taken out of protective custody despite his desire to remain. It appears that only one day later Mikal indicated suicidal thoughts, which the staff took as an attempt to get back to protective custody. However, the examiner did note that Mikal had described an “unusual sensory experience,” during which time he saw paint peel up from the wall and then return to its place. In response medication was suggested but Mikal declined.

During this assessment, the evaluators believed that Mikal’s symptoms were consistent with a diagnosis of major depression. As for Mikal’s irrational thoughts, the evaluators opined that their origins could be psychotic features associated with his depression or immaturity associated with his youth or a mild thought disorder suggestive of an emerging paranoid personality disorder. Later one of the evaluators noted that “during times of increased stress, Mikal’s ability to think coherently and logically was compromised. At these times, his thinking became acutely paranoid and unavailable to therapeutic intervention.” [*Dep’t of Youth and Family Services Records*]. Mikal was released in May 2000.

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Mikal sees Vera

Around the time Mikal was released from DJJ the second time, Mikal's aunt, Sophia Gee, ran into Shareef in a store and gave him her number asking that the boys call her. To her surprise, Mikal did contact her and she attempted to reunite him with Vera. The reunion with Vera did not go well. *[Sophia Gee]*. What Mikal recalled of their brief reunion as most notable was that his mother showed almost no emotion. In fact, the only time he remembers her displaying any emotion occurred when they were going to the store and encountered a stray dog. Vera – rather than protecting Mikal – jumped behind him for protection. He was in disbelief, because she never protected him and this was the only time he ever saw any emotion from her. *[Mikal Mahdi]*.

Mikal ended up being arrested for slitting Vera's car tires and damaging her car when Vera would not let him into her home after he ran up her credit cards. According to testimony by the Officer, Michael Koehler, after his hands were cuffed during the arrest, Mikal repeatedly asked the officers to kill him.

Mikal's friend is murdered

Also, around this time, Mikal's "good friend" was killed. Terrell Goodnight was a friend Mikal met while at DJJ. They had classes together and lived in the same unit. Terrell was released only a few weeks after Mikal and joined him back in Richmond, which is where Terrell was from. They partied and hung out together. Terrell had been a star tight end at Hermitage High and had college prospects, but he was "into the street mentality" and acting like "tough guys." As Mikal understands it from what he heard from Terrell then and others later, Terrell "jipped" some guys from D.C. in a drug deal and bought a used Cadillac with the profits. A few weeks later he was found dead from gunshots in an abandoned complex in a closet wrapped in plastic. *[Mikal Mahdi]*.

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Mikal is incarcerated at Wallens Ridge State Prison

Five months after his release from DJJ, Mikal was charged with assaulting Moises Rivera. He was sentenced to 15 years in the Virginia Department of Corrections. There he continued with the same behavior as his prior incarceration and seemed to get even less attention or counseling. In January of 2003 –approximately a year and a half into his sentence – Mikal was transferred to Virginia's Wallens Ridge State Prison, known for employing harsh techniques to control the inmates. [*Mikal Mahdi*].

Wallens Ridge is a supermax facility in rural Appalachia. Mikal describes Wallens Ridge as an isolated rural place with a blighted local economy. As a result, the guards were largely locals, white men who had never dealt much with urban life or minorities. The main local industry was a coal mine and the mine recruited directly from the prison. [*Mikal Mahdi*].

While Mikal was housed there, the overwhelming majority of the inmates were minorities while the overwhelming majority of the officers were Caucasian. The atmosphere was charged with racial tension. Mikal recalled that officers would often use racial epithets towards the inmates. Mikal would hear officers routinely say things like, "I can't wait to kill me a nigger." "We ought to round all you niggers up and put you in a concentration camp." [*Mikal Mahdi*].

During his time at Wallens Ridge, Mikal was disciplined on numerous occasions for rules infractions, including: disobeying orders, throwing food, possession of contraband, and simple assault. In most instances, Mikal was punished with a fine and time in isolation. Indeed, Mikal spent a substantial amount of his time at Wallens Ridge in some form of isolation.

During the time when he was not isolation, Mikal experienced and witnessed extreme brutality. For example, he witnessed officers beat another inmate to the point where Mikal

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believed he was dead. The inmate was from New Mexico, which had a contract with Virginia to house inmates at Wallens Ridge. He was shackled up for transport back to New Mexico and was being walked by Mikal's cell when officers began subduing the inmate. Even after the inmate was down, the officers stomped, kicked, and beat the inmate until the floor and their boots were covered with blood and the inmate lay there unconscious and seemingly lifeless. He was taken out of the cellblock on a stretcher, but then left on the floor just outside the block for a while due to inmate movements. Mikal assumes the inmate was killed and heard rumors that that was the case, but he does not know for sure as he never saw anything in the news about the incident.

[Mikal Mahdi].

On as many as 14 to 15 occasions, lasting by his description for up to 10 minutes each time if not more, Mikal was "tasered" by officers, whose shields provided electric jolts. He would be called names and taunted, including officers calling him "camel monkey" and "towelhead" saying he looked like he was from Afghanistan. He would try not to cry, which extended the incidents. When he could not take it anymore and would scream, the tasing would stop and then he would just be belittled and berated. At least some of the events occurred with Mikal already cuffed and restrained. *[Mikal Mahdi].*

One of these tasing incidents occurred because Mikal spoke up for a disabled inmate. The inmate was housed in a nearby cell. He was in his 60's and had a tracheostomy speaking valve, which required a battery to operate. Without the battery, the inmate could not speak. When his battery died and he was attempting to get a replacement battery, officers just laughed at him and said he "didn't need a voice." When he became agitated due to this behavior, the inmate was extracted from his cell and tasered with electric shields until he defecated on himself.

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Following this event, he was strapped down and restrained on his bed for several days, during which officers continued to refuse to provide a replacement battery. *[Mikal Mahdi]*.

Mikal also observed and experienced being shot with rubber pellets while on the floor. The pods all had guards placed in glass overhangs in the ceiling: these overhangs were equipped with slits through which the guards would aim rifles loaded with rubber pellets. The guards were supposed to fire off a warning round if they were going to fire the rifles but often they would just start firing. The rounds would start for a variety of infractions, from stepping on the line in recreation, to pushing something outside your cell, to pushing another inmate. The rifles could also be loaded with bullets and they were all aware that live rounds could and would be fired if anyone attempted to escape. Mikal recalled at least one occasion where rival gangs caused a disturbance on the recreation yard. Without warning officers began firing indiscriminately into all the inmates in the yard, including those not involved in the disturbance, and continued firing even after all of the inmates were laid prone on the ground as they had been instructed to do. *[Mikal Mahdi]*.

Mikal was released from Wallens Ridge on May 12, 2004, after spending about a year and a half in that facility. Little more than two months later, Mikal was arrested and charged with the present offenses.

Shareef finally receives treatment for his mental illnesses

While Mikal was incarcerated at Wallens Ridge, Shareef finally sought mental health treatment at the McGuire VA Medical Center in Richmond. His records reflect that he was enrolled in the psychiatric day program due to chronic depression and social anxiety. Examiners noted that his "longest job has been for only 3 yrs in his life and he fails to get along with others well." He was "very paranoid as he describes his small town and even here in Richmond, that

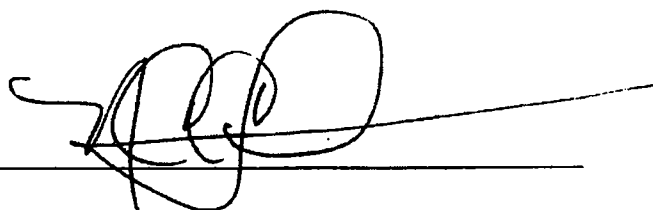
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'they are looking for him. Seems focused on the Masons and white supremacist [sic] groups.'

[McGuire VA Medical Center Records].

Shareef left Richmond, where he was staying at the Salvation Army shelter, and moved to Philadelphia to stay with his Imam. The VA Hospital in Philadelphia records reflect treatment for depression and schizophrenia. [Philadelphia, PA VA Medical Center].

Shareef currently believes that if he had been a good father and husband to the mother of his two boys, things would be different. Shareef reminded the interviewers, "My son took care of me and his brother. It should have been the other way around. Mikal never got over losing his mother. All he wanted was – a family." [Shareef Mahdi]

A handwritten signature in black ink, appearing to read 'N. Cooper-Lewter', is written over a horizontal line.

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