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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. III of XXVIII

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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.	)	PROPOSED
	)	ORDER OF DISMISSAL
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

This is a capital post-conviction relief case. Applicant, Mikal D. Mahdi ("Mahdi") filed a *pro se* application for Post-Conviction Relief (PCR) on August 18, 2009 and served it on Respondent by opposing counsel on November 24, 2009. This action was 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 Mahdi to allow him to pursue potential state post-conviction relief and assigning this Court with continuing jurisdiction regardless of assignment and with the authority to schedule such hearings as may be necessary. Respondent filed a Return and denied the allegations of the application and moved to dismiss the *pro se* application for PCR with prejudice. Applicant filed two (2) amended PCR applications, and Respondent filed a Return to each, denying the allegations, and moved to dismiss the applications with prejudice.

I. PROCEDURAL HISTORY

Mahdi murdered James E. Myers on June 18, 2004. Mahdi was arrested on June 21, 2004 in the State of Florida and charged with a fugitive from justice warrant. Mahdi waived extradition, was returned to South Carolina, and was 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, 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. The case was assigned to the Honorable Clifton Newman, Circuit Court Judge, by the South Carolina Supreme Court.

Carl Grant, Esq. and Glen Walters, Esq. were appointed to represent Mahdi in 2004. Mr. Grant was seriously injured in motorcycle accident in the spring of 2006 and Glenn Walters was substituted as first (1st) chair capital counsel and Joshua Koger, Jr., Esq. was appointed to represent Mahdi as second (2nd) chair capital counsel in the spring of 2006.

The Continuance Motion

The case was **originally scheduled for trial in January of 2006**. Mahdi's capital defense attorneys, Carl Grant and Glenn Walters, **moved for a continuance** based on the need for more time to complete their mitigation investigation. **(PCR Tr. pp. 597-98)(See Respondent's Ex. 16)**. Judge Newman granted this continuance request, and the trial was moved from January 2006 to early November of 2006. **(PCR Tr. pp. 597-98 & Respondent's Ex. 17)**. Shortly before trial, the case was continued again from early November to November 26, 2006.

The Trial (Jury Selection)

On November 26, 2006, jury selection began before Judge Newman. General voir dire, individual voir dire, and jury selection were completed on November 29, 2006 with a jury and four

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)**.

(4) 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).**

The Guilty Plea

On November 30, 2006, Mahdi pled guilty before Judge Newman to murder, grand larceny over \$5,000, and burglary in the 2nd 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 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)² 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.

The Sentencing Proceeding

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

²Mahdi actually pled to murder, grand larceny and burglary second degree.

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 2nd 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 Office of Appellate Defense. In his appeal, Mahdi raised only (1) one issue: "Did the trial judge improperly consider Mikal Mahdi's initial exercise of his constitutional right to a trial by jury in imposing a death sentence?" (**Final Brief of Appellant/Petitioner, p. 3**). The State, represented by Assistant Attorney General Anthony Mabry filed a responsive brief. (See **FBOR**). On June 15, 2009, the Supreme Court affirmed Mahdi's conviction and death sentence. Mahdi v. State, 383 S.C. 135, 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 Motion for a Stay of Execution

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.

The Appointment of Collateral Counsel Hearing

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. Respondent was 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 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, Esq., and Assistant Attorney General 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. Norris and Mr. Lominack to represent applicant Mahdi in this matter. The Order was filed August 28, 2009.

The PCR Application

Prior to the issuance of the Order of Appointment of Counsel, Mahdi filed the above referenced *pro se* Application. (2009-CP-09-00164). As previously stated, Mahdi filed two (2) subsequent Amended PCR Applications. The State filed timely Returns to all three (3) applications, denied the allegations in the applications, and moved to dismiss all three (3) applications.

II. FACTS

Applicant, Mikal Deen Mahdi ("Mahdi"), murdered James Myers, an off-duty police captain, on July 18, 2004 in Calhoun County, South Carolina. **(R. 1341-1368)**. At the time of his murder, Captain Myers had thirty-one (31) years of service as both a fireman and as a police officer. **(R. 1357)**. 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. **(R. 1498-1527)**. Ms. Weaver was a neighbor of Mahdi's grandmother. Mahdi burglarized Ms. Weaver's home when she was away from her house and stole the .380 handgun.

On the same day, Mahdi stole a set of Virginia license plates from a vehicle located at a car rental agency also 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)**. After the theft of the gun, the license plate, and the car, Mahdi left the state of Virginia.

Mahdi left the State of Virginia because homicide detectives were closing in on him for his involvement in the homicide of a drug dealer in Virginia. (PCR Tr. pp. 513, 604, 688-689, 480-482, 550). Mahdi also indicated he had been involved in another homicide in which the body was never discovered. (PCR Tr. pp. 514).³ Mahdi was headed to Florida, where he had friends. (PCR Tr. pp. 689).

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). 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). 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).

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

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

the intersection of Bull Street and Washington Street 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)**. 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, 2004.⁴ **(R. 1532)**.

(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)**. Mahdi was driving the SUV. The stolen Expedition now bore the stolen Virginia license plates from Lawrenceville, Virginia. **(R. 1360-62)**. 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)**. Almost simultaneously with the police arriving at the station, Mahdi fled on foot into woods near the station. **(R. 1362)**. The police searched for Mahdi but could not locate him and eventually came to believe that he had obtained a ride from someone at a nearby Waffle House.

⁴The 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)**.

Unbeknownst to police, Mahdi was on foot in the woods near 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)**. While fleeing on foot from police, Mahdi eventually came upon the work shed of Captain Myers located on Myers' farm. **(R. 1362)**. Mahdi took some type of tool and broke into the work shed/shop. **(R. 1411)**.

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)**. Mahdi also went through Captain Myers' wife's SLED investigation files. **(R. 1414-16)**. 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)**.

Captain Myers was off work the day he was murdered, June 18, 2004. 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)**. 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)**. 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)**.

When the victim stopped by his shed that evening, Mahdi was lying in wait. **(R. 1363-64, 1407-1425)**. Mahdi confronted the victim at the shed. **(R. 1364, 1541-1566)**. Mahdi then shot the victim nine (9) times. **(R. 1364, 1696)**. Mahdi murdered Captain Myers by shooting Myers with

Myers' own .22 caliber rifle. (R. 1364).⁵

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). 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). 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 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 screamed for an unknown period of time. When she finally calmed down enough to use her phone, she contacted 911 and waited until the police arrived. (R. 1395-1425).

In the shop within a few feet of Myers' body, police found the keys to Corey Pitts' stolen red Ford Expedition. (R. 1365). Found at the scene were multiple fired .22 caliber shell casings and seven (7) fired .22 caliber bullets. (R. 1541-1565). Police also found evidence that Mahdi had tried to hot-wire the victim's other truck. (R. 1413-14). Mahdi escaped from South Carolina by using Captain Myers' police issued truck.

⁵There is evidence that after Mahdi confronted Myers at the cabin he forced Myers to empty his pockets on a table or chair inside the cabin. (R. 1419-21, 1774). It is also possible Mahdi emptied Meyers' pockets after he murdered him.

Florida

Three (3) days later, July 21, 2004, in Satellite Beach Florida, Mahdi was spotted by police in the victim's truck.⁶ 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)**. 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)**.

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)**. 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 found in the truck matched footwear impressions found near the scene of Captain Myers' 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)**. Also found in the recovered truck was an Atlas Mahdi had taken from Captain

⁶By 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)**. 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)**.

Myers' shop that contained Mahdi's fingerprints on the Jacksonville, Florida map page.

This led police to eventually locate two (2) 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). 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). The testimony established that Myers kept the badge in his truck or in the pocket of his pants. (R. 1418-1421).

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). Ballistics testing also confirmed the .22 rifle was the weapon used to murder Captain Myers. (R. 1562).

The autopsy of Captain Myers' body determined he died from multiple gunshot wounds. The victim was shot nine (9) times. He was shot in the chest four (4) times. (R. 1698). 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 shed, 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).

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's initial involvement with law enforcement stemmed from an arrest and adjudication for car-breaking, petit larceny, and escape from custody. For these offenses Mahdi was placed on juvenile probation. (PCR Tr. pp.).

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). Mahdi admittedly was also involved in the sale of crack cocaine at the same age. (R. 1440). Mahdi was also charged with assaulting and causing bodily injury to another inmate in the juvenile justice system. (R. 1441-42). While in the juvenile justice system, Mahdi told juvenile authorities that one of his strengths was "robbing people." (R. 1440). During one of the break-ins Mahdi committed, Mahdi stole a .44 magnum pistol. (R. 1428-29). When Brunswick County, Virginia police attempted to arrest Mahdi on a detention order for that charge, 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).

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). Mahdi was also convicted as a juvenile of contempt of court and obstruction of justice. (R. 1612).

As an adult, Mahdi was convicted of brutally stabbing Moises Rivera, a maintenance supervisor, at an apartment complex in Richmond, Virginia. (R. 1475). 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)**. 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)**. 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)**. 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)**. 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)**.

After being released from the Virginia prison for the Rivera assault, Mahdi tried to get a neighbor of his grandmother, Amanda Weaver, to help him assemble a nine (9) mm pistol. **(R. 1501-02)**. Mahdi also bragged to this same neighbor that he was dabbling in drug dealing to make money. **(R. 1500)**. Mahdi also bragged to this same neighbor that he was going to knock off some drug dealers. 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)**. Subsequent to the homicide of the drug dealer, and after 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)**. During this incarceration, Mahdi assaulted another inmate causing bodily injury. **(R. 1441 & 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)**. His overall progress during this incarceration was plagued by maladaptive behavior. **(R. 1612-13 & State's Exhibit #95)**. Records from the Department of Juvenile Justice also document his committing several assaults during this incarceration. **(R. 1441-42 & State's Exhibit 95)**.⁷

As an adult, Mahdi was incarcerated in the Virginia Department of Corrections from October 11, 2001, to May 12, 2004. **(R. 1485-86)**. 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 & 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)**. The officer

⁷At the plea and sentencing hearing, the State did not introduce all of Mahdi's prison disciplinary violations while in the Virginia Department of Juvenile Justice. Only a very small number of those were introduced. At PCR, the State introduced all of Mahdi's juvenile disciplinary violations while incarcerated. They totaled over forty (40).

received a mild concussion. (R. 1619). 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). "The first chance he get, he would finish him off." (R. 1616).

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). Mahdi was housed in this cell by himself. (R. 1618). Mahdi was also caught damaging a conference room and hiding metal fragments from a wall socket on his person. (R. 1622-23). On another occasion, Mahdi was found with a fifteen (15) foot long rope made of blankets. (R. 1624). Another piece of metal was found in Mahdi's cell on a different occasion. (R. 1627-28). Mahdi also wrote a grievance in which he discussed killing Department of Corrections' employees. (R. 1629). Mahdi then made additional threats toward a Department of Corrections' employee at the disciplinary hearing. (R. 1646-48).

Captain Gary Lane testified that at the time of trial, Mahdi was kept on the High D Wing of the super max portion of 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). 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). 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). 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.1661-62). These six (6) cells are even more secure than death-row. (R. 1662). 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).

During the trial/jury selection before Judge Newman, a homemade handcuff key was found in Mahdi's possession. **(R. 1664-65)**. 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)**. 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)**. 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)**. 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)**. Summers testified Mahdi could have easily used the key to take his restraints off and assaulted someone in the courtroom. **(R. 1670)**.⁸

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

⁸The evidence in mitigation is discussed under the appropriate ground of this Order.

alleged beyond a reasonable doubt.⁹ 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. 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

⁹These 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.

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, Sentencing Order, p. 10).

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

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

III.

On August 18, 2009, with the assistance of 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 Madhi'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 grounds: ¹⁰

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

Ground 10(a)/11(a)(iii) Counsel failed to adequately investigate, develop, and present mitigation evidence concerning Applicant's family, social, institutional, and mental health history. (See Amended Application p. 2).

Applicant alleged counsel's conduct in each instance separately and cumulatively was both unreasonable and prejudicial in sentencing. Strickland v. Washington, 466 U.S. 668 (1984);

¹⁰In 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.

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).

Respondent timely filed a Return and moved to dismiss the allegations in the final amended Application.

On March 4, 2011, Mahdi moved to amend his Final Application to include the following

ground:

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

Respondent opposed and objected to the late amendment. This Court allowed the late amendment to the PCR application over Respondent's objection.

The Merit's Hearing

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

After reviewing the record, including the Record on Appeal and the trial exhibits, and after

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

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Standard of Review

In a post-conviction relief action, the applicant has the burden of proving his allegations by a preponderance of the evidence. Rule 71.1(e), SCRCP; 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.

"Surmounting Strickland's high bar is never an easy task[.]" Premo v. Moore, 562 U.S. ____ (2011) *citing* Harrington v. Richter, 562 U.S. ____, (2011), *quoting* Padilla v. Kentucky, 559 U.S. ____, ____ (2009)(slip op. at 14). "It is 'all too tempting' to 'second-guess counsel's assistance after conviction or adverse sentence.'" Harrington v. Richter, 562 U.S. ____, (2011), *citations omitted*. "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." Id.; Strickland, 466 U.S., at 690.

In the context of a guilty plea, the applicant also must establish prejudice by proving 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, 558 U.S. ___, 130 S.Ct. 383, 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 694.¹¹ 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). See also Terry v. State, Shearhouse Advance Sheets, Opinion No. 27033 (2011). Such a showing “requires a substantial, not just conceivable, likelihood of a different result.” Cullen v. Pinholster, ___ U.S. ___, 131 S.Ct. 1388, 1403 (2011)(internal quotations omitted), citing Harrington v. Richter, ___ U.S. ___, 131 S.Ct. 770, 791 (2011). Reviewing applicant Mahdi’s allegations under the cited standards, Mahdi has not established a claim of ineffective assistance of counsel as to any issue raised in his Final Amended Application.

The Lack of Merit of Mahdi’s Grounds

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

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).

¹¹See also Smith v. Spisak, 558 U.S. ___ (2010).

Applicant Mahdi had the burden of proof to establish the merits of this allegation. Butler v. State. Mahdi offered no evidence in support of this ground at PCR. (PCR Tr. pp. 20-710). Mahdi failed to meet his burden of proof to prove counsel was ineffective in this regard. Id.

Furthermore, there is no merit to this allegation. 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
-- 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 *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*.¹² (See BOA, p.9, ll.18-21). Mahdi is wrong. Mahdi is clearly overreaching.

A plain reading of the sentencing 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

¹²Mahdi 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 BOA).

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 non-statutory mitigating circumstance should not be given great weight because the plea occurred one day after Mahdi's failed attempt to escape.¹³

Judge Newman could certainly infer from the timing of the guilty plea(s), i.e. after Mahdi's 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.¹⁴

¹³The 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).

¹⁴Mahdi'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

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.¹⁵ 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 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 his death sentence.

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

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 not giving great weight to Mahdi’s plea(s) as non-statutory mitigating circumstances: (1) discovery of the escape attempt, (2) and Mahdi’s lack of remorse during his plea proceedings.

¹⁵Mahdi cited several state and U.S. Supreme Court cases in his direct appeal 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. This Court agrees this is the law. Unfortunately for Mahdi, he has failed to show anywhere in the record that Judge Newman engaged in such conduct.

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, and four (4) alternates, 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)**. 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.¹⁶ The

¹⁶Judge Newman had ruled *in limine* that in the guilt phase the jury would not be allowed to hear about the murder in North Carolina, only about the theft of the items from Virginia,

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 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-

because of their relation to the car-jacking in Columbia and the eventual murder of Captain Myers in South Carolina.

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 and a home, 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. As trial/plea counsel appropriately testified at PCR, there was nothing improper in Judge Newman's sentencing order, and Judge Newman did not consider Mahdi's participation in jury selection as an aggravating factor in sentencing him to death. Mahdi has failed to prove deficient performance. Strickland v. Washington. 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. As set forth above, the sentence simply does not mean what Mahdi alleges it means. This ground must be dismissed with prejudice. Wong v. Belmontes; Jones v. State.

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).¹⁷ 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. Mahdi offered no evidence on this ground at the PCR evidentiary hearing. Furthermore, 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

¹⁷While 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.

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; Jones. This ground must be dismissed with prejudice.

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

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

There is no merit to Mahdi's second allegation. First, this allegation is vague and ambiguous. Mahdi does not specify what advantages of jury sentencing he is referring to or how counsel's advise regarding advantages of jury sentencing was inadequate. Nor did he clarify this vagueness at the PCR merits hearing. (See PCR Tr. 1-719). This ground must be dismissed as vague and ambiguous.

Additionally, Mahdi offered no evidence at the PCR merits hearing on this issue.¹⁸ Mahdi did not testify at the PCR hearing. Mahdi did not offer the testimony of any witness that he was not fully advised of the advantages of jury sentencing. Mahdi did not question any of his former appointed attorneys on this issue. (PCR Tr. pp. 587-710). There is a complete failure of proof on this issue. This Court finds due to the complete absence of proof on this issue, Mahdi has failed to meet his burden of proof on this allegation. Butler v. State. This ground must be dismissed with prejudice. Id.; Hill v. Lockhart.

¹⁸At the close of applicant Mahdi's case at PCR, Respondent moved for a directed verdict because of the complete lack of any evidence or proof offered by Mahdi on this ground. When asked for a response, collateral counsel gave none. This Court held the motion for a directed verdict in abeyance until the completion of the PCR merits hearing. At the conclusion of the merits hearing, there was still no evidence offered on this ground by applicant Mahdi. (PCR Tr. pp. 1-719).

Additionally, based on the complete lack of proof on this issue, Mahdi waived and abandoned this issue. The burden of proof was on Mahdi to prove the allegations in his application. Butler. In the face of the offer of no proof on this issue by Mahdi (**PCR Tr. pp. 1-720**), this Court must find this issue was waived and abandoned. Parks v. Morris Homes Corp., 245 S.C. 461, 471, 141 S.E.2d 129, 134 (1965)(Further, it is a litigant's duty to bring to the court's attention any perceived error, and "...the failure to do so amounts to a waiver of the alleged error."). *See also* Gibbs v. Kimbrell, 311 S.C. 261, 267, 428 S.E.2d 725, 729 (Ct. App. 1993)(discussing waiver). It must be dismissed with prejudice.

Furthermore, the record indicates Mahdi was fully advised of his rights to jury sentencing and the pros and cons of having a jury conduct his sentencing verses a judge determining his sentence. (**See R. 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 twelve (12) jurors and four (4) 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). Judge Newman's finding in this regard is fully supported by the record.

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 jurors 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).

Additionally, trial/plea counsel testified that Mahdi decided he wanted Judge Newman to sentence him rather than the jury he had selected and impaneled. **(PCR Tr. pp. 682-684).** Applicant Mahdi offered no testimony on this issue and offered no evidence that contradicted trial/plea counsel's sworn testimony on this issue. This Court had the opportunity to view the witnesses and judge their credibility accordingly. This Court finds counsel's testimony on this issue to be credible. This Court also finds that counsel's testimony on this issue is supported and corroborated by Mahdi's responses to Judge Newman's questions during the guilty plea itself.

Given the vague allegations of this ground and the lack of any evidence in the record whatsoever proving this ground, and the clear record before this Court that Mahdi understood the advantages and disadvantages of jury sentencing, this ground must be dismissed with prejudice. Strickland; Hill; Butler. There is a complete lack of proof that counsel was deficient in any manner in this regard. Strickland; Hill; Butler

Additionally as a result of this record, Mahdi cannot show prejudice either. Hill v. Lockhart. Given this record, including counsel's credible testimony, the record of the plea proceeding, and the evidence that would have been admitted against Mahdi before the jury already selected, including the horrendous facts of Captain Myers' murder, the murder of Christopher Boggs in North Carolina, and Mahdi's horrendous prison disciplinary record and criminal record, Mahdi has not and 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 with prejudice.

Conclusion to this Issue

Mahdi offered no evidence with regard to this issue at the PCR hearing, and as a result, Mahdi failed to meet his burden of proof with regard to this issue. In fact, Respondent was entitled to a directed verdict on this issue at the close of applicant's case, due to a complete failure of any proof with regard to this ground. Additionally, Mahdi waived and abandoned this issue at the PCR hearing. (See PCR Tr. 1-720). Finally, the record and the credible evidence shows Mahdi was fully advised of the advantages of jury sentencing, and knowingly, voluntarily, and intelligently waived his right to jury sentencing. Further, Mahdi has failed to demonstrate prejudice. As a result, there is no merit to this ground of ineffective assistance of counsel, and this ground must be dismissed with prejudice.

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

Ground 10(a)/11(a)(iii) Counsel failed to adequately investigate, develop, and present mitigation evidence concerning Applicant's family, social, institutional, and mental health history. (See Amended Application p. 2).

In this ground, Mahdi alleges counsel failed to adequately investigate, develop, and present mitigation evidence concerning his family, social, institutional, and mental health history. Specifically, Mahdi claims counsel should have interviewed and called in the penalty phase several of his extended family members and also community members and school officials to testify to his family, social, scholastic, and mental health history. Mahdi also claims counsel should have presented the testimony counsel presented through a different forensic social worker than the one used at sentencing. Mahdi also claims counsel should have introduced testimony from an expert regarding the effect of incarceration on Mahdi. Mahdi also alleges counsel failed to adequately investigate, develop, and present evidence concerning his mental health history or mentality,

specifically counsel should have discovered and presented the testimony collateral counsel presented through Doctors Schwartz-Watts and Myers at PCR and counsel failed to provide certain records to his psychiatric/psychological experts. Finally, Mahdi claims counsel failed to introduce certain documents at the sentencing proceeding such as certain school records, his DJJ records, and records from his commitment to the Walter Carter Center at age (9).

Standard of Review

Our state Supreme Court has analyzed claims of failure to investigate, discover, and present mitigation evidence under Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527 (2003) and its progeny. See Rosemond v. Catoe; 383 S.C. 320, 680 S.E.2d 5 (2009); Council v. State, 380 S.C. 159, 670 S.E.2d 356 (2008)(relying on Wiggins and referencing Rompilla v. Beard, 545 U.S. 374, 125 S.Ct. 2456 (2005), finding counsel was deficient and capital defendant was prejudiced by counsel's failure to investigate, develop, or present any mitigation evidence regarding applicant's violent upbringing, abuse at home, and mental illness other than limited testimony by his mother); Ard v. Catoe, 372 S.C. 318, 332 n. 14, 642 S.E.2d 590, 597, n. 14 (2007), *cert. denied*, Ozmint v. Ard, 128 S.Ct. 370 (2007)(referencing Wiggins and affirming PCR courts decision finding counsel ineffective in failing to further investigate gunshot residue evidence in capital murder case); Nance v. Ozmint, 367 S.C. 547, 557 n. 8, 626 S.E.2d 878, 883 n. 8 (2006), *cert. denied*, 549 U.S. 943, 127 S.Ct. 131 (2006)(noting the holding in Wiggins and concluding defense counsel in capital murder case should have, among other things, investigated and presented evidence of defendants adaptability to confinement, and presented mitigating social history evidence outlining defendants troubled childhood and mental illness); Von Dohlen v. State, 360 S.C. 598, 606-07, 602 S.E.2d 738, 742-43 (2004), *cert. denied*, 544 U.S. 943, 125 S.Ct. 1645 (2005)(concluding case was sufficiently analogous to Wiggins and holding that counsel in capital murder case was ineffective in failing to

adequately prepare and present evidence in the penalty phase that defendant suffered from severe, chronic depression at the time of the murder given trial counsel failed to provide expert witness with crucial medical records and related information which prevented witness from conveying an accurate diagnosis of defendants mental condition to the jury); *See Simpson v. Moore*, 367 S.C. 587, 605-07, 627 S.E.2d 701, 711-12 (2006)(reversing PCR Court's conclusion that capital defendant suffered prejudice from counsel's failure to offer sufficient social history evidence in mitigation case where record showed counsel did in fact do adequate investigation and presented similar mitigation evidence).

In Wiggins, the defendant was tried and convicted for capital murder before a judge. After his conviction, the defendant elected to be sentenced by a jury. In a pre-sentencing motion, counsel sought to bifurcate the penalty proceeding so that he could first present his theory that the defendant did not act as the principal in killing the victim. Counsel then intended to present a mitigating case. After this motion was denied, the sentencing proceeding commenced. Although counsel made a general reference to the defendants difficult life, counsel did not present any evidence of the defendant's life history. The jury sentenced Wiggins to death. On appeal his convictions and death sentences were affirmed.

Subsequently, Wiggins filed an application for post-conviction relief, alleging his trial attorneys had rendered constitutionally defective assistance by failing to investigate and present mitigating evidence of his dysfunctional background. After he exhausted his state PCR remedies, Wiggins filed a petition for habeas corpus in federal district court. The federal courts grant of relief was reversed by the Fourth Circuit, which held that Wiggins' trial counsel made a reasonable strategic decision to focus on petitioner's direct responsibility.

The United States Supreme Court granted certiorari and reversed the Fourth Circuit's

decision. The Supreme Court found trial counsel was ineffective in failing to adequately prepare and present mitigating evidence. Although counsel obtained a pre-sentence investigation report and DSS records, which revealed Wiggins tumultuous childhood and low I.Q, counsel failed to investigate further. Counsel also chose not to retain a forensic social worker despite the fact that funds were made available to commission a social history report. The Court found counsel's decision not to expand their investigation beyond the retained records was unreasonable given it fell short of professional state standards and the American Bar Association standards governing capital defense work.

The Court also determined that counsel's performance prejudiced Wiggins. Specifically, the Court found that had trial counsel further investigated they would have discovered the following powerful mitigating evidence. Wiggins was abused by his alcoholic mother during the first six years of his life; he was homeless at times; and suffered from diminished mental capacities. Given the strength of the mitigating evidence, the Court believed there was a reasonable probability that the jury would have returned with a different sentence had they been presented with this evidence. Not only did the Court find that it was unreasonable for counsel not to investigate and present this mitigating evidence, it also rejected counsel's assertion that the omission of the evidence constituted a trial strategy.

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

The Alleged Failure to Present Family Member and Community Witnesses

At the PCR evidentiary hearing, Mahdi called several of his aunts and one uncle to testify to his background and that of his family. Mahdi also offered the affidavit of another aunt. Mahdi

also offered the testimony of two community witnesses and the affidavits of two community witnesses regarding Mahdi's family. Mahdi contends counsel was deficient in failing to call these family members and community witnesses at sentencing, and he alleges he was prejudiced by this alleged deficient performance.

At the merits hearing, Mahdi called the following family members as mitigation witnesses: Carson Burwell (a paternal uncle), Rose Gupton (a maternal aunt), Sophie Gee (a maternal aunt), and Lawanda Burwell (a paternal aunt and Carson's wife). Mahdi also offered the affidavit of Sandra Burwell (a paternal aunt). Mahdi also called a community activist, George Smith, and Virginia Pond, another member of Mahdi's community. Mahdi also offered affidavits from James Woodley and Douglas Pond, two more members of Mahdi's community.

Carson Burwell testified to the fact that Mahdi's father was an unwanted child. He testified to the problems Mahdi's father experienced in integrated schools. He testified to Mahdi's father's conversion to Islam. He testified to the arranged marriage between Mahdi's father and Mahdi's mother. He testified to Mahdi's mother leaving Mahdi's father when applicant Mahdi was a small child, and the lack of supervision and parenting skills of his brother, Madhi's father. He also testified to his brother's inability to hold a job. He testified of he and his wife's attempt to help Mahdi by taking him into their home at approximately eight (8) years old. He testified Mahdi could not read when he came to live with he and his wife, and he, Carson, taught Mahdi how to read. He testified to Mahdi's false accusation of child abuse against his wife, Lawanda and the fact he and his wife were almost arrested based on this accusation. He testified to Mahdi's manipulative behavior in their home both before and after his commitment to the Carter Center. He testified to Mahdi's commitment to the Walter Carter Center at age nine (9) and Mahdi's behavior while committed there. He testified to Mahdi's disruptive behavior at school after being released from the Carter

Center and after Mahdi found out his brother had re-united with their father, which forced Carson and Lawanda to return Mahdi to live with his father. Carson testified he could not recall ever meeting with any defense attorneys or mitigation investigators from South Carolina prior to the trial, and if they had asked him to appear as a witness he would have appeared and asked Judge Newman to spare Mahdi's life. **(PCR Tr. pp. 21-77).**

At the PCR hearing, Mahdi also called a maternal aunt, Rose Gupton. Ms. Gupton testified she was one of ten (10) children. Ms. Gupton testified that Mahdi's mother, her sister, was a very timid and withdrawn person because of the verbal abuse by their father. Ms. Gupton testified her mother converted to Islam after separating from her father, the maternal grandfather of Mahdi, and Mahdi's mother and Mahdi's father's marriage was the result of an arranged marriage. She testified she did not believe Mahdi's mother really wanted the marriage. She testified Mahdi's mother married Mahdi's father at the age of seventeen (17). Ms. Gupton also claimed Mahdi's mother later told her that Mahdi's father raped her on their wedding night; however there is no evidence applicant Mikel Mahdi ever knew of this accusation or was told of it. In fact, the record shows the applicant was not told of this accusation until his PCR counsel related it to him. **(PCR Tr. p. 84).** Ms. Gupton testified Mahdi's mother lived with her for several months after she left Mahdi's father. She testified applicant came and stayed with his mother during this time period, and he was angry and would throw bowls and hit his mother. She testified Mahdi's mother did not want to leave the children with Mahdi's father but she was afraid of Mahdi's father because he had threatened her. She testified there was no contact between Mahdi and his mother, after she left Mahdi's father, until he was a teenager. She testified applicant lived with his mother when he was a teenager. Ms. Gupton testified she was not talked to prior to Mahdi's death sentence, and if she had been she would have testified in his behalf and asked the Court for mercy. Ms. Gupton could not explain why her

sisters, Sophie Gee and Corliss Artis, who were interviewed by the defense team, did not tell her about Mahdi's arrest for murder until after he was convicted and sentenced to death. She tried to claim they must not have known about the trial because she talks to her sisters every day, and they never told her of an impending trial. **(PCR Tr. pp. 77-92).**

At the PCR evidentiary hearing, Mahdi also called another maternal aunt, Sophie Gee. Ms. Gee testified she is a registered nurse. She is also one of ten (10) children. She testified Mahdi's maternal grandfather was verbally abusive to her sister, Mahdi's mother. She also testified Mahdi's mother was shy and withdrawn. She also testified her mother and four (4) of her siblings converted to Islam, which was restrictive regarding clothing and socialization. She testified she was not allowed to date and neither was her sister. However, she recalled two (2) teenage friends that Mahdi's mother had while growing up. She testified Mahdi's mother was seventeen (17) when she married Mahdi's father. She testified Mahdi's mother interacted with her family members the same when she was married as before she was married. She testified Mahdi's mother was an introvert; she doesn't like socializing. She testified Mahdi's mother was very protective of her children, dressed them in all white, and was afraid to let them play because they would get dirty. This occurred when they were very small children. She testified Mahdi's mother lived with her for a time after she left Mahdi's father. She testified her sister did not want to leave her children but Mahdi's father threatened her life. She testified Mahdi's mother left Mahdi's father because he was physically abusive and he was controlling. She testified Mahdi's mother tried to maintain contact with the boys and sent them toys and clothes, but Mahdi's father would not let her see them. She testified she did not think Mahdi's father was stable. She testified she saw the boys again when they were about seventeen (17) years old, and Mahdi wanted to meet his mother. She testified Mahdi thought his mother was dead. She admitted she was interviewed by Mahdi's defense team prior to

his capital trial. She testified they interviewed her and her sister Corliss Artis at the same time. She testified that had she been asked to testify on Mahdi's behalf she would. She testified that she loved Mahdi and would have asked the judge to spare his life. Ms. Gee also testified she was aware Mahdi had slashed his mother's tires after he reunited with her and was living with her. She testified Mahdi slashed his mother's tires because she would not let him use the car. She also testified she was aware that Mahdi was arrested for slashing his mother's tires. According to Ms. Gee, this incident ended the relationship between Mahdi and his mother. Ms. Gee testified she knew Ms. Hammock and Ms. Tarr were there in Virginia acting on Mahdi's behalf, she answered their questions, and there was nothing that prevented her from telling them any other information that might be helpful to Mahdi. **(PCR Tr. pp. 92-108).**

At the PCR hearing, Mahdi also called his aunt Lawanda Burwell, Carson's wife. Lawanda Burwell testified to applicant's family background. She described Mahdi's paternal grandfather and grandmother and how their marriage was not particularly a happy one. She testified Mahdi's paternal grandfather was an educator and his grandmother was a teacher as well. She testified applicant Mahdi lived in a modular home with his father on his grandmother Nancy Burwell's farm. She testified Mahdi's grandmother received government subsidies from tobacco allotments. She testified Mahdi's grandmother owned a house in Lawrenceville and also one on the family farm. She testified there were six (6) children by Mahdi's paternal grandfather and grandmother. She testified one child was a nutritionist in Texas and one was a stewardess who had lived all over the United States. She testified her husband had a master's degree in education. She testified she had a doctorate from Harvard graduate school. She testified that none of the other children or grandchildren had been involved in criminal conduct like Mahdi. She testified Mahdi's brother, Saleem, was in the United States Army and served two tours in Afghanistan.

She testified Mahdi came to live with her and her husband because his father was unable to take care of the boys. She testified Mahdi fabricated a claim of physical abuse against her that resulted in his being placed in the Walter Carter Center. She also testified she was not impressed with the Walter Carter Center. She testified Mahdi had made similar statements in the past regarding shooting himself but she did not think he was suicidal. She testified that after Mahdi's release from the Carter Center Mahdi began to misbehave and eventually had to be returned to live with his father. She attributed this misbehavior to Mahdi's attempt to force his return to his father. She also testified she would have been reluctant to testify at trial, because she had not seen Mahdi since he was a small child, but she probably would have come around and testified as she did at PCR. **(PCR Tr. pp. 239-297).**

Sandra Burwell submitted an affidavit. She averred that she was previously married to Nathan Burwell, Mahdi's paternal uncle. She stated in her affidavit that Mahdi's family was highly regarded in the black community in Lawrenceville, Virginia. She averred Mahdi's great grandfather was caucasian. She testified that while Mahdi's grandmother Nancy could be "snooty" and put on airs, his grandfather Nathan Burwell was a sweet man. After Mr. Burwell finished the day teaching agriculture, he would go out and help black-owned Brunswick County farmers and consequently was rarely home to spend time with his children. She stated the grandfather's first marriage ended when his wife and child died in childbirth. He then married Mahdi's grandmother after getting her pregnant and being forced to marry her. She averred that all of the Burwell children are intelligent and well-educated, however none of the men have accomplished much on their own. According to her, the men in the family were supported by their spouses, as she did Nathan during their marriage. She averred Mahdi's father was her ex-husband's brother. She averred his problems started when he was forced to attend an all white school when integration was voluntary. She recalled an incident

in high-school when Madhi's father stood up for himself and other black students, but Mahdi's grandparents and the black community did not back him up because of possible repercussions, even though Mahdi's father was in the right. She further averred Mahdi's father then went to live with a paternal uncle and aunt in New Jersey but had to leave because of his behavior. It was not long after that Mahdi's father decided to join the Marines. She averred that after Mahdi's father returned from the Marines he joined the Nation of Islam and married Mahdi's mother. After the marriage, he brought Mahdi's mother back to Lawrenceville and they moved in with Mr. and Mrs. Burwell, Mahdi's grandparents. They lived in the one-bedroom finished basement. Mahdi's mother would come upstairs basically to eat. She described Mahdi's mother as very timid and difficult to engage in conversation. She averred that Mahdi's father was very domineering with her. While Mahdi's mother never spoke of her unhappiness to anyone in the family, Sandra Burwell believes Mahdi's mother seemed to be making moves that would provide her with a way out of her situation. She finished high school or got her GED. After that she had Mikal. She enrolled in a nursing program in a junior college. After she completed the program, she convinced Mahdi's father, who had no job, that the best plan would be for her to join the military. When she came home, she informed him that she wanted a divorce and had only returned in order to get the children. Mahdi's father would not allow this, and, according to Sandra, ultimately tried to kill Mahdi's mother with the sons watching. Mahdi's father constantly told Mahdi and his brother that their mother abandoned them and didn't love them. She also recalled that when Mahdi was first sent to jail as a juvenile, she was in the courtroom, and after being released, Mahdi was to report to his probation officer as scheduled. He did not report to the probation officer as scheduled. He was a juvenile and had no way of getting there. And he was under his father's custody. When he did not report to the probation officer, he was picked up and that was when the standoff with police occurred. She feels the failure to report

was not his fault. She wanted to visit Mikal when he was in confinement, but Mahdi's father had to approve his visitors and would not allow her to visit. She felt so bad for Mahdi that she even considered adopting him after that. **(Affidavit of Sandra Burwell).**

Mahdi also presented the testimony of a community activist George Smith, an affidavit of James Woodley, an affidavit of Vernon Pond, and the testimony of Sharon Pond, who testified to Mahdi's father's behavior in the community. Both the activist and Ms. Pond testified to an incident where Mahdi's father jumped into a segregated [all white] swimming pool and would not leave the pool in protest. He was subsequently arrested and began throwing items at the jail. As a result, he was sent for a mental evaluation. The evaluation eventually determined Mahdi's father had no major mental illness. Mr. Woodley averred to Mahdi's father's conversion to Islam, his behavior in the community and his abusive behavior toward his wife and his mother. **(PCR Tr. pp. 166-186, & Affidavits of James Woodley and Vernon Pond).**

The Lack of Merit of this Ground

This Court has carefully reviewed the mitigation evidence presented at the PCR hearing with regards to this particular allegation in comparison with the mitigation evidence presented at the sentencing hearing, and considered counsel's, their mitigation specialist's, and private investigator's testimony regarding their mitigation investigation, and counsel's testimony why they presented the mitigation evidence they did present, and why they did not present other mitigation evidence. The record supports that counsel in this case conducted a reasonable mitigation investigation and presented what mitigation they could that was favorable to Mahdi at the time of the sentencing proceeding. Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527 (2003); Rompilla v. Beard, 545 U.S. 374, 125 S.Ct. 2456 (2005); Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495 (2000); Rosemond

v. Catoe; 383 S.C. 320, 680 S.E.2d 5 (2009); Council v. State, 380 S.C. 159, 670 S.E.2 356 (2008); Simpson v. Moore. Based on the entire record, and the credible evidence presented, this Court finds Mahdi has not met his burden of proof to show counsel's performance in this regard was deficient. Strickland; Wiggins; Rompilla; Wong; Rosemond; Council; Simpson.

Trial Counsel's Mitigation Investigation

The record shows counsel did a reasonable and thorough mitigation investigation including retaining a mitigation investigator, Paige Tarr Haas, retaining a forensic social worker, Marjorie Hammock, and retaining a private investigator, James Gordon, to investigate and develop Mahdi's family and social history. The record also shows counsel retained two (2) psychiatric or psychological experts, Dr. Thomas Martin (a forensic psychiatrist) and Dr. Geoffrey McKee (a forensic psychologist), to investigate Mahdi's psychiatric history and mentality at the time of the crime and uncover any mental deficiencies or disorders that would mitigate punishment. **(PCR Tr. pp. 503 - 710).**

The record shows the mitigation investigator and forensic social worker interviewed numerous members of Mahdi's family, and counsel also interviewed potential mitigation witnesses themselves. **(R. pp. 1746-1747, PCR Tr. pp. 503-710).** The record shows counsel and the investigators also consulted with Mahdi's North Carolina defense team [on the Bogg's murder] and obtained from them mitigation evidence or information they had uncovered. **(PCR Tr. pp. 503-710).** The record at the PCR merits hearing also showed counsel moved for and obtained a continuance for almost one (1) year in order to completely and thoroughly investigate and develop the mitigation case on Mahdi's behalf. **(PCR Tr. pp. 597-98, Respondent's Ex. 16 (Motion for Continuance) & Respondent's Ex. 17, Order of Judge Clifton Newman continuing the case**

from January until November).

The record shows Ms. Tarr, the mitigation investigator, was retained by attorney Carl Grant on the recommendation of attorney Jeff Bloom, an experienced capital defense attorney. **(PCR Tr. p. 589).** Ms Tarr had previously served as mitigation investigator or specialist in thirty (30) to forty (40) capital cases. **(PCR Tr. pp. 562-563).**

Ms. Tarr investigated applicant's social, family, school, institutional, and mental health history by interviewing applicant Mahdi, his father, his mother, his grandmother, his paternal uncle Carson, his paternal aunt Lawanda, his paternal aunt Kathy Burwell, his maternal aunt Sophie Gee, his maternal aunt Corlis Artis, his paternal uncle Nathan, and school officials, and by obtaining records of applicant's background including his DJJ records, his school records, and his records of commitment to a psychiatric facility in Baltimore when he was nine (9) years old. **(PCR Tr. pp. 563-575 & Respondent's Exhibit 12).** Ms. Tarr additionally summarized these particular psychiatric records for counsel and their retained experts. **(PCR Tr. pp. 565-566).** Ms. Tarr also summarized applicant's school records for counsel and their retained experts. Ms. Tarr also traveled to North Carolina and met with applicant's attorneys representing him on the North Carolina murder because they had conducted a mitigation investigation themselves on Mahdi's behalf. Their information was shared with Ms. Tarr. **(PCR 569-575 & Respondent's Exhibit 12).**¹⁹ Ms. Tarr also traveled to Lawrenceville, Virginia and made contact with applicant's grandmother Nancy and uncle Nathan, and traveled to Philadelphia and made contact with applicant's aunt Lawanda, uncle Carson, and aunt Kathy. Ms. Tarr also located applicant's maternal aunts Corliss Artis and Sophie Gee in Richmond. Ms. Tarr also located applicant's mother Vera Mahdi. Ms. Tarr also attempted

¹⁹Mahdi's North Carolina defense attorneys were present at the PCR evidentiary hearing and did not contradict this testimony.

to speak with applicant's brother, Saleem, however, the brother was repeatedly unavailable to speak with Ms. Tarr. **(PCR Tr. pp. 563-575)**. Ms. Tarr testified she provided counsel with summaries of the witnesses potential testimony and relayed to counsel the information collected. **(PCR Tr. p. 574)**. As of November 6, 2006, one month before Mahdi's sentencing proceeding, Ms. Tarr had spent approximately one hundred and seventy (170) hours interviewing witnesses, collecting documents, and producing data in her quest to put together an appropriate mitigation presentation at sentencing. **(Respondent's Exhibit 10)**. At that time, she anticipated working an additional seventy-five (75) hours in preparing the case for trial. **(Respondent's Ex. 10)**.

The record shows Marjorie Hammock, a forensic social worker, was retained by attorney Grant, and she had previously worked as a forensic social worker in numerous capital cases in several states including South Carolina. At the time of trial, Ms. Hammock had testified in and been qualified as an expert in clinical social work in approximately fourteen (14) cases. At trial, she testified she had worked on twenty-five (25) capital cases. And, at the time of trial, Ms. Hammock was working on another five (5) capital cases, some here in South Carolina, some in Florida, and one in Alabama. **(R. pp. 1739-1763)**.

Ms. Hammock traveled with Ms. Tarr on a second (2nd) occasion to Lawrenceville, Virginia, to meet with applicant's paternal grandmother Nancy Burwell and his paternal uncle Nathan Burwell. She interviewed both. Ms. Hammock also traveled to Richmond, Virginia and attempted to speak in person with applicant's mother, who was not cooperative, and was finally able to speak with applicant's mother but only by telephone. Ms. Hammock also interviewed a family friend, Ms. Pearson. Ms. Hammock also interviewed applicant's maternal aunts Sophie Gee and Corlis Artis. Ms. Hammock also traveled to Baltimore, Maryland where she met with and interviewed applicant's

paternal uncle Carson Burwell and paternal aunt by marriage Lawanda Burwell. Ms. Hammock also interviewed applicant's father Shareef Mahdi while in Philadelphia. **(R. pp. 1739-1763 & PCR Tr. pp. 563-575).**

Counsel testified they also traveled to North Carolina and met with Mahdi's defense attorneys and mitigation investigators in the North Carolina murder case. Mahdi's North Carolina defense team shared with counsel the results of their investigation. **(PCR Tr. pp. 597, 612).** Counsel also testified there were team meetings at which the mitigation investigator, the forensic social worker, the retained psychiatric experts and counsel were present, and each person would share what their investigation had uncovered. **(PCR Tr. pp, 595-96,).**

Counsel testified they also interviewed applicant Mahdi and traveled to Virginia as well, and spoke with Mahdi's grandmother, Nancy Burwell, and uncle Nathan. Counsel testified Mahdi's uncle Nathan was not cooperative in their mitigation investigation. Counsel also testified they would have been hesitant to call Nathan as a witness because he assisted police in identifying Mahdi from the video-tape of the North Carolina murder and was proud of that fact.²⁰ Counsel testified Mahdi's grandmother was cooperative in their mitigation investigation, and they had her present at trial/sentencing to testify, but she was unwilling to assist Mahdi regarding mitigation, stating she was there to defend the family name. Counsel also talked with Mahdi's aunt Lawanda and uncle Carson. While they were cooperative in providing background information on Mahdi and his family, counsel testified Madhi's uncle Carson informed them that he would not be helpful to Mahdi if he testified in the case. Carson informed counsel Mahdi was defiant and manipulative in their home. Counsel testified Carson and Lawanda's position was they were glad Mahdi was out of their home. Carson

²⁰Ms. Tarr also related to the Court that Mahdi's uncle Nathan was not helpful in the mitigation investigation. **(PCR Tr. p. 576).**

also told counsel that he and his wife were not be going to help Mahdi. Lawanda testified at Mahdi's PCR hearing that she would have been reluctant to testify at Mahdi's sentencing proceeding in 2006. Carson admitted at PCR he may have told Mahdi's North Carolina attorneys that Mahdi was a "demon" because of Mahdi's disruptive conduct in their home. Counsel also testified that Mahdi's aunt Kathy Burwell spoke with them, and she indicated she did not wish to participate in Mahdi's sentencing hearing, because she was still angry and resentful at Mahdi's brother for almost burning her house down. Counsel also testified they interviewed Mahdi's brother, Saleem, however, he was not particularly helpful or interested in testifying.²¹ Counsel also testified Mahdi himself indicated to them he did not want his father involved in his trial or sentencing proceeding. Counsel testified Mahdi's mother was completely uncooperative and did not want to participate in Mahdi's sentencing proceeding. **(PCR Tr. pp. 602-710)**. Neither Mahdi's mother nor his father or brother testified at the PCR hearing or offered any affidavits. **(PCR Tr. pp. 1-720)**.

Both Doctor Martin and Doctor McKee, counsel's psychiatric and psychological experts, also took a social history from Mahdi, and also a psychiatric history. Both Martin and McKee were aware of applicant's commitment to a psychiatric facility when he was nine (9) years old and reviewed those records in detail. Doctor Martin also reviewed Ms. Tarr's interview summaries with applicant's family members. Both experts were also aware that Mahdi had been placed in special education classes in elementary school. Both Doctors Martin and McKee were present at defense team meetings where information was shared regarding the joint investigation into Mahdi's past. Both Doctors Martin and McKee found separately that Mahdi was not suffering from any major mental illness at the time he committed this murder, and they diagnosed him with anti-social

²¹Collateral counsel's forensic social worker, Nicholas Cooper-Lewter, admitted at PCR that Mahdi's brother, Saleem, would not talk to him either. **(PCR, Tr. p. 317-318)**.

personality disorder at the time of Captain Myers' murder. While Doctor Martin testified he found that Mahdi had suffered from some recurrent depression in his life, he did not find any evidence that Mahdi was suffering from any depression at the time he committed the murder of Captain Myers. Doctor Martin testified at the PCR hearing that the records introduced by applicant Mahdi at PCR would not change his diagnosis. Doctor McKee testified at the PCR hearing he did not need additional records to make his diagnosis or issue his report. Neither Dr. Martin nor Doctor McKee changed their diagnosis based on records shown them by applicant at PCR. **(PCR Tr. pp. 508-561)**

Counsel testified they wanted someone at the sentencing hearing to testify on Mahdi's behalf regarding his family and social history mitigation; however, the only person who was willing to come and testify was Mahdi's grandmother Nancy Burwell; the rest of the family, including aunts, were not willing to participate. **(PCR Tr. pp. 636, ll. 12-25, 638, ll. 10-21, 649-650, 693-694, 696-697, 691).** Counsel testified they had the grandmother present at trial to testify and worked with her; however, she did not want to discuss Mahdi and how he came to be where he was; she wanted to talk about all of the accolades of the family, and even though Mahdi committed these horrible crimes, the Burwell family was still a good family. **(PCR Tr. pp. 620-621, 691-692).** As a result of the lack of cooperation with the family, counsel presented the mitigation evidence through its forensic social worker Ms. Hammock. **(PCR Tr. pp. 624, ll. 17-22).**

This Court has viewed the witnesses in this case, listened to their testimony, observed their demeanor, and judged their credibility accordingly. This Court finds the testimony of counsel on this issue *to be credible*, and the present testimony of applicant Mahdi's witnesses regarding their previous willingness to testify *to not be credible*. Accordingly, this Court finds that applicant has failed to meet his burden of proof on this issue, and has failed to show that counsel was deficient.

Butler v. State; Wiggins v. Smith; Council v. State.

This Court does not find Carson Burwell's testimony credible regarding his willingness to come and testify on Mahdi's behalf at the time of trial for several reasons. First, Carson could not recall talking to any attorneys or investigators from South Carolina prior to Mahdi's guilty plea/sentencing proceeding. The implication from his testimony was that counsel and their investigators did not speak with him, and therefore they were deficient in their investigation. However, the record clearly shows Ms. Hammock, counsel's forensic social worker, spoke to Carson Burwell before Mahdi's sentencing proceeding and obtained background information from him. Ms. Tarr, the mitigation investigator, also confirmed at PCR that she spoke with Carson Burwell on more than one occasion. Ms. Tarr also confirmed Ms. Hammock traveled with her to Baltimore and interviewed Carson. Trial counsel also testified Carson was interviewed prior to trial. Additionally, at PCR, Ms. Tarr produced her notes which detailed exactly what Carson told her. Carson told Ms. Tarr that Mahdi was manipulative and the incident which led to Mahdi's commitment to the Carter Center was more of Mahdi's manipulative behavior. **(PCR Tr. pp 572-574)**. Trial counsel also testified they spoke with Carson prior to the sentencing proceeding, and Carson told them that if he were called as a witness he would have bad things to say about Mahdi. Counsel also testified that Carson informed them that he and his wife, Lawanda, would not be going to help Mahdi in his sentencing proceeding. **(PCR Tr. pp. 618-620, 627-628, 649-650, 693-697)**. As a result, this Court finds Carson's testimony regarding his willingness to come and testify at the time of sentencing to be not credible.

Likewise, this Court does not find credible Carson's wife's testimony that even though she was reluctant to testify at the time of trial, she could have been coaxed into coming to South Carolina to testify. Again, counsel's mitigation investigators had met with Lawanda Burwell and counsel also

talked to her has well. Carson and Lawanda had indicated to counsel that they did not want to be involved. Carson had indicated to North Carolina defense counsel that when Mahdi lived with them he was a “demon.” Carson and Lawanda had communicated to counsel that they were glad Mahdi was out of their home. Carson admitted that Mahdi was defiant and manipulative. Both Lawanda and Carson admitted Mahdi made a false claim of child abuse against Lawanda. Carson communicated to counsel prior to the sentencing hearing that he and his wife Lawanda were not going to help Mahdi. As a result, this Court does not find credible Lawanda Burwell’s claim several years after the trial that she could have been coaxed into coming to South Carolina and testifying on Mahdi’s behalf even though she was admittedly reluctant to do so at the time.

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

The circumstances that counsel faced are similar to those faced by counsel in Rutherford v. Crosby, 385 F.3d 1300 (11th Cir. 2000). In that case, the defendant’s family was uncooperative at the time of trial. This Court notes that the behavior of applicant’s family is typical in these type cases. When the crime has been recently committed and those who knew the victim are still outraged, the defendant’s family and friends are likewise shocked, angry, embarrassed, and

disappointed in the defendant's behavior. In this case, as in others, they are in no mood to assist the defendant in escaping responsibility for his crimes. (See PCR Tr. p. 619, ll. 19-24). It is only after the passage of many years, when the case is on post-conviction relief, and the case is no longer in the forefront of the community's or the victims' family's mind, that witnesses become cooperative and insist that they would have cooperated at the time of trial, when in fact they were originally hesitant, did not want to be involved, or refused to testify.

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

Applicant offered the testimony of one aunt by affidavit, therefore she was not subject to cross-examination about what she communicated to counsel at the time of the sentencing proceeding and negative things she knew about Mahdi. One of applicant's relatives who did testify at the PCR hearing, Lawanda Burwell, admitted she would have been reluctant to testify at the time of the sentencing proceeding. However, she testified she could have been coaxed into coming and testifying. Mahdi's uncle Carson contended he would have come and testified if asked. This Court does not find this testimony to be credible. Counsel's credible testimony at PCR was Carson specifically told them if called to testify he would have bad things to say about Mahdi. Additionally, counsel testified Carson informed them he and his wife Lawanda would not be coming to South

Carolina to testify and help Mahdi, and Carson was speaking for both he and his wife.

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

The Mitigation Presentation at Sentencing

This Court finds Mahdi has failed to show deficient performance for another reason, counsel's mitigation presentation at sentencing. In addition to interviewing witnesses, Ms Hammock conducted a bio-social assessment of Mahdi's life and family history. **(R. p. 1747)**. She testified at sentencing before Judge Newman to her bio-social assessment of Mahdi. **(R. pp. 1739-1763)**. Hammock testified she interviewed Madhi's paternal grandmother Nancy Burwell, his paternal uncle Carson, another paternal uncle Nathan, his paternal aunt Lawanda (Carson's wife), his mother Vera Telea Artis, his maternal aunt Sophie Gee, another maternal aunt Corliss Artis, and Mahdi's father Shareef Mahdi. **(R. p. 1746-1747)**. She also interviewed a family friend. 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. 1762)**. Hammock testified that she also reviewed a synopsis of Madhi's school records and reviewed a report from his admission in Baltimore to a psychiatric facility [the Walter Carter Center] at the age of nine (9) years old. **(R. p.**

1747).

Like the family witnesses presented at PCR, Hammock testified to the problems within Mahdi's family. She testified that Mahdi's family looked like an intact family, but they had problems. She testified there was alcoholism in the family, and there was some neglect on the part of Mahdi's grandfather. **(R. p. 1750)**. Counsel introduced through Ms. Hammock a time-line of Mahdi's family which sets forth that Madhi's grandmother, Nancy Burwell, was not allowed to have her tubes tied after the birth of one of the siblings born before Mahdi's father, Shareef, was born. **(Defendant's Exhibit 2/Respondent's Exhibit 5, p. 1)**.

Ms. Hammock testified Mahdi's father, like Mahdi, was extremely troubled as a child. **(R. 1749-1750)**. The time-line sets forth that Madhi's father was described as disturbed as a young child, threw tantrums, and his mother [Mahdi's grandmother Nancy Burwell] was not emotionally available to Mahdi's father or his father's younger sister, Kathy. **(Defendant's Ex. 2/Respondent's Ex. 5)**. Hammock testified before Judge Newman that Mahdi's father considered himself an unwanted child. **(R. p. 1750)**. She testified Mahdi's father's childhood was difficult, and he grew up in a situation feeling alienated from everyone around him. **(R. p. 1750)**.

She also testified that Mahdi's father was traumatized by his attending desegregated schools as a young child. **(R. p. 1750)**. The time-line introduced before Judge Newman sets forth that this experience was destructive to Mahdi's father. He was ridiculed, isolated, challenged physically by classmates, ignored or received negative feedback from some of the instructors at the desegregated school. **(Defendant's Ex. 2/Respondent's Ex. 5)**.

Ms. Hammock also testified to Mahdi's father's inability to get along with his own family and other people in the community. **(R. p. 1750)**. She testified Mahdi's father was constantly in

conflict with those around him. **(R. p. 1750)**. On cross-examination of a State's witness, counsel also brought out that Mahdi's father had committed assaults on some of his own family members. **(R. p. 1433)**.

Ms. Hammock informed Judge Newman that Mahdi's father did not finish high school, and he was the only sibling that did not finish high school, and this was a source of consternation between he and his family members. **(R. p. 1750)**. She testified to his inability to hold a job and his eventual conversion to Islam. **(R. p. 1750-1751)**. The time-line introduced through Hammock also sets forth that Mahdi's father was suffering from depression as early as 1971. **(Defendant's Ex. 2/Respondent's Ex. 5)**. Hammock testified that Mahdi's father's conversion to Islam, and his changing his name from Thomas Burwell to Shareef Mahdi brought grief to the Burwell family. **(R. p. 1750)**. She also testified to Mahdi's father's discharge from the Marines under less than honorable conditions. **(R. p. 1750)**. Hammock testified Mahdi's father was not able to function well, and there was some description of Mahdi's father suffering continuing depression. **(R. p. 1751)**. She also testified there were a number of incidents involving Mahdi's father with local law enforcement. **(R. p. 1751)**. The time-line introduced through Ms. Hammock also sets forth that Mahdi's father was involved in a series of misdemeanors locally, all said to be racially motivated. **(Defendant's Ex. 2/Respondent's Ex. 5)**. On cross-examination of a State's witness, counsel also brought out that Mahdi's father had prior dealings with law enforcement in the community in which he lived. **(R. p. 1433)**. On cross-examination of the same witness, counsel also brought out Mahdi's father's involvement in the eight (8) hour stand-off with law enforcement. **(See Sheriff Woodley's testimony)**.

Ms. Hammock testified before Judge Newman that she also interviewed Mahdi's mother. **(R.**

pp. 1756-1758). She testified Mahdi's mother was very, very withdrawn and did not want to participate in the interview at all. **(R. p. 1756).** Hammock testified it appeared as if Mahdi's mother was frightened about being involved with the family again because of her previous experiences with Mahdi's father. **(R. p. 1757).** Hammock testified that while Mahdi's mother did eventually educate herself, joined the military, and at the present time worked and took care of herself, she was totally isolated from her own family, as well as the Burwell (Mahdi's paternal) family. **(R. p. 1757).** She testified that while Mahdi's mother may occasionally speak to some members of the family, there was a disconnection there. **(R. p. 1757).** She testified the information regarding Mahdi's mother came from Mahdi's mother herself and from her siblings and the Burwell family, and it was all consistent. **(R. p. 1757).**

Ms. Hammock testified to the fact that Mahdi's father and mother's marriage was a pre-arranged marriage to which Mahdi's mother did not agree, and Mahdi's father was much older at the time of the marriage than Mahdi's mother, who was sixteen (16) at the time of the marriage. **(R. p. 1751).** The time-line introduced through Hammock also sets forth that the marriage between Mahdi's father and mother was arranged by Mahdi's mother's mother (maternal grandmother) and Mahdi's father was twenty-seven (27) years old, and Mahdi's mother was just sixteen (16) years old at the time of the marriage. **(Defendant's Ex. 2/Respondent's Ex. 5).** Ms. Hammock testified Mahdi's mother had no choice but to join the marriage, and there was conflict in the marriage from its very beginning. **(R. p. 1751).** The time-line introduced through Hammock sets forth that after the arranged marriage, Mahdi's father changed Mahdi's mother's birth name, Vera, to Tilea. **(Defendant's Ex. 2/Respondent's Ex. 5).**

Ms. Hammock also testified before Judge Newman that Mahdi's father was physically

abusive to Mahdi's mother, and Mahdi's mother eventually left to get away from the abuse. **(R. p. 1751)**. Hammock testified before Judge Newman that Mahdi's mother was in what she, Mahdi's mother, described, and others described, as an abusive relationship, with Mahdi's father, and she decided to leave because she could no longer stay with Shareef Mahdi even though it meant leaving her children. **(R. p. 1757)**. As previously stated, on cross-examination of a state's witness, counsel brought out Mahdi's father had assaulted members of his own family. **(R. p. 1433)**.

Ms. Hammock testified at sentencing that applicant Mahdi's childhood was chaotic. **(R p. 1751)**. Hammock testified to the birth of Mahdi's brother and then the birth of Mahdi into a very unstable family. **(R. p. 1751)**. She testified the two (2) children were born within a twenty-four (24) month period of time. **(R. p. 1757)**. She testified that Mahdi's father could not provide for or take care of the family. **(R p. 1751)**. She testified the family moved several times, ultimately ending up back in Lawrenceville living with Mahdi's grandmother. Once again, Mahdi's father was not able to sustain himself. **(R p. 1751)**.

Ms. Hammock testified that there was a great deal of conflict between Mahdi's father and Mahdi's mother, and Mahdi and his brother Saleem witnessed this. **(R. p. 1751)**. Through Hammock, counsel introduced a time-line of Mahdi's life until he was committed to an adult prison facility. **(See Defendant's Exhibit 2/Respondent's Ex. 5)**. Hammock testified the exhibit accurately reflected what had occurred in Mahdi's life. The Exhibit sets forth that Mahdi and his brother witnessed domestic violence committed by their father against their mother. **(Defendant's Ex. 2/Respondent's Ex. 5)**. Hammock testified Mahdi's mother eventually left the family trying to get away from the abuse committed by Mahdi's father. **(R p. 1751)**. Ms. Hammock informed Judge Newman Mahdi's mother was forced to leave because of the abuse. **(R. p. 1757-1758)**.

Hammock testified Mahdi's mother left applicant Mahdi and his brother Saleem when Mahdi was just four (4) or five (5) years old. **(R. p. 1751-1752).**

Ms. Hammock testified that after Mahdi's mother left him at a young age, the chaos continued. **(R. p. 1752).** She testified Mahdi's father tried to take care of the children, and the grandmother, Nancy Burwell, also tried to provide assistance during this time, but the relationship between Mahdi's father and the grandmother and the rest of the family members was constantly confrontational. **(R. p. 1752).** The time-line introduced through Hammock also sets forth that Mahdi and his brother witnessed their father commit domestic violence on their grandmother. **(Defendant's Ex. 2/Respondent's Ex. 5).** During this period of time, Hammock testified there were several moves in terms of schooling for Mahdi from Lawrenceville to Richmond and back to Lawrenceville. **(R. p. 1752).**

Ms. Hammock also testified to the incident described by family members at PCR where Mahdi's father forced Mahdi's mother to come back to Lawrenceville and assaulted her. **(R. p. 1752).** Hammock testified that after Mahdi's mother left to get away from the abuse, she was literally forced to return from Richmond to Lawrenceville, ostensibly to see the boys, but this ultimately resulted in physical conflict, and Mahdi's mother left again not to see her children for a number of years. **(R. p. 1752).** The time-line introduced through Hammock also sets forth this incident. The time-line sets forth that Mahdi's mother, Vera (Tilea), was taken to Lawrenceville from Richmond by Shareef, who then abused Mahdi's mother. The time-line sets forth that Mahdi's uncle Nathan actually rescued Mahdi's mother, but as a result of this incident Mahdi and his brother witnessed more abuse and violence. **(Defendant's Ex. 2/Respondent's Ex. 5).** The time-line introduced before Judge Newman also chronicles that after this incident Mahdi's mother moved to

Pottsdale without the children (Mahdi or his brother Saleem) in order to escape from Mahdi's father. **(Defendant's Ex. 2/Respondent's Ex. 5).**

Ms. Hammock testified before Judge Newman that ultimately, Mahdi's father was unable to take care of Mahdi at all. **(R. p. 1753).** The time-line introduced through Ms. Hammock also sets forth that Mahdi's father suffered from depression. **(Defendant's Ex. 2/Respondent's Ex. 5).** Hammock testified that at that point in time, Mahdi is sent to live with his aunt and uncle in Baltimore, and his brother Saleem is sent to live with another aunt in Texas. **(R. p. 1753).** Ms. Hammock testified that as a result, Mahdi and his brother are separated from each other, and the two boys are separated from their father. **(R. p. 1753).** The time-line introduced through Hammock also sets forth this same information. **(Defendant's Ex. 2/Respondent's Ex. 5).**

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

Ms. Hammock also testified that Mahdi had been hospitalized, psychiatrically, on one occasion in Baltimore. **(R. p. 1747, 1749, 1756).** Hammock testified this admission lasted approximately two (2) months at a mental health facility, and Mahdi was released. **(R. p. 1756).**²²

²²The 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, Mahdi stated "I have none of those problems, Your Honor." **(R. p. 1347).**

The time-line introduced through Hammock sets forth that Mahdi was committed involuntarily to the Walter Carter Center psychiatric facility, after being separated from his brother and father, where he was diagnosed with Major Depression with suicidal ideation, adjustment disorder, R/O Adjustment Disorder, Developmental Reading Disorder, and history of right arm and leg fractures.²³ **(Defendant's Ex. 1/Respondent's Ex. 5).** The Exhibit sets forth that Mahdi spent sixty (60) days in the psychiatric facility in Baltimore.

Ms. Hammock testified that after Mahdi was released from the mental health facility, he stayed only a short time with his aunt and uncle, Carson and Lawanda, because he was anxious to be reunited with his father and brother. **(R. p. 1756).** The time-line introduced through Hammock also sets forth that Mahd's behavior in Carson and Lawanda's home was defiant and became even more defiant when Mahdi learned his brother had already re-united with his father, and, as a result, Mahdi had to be returned to live with his father. **(Defendant's Ex. 2/Respondent's Ex. 5).**

The time-line introduced through Ms. Hammock also sets forth that Mahdi, his brother, and his father were subsequently re-united on the Burwell family property, and this was an isolated place in the country, and they often had no food, heat, or money. **(Defendant's Ex. 2/ Respondent's Ex. 5).** Hammcock also testified that Mahdi had difficulty in his adolescence which eventually resulted in his incarceration. **(R. p. 1749).**

Ms. Hammock also testified Mahdi eventually re-united with his mother, however this did not work out. Hammock testified it was not a good reunion. Hammock testified Mahdi and his mother did not get along, and they both had very different ideas about his living with her. **(R. p.**

²³Mahdi suffered broken bones as child while riding a bicycle and falling off of money bars. There was no contention at PCR that Mahdi was ever physically or sexually abused by anyone. **(PCR Tr. pp. 571-572).**

1758). The time-line also reflects that Mahdi re-united with his mother after being released from DJJ after his first stint of incarceration. **(Defendant's Ex. 1/Respondent's Ex. 5).** After this split from his mother, Ms. Hammock testified Mahdi and his mother had not spoken to each other since. **(R. p. 1758).**

Ms. Hammock also testified before Judge Newman to Mahdi's difficulties in school. Hammock testified that in her expert opinion Mahdi's education was disrupted many times. **(R. p. 1752,1756).** Hammock testified this was reflected in the school records. **(R. p. 1752).** Ms. Hammock also testified that the school records noted lateness and absences, but that was not consistent through the whole record. **(R. p. 1756).** The time-line of Mahdi's school history introduced before Judge Newman shows Mahdi was forced to change elementary schools five (5) times. **(Defendant's Exhibit 3).** The time line of Mahdi's life introduced into evidence also shows Mahdi had to move several times. **(Defendant's Ex. 2/Respondent's Ex. 5).** Hammock testified that Mahdi started out kindergarten at Sister Clara Muhammad School in Richmond. He also completed part of kindergarten at Totoro Elementary School in Lawrenceville. Mahdi then moved back to Richmond and attended Chamberlayne Elementary School for part of that year. Then he is removed from there and sent to Baltimore where he attended Scotts Branch Elementary School for two years. Then he is removed from that school while in the Carter Center, and ultimately returns back to Lawrenceville to live with his father. **(R. pp. 1754-1756).** Hammock also testified that even in his pre-teen years there was a lack of stability in terms of Mahdi's attending school, and it was reflected in the kinds of reports he received. **(R. p. 1760-61).**

Ms. Hammock testified Mahdi constantly had difficulty in school. **(R. p. 1752).** He was considered bright, but he didn't perform well. **(R. p. 1752-1753).** Hammock testified that Mahdi

was particularly a poor reader. **(R. p. 1753)**. Hammock also related to Judge Newman that Mahdi's uncle Carson also reported that Mahdi could not read when he came to live with them at eight (8) years old. She also informed Judge Newman that both Carson and Lawanda reported to her that Mahdi had difficulty in school. **(R. p. 1753)**. She testified Carson and Lawanda reported that there was constant conflict in getting Mahdi to deal with the fact that he had these academic limitations. **(R. p. 1754)**. She testified the school records during this time were consistent with this report. **(R. p. 1754)**. Hammock testified Mahdi had uneven skills in school. **(R. p. 1755)**. She testified Mahdi was in the average math program, but in the below average reading program. **(R. p. 1755)**. While he excelled in science, his reading, vocabulary, and spelling remained below average. **(R. p. 1756)**. She also noted that he needed improvement in a number of areas, including standards for behavior and showing respect for authority. **(R. p. 1755)**. She testified Mahdi was described as having poor self-esteem throughout his academic time. **(R. p. 1753)**. She also testified that it was noted several places that he had poor self-esteem and had difficulty in relationships with others. **(R. p. 1756)**. The time line of Mahdi's life also shows that when he was involuntarily committed to the Carter Center his initial diagnosis included "Developmental Reading Disorder." **(Defendant's Ex. 2/Respondent's Ex. 5)**. Counsel also introduced another Exhibit through Hammock **(See Defendant's Exhibit 3)** which summarizes Mahdi's difficulties in school particularly in reading, and writing, which remained at below grade level throughout elementary school. Ms. Hammock also confirmed this in her testimony. **(R. p. 1755)**. The exhibit also chronicles the numerous absences Mahdi had while in school. **(Defendant's Exhibit 3)**. The exhibit also chronicles that Mahdi's father removed him from school in the 5th grade to home school him. **(Defendant's Ex. 3)**. The exhibit also indicates there was no information this home schooling had occurred. **(Defendant's Ex.**

3). Hammock testified Mahdi's educational history was one of poor school progress. **(R. p. 1762).**

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

Ms. Hammock testified that Mahdi had been traumatized throughout his early life, and this had an impact on his inability to make good choices. It also had an effect on his ability to have a good sense of himself and others. And, it had an impact on his ability to behave according to

societal norms. **(R. p. 1762).**

Ms. Hammock testified that during her investigation of Mahdi's life, she assessed whether certain risk factors were present or not. She testified certain risk factors were present. She testified Mahdi had been abused and neglected. She testified he suffers from abandonment. She also testified he was never exposed to the right kind of socialization. And, he has poor self-esteem. She testified he has a poor history of school progress and a poor sense of self. **(R. p. 1762).**

Ms. Hammock testified Mahdi is someone who has been neglected, was abandoned, suffers from poor parenting, and as a result is likely to end up in a situation where he is out of control and he does damage to himself and others. Hammock testified Mahdi fits the typical profile of persons who end up in the kind of situation before the sentencing court, because Mahdi never really had a chance to develop appropriately. **(R. p. 1762-1763).**

The State did not cross-examine Ms. Hammock or challenge her mitigation testimony. **(R. p. 1763).** The State did not challenge the accuracy of the exhibits introduced through Hammock. **(R. pp. 1739-1763).** All of this evidence was before the sentencing court uncontested.

Furthermore, the State introduced portions of Mahdi's DJJ records during the sentencing proceeding. While the State introduced these records as evidence of Mahdi's character, the records also confirmed much of what Ms. Hammock testified to regarding Mahdi's family and upbringing. The records indicate that Mahdi lacked appropriate parental discipline and support. The records also indicate Mahdi was not supervised as a child and was not given appropriate structure and guidelines. **(State's Exhibit & See R. pp. 1440, 1442, 1869-70, 1873-74).** The records indicate Mahdi began smoking marijuana at age 12 and had been smoking marijuana every day since he was twelve (12) years old. Mahdi also informed DJJ officials he began selling crack cocaine at age fourteen (14).

(R. p. 1440). These records indicate that Mahdi needed self-esteem training, family services, and values clarification. The records also indicate that Mahdi suffered from a lack of a mother. (R. p. 1446). The records also indicate Mahdi's father was not involved in his life, the father had a criminal record for malicious damage to property and escape, Mahdi had no supervision, no curfew, and Mahdi's father did not care about Mahdi's criminal behavior. (R. pp. 1869-70, 73-74). These records also indicate Mahdi came from a dis-functional one (1) parent family. The DJJ day notes also indicate that Mahdi's father believed the criminal justice system was prejudiced, and he also voiced his belief that there were many white supremacists in the area. (R. p. 2146). These notes also indicate that a young Mahdi also makes racial comments. (R. p. 2154).

Based on the record, Mahdi has failed to demonstrate deficient performance here because much, if not all, of the evidence Mahdi offered regarding his family and social history, whether through family or community witnesses, was cumulative to evidence presented in Mahdi's capital sentencing proceeding. (See **Record 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); Simpson v. Moore, 367 S.C. 587, 605-07, 627 S.E.2d 701, 711-12 (2006)(reversing PCR Court's conclusion that capital defendant suffered prejudice from counsel's failure to offer sufficient social history evidence in mitigation case where record showed counsel did in fact do adequate investigation and presented similar mitigation evidence); 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). This ground must be dismissed with prejudice.

Furthermore, if counsel did not present certain evidence Mahdi presented at PCR, there was

an objectively reasonable strategic reason for not doing so. Strickland v. Washington; Council v. State. Mahdi presented several family members at the PCR hearing who were interviewed by Ms. Tarr, Ms. Hammock, and/or counsel prior to the sentencing proceeding but not called during the sentencing proceeding before Judge Newman. Trial counsel testified that at the time of the sentencing proceeding these witnesses were not cooperative and were unwilling to testify at the sentencing proceeding. Further, counsel testified the witnesses related or their investigation uncovered that the witnesses would say bad things about Mahdi. Carson Burwell related to applicant's defense attorneys in N.C. that Mahdi "was a demon." This fact was established by a document generated by Ms. Tarr after meeting with the N.C. defense attorneys and shared with defense counsel in this case. (PCR Tr. pp. 503-505, Defendant's Ex. 7). Carson also related to counsel in this case that if he were called to testify he would not have good things to say about Mahdi. (PCR Tr. pp. 618-619). Carson indicated that Mahdi was manipulative and faked abuse and suicidal gestures. (PCR Tr. pp. 572-574, 64). Both Lawanda and Carson admitted that Mahdi almost had them arrested by police when he made a false claim of child abuse, and manufactured false evidence of that child abuse. (PCR Tr. pp. 572-574, 58-61, 63-64, 266-267, 287-288, 290). Lawanda and Carson also related that Mahdi acted out while at the Carter Center, the psychiatric facility, and had to be placed in isolation. (PCR Tr. pp. 66-67, 292). Carson also related to Paige Tarr Haas that Mahdi was manipulative. (PCR Tr. pp. 572-574). Carson related that Mahdi acted out after being released from the Carter Center and had to be returned to live with his father. (PCR Tr. p. 68-69, 618-619). Lawanda also related that Mahdi acted out and had to be returned to live with his father. (PCR Tr. pp. 293-294). Both aunt and uncle related that Mahdi would only talk about suicide when he did not get his way or did something wrong. (PCR Tr. pp. 572-574, 64-66,

288-289, 618-619). Carson was also aware of an incident where Mahdi, his brother, and his father were involved in destroying Carson's sister's car. **(PCR Tr. p. 69).** Carson and Lawanda also related that when Mahdi lived with his uncle Nathan as an adult, he could not abide by the rules of the house, and was forced to leave that home. **(PCR Tr. pp. 70, 278).**

At PCR Mahdi also called one of his aunt's, Sophie Gee, to testify as to mitigation. Ms. Gee was aware of the incident where Mahdi slashed his mother's tires. Ms. Gee also testified that Mahdi slashed his mother's tires because she would not let him use her car. She was also aware Mahdi was arrested for this incident. **(PCR Tr. p 105-106).** If she had been called at sentencing should would have been questioned about this incident, further underscoring this incident to the sentencing court, and also informing the sentencing court that Mahdi slashed his mother's tires simply because she would not let him use her car.

Counsel was not ineffective in failing to call witnesses from whom bad things could be elicited about Mahdi, or who indicated they were not going to be helpful to Mahdi. This Court finds it was an objectively reasonable trial strategy decision for counsel not to call Carson or Lawanda Burwell or Sophie Gee, who could be asked on cross-examination about instances of bad conduct by applicant and who would have been required to answer truthfully to such questions. Reed v. Florida Department of Corrections, 393 F.3d 1217 (11th Cir. 2010)(attorneys were not ineffective in failing to call family members who would have opened the door to bad things about defendant's past); Rutherford v. Crosby, 385 F.3d 1300 (11th Cir. 2000)(trial attorneys' strategic decision not to call witnesses on alcoholism of defendant was objectively reasonable where it would have opened the door to prior violent behavior of the defendant that the jury had not heard). *See also* Bell v. Kelly, 260 Fed. App. 599 (4th Cir. 2008)(*Unpublished Opinion*)(finding state court's determination

petitioner had failed to prove prejudice was not unreasonable where petitioner alleged counsel was ineffective for failing to investigate and present family members mitigation evidence where family members could have been cross-examined about the defendant's prior bad conduct such as infidelity, abandonment of his children, wife, and girlfriend, domestic abuse, and failure to provide child support), *citing Barnes v. Thompson*, 58 F.3d 571 (1995)(upholding in a federal habeas setting district court's determination that trial counsel was not ineffective in state death penalty case in failing to offer family members who constituted "cross-purpose evidence."); *Moody v. Polk*, 408 F.3d 141, 154 (4th Cir. 2005)(to the extent affidavits presented new information, they were "double edged.").

Furthermore, calling Mahdi's family members as mitigation witnesses during the sentencing proceeding would have exposed Mahdi to testimony that none of Mahdi's cousins had engaged in violent criminal activity against another. (See PCR Tr. pp. 278-282, 284-285). See *Reed v. Florida Dept. of Corrections*, *supra* (similar). In fact, Mahdi's brother Saleem grew up in the same household as Mahdi and under the same circumstances and had not engaged in, been arrested for, or convicted of any violent behavior toward other persons during his life. (PCR Tr. pp. 284-285, 318-319). *Id.* Furthermore, the record shows Mahdi's family is well-educated with many family members employed as professionals or educators, and one distant relative having graduated from Harvard. If Mahdi's family members had been called as witnesses, the State could have contrasted Mahdi's criminal history with other family members who were successful and did not engage in criminal conduct.

This Court had the opportunity to view the witnesses testimony at the merits hearing, and make a credibility assessment accordingly, and finds the testimony of counsel to be credible on this

issue. Counsel's testimony on this issue is also supported and corroborated by the evidence and testimony introduced at the PCR hearing. Counsel made an objectively reasonable trial strategy decision not present witnesses who were uncooperative, refusing to testify, or had bad things to say about Mahdi or from whom bad information about Mahdi could have been elicited on cross-examination. Strickland v. Washington (objectively reasonable trial strategy decisions are not subject to claims of ineffective assistance of counsel); Council v. State (counsel's strategic decisions will be judged on an objective standard of reasonableness); Wong v. Belmontes (it was an objectively reasonable trial strategy decision for counsel not to call witnesses who would expose on cross-examination bad character evidence about the defendant).

Furthermore, this Court finds Mahdi has not shown that trial counsel was deficient in failing to investigate, develop, or present mitigation evidence from his family members or community witnesses. Counsel conducted a reasonable investigation regarding mitigation evidence and presented what evidence it could at the sentencing proceeding that was favorable to Mahdi. Wiggins; Rosemond.

The New Social Worker

Nicholas Cooper-Lewter, Ph.D. was qualified as an expert in clinical social work and psycho-social assessment. (PCR Tr. 187-89). He testified that he spoke with Carson Burwell, Lawanda Burwell, Frances Read, Rose Gupton, Sophia Artis Gee, Sandra Burwell, Debra Gray, Pastor Myra Harris, Gerald Wilson, George Smith, and Sharon Pond, to name a few. (PCR Tr. 190-91). Others were listed on the second page of his report. Cooper-Lewter also indicated that he reviewed two notebooks of documents provided by Applicant's PCR counsel.

Cooper-Lewter testified that unlike a psychologist or psychiatrist, he does not do testing. (PCR Tr. 193). He noted that as a social historian, he makes no diagnoses. Id. Cooper-Lewter

testified that in this process in Mahdi's case, he consulted with deRossett Myers, Ph.D. and Donna Schwartz-Watts, M.D. (PCR Tr. 193-94).

Cooper-Lewter testified that Mahdi was born into a very fragile family. There were toxic relationships between husband and wife. Cooper-Lewter saw that there was a lot of unpredictable repeated losses that would destabiliz

Cooper-Lewter also saw an issue with Mahdi's relationship with his father. (PCR Tr. 194). Mahdi's father had issues with depression and anger. (PCR Tr. 194-95). Cooper-Lewter found it was significant that Mahdi's flawed father was his role model and the person to whom Mahdi was most attached. (PCR Tr. 195).

Cooper-Lewter testified that Mahdi's mother enjoyed him in the beginning. (PCR Tr. 196). He indicated that Mahdi's mother left when he was around four or five, and it was a traumatic experience for Mahdi. (PCR Tr. 196-97). Cooper-Lewter noted that Mahdi was not comforted by his father regarding his mother's abandonment; instead, Mahdi was exposed to physical violence in his father's home. (PCR Tr. 197-98). Cooper-Lewter testified that Mahdi attached to his father at a young age, and that was not helpful. (PCR Tr. 199). Cooper-Lewter indicated that Mahdi's father admitted that he did not supervise his children like he should have. (PCR Tr. 200). According to Cooper-Lewter, Mahdi's father acknowledged that he placed Mahdi in a situation where Mahdi was looking after his father and brother. (PCR Tr. 201).

When Mahdi was approximately eight years old, he was both shocked and excited when he discovered his mother was alive. (PCR Tr. 202). When Mahdi's father attempted to kidnap Mahdi's mother, Mahdi and his brother attempted to intervene. (PCR Tr. 202-03). Mahdi was further traumatized when his mother left again. (PCR Tr. 203).

Mahdi attended five different schools between pre-kindergarten and the eighth grade. (PCR

Tr. 204-05). Cooper noted that it would have been difficult for Mahdi to connect with peers or teachers as a result of his frequent moving. (PCR Tr. 207). According to Cooper-Lewter, Mahdi did not receive the type of intensive treatment that he needed when he went to the Carter Center when he was nine. (PCR Tr. 208-09). Cooper-Lewter testified that the documents from the Carter Center indicated that Mahdi blamed himself for his family breaking up, and all Mahdi wanted was his family back together. (PCR Tr. 211-12). Mahdi was diagnosed with major depression recurrent with suicidal ideation; adjustment disorder and developmental reading disorder were both ruled out. (PCR Tr. 212).

Cooper-Lewter testified that while the records indicated that Mahdi never stopped looking for or wanting his mother. (PCR Tr. 218). Mahdi did not have a lot of structure in his life, particularly between ages five and eight. (PCR Tr. 219).

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

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

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

Cooper-Lewter contended that Mahdi's mental state continued to decline. When Mahdi was released from DJJ at age 17, he did not get better. (PCR Tr. 308-09). Mahdi attempted to reconnect with his mother, but the attempt did not go well. (PCR Tr. 309). According to Cooper-Lewter, Mahdi was incarcerated in adult prison within a month of his release. (PCR Tr. 309). Cooper-Lewter maintained that Mahdi continued going downhill during his incarceration. (PCR Tr. 309). Cooper-Lewter opined that some of the incidents that Mahdi witnessed while in Wallens Ridge started to give credence to the ideas that Mahdi was taught by his father. (PCR Tr. 309-11).

Cooper-Lewter admitted that he did not include any details regarding Mahdi's employment history in his report, and he asserted he did not do so because he did not believe it was important in terms of impacting Mahdi's psycho-social history. (PCR Tr. 315-17). Cooper-Lewter did not review Marjorie Hammock's notes, Dr. Geoff McKee's notes, or Dr. Martin's notes. (PCR Tr. 328-29). Cooper-Lewter did not interview Mahdi's brother, Saleem. (PCR Tr. 317-18). He noted that Saleem had the same mother and father, and Saleem lived with their father during the same periods of time as Mahdi. (PCR Tr. 318-19). Saleem went to the Job Corps and Mahdi ended up in DJJ. (PCR Tr. 319). Cooper-Lewter also testified that he was only asked to assess Mahdi's history until he was

released from Wallens Ridge. (PCR Tr. 319-21). Cooper-Lewter also did not talk with Nathan Burwell. (PCR Tr. 329-30). He did not review the videotaped statement of Nancy Burwell, Mahdi's grandmother. (PCR Tr. 330). He could not say why Mahdi left the State of Virginia, or what psycho-social stressors Mahdi was under when he left shortly before Christopher Boggs' murder in North Carolina or Captain Myers' murder in South Carolina. (PCR Tr. 321).

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

Cooper-Lewter admitted that Mahdi indicated he was embarrassed by his father's ranting. (PCR Tr. 331-32). He noted that Mahdi indicated that the rants would go on and on, and there was a point where he just stopped listening. (PCR Tr. 332).

The Lack of Merit of this Ground

Mahdi claims counsel should have called a different social worker, Dr. Nicholas Cooper-Lewter, and related what Cooper-Lewter related to this Court. However, Mahdi ignores that counsel did retain and call a qualified forensic social worker who interviewed Mahdi, Mahdi's immediately family, and many members of his extended family. As previously set forth above, Ms. Hammock testified in detail before Judge Newman to the problems in Mahdi's family including his father's difficulties in life, including depression, criminal arrests, inability to keep a job, and inability to get along with the community and even with his own family. **(R. pp. 1734-1763 & Defendant's Ex.**

2). Ms. Hammock also testified to Mahdi's life of deprivation, including transience, lack of proper support, abandonment by his mother, witnessing domestic violence committed by his father on his mother and grandmother, lack of a proper male role model, and psychiatric commitment at the age of nine (9). **(R. pp. 1734-1763 & Defendant's Ex. 2).** Ms. Hammock also testified to the risk factors Mahdi was exposed to as a child and adolescent and how that affected the rest of his life. **(R. pp. 1734-1763).** The DJJ records introduced at sentencing also detailed that Mahdi came from a dysfunctional one parent family, and Mahdi was provided with no structure or guidelines as a child. Cooper-Lewter admitted at PCR that this information was all before Judge Newman. **(PCR Tr. pp. 328-340).** This Court does not find counsel was deficient in failing to introduce the testimony of a different forensic social worker.

This Court finds Mahdi has failed to show deficient performance in failing to present the information presented by Cooper-Lewter because much of Cooper-Lewter's testimony was also testified to by Ms. Hammock at the sentencing hearing. Simpson v. Moore, 367 S.C. 587, 605-07, 627 S.E.2d 701, 711-12 (2006)(reversing PCR Court's conclusion that capital defendant suffered prejudice from counsel's failure to offer sufficient social history evidence in mitigation case where record showed counsel did in fact do adequate investigation and presented similar mitigation evidence); 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). Counsel is not required to expert shop. *See Poyner v. Murray*, 964 F.2d 1404, 1419 (4th Cir. 1992)(petitioner could not establish ineffective assistance because counsel did not "expert shop" until one could be found who would testify favorably).

Additionally, if counsel had called Cooper-Lewter, on cross-examination the Solicitor would

have introduced Mahdi's numerous disciplinary violations within the Virginia Department of Juvenile Justice as the Attorney General did at the PCR merits hearing. Cooper-Lewter specifically relied on these records in forming his assessment of Mahdi.

There were over forty (40) disciplinary violations by Mahdi in the Virginia Department of Juvenile Corrections. These included Mahdi assaulting a teacher; assaulting guards on numerous occasions; assaulting other inmates, leading an escape attempt, refusing to follow orders; refusing to be disciplined, cursing staff, and damaging and destroying property. Cooper-Lewter could also have been questioned about Mahdi's statements to Cooper-Lewter that he never should have been placed in special education in elementary school, because he did not belong there. Cooper-Lewter would also have been cross-examined about Mahdi's numerous disciplinary violations within the Virginia Department of Corrections, including assaulting staff, setting fire to his cell, and possession of contraband. The State would also have cross-examined Cooper-Lewter as he was at PCR regarding Mahdi's faking a suicide attempt at DJJ in order to manipulate the system to gain better conditions of confinement. The State would also have brought out from Cooper-Lewter that Mahdi was diagnosed at DJJ with conduct disorder, which is a pre-cursor to anti-social personality disorder.

The State would also have cross-examined Cooper Lewter on the fact Mahdi's aunt informed him that Mahdi would threaten to harm himself when he did not get his way. The State would also have brought out that Mahdi informed personnel at the Carter Center that he only wanted to hurt himself when he did not get his way. The State would also have cross-examined Cooper-Lewter on the fact that Mahdi's brother grew up in the same home and did not commit criminal offenses.

Cooper-Lewter would also have been cross-examined regarding Mahdi holding several different jobs during his life and even obtaining college credits. Cooper-Lewter would also have been forced to admit, as he testified at PCR, that Mahdi had never been physically abused or sexually

abused by his father, mother, or uncle Carson or aunt Lawanda. (PCR Tr. pp. 340-341).

Cooper-Lewter would also have been impeached on the fact that he did not review any records on Mahdi after he was released from the Virginia Department of Corrections. He did not review Dr. Martin's notes; he did not review Dr. McKee's notes, and he did to even review Ms. Hammock's interview notes. He could not opine what stressors, if any, Mahdi was under or caused him to commit the murder of Christopher Boggs or Captain Myers. Cooper-Lewter admitted that he did not include any details regarding Mahdi's employment history in his report, and he asserted he did not do so because he did not believe it was important in terms of impacting Mahdi's psycho-social history.

Dr. Haney

Craig Haney, Ph.D, an expert in social psychology with specific expertise in prison systems and the effects of incarceration on inmates, reviewed Mahdi's school records, psychiatric records, juvenile justice records, and Virginia Department of Corrections. (PCR Tr. 362-63). Haney noted that Mahdi was identified early on as someone with a significant psychological or psychiatric disorder. (PCR Tr. 364). Mahdi was diagnosed with clinical depression at age 9, and he was treated as an inpatient at the Walter Carter Center. (PCR Tr. 365-66). Haney testified there was no indication that Mahdi was cured when he was released; instead, he was released with a recommendation that he receive follow-up treatment or therapy. (PCR Tr. 366). Mahdi received very limited treatment, and he was not medicated as part of those treatments. (PCR Tr. 366-67).

Haney testified that while Mahdi was in DJJ, he did receive some contact with therapists, but that was in the context of the correctional institution whose primary purpose was not to provide therapy. (PCR Tr. 368). In the juvenile institution, Mahdi would have experienced some victimization akin to what Mahdi saw when his father victimized his mother. (PCR Tr. 370). Haney

asserted the records indicate Mahdi projected a tough exterior as a defense to avoid being victimized by others in the institution. (PCR Tr. 371-72). Mahdi's inability to deal with his anger resulted in a record replete with incidents of impulsive acting out, though some of his actions were done just out of stupidity. (PCR Tr. 373). Haney opined that Mahdi's problems were deeper than DJJ understood them to be, and in light of the fact the problems Mahdi had in his first stint were reoccurring in his second stint, DJJ should have considered utilizing a different approach in handling his problems. (PCR Tr. 378-79). Mahdi was released from this second stint with a record that arguably indicated his behavior was getting worse, and left DJJ with many of the same problems he had when he entered the system. (PCR Tr. 377-80).

Haney agreed that some of the records indicated Mahdi's expression of suicidal thoughts could be viewed as attempts to manipulate his situation, but it was not inconsistent for someone to express suicidal thoughts and be manipulative. (PCR Tr. 374-75).²⁴ Haney agreed that Mahdi began acting out after his release from the Carter Center when he learned that his brother was living with his father. (PCR Tr. 398). He understood Lawanda Burwell as stating "why don't you shoot me" or "just shoot me" on a number of occasions, and she was not sure what that meant. (PCR Tr. 399).

Haney noted that in Mahdi's stint in the adult prisons in Virginia, Mahdi had almost no psychological or psychiatric contact during the entire period of his institutionalization. Haney characterized the overwhelming majority of the infractions that led Mahdi to be placed in supermax as relatively minor. (PCR Tr. 381-82). In reviewing Mahdi's records from his stint in Wallens Ridge, Haney noted that Mahdi's pattern of behavior of acting out in irrational and impulsive ways

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

that was evident in the DJJ records continued. (PCR Tr. 391). Haney connected those actions to Mahdi's underlying, untreated psychological issues. (PCR Tr. 392). The overwhelming majority of the offenses for which Mahdi is written up were impulsive, and Haney claimed Mahdi was not one who devised elaborate plans or victimized others. (PCR Tr. 393). Haney testified that none of Mahdi's lifelong mental health issues were addressed while he was in adult prison. (PCR Tr. 393). Further, no effort was made by the corrections system to ease Mahdi's transition from Wallens Ridge to society. (PCR Tr. 393-94).

Haney recalled that extensive testing was done on Mahdi when he entered DJJ, and they recommended he be placed in an anger management program. (Tr. 400-01). Mahdi was kicked out of the anger management program. (PCR Tr. 401). Mahdi did have periodic visits with one or two different psychologists while he was in DJJ. (PCR Tr. 401-02). Haney acknowledged that he was aware a psychologist diagnosed Mahdi with intermittent explosive disorder and antisocial personality disorder when he was processed at the Virginia Department of Corrections. (PCR Tr. 395).

Haney testified he only examined the institutional history. (PCR Tr. 410-11). He did not examine any employment history Mahdi had. Id. While he has talked with Mahdi, Haney had not discussed anything that occurred after Wallens Ridge with him. Thus, he was not aware of what exactly may have influenced Mahdi when these crimes were committed. (PCR Tr. 403-05). Haney indicated he had not seen any of Mahdi's corrections' records from South Carolina. (PCR Tr. 402).

Haney noted that Mahdi has a high IQ. (PCR Tr. 403). Haney contended that Mahdi's prior, untreated problems led him to engage in a lot of irrational, immature, and impulsive things that he should not have done. (PCR Tr. 407-09). Haney asserted Mahdi's choices were impaired by the virtue of the experiences preceding them. (PCR Tr. 408).

The Lack of Merit of this Ground

Mahdi claims counsel should have called Dr. Haney at mitigation to elicit the testimony above and to underscore the impact of Mahdi's confinement on him. There is no merit to this argument either.

This Court had the opportunity to view and listen to Dr. Haney's testimony above. This Court finds that it is not credible nor are his conclusions supported by the evidence in the record.

This Court does not accept Dr. Haney's attempt to place the blame for Mahdi's criminal conduct on untreated psychological issues or on the criminal justice system. The Court finds this testimony is not credible on this record. Nor does this Court believe Judge Newman would have found this testimony persuasive or credible.

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

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

The record shows that Mahdi stole items from victims because he wanted to and did not think

he would get caught. The record also shows Mahdi stabbed Moises Rivera because Rivera caught him breaking into an apartment as an adult. The record shows Mahdi murdered drug dealers in Virginia to create a false drought so he could make more money selling drugs. The record shows Mahdi burglarized a home in Lawrenceville so he could steal the owners' gun. The record shows Mahdi stole a license plate and stole a car to leave Virginia because homicide detectives were closing in on him for one of the homicides he committed there. The record shows Mahdi murdered Christopher Boggs to rob the convenience store in Winston-Salem, North Carolina. The record shows Mahdi car-jacked a car in Columbia, South Carolina because his other car, the one he had stolen in Virginia, had broken down. The record shows Mahdi murdered Captain Myers because Mahdi had broken into Captain Myers shed to escape police and, Myers came in on Mahdi inside the shed. The record shows Mahdi attempted to burn Captain Myers' body to destroy evidence. And, the record shows Mahdi stole Captain Myers' truck to escape from South Carolina. The record shows Mahdi is willing to commit crimes and committed crimes if necessary for his own personal benefit.

Nor does this Court accept Dr. Haney's testimony that Mahdi is just an impulsive actor and does not victimize others. The Virginia DJJ records and Mahdi's adult criminal records from Virginia show without question that he is a person who victimizes others and manipulates the system for his own benefit. Mahdi repeatedly assaulted guards in Virginia. Furthermore, Mahdi's records from the South Carolina Department of Corrections, which Dr. Haney did not review, show that Mahdi has repeatedly assaulted guards and threatened to assault guards here. Additionally, Mahdi's conduct in murdering Christopher Boggs in North Carolina shows his plan was to murder Boggs simply so he could rob the store's cash register. And, trial counsel's testimony, along with that of Dr. Martin and Dr. McKee at PCR, shows that Mahdi plans out criminal behavior when necessary

to benefit himself. As a result, this Court does not accept Dr. Haney's testimony as credible and so finds.

Nor does this Court accept Dr. Haney's testimony that Mahdi's incarceration in DJJ and in adult prison led to his later criminal conduct. Mahdi misses the point. The elephant in the courtroom is Mahdi's bad character and characteristics that led him to be confined, and which led him to be confined in the institutions in which he was confined. And, Mahdi did not conform his conduct to the requirements of the law so that he would not go back to a harsh prison environment, but committed even more and more violent offenses.

The record shows Mahdi was not confined after his first brush with the law. Mahdi was arrested at fourteen (14) after breaking into a car and stealing a purse. Mahdi also escaped from police custody after this arrest. Mahdi admitted to DJJ employees that he had no problem in stealing, and he felt no remorse about it. Mahdi was placed on juvenile probation for this offense. **(PCR Tr. pp. 342-343, Mahdi's DJJ Records).**

While on juvenile probation, Mahdi did not adjust his criminal behavior. Mahdi broke into two (2) homes and stole firearms. One gun was a .44 magnum pistol. As a result, Mahdi was confined at the Virginia Department of Juvenile Justice. While there, Mahdi led a pre-meditated assault on another inmate, in which he enlisted the support of other juveniles. This inmate was injured and had to be taken for medical treatment. While confined on this first occasion, Mahdi complained that he should not be confined at all because he did not have a lengthy juvenile record. While confined, Mahdi admitted that one of his strengths was robbing people. During this confinement, Mahdi engaged in other disruptive behavior and committed other disciplinary violations.

After his release from the Virginia Dept. of Juvenile Justice, Mahdi was confined again after

engaging in an eight (8) hour standoff with police. During this stand-off, Mahdi was heard to say "them mother-fuckers' got guns" and "I'm going to kill a police officer before I die." While Mahdi attempts to blame his father for this stand-off, Mahdi could have walked out of his home anytime he wanted to during the standoff. When the stand-off ended, police found Mahdi in the back room of the house watching television. Mahdi was recommitted to the Department of Juvenile Justice for obstruction of justice and contempt of court.

While incarcerated this second time, Mahdi assaulted other inmates, destroyed property, assaulted staff, threatened staff, and generally refused to follow orders and comply with discipline. Mahdi threatened that if he was not released from DJJ on time (i.e. when he expected to be released), he would "go around acting crazy" and assaulting people. Mahdi also threatened that if he were not released on time, guards would find him hanging in his cell. True to his word, Mahdi fashioned a sheet into a noose and tied it around his neck, causing him to be placed on suicide watch. Later, Mahdi admitted to the staff counselor that this suicide attempt was not genuine, and he only wanted better living conditions, specifically more recreation time, and was attempting to manipulate the system by the suicidal gesture. After this incident, Mahdi incurred other disciplinary violations, including an assault.

Mahdi was eventually released from the Department of Juvenile Justice. Rather than maintaining good behavior so that he would not have to return to prison, Mahdi slashed his mother's tires either because she would not come to the door of her residence, or she would not let Mahdi use her car.

Subsequently, Mahdi attempted to break into an apartment. When caught in this last act, he severely stabbed Moises Rivera, a maintenance worker at the apartment complex. Madhi fled the scene and was apprehended by police using dogs. Madhi was sentenced to adult prison for this

criminal act.

While in adult prison, Mahdi engaged in the same behavior he had in the Virginia Department of Juvenile Justice. Mahdi disobeyed direct orders, was found in possession of contraband, set fire to his cell, and committed other disciplinary violations. As a result of his prison mis-conduct, Mahdi was assigned to a Super-Max facility, Wallens' Ridge State Prison. At Wallens' Ridge, Madhi engaged in similar conduct including assaulting a non-inmate and other disciplinary violations.

After being released from Wallens' Ridge, Mahdi did not conform his behavior in order that he would not be sent back to a harsh prison environment. Mahdi initially lived with his Uncle Nathan and his grandmother Nancy Burwell. Mahdi would not live by the rules of the house as set down by his uncle and was asked to leave.

Rather than obeying the law so he would not be sent back to prison, Mahdi engaged in numerous criminal acts while on supervised probation or parole. Mahdi engaged in these acts knowing they could result in the revocation of his supervised probation and his return to prison.

While on supervised probation, Mahdi possessed a 9 mm handgun. Mahdi also sold drugs during this time period. Mahdi was involved in the murder of a drug dealer in Virginia. Mahdi told Doctor Martin he was involved in another murder in which the police had yet to discover the body. Mahdi burglarized the home of Amanda Weaver and stole a .380 pistol, which he was not supposed to even possess under the conditions of his supervised probation or parole. Mahdi stole a car and a license plate. Mahdi then left the State of Virginia because homicide detectives were closing in on him on the Virginia homicide. Under the conditions of his supervised probation, Mahdi was not supposed to leave the State of Virginia. Shortly thereafter, Mahdi murdered Christopher Boggs in North Carolina so he could rob the store's cash register. Mahdi then drove to South Carolina and

car-jacked a vehicle in Columbia, South Carolina. Mahdi then attempted to pass a stolen credit card in Calhoun County. Mahdi then burglarized Captain Myers' shed and murdered Captain Myers. Mahdi stole Captain Myers truck and his firearms. Mahdi then drove to Florida. While there, Mahdi impersonated a police officer in Satellite Beach, Florida. Also in Florida, Mahdi fled from police in Captain Myers' police issued truck.

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

This Court does not find Dr. Haney's testimony on the impact of prison on Mahdi to be credible or persuasive. Nor would it have been to Judge Newman.

Quite the opposite is true. The record shows Mahdi has had an impact on each prison or institution he has been in, not the reverse.

Additionally, the record shows that Mahdi was violent before he was ever incarcerated at Wallens' Ridge. According to Mahdi's school records he was physically aggressive toward other children. Mahdi threatened to kill a police officer when he was a juvenile. Mahdi grabbed a police officer's gun during another arrest when he was a teenager. Mahdi also slashed his mother's tires when he was a teenager. Mahdi also told an officer he should have killed his mother. Mahdi threw a cement block through an aunt's windshield as a teenager. In 1998, Mahdi stated his only strength was robbing people. As previously stated, Mahdi assaulted inmates while incarcerated in the Virginia Department of Juvenile Justice. Mahdi assaulted an inmate on April 11, 1999 by hitting him in the head with a broom. Mahdi had 12 moderate institutional violations while at Culpepper

Juvenile Institution, and Mahdi had 12 major institutional violations at Culpepper Juvenile Institution. Mahdi had anger management training while in DJJ but did not practice what he learned. Mahdi committed several assaults on guards while he was a juvenile. Mahdi punched a guard in the face on September 29, 1999. Mahdi assaulted a staff person on November 18, 1999. Mahdi had an assault on another staff person on December 5, 1999. Mahdi threatened to assault individuals on several occasions while he was a juvenile. The record shows Mahdi was violent even at a young age.

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

This Court finds counsel was not deficient in failing to investigate, develop, and present the mitigation evidence presented by Dr. Haney. Strickland; Wiggins; Rompilla; Council; Rosemond. The evidence is not credible, nor would it have been to Judge Newman, the sentencing court. Dr. Haney's position is refuted by the evidence and Mahdi's record. Furthermore, if counsel had called Dr. Haney as a witness, the State would have been able to highlight Mahdi's lengthy criminal career including his commission of crimes before he was ever incarcerated or confined as a juvenile.

Drs. Schwartz-Watts' and Myers' testimony

Mahdi also claims counsel did not adequately investigate his mentality at the time of the crime. Mahdi asserts counsel should have discovered what Dr. Schwartz-Watts (a psychiatrist) and Dr. Myers (a psychologist) found, that Mahdi was suffering from serious mental illnesses at the time

of the murder of Captain Myers.²⁵

Dr. Donna Schwartz-Watts, a psychiatry expert, testified that she reviewed two notebooks of records, transcripts of Mahdi's prior court hearings, and records from Dr. McKee. (PCR Tr. 458-60). She met with Mahdi three times. (PCR Tr. 460). Mahdi did not trust her or provide her much information during her interviews with him. (PCR Tr. 478). She obtained more information regarding Mahdi's thought process after he left Wallens Ridge from Dr. Martin's and Dr. McKee's notes. (PCR Tr. 478-80).

Schwartz-Watts diagnosed Mahdi as suffering from major depression, anxiety disorder, paranoid personality disorder, reactive attachment disorder, and antisocial personality disorder. (PCR Tr. 460-61). She noted that the depression was in remission at the post-conviction relief hearing. (PCR Tr. 462). She testified Mahdi's depression went into remission between one of the first times she spoke with him and one of the last times she spoke with him. Schwartz-Watts opined that Mahdi was suffering from these diagnoses when he went on the crime spree that included the murder of Captain Myers. (PCR Tr. 468-71). Schwartz-Watts also disagreed with the Virginia Department of Corrections' diagnosis that Mahdi met the criteria for intermittent explosive disorder. (PCR Tr. 473). She stated that Mahdi was not an impulsive person by nature. (PCR Tr. 473).

Reactive attachment disorder was a very rare disorder that is not seen in a lot of adults. (PCR Tr. 463). She opined that Mahdi suffered from the inhibited type of attachment disorder, noting that the records indicate Mahdi was typically described as being detached. (PCR Tr. 463). She noted

²⁵Doctor Schwartz-Watts evaluated Mahdi beginning approximately one (1) year before the merits hearing in this case. She issued her report approximately three (3) days before the merits hearing. Absent from her report is any discussion of the crimes against Captain Myers, Christopher Boggs, or the drug dealer in Virginia and how Mahdi's alleged mental illnesses could have caused Mahdi to commit any of these crimes.

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

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

Schwartz-Watts did not ask Mahdi about the murder in North Carolina, but she believed he would have been suffering from major depression at that time. (PCR Tr. 482-83). The last documentation she saw that evidenced Mahdi's depression was the statement from Mr. Crutchfield, Mahdi's co-defendant from Virginia. (PCR Tr. 483-85). She also asserted that other documentation regarding Mahdi's depression dated back to 2001, when Mahdi denied he has been treated for mental illness and denied he had attempted suicide in his evaluation in the Virginia Department of Corrections. (PCR Tr. 486). Schwartz-Watts admitted there was no evidence in any of Mahdi's adult prison records that indicate he either complained or received treatment for depression. (PCR Tr. 487-90).

Schwartz-Watts stated Mahdi may not have been suffering from major depression on the day he shot Captain Myers, but Mahdi would still have been affected by the condition. (PCR Tr. 493-94). She noted the only illness that probably had anything to do with the crime was Mahdi's anxiety disorder. (PCR Tr. 496-97).

deRossett Myers, Ph.D., a clinical psychologist who was qualified as an expert in child and

adolescent psychology, evaluated Mahdi for developmental concerns that were evident from his life as a juvenile. (PCR Tr. 419). Myers was struck by the extent of the poverty of Mahdi's family, the number of times Mahdi moved in a short period of time, and the amount of violence in Mahdi's family. (PCR Tr. 420). Myers indicated those were all factors that put Mahdi at risk for mental health problems. (PCR Tr. 421). Myers opined that Mahdi suffered from major depression and severe attachment disorder. (PCR Tr. 421).

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

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

A psychologist during Mahdi's first stint at DJJ recommended that Mahdi be placed into an

out-of-home placement, like a group home or residential treatment facility. Myers noted that Shareef Mahdi's home did not comport with the recommendations. (PCR Tr. 447-48). Myers further noted that the observations made in the psychological testing during this second stint at DJJ was consistent with attachment disorder and depression. (PCR Tr. 450-52). He recalled that in the DJJ records, someone had indicated Mahdi would be very difficult to deal with in the future unless he got the treatment he needed. (PCR Tr. 457). Myers noted that same individual indicated an untreated Mahdi would likely end up in adult prison, and Mahdi had aged well beyond his years in terms of some of his criminal behaviors. (PCR Tr. 457).

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

This Court finds Dr. Schwartz-Watts' testimony is not credible on these issues given the record before this Court. First, Dr. Schwartz-Watts admitted during her testimony that Mahdi's history of depression had nothing to do with the murder of Captain Myers. **(PCR Tr. pp. 495-496)**. Additionally, she testified the only illness that he suffered from that could have had anything to do with the murder of Captain Myers was the generalized anxiety disorder that she diagnosed him as having. **(PCR Tr. p. 495-497)**. She based this determination mainly on the fact that Mahdi told her he was anxious at the time he murdered Captain Myers. However, Dr. Schwartz-Watts admitted that Mahdi had broken into Captain Myers' cabin, and it would be expected that he would be anxious when he saw Captain Myers entering his cabin and about to discover Mahdi unlawfully inside his

shed. **(PCR Tr. pp. 496-497)**. This Court does not find this significantly mitigating given the circumstances. This Court also finds this a tenuous basis to diagnose generalized anxiety disorder and its relation to this crime. Furthermore, while Dr. Martin's notes indicate Mahdi told him he was anxious and paranoid in Virginia, because he was being investigated for a homicide he committed, he was no longer anxious or paranoid after he left Virginia. **(Defendant's Ex. 8)**. Dr. Martin took a detailed history from Mahdi, which Doctor Schwartz-Watts relied on, and did not diagnose Mahdi with generalized anxiety disorder. Additionally, the record shows Mahdi has been in the South Carolina Department of Corrections for the past six to seven (6-7) years and has not been treated for any anxiety disorder or any mental illness. **(PCR Tr. pp. 488-491)**. Mahdi has received no psychotropic medications or attempted suicide since his arrest in 2004. **(PCR Tr. pp. 488-491)**. Mahdi did go on a hunger strike prior to trial, but this was due to his objection to being kept as a safe-keeper prior to trial, i.e. his conditions of confinement. **(PCR Tr. pp. 489-490)**. Mahdi also denies that he has any mental illness. **(PCR Tr. p. 490)**. Mahdi was also examined by Dr. Michael Cross and Randy Pickens prior to trial for competency to stand trial. Dr. Cross found no evidence of any mental illness. **(R. pp, 131, 136 & Court's Ex. 2)**. Dr. McKee also ran tests on Mahdi and took a history from him and did not diagnose him with generalized anxiety disorder.

The record also shows Dr. Schwartz-Watts admitted Mahdi did not provide her with a lot of information and was not as conversive with her as he was with Dr. Martin and Dr. McKee. **(PCR Tr. p. 479)**. Doctor Schwartz-Watts was forced to admit that there are no records from the South Carolina Department of Corrections where Mahdi has been treated for depression or any mental illness since his arrest for Captain Myers' murder. **(PCR Tr. p. 488-491)**. Doctor Schwartz-Watts claimed there was evidence in the DOC records that Mahdi was suffering from depression; however,

that claim was not credible. She was forced to admit that Mahdi's hunger-strike was related to his being kept as a safe-keeper prior to trial, i.e. his conditions of confinement. **(PCR Tr. pp. 489-490)**. And, his physical complaint was for just not feeling well, i.e. tired and run down. **(PCR Tr. pp. 488-489)**. And, this Court does not find credible her claim that Mahdi's aggressive and threatening conduct is definitive evidence of depression, because it is also consistent with Mahdi's diagnoses anti-social personality disorder. **(PCR Tr. p. 489)**. Doctor Schwartz-Watts admitted that Mahdi has stated over the past six (6) years that there is nothing wrong with him. **(PCR Tr. p. 491-492)**. And, she also admitted he has not been given any medications for any mental illness. **(PCR Tr. p. 491)**. This Court would also note that at his guilty plea on the current charge, Mahdi told Judge Newman that he was not suffering from any mental illness. Dr. Cross found no evidence of any mental illness. **(R. pp, 131, 136 & Court's Ex. 2)**. Doctor Schwartz-Watts was also forced to admit that upon Mahdi's entry into the Virginia Department of Corrections in 2001, Mahdi was not diagnosed as suffering from depression but intermittent explosive disorder and anti-social personality disorder. **(PCR Tr. p. 486-487)**. She was also forced to admit that there was nothing in Mahdi's adult prison records from the Virginia Department of Corrections, where Mahdi resided from 2001 to 2004, that showed Mahdi was suffering from depression or was being treated for depression. **(PCR Tr. p. 487)**. Doctor Schwartz-Watts also admitted that there was no documentation by a doctor, psychologist, parole officer or any professional that Mahdi was suffering depression before he left Virginia before committing this current crime. **(PCR Tr. p. 487)**. She further admitted there was no record of Mahdi being treated for depression or complaining of depression from his arrest in Florida until his return to South Carolina to face these charges. **(PCR Tr. p. 487-488)**. Doctor Schwartz-Watts was also forced to admit that Mahdi admitted his suicidal

gesture in the Virginia Department of Juvenile Justice was manipulative behavior on his part in order to obtain better living conditions and more recreation time. (PCR Tr. p. 490, See also Respondent's Ex. 4). And, this Court finds, if Mahdi was anxious or depressed in Virginia, it was due to his own criminal conduct there and his fear that he would be apprehended.²⁶ (Defendant's Ex. 8). Doctor Schwartz-Watts further admitted that it did not appear Mahdi was depressed the day of Captain Myers' murder, based on his actions, and he may not have been depressed at all. (PCR Tr. p. 493).

This Court does not find credible Dr. Schwartz-Watts diagnosis that Mahdi was suffering from depression at the time of the murder of Captain Myers. In addition to the facts cited above, Mahdi's cold, calculated, and intelligent actions over several days from Virginia, to North Carolina, to Columbia, to Calhoun County, and finally to Florida do not indicate Mahdi was depressed.

Mahdi burglarized a neighbor's home in Virginia and stole a firearm. Mahdi then stole a license plate from one establishment and a car from another and left the State of Virginia to escape police who were investigating him for a homicide there. Mahdi drove the stolen vehicle to Winston-Salem North Carolina. Mahdi entered a convenience store and pretended to be a patron, and when the clerk was distracted checking his identification to buy alcohol, Mahdi drew the stolen pistol and shot the clerk. Mahdi then shot the clerk again to render him helpless. Mahdi then attempted to rob the store's cash register. Mahdi then drove to Columbia, South Carolina in the vehicle stolen from Virginia. While here, he pretended to be a homeless person and stayed at the Oliver Gospel Mission.

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

Mahdi then pretended to be a homosexual person so he could car-jack a vehicle and did so. Mahdi then switched the license plate on the car-jacked vehicle with the license plate he stole from Virginia. Mahdi then drove to Calhoun County. Mahdi then attempted to pass a stolen credit card, but the card had been cancelled. Mahdi then fled when he realized police were going to apprehend him. Mahdi then burglarized Captain Myers' shed and while there altered a shotgun into a sawed off shogun. Mahdi then murdered Captain Myers and attempted to burn his body to destroy evidence of the crime. Mahdi then stole Captain Myers' truck, but switched license plates on the vehicle before fleeing to Florida. Mahdi then drove all the way to Jacksonville, Florida where he sold both the murder weapon he used in North Carolina and the murder weapon he used in South Carolina. However, Mahdi retained the assault rifle and sawed-off shotgun he had stolen from Captain Myers' shed. Mahdi then impersonated a police officer when approached by a citizen in Florida. Mahdi then attempted to flee from police in Satellite Beach, Florida, and was arrested only after the use of a police dog.

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

Additionally, this Court does not find counsel was ineffective in failing to retain Dr. deRossett Myers, a clinical psychologist, or elicit the testimony he provided. Dr. Myers testified to many things that were not favorable to Mahdi and would not have helped his case in mitigation before Judge Newman. Specifically, Dr. Myers testified that the Carter Center records reflected

either a *diagnosis* of oppositional defiant disorder or a *rule out* oppositional defiant disorder, which Dr. Meyers admitted was a precursor to antisocial personality disorder. (PCR Tr. pp. 442-443). Dr. Myers also noted that Mahdi had a history of being oppositional and a history of behaviorally acting out with aggression. (PCR Tr. p. 443). While Dr. Myers testified his interpretation of the Carter Center records was that the doctors attributed Mahdi's oppositional behavior to his depression, Dr. Myers admitted that a diagnosis of conduct disorder/oppositional defiant disorder is based exclusively on observation of overt behavior. (PCR Tr. p. 443). Doctor Myers also related that when Mahdi returned to school in Lawrenceville he was tested because he was not doing well in school and his behavior wasn't particularly good at school. Dr. Myers also admitted that after Mahdi was committed to the Virginia Dept. of Juvenile Justice Mahdi was described as being an angry, alienated, tough youth. (PCR Tr. p. 447). Myers also testified that at that time Mahdi had already been involved in an altercation in a cottage that he was housed in. (PCR Tr. p. 447). Myers testified the psychologist noted Mahdi had a lot of negative attitudes towards authority; Mahdi did not like rules; Mahdi did not like limits; he was poorly socialized; and, Mahdi was not sensitive to the rights and privileges of other people. (PCR Tr. p. 447). Dr. Myers related that the psychologist termed Mahdi's problem a conduct disorder. (PCR Tr. p. 447). Myers also related that Mahdi only stayed out of DJJ about two weeks before he was involved in a stand-off with police, and he was recommitted to DJJ where he was diagnosed with conduct disorder. (PCR Tr. pp. 449-450). Myers also noted that Mahdi was noted to be disruptive at DJJ and also engaged in oppositional defiance. (PCR Tr. p. 451). Dr. Myers also testified that Mahdi's diagnosis of antisocial personality disorder in the adult department of corrections was justified at the time based on the record as he knew it. (PCR Tr. p. 456). Myers also admitted it was noted in Mahdi's DJJ

records that Mahdi had aged well beyond his years in terms of his criminal behaviors. (PCR Tr. p. 457). Myers also agreed Mahdi's I.Q. of 118 was an accurate level of his intelligence. (PCR Tr. p. 457).

More importantly, it is not what Dr. Schwartz-Watts or Myers allegedly found six (6) to seven (7) years after the murder that is critical to the issue before this Court. Reed v. Florida Dept. of Corrections, 593 F.3d 1219 (11th Cir. 2010)(fact that expert retained at trial and expert retained later at PCR differed, does not prove trial counsel was ineffective); Davis v. Singletary, 19 F.3d 1471, 1475 (11th Cir. 1997)("the mere fact that a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial."). This Court notes none of Mahdi's appointed attorneys, Mr. Grant, Mr. Walters, or Mr. Koger are psychiatrists or psychologists. They retained experts to investigate this area of mitigation on Mahdi's behalf and relied on what their experts told them. Counsel had a right to rely on what their experts told them. See Poyner v. Murray, 964 F.2d 1404, 1419 (4th Cir. 1992)(Petitioner cannot establish ineffective assistance because counsel did not expert shop until one could be found who would testify favorably).

Counsel retained Doctor Thomas Martin, *a forensic psychiatrist*, who has testified in several capital cases, to evaluate Mahdi and determine if he suffered from any mental illness that would serve as mitigation. Dr. Martin found that Mahdi had some history of recurrent depression, but there was no evidence that he suffered from a mental illness at the time of the commission of the crimes against Captain Myers. The only thing Dr. Martin found with regard to Mahdi was that Mahdi suffers from a personality disorder, anti-social personality disorder. That diagnosis *is* fully supported by the record. When Mahdi was admitted to the Virginia Department of Corrections, he was

diagnosed with intermittent explosive disorder and anti-social personality disorder. Doctor Martin testified at PCR that Mahdi had no difficulty in talking about killing people if necessary in order to achieve independence, and he appeared to have no remorse regarding any of his past violent acts. Dr. Martin related to trial counsel on several occasions what his findings were and that they would not be helpful to Mahdi. Additionally, in conducting his evaluation, Dr. Martin took a history from Mahdi. Dr. Martin discussed with Mahdi the circumstances of the crimes against Captain Myers and why Mahdi left Virginia in the first place. Mahdi related to Dr. Martin that he left Virginia because he was involved in the homicide of a drug dealer, and homicide detectives in Virginia were closing in on him. Mahdi also related to Dr. Martin that he was involved in another homicide in which the police had yet to find the body. Mahdi also related to Dr. Martin that he shot Captain Myers in the chest and head, and after Captain Myers was on the floor of his cabin, he shot him several more times in the head to make sure he was dead. **(PCR Tr. pp. 508-523).**

Counsel also retained a *forensic psychologist*, Dr. Geoffrey McKee, to evaluate Mahdi with regard to mental health mitigation. Doctor McKee took a detailed history from Mahdi, conducted tests on Mahdi, and reviewed records including Mahdi's psychiatric records from when he was nine (9) years old. Dr. McKee found that Mahdi was very intelligent and that he suffered from no major mental illness at the time of the crime. Dr. McKee found, independent of Dr. Martin, that Mahdi had anti-social personality disorder. Doctor McKee found nothing else. Mahdi also related to Doctor McKee that he left Virginia because he was involved in the homicide of a drug dealer and police were closing in on him for that murder.²⁷ **(PCR Tr. pp. 545-561).** Doctor McKee also related his

²⁷Mahdi also related to attorneys Grant, Walters and Koger his involvement in the murder of the drug dealer in Virginia and that this was why he left Virginia immediately prior to the Boggs' and Myers' murders. **(PCR Tr. pp. 592-93).**

findings to trial counsel. (PCR Tr. p. 689-690, 626-627).

Counsel testified they made a strategic decision not call either psychiatric or psychological expert in the sentencing hearing before Judge Newman, because their testimony would not be helpful and damaging information would have come out if these two (2) witnesses were subject to cross-examination. (PCR Tr. p. 689-690, 626-627). This Court finds this was an objectively reasonable trial strategy decision by counsel under the circumstances, and is not subject to a claim of ineffective assistance of counsel. Strickland; Wong; Council.²⁸ This Court finds that had either of these experts been called to testify at trial, they would have been cross-examined by the Solicitor on the fact that they took a history from Mahdi and what Mahdi related about why he stole a car and left Virginia and about the murder of Captain Myers. Each expert's testimony would not have been helpful but would have been devastating to Mahdi's mitigation case because it would have revealed other homicides Mahdi had committed in addition to the Boggs' and Myers' murders and that Mahdi shot Myers again after he was helpless on the floor. Wong v. Belmontes, *supra* (calling mitigation witness would have exposed defendant to admission of evidence of other homicide not previously before the sentencing authority).

Additionally, the experts would had to have related that they found Mahdi was suffering from no major mental illness and had anti-social personality disorder, which is not a mental illness but a

²⁸The fact that Mahdi had committed another homicide would clearly have been admissible in the sentencing phase before Judge Newman. See State v. George, 476 S.E.2d 903, 913(admission of testimony defendant had attempted to commit similar crime in past was proper as evidence of individual characteristics of defendant and pre-disposition to commit similar crimes); State v. Owens, 552 S.E.2d 745 (2001)(defendant's confession to another murder during 24 hour waiting period was admissible in the penalty phase because it went to defendant's character); State v. Ray, 498 S.E.2d 640, 641-42 (photographs of prior victim in ABIK admissible in penalty phase); State v. Green, 392 S.E.2d 157, 162-63 (1990)(prior crimes of defendant admissible in penalty phase); State v. Howard,

personality disorder. This would not have been helpful to the defense mitigation case. Byrum v. Ozmint, 339 F.3d 203, 210 (4th Cir. 2003)(counsel were not ineffective in failing to present testimony by a psychiatrist and psychologist because the suggestions of antisocial behavior which the experts found could have been harmful to the defense); Satcher v. Pruett, 126 F.3d 561 572 (4th Cir. 1997)(finding that trial counsel was not ineffective for not presenting testimony by a psychologist and psychiatrist who examined the defendant for the purpose of developing mitigating evidence where the psychologist and the psychiatrist found no psychiatric or neurological disorders, but also finding that the defendant had an antisocial personality disorder that might make him a “future danger”); Reed v. Florida Dept. of Corrections, 593 F.3d 1217 (11th Cir. 2010)(counsel made objectively reasonable trial strategy decision not to offer anti-social personality disorder diagnosis); Cummings, 588 F.3d 1368 (11th Cir. 2009)(stating that a diagnosis of antisocial personality disorder “is not mitigating but damaging”)(collecting cases); *see also* Looney v. State, 941 So.2d 1017, 1028-29 (Fla. 2006)(observing that “[t]his Court has noted that a diagnosis as a psychopath is a mental health factor viewed negatively by jurors and is not really considered mitigation”) *citing* Dufour v. State, 905 So.2d 42, 57-58 (Fla. 2005)); Freeman v. State, 858 So.2d 319, 327 (Fla. 2003); Parker, 331 F.3d at 788; Clisby v. State of Ala., 26 F.3d 1054, 1056 & n.2 (11th Cir. 1994); Weeks v. Jones, 26 F.3d 1030, 1035, n. 4 (11th Cir. 1994)(stating antisocial personality disorder is “not ...mitigating as a matter of law”). *See* Truesdale v. Moore, 142 F.3d 749, 755 (4th Cir. 1998)(mental health evidence is a “double edged sword that might as easily condemn a defendant to death as excuse his actions.”). *See also* Cullen v. Pinholster, ___ U.S. ___, 131 S.Ct. 1388 (2011)(it was a reasonable penalty phase strategy to pursue evoking sympathy for mother where psychiatrist found defendant had no signs or symptoms of mental disorder other than his “pychopathic personality traits”). Fulks

v. United States, *Slip Copy*, 2010 WL 3069390 (D.S.C. 2010)²⁹(trial attorneys were not ineffective in avoiding testimony defendant met criteria of antisocial personality disorder); St. Pierre v. Walls, 297 F.3d 617, 633 (7th Cir. 2002)(facts that show a defendant has a condition or proclivity toward violence are often aggravating, not redeeming or mitigating factors).³⁰

Once Mahdi's psychiatric and psychological experts returned to counsel with their opinion regarding Mahdi, counsel was under no obligation to expert shop and find another psychiatrist or psychologist who might find something more palatable to a sentencing court. Poyner v. Murray, 964 F.2d 1404, 1419 (4th Cir. 1992)(petitioner could not establish ineffective assistance because counsel did not "expert shop" until one could be found who would testify favorably). Counsel was under no duty to search out and find Doctors Schwartz-Watts or Myers. See Harrington v. Richter, 562 U.S. ____ (2011)(slip op. at 17)("Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies."). Mahdi has failed to show deficient performance on the part of trial counsel. Strickland; Wong.

Furthermore, even if counsel had retained and called Doctor Schwartz-Watts or Doctor Myers at sentencing, the devastating evidence of Mahdi's involvement in the Virginia homicide would have

²⁹In Fulks, United States District Judge Joseph Anderson cited several articles written by attorney John Blume discussing that antisocial personality disorder is a diagnosis to be avoided. See John H. Blume & David Voisin, *Avoiding or Challenging a Diagnosis of Antisocial Personality Disorder*, 24 *Champion* 69 (Apr. 2000)(antisocial personality disorder diagnosis "can be the kiss of death, because to many people, and most judges, this means that the defendant is little more than a remorseless sociopath."). Fulks, at p. 18, n. 21.

³⁰This Court recognizes that a diagnosis of anti-social personality disorder would entitle a defendant to a jury charge on certain statutory mitigating circumstances. See State v. Caldwell, 308 S.C. 494, 388 S.E.2d 816 (1990). However, as the above cited authority shows, that does not mean counsel is deficient for failing to offer testimony that their client suffers from anti-social personality disorder. And, there was no real contention at PCR that counsel was deficient in failing to call Doctors Martin or McKee in this regard.

been elicited at trial, as it was at PCR. Doctor Schwartz-Watts' report lists Dr. Martin's and Dr. McKee's records as part of the materials she relied upon in conducting her evaluation of Mr. Mahdi. She admitted at PCR that she relied, in part, and reviewed Dr. Martin 'sand Dr. McKee's files in rendering her opinion. She admitted that Mahdi told Dr. Martin and Dr. McKee that the reason he left Virginia was because the police were closing in on him for a homicide he was involved with there. (PCR Tr. p. 481). This would have been devastating to any mitigation case trial counsel was trying to present. Wong v. Belmontes.

Finally, Doctor Schwartz-Watts and Doctor Myers also diagnosed applicant Mahdi with antisocial personality disorder. As previously discussed, this testimony would not have been helpful to the mitigation case. Byrum v. Ozmint, 339 F.3d 203, 210 (4th Cir. 2003)(counsel were not ineffective in failing to present testimony by a psychiatrist and psychologist because the suggestions of antisocial behavior which the experts found could have been harmful to the defense); Satcher v. Pruett, 126 F.3d 561 572 (4th Cir. 1997)(finding that trial counsel was not ineffective for not presenting testimony by a psychologist and psychiatrist who examined the defendant for the purpose of developing mitigating evidence where the psychologist and the psychiatrist found no psychiatric or neurological disorders, but also finding that the defendant had an antisocial personality disorder that might make him a "future danger"); Reed v. Florida Dept. of Corrections, 593 F.3d 1217 (11th Cir. 2010)(anti-social personality disorder was not good mitigation evidence, counsel made objectively reasonable trial strategy decision not to offer the same); Cummings, 588 F.3d 1368 (11th Cir. 2009)(stating that a diagnosis of antisocial personality disorder "is not mitigating but damaging")(collecting cases); *see also* Looney v. State, 941 So.2d 1017, 1028-29 (Fla. 2006)(observing that "[t]his Court has noted that a diagnosis as a psychopath is a mental health factor viewed negatively by jurors and is not really considered mitigation") *citing* Dufour v. State,

905 So.2d 42, 57-58 (Fla. 2005)); Freeman v. State, 858 So.2d 319, 327 (Fla. 2003); Parker, 331 F.3d at 788; Clisby v. State of Ala., 26 F.3d 1054, 1056 & n.2 (11th Cir. 1994); Weeks v. Jones, 26 F.3d 1030, 1035, n. 4 (11th Cir. 1994)(stating antisocial personality disorder is “not ...mitigating as a matter of law”). See Truesdale v. Moore, 142 F.3d 749, 755 (4th Cir. 1998)(mental health evidence is a “double edged sword that might as easily condemn a defendant to death as excuse his actions.”). See also Cullen v. Pinholster, ___ U.S. ___, 131 S.Ct. 1388 (2011)(it was a reasonable penalty phase strategy to pursue evoking sympathy for mother where psychiatrist found defendant had no signs or symptoms of mental disorder other than his “psychopathic personality traits”); Fulks v. United States, Slip Copy, 2010 WL 3069390 (D.S.C. 2010)³¹(trial attorneys were not ineffective in avoiding testimony defendant met criteria of antisocial personality disorder); St. Pierre v. Walls, 297 F.3d 617, 633 (7th Cir. 2002)(facts that show a defendant has a condition or proclivity toward violence are often aggravating, not redeeming or mitigating factors).³²

Furthermore, this Court finds Mahdi has failed to prove counsel was deficient in failing to have Dr. Martin or Dr. McKee diagnose Mahdi with depression, generalized anxiety disorder, or

³¹In Fulks, United States District Judge Joseph Anderson cited several articles written by attorney John Blume discussing that antisocial personality disorder is a diagnosis to be avoided. See John H. Blume & David Voisin, *Avoiding or Challenging a Diagnosis of Antisocial Personality Disorder*, 24 Champion 69 (Apr. 2000)(antisocial personality disorder diagnosis “can be the kiss of death, because to many people, and most judges, this means that the defendant is little more than a remorseless sociopath.”). Fulks, at p. 18, n. 21.

³²Again, this Court recognizes that testimony of an expert that a defendant suffers from anti-social personality disorder would entitle a defendant to a charge on certain statutory mitigating circumstances. Caldwell. However, as the above authority shows, this does not mean counsel is deficient in failing to offer such testimony. This Court finds this testimony would have been harmful to the defense mitigation case had this testimony been presented before Judge Newman and counsel made an objectively reasonable trial strategy decision not to offer this evidence from their retained psychiatrist and psychologist. .

paranoid personality disorder.³³ While Mahdi called two new experts that said Mahdi suffered from depression, one in his childhood, and the other in his childhood and as an adult, and Dr. Schwartz-Watts testified Mahdi had paranoid personality disorder and generalized anxiety disorder, this was not sufficient to prove counsel was deficient in this regard. Reed v. Florida Dept. of Corrections, 593 F.3d 1219 (11th Cir. 2010)(fact that expert retained at trial and expert retained later at PCR differed, does not prove trial counsel was ineffective); Davis v. Singletary, 19 F.3d 1471, 1475 (11th Cir. 1997)(“the mere fact that a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial.”). It was incumbent upon Mahdi to show that had counsel provided additional documents or information to their experts they would have come up with a different diagnosis. Von Dohlen v. State, 360 S.C. 598, 606-07, 602 S.E.2d 738, 742-43 (2004), *cert. denied*, 544 U.S. 943, 125 S.Ct. 1645 (2005)(concluding case was sufficiently analogous to Wiggins and holding that counsel in capital murder case was ineffective in failing to adequately prepare and present evidence in the penalty phase that defendant suffered from severe, chronic depression at the time of the murder given trial counsel failed to provide their expert witness with crucial medical records and related information which prevented that witness from conveying an accurate diagnosis of defendants mental condition to the jury). Specifically, at PCR, Mahdi did not call Dr. Martin or McKee and prove that had they been provided with certain additional records or information, their diagnosis would have been different, i.e. depression, paranoid personality disorder, and/or generalized anxiety disorder. Von Dohlen, *supra*. In fact, the State called Dr. Martin and Dr.

³³Dr. Martin did diagnose Mahdi as having some recurrent depression during his life but not at the time of the offense. Counsel could not call Dr. Martin because of the other negative things he would had to have related to Judge Newman, including his diagnosis of anti-social personality disorder and things Mahdi had told him.

McKee at the PCR hearing, and Mahdi did not establish through either expert that if they had been shown certain additional records or information that their diagnosis would have been any of the above. Id. As a result, Mahdi has failed to meet his burden of proof to show ineffective assistance in this regard. Id. In fact, Dr. Martin testified that based on the records he saw and what he had heard at the PCR hearing, his diagnosis would not have been any different. McKee also testified that he did not need any further records to make the diagnosis he made. As a result, his Court finds Mahdi has failed to meet his burden in this regard. Butler v. State; Von Dohlen v. State; Reed v. Florida Dept. of Corrections, 593 F.3d 1219 (11th Cir. 2010)(fact that expert retained at trial and expert retained later at PCR differed, does not prove trial counsel was ineffective); Davis v. Singletary, 19 F.3d 1471, 1475 (11th Cir. 1997)(“the mere fact that a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial.”).

Furthermore, this Court finds Mahdi has failed to prove counsel deficient in failing to have Dr. Martin or Dr. McKee diagnose Mahdi with reactive attachment disorder. Mahdi called two new experts, Dr. Schwartz-Watts and Dr. Myers who testified Mahdi either had reactive attachment disorder or the evidence indicated Mahdi had reactive attachment disorder. This Court first notes that this diagnosis is questionable. The DSM IV TR provides that onset of reactive attachment disorder must be before age (5). There is no evidence in this case that there was onset of reactive attachment disorder before the age of (5) in this case. DSM-IV-TR, 4th edition, pp. 127-130.

More importantly, Mahdi did not prove *counsel* did not provide *their experts* with records or information that would have led *them* to diagnose Mahdi as having reactive attachment disorder. Von Dohlen v. State, 360 S.C. 598, 606-07, 602 S.E.2d 738, 742-43 (2004), *cert. denied*, 544 U.S. 943, 125 S.Ct. 1645 (2005)(concluding case was sufficiently analogous to Wiggins and holding that

counsel in capital murder case was ineffective in failing to adequately prepare and present evidence in the penalty phase that defendant suffered from severe, chronic depression at the time of the murder given trial counsel failed to provide their expert witness with crucial medical records and related information which prevented that witness from conveying an accurate diagnosis of defendants mental condition to the jury) Specifically, Mahdi did not call Dr. Martin or McKee and prove that had they been provided with certain additional records or information, their diagnosis would have been different, i.e. reactive attachment disorder. Von Dohlen, *supra*. In fact, the State called Dr. Martin and Dr. McKee at the PCR hearing, and Mahdi did not establish through either expert that if they had been shown certain additional records or information that their diagnosis would have reactive attachment disorder. Id. As a result, Mahdi has failed to meet his burden of proof to show ineffective assistance in this regard. Id. In fact, Dr. Martin testified that based on the records he saw and what he had heard at the PCR hearing, his diagnosis would not have been any different. McKee also testified that he did not need any further records to make the diagnosis he made. This Court finds Mahdi has failed to meet his burden in this regard. Butler v. State; Von Dohlen v. State; Reed v. Florida Dept. of Corrections, 593 F.3d 1219 (11th Cir. 2010)(fact that expert retained at trial and expert retained later at PCR differed, does not prove trial counsel was ineffective); Davis v. Singletary, 19 F.3d 1471, 1475 (11th Cir. 1997)(“the mere fact that a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial.”).

As a result of the above, counsel was not deficient in failing to investigate, develop, and present mental health mitigation evidence.

The DJJ Records

Mahdi also claims counsel should have introduced Mahdi's records from the Virginia

Department of Juvenile Justice. Mahdi argues these records should have been introduced because they contained some mitigating evidence, that he was noted to be suffering from depression while in DJJ. Mahdi introduced these DJJ records at the PCR hearing, and the State did as well, and this Court has reviewed them carefully. Counsel was not deficient in failing to introduce these records.

At Mahdi's sentencing hearing, the State introduced a minimal amount of Mahdi's DJJ records. (See ROA, Vol. IV. and IV.). The records introduced at the sentencing hearing document just a few of Mahdi's disciplinary violations; however they do not document the extensive and aggravated nature of Mahdi's disciplinary violations while in the Virginia Dept. of Juvenile Justice.

The record shows counsel obtained Mahdi's DJJ records through the efforts of its mitigation investigator. **(PCR Tr. p. 585)**. Mahdi had over forty (40) disciplinary violations within the Virginia Dept. of Juvenile Justice. **(PCR Tr. p. 684)**. These included assaults on guards, teachers, and inmates. Mahdi was involved in destroying property on several occasions. Mahdi was involved in one escape attempt by assaulting a female guard, taking her radio away from her, and demanding keys from another guard. The records also show that Mahdi threatened that if he was not released from DJJ when he thought he should be released, he would go around "acting crazy." These records also show that Mahdi later admitted faking a suicidal gesture in an attempt to manipulate the DJJ prison system into gaining more recreation time. The records would also have shown that Mahdi did not think he should have been incarcerated for any of his offenses, and threatened to assault other inmates or guards or harm himself if he was not released from DJJ. when he thought he should be released. The records would also have shown that Mahdi received various treatment programs provided to inmates by the Virginia DJJ, but he did not practice what he had learned such as anger management. In fact, Mahdi was kicked out of the anger management program for disruptive behavior. Counsel was not deficient in failing to introduce Mahdi's DJJ records. In fact, on January

14, 1998, it was reported that Mahdi described his own criminal behavior “in a very calculated, almost professional way that is alarming.” The report also indicated that Mahdi “is behaving and developing like a teenager much older” than he was. There were numerous bad things about Mahdi that would have been revealed to the sentencing court if these records would have been introduced. If counsel had introduced only select portions of these records, then the State would have introduced all of Mahdi’s DJJ records, which included his numerous disciplinary violations and his admission to faking a suicide gesture to manipulate the system.

Mahdi also admitted to DJJ officials he had difficulties in school adjustment. He admitted he had been frequently suspended, he had a history of verbal aggression, he had a history of physical aggression, he had conflicts with educational authorities, and he had difficulties getting along with classmates. (See DJJ record M00416). He also admitted he had injured someone in a fight, and he had hit or attacked someone who was not in his family. (See DJJ record M00495). One DJJ official indicated that Mahdi was very dangerous if he did not get his way. (See DJJ record M00511). Counsel was not deficient in failing to introduce Mahdi’s DJJ records. Wong v. Belmontes. This Court finds counsel’s not introducing Mahdi’s DJJ records was an objectively reasonable trial strategy decision.

This evidence would have further advanced the State’s argument that Mahdi has a bad character and further advanced proof of his future dangerousness. See State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999)(evidence of defendant’s behavior in prison is admissible in capital sentencing because it bears on his character and future dangerousness); State v. Whipple, 324 S.C. 43, 476 S.E.2d 683 (1996). It would also have further undercut applicant’s prison adaptability expert’s testimony at trial. See Hughes, supra.; State v. Woomer, 278 S.C. 468, 299 S.E.2d 317

(1982)(prior escape by defendant refuted evidence by defendant of his good conduct while in prison).

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

Both Dr. Martin and Dr. McKee had reviewed Mahdi's psychiatric records of his commitment to the Walter Carter Center. Both knew Mahdi had been diagnosed with major depression as a child. Dr. Martin testified he also interviewed Mahdi, and based on his interviews with Mahdi and his participation in the mitigation team meetings where the other experts shared their background information on Mahdi, he determined Mahdi had a history of recurrent depression in his life.³⁴ However, even with this determination, Dr. Martin testified he found that Mahdi was not suffering from any mental illness at the time the crime was committed. Therefore, even with this information from DJJ, Dr. Martin's diagnosis would not change because he was already aware Mahdi had a history of recurrent depression during his life.

Additionally, as previously set forth above, this Court does not find credible the claim that Mahdi was suffering from depression at the time of Captain Myers' murder. The evidence introduced at trial and the PCR does not support a conclusion that Mahdi was depressed or was suffering from depression at the time he murdered Captain Myers.

Additionally, even if counsel had provided these documents to their psychiatric experts, they could not call either Dr. Martin or McKee in the sentencing phase because of things Mahdi told both doctors that would have come out on cross-examination and their diagnosis of anti-social personality disorder. Wong v. Belmontes.

³⁴Ms. Tarr testified at the PCR hearing that she received the DJJ records.

Counsel could not call Dr. Martin to testify to Mahdi's history of recurrent depression for several reasons: (1) Dr. Martin did not find Mahdi was suffering from depression at the time of the crime; (2) Dr. Martin diagnosed Mahdi with anti-social personality disorder, and (3) Mahdi told Dr. Martin he had committed two (2) homicides in Virginia, and he fled from Virginia to get away from homicide detectives who were closing in on him for one (1) of the two (2) homicides. Again, this was an objectively reasonable trial strategy decision under the circumstances, and providing the DJJ records to Dr. Martin would not have changed these negative factors that led to this strategic decision. Mahdi has failed to show deficient performance here.

Additionally, Dr. McKee also diagnosed Mahi with anti-social personality disorder. And, Mahdi also informed Dr. McKee that he left Virginia to escape from homicide detectives who were closing in on him. Counsel did not and could not call Dr. McKee to testify for these two (2) reasons, which this Court finds were objectively reasonable trial strategy decisions under the circumstances. Providing the DJJ records to Dr. McKee would not have changed these negative factors that led to this strategic decision. Mahdi has failed to show deficient performance here.

Finally, Mahdi failed to meet his burden of proof with regard to this specific allegation. Both Dr. Martin and Dr. McKee testified at the PCR hearing. Mahdi did not show either Dr. Martin or Dr. McKee the DJJ records and ask them if these records would have changed their opinion in this case.³⁵ Von Dohlen v. State. As a result, Mahdi has failed to meet his burden of proof to show counsel was deficient in this regard. Butler v. State.

³⁵In fact, Dr. Martin testified that based on what he saw and heard discussed at the PCR hearing, his opinion regarding Mahdi's mental state had not changed. And, Dr. McKee testified he did not need to see any additional records to make his diagnosis in this case.

The School Records and School Witnesses

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

Trial counsel retained a qualified mitigation investigator, Paige Haas Munn, to investigate and develop mitigation in this case. Ms. Haas had previously been a mitigation investigator in thirty (30) to forty (40) capital cases. Ms. Haas testified as part of her investigation she requested school records of Mahdi. **(PCR Tr. p. 565)**. Although she no longer had her file in this case, she testified it was her common practice to request records from any school that Mahdi or his family informed her he had attended. **(PCR Tr. p. 565)**. She also testified that she went to the schools Mahdi attended. **(PCR Tr. p. 585)**. She also testified that she spoke with teachers in Lawrenceville who were familiar with Mahdi; however, these teachers had not spent a lot of time with Mahdi **(PCR Tr. p. 586)**. She also testified she spoke with individuals from a school Mahdi attended in Baltimore. **(PCR Tr. p. 586)**. Ms. Haas testified that she routinely provides summaries of school records in capital cases. **(PCR Tr. p. 587)**. She also testified that if she had done a summary of school records in this case, she would have included all pertinent information that she thought was helpful to Mr. Madhi. **(PCR Tr. p. 586-587)**. The record shows a summary of the school records was done in this case and introduced at the sentencing hearing before Judge Newman. Counsel testified that they relied on Ms. Tarr and also Ms. Hammock to get all of the information with regards to Mahdi's

school and education. **(PCR Tr. p. 629-630)**. Counsel also testified they were team meetings where the mitigation investigators shared with them and their experts what they had found in their investigation. **(PCR Tr. p. 631, 700)**. Counsel testified he was aware Mahdi was in special education. **(PCR Tr. p. 629)**. Doctors Martin and McKee also testified they were aware Mahdi was in special education. Counsel also testified they would have forwarded any records they received to their experts.

At Mahdi's sentencing proceeding before Judge Newman, Ms. Hammock testified to Mahdi's difficulties in school. Ms. Hammock testified that in her expert opinion Mahdi's education was disrupted many times. **(R. p. 1752,1756)**. Ms. Hammock testified this was reflected in the school records. **(R. p. 1752)**. Ms. Hammock also testified that the school records noted lateness and absences, but that was not consistent through the whole record. **(R. p. 1756)**. The time-line of Mahdi's school history introduced before Judge Newman shows Mahdi was forced to change elementary schools five (5) times. **(Defendant's Exhibit 3)**. The time line of Mahdi's life introduced also shows Mahdi had to move several times. **(Defendant's Ex. 2/Respondent's Ex. 5)**.

Ms. Hammock testified that Mahdi started out kindergarten at Sister Clara Muhammad School in Richmond. He also completed part of kindergarten at Totaro Elementary School in Lawrenceville. Mahdi then moved back to Richmond and attended Chamberlayne Elementary School for part of that year. Then he was removed from there and sent to Baltimore where he attended Scotts Branch Elementary School for two years. Then he was removed from that school while in the Carter Center, and ultimately returns back to Lawrenceville to live with his father. **(R. pp. 1754-1756)**. Hammock also testified that even in his pre-teen years there was a lack of stability

in terms of Mahdi's attending school, and it was reflected in the kinds of reports he received. (R. p. 1760-61).

Ms. Hammock testified Mahdi constantly had difficulty in school. (R. p. 1752). He was considered bright, but he didn't perform well. (R. p. 1752-1753). Hammock testified that Mahdi was particularly a poor reader. (R. p. 1753). Ms. Hammock also related to Judge Newman that Mahdi's uncle Carson also reported that Mahdi could not read when he came to live with them at eight (8) years old. She also informed Judge Newman that both Carson and Lawanda reported to her that Mahdi had difficulty in school. (R. p. 1753). She testified Carson and Lawanda reported that there was constant conflict in getting Mahdi to deal with the fact that he had these academic limitations. (R. p. 1754). She testified the school records during this time were consistent with this report. (R. p. 1754). Hammock testified Mahdi had uneven skills in school. (R. p. 1755). She testified Mahdi was in the average math program, but in the below average reading program. (R. p. 1755). While he excelled in science, his reading, vocabulary, and spelling remained below average. (R. p. 1756). She also noted that he needed improvement in a number of areas, including standards for behavior and showing respect for authority. (R. p. 1755). She testified Mahdi was described as having poor self-esteem throughout his academic time. (R. p. 1753). She testified that it was noted several places that he had poor self-esteem and had difficulty in relationships with others. (R. p. 1756). The time line of Mahdi's life shows when he was involuntarily committed to the Carter Center his initial diagnosis included "Developmental Reading Disorder." (Defendant's Ex. 2/Respondent's Ex. 5). Counsel also introduced another Exhibit through Hammock (See Defendant's Exhibit 3) which summarizes Mahdi's difficulties in school particularly in reading, and writing, which remained at below grade level throughout elementary school. Hammock also

confirmed this in her testimony. **(R. p. 1755)**. The exhibit also chronicles the numerous absences Mahdi had while in school. **(Defendant's Exhibit 3)**. The exhibit also chronicles that Mahdi's father removed him from school in the 5th grade to home school him. **(Defendant's Ex. 3)**. The exhibit also indicates there was no information this home schooling had occurred. **(Defendant's Ex. 3)**. Ms. Hammock testified Mahdi's educational history was one of poor school progress. **(R. p. 1762)**.

While counsel did not introduce the records themselves, counsel conducted a reasonable investigation of Mahdi's school history and presented the same before Judge Newman. Wiggins; Rompilla; Rosemond; Simpson.

The school records themselves reveal damaging information about Mahdi and his character, even at an early age. The records reveal that Mahdi was referred for special services not because he was mentally retarded, but because of "...behavior problems. He exhibits inappropriate and disruptive behavior." **(Brunswick County Public Schools, 3/25/99)**. The same record also indicates that Mahdi had a negative attitude about being corrected, he did not always get along with other children, his behavior with adults was inappropriate at times, and most of his problems seemed to be getting along with people. The records also indicate that Mahdi had an I.Q. of 118, but had episodic acting-out behavior and an unwillingness to deal with difficult school tasks. **(Confidential Psychological Evaluation)**. The records also indicate Mahdi was referred for special services, not because of mental retardation, but because of "*behavioral difficulties*; such as leaving his seat inappropriately, *physically and verbally aggressive towards others* at times, talks out of turn, preoccupied, anxious, *easily* frustrated or *angered*, *lacks respect for authority*, and daydreams. **(Educational evaluation)(emphasis added)**. A Burk's Behavior Rating Scale revealed very

significant factors for poor impulse control, poor anger control and excessive resistance. (**Appendix Y**). The records also indicate Mahdi's "intellectual functioning" was "in the high average range." (**M000065**).

To have introduced Mahdi's school records would have introduced bad things about Mahdi to Judge Newman. It would also have introduced before Judge Newman that Mahdi's intellectual functioning was not impaired. This Court finds counsel was not deficient in failing to introduce Mahdi's school records which contained bad things about Mahdi. Counsel introduced through Ms. Hammock's testimony and through an exhibit showing Mahdi's problems in school without introducing the bad things he had done while in school. Counsel's performance was not deficient in this regard. Wong v. Belmontes.

Mahdi further argues counsel should have introduced Mahdi's school records and called school witnesses to show Mahdi was diagnosed by school officials in the fourth grade as emotionally disturbed. However, the record shows Mahdi's emotional disturbance diagnosis was based in large part on his inappropriate behavior in school such as defiance and aggressiveness toward other students. Further, there was expert testimony in this case that a diagnosis of emotional disturbance many times means simply a misbehaving child. (**PCR Tr. p. 542**). This testimony would have further exposed testimony regarding Mahdi's oppositional defiant disorder/intermittent explosive disorder and his conduct disorder, which is a pre-cursor to anti-social personality disorder, which would not have been favorable to Mahdi. Additionally, Mahdi was also referred for special education services because of his inability to read, which Judge Newman already knew about.

Additionally, the records contain information that would have undercut counsel's attempt to present mitigation. The records themselves indicate Mahdi was living in his grandmother Nancy

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

Furthermore, Mahdi's own mitigation witnesses undercut the validity of Mahdi's being placed in special education. Doctor Cooper-Lewter testified Mahdi himself informed him that he should not have been placed in special education. Mahdi informed Cooper-Lewter that after being placed in special education he put forth no effort, because he did not belong there. Lawanda Burwell, Mahdi's aunt, and a credentialed school administrator, also testified she did not believe

Mahdi should have been in special education.³⁶

As previously discussed, Mahdi also claims trial counsel was ineffective in failing to provide his psychiatric experts, Doctors Martin and McKee with records from Mahdi's school history, specifically the records regarding Mahdi being placed in special education classes. However, both Doctors Martin and McKee testified these records would not have changed their ultimate diagnosis. **(PCR Tr. pp. 544, 561)**. Doctor Martin also testified at the PCR hearing that applicant Mahdi informed him he had been placed in special education. **(PCR Tr. p. 515)**. Doctor Martin also testified Mahdi told him that he should not have been placed in special education. **(PCR Tr. p. 515)**. Mahdi told Dr. Martin he begged the school principal to take him out of special education, but this was unsuccessful. **(PCR Tr. p. 516)**. And, he also asked his father to take him out of special education, and his father eventually pulled him out of public school and home schooled him. **(PCR Tr. p. 516)**. Doctor Martin also testified that students are classified as emotionally disturbed and placed in special education classes because they are behavioral problems. **(PCR Tr. p. 542)**. Dr. Martin testified that sometimes this behavior is fueled by depression, sometimes its incorrigible behavior, or sometimes they are truant or having problems with conduct disorder. **(PCR Tr. p. 542)**. Doctor Martin also testified Mahdi's acting-out behaviors such as irritability, talking back to teachers, and disrespectful attitude were in other reports he did review and also in information Mahdi provided to him. **(PCR Tr. p. 542)**. This Court had the opportunity to view the testimony of Doctors Martin and McKee and finds their testimony on this issue to be credible. Mahdi has failed to show counsel was deficient in failing to provide Doctors Martin or McKee with Mahdi's school

³⁶Mahdi also told Doctors Martin and McKee that she should not have been in special education. Mahdi also told Doctor Martin that he became ODD (Oppositional Defiant Disorder) after being placed in special education because he did not belong there. **(Respondent's Ex. 8)**.

records. See Von Dohlen v. State.

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

Doctor Martin testified he extensively reviewed Mahdi records from the Walter Carter Center that documented his major depression at age (9). He reviewed the summary prepared by Ms. Tarr and the records themselves. Doctor McKee likewise reviewed Mahdi's commitment records from the Walter Carter Center at age nine (9). Both experts knew Mahdi suffered from major depression as a child. The special education records were generated approximately eighteen (18) months after Mahdi's release from the Carter Center. Dr. Martin further testified he interviewed Mahdi about his life. Mahdi informed him he had been placed in special education classes. Mahdi also indicated he had suffered from recurrent depression in his life. Dr. Martin further testified that he participated in several team meetings where the findings of other members of the mitigation team were shared with him, including Mahdi's developmental and social history. Dr. McKee testified likewise. As previously stated, Ms. Tarr had subpoenaed Mahdi's school records and interviewed individuals who worked at two different elementary schools Mahdi attended. Based on his interviews with Mahdi regarding his life, and his review of the Carter Center records, along with the information he received from the mitigation investigators, Dr. Martin determined that Mahdi had suffered from recurrent depression during his life. Dr. Martin further testified at PCR that the records Mahdi presented at PCR, the special education records, would not change his opinion in this case. Dr. McKee also testified he was aware Mahdi had been placed in special education as a child. Dr. McKee also testified he did not need any further records to make his diagnosis in this case. **(R. pp. 508-545, 545-561)**. As a result, Mahdi has not shown deficient performance on the part of counsel for failing to

provide Dr. Martin or McKee with Mahdi's school records regarding special education. Von Dohlen.

Additionally, Mahdi cannot show deficient performance from the failure to provide these records because counsel could not call either of these witnesses because they found Mahdi had anti-social personality disorder, and Mahdi had related to both Dr. Martin and Dr. McKee that he had been involved in at least one homicide in Virginia. Mahdi had also related to Dr. Martin other damaging things: (1) Dr. Martin noted Mahdi had no difficulty talking about killing people if necessary to achieve independence; (3) Mahdi informed Dr. Martin of another homicide he had committed in Virginia, where police had yet to find the body; (4) Dr. Martin testified Mahdi's outlook on life was quite violent and his interactions with others were hostile, aggressive, and sometimes quite violent. **(R. pp. 508-545, 545-561)**. As previously stated above, this Court finds counsel's decision not to call these witnesses in mitigation was an objectively reasonable trial strategy decision under the circumstances, and providing these experts with Mahdi's special education records would not change the negative factors that motivated this decision.

Doctor Martin also testified there was no evidence Mahdi was depressed at the time he committed Captain Myers' murder. Mahdi did not state he was depressed or psychotic at the time. There was no evidence of depression from the way Mahdi described the events surrounding Captain Myers' murder. Madhi's description of the events of Captain Myers' murder were quite coherent. Mahdi described very clearly to Dr. Martin what he was feeling and what he was perceiving at the time of Captain Myers murder. Madhi described extensive details regarding his actions during Myers' murder. Mahdi described murdering Captain Myers because Captain Myers discovered Mahdi in Captain Myers' cabin, and Mahdi thought Captain Myers' was going to shoot him. Mahdi also described burning Captain Myers' body to cover-up or destroy evidence. Mahdi was coherent

and had no problem remembering events. As a result, Dr. Martin opined that at the time of the offense Mahdi only had a personality disorder, anti-social personality disorder. Likewise, Dr. McKee found no evidence Mahdi was suffering from depression at the time of the Captain Myers' murder. Dr. Martin testified the special education records would not change his opinion in this case. Dr. McKee testified that he did not need to see any other records to make his diagnosis in this case. (R. pp. 508-545, 545-561).

Finally, Mahdi has failed to meet his burden of proof with regard to this specific allegation. Butler v. State. Dr. Martin was shown Mahdi's special education records at PCR and testified they would not change his opinion in this case. Additionally, Mahdi did not show Dr. McKee the special education records and even ask him if they would have changed his opinion in this case. As a result, Mahdi has failed to show counsel was deficient in failing to provide the special education records to their psychiatric experts. Von Dohlen v. State; Reed v. Florida Dept. of Corrections, 593 F.3d 1219 (11th Cir. 2010)(fact that expert retained at trial and expert retained later at PCR differed, does not prove trial counsel was ineffective); Davis v. Singletary, 19 F.3d 1471, 1475 (11th Cir. 1997)("the mere fact that a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial."); *See* Poyner v. Murray, 964 F.2d 1404, 1419 (4th Cir. 1992)(Petitioner cannot establish ineffective assistance because counsel did not expert shop until one could be found who would testify favorably).

As a result of all of the above, this Court finds Mahdi has failed to show deficient performance in counsel's failure to introduce Mahdi's school records, failure to call school officials as witnesses, or failure to provide his school records to his psychiatric/psychological experts. As a result, this ground must be dismissed with prejudice.

The Walter Carter Center Records

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

First, the record shows trial counsel had possession of these records, and Ms. Tarr summarized them for counsel and the experts. (See **Defendant's Exhibit # 11 & PCR Tr. pp. 565-66**). Trial counsel's experts, Dr. Thomas Martin and Dr. Geoffrey McKee, also had the records themselves from the Walter Carter Center. (PCR Tr. pp. 511-512, 553-554). They reviewed them in conducting their evaluation of Mahdi. (PCR Tr. pp. 511-512, 553-554).

The sentencing phase record shows, Ms. Hammock testified regarding Mahdi's commitment to the Walter Carter Center, his diagnosis there, and his discharge diagnosis. An exhibit was also introduced detailing Mahdi's involuntary commitment and diagnosis at the Carter Center. The sentencing court, Judge Newman, was well aware that Mahdi was committed to the Walter Carter Center at age nine (9) for depression and suicidal ideation. Judge Newman was also well aware that Mahdi was diagnosed with major depression at this young age, and that it came of the heels of his being separated from his family, and being forced to move to Baltimore with to live with his aunt and uncle. Judge Newman was also well aware that Mahdi was confined at the Walter Carter Center for sixty (60) days, and he was discharged to his aunt and uncle. Trial counsel chose not to introduce the records themselves. (**R. pp. 1739-1763 & Defendant's Ex. 2**).

This Court has reviewed the Carter Center records in detail. The records themselves are cumulative to the testimony of Ms. Hammock and the exhibit introduced through her. Additionally, the records themselves contain damaging information about Mahdi.

Mahdi was placed in isolation several times while at the Carter Center due to his disruptive

or inappropriate behavior. Importantly, the records show Mahdi assaulted other patients, assaulted staff, was verbally threatening or aggressive towards staff, and attempted to escape from the facility. On several occasions, Mahdi threw chairs or tables and attempted to damage property of the hospital. On one occasion, Mahdi falsely pulled a fire alarm. Mahdi also cursed staff members. On another occasion Mahdi threatened to suffocate a staff member with a pillow. Additionally, the records detail Mahdi's making a false claim of child abuse against his aunt Lawanda Burwell. The records show the claim of child abuse against his aunt was determined to be unfounded. The records also show Mahdi admitted that he only threatened suicide when he didn't get his way. The records also show that Mahdi's aunt reported that Mahdi only talked about suicide when he didn't get his way or did something wrong. Mahdi also admitted threatening suicide as a way of getting attention. The records also indicate Mahdi had anti-social behavior and conduct disorder. Counsel was not deficient in failing to introduce the records themselves when bad things were contained within the records that would have been damaging to their client. **(See Walter Carter Center Records & Respondent's Ex. 7). Wong v. Belmontes.** Counsel appropriately presented the Carter Center testimony or information to the sentencing court through Ms. Hammock, without the negative information about Mahdi that would have been before the sentencing court had the records themselves been introduced. This ground has no merit must be dismissed with prejudice.

Conclusion to Deficiency Analysis

This Court finds counsel conducted a proper mitigation investigation, however, Mahdi's family members were resistant and uncooperative in that investigation, and Mahdi's family members either refused to be involved and/or knew matters about Mahdi that would have been harmful to counsel's attempt to present a mitigation case on Mahdi's behalf. This Court also finds counsel

made objectively reasonable trial strategy decisions under the circumstances not to call these 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); Council v. State (strategic decisions will be judged as reasonableness under the circumstances). This Court also finds counsel's mitigation presentation of Mahdi's social and family history was not deficient. This Court also finds counsel was not deficient in failing to introduce Mahdi's DJJ records, school records, or Walter Carter Center records. This Court also finds counsel was not deficient in failing to call school officials to testify. This Court finds counsel was not deficient in failing to call or elicit the testimony Dr. Cooper-Lewter testified to at PCR. This Court also finds counsel was not deficient in failing to call or elicit the testimony Dr. Haney testified to at PCR. This Court also finds counsel was not deficient in failing to investigate, develop, and present mitigating evidence regarding Mahdi's mental status. Counsel retained two well-qualified psychiatric/psychological experts to evaluate Mahdi and there findings were not helpful to the mitigation case, and there testimony would have been even more harmful if presented. Wong v. Belmontes. This Court also finds applicant has failed to show counsel was deficient in failing to provide his experts with specific records. Von Dohlen.

This Court finds Mahdi has not met his burden of proof to show deficient performance. Strickland; Wong. 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; Council v. State. As

a result, this Court finds Mahdi has failed to meet his burden of proof to show counsel's performance was deficient in this regard.

The Prejudice Prong

Furthermore, this Court finds Mahdi has failed to prove prejudice from any alleged deficient performance under this ground. Wong v. Belmontes, 558 U.S. ___, 130 S.Ct. 383 (2009); Jones v. State, 332 S.C. 329, 333, 504 S.E.2d 822, 823 (1998). Mahdi has failed to show there is a reasonable probability that, absent counsel's *alleged* errors, there is a reasonable probability Judge Newman would have returned with a different sentence. Id. Again, a reasonable probability is a probability sufficient to undermine confidence in the outcome. Mahdi has failed to make this showing.

When determining if want of mitigation evidence resulted in prejudice, the Court must determine whether the "mitigation evidence, taken as a whole, 'might well have influenced the jury's [or judge's] appraisal' of [the defendant's] culpability." Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009), *quoting* Wiggins v. Smith, 539 U.S. 510, 538, 123 S.Ct. 2527 (2003), *quoting* Williams v. Taylor, 529 U.S. 362, 398, 120 S.Ct. 1495 (2000); *see also* Rompilla v. Beard, 545 U.S. 374, 393, 125 S.Ct. 2456 (2005). In this regard, the United States Supreme Court held, "the likelihood of a different result if the [mitigation] evidence had gone in is 'sufficient to undermine confidence in the outcome' actually reached at sentencing." Rompilla, 545 U.S. at 393, 125 S.Ct. 2456 (*quoting* Strickland, 466 U.S. at 694, 104 S.Ct. 2052). Accordingly, if counsel's failure to present mitigation evidence undermines confidence in the outcome, then the applicant suffered prejudice. Rosemond v. Catoe, *supra* (finding counsel's complete failure to present mitigation evidence undermined confidence in the outcome where the jury deliberated over two days before reaching a death sentence).

The United States Supreme Court made clear in its recent decision in Wong v. Belmontes,

supra 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. That showing requires applicant “to establish ‘a reasonable probability that a competent attorney aware of the [available mitigating evidence], would have introduced it at sentencing,” and “that had the jury [the judge in this case] been confronted with this . . . mitigating evidence, there is a reasonable probability that it [he] would have returned with a different sentence.”” Id., *quoting Wiggins v. Smith*, 539 U.S. 510, 535, 536, (2003). “In evaluating that question, it is necessary to consider *all* the relevant evidence that the jury [or judge] would have had before it [or him]” if applicant “had pursued the different path - not just the mitigation evidence” applicant could have presented, but also” the aggravating evidence “that almost certainly would have come in with it.” Id., *referencing Strickland*, at 695-696, 700 (emphasis in original). “Thus, to establish prejudice,” applicant “must show a reasonable probability that the jury [the judge in this case] would have rejected a capital sentence after it weighed the entire body of mitigating evidence” (including the additional testimony applicant could have presented) against the entire body of aggravating evidence (including any additional aggravating evidence likely to have come in). Id.; *See also Porter v. McCollum*, 558 U.S. ____ (2009); *Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008), *citing Jones*, 332 S.C. at 333, 504 S.E.2d at 824. “To assess [the] probability of a different outcome under *Strickland*, we consider the totality of the available mitigation evidence- both that adduced at trial, and the evidence adduced in the habeas proceeding-and reweig[h] it against the evidence in aggravation.” *Sears v. Upton*, ____ U.S. ____, 130 S.Ct. 3259 (2010), *quoting Porter v. McCollum*, 558 U.S. at ____, 130 S.Ct. At 453-54 (internal quotation marks omitted; third alteration in original). “That same standard applies-and will necessarily require a court to ‘speculate’

as to the effect of the new evidence-regardless of how much or how little mitigation evidence was presented during the initial penalty phase. Indeed, it is exactly this kind of probing inquiry that ... the trial court failed to do. In all circumstances, this is the proper prejudice standard for evaluating a claim of ineffective representation in the context of penalty phase mitigation investigation.” Sears v. Upton, ___ U.S. ___, 130 S.Ct. 3259 (2010). This Court has analyzed Mahdi’s claims of prejudice under this ground pursuant to the above cited standards and finds applicant has not met his burden of proof to show prejudice..

The Evidence in Aggravation

The amount of evidence in aggravation the State presented at the guilty plea and in the penalty phase of applicant’s trial was overwhelming. *See Plath v. Moore*, 130 F.3d 595, 602 (4th Cir. 1997)(holding that, considering the sheer magnitude of the aggravating evidence, the defendant failed to show prejudice from trial counsel’s failure to present certain mitigating evidence). As detailed in the record, and Judge Newman’s sentencing order, the evidence of Madhi’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. *The*

Guilty Plea

First, Mahdi admitted that he murdered Captain Myers, burglarized his cabin before murdering him, and stole his guns and police issued truck after murdering Captain Myers. There is no question Mikel Mahdi is the person who murdered Captain Myers; he was alone when he murdered Captain Myers, and he acted completely alone. Mahdi also admitted he murdered Captain Myers during the entering or remaining in the cabin after the burglary. Mahdi also admitted the facts surrounding the murder as recited by the Solicitor were correct. **(See Guilty Plea Transcript).**

The Sentencing Phase

In the sentencing phase, the State established Mahdi burglarized the home of Amanda Weaver in Lawrenceville, Virginia on June 14, 2004, and stole a chrome .380 pistol. The State also established Mahdi stole a license plate from a car rental agency and stole a green Mercury station wagon from a nearby car lot in Lawrenceville.

The State proved Mahdi drove this vehicle to Columbia, S.C., where Mahdi abandoned it in a church parking lot. The State proved Mahdi then car-jacked a Ford Expedition at gunpoint and drove to the Wilco/Hess Plaza in Calhoun County. The State established Mahdi had replaced the tag on the Ford Expedition with the tag he originally placed on the stolen Mercury Sable. The State proved Mahdi attempted to use a stolen credit card at the Hess station and then fled into some nearby woods when he was unsuccessful in obtaining gas and believed police were about to apprehend him.

The State proved Mahdi came upon Captain Myers' shed and burglarized it using some type of tool. While in the cabin, Mahdi manufactured a sawed-off shotgun and painted it black. Mahdi also armed himself with Captain Myers' loaded .22 rifle. The State proved that when Captain Myers went to his cabin/shed, late on the evening of June 16, 2004, Mahdi was lying in wait. The State proved Mahdi murdered Captain Myers by shooting him nine (9) times with the .22 rifle. The State also proved Mahdi shot Captain Myers several times in the head after he was helpless on the floor.

The State proved Mahdi stole Captain Myers truck keys, his guns, and his police issued truck and fled from South Carolina. Before leaving, Mahdi attempted to burn Captain Myers' body and his shed/cabin to conceal evidence. Captain Myers' wife had the unfortunate circumstance of finding her husband's burned and bullet riddled body. She screamed for an unknown period of time before she was able to call 911. She also remained at the cabin, after finding her husband's body, for approximately 30 minutes waiting on police and emergency workers to arrive.

The State proved Mahdi drove to Jacksonville, Florida and sold the .380 caliber pistol he

stole from Virginia and the .22 rifle he used to murder Captain Myers. The State also proved Mahdi retained several other weapons including an assault rifle and the sawed-off shotgun he had manufactured. The State established Mahdi was not captured until an extensive police chase and the use of a police dog, and Mahdi considered shooting the officers before being arrested. Mahdi was arrested after fleeing from Captain Myers' stolen truck. The State proved Captain Myers' stolen assault rifle and stolen shotgun were recovered in or near the truck Mahdi was driving.

In the sentencing phase, the State also established Mahdi's bad character and characteristics. The State proved Mahdi had previously been adjudicated delinquent as a juvenile for car-breaking, petty larceny, escape from custody, breaking an entering (2 counts), obstruction of justice, and contempt of court.

The State also established Mahdi was convicted of malicious wounding as an adult, for the brutal stabbing of Moises Rivera, after Mahdi tried to burglarize an apartment in the complex where Rivera worked. The State also established the brutality of the stabbing of Moises Rivera in Virginia. The State established Mahdi stabbed Rivera approximately five (5) or six (6) times and severely injured Rivera. Rivera's heart actually stopped in the ambulance, and he had to be revived. Rivera was in the hospital for several days and was out of work for approximately six (6) weeks because of Mahdi's actions.

The State also established the murder of Captain Myers was not Mahdi's first murder. Mahdi had murdered Christopher Boggs, a convenience store clerk, on his way down to South Carolina from Virginia. Mahdi brutally murdered Boggs by shooting him in the face, and then shooting him again in the head after the victim Boggs fell to the floor. The video-tape portrays the heinousness of this murder, with Mahdi leaning over the counter to fire another bullet into Boggs' head. The State also established that after murdering Boggs, Mahdi tried to rob the store's cash register. There

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

The State also established Mahdi's bad prison behavior. The State introduced some of Mahdi's disciplinary violations while in the Virginia Department of Juvenile Justice, and the State introduced Mahdi's disciplinary violations while in adult prison in Virginia. The State also introduced Mahdi's disciplinary violations in the South Carolina Department of Corrections, including assaulting a guard and threatening other guards. And, finally the State introduced Mahdi's escape attempt during the trial itself by the use of a homemade handcuff key Mahdi kept secreted in his mouth.

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

The PCR Evidence

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

(Family Members and Community Members)

Mahdi's family members and community members testified to the history of the family, particularly with regard to Mahdi's father, and his difficulties in life, and the difficulties Mahdi had to overcome in life. With regard to the family member testimony, it was largely cumulative to the testimony presented by trial counsel before Judge Newman. What was not cumulative, this Court

finds Mahdi has failed to prove there is a reasonable probability Judge Newman would have returned with a different sentence had this information been presented. Wong v. Belmontes; Jones v. State.

The family and community members described the difficulties Mahdi's father had in growing up particularly that he was unwanted by this mother, the grandmother Rose Burwell; that he was forced to go to an integrated school that was traumatic; and that he suffered from depression after his wife left he and applicant and his brother Saleem. The family and community members also described Mahdi's father's inability to get along with others, to parent effectively, to obey the law, and to hold a job. The family and community members also testified to the domestic violence within Mahdi's immediate family.

This same evidence was presented at the sentencing hearing through Ms. Hammock in her testimony before Judge Newman, and through the time-line of Mahdi's life introduced through Ms. Hammock by trial counsel. **(See R. pp. 1739-1763 & Defendant's Exhibit 2)**. In fact, many of the details testified to by family members were related by Ms. Hammock in her sworn testimony or are set forth in the Exhibit detailing Mahdi's family history. Ms. Hammock's testimony was not challenged by the Solicitor, nor was the Exhibit chronicling his family's and his life.

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

(9).

This same evidence was also presented at the sentencing hearing before Judge Newman through Ms. Hammock in her sworn testimony and in the Exhibit chronicling Mahdi's family's life and his life, and in the Exhibit chronicling his school difficulties. Judge Newman was well aware that Mahdi had a life of deprivation, including his being abandoned by his mother around the age of five (5) years old. Judge Newman was also aware that Mahdi's father could not provide for the children, and as a result Mahdi and his brother were sent to live with different aunts and uncles. Judge Newman was fully aware that Mahdi's family was split up because of these difficulties, and shortly thereafter, Mahdi was committed to the Walter Carter Center suffering from depression and suicidal ideation. Ms. Hammock also testified to Mahdi's father's defiant behavior in the community and the fact that he had converted to Islam at a young age. Judge Newman was also fully aware that Mahdi and his brother witnessed their father assaulting their mother and their grandmother. Judge Newman was also aware that Mahdi had difficulties in school, and that he had particular difficulty in learning to read. Ms. Hammock also testified to Mahdi's lack of a proper role model, and Judge Newman was aware that Mahdi's father suffered from depression and had a criminal record. **(R. pp. 1739-1763, Defendant's Exhibit 2)**. Counsel presented this evidence through Ms. Hammock rather than family members, because the family members were uncooperative at the time of the sentencing hearing and knew bad things about Mahdi that could have been brought out on cross-examination had they been called. This was an objectively reasonable trial strategy decision. Strickland v. Washington; Reed.

The evidence presented by applicant Mahdi from his family and community members was largely cumulative and would not entitle Mahdi to relief. Wong v. Belmontes, 558 U.S. ___, 130 S.Ct. 383, 387-88 (2009)(when substantial mitigation case was presented, evidence that is merely

cumulative to the evidence actually presented fails to demonstrate the prejudice necessary to meet the prejudice prong of Strickland); Buckner v. Polk, 453 F.3d 195, 206 (4th Cir. 2006)(trial counsel's failure to present merely cumulative mitigating evidence does not prejudice a defendant's case); Simpson v. Moore; 367 S.C. 587, 627 S.E.2d 701 (2006)(finding where substantial mitigation case was presented, applicant had failed to show prejudice from failure to call other mitigation witnesses that were in essence cumulative); Jones v. State, 332 S.C. 329, 504 S.E.2d 822 (1998)(holding that "fancier mitigation case" does not render the prior case inadequate).

Furthermore, this Court cannot divorce from its prejudice analysis the bad information that would have come in through the family witnesses had they been called at the sentencing hearing as applicant Mahdi proposes. Wong v. Belmontes. In making a prejudice determination, this Court must consider the bad information that in all likelihood that would have come in with the good mitigation evidence. *Id.* Additionally, as the United States Supreme Court set forth in Wong v. Belmontes, this Court must look not only at what mitigation evidence could have been introduced, but also what bad evidence about applicant Mahdi would have been admitted had counsel chosen to introduce the evidence Mahdi now claims should have been introduced. *Id.*

Mahdi's family members were aware of bad things regarding Mahdi, and this Court finds these bad things in all likelihood would have come in on cross-examination. Carson and Lawanda Burwell were aware that as an adult Mahdi had to move out of his grandmother's home because he would not abide by the rules of the home as set down by Mahdi's uncle Nathan. This occurred while applicant Mahdi had just been released from adult prison and was on supervised adult probation. Carson Burwell related to applicant's attorneys in N.C. that Mahdi "was a demon." This fact was established by a document generated by Ms. Tarr after meeting with the N.C. defense attorneys and shared with defense counsel in this case. Carson also related to trial counsel in South Carolina that

if he were called to testify he would not have good things to say about Mahdi. Since this was Carson's mind-set at the time of the sentencing proceeding, these bad matters would have come out on the stand as they did at PCR. Both Lawanda and Carson admitted that Mahdi almost had them arrested by making a false claim of child abuse, and manufacturing false evidence of that child abuse. Lawanda and Carson also related that Mahdi acted out while at the Carter Center and had to be placed in isolation. Carson also related to Paige Tarr that Mahdi was manipulative. Lawanda also related that Mahdi acted out and had to be returned to live with his father. Both related that Mahdi would only talk about suicide when he did not get his way or did something wrong, more manipulative behavior.

This Court in making its prejudice analysis must also consider the good with the bad that would have come out through these witnesses. These bad things about Mahdi would not have been helpful to Mahdi's mitigation case. Mahdi claims counsel should have introduced his Uncle Carson's and his Aunt Lawanda's testimony at the sentencing hearing. If they had, then Mahdi's manipulative behavior, specifically making a false claim of child abuse to police, which almost had Carson and Lawanda Burwell arrested, would have been admitted at trial. Furthermore, Mahdi's disruptive behavior at the Carter Center, would have been brought out on cross-examination, such as Mahdi hitting other patients, attempting to escape from the facility, cursing staff, falsely pulling a fire alarm, and throwing chairs. Due to Mahdi's disruptive behavior at the Carter Center, Mahdi had to be placed in isolation on several occasions. Additionally, testimony that Mahdi talked about suicide only when he didn't get his way or did something wrong, and was about to be punished, would have been brought out, i.e. additional manipulative behavior on Mahdi's part. Furthermore, Mahdi's disruptive behavior within the Burwell home, which Mahdi wanted to cause, and which eventually did cause his uncle to return Mahdi to his father, would have been elicited on cross-

examination, further underscoring Mahdi's manipulative behavior and nature. Testimony would also have been elicited from Carson that Mahdi could not obey the rules of his Uncle Nathan's home when he resided there as an adult, and was eventually asked to leave.

Carson was also aware of an incident where Mahdi, his brother Saleem, and their father were involved in maliciously damaging an aunt's motor vehicle. Mahdi through a cement block through the aunt's car window. If Carson had been called, it is clear this bad testimony would have been elicited. The State had already introduced this event through the testimony of one of the police officers during the penalty phase. Further, emphasis before Judge Newman would not have helped the mitigation case. Wong v. Belmontes, *supra*.

Applicant's aunt Sophie Gee was also aware of Mahdi slashing his mother's car tires. She testified at PCR that Mahdi slashed his mother's car tires simply because she would not let him use the car. This information would have been brought out on cross-examination had she testified at trial, and would have further emphasized this incident before Judge Newman.

(The Social Worker)

At PCR, counsel called a different social worker, Dr. Nicolas Cooper-Lewter. Cooper-Lewter related basically the same information as related by Ms. Hammock, the forensic social worker who testified at the sentencing proceeding. Most of the information related by Cooper-Lewter was before the sentencing court through Ms. Hammock's testimony and the exhibits introduced. This Court finds that the information related by Cooper-Lewter that was not presented by Ms. Hammock does not change the sentencing equation. Wong v. Belmontes; Rosemond v. Catoe.

However; if counsel had called Cooper-Lewter, on cross-examination the Solicitor would have introduced Mahdi's numerous disciplinary violations within the Virginia Department of

Juvenile Corrections. Wong v. Belmontes. Cooper-Lewter specifically relied on these records in forming his assessment. There were over forty (40) disciplinary violations by Mahdi in the Virginia Department of Juvenile Corrections. Cooper-Lewter was cross-examined about these at the PCR hearing. These included Mahdi assaulting a teacher; assaulting guards on numerous occasions; assaulting other inmates, leading an escape attempt, refusing to follow orders; refusing to be disciplined, cursing staff, and damaging and destroying property. Cooper-Lewter would also have been cross-examined about Mahdi's numerous disciplinary violations within the Virginia adult Department of Corrections. These included setting fire to a cell, possession of contraband, failure to follow orders, and assaulting a non-inmate. Cooper-Lewter was forced to admit at PCR that Mahdi was confined to Wallens' Ridge Maximum Security Facility in Virginia because of behavior in other facilities. Cooper-Lewter could also have been questioned about Mahdi's statements to Cooper-Lewter that he never should have been placed in special education in elementary school, because he did not belong there. Cooper-Lewter was also forced to admit Mahdi had an I.Q. of 118, obtained his GED after his release from adult prison, had held several jobs, and obtained college credits from a local college in Lawrenceville, Virginia. Given these facts, this Court also finds that had counsel called Cooper-Lewter to testify at the sentencing proceeding, there is no reasonable probability the result of the sentencing proceeding would have been different. Wong v. Belmontes

(Dr. Haney's testimony)

This Court also finds that had Dr. Haney been called to testify at the sentencing proceeding there is no reasonable probability to result of the sentencing proceeding would have been different. Wong v. Belmontes. Dr. Haney's PCR testimony would have been before the sentencing Court; however, as set forth in the deficiency portion of this Order under this ground, Dr. Haney's claim that Mahdi was not violent toward other individuals or that Mahdi is a product of his incarceration

at Wallens' Ridge Maximum Security Facility, and to a lesser extent, at other facilities, would have been impeached. The testimony is simply not credible.

The record shows Mahdi was a violent, manipulative, and disruptive individual before he was incarcerated at Wallens' Ridge Prison. Mahdi was violent, disruptive, and manipulative when he was incarcerated the first time in the Virginia Department of Juvenile Justice. Mahdi was violent, disruptive, and manipulative during his second incarceration as a juvenile. Mahdi continued his violent behavior after being released from juvenile prison seriously wounding Moises Rivera, a maintenance worker, during a burglary attempt. After this incident, as in the present case, Mahdi had to be captured with the use of a police dog. Mahdi continued his violent and disruptive behavior in the adult prison system resulting in his eventual incarceration at Wallen's Ridge. And, he continued to violate institutional rules at Wallen's Ridge. And, rather than conforming his behavior to societal norms when he was released from Wallens Ridge, so he would never have to go back to a maximum security prison, Mahid repeatedly violated not only the law but the rules of his supervised probation. Mahdi sold drugs. Mahdi possessed handguns. Mahdi used marijuana. Mahdi committed at least one homicide in Virginia. Mahdi burglarized a home and stole a handgun and left the state. Mahdi stole a car and a license plate. Mahdi then committed two (2) additional murders during his flight through the southeastern United States. And, Mahdi has engaged in the same or similar conduct while incarcerated in South Carolina, over and over again. Furthermore, if Dr. Haney had testified at sentencing, the State would have brought out through him all of Mahdi's disciplinary violations in the Department of Juvenile Justice and re-emphasized all of Mahdi's disciplinary violations in the Virginia adult Department of Corrections along with Mahdi's numerous disciplinary violations in the South Carolina Department of Corrections.

Additionally, his attempt to blame all of Mahdi's criminal behavior on undiagnosed or

untreated mental illness or the failures of the criminal justice system would also have been impeached and is not credible. The record shows Mahdi engaged in criminal activity such as stealing because he could and believed he would not get caught. The record also shows Mahdi assaulted other individuals because it was in his own self-interests. The record also shows Mahdi was not victimized in DJJ as Dr. Haney contends but Mahdi victimized others including inmates and guards.

Given this record, this Court finds there is no reasonable probability Judge Newman would have returned with a different sentence had Dr. Haney testified during Mahdi's sentencing proceeding. Wong v. Belmontes; Jones v. State.

(The Va. DJJ Records)

Additionally, had Mahdi's juvenile records been introduced as Mahdi now alleges they should have been, Mahdi's long list of forty (40) disciplinary violations in the Virginia Department of Juvenile Justice would have been before Judge Newman. As previously stated, those records indicate Mahdi repeatedly assaulted other inmates, assaulted staff, destroyed property, led an escape attempt, and engaged in manipulative behavior. **(Respondent's Ex. 6)**. While there was some indication in these records that Mahdi was treated for depression while at DJJ, the records also indicate that Mahdi later admitted he fabricated a suicidal gesture in order to gain additional privileges in DJJ, i.e. manipulating the system. Given this record, this Court finds there is no reasonable probability Judge Newman would have returned with a different sentence had Mahdi's DJJ records been introduced during Mahdi's sentencing. Wong v. Belmontes; Jones v. State.

(The School Records)

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

schooling was interrupted several times, that Mahdi had many absences, and his father pulled him out of school after the fifth grade to home school Mahdi. Judge Newman was also aware that Mahdi had difficulty in reading throughout his school history. While the records show that he was placed in special education, Mahdi was not mentally retarded but had an I.Q. of 118 and functioned on grade level or higher in all classes except reading, spelling, and writing. And while the records indicate Mahdi was diagnosed as emotionally disturbed, and had some depressive symptoms at that time, the records also show Mahdi was placed in special education or classified as emotionally disturbed based in large part on his misconduct and aggressive behavior in school and his inability to read. Judge Newman was already aware Mahdi had been committed to a psychiatric facility approximately eighteen (18) months before for major depression, and Mahdi told the sentencing court at his guilty plea that he was not suffering from any mental illness. And, Judge Newman already knew of Mahdi's inability to read. Furthermore, Dr. Cooper Lewter testified Mahdi should not have been in special education and this had a negative impact on his school performance. Lawanda Burwell also testified she did not believe Mahdi should have been placed in special education. Importantly, the records also included bad things about Mahdi. Had Mahdi's school records been introduced, further evidence of Mahdi's bad behavior would have been before Judge Newman, including Mahdi's aggressiveness and assaults on other children and resistance to authority. Given this record, this Court finds there is no reasonable probability Judge Newman would have returned with a different sentence had Mahdi's school records been introduced. Wong v. Belmontes; Jones v. State.

(The Walter Carter Center Records)

Finally, as previously discussed, the Walter Carter Center records detail Mahdi's disruptive and manipulative behavior. Mahdi assaulted other patients, attempted to escape, admitted he

fabricated a child abuse claim, damaged property, and used profanity against staff of the hospital. Mahdi also threw furniture at hospital staff, falsely pulled a fire alarm, and threatened to suffocate a staff member with a pillow. These records also indicated Mahdi's anti-social behavior and conduct disorder. Mahdi's commitment to the Walter Carter Center, the reason for his commitment there, and his length of commitment was before Judge Newman, without the negative and damaging information contained in those records. As a result, this Court finds there is no reasonable probability Judge Newman would have returned with a different sentence had these records been introduced. Wong v. Belmontes; Jones v. State.

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

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

Furthermore, Dr. Schwartz-Watts' questionable diagnosis of anxiety disorder at the time of this murder would have been impeached by the Solicitor. Further, Dr. Schwartz-Watts' diagnosis that Mahdi had depression but was not suffering from it at the time of Captain Myers' murder would have been impeached by the State and contradicted by the evidence and testimony. Further, Dr. Schwartz-Watts admitted Mahdi's mental illnesses or personality disorders did not rise to the level of a statutory mitigator. Additionally, Dr. Myers' testimony regarding bad characteristics of Mahdi

contained in the DJJ records, including conduct disorder, would have been brought out on cross-examination. And, Mahdi's previous diagnosis of intermittent explosive disorder and anti-social personality disorder in the Virginia Department of Corrections would have been emphasized before Judge Newman with either of these two witnesses. Finally, both Dr. Schwartz-Watts and Dr. Meyers concurred in the diagnosis of Mahdi having anti-personality disorder. This information would not have been helpful before Judge Newman. As a result, this Court finds there is no reasonable probability Judge Newman would have returned with a different sentence had this testimony been introduced. Wong v. Belmontes; Jones v. State.

Conclusion to the Prejudice Analysis

Considering the evidence in aggravation, along with all the evidence in mitigation Mahdi alleges should have been presented, along with the aggravating evidence that would have almost certainly come in on cross-examination, rebuttal, or contained within the evidence itself, and considering the mitigation evidence presented at the sentencing hearing before Judge Newman, this Court finds there is no reasonable probability Judge Newman would have returned with a different sentence had the mitigation evidence Mahdi now claims should have been introduced been presented. Wong v. Belmontes; Sears v. Upton; Rosemond v. Catoe; Council v. State; Jones v. State. Mahdi has failed to prove prejudice. Id. This ground must be dismissed with prejudice.

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

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

There is no merit to Mahdi's fourth allegation. First, 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 is referring to his alleged “mental age” allegation in Ground 10(b)/11(b)[below], the record shows Mahdi was twenty-one (21) years old at the time of the crime. Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183 (2005)(Eighth Amendment prohibits execution of those under the age of 18 at the time of the crime). The record also shows Mahdi is not mentally retarded. (See Blair hearing testimony and testimony of R&E evaluation).³⁷ Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242 (2002)(Eighth Amendment prohibits the execution of mentally retarded); State v. Laney, 367 S.C. 639, 627 S.E.2d 726 (2006); Franklin v. Maynard, 356 S.C. 276, 588 S.E.2d 604 (2003)(defining mental retardation). There is no testimony in the record that Mahdi was insane at the time of the crime, is insane now, or is incompetent to be executed. Ford v. Wainwright, 477 U.S. 399 (1986)(Eighth Amendment precludes the execution of one who is insane); Singleton v. State, 313 S.C. 75, 437 S.E.2d 53 (1993)(setting forth the standard for competency to be executed). Mahdi has failed to show he fits under any class of persons recognized by the United States Supreme Court or the South Carolina Supreme Court as being excluded from application of the death penalty. See Atkins; Roper; Ford. 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.

To date, the Court is unaware of **any** majority decision by any state or federal court in America that would support such an objection by trial counsel. See e.g. State v. Irick, 320 S.W.3d 284, 297-98 (Tenn. 2010); Mays v. State, 318 S.W.3d 368, 379-80 (Tex. Crim. App. 2010); Johnson v. State, 27 So.3d 11, 26-27 (Fla. 2010). See also, e.g. ShisInday v. Quarterman, 511 F.3d 514 (5th

³⁷Mahdi’s I.Q. was tested twice. On one occasion his I.Q. was 118. On another occasion it was 108. Mahdi introduced no other I.Q. scores at the PCR merits hearing. Mahdi made no claim at the PCR merits hearing that he was mentally retarded.

Cir. 2007); In re Neville, 440 F.3d 220, 221 (5th Cir. 2006)(citing In re Woods, 155 Fed. Appx. 132, 136, 2005 WL 3087882, *3 (5th Cir., Nov. 17, 2005)(unpublished); State v. Ketterer, 111 Ohio St. 3d 70, 855 N.E.2d 48 (2006); Matheney v. State, 833 N.E.2d 454 (Ind. 2005); Hall v. Brannan, 284 Ga. 716, 670 S.E.2d 87 (2008); Coleman v. State, No. W2007-0267-CCA-R3-PD, 2010 WL 118696 (Tenn. Crim. App., Jan 13, 2010)(unpublished).

Further, Petitioner cannot demonstrate a trend among state legislatures to categorically prohibit the imposition of capital punishment against mentally disabled offenders. Mays, 318 S.W.3d at 379 & n. 25; Irick, *supra*; Johnston, 27 So.3d at 26-27.³⁸ Finally, Applicant has failed to show that whatever mental impairment he may have had at the time of the murders, if any, was so severe that he is necessarily and categorically less morally culpable than those who are not mentally disabled.³⁹ Mays, *supra*. Thus he cannot show deficiency or prejudice. Obviously, trial counsel cannot be held ineffective for failing to foresee changes in the law, especially where none has occurred. Schneider v. Day, 73 F.3d 610 (5th Cir. 1996)(counsel cannot be ineffective for failing to foresee changes in the law subsequent to petitioner's trial); Walker v. Jones, 10 F.3d 1569 (11th Cir. 1994)(counsel not ineffective for failing to foresee change in the law that took place four years after petitioner's trial).

Nor is there any merit to this ground factually. Counsel had Mahdi evaluated by order of the circuit court for competency. (**R. pp. 8-10**). As a result of that examination, it was determined Mahdi had no mental illness. (**R. p. 131**). It was also determined Mahdi was not mentally retarded.

³⁸The Court in Irick pointed out that "Connecticut appears to be the only state that has adopted a statute barring the execution of offenders, who at the time of the offense, had a 'significantly impaired . . . ability to conform [their] conduct to the requirements of law.' Conn. Gen. Stat. Ann. 53a-46a(h)."

³⁹Applicant has not presented any evidence that he is insane or guilty but mentally ill.

(R. p. 131). (See also Court's Exhibit 2). It was also determined Mahdi was competent to stand trial. (R. pp. 139-140). The record also shows Mahdi was twenty-three (23) years old at the time of his guilty plea. (R. p. 1346). The record also shows Mahdi obtained his GED. (R. p. 1346). The record also shows that in addition to obtaining his GED, Mahdi had attended some community college. (R. p. 1346). The record also shows Mahdi had been previously employed in mostly roofing and brick laying. (R. p. 1346). The record also shows Mahdi denied ever having been treated for abuse of alcohol, drugs or for any mental disease. (R. 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).⁴⁰ 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. (R. p. 1347). The record also shows Mahdi had a good understanding of the legal process. (R. p. 1341). The record also shows Mahdi had a factual knowledge of the legal system. (R. p. 1340). And, the record shows Mahdi was competent to plead guilty. (R. 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. (R. pp. 1339-1368). At the time the murder of Captain Myers occurred, Mahdi was twenty-one (21) years old. (R. 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. (R. pp. 1437-1439).

⁴⁰The 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).

Mahdi's I.Q. was tested in elementary school and determined to be 118. In his evaluation at Virginia's DJJ, Mahdi described himself as a leader among his peers. **(R. p. 1440)**. And, he also described himself as his own person. **(R. 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. **(R. 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. **(R. pp. 1487-1491)**. The record shows he chose to engage in such conduct anyway. **(R. 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 also sold the .22 rifle used to murder Captain Myers. Mahdi had the wherewithal to sell these two (2) incriminating weapons, but retain those weapons not used in the killings. 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's Evaluation Prior to his Sentencing Proceeding

The record shows Mahdi was also evaluated by two (2) psychiatric or psychological experts retained by trial/plea counsel (the defense). Both Doctor Thomas Martin, a psychiatrist, and Doctor

Geoffrey McKee, a psychologist, found Mahdi had antisocial personality disorder, which is not a mental illness. Both mental health professionals found Mahdi was not suffering from any mental illness at the time he committed the offenses involving Captain Myers. Both witnesses testified at the PCR hearing and testified Mr. Mahdi was very intelligent, and neither testified that Mr. Mahdi was immature or had a “juvenile mentality.” (PCR Tr. pp. 508-561).

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

Mahdi’s PCR Experts

Mahdi was also examined by Doctor Donna Schwartz-Watts prior to his PCR hearing. While she testified Mahdi’s immaturity was cross-referenced in the records, she did not testify Mahdi had a “juvenile mentality” nor did she testify to what mental age Mahdi was. Doctor Myers referenced Mahdi’s immaturity in one DJJ record; however, he gave no opinion regarding Mahdi’s mentality at the time he committed Captain Myers’ murder. There is absolutely no evidence in the record Mahdi has a quote “juvenile mentality.” Mahdi has failed to meet his burden of proof on this issue.

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Nor do the records support this assertion. In fact, several records indicate Mahdi had matured beyond his age, especially with regard to his criminal activities. (See Va. DJJ Records). As a teenager, Mahdi stated his friends were other 14 and 15 year olds, and he was a “leader among his peers”, and he was his “own person.” (See Va. DJJ Records M00431). At the Virginia DJJ, Mahdi admitted his criminal behaviors involved a great deal of thought and planning. (See Va. DJJ records). A counselor noted: “He described his current criminal charges in a very calculated, almost

professional way that is alarming.” (See Va. DJJ records M000410). “He is developing and behaving like a teenager much older.” (See Va. DJJ records M000410). Mahdi was described as a teenager with many negative attitudes toward authority, rules, limits, and the rights and privileges of others. (See Va. DJJ records M00410).

While in the Virginia DJJ system, Madhi planned an assault on another inmate and enlisted the support of other juveniles in this assault. (DJJ records M00425). The victim was injured in this assault. Mahdi exhibited a negative attitude with staff, and stated the attitude would continue until he got his way. Mahdi cursed staff profusely. (DJJ records M00425). Mahdi was also found to be age appropriate with regard to his maturity level during his intake evaluation. (See DJJ records M00418, line 4). Another record indicated that Mahdi’s teachers should be aware that “he has demonstrated the capacity to plot, and carry out, apparently unprovoked assaults on peers. He requires extraordinarily close supervision.” (See DJJ records M00426)

Additionally, Mahdi was tested in 1994 when he was in the 4th grade and his overall level of functioning was at a mid-fourth grade level. At that time, his current level of education functioning fell in the average range. His mathematics equivalent yielded a grade equivalent of 5.8. Other tests showed his general information skills at a 6.8 grade level. Mahdi did struggle in reading during this time. However, psychological data revealed Mahdi’s intellectual functioning was in the high average range. (See Brunswick County School Records).

Trial/Plea Counsel’s Testimony

Trial/plea counsel also testified at the PCR merits hearing. Trial counsel testified Mr. Mahdi was very intelligent. Trial counsel recounted that Mahdi had informed him that he had hatched a plan when he lived in Virginia whereby he would eliminate all other drug dealers in his area,

resulting in a “false drought” of drugs. As a result, Mahdi would make more money selling drugs because everyone would have to come to him for the illegal product. Mahdi also related to trial counsel that he left Virginia because homicide detectives were closing in on him for a homicide committed in the Richmond, Virginia area. Counsel also related that Mahdi was able to impersonate various individuals in order to get what he wanted. Mahdi impersonated homeless person after the car he stole from Virginia broke down in Columbia, S.C. Mahdi impersonated a homosexual in order to carjack Corey Pitts Ford Explorer in Columbia. Mahdi also impersonated a police officer in Florida and pretended to investigate a criminal case reported to him by a citizen there. Trial counsel also testified they had no problems communicating with Mahdi, and he was very smart. Trial counsel did not believe Mahdi had a “juvenile mind” or mentality. (PCR Tr. pp. 603-611, 688-690, 592-593).

This Court had an opportunity to view trial counsel’s testimony on this issue and judge their credibility accordingly. This Court finds trial counsel’s testimony on this issue to be credible. This Court also finds trial counsel’s testimony on this issue to be supported by the credible evidence in the record.

This Court finds Mahdi did not present any credible testimony or evidence on this issue, and therefore he failed to meet his burden of proof regarding this issue. Butler v. State. Mahdi has not convinced this Court by a preponderance of the evidence that he has a “juvenile mind” or mentality. In fact, the credible evidence shows, Mahdi has an adult mentality, and an adult criminal mentality. As a result, this ground of ineffective assistance of counsel has no merit and must be dismissed with prejudice.

Conclusion to this Ground

Mahdi cannot show counsel was deficient in failing to object to the imposition of the death

penalty against him for the above stated reason given the law and this record. Nor can Mahdi show prejudice in this regard under Strickland and Wong v. Belmontes, because the law does not recognize Mahdi's contention and the record demonstrates Mahdi is educated, has an above average I.Q., is streetwise, was twenty-one (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. The record and credible evidence demonstrates that Mahdi does not have a juvenile mentality, if this is what Mahdi is referring to in this ground, but an adult criminal mentality and bad character. This ground must be dismissed with prejudice.

10(b)/11(b)

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

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

There is no merit to this ground either. First, this is a claim of trial court error, and a direct appeal issue that is not cognizable on post conviction relief. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993)(issues that could have been raised at trial or on direct appeal cannot be raised in a PCR application absent a claim of ineffective assistance of counsel). Ground 10(b)/11(b) is a direct appeal claim that was not preserved for appellate review because there was no objection at sentencing,⁴¹ and this issue, being a direct appeal claim is not cognizable in post-conviction relief.

⁴¹See Mahdi v. State, 383 S.C. 135, 678 S.E.2d 807 (2009).

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 the guilty plea and sentencing and not raised on appeal to the South Carolina Supreme Court. (See FBOA, 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” or “developmental deficits”, 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). As a result, this ground is dismissed with prejudice.

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

Third, applicant has failed to state a claim upon which relief may be granted. The record

shows Mahdi was twenty-one (21) years old at the time of the crime. The record also shows Mahdi was not mentally retarded. (See Blair hearing testimony). Mahdi's highest I.Q. score was 118 and lowest I.Q. score was 95.⁴² 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. Ford v. Wainwright, 477 U.S. 399 (1986)(Eighth Amendment precludes the execution of on who is insane); Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183 (2005)(Eighth Amendment prohibits execution of those under the age of 18 at the time of the crime); Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242 (2002)(Eighth Amendment prohibits the execution of mentally retarded); State v. Laney, 367 S.C. 639, 627 S.E.2d 726 (2006); Franklin v. Maynard, 356 S.C. 276, 588 S.E.2d 604 (2003)(defining mental retardation). This ground must be dismissed.

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

⁴²This score was attributed to his long-term incarceration.

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

Further, Petitioner cannot demonstrate a trend among state legislatures to categorically prohibit the imposition of capital punishment against mentally disabled offenders. Mays, 318 S.W.3d at 379 & n. 25; Irick, *supra*; Johnston, 27 So.3d at 26-27.⁴³ Finally, Applicant has failed to show that whatever mental impairment he may have had at the time of the murders, if any, was so severe that he is necessarily and categorically less morally culpable than those who are not mentally disabled.⁴⁴ Mays, *supra*. Thus he cannot show error or prejudice.

Fourth, there is no factual merit to this ground. As previously stated, counsel had Mahdi evaluated by order of the circuit court for competency. **(R. pp. 8-10).**

The Competency Evaluation and its Results

As a result of that examination, it was determined Mahdi had no mental illness. **(R. p. 131).** There is no testimony in the record that Mahdi was insane. It was also determined Mahdi was not mentally retarded. **(R. p. 131).** **(See also Court's Exhibit 2).** It was also determined Mahdi was competent to stand trial. **(R. pp. 139-140).** The record also shows Mahdi was twenty-three (23) years old at the time of his guilty plea. **(R. p. 1346).** The record also shows Mahdi obtained his GED. **(R. p. 1346).** The record also shows that in addition to obtaining his GED, Mahdi had

⁴³The Court in Irick pointed out that "Connecticut appears to be the only state that has adopted a statute barring the execution of offenders, who at the time of the offense, had a 'significantly impaired . . . ability to conform [their] conduct to the requirements of law.' Conn. Gen. Stat. Ann. 53a-46a(h)."

⁴⁴Applicant has not presented any evidence that he is insane or guilty but mentally ill.

attended some community college. **(R. p. 1346)**. The record also shows Mahdi had been previously employed in mostly roofing and brick laying. **(R. p. 1346)**. Mahdi had also been employed in car detailing and the restaurant field. The record also shows Mahdi denied ever having been treated for abuse of alcohol or drugs. **(R. 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. **(R. p. 1347)**. Ms. Hammock testified that Mahdi had been hospitalized on one occasion as an adolescent. **(R. p. 1747)**. Ms. Hammock testified Mahdi was treated and released. **(R. pp. 1747, 1756)**.⁴⁵ The record also shows Mahdi had a good understanding of the legal process. **(R. p. 1341)**. The record also shows Mahdi had a factual knowledge of the legal system. **(R. p. 1340)**. And, the record shows Mahdi was competent to plead guilty. **(R. 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. **(R. pp. 1339-1368)**. At the time the murder of Captain Myers occurred, Mahdi was twenty-one (21) years old. **(R. 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. **(R. pp. 1437-1439)**. An earlier I.Q. test revealed Mahdi's I.Q. to be 118. In his evaluation at Virginia's DJJ, Mahdi described himself as a leader among his peers. **(R. p. 1440)**. And, as his own person. **(R. 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. **(R. pp. 1472-1487)**.

⁴⁵The 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)**.

Mahdi's Actions Prior to and During this Current Offense

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. **(R. pp. 1487-1491)**. The record shows he chose to engage in such conduct anyway. **(R. pp. 1492-1511)**. As previously stated in the factual recitation, the record also shows Mahdi stole a car from a car lot in Lawrenceville, Virginia and stole a license plate from a separate car rental agency and placed the stolen plate on the stolen car before leaving Virginia. Mahdi burglarized the home of a neighbor and stole her handgun. The record shows that Mahdi understood that under the terms of his supervised probation, he could not leave the State of Virginia without permission of his probation agent. Mahdi chose to leave the State of Virginia anyway, because police were closing in on him for a homicide in Virginia. Once in North Carolina, Mahdi entered a convenience store and removed a beer from a cooler and placed it on the counter like he was a paying customer. While the cashier checked Mahdi's I.D., Mahdi pulled out the .380 caliber pistol and shot the store clerk. Mahdi then attempted to rob the store's cash register. 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. Mahdi drove Captain Myers' truck to Florida. Mahdi used a map to locate Jacksonville, Florida. Once in Florida, Mahdi sold the murder weapon used in the North Carolina murder and the murder weapon used in the South Carolina murder, but retained other weapons for himself. After his arrest, and during the trial of this case, Mahdi fashioned a hand-cuff key while in super-max and secreted it in his mouth while being

brought to trial and during the trial.

The entire 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. Mahdi does not have a juvenile mentality, as alleged, but an adult criminal mentality and bad character. And, the record demonstrates the same.

Mahdi's Evaluation Prior to his Sentencing Proceeding

The record shows Mahdi was also evaluated by two (2) psychiatric or psychological experts retained by trial/plea counsel (the defense). Both Doctor Thomas Martin, a psychiatrist, and Doctor Geoffrey McKee, a psychologist, found Mahdi had antisocial personality disorder, which is not a mental illness. Both mental health professionals found Mahdi was not suffering from any mental illness at the time he committed the offenses involving Captain Myers. Both witnesses testified at the PCR hearing and testified Mr. Mahdi was very intelligent, and neither testified that Mr. Mahdi was immature or had a "juvenile mentality." (PCR Tr. pp. 508-561).

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

Mahdi's PCR Experts

Mahdi was also examined by Doctor Donna Schwartz-Watts prior to his PCR hearing. While she testified Mahdi's immaturity was cross-referenced in the records, she did not testify Mahdi had a "juvenile mentality" nor did she testify to what mental age Mahdi was. And, while Dr. Myers testified Mahdi's immaturity was noted in a DJJ record, he gave no opinion regarding Mahdi's mentality at the time of Captain Myers' murder. There is absolutely no evidence in the record Mahdi has a quote "juvenile mentality." Mahdi has failed to meet his burden of proof on this issue.

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Nor do the records support this assertion. In fact, several records indicate Mahdi had matured beyond his age, especially with regard to his criminal activities. **(See Va. DJJ Records)**. As a teenager, Mahdi stated his friends were other 14 and 15 year olds, and he was a “leader among his peers”, and he was his “own person.” **(See Va. DJJ Records M00431)**. At the Virginia DJJ, Mahdi admitted his criminal behaviors involved a great deal of thought and planning. **(See Va. DJJ records)**. A counselor noted: “He described his current criminal charges in a very calculated, almost professional way that is alarming.” **(See Va. DJJ records M000410)**. “He is developing and behaving like a teenager much older.” **(See Va. DJJ records M000410)**. Mahdi was described as a teenager with many negative attitudes toward authority, rules, limits, and the rights and privileges of others. **(See Va. DJJ records M00410)**.

While in the Virginia DJJ system, Madhi planned an assault on another inmate and enlisted the support of other juveniles in this assault. **(DJJ records M00425)**. The victim was injured in this assault. Mahdi exhibited a negative attitude with staff, and stated the attitude would continue until he got his way. Mahdi cursed staff profusely. **(DJJ records M00425)**. Mahdi was also found to be age appropriate with regard to his maturity level during his intake evaluation. **(See DJJ records M00418, line 4)**. Another record indicated that Mahdi’s teachers should be aware that “he has demonstrated the capacity to plot, and carry out, apparently unprovoked assaults on peers. He requires extraordinarily close supervision.” **(See DJJ records M00426)**

Additionally, Mahdi was tested in 1994 when he was in the 4th grade and his overall level of functioning was at a mid-fourth grade level. At that time, his current level of education functioning fell in the average range. His mathematics equivalent yielded a grade equivalent of 5.8. Other tests

showed his general information skills at a 6.8 grade level. Mahdi did struggle in reading during this time. However, psychological data revealed Mahdi's intellectual functioning was in the high average range. **(See Brunswick County School Records).**

Trial/Plea Counsel's Testimony

Trial/plea counsel also testified at the PCR merits hearing. Counsel testified Mr. Mahdi was very intelligent. Trial counsel recounted that Mahdi had informed him that he had hatched a plan when he lived in Virginia whereby he would eliminate all other drug dealers in his area, resulting in a "false drought" of drugs. As a result, Mahdi would make more money selling drugs because everyone would have to come to him for the illegal product. Mahdi also related to trial counsel that he left Virginia because homicide detectives were closing in on him for a homicide committed in the Richmond, Virginia area. Trial counsel also testified they had no problems communicating with Mahdi, and he was very smart. Counsel also testified Mahdi was calculating and intelligent in being able to disguise himself as someone else. Counsel related Mahdi impersonated a homeless person in Columbia in order to gain entrance into the Oliver Gospel Mission when the car he originally stole from Virginia broke down. Counsel related Mahdi was able to pretend he was a homosexual in order to car-jack the Ford Explorer belonging to Corey Pitts. Counsel also related how Mahdi impersonated a police officer while in Florida, including investigating a crime reported by a citizen. Trial counsel did not believe Mahdi had a "juvenile mind" or mentality. **(PCR Tr. pp. 603-611, 688-690, 592-593).** This Court had an opportunity to view counsel's testimony on this issue and judge their credibility accordingly. This Court finds counsel's testimony on this issue to be credible. This Court also finds counsel's testimony on this issue to be supported by the credible evidence in the record.

This Court finds Mahdi did not present any credible testimony or evidence on this issue, and therefore he failed to meet his burden of proof regarding this issue. Butler v. State. Mahdi has not convinced this Court by a preponderance of the evidence that he has a “juvenile mind” or mentality. In fact, the credible evidence shows, Mahdi has an adult mentality, and an adult criminal mentality. This ground has no merit and must be dismissed with prejudice.

Conclusion to this Ground

This ground is not cognizable in post-conviction relief. This ground was also waived and abandoned at the trial level and on direct appeal. Additionally, Mahdi has not shown he falls into any category that would prohibit the imposition of the death penalty under the Eighth Amendment to the United States Constitution. Furthermore, Mahdi has failed to meet his burden of proof to show he has a “juvenile mind” or mentality, and this Court finds the credible evidence is Mahdi has an adult mentality and an adult criminal mentality. As a result of all of the above, this ground must be dismissed with prejudice.

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

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

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

First, the underlying claim that the statute is unconstitutional has been rejected by the South

Carolina Supreme Court on several occasions. State v. Allen, 386 S.C. 93, 687 S.E.2d 21 (2009), *cert. denied*; State v. Crisp, 362 S.C. 412, 608 S.E.2d 429 (2005); State v. Downs, 361 S.C. 141, 604 S.E.2d 377 (2004); State v. Wood, 362 S.C. 135, 607 S.E.2d 57 (2004).⁴⁶ Therefore, counsel could not have been deficient in failing to preserve an issue that has no merit under the law. Id. Additionally, Mahdi has failed to show any prejudice because any such objection would have been overruled by Judge Newman and our state Supreme Court would have found this issue to be without any merit as it has on several occasions. Id. See also State v. Inman, Shearhouse Advance Sheets, Opinion No. 27081 (Filed December 28, 2011).

Additionally, there was no authority to support counsel arguing that S.C. Code Ann. Section 16-23-30 is unconstitutional, and counsel cannot be ineffective for failing to “anticipate a change in the law.” See Gilmore v. State, 314 S.C. 453, 445 S.E.2d 454 (1994); Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993). See also Jameson v. v. Coughlin, 22 F.3d 427, 429-30 (2nd Cir. 1994); Horne v. Trickey, 895 F.2d 497, 500 (8th Cir. 1990).

Second, as counsel testified to at the PCR hearing, Mahdi did not want to plead guilty and have the jury sentence him. (**PCR Tr. pp. 682-684**). Mahdi had selected twelve (12) jurors and four (4) alternates to hear his trial and decide his sentence. Mahdi decided to plead guilty because Mahdi believed he had a better chance of receiving a life sentence from Judge Newman than he did with the jury he had selected. (**PCR Tr. pp. 682-684**). As counsel correctly testified at the PCR hearing, the jury, composed of ordinary citizens, would not have been used to seeing murders, as Judge Newman, an experienced circuit judge, and when confronted with the brutality of Mahdi’s murder

⁴⁶The South Carolina Supreme Court recently recognized this issue has no merit and has been repeatedly rejected by the Court. State v. Inman, Shearhouse Advance Sheets, Opinion No. 27081 (Filed December 28, 2011).

of Captain Myers, and the video-tape of the murder in North Carolina and its brutality, would in all likelihood have sentenced Mahdi to death for the murder of Captain Myers. Additionally, the jury would have heard Mahdi's extensive criminal record, both adult and juvenile; and, the jury would have heard Mahdi's horrible prison behavior record while in the Virginia Department of Juvenile Justice, the Virginia Department of Corrections, and the South Carolina Department of Corrections. This Court had the opportunity to view the witnesses and hear their testimony on this issue. This Court finds trial counsel's testimony on these issues to be credible. Mahdi offered no testimony to contradict trial counsel's testimony on these issues. This Court finds based on trial counsel's credible testimony and the record in this case, Mahdi wanted Judge Newman to sentence him, not the jury he had initially selected and impaneled. Therefore, since Mahdi wanted Judge Newman to sentence him, and not the jury, it would have made no sense for Mahdi to have objected to the constitutionality of the statute and insist on pleading guilty and being sentenced by the jury. That is not what Mahdi wished or desired in pleading guilty. Therefore, counsel was not ineffective in failing to object to the constitutionality of Section 16-3-20. Mahdi has failed to show deficient performance or prejudice on the part of counsel in this regard. Strickland. This ground must be dismissed with prejudice.

V. CONCLUSION

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

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

February 13, 2012.

CERTIFICATE FOR SERVICE

I, Anthony Mabry, hereby certify that I have served the Proposed Order of Dismissal 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 13th day of February, 2012.

ANTHONY MABRY
Assistant Attorney General

STATE OF SOUTH CAROLINA

COUNTY OF

CALHOUN

Mikal D. Mahdi

Plaintiff,

vs.

State of South Carolina

Defendant.

IN THE COURT OF COMMON PLEAS

First JUDICIAL CIRCUIT

CASE NO.: 09-CP-09-164

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney: <u>Teresa L. Norris</u> , Bar No. _____ Address: <u>900 Elmwood Ave, Ste 101, Columbia SC 29201</u> Phone: <u>(803) 765-1044</u> Fax _____ E-mail: _____ Other: _____		Defendant's Attorney: <u>Anthony Mabry</u> , Bar No. <u>11973</u> Address: <u>P.O. Box 11549 Columbia SC 29211</u> Phone: <u>(803) 734-6305</u> Fax <u>(803) 734-4035</u> E-mail: _____ Other: _____	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information Nature of Motion: <u>Rule 59</u> Estimated Time Needed: <u>1 hr</u> Court Reporter Needed: ☒ YES / ☐ NO			
SECTION II: Motion/Order Type ☐ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order. _____, 20____ Signature of Attorney for ☐ Plaintiff / ☐ Defendant Date submitted			
SECTION III: Motion Fee ☐ PAID - AMOUNT: \$ _____ ☒ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☒ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☒ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other: _____			
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____		JUDGE CODE _____ Date: _____, 20____	
CLERK'S VERIFICATION Collected by: _____ Date Filed: _____, 20____ ☐ MOTION FEE COLLECTED: \$ _____ ☐ CONTESTED - AMOUNT DUE: \$ _____			

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.	)	RULE 59, SCRCP
	)	MOTION TO ALTER OR AMEND
State of South Carolina,	)	ORDER OF DISMISSAL
	)	
Respondent.	)	

This is a capital post-conviction relief case. On December 28, 2012, this Court issued its Order of Dismissal denying dismissing the allegations of Applicant Mikal D. Mahdi's PCR Application with prejudice. The Order was filed with the Calhoun County Clerk of Court on January 8, 2013. Respondent received written notice of the entry of the Order of Dismissal on January 30, 2013.¹ Respondent believes this Court correctly decided all grounds presented in Applicant's PCR Application except the Court's finding of *deficient performance* of counsel with regard to the following ground:²

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

Ground 10(a)/11(a)(iii) Counsel failed to adequately investigate, develop, and present mitigation evidence concerning Applicant's family, social, institutional, and mental health history. (See Amended Application p. 2).

Pursuant to Rule 59, SCRCP, Respondent moves that this Court alter or amend its Order of Dismissal to correctly find counsel was not deficient under this ground.

¹Respondent did not receive notice of entry of the Order until it received Applicant's Notice of Appeal from the Order.

²Respondent agrees this Court correctly determined there was no prejudice to Petitioner from any *alleged* deficient performance.

Specifically, with regard to this ground, Mahdi claimed counsel should have interviewed and called in the penalty phase several of his extended family members and also community members and school officials to testify to his family, social, scholastic, and mental health history. Mahdi also claimed counsel should have presented the testimony collateral counsel presented through a different forensic social worker than the one used at sentencing. Mahdi claimed counsel should have introduced testimony from an expert regarding the effect of incarceration on Mahdi. Mahdi also alleged counsel failed to adequately investigate, develop, and present evidence concerning his mental health history or mentality, specifically counsel should have discovered and presented the testimony collateral counsel presented through Doctors Schwartz-Watts and Myers at PCR and counsel failed to provide certain records to his psychiatric/psychological experts. Finally, Mahdi claimed counsel failed to introduce certain documents at the sentencing proceeding such as certain school records, his DJJ records, and records from his commitment to the Walter Carter Center at age (9).

1. In its Order of Dismissal, this Court erred in finding counsel's performance was deficient under this ground. This Court specifically held that counsel's performance in investigating mitigation evidence was deficient because counsel did not comply with several ABA Guidelines for Counsel in Capital or Death Penalty Cases (2003). The Court erred in doing so.

As the United States Supreme Court pointed out recently in Bobby v. Van Hook, 558 U.S. 4, 130 S.Ct. 13, 175 L.Ed. 255 (2009), the ABA Guidelines are not the mandatory constitutional standard for determining whether counsel's performance was deficient or not, but the proper standard is that set forth in Strickland v. Washington. Id. Further, as Justice Alito pointed out in his concurring opinion in Van Hook:

I join the Court's *per curiam* opinion but emphasize my understanding that the opinion in no way suggests that the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003)(2003

Guidelines or ABA Guidelines) have special relevance in determining whether an attorney's performance meets the standard required by the Sixth Amendment. The ABA is a venerable organization with a history of service to the bar, but it is, after all, a private group with limited membership. The views of the association's members, not to mention the views of the members of the advisory committee that formulated the 2003 Guidelines, do not necessarily reflect the views of the American bar as a whole. It is the responsibility of the courts to determine the nature of the work that a defense attorney must do in a capital case in order to meet the obligations imposed by the Constitution, and I see no reason why the ABA Guidelines should be given a privileged position in making that determination.

Id. Subsequent, to Van Hook, the United States Supreme Court handed down Cullen v. Pinholster, 131 S.Ct. 1388, 179 L.Ed. 557 (2011) in which the Court reiterated that the determination of whether counsel's performance was deficient and ultimately ineffective cannot be made based specific guidelines. Id. In fact, the Court pointed out in Pinholster that "[b]eyond the general requirement of reasonableness, 'specific guidelines are not appropriate.'" Id., citing Strickland, at 688, 104 S.Ct. 2052. The Pinholster Court went on to state: "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions..." Id., quoting Strickland, at 688-89, 104 S.Ct. 2052. The Pinholster Court went further in stating:

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

As a result, it is clear that since the particular decisions cited by this Court in finding deficient performance in this case, the United States Supreme Court has subsequently made clear that the mere fact that an attorney did not follow the ABA Guidelines in general or specific ABA Guidelines does not mean counsel's performance was deficient in performing a mitigation investigation in a capital case. As a result, this Court erred in finding counsel in the present case was deficient because counsel did not follow specific ABA Guidelines. Van Hook; Pinholster.

2. This Court erred in finding counsel conducted a superficial mitigation investigation and one focused on competency and criminal responsibility. The record shows completely the opposite.³

The record shows counsel did a reasonable mitigation investigation including retaining a mitigation investigator, Paige Tarr Haas, retaining a forensic social worker, Marjorie Hammock, and retaining a private investigator, James Gordon, to investigate and develop Mahdi's family and social history. The record also shows counsel retained two (2) psychiatric or psychological experts, Dr. Thomas Martin (a forensic psychiatrist) and Dr. Geoffrey McKee (a forensic psychologist), to investigate Mahdi's psychiatric history and mentality at the time of the crime *and* uncover any mental deficiencies or disorders that would mitigate punishment. (PCR 503 - 710). Counsel also interviewed Mahdi about his life and his life history.⁴

³The record also shows counsel moved for and obtained a continuance for almost one (1) year in order to completely and thoroughly investigate and develop the mitigation case on Mahdi's behalf. (PCR 597-98, Resp. Ex. 16 (Motion for Continuance) & Resp. Ex. 17, Order of Judge Clifton Newman continuing the case from January until November).

⁴Counsel testified they also traveled to N.C. and met with Mahdi's defense attorneys and mitigation investigators in the N.C. murder case. Mahdi's N.C. defense team shared with counsel the results of their investigation. (PCR 597, 612). Counsel also testified there were team meetings at which the mitigation investigator, the forensic social worker, the retained psychiatric/psychological experts and counsel were present, and each person would share what their investigation had uncovered. (PCR 595-96,). Counsel testified they also interviewed applicant

The record shows Ms. Tarr, the mitigation investigator, was retained by attorney Carl Grant on the recommendation of attorney Jeff Bloom, an experienced capital defense attorney. (PCR 589). Tarr had previously served as mitigation investigator or specialist *in thirty (30) to forty (40) capital cases*. (PCR 562-563). As a result, she was thoroughly familiar with the necessity of, and how to conduct a capital mitigation investigation. Ms. Tarr also traveled to Lawrenceville, Virginia and made contact with applicant's grandmother Nancy and uncle Nathan, and traveled to Philadelphia and made contact with applicant's aunt Lawanda, uncle Carson, and aunt Kathy. Ms. Tarr also located applicant's maternal aunts Corliss Artis and Sophie Gee in Richmond. Ms. Tarr also located applicant's mother Vera Mahdi. Ms. Tarr also attempted to speak with applicant's brother, Saleem, however, the brother was repeatedly unavailable to speak with Ms. Tarr. (PCR 563-575). Tarr traveled to Virginia, Maryland, and Pennsylvania to interview Mahdi's immediate family and members of his extended family. Tarr investigated applicant's social, family, school, institutional, and mental health history by interviewing Mahdi, his father, his mother, his grandmother, his paternal uncle Carson, his paternal aunt Lawanda, his paternal aunt Kathy Burwell, his maternal aunt Sophie Gee, his maternal aunt Corlis Artis, his paternal uncle Nathan, *and* school officials, and by obtaining records of applicant's background including his DJJ records, school records, and his records of commitment to a psychiatric facility in Baltimore when he was nine (9) years old. (PCR 563-575 & Resp. Ex. 12). Tarr additionally summarized these particular psychiatric records for counsel and their retained experts. (PCR 565-66). Tarr also summarized

Mahdi and traveled to Virginia as well, and spoke with Mahdi's grandmother, Nancy Burwell, and uncle Nathan. Mahdi's uncle Nathan was not cooperative in their mitigation investigation, and counsel testified they would have been hesitant to call Nathan as a witness because he assisted police in identifying Mahdi from the video-tape of the N.C. murder and was proud of that fact.

applicant's school records for counsel and their retained experts. The mitigation investigator also met with Mahdi's defense team in the N.C. murder case and obtained the results of their mitigation investigation.⁵ She returned to Virginia and Maryland with the forensic social worker where they were able to interview members of Mahdi's immediate and extended family. Tarr testified she provided counsel with summaries of the witnesses potential testimony and relayed to counsel the information collected. (PCR 574). As of November 6, 2006, one month before Mahdi's sentencing proceeding, Tarr had spent approximately 170 hours interviewing witnesses, collecting documents, and producing data in her quest to put together an appropriate mitigation presentation at sentencing. (Resp. Ex. 10). At that time, she anticipated working an additional seventy-five (75) hours in preparing the case for trial. (Resp. Ex. 10).

Ms. Marjorie Hammock, the forensic social work expert, retained by attorney Grant, had previously worked as a forensic social worker in numerous capital cases in several states including South Carolina. At the time of trial, Hammock had testified in and been qualified as an expert in clinical social work in approximately 14 cases. At trial, she testified she had worked on 25 capital cases. And, at the time of trial, Hammock was working on another 5 capital cases, some here in South Carolina, some in Florida, and one in Alabama. (R 1739-63). Hammock traveled with Tarr on a second (2nd) occasion to Lawrenceville, Virginia, to meet with applicant's paternal grandmother Nancy Burwell and his paternal uncle Nathan Burwell. She interviewed both. Hammock also traveled to Richmond, Virginia and attempted to speak in person with applicant's mother, who was not cooperative, and was finally able to speak with applicant's mother but only by telephone. Hammock also interviewed a family friend, Ms. Pearson. Hammock also interviewed applicant's

⁵Mahdi's N.C. defense team was present at the PCR and did not contest this fact.

maternal aunts Sophie Gee and Corlis Artis. Hammock also traveled to Baltimore, Maryland where she met with and interviewed applicant's paternal uncle Carson Burwell and paternal aunt by marriage Lawanda Burwell. Hammock also interviewed applicant's father Shareef Mahdi while in Philadelphia. **(R 1739-63 & PCR 563-75).**

Both Dr. Martin and Dr. McKee, counsel's psychiatric and psychological experts, also took an additional social history from Mahdi, and also a psychiatric history. Both Martin and McKee were aware of applicant's earlier commitment to a psychiatric facility when he was 9 years old and reviewed those records in detail. Dr. Martin also reviewed Ms. Tarr's interview summaries with applicant's family members. Both experts were also aware that Mahdi had been placed in special education classes in elementary school. Both Drs. Martin and McKee were present at defense team meetings where information was shared regarding the joint investigation into Mahdi's past. Both Doctors Martin and McKee found separately that Mahdi was not suffering from any major mental illness at the time he committed this murder, and they diagnosed him with anti-social personality disorder at the time of Captain Myers' murder. While Dr. Martin testified he found that Mahdi had suffered from some recurrent depression in his life, he did not find any evidence that Mahdi was suffering from any depression at the time he committed the murder of Captain Myers. Doctor Martin testified at the PCR hearing that the records introduced by applicant Mahdi at PCR would not change his diagnosis. Dr. McKee testified at the PCR hearing he did not need additional records to make his diagnosis or issue his report. Neither Dr. Martin nor Dr. McKee changed their diagnosis based on records shown them by applicant at PCR. **(PCR 508-561)**

Counsel also traveled to North Carolina and met with Mahdi's defense attorneys and mitigation investigators in the North Carolina murder case. Mahdi's North Carolina defense team

shared with counsel the results of their investigation. (PCR 597, 612). Counsel also testified there were team meetings at which the mitigation investigator, the forensic social worker, the retained psychiatric experts and counsel were present, and each person would share what their investigation had uncovered. (PCR 595-96). Counsel also interviewed applicant Mahdi and traveled to Virginia as well, and spoke with Mahdi's grandmother, Nancy Burwell, and uncle Nathan. Mahdi's uncle Nathan was not cooperative in their mitigation investigation. Counsel testified they would have been hesitant to call Nathan as a witness because he assisted police in identifying Mahdi from the videotape of the North Carolina murder and was proud of that fact.⁶ Mahdi's grandmother was cooperative in their mitigation investigation, and they had her present at trial/sentencing to testify, but she was unwilling to assist Mahdi regarding mitigation, stating she was there to defend the family name. Counsel also talked with Mahdi's aunt Lawanda and uncle Carson. While they were cooperative in providing background information on Mahdi and his family, Carson informed counsel that he would not be helpful to Mahdi if he testified in the case. Carson informed counsel Mahdi was defiant and manipulative in their home. Carson and Lawanda's position was they were glad Mahdi was out of their home. Both Lawanda and Carson admitted Mahdi made a false claim of child abuse against Lawanda and almost had her arrested. Carson also told counsel he and his wife were not going to help Mahdi.⁷ Trial counsel also testified they spoke with Carson prior to the sentencing proceeding, and Carson told them that if he were called as a witness he would have bad things to say about Mahdi. Counsel also testified that Carson informed them that he and his wife, Lawanda,

⁶ Ms. Tarr also related to the Court that Mahdi's uncle Nathan was not helpful in the mitigation investigation. (PCR 576).

⁷Lawanda testified at Mahdi's PCR hearing that she would have been reluctant to testify at Mahdi's sentencing proceeding in 2006.

would not be going to help Mahdi in his sentencing proceeding. (PCR 618-20, 627-28, 649-50, 693-97). Carson admitted at PCR he may have told Mahdi's N.C. attorneys that Mahdi was a "demon" because of Mahdi's disruptive conduct in their home. Counsel also spoke with Mahdi's aunt Kathy Burwell, and she indicated she did not wish to participate in Mahdi's sentencing hearing, because she was still angry and resentful at Mahdi's brother for almost burning her house down. Counsel also testified they interviewed Mahdi's brother, Saleem, however, he was not particularly helpful or interested in testifying.⁸ Counsel also testified Mahdi himself indicated to them he did not want his father involved in his trial or sentencing proceeding. Counsel testified Mahdi's mother was completely uncooperative and did not want to participate in Mahdi's sentencing proceeding. (PCR 602-710).⁹

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

⁸Collateral counsel's forensic social worker, Nicholas Cooper-Lewter, admitted at PCR that Mahdi's brother, Saleem, would not talk to him either. (PCR 317-18).

⁹Neither Mahdi's mother nor his father or brother testified at the PCR hearing or offered any affidavits. (PCR 1-720).

worker Ms. Hammock. (PCR 624, ll. 17-22).¹⁰

The record clearly shows counsel's mitigation investigation was anything but superficial or focused only on competency to stand trial or criminal responsibility. Counsel, their mitigation investigator, forensic social worker, experts, and private investigator attempted to develop live mitigation evidence witnesses but were unable to do so due to the family members reluctance and/or refusal to testify at the time of trial, or refusal to testify in a helpful fashion. (PCR 503-710). The record also clearly shows counsel conducted a reasonable mitigation investigation. Strickland; Van Hook; Pinholster.

3. This Court erred in finding counsel was deficient in presenting mitigation evidence at Mahdi's sentencing proceeding when essentially the same testimony presented at the PCR hearing was presented at Mahdi's sentencing through the forensic social worker *or* counsel made an objectively reasonable strategic decision not to present mitigation evidence, and Mahdi's family was uncooperative with counsel in being willing to testify favorably at the sentencing proceeding. See Simpson v. Moore, 367 S.C. 587, 605-07, 627 S.E.2d 701, 711-12 (2006)(reversing PCR Court's conclusion that capital defendant suffered prejudice from counsel's failure to offer sufficient social history evidence in mitigation case where record

¹⁰Mahdi's family's reluctance to testify is further demonstrated by what occurred at the PCR evidentiary hearing. Applicant's mother, father, and brother did not testify at the PCR hearing. His grand-mother did not testify at the PCR hearing, apparently because she now has dementia; however, there was no contention by Mahdi that counsel should have called the grandmother Nancy Burwell at sentencing. At the time of sentencing, she was only interested in defending the family name, not helping Mahdi. None of Mahdi's immediate family testified at the PCR merits hearing. Nor were any affidavits offered by them. (PCR 1-720). The circumstances trial counsel faced are similar to those faced in Rutherford v. Crosby, 385 F.3d 1300 (11th Cir. 2000). In that case, the defendant's family was uncooperative at the time of trial. The behavior of applicant's family is typical in these type cases. When the crime has been recently committed and those who knew the victim are still outraged, the defendant's family and friends are likewise shocked, angry, embarrassed, and disappointed in the defendant's behavior. In this case, as in others, they are in no mood to assist the defendant in escaping responsibility for his crimes. (See PCR 619, ll. 19-24). It is only after the passage of many years, when the case is on post-conviction relief, and the case is no longer in the forefront of the community's or the victims' family's mind, that witnesses become cooperative and insist that they would have cooperated at the time of trial, when in fact they were originally hesitant, did not want to be involved, or refused to testify.

showed counsel did in fact do adequate investigation and presented similar mitigation evidence); 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).

The record shows many of the witnesses presented at the PCR hearing were interviewed by counsel or the mitigation team, or both; however, at the time of the sentencing proceeding these witnesses were uncooperative or unwilling to come and testify favorably on Mahdi's behalf and counsel was forced to present the mitigation story through the forensic social worker rather than through mitigation witnesses. However, the same information was related to the sentencing judge through the forensic social worker, Ms. Hammock, i.e. that Mahdi came from a superficially intact family that was dis-functional upon further examination, and Mahdi was the product of a broken home, in which he witnessed domestic violence, in which his mother was withdrawn and his father suffered from mental illness and could not competently care for applicant.¹¹

¹¹Ms. Hammock conducted a bio-social assessment of Mahdi's life and family history. (R 1747). She testified to the same before Judge Newman. (R 1739-63). She interviewed Madhi's paternal grandmother Nancy Burwell, his paternal uncle Carson, another paternal uncle Nathan, his paternal aunt Lawanda Burwell, his mother Vera Telea Artis, his maternal aunt Sophie Gee, another maternal aunt Corliss Artis, and Mahdi's father Shareef Mahdi. (R 1746-47). She also interviewed a family friend. She conducted her bio-social assessment by interviewing family members, reviewing records, interviewing Mahdi, and taking information from anyone who would give information about Mahdi, his life and development. (R 1762). She also reviewed a synopsis of Madhi's school records and reviewed a report from his admission in Baltimore to a psychiatric facility [the Walter Carter Center] at the age of nine (9). (R 1747). Like the family witnesses presented at PCR, Hammock testified to the problems within Mahdi's family. Mahdi's family looked like an intact family, but there were problems within the same. There was alcoholism in the family, and there was some neglect on the part of Mahdi's grandfather. (R 1750). Counsel introduced through Hammock a time-line of Mahdi's family which sets forth Madhi's grandmother, Nancy, was not allowed to have her tubes tied after the birth of 1 of the siblings born before Mahdi's father, Shareef, was born. (Def. Ex. 2/Resp. Ex. 5, p. 1). Hammock testified Mahdi's father, like Mahdi, was extremely troubled as a child. (R 1749-50). The time-line sets forth Madhi's father was described as disturbed as a young child, threw tantrums, and his mother was not emotionally available to him or his younger sister, Kathy. (Def. Ex. 2/Resp. Ex. 5). Hammock testified Mahdi's father considered himself an unwanted child. (R 1750). His childhood was difficult, and he grew up in a situation feeling alienated from

everyone around him. (R 1750). Mahdi's father was traumatized by his attending desegregated schools as a young child. (R 1750). The time-line sets forth this experience was destructive to Mahdi's father. He was ridiculed, isolated, challenged physically by classmates, ignored or received negative feedback from instructors at school. (Def. Ex. 2/Resp. Ex. 5). Hammock also testified to Mahdi's father's inability to get along with his own family and others in the community. (R 1750). Mahdi's father was constantly in conflict with those around him. (R 1750). On cross-examination of a State's witness, counsel also brought out Mahdi's father had committed assaults on some of his own family members. (R 1433). Mahdi's father did not finish high school, and he was the only sibling that did not, and this was a source of consternation between he and his family. (R 1750). Hammock testified to his inability to hold a job and his eventual conversion to Islam. (R 1750-51). The time-line also sets forth Mahdi's father was suffering from depression as early as 1971. (Def. Ex. 2/Resp. Ex. 5). Hammock testified Mahdi's father's conversion to Islam, and his changing his name from Thomas Burwell to Shareef Mahdi brought grief to the Burwell family. (R 1750). She also testified to Mahdi's father's discharge from the Marines under less than honorable conditions. (R 1750). Hammock testified Mahdi's father was not able to function well, and there was some description of Mahdi's father suffering continuing depression. (R 1751). There were a number of incidents involving Mahdi's father with local law enforcement. (R 1751). The time-line also sets forth Mahdi's father was involved in a series of misdemeanors locally, all said to be racially motivated. (Def.'s Ex. 2/Resp.'s Ex. 5). On cross-examination of a State's witness, counsel also brought out Mahdi's father had prior dealings with law enforcement in the community. (R 1433). On cross-examination of the same witness, counsel also brought out Mahdi's father's involvement in the eight (8) hour stand-off with law enforcement. Hammock also interviewed Mahdi's mother. (R 1756-58). Mahdi's mother was extremely withdrawn and did not want to participate in the interview at all. (R 1756). It appeared as if Mahdi's mother was frightened about being involved with the family again because of her previous experiences with Mahdi's father. (R 1757). While Mahdi's mother did eventually educate herself, joined the military, and at the present time worked and took care of herself, she was totally isolated from her own family, as well as the Burwell (Mahdi's paternal) family. (R 1757). While Mahdi's mother may occasionally speak to some members of the family, there was a disconnection there. (R 1757). The information regarding Mahdi's mother came from Mahdi's mother herself *and* from her siblings and the Burwell family, and it was all consistent. (R 1757). She testified Mahdi's father and mother's marriage was a pre-arranged one to which Mahdi's mother did not agree, and Mahdi's father was much older at the time of the marriage than Mahdi's mother, who was 16 at the time. (R 1751). The time-line also sets forth the marriage between Mahdi's father and mother was arranged by Mahdi's maternal grandmother, and Mahdi's father was 27 years old, and Mahdi's mother was just 16 at the time of the marriage. (Def.'s Ex. 2/Resp.'s Ex. 5). Mahdi's mother had no choice but to join the marriage, and there was conflict in the marriage from its very beginning. (R 1751). The time-line sets forth that after the arranged marriage, Mahdi's father changed Mahdi's mother's birth name, Vera, to Tilea. (Def.'s Ex. 2/Resp.'s Ex. 5). Mahdi's father was physically abusive to Mahdi's mother, and Mahdi's mother eventually left to escape the abuse. (R 1751). Mahdi's mother was in what she, Mahdi's mother, described, and others described, as an abusive

relationship, with Mahdi's father, and she decided to leave because she could no longer stay with Shareef Mahdi even though it meant leaving her children. (R 1757). As previously stated, on cross-examination of a state's witness, counsel brought out Mahdi's father had assaulted members of his own family. (R 1433). Hammock testified Mahdi's childhood was chaotic. (R 1751). Mahdi's brother and then Mahdi were born into a very unstable family. (R 1751). The 2 children were born within a 24 month period of time. (R 1757). Mahdi's father could not provide for or take care of the family. (R 1751). The family moved several times, ultimately ending up back in Lawrenceville living with Mahdi's grandmother. Once again, Mahdi's father was not able to sustain himself. (R 1751). There was a great deal of conflict between Mahdi's father and Mahdi's mother, and Mahdi and his brother Saleem witnessed this. (R 1751). The time-line showed Mahdi's life until he was committed to an adult prison facility. (Def.'s Ex. 2/ Resp.'s Ex. 5). Hammock testified the exhibit accurately reflected what had occurred in Mahdi's life. The Exhibit sets forth Mahdi and his brother witnessed domestic violence committed by their father against their mother. (Def.'s Ex. 2/Resp.'s Ex. 5). Mahdi's mother eventually left the family trying to get away from the abuse committed by Mahdi's father. (R 1751). Mahdi's mother was forced to leave because of the abuse. (R 1757-58). Mahdi's mother left applicant Mahdi and his brother Saleem when Mahdi was just 4 or 5 years old. (R 1751-52). After Mahdi's mother left him at a young age, the chaos continued. (R 1752). Mahdi's father tried to take care of the children, and the grandmother, Nancy Burwell, also tried to provide assistance during this time, but the relationship between Mahdi's father and the grandmother and the rest of the family members was constantly confrontational. (R 1752). The time-line also sets forth Mahdi and his brother witnessed their father commit domestic violence on their grandmother. (Def.'s Ex. 2/Resp.'s Ex. 5). During this period of time, there were several moves in terms of schooling for Mahdi from Lawrenceville to Richmond and back to Lawrenceville. (R 1752). Hammock also testified to the incident described by family members at PCR where Mahdi's father forced Mahdi's mother to come back to Lawrenceville and assaulted her. (R 1752). After Mahdi's mother left to get away from the abuse, she was literally forced to return from Richmond to Lawrenceville, ostensibly to see the boys, but this ultimately resulted in physical conflict, and Mahdi's mother left again not to see her children for a number of years. (R 1752). The time-line also sets forth this incident. The time-line sets forth Mahdi's mother, Vera (Tilea), was taken to Lawrenceville from Richmond by Shareef, who then abused Mahdi's mother. It sets forth Mahdi's uncle Nathan actually rescued Mahdi's mother, but as a result of this incident Mahdi and his brother witnessed more abuse and violence. (Def.'s Ex. 2/Resp.'s Ex. 5). The time-line also chronicles that after this incident Mahdi's mother moved to Pottsdale without the children (Mahdi or his brother Saleem) in order to escape from Mahdi's father. (Def.'s Ex. 2/Resp.'s Ex. 5). Ultimately, Mahdi's father was unable to take care of Mahdi at all. (R 1753). The time-line also sets forth Mahdi's father suffered from depression. (Def.'s Ex. 2/Resp.'s Ex. 5). Hammock testified that at that point in time, Mahdi is sent to live with his aunt and uncle in Baltimore, and his brother Saleem is sent to live with another aunt in Texas. (R 1753). As a result, Mahdi and his brother are separated, and the two boys are separated from their father. (R 1753). The time-line introduced also sets forth this same information. (Def. Ex. 2/Resp. Ex. 5). Hammock testified she personally interviewed the aunt and uncle Mahdi had to live with because of his

father's inability to care for him (Lawanda and Carson Burwell), and they related Mahdi was a bright and energetic young boy, but very, very troubled, who had difficulty in school. (R 1753). Carson related that when Mahdi came to live with them he could not read. (R 1753). There was conflict at this time in getting Mahdi to deal with the fact that he had these academic limitations. (R 1754). Hammock also testified Mahdi had been hospitalized, psychiatrically, on 1 occasion in Baltimore. (R 1747, 1749, 1756). This admission lasted approximately two (2) months at a mental health facility, and Mahdi was released. (R 1756). The time-line sets forth Mahdi was committed involuntarily to the Walter Carter Center psychiatric facility, after being separated from his brother and father, where he was diagnosed with Major Depression with suicidal ideation, adjustment disorder, R/O Adjustment Disorder, Developmental Reading Disorder, and history of right arm and leg fractures. (Def. Ex. 1/Resp. Ex. 5). [Mahdi suffered broken bones as child while riding a bicycle and falling off of monkey bars. There was no contention at PCR that Mahdi was ever physically or sexually abused by anyone. (PCR Tr. pp. 571-572).] The Exhibit sets forth Mahdi spent sixty (60) days in the psychiatric facility in Baltimore. After Mahdi was released from the facility, he stayed only a short time with his aunt and uncle, Carson and Lawanda, because he was anxious to be reunited with his father and brother. (R 1756). The time-line also sets forth Mahdi's behavior in Carson and Lawanda's home was defiant and became even more defiant when Mahdi learned his brother had already re-united with his father, and, as a result, Mahdi had to be returned to his father. (Def. Ex. 2/Resp. Ex. 5). It also sets forth Mahdi, his brother, and his father were subsequently re-united on the Burwell family property, and this was an isolated place in the country, and they often had no food, heat, or money. (Def. Ex. 2/ Resp. Ex. 5). Hammock also testified Mahdi had difficulty in his adolescence which eventually resulted in his incarceration. (R. 1749). She also testified Mahdi eventually re-united with his mother, however this did not work out. It was not a good reunion. Mahdi and his mother did not get along, and they both had very different ideas about his living with her. (R 1758). The time-line reflects Mahdi re-united with his mother after being released from DJJ after his 1st stint of incarceration. (Def. Ex. 1/Resp. Ex. 5). After this split from his mother, Mahdi and his mother had not spoken to each other since. (R 1758). Hammock also testified to Mahdi's difficulties in school. In her expert opinion Mahdi's education was disrupted many times. (R 1752, 1756). She testified this was reflected in the school records. (R 1752). She also testified the school records noted lateness and absences, but not consistently through the whole record. (R 1756). The time-line of Mahdi's school history introduced showed Mahdi was forced to change elementary schools five (5) times. (Def. Ex. 3). The time line of Mahdi's life also shows Mahdi had to move several times. (Def. Ex. 2/Resp. Ex. 5). Hammock testified Mahdi started out kindergarten at Sister Clara Muhammad School in Richmond. He also completed part of kindergarten at Totoro Elementary School in Lawrenceville. Mahdi then moved back to Richmond and attended Chamberlayne Elementary School for part of that year. Then he is removed from there and sent to Baltimore where he attended Scotts Branch Elementary School for 2 years. Then he was removed from that school while in the Carter Center, and ultimately returns back to Lawrenceville to live with his father. (R 1754-56). Hammock testified even in his pre-teen years there was a lack of stability in terms of Mahdi's attending school, and it was reflected in the kinds of reports he received. (R 1760-61). She

testified Mahdi constantly had difficulty in school. (R 1752). He was considered bright, but he didn't perform well. (R 1752-1753). Mahdi was particularly a poor reader. (R 1753). Mahdi's uncle Carson also reported Mahdi could not read when he came to live with them at eight (8) years old. Both Carson and Lawanda also reported Mahdi had difficulty in school. (R 1753). Carson and Lawanda reported there was constant conflict in getting Mahdi to deal with the fact that he had academic limitations. (R 1754). Hammock testified the school records during this time were consistent with this report. (R 1754). She testified Mahdi had uneven skills in school. (R 1755). Mahdi was in the average math program, but in the below average reading program. (R 1755). While he excelled in science, his reading, vocabulary, and spelling remained below average. (R 1756). He needed improvement in a number of areas, including standards for behavior and showing respect for authority. (R 1755). Mahdi was described as having poor self-esteem throughout his academic time. (R 1753). It was noted several places that he had poor self-esteem and had difficulty in relationships with others. (R 1756). The time line of Mahdi's life also shows when he was involuntarily committed to the Carter Center his initial diagnosis included "Developmental Reading Disorder." (Def. Ex. 2/Resp. Ex. 5). Counsel also introduced another Exhibit through Hammock (See Def. Ex. 3) which summarizes Mahdi's difficulties in school particularly in reading, and writing, which remained at below grade level throughout elementary school. Hammock confirmed this in her testimony. (R 1755). The exhibit also chronicles the numerous absences Mahdi had while in school. (Def. Ex. 3). And, that Mahdi's father removed him from school in the 5th grade to home school him. (Def. Ex. 3). The exhibit also indicates there was no information this home schooling had occurred. (Def. Ex. 3). Hammock testified Mahdi's educational history was one of poor school progress. (R. p. 1762). Hammock informed Judge Newman Mahdi did not receive proper parenting while growing up. (R 1759). Mahdi's father was not equipped to provide consistency, positive reinforcement, support, care giving, to teach social values in the community, and how to develop relationships with others, i.e. those things children need to grow up healthy. (R 1759). Mahdi's father had his own personal issues that prohibited him from being a good father. (R 1759). Mahdi's father and his mother were not really available to Mahdi on any kind of consistent basis. (R 1760). Mahdi was exposed to a lot of conflict and chaos. (R 1760). In his preteen years he was exposed to more chaos, more movement, more change, a lack of stability even in terms of his attending school, and this was reflected in the kinds of reports he received. (R 1760). In his adolescent years Mahdi was exposed to more chaos. (R.1761) He was exposed to his father's outbursts and problems. (R 1761). His father was known to be at odds with people in the community, with his own family, and with law enforcement. (R 1761). Hammock testified Mahdi cares about his father, wanted more than anything else to have an intact family and an ongoing relationship, but that did not happen. (R 1761). Hammock testified Mahdi did not receive from his mother or father consistent help in growing up, developing good skills, and a sense of value. (R 1761). While some people tried, it was not consistent enough for him to learn how to do these types of things. (R 1761). Mahdi had been traumatized throughout his early life, and this had an impact on his inability to make good choices. It also had an effect on his ability to have a good sense of himself and others. And, it had an impact on his ability to behave according to societal norms. (R 1762). Hammock testified that during her investigation

Further, counsel had to be careful regarding presentation of mitigation testimony from Virginia or Mahdi's previous incarcerations because of the danger of opening the door to damaging character evidence of Mahdi's criminal conduct in the community, including two (2) unsolved homicides, and his egregious behavior in the Department of Juvenile Justice and the Virginia Department of Corrections. Wong v. Belmontes, 558 U.S. ___, 130 S.Ct. 383 (2009). If counsel did not present certain evidence Mahdi presented at PCR, there was an objectively reasonable strategic reason for not doing so. Strickland v. Washington; Council v. State. Mahdi presented several family members at the PCR hearing who were previously interviewed by Ms. Tarr, Ms.

of Mahdi's life, she assessed whether certain risk factors were present or not. She testified certain risk factors were present. Mahdi had been abused and neglected. He suffers from abandonment. He was never exposed to the right kind of socialization. And, he has poor self-esteem. He has a poor history of school progress and a poor sense of self. (R 1762). Mahdi is someone who has been neglected, was abandoned, suffers from poor parenting, and as a result is likely to end up in a situation where he is out of control and he does damage to himself and others. Mahdi fits the typical profile of persons who end up in the kind of situation before the sentencing court, because Mahdi never really had a chance to develop appropriately. (R 1762-63). The State did not cross-examine Hammock or challenge her mitigation testimony. R 1763). The State did not challenge the accuracy of the exhibits introduced through her. (R 1739-63). All of this evidence was before the sentencing court uncontested. Further, the State introduced portions of Mahdi's DJJ records during the sentencing proceeding. These records also confirmed much of what Hammock testified to regarding Mahdi's family and upbringing. They indicate Mahdi lacked appropriate parental discipline and support. Mahdi was not supervised as a child and was not given appropriate structure and guidelines.(State's Ex. & See R. 1440, 1442, 1869-70, 1873-74). Mahdi began smoking marijuana at age 12 and had been smoking marijuana every day since he was twelve (12) years old. Mahdi informed DJJ officials he began selling crack cocaine at age fourteen (14). (R 1440). The records indicate Mahdi needed self-esteem training, family services, and values clarification. Mahdi suffered from a lack of a mother. (R 1446). Mahdi's father was not involved in his life, the father had a criminal record for malicious damage to property and escape, Mahdi had no supervision, no curfew, and Mahdi's father did not care about Mahdi's criminal behavior. (R 1869-70, 73-74). Mahdi came from a dis-functional one (1) parent family. The DJJ day notes also indicate that Mahdi's father believed the criminal justice system was prejudiced, and he also voiced his belief that there were many white supremacists in the area. (R 2146). These notes also indicate that a young Mahdi also makes racial comments. (R 2154).

Hammock, and/or counsel prior to the sentencing proceeding, but not called during the sentencing proceeding. At the time of the sentencing proceeding these witnesses were not cooperative with trial counsel and were unwilling to testify at the sentencing proceeding. Further, counsel testified the witnesses related or their investigation uncovered that the witnesses would say bad things about Mahdi.

Carson Burwell related to applicant's defense attorneys in N.C. that Mahdi "was a demon." This fact was established by a document generated by Ms. Tarr after meeting with the N.C. attorneys and shared with defense counsel in this case. (PCR 503-05, Def. Ex. 7). Carson also related to counsel in this case that if he were called to testify he would not have good things to say about Mahdi. (PCR 618-619). Carson indicated Mahdi was manipulative and faked abuse and suicidal gestures. (PCR 572-74, 64). Both Lawanda and Carson admitted Mahdi almost had them arrested by police when he made a false claim of child abuse, and manufactured false evidence of that abuse. (PCR 572-74, 58-61, 63-64, 266-67, 287-88, 290). Lawanda and Carson also related Mahdi acted out while at the Carter Center, the psychiatric facility, and had to be placed in isolation. (PCR 66-67, 292). Carson also related to Haas that Mahdi was manipulative. (PCR 572-74). Carson related Mahdi acted out after being released from the Carter Center and had to be returned to live with his father. (PCR 68-69, 618-19). Lawanda also related Mahdi acted out and had to be returned to live with his father. (PCR 293-94). Both aunt and uncle related Mahdi would only talk about suicide when he did not get his way or did something wrong. (PCR 572-74, 64-66, 288-89, 618-19). Carson was also aware of an incident where Mahdi, his brother, and his father were involved in destroying Carson's sister's car. (PCR 69). Carson and Lawanda also related that when Mahdi lived with his uncle Nathan as an adult, he could not abide by the rules of the house, and was forced to leave that

home. (PCR 70, 278).

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

Counsel was not ineffective in failing to call witnesses from whom negative things could be elicited about Mahdi, or who also indicated they were not going to be helpful to Mahdi. It was an objectively reasonable trial strategy decision for counsel not to call Carson or Lawanda Burwell or Sophie Gee, who could be asked on cross-examination about confirmed instances of bad conduct by applicant and who would have been required to answer truthfully to such questions. Reed v. Florida Department of Corrections, 393 F.3d 1217 (11th Cir. 2010)(attorneys were not ineffective in failing to call family members who would have opened the door to bad things about defendant's past); Rutherford v. Crosby, 385 F.3d 1300 (11th Cir. 2000)(attorneys' strategic decision not to call witnesses on alcoholism of defendant was objectively reasonable where it would have opened the door to prior violent behavior of the defendant that the jury had not heard). See Bell v. Kelly, 260 Fed. App. 599 (4th Cir. 2008)(*Unpublished Opinion*)(finding state court's determination petitioner had failed to prove prejudice was not unreasonable where petitioner alleged counsel was ineffective for failing to investigate and present family members mitigation where family members could have been cross-examined about the defendant's prior bad conduct such as infidelity, abandonment of his

children, wife, and girlfriend, domestic abuse, and failure to provide child support), *citing Barnes v. Thompson*, 58 F.3d 571 (1995)(upholding in a federal habeas district court's determination that counsel was not ineffective in state death penalty case in failing to offer family members who constituted "cross-purpose evidence."); *Moody v. Polk*, 408 F.3d 141, 154 (4th Cir. 2005)(to the extent affidavits presented new information, they were "double edged.").

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

Counsel's testimony concerning reasonableness and strategy on this issue is also supported and corroborated by the evidence and testimony introduced at the PCR hearing. Counsel made an objectively reasonable trial strategy decision not present witnesses who were uncooperative, refusing to testify, or had bad things to say about Mahdi or from whom bad information about Mahdi could have been elicited on cross-examination. *Strickland v. Washington* (objectively reasonable trial strategy decisions are not subject to claims of ineffective assistance of counsel); *Council v. State* (counsel's strategic decisions will be judged on an objective standard of reasonableness); *Wong v.*

Belmontes (it was an objectively reasonable trial strategy decision for counsel not to call witnesses who would expose on cross-examination bad character evidence about the defendant).

Mahdi also presented the testimony of a community activist George Smith, an affidavit of James Woodley, an affidavit of Vernon Pond, and the testimony of Sharon Pond, who testified to Mahdi's father's behavior in the community. Both the activist and Ms. Pond testified to an incident where Mahdi's father jumped into a segregated [all white] swimming pool and would not leave the pool in protest. He was subsequently arrested and began throwing items at the jail. As a result, he was sent for a mental evaluation. The evaluation eventually determined Mahdi's father had no major mental illness. Mr. Woodley averred to Mahdi's father's conversion to Islam, his behavior in the community and his abusive behavior toward his wife and his mother. **(PCR 166-86, & Affidavits of James Woodley and Vernon Pond)**. Counsel was not ineffective in failing to interview these witnesses where similar testimony was presented to the sentencing court by counsel.

Mahdi claims counsel should have called a different social worker than Ms. Hammock, Dr. Nicholas Cooper-Lewter, and related what Cooper-Lewter related to this Court. However, Mahdi discounts that counsel did retain and call a qualified clinical social work expert who interviewed Mahdi, Mahdi's immediately family, and many members of his extended family.

As previously set forth above, Ms. Hammock testified in detail before Judge Newman to the problems in Mahdi's family including his father's difficulties in life, including depression, criminal arrests, inability to keep a job, and inability to get along with the community and even with his own family. **(R 1734-63 & Def. Ex. 2)**. Hammock also testified to Mahdi's life of deprivation, including transience, lack of proper support, abandonment by his mother, witnessing domestic violence committed by his father on his mother and grandmother, lack of a proper male role model, and

psychiatric commitment at the age of 9. (R. 1734-63 & Def. Ex. 2). Hammock also testified to the risk factors Mahdi was exposed to as a child and adolescent and how that affected the rest of his life. (R 1734-63). The DJJ records introduced at sentencing also detailed that Mahdi came from a dysfunctional one parent family, and Mahdi was provided with no structure or guidelines as a child. Cooper-Lewter admitted at PCR that this information was before Judge Newman. (PCR 328-40). Mahdi has failed to show deficient performance in failing to present the information presented by Cooper-Lewter because much of Cooper-Lewter's testimony was also testified to by Ms. Hammock at the sentencing hearing. Simpson v. Moore, 367 S.C. 587, 605-07, 627 S.E.2d 701, 711-12 (2006)(reversing PCR Court's conclusion that capital defendant suffered prejudice from counsel's failure to offer sufficient social history evidence in mitigation case where record showed counsel did in fact do adequate investigation and presented similar mitigation evidence); see 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). Counsel is not required to expert shop. See Poyner v. Murray, 964 F.2d 1404, 1419 (4th Cir. 1992)(petitioner could not establish ineffective assistance because counsel did not "expert shop" until one could be found who would testify favorably).

Additionally, if counsel had called Dr. Cooper-Lewter, on cross-examination the Solicitor would have introduced Mahdi's numerous disciplinary violations within the Virginia DJJ as the State did at the PCR merits hearing which dramatically removed positive impact of his testimony. Cooper-Lewter specifically relied on these records in forming his assessment of Mahdi. There were over forty (40) disciplinary violations by Mahdi in the Virginia DJJ. These included Mahdi assaulting a teacher; assaulting guards on numerous occasions; assaulting other inmates, leading an escape attempt, refusing to follow orders; refusing to be disciplined, cursing staff, and damaging and

destroying property. Cooper-Lewter could also have been questioned about Mahdi's statements to Cooper-Lewter that he never should have been placed in special education in elementary school, because he did not belong there. Cooper-Lewter would also have been cross-examined about Mahdi's numerous disciplinary violations within the Virginia Department of Corrections, including assaulting staff, setting fire to his cell, and possession of contraband. The State would also have cross-examined Cooper-Lewter as he was at PCR regarding Mahdi's faking a suicide attempt at DJJ in order to manipulate the system to gain better conditions of confinement. The State would also have brought out from Cooper-Lewter that Mahdi was diagnosed at DJJ with conduct disorder, which is a pre-cursor to a diagnosis of anti-social personality disorder.

The State at trial would also have cross-examined Cooper Lewter on the fact Mahdi's aunt informed him that Mahdi would threaten to harm himself when he did not get his way. The State would also have brought out that Mahdi informed personnel at the Carter Center that he only wanted to hurt himself when he did not get his way. The State would also have cross-examined Cooper-Lewter on the fact that Mahdi's brother grew up in the same home and did not commit criminal offenses.

Cooper-Lewter would also have been cross-examined regarding Mahdi holding several different jobs during his life and even obtaining college credits. Cooper-Lewter would also have been forced to admit, as he testified at PCR, that Mahdi had never been physically abused or sexually abused by his father, mother, or uncle Carson or aunt Lawanda. (PCR 340-41).

Cooper-Lewter would also have been impeached on the fact that he did not review any records on Mahdi after he was released from the Virginia Department of Corrections. He did not review Dr. Martin's notes; he did not review Dr. McKee's notes, and he did to even review Ms.

Hammock's interview notes. He could not opine what stressors, if any, Mahdi was under or caused him to commit the murder of Christopher Boggs or Captain Myers. Cooper-Lewter admitted that he did not include any details regarding Mahdi's employment history in his report, and he asserted he did not do so because he did not believe it was important in terms of impacting Mahdi's psycho-social history. This testimony is simply not persuasive. Counsel was not deficient in failing to call Cooper-Lewter or in not presenting the information Cooper-Lewter presented.

Mahdi claims counsel should have called Dr. Haney at mitigation to elicit his testimony above and to underscore the impact of Mahdi's confinement on him.¹² There is no merit to this argument. Dr. Haney's testimony is not persuasive nor are his conclusions supported by the evidence in the record. Dr. Haney attempts to place the blame for Mahdi's criminal conduct on untreated psychological issues or directly on the criminal justice system. Judge Newman would not have found this testimony persuasive to a reasonable probability in light of the entire record. Counsel was not deficient in failing to present such evidence.

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

The sentencing court was aware Mahdi had been committed to the Walter Carter Center after being separated from his father and brother. The Court was aware of the diagnosis of Mahdi while

¹²Craig Haney, Ph.D, an expert in social psychology with specific expertise in prison systems and the effects of incarceration on inmates, reviewed Mahdi's school records, psychiatric records, juvenile justice records, and Virginia Department of Corrections.

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

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

Nor is Dr. Haney's testimony that Mahdi is just an impulsive actor and does not victimize others persuasive. The Virginia DJJ records and Mahdi's adult criminal records from Virginia show without question that he is a person who victimizes others and manipulates the system for his own

benefit. Mahdi repeatedly assaulted guards in Virginia. Further, Mahdi's records from the South Carolina Department of Corrections, which Dr. Haney did not review, show that Mahdi has repeatedly assaulted guards and threatened to assault guards here. Additionally, Mahdi's conduct in murdering Christopher Boggs in North Carolina shows his plan was to murder Boggs simply so he could rob the store's cash register. And, trial counsel's testimony, along with that of Dr. Martin and Dr. McKee at PCR, shows that Mahdi plans out criminal behavior when necessary to benefit himself. As a result, Dr. Haney's testimony would not have been persuasive to Judge Newman.

Nor should the Court accept Dr. Haney's testimony that Mahdi's incarceration in DJJ and in adult prison led to his later criminal conduct. Haney misses the point. The elephant in the courtroom is Mahdi's bad character and characteristics that led him to be confined, and which continued and led him to be confined in the institutions in which he was confined. And, Mahdi did not conform his conduct to the requirements of the law so that he would not go back to a harsh prison environment, but committed even more and more violent offenses.

The record shows Mahdi was not confined after his first brush with the law. Mahdi was arrested at fourteen (14) years old after breaking into a car and stealing a purse. Mahdi also escaped from police custody after this arrest. Mahdi admitted to DJJ employees that he had no problem in stealing, and he felt no remorse about it. Mahdi was placed on juvenile probation for this offense. **(PCR 342-43, Mahdi's DJJ Records)**. While on juvenile probation, Mahdi did not adjust his criminal behavior. Mahdi broke into two (2) homes and stole firearms. One gun was a .44 magnum pistol. As a result, Mahdi was confined at the Virginia DJJ. While there, Mahdi led a pre-meditated assault on another inmate, in which he enlisted the support of other juveniles. This inmate was injured and had to be taken for medical treatment. While confined on this first occasion, Mahdi

complained that he should not be confined at all because he did not have a lengthy juvenile record. While confined, Mahdi admitted that one of his strengths was robbing people. During this confinement, Mahdi engaged in other disruptive behavior and committed other disciplinary violations.

After his release from DJJ, Mahdi was confined again after engaging in an eight (8) hour standoff with police. During this stand-off, Mahdi was heard to say "them mother-fuckers' got guns" and "I'm going to kill a police officer before I die." While Mahdi attempts to blame his father for this stand-off, Mahdi could have walked out of his home anytime he wanted to during the standoff. When the stand-off ended, police found Mahdi in the back room of the house watching television. Mahdi was recommitted to DJJ for obstruction of justice and contempt of court.

While incarcerated this 2nd time, Mahdi assaulted other inmates, destroyed property, assaulted staff, threatened staff, and generally refused to follow orders and comply with discipline. Mahdi threatened that if he was not released from DJJ on time (i.e. when he expected to be released), he would "go around acting crazy" and assaulting people. Mahdi also threatened that if he were not released on time, guards would find him hanging in his cell. True to his word, Mahdi fashioned a sheet into a noose and tied it around his neck, causing him to be placed on suicide watch. Later, Mahdi admitted to the staff counselor that this suicide attempt was not genuine, and he only wanted better living conditions, specifically more recreation time, and was attempting to manipulate the system by the suicidal gesture. After this incident, Mahdi incurred other disciplinary violations, including an assault.

Mahdi was eventually released from DJJ. Rather than maintaining good behavior so that he would not have to return to prison, Mahdi slashed his mother's tires either because she would not

come to the door of her residence, or she would not let Mahdi use her car.

Subsequently, Mahdi attempted to break into an apartment. When caught in this last act, he severely stabbed Moises Rivera, a maintenance worker at the apartment complex. Madhi fled the scene and was apprehended by police using dogs. Madhi was sentenced to adult prison for this criminal act.

While in adult prison, Mahdi engaged in the same behavior he had in the Virginia DJJ. Mahdi disobeyed direct orders, was found in possession of contraband, set fire to his cell, and committed other disciplinary violations. As a result of his prison mis-conduct, Mahdi was assigned to a Super-Max facility, Wallens' Ridge State Prison. At Wallens' Ridge, Madhi engaged in similar conduct including assaulting a non-inmate and other disciplinary violations.

After being released from Wallens' Ridge, Mahdi did not conform his behavior in order that he would not be sent back to a harsh prison environment. Mahdi initially lived with his Uncle Nathan and his grandmother Nancy Burwell. Mahdi would not live by the rules of the house as set down by his uncle and was asked to leave. Rather than obeying the law so he would not be sent back to prison, Mahdi engaged in numerous criminal acts while on supervised probation or parole. Mahdi engaged in these acts knowing they could result in the revocation of his supervised probation and his return to prison. While on supervised probation, Mahdi possessed a 9 mm handgun. Mahdi also sold drugs during this time period. Mahdi was involved in the murder of a drug dealer in Virginia. Mahdi told Dr. Martin he was involved in another murder in which the police had yet to discover the body. Mahdi burglarized the home of Amanda Weaver and stole a .380 pistol, which he was not supposed to even possess under the conditions of his supervised probation or parole. Mahdi stole a car and a license plate. Mahdi then left Virginia because homicide detectives were

closing in on him on the Virginia homicide. Under the conditions of his supervised probation, Mahdi was not supposed to leave the State of Virginia. Shortly thereafter, Mahdi murdered Christopher Boggs in N.C. so he could rob the store's cash register. Mahdi then drove to South Carolina and car-jacked a vehicle in Columbia, S.C. Mahdi then attempted to pass a stolen credit card in Calhoun County. Mahdi then burglarized Captain Myers' shed and murdered Captain Myers. Mahdi stole Captain Myers truck and his firearms. Mahdi then drove to Florida. While there, Mahdi impersonated a police officer in Satellite Beach, Florida. Also in Florida, Mahdi fled from police in Captain Myers' police issued truck.

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

Dr. Haney's testimony on the impact of prison on Mahdi is not persuasive to a reasonable probability. Nor would it have been to Judge Newman. Quite the opposite is true. The record shows Mahdi has had an impact on each prison or institution he has been in, not the reverse.

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

was robbing people. As previously stated, Mahdi assaulted inmates while incarcerated in DJJ. Mahdi assaulted an inmate on April 11, 1999 by hitting him in the head with a broom. Mahdi had 12 moderate institutional violations while at Culpepper Juvenile Institution, and Mahdi had 12 major institutional violations at Culpepper Juvenile Institution. Mahdi had anger management training while in DJJ but did not practice what he learned. Mahdi committed several assaults on guards while he was a juvenile. Mahdi punched a guard in the face on September 29, 1999. Mahdi assaulted a staff person on November 18, 1999. Mahdi had an assault on another staff person on December 5, 1999. Mahdi threatened to assault individuals on several occasions while he was a juvenile. The record shows Mahdi was violent even at a young age.

Mahdi's incarceration did not cause him to commit crimes. Mahdi engaged in criminal behavior before ever being incarcerated. Mahdi had no remorse for stealing even as a juvenile. After being released from Wallens' Ridge, Mahdi began to sell drugs and bragged to his grandmother's neighbor about his drug dealing. He also bragged that he was going to kill drug dealers. The evidence produced at PCR shows he did exactly that, becoming involved in the murder of a drug dealer in Virginia.

This Court should have found that counsel was not deficient in failing to investigate, develop, and present the mitigation evidence presented by Dr. Haney. Strickland; Wiggins; Rompilla; Council; Rosemond. The evidence is not persuasive, nor would it have been to Judge Newman, the sentencing court. Dr. Haney's position is refuted by the evidence and Mahdi's record. Furthermore, if counsel had called Dr. Haney as a witness, the State would have been able to highlight Mahdi's lengthy criminal career including his commission of crimes before he was ever incarcerated or confined as a juvenile and his extensive violent behavior in DJJ, in adult prison in Virginia, and in

prison in South Carolina.

Mahdi also claims counsel did not adequately investigate his mentality at the time of the crime. Mahdi asserts counsel should have discovered what Dr. Schwartz-Watts (a psychiatrist) and Dr. Myers (a psychologist) found, that Mahdi was suffering from serious mental illnesses at the time of the murder of Captain Myers.¹³

Dr. Donna Schwartz-Watts, a psychiatry expert, testified that she reviewed two notebooks of records, transcripts of Mahdi's prior court hearings, and records from Dr. McKee. (PCR Tr. 458-60). She met with Mahdi three times. (PCR Tr. 460). Mahdi did not trust her or provide her much information during her interviews with him. (PCR Tr. 478). She obtained more information regarding Mahdi's thought process after he left Wallens Ridge from Dr. Martin's and Dr. McKee's notes. (PCR Tr. 478-80).

Schwartz-Watts diagnosed Mahdi as suffering from major depression, anxiety disorder, paranoid personality disorder, reactive attachment disorder, and antisocial personality disorder. (PCR Tr. 460-61). She noted that the depression was in remission at the post-conviction relief hearing. (PCR Tr. 462). She testified Mahdi's depression went into remission between one of the first times she spoke with him and one of the last times she spoke with him. Schwartz-Watts opined that Mahdi was suffering from these diagnoses when he went on the crime spree that included the murder of Captain Myers. (PCR Tr. 468-71). Schwartz-Watts also disagreed with the Virginia Department of Corrections' diagnosis that Mahdi met the criteria for intermittent explosive disorder.

¹³Dr. Schwartz-Watts evaluated Mahdi beginning approximately one (1) year before the merits hearing in this case. She issued her report approximately three (3) days before the merits hearing. Absent from her report is any discussion of the crimes against Captain Myers, Christopher Boggs, or the drug dealer in Virginia and how Mahdi's alleged mental illnesses could have caused Mahdi to commit any of these crimes.

(PCR Tr. 473). She stated that Mahdi was not an impulsive person by nature. (PCR Tr. 473).

Reactive attachment disorder was a very rare disorder that is not seen in a lot of adults. (PCR Tr. 463). She opined that Mahdi suffered from the inhibited type of attachment disorder, noting that the records indicate Mahdi was typically described as being detached. (PCR Tr. 463). She noted the reactive attachment disorder would have been the result of the numerous disruptions in relationships that he had in his childhood. (PCR Tr. 464). There was little stability in his early life. Mahdi mother left when he was young; his father had some mental illness, and was available to Mahdi only at times; he lived with his aunt and uncle for some time; and he moved six times in that period. (PCR Tr. 464-65).

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

Schwartz-Watts did not ask Mahdi about the murder in North Carolina, but she believed he would have been suffering from major depression at that time. (PCR Tr. 482-83). The last documentation she saw that evidenced Mahdi's depression was the statement from Mr. Crutchfield, Mahdi's co-defendant from Virginia. (PCR Tr. 483-85). She also asserted that other documentation regarding Mahdi's depression dated back to 2001, when Mahdi denied he has been treated for mental illness and denied he had attempted suicide in his evaluation in the Virginia Department of Corrections. (PCR Tr. 486). Schwartz-Watts admitted there was no evidence in any of Mahdi's adult prison records that indicate he either complained or received treatment for depression. (PCR Tr. 487-90).

Schwartz-Watts stated Mahdi may not have been suffering from major depression on the day he shot Captain Myers, but Mahdi would still have been affected by the condition. (PCR Tr. 493-94). She noted the only illness that probably had anything to do with the crime was Mahdi's anxiety disorder. (PCR Tr. 496-97).

deRossett Myers, Ph.D., a clinical psychologist who was qualified as an expert in child and adolescent psychology, evaluated Mahdi for developmental concerns that were evident from his life as a juvenile. (PCR Tr. 419). Myers was struck by the extent of the poverty of Mahdi's family, the number of times Mahdi moved in a short period of time, and the amount of violence in Mahdi's family. (PCR Tr. 420). Myers indicated those were all factors that put Mahdi at risk for mental health problems. (PCR Tr. 421). Myers opined that Mahdi suffered from major depression and severe attachment disorder. (PCR Tr. 421).

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

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

A psychologist during Mahdi's first stint at DJJ recommended that Mahdi be placed into an out-of-home placement, like a group home or residential treatment facility. Myers noted that Shareef Mahdi's home did not comport with the recommendations. (PCR Tr. 447-48). Myers further noted that the observations made in the psychological testing during this second stint at DJJ was consistent with attachment disorder and depression. (PCR Tr. 450-52). He recalled that in the DJJ records, someone had indicated Mahdi would be very difficult to deal with in the future unless he got the treatment he needed. (PCR Tr. 457). Myers noted that same individual indicated an untreated Mahdi would likely end up in adult prison, and Mahdi had aged well beyond his years in terms of some of his criminal behaviors. (PCR Tr. 457).

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

Dr. Schwartz-Watts' retrospective testimony is not persuasive on these issues given the record before this Court. First, Dr. Schwartz-Watts admitted during her testimony that Mahdi's history of depression had nothing to do with the murder of Captain Myers. (PCR 495-496).

Additionally, she testified the only illness that he suffered from that could have had anything to do with the murder of Captain Myers was the generalized anxiety disorder that she diagnosed him as having. (PCR 495-497). She based this determination mainly on the fact that Mahdi told her he was anxious at the time he murdered Captain Myers. However, Schwartz-Watts admitted that Mahdi had broken into Captain Myers' cabin, and it would be expected he would be anxious when he saw Captain Myers entering his cabin and about to discover Mahdi unlawfully inside his shed. (PCR 496-497). This is not significantly mitigating given the circumstances. This is also a tenuous basis to diagnose generalized anxiety disorder and its relation to this crime. Furthermore, while Dr. Martin's notes indicate Mahdi told him he was anxious and paranoid in Virginia, because he was being investigated for a homicide he committed, he was no longer anxious or paranoid after he left Virginia. (Def. Ex. 8). Dr. Martin took a detailed history from Mahdi, which Dr. Schwartz-Watts relied on, and did not diagnose Mahdi with generalized anxiety disorder. Additionally, the record shows Mahdi has been in the South Carolina Department of Corrections for the past six to seven (6-7) years and has not been treated for any anxiety disorder or any mental illness. (PCR 488-491). Mahdi has received no psychotropic medications or attempted suicide since his arrest in 2004. (PCR 488-491). Mahdi did go on a hunger strike prior to trial, but this was due to his objection to being kept as a safe-keeper prior to trial, i.e. his conditions of confinement. (PCR 489-490). Mahdi also denies that he has any mental illness. (PCR 490). Mahdi was also examined by Dr. Michael Cross and Randy Pickens prior to trial for competency to stand trial. Dr. Cross found no evidence of any mental illness. (R 131, 136 & Court's Ex. 2). Dr. McKee also ran tests on Mahdi and took a history from him and did not diagnose him with generalized anxiety disorder.

The record also shows Dr. Schwartz-Watts admitted Mahdi did not provide her with a lot of

information and was not as conversive with her as he was with Dr. Martin and Dr. McKee. (PCR 479). Dr. Schwartz-Watts acknowledged that there are no records from the South Carolina Department of Corrections where Mahdi has been treated for depression or any mental illness since his arrest for Captain Myers' murder. (PCR 488-491). Dr. Schwartz-Watts claimed there was evidence in the DOC records that Mahdi was suffering from depression; however, that claim was not persuasive. She acknowledged that Mahdi's hunger-strike was related to his being kept as a safe-keeper prior to trial, i.e. his conditions of confinement. (PCR 489-490). And, his physical complaint was for just not feeling well, i.e. tired and run down. (PCR 488-489). And, her claim that Mahdi's aggressive and threatening conduct is definitive evidence of depression is not persuasive, because it is also consistent with Mahdi's diagnoses anti-social personality disorder. (PCR 489). Schwartz-Watts admitted that Mahdi has stated over the past six (6) years that there is nothing wrong with him. (PCR 491-492). And, she also admitted he has not been given any medications for any mental illness. (PCR 491). At his guilty plea on the current charge, Mahdi told Judge Newman that he was not suffering from any mental illness. Dr. Cross found no evidence of any mental illness. (R 131, 136 & Court's Ex. 2). Dr. Schwartz-Watts acknowledged that upon Mahdi's entry into the Virginia DOC in 2001, Mahdi was not diagnosed as suffering from depression but intermittent explosive disorder and anti-social personality disorder. (PCR 486-487). She acknowledged that there was nothing in Mahdi's adult prison records from the Virginia DOC, where Mahdi resided from 2001 to 2004, that showed Mahdi was suffering from depression or was being treated for depression. (PCR 487). Schwartz-Watts also admitted there was no documentation by a doctor, psychologist, parole officer or any professional that Mahdi was suffering depression before he left Virginia before committing this current crime. (PCR 487). She further admitted there was no record of Mahdi

being treated for depression or complaining of depression from his arrest in Florida until his return to South Carolina to face these charges. (PCR 487-488). Schwartz-Watts was also acknowledged that Mahdi admitted his suicidal gesture in the Virginia DJJ was manipulative behavior on his part in order to obtain better living conditions and more recreation time. (PCR 490, See also Resp. Ex. 4). If Mahdi was anxious or depressed in Virginia, it was due to his own criminal conduct there and his fear that he would be apprehended.¹⁴ (Def. Ex. 8). Dr. Schwartz-Watts further admitted it did not appear Mahdi was depressed the day of Captain Myers' murder, based on his actions, and he may not have been depressed at all. (PCR 493).

Dr. Schwartz-Watts diagnosis that Mahdi was suffering from depression at the time of the murder of Captain Myers is not persuasive. In addition to the facts cited above, Mahdi's cold, calculated, and intelligent actions over several days from Virginia, to North Carolina, to Columbia, to Calhoun County, and finally to Florida do not indicate Mahdi was depressed. Mahdi burglarized a neighbor's home in Virginia and stole a firearm. Mahdi then stole a license plate from one establishment and a car from another and left Virginia to escape police who were investigating him for a homicide there. Mahdi drove the stolen vehicle to Winston-Salem N. C.. Mahdi entered a convenience store and pretended to be a patron, and when the clerk was distracted checking his identification to buy alcohol, Mahdi drew the stolen pistol and shot the clerk. Mahdi then shot the clerk again to render him helpless. Mahdi then attempted to rob the store's cash register. Mahdi

¹⁴Dr. Schwartz-Watts relied in large part in her diagnosis of depression at the time of the crime on the statements Mahdi made to a co-defendant in the Virginia homicide. The co-defendant stated Mahdi stated "he didn't have shit to live for," and Mahdi had a belief in a fore-shortened future. Again, if these statements of this witness are even credible, they are due to Mahdi's involvement in a robbery and a murder in Virginia and his belief that he was about to be arrested for his criminal activities while on supervised probation. This is not significantly mitigating. And, Judge Newman would not have found this mitigating either.

then drove to Columbia, S.C. in the vehicle stolen from Virginia. While here, he pretended to be a homeless person and stayed at the Oliver Gospel Mission. Mahdi then pretended to be a homosexual person so he could car-jack a vehicle and did so. Mahdi then switched the license plate on the car-jacked vehicle with the license plate he stole from Virginia. Mahdi then drove to Calhoun County. Mahdi then attempted to pass a stolen credit card, but the card had been cancelled. Mahdi then fled when he realized police were going to apprehend him. Mahdi then burglarized Captain Myers' shed and while there altered a shotgun into a sawed off shogun. Mahdi then murdered Captain Myers and attempted to burn his body to destroy evidence of the crime. Mahdi then stole Captain Myers' truck, but switched license plates on the vehicle before fleeing to Florida. Mahdi then drove all the way to Jacksonville, Florida where he sold both the murder weapon he used in N.C. and the murder weapon he used in S.C.. However, Mahdi retained the assault rifle and sawed-off shotgun he had stolen from Captain Myers' shed. Mahdi then impersonated a police officer when approached by a citizen in Florida. Mahdi then attempted to flee from police in Satellite Beach, Florida, and was arrested only after the use of a police dog.

Furthermore, Doctors Martin and McKee, based in part on their interviews with Mahdi, found that Mahdi was not suffering from any mental illness at the time of Captain Myers' murder. They diagnosed Mahdi as having anti-social personality disorder. Their testimony is persuasive given this record. While Mahdi may have suffered some recurrent depression in his childhood and adolescence, Mahdi was not depressed at the time of Captain Myers' murder.

Additionally, counsel was not ineffective in failing to retain Dr. deRossett Myers, a clinical psychologist, or elicit the testimony he provided. Dr. Myers testified to many things that were not favorable to Mahdi and would not have helped his case in mitigation before Judge Newman.

Specifically, Myers testified that the Carter Center records reflected either a *diagnosis* of oppositional defiant disorder or a *rule out* oppositional defiant disorder, which Meyers admitted was a precursor to antisocial personality disorder. (PCR 442-43). Myers also noted that Mahdi had a history of being oppositional and a history of behaviorally acting out with aggression. (PCR 443). While Myers testified his interpretation of the Carter Center records was that the doctors attributed Mahdi's oppositional behavior to his depression, Myers admitted that a diagnosis of conduct disorder/oppositional defiant disorder is based exclusively on observation of overt behavior. (PCR 443). Myers also related that when Mahdi returned to school in Lawrenceville he was tested because he was not doing well in school *and* his behavior wasn't particularly good at school. Myers also admitted that after Mahdi was committed to the Virginia DJJ Mahdi was described as being an angry, alienated, tough youth. (PCR 447). Myers also testified that at that time Mahdi had already been involved in an altercation in a cottage that he was housed in. (PCR 447). Myers testified the psychologist noted Mahdi had a lot of negative attitudes towards authority; Mahdi did not like rules; Mahdi did not like limits; he was poorly socialized; and, Mahdi was not sensitive to the rights and privileges of other people. (PCR 447). Myers related that the psychologist termed Mahdi's problem a conduct disorder. (PCR 447). Myers also related Mahdi only stayed out of DJJ about 2 weeks before he was involved in a stand-off with police, and he was recommitted to DJJ where he was diagnosed with conduct disorder. (PCR 449-50). Myers also noted that Mahdi was noted to be disruptive at DJJ and also engaged in oppositional defiance. (PCR 451). Myers also testified that Mahdi's diagnosis of anti-social personality disorder in the adult department of corrections was justified at the time based on the record as he knew it. (PCR 456). Myers also admitted it was noted in Mahdi's DJJ records that Mahdi had aged well beyond his years in terms of his criminal

behaviors. (PCR 457). Myers also agreed Mahdi's I.Q. of 118 was an accurate level of his intelligence. (PCR 457).

More importantly, it is not what Dr. Schwartz-Watts or Myers allegedly found six (6) to seven (7) years after the murder that is critical to the issue before this Court. Reed v. Florida Dept. of Corrections, 593 F.3d 1219 (11th Cir. 2010)(fact that expert retained at trial and expert retained later at PCR differed, does not prove trial counsel was ineffective); Davis v. Singletary, 19 F.3d 1471, 1475 (11th Cir. 1997)("the mere fact that a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial."). None of Mahdi's appointed attorneys, Mr. Grant, Mr. Walters, or Mr. Koger are psychiatrists or psychologists. They retained experts to investigate this area of mitigation on Mahdi's behalf and relied on what their experts told them. Counsel had a right to rely on what their experts told them. See Poyner v. Murray, 964 F.2d 1404, 1419 (4th Cir. 1992)(Petitioner cannot establish ineffective assistance because counsel did not expert shop until one could be found who would testify favorably). Counsel retained Dr. Thomas Martin, *a forensic psychiatrist*, who has testified in several capital cases, to evaluate Mahdi and determine if he suffered from any mental illness that would serve as mitigation. Dr. Martin found that Mahdi had some history of recurrent depression, but there was no evidence that he suffered from a mental illness at the time of the commission of the crimes against Captain Myers. The only thing Dr. Martin found with regard to Mahdi was that Mahdi suffers from a personality disorder, anti-social personality disorder. That diagnosis *is* fully supported by the record. When Mahdi was admitted to the Virginia DOC, he was diagnosed with intermittent explosive disorder and anti-social personality disorder. Dr. Martin testified at PCR Mahdi had no difficulty in talking about killing

people if necessary in order to achieve independence, and he appeared to have no remorse regarding any of his past violent acts. Dr. Martin related to trial counsel on several occasions what his findings were and that they would not be helpful to Mahdi. Additionally, in conducting his evaluation, Dr. Martin took a history from Mahdi. Dr. Martin discussed with Mahdi the circumstances of the crimes against Captain Myers and why Mahdi left Virginia in the first place. Mahdi related to Dr. Martin that he left Virginia because he was involved in the homicide of a drug dealer, and homicide detectives in Virginia were closing in on him. Mahdi also related to Dr. Martin that he was involved in another homicide in which the police had yet to find the body. Mahdi also related to Dr. Martin that he shot Captain Myers in the chest and head, and after Captain Myers was on the floor of his cabin, he shot him several more times in the head to make sure he was dead. (PCR 508-523).

Counsel also retained a *forensic psychologist*, Dr. Geoffrey McKee, to evaluate Mahdi with regard to mental health mitigation. Dr. McKee took a detailed history from Mahdi, conducted tests on Mahdi, and reviewed records including Mahdi's psychiatric records from when he was 9 years old. McKee found that Mahdi was very intelligent and that he suffered from no major mental illness at the time of the crime. McKee found, independent of Dr. Martin, that Mahdi had anti-social personality disorder. McKee found nothing else. Mahdi also related to Dr. McKee that he left Virginia because he was involved in the homicide of a drug dealer and police were closing in on him for that murder.¹⁵ (PCR 545-561). Dr. McKee also related his findings to trial counsel. (PCR 689-690, 626-27).

Counsel testified they made a strategic decision not call either psychiatric or psychological

¹⁵Mahdi also related to attorneys Grant, Walters and Koger his involvement in the murder of the drug dealer in Virginia and that this was why he left Virginia immediately prior to the Boggs' and Myers' murders. (PCR Tr. pp. 592-93).

expert in the sentencing hearing before Judge Newman, because their testimony would not be helpful and damaging information would have come out if these 2 witnesses were subject to cross-examination. (PCR 689-90, 626-27). This was an objectively reasonable trial strategy decision by counsel under the circumstances, and is not subject to a claim of ineffective assistance of counsel. Strickland; Wong; Council.¹⁶ Had either of these experts been called to testify at trial, they would have been cross-examined by the Solicitor on the fact that they took a history from Mahdi and what Mahdi related about why he stole a car and left Virginia and about the murder of Captain Myers. Each expert's testimony would not have been helpful but would have been devastating to Mahdi's mitigation case because it would have revealed other homicides Mahdi had committed in addition to the Boggs' and Myers' murders and that Mahdi shot Myers again after he was helpless on the floor. Wong v. Belmontes, *supra* (calling mitigation witness would have exposed defendant to admission of evidence of other homicide not previously before the sentencing authority).

Additionally, the experts would had to have related that they found Mahdi was suffering from no major mental illness and had anti-social personality disorder, which is not a mental illness but a personality disorder. This would not have been helpful to the defense mitigation case. Byrum v. Ozmint, 339 F.3d 203, 210 (4th Cir. 2003)(counsel were not ineffective in failing to present testimony by a psychiatrist and psychologist because the suggestions of antisocial behavior which

¹⁶The fact that Mahdi had committed another homicide would clearly have been admissible in the sentencing phase before Judge Newman. See State v. George, 476 S.E.2d 903, 913(admission of testimony defendant had attempted to commit similar crime in past was proper as evidence of individual characteristics of defendant and pre-disposition to commit similar crimes); State v. Owens, 552 S.E.2d 745 (2001)(defendant's confession to another murder during 24 hour waiting period was admissible in the penalty phase because it went to defendant's character); State v. Ray, 498 S.E.2d 640, 641-42 (photographs of prior victim in ABIK admissible in penalty phase); State v. Green, 392 S.E.2d 157, 162-63 (1990)(prior crimes of defendant admissible in penalty phase); State v. Howard,

the experts found could have been harmful to the defense); Satcher v. Pruett, 126 F.3d 561 572 (4th Cir. 1997)(finding that trial counsel was not ineffective for not presenting testimony by a psychologist and psychiatrist who examined the defendant for the purpose of developing mitigating evidence where the psychologist and the psychiatrist found no psychiatric or neurological disorders, but also finding that the defendant had an antisocial personality disorder that might make him a “future danger”); Reed v. Florida Dept. of Corrections, 593 F.3d 1217 (11th Cir. 2010)(counsel made objectively reasonable trial strategy decision not to offer anti-social personality disorder diagnosis); Cummings, 588 F.3d 1368 (11th Cir. 2009)(stating that a diagnosis of antisocial personality disorder “is not mitigating but damaging”)(collecting cases); *see also* Looney v. State, 941 So.2d 1017, 1028-29 (Fla. 2006)(observing that “[t]his Court has noted that a diagnosis as a psychopath is a mental health factor viewed negatively by jurors and is not really considered mitigation”) *citing* Dufour v. State, 905 So.2d 42, 57-58 (Fla. 2005)); Freeman v. State, 858 So.2d 319, 327 (Fla. 2003); Parker, 331 F.3d at 788; Clisby v. State of Ala., 26 F.3d 1054, 1056 & n.2 (11th Cir. 1994); Weeks v. Jones, 26 F.3d 1030, 1035, n. 4 (11th Cir. 1994)(stating antisocial personality disorder is “not ...mitigating as a matter of law”). *See* Truesdale v. Moore, 142 F.3d 749, 755 (4th Cir. 1998)(mental health evidence is a “double edged sword that might as easily condemn a defendant to death as excuse his actions.”). *See also* Cullen v. Pinholster, ___ U.S. ___, 131 S.Ct. 1388 (2011)(it was a reasonable penalty phase strategy to pursue evoking sympathy for mother where psychiatrist found defendant had no signs or symptoms of mental disorder other than his “psychopathic personality traits”). Fulks v. United States, *Slip Copy*, 2010 WL 3069390 (D.S.C. 2010)¹⁷(trial attorneys were not ineffective

¹⁷In Fulks, United States District Judge Joseph Anderson cited several articles written by attorney John Blume discussing that antisocial personality disorder is a diagnosis to be avoided. *See* John H. Blume & David Voisin, *Avoiding or Challenging a Diagnosis of Antisocial*

in avoiding testimony defendant met criteria of antisocial personality disorder); St. Pierre v. Walls, 297 F.3d 617, 633 (7th Cir. 2002)(facts that show a defendant has a condition or proclivity toward violence are often aggravating, not redeeming or mitigating factors).¹⁸

Once Mahdi's psychiatric and psychological experts returned to counsel with their opinion regarding Mahdi, counsel was under no constitutional obligation to expert shop and find another psychiatrist or psychologist who might find something more palatable to a sentencing court. Poyner v. Murray, 964 F.2d 1404, 1419 (4th Cir. 1992)(petitioner could not establish ineffective assistance because counsel did not "expert shop" until one could be found who would testify favorably). Counsel was under no duty to search out and find Drs. Schwartz-Watts or Myers. See Harrington v. Richter, 562 U.S. ____ (2011)(slip op. at 17)("Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies."). Mahdi has failed to show deficient performance on the part of trial counsel. Strickland; Wong.

Further, even if counsel had retained and called Dr. Schwartz-Watts or Dr. Myers at sentencing, the devastating evidence of Mahdi's involvement in the Virginia homicide would have been elicited at trial, as it was at PCR. Dr. Schwartz-Watts' report lists Dr. Martin's and Dr.

Personality Disorder, 24 Champion 69 (Apr. 2000)(antisocial personality disorder diagnosis "can be the kiss of death, because to many people, and most judges, this means that the defendant is little more than a remorseless sociopath."). Fulks, at p. 18, n. 21.

¹⁸This Court recognizes that a diagnosis of anti-social personality disorder would entitle a defendant to a jury charge on certain statutory mitigating circumstances. See State v. Caldwell, 308 S.C. 494, 388 S.E.2d 816 (1990). However, as the above cited authority shows, that does not mean counsel is deficient for failing to offer testimony that their client suffers from anti-social personality disorder. And, there was no real contention at PCR that counsel was deficient in failing to call Doctors Martin or McKee in this regard.

McKee's records as part of the materials she relied upon in conducting her evaluation of Mahdi. She acknowledged at PCR she relied, in part, and reviewed Dr. Martin's and Dr. McKee's files in rendering her opinion. She acknowledged Mahdi told Dr. Martin and Dr. McKee that the reason he left Virginia was because the police were closing in on him for a homicide he was involved with there. (PCR 481). This would have been devastating to any mitigation case trial counsel was trying to present. Wong v. Belmontes.

Finally, Dr. Schwartz-Watts and Dr. Myers also diagnosed applicant Mahdi with antisocial personality disorder. As previously discussed, this testimony would not have been helpful to the mitigation case. Byrum v. Ozmint, 339 F.3d 203, 210 (4th Cir. 2003)(counsel were not ineffective in failing to present testimony by a psychiatrist and psychologist because the suggestions of antisocial behavior which the experts found could have been harmful to the defense); Satcher v. Pruett, 126 F.3d 561 572 (4th Cir. 1997)(finding that trial counsel was not ineffective for not presenting testimony by a psychologist and psychiatrist who examined the defendant for the purpose of developing mitigating evidence where the psychologist and the psychiatrist found no psychiatric or neurological disorders, but also finding that the defendant had an antisocial personality disorder that might make him a "future danger"); Reed v. Florida Dept. of Corrections, 593 F.3d 1217 (11th Cir. 2010)(anti-social personality disorder was not good mitigation evidence, counsel made objectively reasonable trial strategy decision not to offer the same); Cummings, 588 F.3d 1368 (11th Cir. 2009)(stating that a diagnosis of antisocial personality disorder "is not mitigating but damaging")(collecting cases); *see also* Looney v. State, 941 So.2d 1017, 1028-29 (Fla. 2006)(observing that "[t]his Court has noted that a diagnosis as a psychopath is a mental health factor viewed negatively by jurors and is not really considered mitigation") *citing* Dufour v. State,

905 So.2d 42, 57-58 (Fla. 2005)); Freeman v. State, 858 So.2d 319, 327 (Fla. 2003); Parker, 331 F.3d at 788; Clisby v. State of Ala., 26 F.3d 1054, 1056 & n.2 (11th Cir. 1994); Weeks v. Jones, 26 F.3d 1030, 1035, n. 4 (11th Cir. 1994)(stating antisocial personality disorder is “not ...mitigating as a matter of law”). See Truesdale v. Moore, 142 F.3d 749, 755 (4th Cir. 1998)(mental health evidence is a “double edged sword that might as easily condemn a defendant to death as excuse his actions.”). See also Cullen v. Pinholster, ___ U.S. ___, 131 S.Ct. 1388 (2011)(it was a reasonable penalty phase strategy to pursue evoking sympathy for mother where psychiatrist found defendant had no signs or symptoms of mental disorder other than his “psychopathic personality traits”); Fulks v. United States, Slip Copy, 2010 WL 3069390 (D.S.C. 2010) (trial attorneys were not ineffective in avoiding testimony defendant met criteria of antisocial personality disorder); St. Pierre v. Walls, 297 F.3d 617, 633 (7th Cir. 2002)(facts that show a defendant has a condition or proclivity toward violence are often aggravating, not redeeming or mitigating factors).¹⁹

Furthermore, Mahdi has failed to prove counsel was deficient in failing to have Dr. Martin or Dr. McKee diagnose Mahdi with depression, generalized anxiety disorder, or paranoid personality disorder.²⁰ While Mahdi called 2 new experts that said Mahdi suffered from depression, one in his

¹⁹Again, testimony of an expert that a defendant suffers from anti-social personality disorder would entitle a defendant to a charge on certain statutory mitigating circumstances. Caldwell. However, as the above authority shows, this does not mean counsel is deficient in failing to offer such testimony. This testimony would have been harmful to the defense mitigation case had this testimony been presented before Judge Newman and counsel made an objectively reasonable trial strategy decision not to offer this evidence from their retained psychiatrist and psychologist. .

²⁰Dr. Martin did diagnose Mahdi as having some recurrent depression during his life but not at the time of the offense. Counsel did not call Dr. Martin because of the other negative things he would had to have related to Judge Newman, including his diagnosis of anti-social personality disorder and things Mahdi had told him.

childhood, and the other in his childhood and as an adult, and Dr. Schwartz-Watts testified Mahdi had paranoid personality disorder and generalized anxiety disorder, this was not sufficient to prove counsel was deficient in this regard. Reed v. Florida Dept. of Corrections, 593 F.3d 1219 (11th Cir. 2010)(fact that expert retained at trial and expert retained later at PCR differed, does not prove trial counsel was ineffective); Davis v. Singletary, 19 F.3d 1471, 1475 (11th Cir. 1997)(“the mere fact that a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial.”). It was incumbent upon Mahdi to show that had counsel provided additional documents or information to their experts they would have come up with a different diagnosis. Von Dohlen v. State, 360 S.C. 598, 606-07, 602 S.E.2d 738, 742-43 (2004), *cert. denied*, 544 U.S. 943, 125 S.Ct. 1645 (2005)(concluding case was sufficiently analogous to Wiggins and holding counsel in capital murder case was ineffective in failing to adequately prepare and present evidence in the penalty phase that defendant suffered from severe, chronic depression at the time of the murder given trial counsel failed to provide their expert witness with crucial medical records and related information which prevented that witness from conveying an accurate diagnosis of defendant’s mental condition to the jury). Specifically, at PCR, Mahdi did not call Dr. Martin or McKee and prove that had they been provided with certain additional records or information, their diagnosis would have been different, i.e. depression, paranoid personality disorder, and/or generalized anxiety disorder. Von Dohlen, supra. In fact, the State called Dr. Martin and Dr. McKee at the PCR hearing, and Mahdi did not establish through either expert that if they had been shown certain additional records or information that their diagnosis would have been any of the above. Id. As a result, Mahdi has failed to meet his burden of proof to show ineffective assistance in this regard. Id. In fact, Dr. Martin

testified that based on the records he saw and what he had heard at the PCR hearing, his diagnosis would not have been any different. McKee also testified that he did not need any further records to make the diagnosis he made. As a result, Mahdi has failed to meet his burden in this regard. Von Dohlen v. State; Reed v. Florida Dept. of Corrections, (fact that expert retained at trial and expert retained later at PCR differed, does not prove trial counsel was ineffective); Davis v. Singletary (“the mere fact that a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial.”).

Furthermore, Mahdi has failed to prove counsel deficient in failing to have Dr. Martin or Dr. McKee diagnose Mahdi with reactive attachment disorder. Mahdi called 2 new experts, Dr. Schwartz-Watts and Dr. Myers who testified Mahdi either had reactive attachment disorder or the evidence indicated Mahdi had reactive attachment disorder. This diagnosis is questionable. The DSM IV TR provides that onset of reactive attachment disorder must be before age (5). There is no evidence in this case that there was onset of reactive attachment disorder before the age of (5). DSM-IV-TR, 4th edition, pp. 127-130. More importantly, Mahdi did not prove *counsel* did not provide *their experts* with records or information that would have led *them* to diagnose Mahdi as having reactive attachment disorder. Von Dohlen v. State, 360 S.C. 598, 606-07, 602 S.E.2d 738, 742-43 (2004), *cert. denied*, 544 U.S. 943, 125 S.Ct. 1645 (2005). Specifically, Mahdi did not call Dr. Martin or McKee and prove that had they been provided with certain additional records or information, their diagnosis would have been different, i.e. reactive attachment disorder. Id. In fact, the State called Dr. Martin and Dr. McKee at the PCR hearing, and Mahdi did not establish through either expert that if they had been shown certain additional records or information that their

diagnosis would have reactive attachment disorder. Id. As a result, Mahdi has failed to meet his burden of proof to show ineffective assistance in this regard. Id. In fact, Dr. Martin testified that based on the records he saw and what he had heard at the PCR hearing, his diagnosis would not have been any different. McKee also testified that he did not need any further records to make the diagnosis he made. Mahdi has failed to meet his burden in this regard. Von Dohlen v. State; Reed v. Florida Dept. of Corrections, 593 F.3d 1219 (11th Cir. 2010)(fact that expert retained at trial and expert retained later at PCR differed, does not prove trial counsel was ineffective); Davis v. Singletary, 19 F.3d 1471, 1475 (11th Cir. 1997)(“the mere fact that a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial.”). As a result of the above, counsel was not deficient in failing to investigate, develop, and present mental health mitigation evidence.

The DJJ Records

Mahdi also claims counsel should have introduced Mahdi’s records from the Virginia DJJ. Mahdi argues these records should have been introduced because they contained some mitigating evidence, that he was noted to be suffering from depression while in DJJ. Mahdi introduced these DJJ records at the PCR hearing, and the State did as well. Counsel was not deficient in failing to introduce these records.

At Mahdi’s sentencing hearing, the State introduced a minimal amount of Mahdi’s DJJ records. (ROA, Vol. IV. and V.). The records introduced at sentencing document just a few of Mahdi’s disciplinary violations; however they do not document the extensive and aggravated nature of Mahdi’s disciplinary violations while in the Virginia DJJ.

The record shows counsel obtained Mahdi’s DJJ records through the efforts of its mitigation

investigator. (PCR 585). Mahdi had over forty (40) disciplinary violations within the Virginia DJJ. (PCR 684). These included assaults on guards, teachers, and inmates. Mahdi was involved in destroying property on several occasions. Mahdi was involved in one escape attempt by assaulting a female guard, taking her radio away from her, and demanding keys from another guard. The records also show that Mahdi threatened that if he was not released from DJJ when he thought he should be released, he would go around "acting crazy." These records also show that Mahdi later admitted faking a suicidal gesture in an attempt to manipulate the DJJ prison system into gaining more recreation time. The records would also have shown that Mahdi did not think he should have been incarcerated for any of his offenses, and threatened to assault other inmates or guards or harm himself if he was not released from DJJ. when he thought he should be released. The records would also have shown that Mahdi received various treatment programs provided to inmates by the Virginia DJJ, but he did not practice what he had learned such as anger management. In fact, Mahdi was kicked out of the anger management program for disruptive behavior. In fact, on January 14, 1998, it was reported that Mahdi described his own criminal behavior "in a very calculated, almost professional way that is alarming." The report also indicated that Mahdi "is behaving and developing like a teenager much older" than he was. There were numerous bad things about Mahdi that would have been revealed to the sentencing court if these records would have been introduced. If counsel had introduced only select portions of these records, then the State would have introduced all of Mahdi's DJJ records, which included his numerous disciplinary violations and his admission to faking a suicide gesture to manipulate the prison system.

Mahdi also admitted to DJJ officials he had difficulties in school adjustment. He admitted he had been frequently suspended, he had a history of verbal aggression, he had a history of physical

aggression, he had conflicts with educational authorities, and he had difficulties getting along with classmates. (DJJ record M00416). He also admitted he had injured someone in a fight, and he had hit or attacked someone who was not in his family. (DJJ record M00495). One DJJ official indicated Mahdi was very dangerous if he did not get his way. (DJJ record M00511). Counsel was not deficient in failing to introduce Mahdi's DJJ records. Wong v. Belmontes. Counsel's not introducing Mahdi's DJJ records was an objectively reasonable trial strategy decision.

This evidence would have further advanced the State's argument Mahdi has a bad character and further advanced proof of his future dangerousness. See State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999)(evidence of defendant's behavior in prison is admissible in capital sentencing because it bears on his character and future dangerousness); State v. Whipple, 324 S.C. 43, 476 S.E.2d 683 (1996). It would also have further undercut applicant's prison adaptability expert's testimony at trial. See Hughes, supra.; State v. Woomer, 278 S.C. 468, 299 S.E.2d 317 (1982)(prior escape by defendant refuted evidence by defendant of his good conduct while in prison).

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

Both Dr. Martin and Dr. McKee had reviewed Mahdi's psychiatric records of his commitment to the Walter Carter Center. Both knew Mahdi had been diagnosed with major depression as a child. Dr. Martin testified he also interviewed Mahdi, and based on his interviews with Mahdi and his participation in the mitigation team meetings where the other experts shared their background information on Mahdi, he determined Mahdi had a history of recurrent depression in his

life.²¹ However, even with this determination, Dr. Martin testified he found that Mahdi was not suffering from any mental illness at the time the crime was committed. Therefore, even with this information from DJJ, Dr. Martin's diagnosis would not change because he was already aware Mahdi had a history of recurrent depression during his life. Additionally, as previously set forth above, the claim that Mahdi was suffering from depression at the time of Captain Myers' murder is not persuasive. The evidence introduced at trial and the PCR does not support a conclusion Mahdi was depressed or was suffering from depression at the time he murdered Captain Myers. Additionally, even if counsel had provided these documents to their psychiatric experts, they could not call either Dr. Martin or McKee in the sentencing phase because of things Mahdi told both doctors that would have come out on cross-examination *and* their diagnosis of anti-social personality disorder. Wong v. Belmontes.

Counsel did not or could not call Dr. Martin to testify to Mahdi's history of recurrent depression for several reasons: (1) Dr. Martin did not find Mahdi was suffering from depression at the time of the crime; (2) Dr. Martin diagnosed Mahdi with anti-social personality disorder, and (3) Mahdi told Dr. Martin he had committed two (2) homicides in Virginia, and he fled from Virginia to get away from homicide detectives who were closing in on him for one of the two homicides. Again, this was an objectively reasonable trial strategy decision under the circumstances, and providing the DJJ records to Dr. Martin would not have changed these negative factors that led to this strategic decision. Mahdi has failed to show deficient performance in this regard.

Additionally, Dr. McKee also diagnosed Mahdi with anti-social personality disorder. And, Mahdi also informed McKee that he left Virginia to escape from homicide detectives who were

²¹Ms. Tarr testified at the PCR hearing that she received the DJJ records.

closing in on him. Counsel did not and could not call Dr. McKee to testify for these two reasons, which were objectively reasonable trial strategy decisions under the circumstances. Providing the DJJ records to Dr. McKee would not have changed these negative factors that led to this strategic decision. Mahdi has failed to show deficient performance here.

Finally, Mahdi failed to meet his burden of proof with regard to this specific allegation. Both Dr. Martin and Dr. McKee testified at the PCR hearing. Mahdi did not show either Dr. Martin or Dr. McKee the DJJ records and ask them if these records would have changed their opinion in this case.²² Von Dohlen v. State. As a result, Mahdi has failed to meet his burden of proof to show counsel was deficient in this regard. Id.

The School Records and School Witnesses

Mahdi also alleges counsel was ineffective for failing to introduce Mahdi's school records and in not calling elementary school officials. At PCR, Mahdi introduced school records and called several school officials and provided the affidavit of another school official. These individuals either taught Mahdi or were involved in the decision to place him in special education. There is no merit to this ground.

Trial counsel retained a qualified mitigation investigator, Paige Tarr Haas, to investigate and develop mitigation in this case. Ms. Haas had previously been a mitigation investigator in thirty (30) to forty (40) capital cases. Haas testified as part of her investigation she requested school records of Mahdi. (PCR 565). Although she no longer had her file in this case, she testified it was her common practice to request records from any school that Mahdi or his family informed her he had

²²In fact, Dr. Martin testified that based on what he saw and heard discussed at the PCR hearing, his opinion regarding Mahdi's mental state had not changed. And, Dr. McKee testified he did not need to see any additional records to make his diagnosis in this case.

attended. (PCR 565). She also testified that she went to the schools Mahdi attended. (PCR 585). She also testified that she spoke with teachers in Lawrenceville who were familiar with Mahdi; however, these teachers had not spent a lot of time with Mahdi (PCR 586). She also testified she spoke with individuals from a school Mahdi attended in Baltimore. (PCR 586). Ms. Haas testified that she routinely provides summaries of school records in capital cases. (PCR 587). She also testified that if she had done a summary of school records in this case, she would have included all pertinent information that she thought was helpful to Mr. Madhi. (PCR 586-87). The record shows a summary of the school records was done in this case and introduced at the sentencing hearing before Judge Newman. Counsel testified that they relied on Hass and also Ms. Hammock to get all of the information with regards to Mahdi's school and education. (PCR 629-30). Counsel also testified there were team meetings where the mitigation investigators shared with them and their experts what they had found in their investigation. (PCR 631, 700). Counsel testified he was aware Mahdi was in special education. (PCR 629). Doctors Martin and McKee also testified they were aware Mahdi was in special education. Counsel also testified they would have forwarded any records they received to their experts.

At Mahdi's sentencing proceeding before Judge Newman, Ms. Hammock testified to Mahdi's difficulties in school. Hammock testified that in her expert opinion Mahdi's education was disrupted many times. (R 1752, 1756). Hammock testified this was reflected in the school records. (R 1752). Hammock also testified the school records noted lateness and absences, but that was not consistent in the whole school record. (R 1756). The time-line of Mahdi's school history introduced before Judge Newman shows Mahdi was forced to change elementary schools five (5) times. (Def. Ex. 3). The time line of Mahdi's life introduced also shows Mahdi had to move several times. (Def.

Ex. 2/Resp. Ex. 5). Hammock testified Mahdi started out kindergarten at Sister Clara Muhammad School in Richmond. He completed part of kindergarten at Totaro Elementary School in Lawrenceville. He then moved back to Richmond and attended Chamberlayne Elementary School for part of that year. Then he was removed from there and sent to Baltimore where he attended Scotts Branch Elementary School for 2 years. Then he was removed from that school while in the Carter Center, and ultimately returned back to Lawrenceville to live with his father. **(R 1754-56).** Hammock also testified that even in his pre-teen years there was a lack of stability in terms of Mahdi's attending school, and it was reflected in the kinds of reports he received. **(R 1760-61).**

Hammock testified Mahdi constantly had difficulty in school. **(R 1752).** He was considered bright, but he didn't perform well. **(R 1752- 53).** Hammock testified Mahdi was particularly a poor reader. **(R 1753).** Hammock also related Mahdi's uncle Carson also reported Mahdi could not read when he came to live with them at 8 years old. She also informed Judge Newman that both Carson and Lawanda reported to her Mahdi had difficulty in school. **(R 1753).** She testified Carson and Lawanda reported there was constant conflict in getting Mahdi to deal with the fact that he had academic limitations. **(R 1754).** She testified the school records during this time were consistent with this report. **(R 1754).** Hammock testified Mahdi had uneven skills in school. **(R 1755).** Mahdi was in the average math program, but in the below average reading program. **(R 1755).** While he excelled in science, his reading, vocabulary, and spelling remained below average. **(R 1756).** He needed improvement in a number of areas, including standards for behavior and showing respect for authority. **(R 1755).** Mahdi was described as having poor self-esteem throughout his academic time. **(R 1753).** It was noted in records that he had poor self-esteem and had difficulty in relationships with others. **(R 1756).** The time line of Mahdi's life shows when he was

involuntarily committed to the Carter Center his initial diagnosis included "Developmental Reading Disorder." (Def. Ex. 2/Resp. Ex. 5). Counsel also introduced another Exhibit through Hammock (Def. Exhibit 3) which summarizes Mahdi's difficulties in school particularly in reading, and writing, which remained at below grade level throughout elementary school. Hammock also confirmed this in her testimony. (R 1755). The exhibit also chronicles the numerous absences Mahdi had while in school. (Def. Ex. 3). The exhibit also chronicles that Mahdi's father removed him from school in the 5th grade to home school him. (Def. Ex. 3). The exhibit also indicates there was no information this home schooling ever occurred. (Def. Ex. 3). Hammock testified Mahdi's educational history was one of poor school progress. (R 1762). While counsel did not introduce the records themselves, counsel conducted a reasonable investigation of Mahdi's school history and presented the same before Judge Newman. Strickland; Vanhook.

The school records themselves reveal damaging information about Mahdi and his character, even at an early age. The records reveal that Mahdi was referred for special services not because he was mentally retarded, but because of "...behavior problems. He exhibits inappropriate and disruptive behavior." (Brunswick County Public Schools, 3/25/99). The same record also indicates Mahdi had a negative attitude about being corrected, he did not always get along with other children, his behavior with adults was inappropriate at times, and most of his problems seemed to be getting along with people. The records also indicate that Mahdi had an I.Q. of 118, but had episodic acting-out behavior and an unwillingness to deal with difficult school tasks. (Confidential Psychological Evaluation). The records also indicate Mahdi was referred for special services, not because of mental retardation, but because of "*behavioral difficulties*; such as leaving his seat inappropriately, *physically and verbally aggressive towards others* at times, talks out of turn, preoccupied, anxious,

easily frustrated or *angered*, *lacks respect for authority*, and daydreams. (**Educational evaluation**)(**emphasis added**). A Burk's Behavior Rating Scale revealed very significant factors for poor impulse control, poor anger control and excessive resistance. (**Appendix Y**). The records also indicate Mahdi's "intellectual functioning" was "in the high average range." (**M000065**).

To have introduced Mahdi's school records, including the special education records, would have introduced bad things about Mahdi to Judge Newman. It would also have introduced that Mahdi's intellectual functioning was not impaired. Counsel was not deficient in failing to introduce Mahdi's school records which contained bad things about Mahdi. Counsel introduced Mahdi's school problems and difficulties through Hammock's testimony and through an exhibit showing Mahdi's problems in school without introducing the bad things Mahdi had done while in school. Counsel's performance was not deficient in this regard. Wong v. Belmontes.

Mahdi further argues counsel should have introduced Mahdi's school records and called school witnesses to show Mahdi was diagnosed by school officials in the fourth grade as emotionally disturbed. However, the record shows Mahdi's emotional disturbance diagnosis was based in large part on his *inappropriate behavior* in school such as defiance and aggressiveness toward other students. Further, there was expert testimony in this case that a diagnosis of emotional disturbance many times means simply a misbehaving child. (**PCR 542**). This testimony would have further exposed testimony regarding Mahdi's oppositional defiant disorder/intermittent explosive disorder and his conduct disorder, which is a pre-cursor to anti-social personality disorder, which would not have been favorable to Mahdi. Additionally, Mahdi was also referred for special education services because of his inability to read, which Judge Newman already knew about.

Additionally, the records contain information that would have undercut counsel's attempt to

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

Furthermore, Mahdi's own mitigation witnesses undercut the validity of Mahdi's being placed in special education. Dr. Cooper-Lewter testified Mahdi himself informed him that he should not have been placed in special education. Mahdi informed Cooper-Lewter that after being placed in special education he put forth no effort, because he did not belong there. Lawanda Burwell, Mahdi's aunt, and a credentialed school administrator, also testified Mahdi should not have been in

special education.²³

As previously discussed, Mahdi also claims trial counsel was ineffective in failing to provide his psychiatric experts, Doctors Martin and McKee with records from Mahdi's school history, specifically the records regarding Mahdi being placed in special education classes. However, both Drs. Martin and McKee testified these records would not have changed their ultimate diagnosis. (PCR 544, 561). Dr. Martin also testified at the PCR hearing that applicant Mahdi informed him he had been placed in special education. (PCR 515). Dr. Martin also testified Mahdi told him that he should not have been placed in special education. (PCR 515). Mahdi told Dr. Martin he begged the school principal to take him out of special education, but this was unsuccessful. (PCR 516). And, he also asked his father to take him out of special education, and his father eventually pulled him out of public school and home schooled him. (PCR 516). Dr. Martin also testified that students are classified as emotionally disturbed and placed in special education classes because they are behavioral problems. (PCR 542). Dr. Martin testified that sometimes this behavior is fueled by depression, sometimes its incorrigible behavior, or sometimes they are truant or having problems with conduct disorder. (PCR 542). Dr. Martin also testified Mahdi's acting-out behaviors such as irritability, talking back to teachers, and disrespectful attitude were in other reports he did review and also in information Mahdi provided to him. (PCR 542). Mahdi has failed to show counsel was deficient in failing to provide Drs. Martin or McKee with Mahdi's school records. See Von Dohlen v. State.

Mahdi also claims counsel was ineffective for failing to provide their experts with these

²³Mahdi also told Doctors Martin and McKee that she should not have been in special education. Mahdi also told Dr. Martin that he became ODD (Oppositional Defiant Disorder) after being placed in special education because he did not belong there. (Respondent's Ex. 8).

specific records of Mahdi being placed in special education because they showed evidence of Mahdi's depression. This ground has no merit for several reasons.

Dr. Martin testified he extensively reviewed Mahdi records from the Walter Carter Center that documented his major depression at age (9). He reviewed the summary prepared by Ms. Tarr and the records themselves. Dr. McKee likewise reviewed Mahdi's commitment records from the Walter Carter Center at age nine (9). Both experts knew Mahdi suffered from major depression as a child. The special education records were generated approximately eighteen (18) months after Mahdi's release from the Carter Center. Dr. Martin further testified he interviewed Mahdi about his life. Mahdi informed him he had been placed in special education classes. Mahdi also indicated he had suffered from recurrent depression in his life. Dr. Martin further testified that he participated in several team meetings where the findings of other members of the mitigation team were shared with him, including Mahdi's developmental and social history. Dr. McKee testified likewise. As previously stated, Ms. Tarr had subpoenaed Mahdi's school records and interviewed individuals who worked at two different elementary schools Mahdi attended. Based on his interviews with Mahdi regarding his life, and his review of the Carter Center records, along with the information he received from the mitigation investigators, Dr. Martin determined that Mahdi had suffered from recurrent depression during his life. Dr. Martin further testified at PCR that the records Mahdi presented at PCR, the special education records, would not change his opinion in this case. Dr. McKee also testified he was aware Mahdi had been placed in special education as a child. Dr. McKee also testified he did not need any further records to make his diagnosis in this case. (R 508-545, 545-561). As a result, Mahdi has not shown deficient performance on the part of counsel for failing to provide Dr. Martin or McKee with Mahdi's school records regarding special education. Von

Dohlen.

Additionally, Mahdi cannot show deficient performance from the failure to provide these records because counsel could not call either of these witnesses because they found Mahdi had anti-social personality disorder, and Mahdi had related to both Dr. Martin and Dr. McKee that he had been involved in at least one homicide in Virginia. Mahdi had also related to Dr. Martin other damaging things: (1) Dr. Martin noted Mahdi had no difficulty talking about killing people if necessary to achieve independence; (2) Mahdi informed Dr. Martin of another homicide he had committed in Virginia, where police had yet to find the body; (3) Dr. Martin testified Mahdi's outlook on life was quite violent and his interactions with others were hostile, aggressive, and sometimes quite violent. (R 508-545, 545-561). As previously stated, counsel's decision not to call these witnesses in mitigation was an objectively reasonable trial strategy decision under the circumstances, and providing these experts with Mahdi's special education records would not change the negative factors that motivated this decision.

Dr. Martin also testified there was no evidence Mahdi was depressed at the time he committed Captain Myers' murder. Mahdi did not state he was depressed or psychotic at the time. There was no evidence of depression from the way Mahdi described the events surrounding Captain Myers' murder. Madhi's description of the events of Captain Myers' murder were quite coherent. Mahdi described very clearly to Dr. Martin what he was feeling and what he was perceiving at the time of Captain Myers' murder. Madhi described extensive details regarding his actions during Myers' murder. Mahdi described murdering Captain Myers because Captain Myers discovered Mahdi in Captain Myers' cabin, and Mahdi thought Captain Myers' was going to shoot him. Mahdi also described burning Captain Myers' body to cover-up or destroy evidence. Mahdi was coherent

and had no problem remembering events. As a result, Dr. Martin opined that at the time of the offense Mahdi only had a personality disorder, anti-social personality disorder. Likewise, Dr. McKee found no evidence Mahdi was suffering from depression at the time of the Captain Myers' murder. Dr. Martin testified the special education records would not change his opinion in this case. Dr. McKee testified that he did not need to see any other records to make his diagnosis in this case. (R 508-545, 545-561).

Finally, Mahdi has failed to meet his burden of proof with regard to this specific allegation. Dr. Martin was shown Mahdi's special education records at PCR and testified they would not change his opinion in this case. Additionally, Mahdi did not show Dr. McKee the special education records and even ask him if they would have changed his opinion in this case. As a result, Mahdi has failed to show counsel was deficient in failing to provide the special education records to their psychiatric/psychological experts. Von Dohlen v. State; Reed v. Florida Dept. of Corrections, 593 F.3d 1219 (11th Cir. 2010)(fact that expert retained at trial and expert retained later at PCR differed, does not prove trial counsel was ineffective); Davis v. Singletary, 19 F.3d 1471, 1475 (11th Cir. 1997)("the mere fact that a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial."); See Poyner v. Murray, 964 F.2d 1404, 1419 (4th Cir. 1992)(Petitioner cannot establish ineffective assistance because counsel did not expert shop until one could be found who would testify favorably).

As a result of all of the above, Mahdi has failed to show deficient performance in counsel's failure to introduce Mahdi's school records, failure to call school officials as witnesses, or failure to provide his school records to his psychiatric/psychological experts. As a result, this ground must

be dismissed with prejudice.

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

First, the record shows trial counsel had possession of these records, and Ms. Tarr summarized them for counsel and the experts. (**Def. Ex. 11 & PCR 565-66**). Trial counsel's experts, Dr. Thomas Martin and Dr. Geoffrey McKee, also had the records themselves from the Walter Carter Center. (**PCR 511-512, 553-54**). They reviewed them in conducting their evaluation of Mahdi. (**PCR 511-512, 553-54**).

The sentencing phase record shows, Ms. Hammock testified regarding Mahdi's commitment to the Walter Carter Center, his diagnosis there, and his discharge diagnosis. An exhibit was also introduced detailing Mahdi's involuntary commitment and diagnosis at the Carter Center. Judge Newman, was well aware that Mahdi was committed to the Walter Carter Center at age 9 for depression and suicidal ideation. Judge Newman was also well aware Mahdi was diagnosed with major depression at this young age, and that it came of the heels of his being separated from his family, and being forced to move to Baltimore with to live with his aunt and uncle. Judge Newman was also well aware Mahdi was confined at the Walter Carter Center for 60 days, and he was discharged to his aunt and uncle. Trial counsel chose not to introduce the records themselves. (**R 1739-63 & Def. Ex. 2**).

The records themselves are cumulative to the testimony of Hammock and the exhibit introduced through her. Additionally, the records themselves contain damaging information about Mahdi. Mahdi was placed in isolation several times while at the Carter Center due to his disruptive or inappropriate behavior. Importantly, the records show Mahdi assaulted other patients, assaulted

staff, was verbally threatening or aggressive towards staff, and attempted to escape from the facility. On several occasions, Mahdi threw chairs or tables and attempted to damage property of the hospital. On one occasion, Mahdi falsely pulled a fire alarm. Mahdi also cursed staff members. On another occasion Mahdi threatened to suffocate a staff member with a pillow. Also, the records detail Mahdi's making a false claim of child abuse against his aunt Lawanda Burwell. The records show the claim of child abuse against his aunt was determined to be unfounded. The records show Mahdi admitted he only threatened suicide when he didn't get his way. The records also show that Mahdi's aunt reported that Mahdi only talked about suicide when he didn't get his way or did something wrong. Mahdi also admitted threatening suicide as a way of getting attention. The records also indicate Mahdi had anti-social behavior and conduct disorder. Counsel was not deficient in failing to introduce the records themselves when bad things were contained within the records that would have been damaging to their client. (**Walter Carter Center Records & Resp. Ex. 7**). Wong v. Belmontes. Counsel appropriately presented the Carter Center testimony or information to the sentencing court through Ms. Hammock, without the negative information about Mahdi that would have been before the sentencing court had the records themselves been introduced. This ground has no merit must be dismissed with prejudice.

Conclusion

Counsel conducted a proper mitigation investigation, however, Mahdi's family members were resistant and uncooperative in that investigation, and Mahdi's family members either refused to be involved and/or knew matters about Mahdi that would have been harmful to counsel's attempt to present a mitigation case on Mahdi's behalf. Counsel made objectively reasonable trial strategy decisions under the circumstances not to call these 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); Council v. State (strategic decisions will be judged as reasonableness under the circumstances). Counsel's mitigation presentation of Mahdi's social and family history was not deficient. Counsel was not deficient in failing to introduce Mahdi's DJJ records, school records, or Walter Carter Center records. Counsel was not deficient in failing to call school officials to testify. Counsel was not deficient in failing to call or elicit the testimony Dr. Cooper-Lewter testified to at PCR. Counsel was not deficient in failing to call or elicit the testimony Dr. Haney testified to at PCR. Counsel was not deficient in failing to investigate, develop, and present mitigating evidence regarding Mahdi's mental status. Counsel retained two well-qualified psychiatric/psychological experts to evaluate Mahdi and there findings were not helpful to the mitigation case, and there testimony would have been even more harmful if presented. Wong v. Belmontes. Applicant has also failed to show counsel was deficient in failing to provide his experts with specific records. Von Dohlen.

Mahdi has not met his burden of proof to show deficient performance. Strickland; Wong. Vanhook; Pinholster. As a result, this Court should alter or amend its Order of Dismissal to correctly find that Mahdi has failed to meet his burden of proof to show counsel's performance was deficient in this regard.

RESPONDENT SO MOVES.

Respectfully submitted,

ALAN WILSON
Attorney General

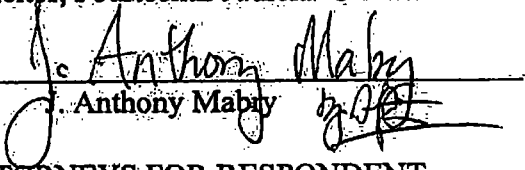
JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

J. ANTHONY MABRY
Assistant Attorney General

ISAAC McDUFFIE STONE, III
Solicitor, Fourteenth Judicial Circuit

By:


J. Anthony Mabry

ATTORNEYS FOR RESPONDENT
P.O. Box 11549
Columbia, SC 29211

February 8, 2013

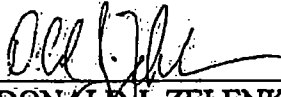
CERTIFICATE FOR SERVICE

I, Donald J. Zelenka, hereby certify that I have served the Proposed Order of Dismissal 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
900 Elmwood Avenue, Ste. 101
Columbia, SC 29201

This 8th day of February, 2013.



DONALD J. ZELENKA for
Anthony Mabry
Assistant Attorney General

FORM 5

STATE OF SOUTH CAROLINA

COUNTY OF CALHOUN

Mikal D. Mahdi

Full name and prison number (if any) of Applicant

v.

State of South Carolina

IN THE COURT OF COMMON PLEAS

2009-CP-09-00164

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Death Row, Lieber Correctional Institution P.O. Box 205 Ridgeville, SC 29472
2. Name and location of Court which imposed sentence Calhoun County Court of General Sessions, Judge Clifton Newman presiding.
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2004-GS-09-0243 - Murder
 - (b) 2004-GS-09-0244 - Burglary 2nd
 - (c) 2004-GS-09-0242 - Grand Larceny
5. The date upon which sentence was imposed and the terms of the sentence:

- (a) December 8, 2006
- (b) 2004-GS-09-0243 - Murder - Death
- (c) 2004-GS-09-0244 - Burglary 2nd - 15 years consecutive
- (d) 2004-GS-09-0242 - Grand Larceny - 10 years consecutive

6. Check whether a finding of guilty was made:

- (a) after a plea of guilty X
- (b) after a plea of not guilty _____
- (c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

- i. South Carolina Supreme Court
- ii. _____
- iii. _____

(b) the result in each such Court to which you appealed:

- i. Affirmed
- ii. _____
- iii. _____

(c) the date of each such result:

- i. June 15, 2009
- ii. _____
- iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

- i. Mahdi v. State, 383 S.C. 135, 678 S.E.2d 807 (2009).
- ii. _____
- iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

- (a) _____
- (b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective assistance of counsel
- (b) _____
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (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).
- (b) _____
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? No
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
- (d) any other petitions, motions or applications in this or any other Court? No
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. _____
- ii. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. _____
- ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) Issue was not preserved for appellate review.
 - (b) _____
 - (c) _____
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? Yes
 - (b) your trial, if any? _____
 - (c) your sentencing? Yes
 - (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
 - (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
 - i. Glenn Walters P.O. Box 1346 Orangeburg, SC 29115
 - ii. Joshua Koger, Jr. P.O. Box 513 Orangeburg, SC 29116
 - iii. Kathrine H. Hudgins, 1330 Lady St. Suite 401 Columbia, SC 29201
 - (b) the proceedings at which each such attorney represented you:
 - i. Plea and Sentencing - Glenn Walters
 - ii. Plea and Sentencing - Joshua Koger, Jr.
 - iii. Appeal - Kathrine H. Hudgins
19. State clearly the relief you seek in filing this application:
New trial and sentencing
20. Are you now under sentence from any other court that you have not challenged?
No

STATE OF SOUTH CAROLINA

County of Calhoun

VERIFICATION

I, Mikal D. Mahdi, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Mikal D. Mahdi

SWORN to and subscribed before me this 18th
day of August, 2012.

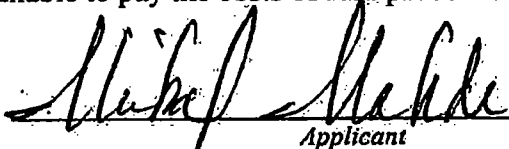
Walter J. Jagan (L.S.)
Notary Public

My Commission Expires: May 13, 2013

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

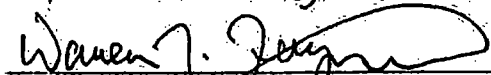
I, Mikal D. Mahdi, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.


Applicant

SWORN or affirmed to and subscribed before me this

18 day of August, 2009.


Notary Public

My Commission Expires: May 13, 2013.

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.	)	PROPOSED
	)	AMENDED ORDER OF DISMISSAL
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

This is a capital post-conviction relief (PCR) case. Applicant, Mikal D. Mahdi ("Mahdi") filed an application for PCR on August 18, 2009 pursuant to *S.C. Code Ann. Section 17-27-160* and the S.C. Supreme Court's July 23, 2009 Order staying execution, allowing Mahdi to pursue potential PCR relief, and assigning this Court with continuing jurisdiction of this action. Respondent filed a Return denying the allegations of the application and moved to dismiss with prejudice. Mahdi filed 2 amended applications on March 19 and July 29, 2010, and Respondent filed a Return to each as above. On March 4, 2011, Mahdi moved to amend his Final Application to include an additional ground, which was formally objected to by Respondent, and this Court granted the late amendment over Respondent's objection. On March 9, 2011, an evidentiary hearing was held. On December 18, 2012, this Court issued an Order of Dismissal, filed January 8, 2013, denying and dismissing the allegations of the Final Application with prejudice.

The State subsequently filed a timely Rule 59, SCRPC Motion to Alter or Amend one (1) of the findings in the Order of Dismissal.¹ On February 11, 2013, this Court heard argument on the State's Rule 59 Motion. After careful consideration of the entire record, the arguments of

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

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

I. PROCEDURAL HISTORY

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

The Continuances

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

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

Grant was seriously injured in motorcycle accident, whereupon Mr. Walters was substituted as 1st chair capital counsel, and attorney Joshua Koger, Jr., was appointed to represent Mahdi as 2nd chair capital counsel. Shortly before trial, the case was continued again until November 26, 2006.

Jury Selection

On November 26, 2006, jury selection began before Judge Newman. General *voir dire*, individual *voir dire*, and jury selection were completed on November 29, 2006, with a jury and 4 alternates impaneled. Prior to the swearing of the jury, Mahdi waived his right to a jury trial and changed his plea to guilty. (R. 123-1336).

The Guilty Plea

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

The Sentencing Proceeding

After the statutorily required 24 hour waiting period, the sentencing proceeding began on December 1, 2006, with evidence concluding on December 5, 2006, and final arguments on December 6, 2006. On December 8, 2006, Judge Newman issued his sentencing decision by

reading into the record his written sentencing order, filed on the same date. (R. 1726-42, 1810-26, 1842-53; Sentencing Order pp. 1-12). Judge Newman found the following statutory aggravating circumstances had been proven by the State beyond a reasonable doubt: (1) the murder was committed during the commission of a grand larceny; and (2) the murder was committed during the commission of a burglary. (R. 1730-31, 1814-15, 1845; Sentencing Order p. 4). After considering all of the evidence in extenuation, aggravation, and mitigation of punishment, Judge Newman sentenced Mahdi to death for the murder of James Myers. (R. 1726-42, 1810-26). Mahdi was sentenced to 15 years for burglary 2nd degree and 10 years for grand larceny, to run consecutively to one another and to the murder sentence. (R. 1741, 1825).

The Appeal

Mahdi appealed his death sentence to the S.C. Supreme Court. He was represented by attorney Katherine Hudgins of the Office of Appellate Defense. On appeal, Mahdi raised 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 Anthony Mabry, filed a responsive brief. (See Final Brief of Respondent). On June 15, 2009, the S.C. Supreme Court affirmed Mahdi’s death sentence. *Mahdi v. State*, 383 S.C. 135, 678 S.E.2d 807 (2009). The Remittitur was issued July 1, 2009. Mahdi did not seek certiorari to the U.S. Supreme Court.

The Motion for Stay of Execution

Mahdi, through attorney Hudgins, filed a Motion for a Stay of Execution on June 23, 2009 before the S.C. Supreme Court, to pursue potential PCR remedies. Pursuant to *In Re Stays of Execution*, the State filed a Return and did not oppose the Stay request to pursue *potential* PCR

remedies. On July 23, 2009, the Supreme Court issued its Order granting the stay and assigning this Court to hear Mahdi's PCR application.

The Appointment of Collateral Counsel Hearing

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

The PCR Application

Prior to the issuance of the Order of Appointment of Counsel, Mahdi filed a *pro se* PCR Application. (2009-CP-09-00164). Mahdi filed 2 subsequent Amended Applications. The State filed Returns to all 3 applications, denied the allegations, and moved to dismiss. Mahdi also moved to amend his final application, which was formally objected to by the State by the filing of a formal objection, which served as a Return to this final allegation. This Court granted Mahdi's motion to amend his final application to add 1 additional allegation, over the State's formal objection.

II. FACTS

Mahdi murdered James Myers, an off-duty police captain, on July 18, 2004 in Calhoun County, S.C., during a crime spree. (R. 1341-68). At the time of his murder, Myers had 31 years

of service as both a fireman and as a police officer, with the rank of Captain. (R. 1357). Mahdi was a fugitive wanted for several crimes he committed outside South Carolina.

A. Crimes

Virginia

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

North Carolina

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

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

then left the store with only the beer. (State's Ex. 94). The store clerk, Christopher J. Boggs, died from his wounds. (R. 1567-82, 1585).⁴

South Carolina

(Columbia)

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

(Calhoun County)

Approximately 35 minutes after the car-jacking, Mahdi drove the stolen red Ford Expedition to the Wilco Hess station at Exit 139 off I-26 in Calhoun County. (R. 1360). The Expedition now bore the license plates Mahdi stole from Lawrenceville, VA. (R. 1360-62). Mahdi's fingerprints were found inside the Expedition, and on the license tag and the frame surrounding the tag.

Mahdi attempted for 45 minutes to an hour to use a credit card at 1 of the Wilco gas pumps to fuel the Expedition, but the pump would not accept the card. Due to this suspicious behavior, the Wilco store clerks notified police. Mahdi abandoned the stolen Expedition behind the station, and, as police arrived, fled into woods near the station. (R. 1361-62). The police searched

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

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

unsuccessfully for Mahdi and concluded he had obtained a ride from someone at a nearby Waffle House. Mahdi was, instead, on foot in the woods near the store, headed toward victim James Myers' farm.

James Myers owned a farm approximately a ¼ to ½ a mile through the woods from the Wilco station. (R. 1362, 1399-1401). While fleeing on foot from police, Mahdi came upon Myers' work shed and broke into it. (R. 1362, 1411). While there, he watched T.V., converted Myers's shotgun into a sawed off shotgun, and painted it black. (R. 1603). He went through SLED investigation files maintained by Myers' wife, a SLED agent. (R. 1414-16). He armed himself with Myers' .22 caliber rifle, which was kept in the shed with other guns. (R. 1604).

Myers was off work June 18, 2004, having returned with his wife from Edisto Beach, where they celebrated the birthdays of his wife, sister, and daughter. (R. 1402-03). After returning home, Myers stopped by his father's home, as he routinely did, to visit and help his father with the loss of Myers's mother, who had died 2 years earlier. (R. 1404). After visiting with his father, Myers left around 6:45 p.m. and headed to his farm, where Mahdi was lying in wait at the shed. (R. 1363-64, 1403-25). Mahdi confronted Myers in the shed, and shot him 9 times with the victim's own .22 caliber rifle, killing him. (R. 1364, 1541-66, 1696).⁶ After murdering Myers, Mahdi poured diesel fuel on and around the body and set the body on fire. (R. 1364, 1696). He then stole Captain Myers' police issued Dodge truck and a license plate from another vehicle located near the shed. (R. 1365, 1414, 1418). In addition to the .22 rifle, Mahdi stole Captain Myers' police issued Ruger assault rifle and the converted shotgun.

Myers' wife began missing him around 9:00 p.m., when he did not come home as expected.

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

She called him several times and paged him, with no response. Finally, she contacted Myers' father and discovered what time he left his father's home. Mrs. Myers drove to their farm, and finding the gate to the property open, she drove to the shed and found her husband's truck missing. Mrs. Myers then went into the shed and found her husband's burned and bullet riddled body lying in a pool of blood. She knew immediately he was dead and screamed for an unknown period of time. When she finally calmed down enough to use her phone, she contacted 911 and waited until the police arrived. (R. 1395-1425).

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

Florida

On July 21, 2004, in Satellite Beach, FLA, Mahdi was spotted by police in the victim's truck.⁷ He jumped out of the truck, while it was moving, and fled. Mahdi ran for the beach, carrying the fully-loaded Ruger assault rifle. (R. 1377-94). Police were about to use deadly force when Mahdi dropped the gun and continued to run. He ran into a condominium complex and was eventually apprehended on the 5th floor of the building with the use of a police dog.

While transporting Mahdi to the police station, the arresting officer thanked him for not shooting him with the assault rifle, to which Mahdi responded that the gun was "stuck on a three shot." Mahdi said with "cold eyes," "I don't think I could have got you - - I couldn't have shot

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

you, the other cop, and excuse my language, that fucking dog.” (R. 1394).

After Mahdi’s arrest, police discovered the license plate on Myers’ police-issued Dodge truck had been replaced with the license plate off Myers’ personal GMC truck. (R. 1559-60). Clothing found by police inside the Dodge truck matched clothing Mahdi was seen wearing at the Wilco station in Calhoun County. Shorts found in the truck matched the shorts worn by Mahdi in the surveillance video of the murder at the Exxon station in Winston-Salem. Shoes found in the truck matched footwear impressions found near the scene of Myers’ murder. The Ruger Mini 14 assault rifle was recovered, and the sawed off shotgun and ammunition were found in the truck, as was an “Atlas” taken from Myers’ shop, with Mahdi’s fingerprints on the Jacksonville, FLA map. (R. 1394-95, 1561). This led police to 2 witnesses in Jacksonville, who purchased a .380 caliber pistol and a .22 rifle from Mahdi shortly after Myers’ murder. (R. 1366, 1565). The witnesses identified Myers’ Dodge truck as the vehicle Mahdi was driving at the time, and identified Mahdi in a photographic lineup, as the person who sold them the chrome .380 pistol and the .22 rifle. The only personal item belonging to Myers that was missing but never recovered was his police badge, which he kept in his truck or in the pocket of his pants. (R. 1418-21).

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

The autopsy determined Myers died from multiple gunshot wounds, after being shot 9 times, including 4 in the chest and 3 in the head. The pathologist, Dr. Janice Ross, opined Myers was shot first in the chest and possibly once in the head. After he collapsed to the floor of the shed, he possibly raised his head and was shot again, and then was shot again in the head while his

head was lying on the floor. (R. 1702).

B. Aggravation Factors

(Mahdi's Prior Criminal Acts)

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

Mahdi was committed to the Virginia's Department of Juvenile Justice (DJJ) at age 14 for 2 counts of breaking and entering and 2 counts of grand larceny. (R. 1437). He admittedly was also involved in the sale of crack cocaine at the same age. (R. 1440). He was charged with assaulting and causing bodily injury to another inmate in Virginia's DJJ. (R. 1441-42). While in Virginia's DJJ, Mahdi told authorities 1 of his strengths was "robbing people." (R. 1440). During 1 of the break-ins he committed, Mahdi stole a .44 magnum pistol. (R. 1428-29). When Brunswick County, VA police attempted to arrest Mahdi on a detention order for that charge, he and his father refused to come out of their home. An 8 hour standoff ensued, during which Sheriff James Woodley heard Mahdi say, "Them motherfuckers got guns." Mahdi also told police after he was finally arrested, "I'm going to kill a cop before I die." (R. 1431).

At the age of 17, Mahdi was arrested for slashing his mother's tires and for resisting arrest. During this arrest, Mahdi grabbed the holstered pistol of 1 of the investigating police officers. He later told 1 of the officers that he should have killed "that bitch," referring to his own mother. (R. 1457-62). Mahdi was also convicted as a juvenile of contempt of court and obstruction of justice.

(R. 1612).

As an adult, Mahdi was convicted and served 3 years in prison, for brutally stabbing Moises Rivera, a maintenance supervisor, at an apartment complex in Richmond, VA, 5 times in the back with a knife, after Rivera investigated a disturbance at the apartment complex and came upon Mahdi trying to break into an apartment on April 17, 2001. Rivera's lung was punctured, and he arrested in the ambulance but was revived by EMS personnel. Rivera was in the hospital for 6 days and was out of work for 2 months as a result of the assault. (R. 1473-75).

Mahdi was released from the Virginia prison system on May 12, 2004. At the time Myers was murdered, Mahdi was on supervised probation for the Rivera assault, with requirements that he not to leave Virginia, violate any laws, or possess a firearm. (R. 1483-97). After his release, Mahdi tried to get his grandmother's neighbor, Amanda Weaver, to help him assemble a 9mm pistol. He bragged to her he was dabbling in drug dealing to make money, and was going to knock off some drug dealers. (R. 1500-02). On June 14, 2004, the day before the .380 pistol disappeared from Ms. Weaver's home, as a condition of his supervised probation, Mahdi was required to submit to a urine drug screen administered by Virginia's Department of Probation and Parole. The test result showed he was using marijuana less than 2 months after being released from prison. (R. 1491). Thereafter, he stole the gun, the Mercury Sable, and the license plate and drove to N.C.

(Mahdi's Prison Conduct)

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

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

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

As a S.C. pre-trial detainee on the instant charges, Mahdi was charged with assaulting a correctional officer, who sustained a mild concussion. (R. 1619). At the disciplinary hearing, Mahdi looked at the officer and said that, at the next chance he got, he would kill the "motherfucking officer." (R. 1616). During a search of Mahdi's cell, officers found a 3 to 4 foot piece of rope and some pieces of metal. (R. 1617). Mahdi was housed by himself. (R. 1618). He was caught damaging a conference room and hiding metal fragments from a wall socket on his person. (R. 1622-23). On another occasion, Mahdi was found with a 15 foot rope made of blankets. (R. 1624). Another piece of metal was found in his cell on a different occasion. (R. 1627-28). Mahdi also wrote a grievance in which he discussed killing DOC' employees. (R. 1629). Mahdi made additional threats toward a DOC' employee at the disciplinary hearing. (R. 1646-48).

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

Captain Gary Lane testified that at the time of trial, Mahdi was kept on the High D Wing of the super-max portion of Kirkland Correctional Facility. This facility houses the 6 most difficult to manage inmates in the entire S.C. DOC. (R. 1652-53). These 6 inmates are kept differently than the other 23,000 inmates in the DOC. (R. 1661-62). Their 6 cells are even more secure than death-row. (R. 1662). While in 1 of these super-secure cells, Mahdi made a rope and obtained 2 pieces of contraband metal, of which 1 was sharpened to a point. (R. 1656-57). Mahdi had been transferred to the High D Wing, from the High C Wing, because of a history of making objects and because a "hammer-like" weapon was found in Mahdi's cell. (R. 1653, 1655).

During jury selection before Judge Newman, a homemade handcuff key was found in Mahdi's possession, after he had persuaded his courthouse security detail to remove leg braces or irons and replace them with shackles. (R. 1319-21, 1664-65). Mahdi admitted he made the key in the DOC, kept it secreted in his mouth during the trial, and took it out of his mouth when he was away from guards for a meeting with his attorneys. (R. 1666-67). Mahdi had attempted to use it in the county jail but had not had an opportunity to use it in the courtroom, due to the guards' watchfulness. (R. 1319-21). Calhoun County Sheriff Thomas S. Summers, Jr., testified that he tried the handcuff key on 3 handcuff sets, and was able to open 2 of the 3 sets with the key. (R. 1667). Summers testified Mahdi could have easily used the key to remove his restraints and assault someone in the courtroom. (R. 1670).

C. The Sentencing Order

On December 8, 2006, Judge Newman issued his 12-page sentencing order, which he read into the record. Judge Newman found that the State proved 2 aggravating circumstances beyond a reasonable doubt: (1) the murder of James Myers was committed during the commission of a

larceny; and (2) the murder of Myers was committed during the commission of a burglary. (R. 1845; Sentencing Order, p. 4).

In addition to finding the State had established 2 aggravating circumstances beyond a reasonable doubt, Judge Newman found that while there was strong evidence of 2 other alleged aggravating circumstances, the State did not prove those other aggravating circumstances beyond a reasonable doubt.⁹ Therefore, Judge Newman did not consider or give any weight to those other alleged aggravating circumstances. (R. 1845-46; Sentencing Order, p. 4-5).

Judge Newman found the State presented compelling evidence of prior and subsequent bad acts of Mahdi which showed Mahdi's bad character, evil nature, and malignant heart. Judge Newman found these acts covered a period over 8 years and included housebreaking, stealing guns, robbing people, selling crack cocaine, vandalism, and malicious wounding of another human being. In his order, Judge Newman summarized these acts in detail. Judge Newman found the State had established Mahdi's bad character and propensities by clear and convincing evidence. Judge Newman did not consider this evidence as proof of any aggravating circumstance. (R. 1846-48; Sentencing Order, p. 5-7).

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

⁹ These 2 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.

Judge Newman considered Mahdi's age (21 years) and mentality at the time of this murder. Judge Newman noted the last time Mahdi's I.Q. was tested, at age 14, his I.Q. was 108, slightly above average. While he considered this statutory mitigating circumstance, he did not give it great weight because Mahdi began his criminal career at an early age, 14. Judge Newman found that at 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, nor should it be given any significant weight in his ultimate decision as to the appropriate sentence. (R. 1848-49; Sentencing Order, p. 7-8).

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

Judge Newman also considered Mahdi's offered testimony of prison adaptability. While he considered the testimony of defense expert James Aiken, Judge Newman pointed out that he

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

Mahdi requested, and Judge Newman considered Mahdi's guilty plea as a non-statutory, mitigating circumstance to determine the appropriate sentence to be imposed. Judge Newman noted that the plea occurred on the fourth day of the trial, following jury selection but prior to the jury being sworn. Judge Newman pointed out that this was 1 day following the discovery of Mahdi's homemade handcuff key. Additionally, Judge Newman found that Mahdi had failed to demonstrate any remorse for his actions. Therefore, while he considered the guilty plea, Judge Newman concluded that no significant weight should be given to it in his ultimate decision as to the sentence to be imposed. (R. 1850; Sentencing Order, p. 9).

Judge Newman also considered the impact of the crime upon the victim's family and the community. Judge Newman found the victim, James Myers, was a husband, father, grandfather, son and friend to many. Judge Newman found Myers was a well-respected police officer, an outdoorsman, a mentor, and a treasured member of humanity. Furthermore, Judge Newman found Mahdi burglarized Myers's farm shed and stole his family's sense of security and serenity. Moreover, Judge Newman found Mahdi, by committing these crimes, robbed the Myers family and their friends of their right to peaceful enjoyment of life. (R. 1851; Sentencing Order, p. 10).

In his final decision, Judge Newman noted that he was acutely aware of the decision before him, and he stated that he did not take it lightly. Moreover, Judge Newman noted that he considered Mahdi's plea for mercy and the State's plea for justice. In evaluating these 2 ideals, Judge Newman also said that he was reminded of his sworn duty to preserve, protect, and defend the Constitution of this State and the United States. Furthermore, Judge Newman stated that this obligation was not only to Mikal Mahdi, but of equal importance, this was an obligation that he had to the citizens of South Carolina.

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

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

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

In considering all of the evidence in this case, I have concluded that the only appropriate punishment for the murder of Captain

James E. Myers is death." (R. 1825, 1852; Sentencing Order, p. 11).

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

III. PCR ALLEGATIONS/GROUNDS

Based on Mahdi's PCR application, amended applications, and Motion to Amend, Mahdi alleges the following grounds entitle him to post-conviction relief:

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

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

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

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

(10)(b)/11(b) *Applicant's death sentence violates the Cruel and Unusual Punishment Clause of*

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

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

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

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

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

The PCR Merit's Hearing

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

After reviewing the record, including the Record on Appeal and the trial exhibits, and

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

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Standard of Review

In a PCR action, the applicant has the burden of proving his allegations by a preponderance of the evidence. *Rule 71.1(e), SCRPC; Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); *Butler, supra*.

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

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Second, counsel's deficient performance must have prejudiced the applicant, such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different." *Cherry*, 300 S.C. at 117, 385 S.E.2d at 625, *citing Strickland*.

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

In the context of a guilty plea, the applicant also must establish prejudice by proving "counsel's constitutionally-ineffective performance affected the outcome of the plea process." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). The applicant must show, but for counsel's ineffective assistance, there is a reasonable probability he would not have pled guilty but would have proceeded to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

In the context of sentencing phase issues, the applicant must show deficient performance and prejudice. To show prejudice is to show that "there is a reasonable probability that ... the sentencer—including an appellate court, to the extent it independently reweighs the evidence--would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695; *see also Wiggins*, 539 U.S. at 537; *Jones v. State*, 332 S.C. 329, 344-45, 504 S.E.2d 822, 829-30 (1998). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Jones*, 504 S.E.2d at 823-824. The U.S. Supreme Court made clear that the burden is *not on the State* to show the lack of prejudice, but the burden is *on the applicant* to show prejudice. *Wong v. Belmontes*, 130 S.Ct. 383 (2009), *citing*

Strickland. The applicant must prove that had counsel acted competently there is a reasonable probability that a different sentence would have resulted. *Id.*; *Wiggins v. Smith*, 539 U.S. 510, 535, 536 (2003); *see also Terry v. State*, 394 S.C. 62, 714 S.E.2d 326 (2011). Such a showing “requires a substantial, not just conceivable, likelihood of a different result.” *Cullen v. Pinholster*, 131 S.Ct. 1388, 1403 (2011), *citing Harrington*, 131 S.Ct. at 791 (2011).

IV. Mahdi’s Grounds Lack Merit

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

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

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

The defense further argues a non-statutory mitigating circumstance that the Court should consider the defendant’s guilty plea in determining the appropriate sentence to be imposed.

The defendant’s guilty plea occurred during the fourth day

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

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

Mahdi engages in a strained reading of 1 sentence of this 1 paragraph of a 12 page capital sentencing order in an attempt to vacate his death sentence. In his direct appeal brief, Mahdi selected a single sentence from this paragraph and alleged the selected sentence evidenced the trial judge considered the initial exercise of Mahdi's right to a jury trial as a circumstance supporting the imposition of the death penalty.¹³ (See BOA, p. 9, 11, 18-21).

A plain reading of the sentencing order and this paragraph shows that Judge Newman accurately recounted in his Order and for the S.C. Supreme Court, or any reviewing court, when Mahdi's guilty plea occurred in the request to consider the 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 of this state's death penalty statute), referencing *Walton v. Arizona*, 497 U.S. 639 (1990).

Mahdi's allegation of ineffective assistance of counsel in this regard is without merit. Mahdi offered no evidence on this ground at the PCR evidentiary hearing, and Judge Newman did not sentence Mahdi to death for participating in *voir dire* and selecting a jury. Mahdi's assertion

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

is not supported by the sentencing order or the record. Mahdi was sentenced to death only for the appropriate reasons, the circumstances of the crime and his character. Therefore, counsel was not ineffective in failing to object to this portion of the sentencing order. Mahdi cannot show deficient performance or resulting prejudice from counsel's alleged failure to object. *Strickland; Wong; Wiggins; Jones*. This ground must be dismissed with prejudice.

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

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

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

Mahdi did not testify, and offered no testimony or other evidence at the merits hearing on this issue.¹⁴ Mahdi did not question any of his former appointed attorneys on this issue. (PCR Tr. pp. 587-710). Mahdi has failed to meet his burden of proof on this allegation, which must therefore be dismissed with prejudice. *Butler, supra; Hill, supra*. Furthermore, having offered no proof, Mahdi waived and abandoned this issue. *Parks v. Morris Homes Corp.*, 245 S.C. 461, 471, 141 S.E.2d 129, 134 (1965)(Further, it is a litigant's duty to bring to the court's attention any perceived error, and "the failure to do so amounts to a waiver of the alleged error."). *See also Gibbs v. Kimbrell*, 311 S.C. 261, 267, 428 S.E.2d 725, 729 (Ct. App. 1993)(discussing waiver).

Furthermore, the record indicates Mahdi was fully advised of his rights to jury sentencing

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

and the pros and cons of having a jury conduct his sentencing verses a judge determining his sentence. (See R. 1324-68). After Mahdi indicated a possible guilty plea, court recessed overnight, and Mahdi was given additional time to talk to his lawyers about whether he wanted to plead guilty and have the judge determine his sentence or proceed with a jury trial and have a jury determine his guilt and sentence. (R. 1332-36). The record reflects that discussions in this regard had already occurred before counsel indicated to the Court that Mahdi might change his plea to guilty. (R. 1329-32). Mahdi clearly understood his right to have a jury determine his sentence, because several days of individual *voir dire* and jury selection had been completed, and a panel of 12 jurors and 4 alternates had been seated but not sworn at the time Mahdi indicated he might plead guilty. (R. 1370-71). After the overnight recess, Mahdi told the Court he wanted to enter a plea of guilty. (R. 1336).

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

During the lengthy colloquy with the Court, Mahdi was placed under oath. (R. 1343). Mahdi testified that he understood that if he pled guilty in front of Judge Newman that the possible

sentences were life in prison and the death penalty. (R. 1347). Mahdi testified under oath that he understood he had the right to a jury sentencing, and that in order to sentence him to death all 12 jurors would have to unanimously agree that he should be sentenced to death. (R. 1347-48). Mahdi also stated under oath that he understood that if he pled guilty, the Judge would solely determine the sentence, not the 12 jurors. (R. 1349).

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

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

This Court also finds that counsel's testimony on this issue is supported and corroborated by Mahdi's responses to Judge Newman's questions during the guilty plea itself. Given the vague allegations of this ground, the lack of any supportive evidence in the record, and the clear record before this Court that Mahdi understood the advantages and disadvantages of jury sentencing, this ground must be dismissed with prejudice. *Strickland, supra* ; *Hill, supra*; *Butler, supra*. There is no proof that counsel was deficient in any manner in this regard. *Strickland, supra*; *Hill, supra*; *Butler, supra*.

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

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

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

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

- a) Counsel should have interviewed and called at sentencing several of Mahdi's extended family members and also community members to testify to his family, social, scholastic, and mental health history.
- b) Counsel should have presented the testimony collateral counsel presented [at PCR] through a different forensic social worker than the one counsel used at sentencing.
- c) Counsel should have introduced testimony from an expert regarding the effect of Mahdi's life of incarceration on Mahdi.
- d) Counsel failed to adequately investigate, develop, and present evidence concerning his mental health history or mentality; specifically, counsel should have discovered and presented the testimony Mahdi presented through Drs. Schwartz-Watts and Myers at PCR, and counsel failed to provide certain records to their own psychiatric/psychological experts;
- e) Finally, counsel failed to introduce certain documents at sentencing such as certain school records, his DJJ records, records from his commitment to the Walter Carter Center at age 9, his father's records, and counsel failed to call school officials.

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

Our Supreme Court has analyzed claims of failure to investigate, discover, and present mitigation evidence under *Strickland*, *Wiggins v. Smith*, 539 U.S. 510 (2003) and its progeny. *See Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009); *Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008)(relying on *Wiggins* and *Rompilla v. Beard*, 545 U.S. 374 (2005), finding counsel deficient and defendant prejudiced by failure to investigate, develop, or present any mitigation evidence regarding defendant's violent upbringing, abuse at home, and mental illness other than limited testimony by his mother); *Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007); *Nance v.*

Ozmint, 367 S.C. 547, 557 n. 8, 626 S.E.2d 878, 883 n. 8 (2006)(citing *Wiggins* and concluding counsel should have investigated and presented evidence of adaptability to prison and mitigating social history evidence outlining defendant's troubled childhood and mental illness); *Von Dohlen v. State*, 360 S.C. 598, 606-07, 602 S.E.2d 738, 742-43 (2004)(concluding counsel was ineffective in failing to adequately prepare and present evidence in penalty phase defendant suffered from severe, chronic depression at time of murder given counsel failed to provide expert witness with crucial medical records and related information which prevented that witness from conveying an accurate diagnosis of defendant's mental condition to the jury); *Simpson v. Moore*, 367 S.C. 587, 605-07, 627 S.E.2d 701, 711-12 (2006)(reversing PCR court's conclusion capital defendant suffered prejudice from failure to offer sufficient social history evidence in mitigation where record showed counsel did in fact do adequate investigation and presented similar mitigation evidence); *Jones v. State*, 332 S.C. 329, 344-45, 504 S.E.2d 822, 829-30 (1998)(fancier mitigation case does not establish ineffective assistance of counsel).

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

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

This standard is necessarily a general one. *Bobby v. Van Hook*, 558 U.S. 4 (2009). “No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.” *Strickland*, 466 U.S. at 688-689. “Restatements of professional standards, we have recognized can be useful ‘guides’ to what reasonableness entails, but only to the extent they describe the professional norms prevailing when the representation took place.” *Bobby v. Van Hook*; *Strickland*, at 688. The ABA Guidelines for Appointment and Performance of Defense Counsel in Death Penalty Cases are not the definition of what reasonableness means under *Strickland*, and they are not “inexorable commands with which all capital defense counsel must comply.” *Van Hook*, *supra*.¹⁵ In fact, as Justice Alito pointed out in his concurring opinion in *Van Hook*:

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

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

While the ABA Guidelines provide noble standards for legal representation in capital cases and are intended to improve that representation, they are not minimum constitutional standards, which defense counsel must follow or they are ineffective. *Yarborough v. Johnson*, 520 F.3d 329 (4th Cir. 2008); *Walker v. True*, 401 F.3d 574, 583 n. 7 (4th Cir. 2005)(the *Strickland* inquiry "does not entail the application of *per se* rules derived from ABA standards), *vacated on other grounds*, 546 U.S. 1086 (2006). *See Roe v. Flores-Ortega*, 528 U.S. 470, 479 (2000); *Strickland*, 466 U.S. 688-89 (cautioning against the fallacy of treating guidelines as a "checklist for judicial evaluation of attorney performance").

Subsequent to *Van Hook*, the U.S. Supreme Court handed down *Cullen v. Pinholster*, 131 S.Ct. 1388 (2011) in which the Court reiterated the determination of whether counsel's performance was deficient and ultimately ineffective cannot be made based on specific guidelines. *Id.* In fact, the Court pointed out in *Pinholster* that "[b]eyond the general requirement of

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

reasonableness, ‘specific guidelines are not appropriate.’” *Id.*, citing *Strickland* at 688. The *Pinholster* Court went on to state: “No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions...” *Id.*, quoting *Strickland*, at 688-89. The *Pinholster* Court went further in stating:

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

As a result, it is clear that since the decisions by the U.S. Supreme Court and the S.C. Supreme Court referencing the ABA guidelines, the U.S. Supreme Court has made clear that the mere fact that an attorney did not follow the ABA Guidelines in general or specific ABA Guidelines does not mean counsel’s performance was deficient in performing a mitigation investigation in a capital case. *Pinholster*; *Van Hook*; *Strickland*.

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

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

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

At the PCR hearing, Mahdi called several aunts and 1 uncle to testify to Mahdi's background and that of his family. Mahdi also offered the affidavit of another aunt. He offered the testimony of 2 community witnesses and the affidavits of 2 community witnesses on the same issue. Mahdi contends counsel was deficient in failing to call these family members and community witnesses at sentencing, and he alleges he was prejudiced by this alleged deficient performance. At PCR, Mahdi called the following family members as mitigation witnesses: Carson Burwell (a paternal uncle), Rose Gupton (a maternal aunt), Sophie Gee (a maternal aunt), and Lawanda Burwell (a paternal aunt and Carson's wife). Mahdi also offered the affidavit of Sandra Burwell (a paternal aunt). Mahdi also called a community activist, George Smith, and Virginia Pond, another member of Mahdi's community. Mahdi also offered affidavits from James Woodley and Douglas Pond, 2 more members of Mahdi's community.

Carson Burwell testified as follows. His brother, Shareef Mahdi [Mahdi's father], was an unwanted child who also experienced problems when attending integrated schools, and eventually converted to Islam and changed his name from Thomas Burwell to Shareef Mahdi. Mahdi's father and mother's marriage was an arranged marriage, and Mahdi's mother left Mahdi's father when Mahdi was a small child leaving Mahdi and his brother with Mahdi's father. Mahdi's father

lacked supervision and parenting skills, and Mahdi's father was unable to hold a job. Carson and his wife, Lawanda, attempted to help Mahdi by taking him into their home when he was age 8. Mahdi could not read, and Carson taught Mahdi how to read. Mahdi made a false accusation of child abuse against Carson's wife, and Carson and Lawanda were almost arrested based on this accusation. Mahdi also asked the responding police officer for his pistol so he could kill himself, which resulted in Mahdi's commitment to the Walter Carter Center [a psychiatric center] at age 9. Carson testified to Mahdi's manipulative behavior in Carson's home both before and after the commitment to the Carter Center, and Mahdi's misbehavior while in the Carter Center. He testified to Mahdi's disruptive behavior at school after being released from the Carter Center and after Mahdi found out his brother had re-united with their father, which forced Carson and Lawanda to return Mahdi to live with his father. Carson also testified to Mahdi's being asked to leave his uncle Nathan's home as an adult because Mahdi would not abide by the rules of that home. Finally, Carson testified he could not recall ever meeting with any defense attorneys or mitigation investigators from S.C. prior to trial, and if they had asked him to appear as a witness he would have and asked the Court to spare Mahdi's life. **(PCR. 21-77).**

Rose Gupton, a maternal aunt, testified she was 1 of 10 children, and her sister, Mahdi's mother, was very timid and withdrawn because of verbal abuse by their father. Gupton's mother converted to Islam after separating from Gupton's father [Mahdi's maternal grandfather]. Mahdi's mother and father's marriage was an arranged marriage, which Mahdi's mother did not really want. Mahdi's mother was 17 when she married Mahdi's father. Gupton claimed

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

Sophie Gee, a maternal aunt, testified she is a registered nurse and is 1 of 10 children. Mahdi's maternal grandfather was verbally abusive to Mahdi's mother. Mahdi's mother was shy and withdrawn. Gee's mother and 4 of her siblings converted to Islam, which was restrictive regarding clothing and socialization. She was not allowed to date and neither was her sister, Mahdi's mother, but she recalled 2 teenage friends Mahdi's mother had while growing up. Mahdi's mother was 17 when she married Mahdi's father. Mahdi's mother interacted with her family the same when married as before. Mahdi's mother is an introvert and doesn't like

socializing. Mahdi's mother was very protective of her children, dressed them in all white, and was afraid to let them play when they were small because they would get dirty. Mahdi's mother lived with Gee for a time after she left Mahdi's father. She did not want to leave her children, but Mahdi's father threatened her life. Mahdi's mother left Mahdi's father because he was physically abusive and controlling. Mahdi's mother tried to maintain contact with the boys and sent toys and clothes, but Mahdi's father would not let her see them. Gee did not think Mahdi's father was stable. Gee saw the boys again when they were about 17, and Mahdi wanted to meet his mother. She claimed Mahdi thought his mother was dead. Gee admitted she and her sister Corlis Artis were interviewed by Mahdi's defense team prior to trial. Gee claimed had she been asked to testify she would have. She stated she loved Mahdi and would have asked the judge to spare his life. Gee admitted she was aware Mahdi slashed his mother's tires after reuniting and living with her; he slashed her tires because she would not let him use the car, and he was arrested for this crime. Gee stated this incident ended the relationship between Mahdi and his mother. Gee admitted she knew counsel's forensic social worker and mitigation investigator were in Virginia acting on Mahdi's behalf; she answered their questions, and there was nothing that prevented her from telling them any other information that might be helpful to Mahdi. **(PCR. 92-108).**

Lawanda Burwell, Carson's wife, testified to Mahdi's family background. She described Mahdi's paternal grandparents and how their marriage was not particularly a happy one. The paternal grandparents were both educators. Mahdi lived in a modular home with his father on his grandmother, Nancy's farm. Mahdi's grandmother received government subsidies from tobacco

allotments, and she owned a house in Lawrenceville and another on the family farm. There were 6 children by Mahdi's paternal grandparents. One child was a nutritionist in Texas, and one was a stewardess who had lived all over the U.S. Carson has master's degree in education, and Lawanda has a doctorate from Harvard. None of the other children or grandchildren have been involved in criminal conduct like Mahdi. Mahdi's brother, Saleem, was in the U.S. Army and served 2 tours in Afghanistan. Mahdi came to live with Lawanda and Carson because his father was unable to take care of the boys. Mahdi fabricated a claim of physical abuse against Lawanda and told a police officer he wanted to kill himself, which resulted in his being placed in the Carter Center. Mahdi had made similar statements in the past regarding shooting himself, but Lawanda did not believe he was suicidal. Lawanda was not impressed with the Carter Center. After Mahdi's release from there, he began to misbehave and eventually had to be returned to his father. Lawanda attributed this misbehavior to Mahdi's attempt to force his return to his father. She admitted she would have been reluctant to testify at trial, because she had not seen Mahdi since he was a small child but claimed she probably would have come around and testified as she did at PCR. (PCR. 239-95).

Sandra Burwell submitted an affidavit. She averred she was previously married to Nathan Burwell, Mahdi's paternal uncle. Mahdi's family was highly regarded in the black community in Lawrenceville, VA. Mahdi's great grandfather was caucasian. While Mahdi's grandmother Nancy could be "snooty" and put on airs, his grandfather Nathan was a sweet man. After finishing the day teaching agriculture, Nathan would visit and help black-owned Brunswick

County farmers and consequently was rarely home to spend time with his children. The grandfather's 1st marriage ended when his wife and child died in childbirth. He then married Mahdi's grandmother after getting her pregnant and being forced to marry her. All of the Burwell children are intelligent and well-educated; however, none of the men have accomplished much on their own. According to Sandra, the men in the family were supported by their spouses, as she did Nathan. Mahdi's father is Nathan's brother. His problems started when he was forced to attend an all-white school when integration was voluntary. She recalled an incident in high-school when Mahdi's father stood up for himself and other black students, but Mahdi's grandparents and the black community did not support him because of possible repercussions, even though he was in the right. Mahdi's father then went to live with a paternal uncle and aunt in New Jersey but had to leave because of his behavior. Not long after, Mahdi's father joined the Marines. When he returned from service, he joined the Nation of Islam and married Mahdi's mother. He brought Mahdi's mother to Lawrenceville and moved in with his parents. They lived in the 1 bedroom finished basement. Mahdi's mother would come upstairs basically to eat. Mahdi's mother was very timid and difficult to engage in conversation. Mahdi's father was very domineering with her. While Mahdi's mother never spoke of any unhappiness, Sandra believed Mahdi's mother was making moves to provide her a way out of her situation. She finished high school/got her GED. She then gave birth to Mahdi. She enrolled in a nursing program in a junior college. After completing it, she convinced Mahdi's father, who had no job, the best plan would be for her to join the military. When she came home, she informed him she wanted a divorce and had only

returned for the children. Mahdi's father would not allow this, and, according to Sandra, ultimately tried to kill Mahdi's mother with the sons watching. Mahdi's father constantly told Mahdi and Saleem that their mother abandoned them and didn't love them. Sandra also recalled when Mahdi was first sent to jail as a juvenile, she was in the courtroom, and after being released, Mahdi was to report to his probation officer. He did not report. She alleged he was a juvenile and had no way of getting there, and he was under his father's custody. When he did not report, he was picked up and the standoff with police occurred. She feels the failure to report was not his fault. She wanted to visit Mahdi when he was confined, but Mahdi's father had to approve visitors and would not allow her to visit. She felt so bad for Mahdi she even considered adopting him, though she never did. **(Affidavit of Sandra Burwell).**

At PCR, Mahdi also presented the testimony of a community activist George Smith, an affidavit of James Woodley, an affidavit of Vernon Pond, and the testimony of Sharon Pond, who all testified to Mahdi's father's behavior in the community. Both Smith and Pond testified to an incident where Mahdi's father jumped into a segregated [all white] swimming pool and would not leave in protest. He was arrested and began throwing items at the jail. As a result, he was sent for a mental evaluation. The evaluation eventually determined Mahdi's father had no major mental illness. Mr. Woodley averred to Mahdi's father's conversion to Islam, his defiant behavior in the community, and his physically abusive behavior toward his wife and his mother. **(PCR. 166-86, & Affidavits of James Woodley and Vernon Pond).**

Counsels' Mitigation Investigation

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

The record shows counsel (Mr. Grant and Mr. Walters) retained a mitigation investigator (Paige Tarr Haas Munn), a forensic social worker (Marjorie Hammock), and a private investigator (James Gordon), to investigate and develop Mahdi's family and social history for mitigation evidence to be presented at sentencing. Counsel also retained 2 psychiatric or psychological experts, Dr. Thomas Martin (a forensic psychiatrist) and Dr. Geoffrey McKee (a forensic psychologist), to investigate Mahdi's psychiatric history and mentality at the time of the crime *and* uncover any mental deficiencies or disorders that would mitigate punishment. **(PCR. 503-710)**. The record shows the mitigation investigator and forensic social worker interviewed numerous members of Mahdi's family, and counsel also interviewed potential mitigation witnesses themselves. **(R. 1746-47, PCR. 503-710)**. Counsel and the investigators also consulted with Mahdi's N.C. defense team [on the Boggs' murder] and obtained from them mitigation evidence or information they had uncovered. **(PCR. 503-710)**. Counsel also moved for and obtained a continuance for almost 1 year in order to completely and thoroughly investigate and develop the mitigation case on Mahdi's behalf. **(PCR. 597-98, Resp. Ex. 16[Continuance Motion], Resp.**

Ex. 17[Continuance Order]).

Ms. Tarr Haas Munn (hereinafter “Tarr”), the mitigation investigator, was retained by attorney Carl Grant on the recommendation of Jeff Bloom, an experienced capital defense attorney. **(PCR. 589)**. She had previously served as mitigation investigator or specialist in 30 to 40 capital cases. **(PCR. 562-63)**. As a result, she was thoroughly familiar with the necessity of, and how to conduct a capital mitigation investigation. Tarr investigated Mahdi’s social, family, school, institutional, and mental health history by interviewing Mahdi, his father, mother, grandmother, paternal uncle Carson, paternal aunt Lawanda, paternal aunt Kathy Burwell, maternal aunt Sophie Gee, maternal aunt Corlis Artis, paternal uncle Nathan, and school officials, and by obtaining records of Mahdi’s background including his DJJ records, his school records, and his records of commitment to a psychiatric facility (the Walter Carter Center) in Baltimore at age 9. **(PCR. 563-75; Resp. Ex. 12)**. Tarr also summarized these particular psychiatric records for counsel and their retained experts. **(PCR. 565-66)**. Tarr also summarized Mahdi’s school records for counsel and the retained experts. Tarr also traveled to N.C. and met with Mahdi’s attorneys representing him on the Boggs’ murder; because, they had conducted a mitigation investigation themselves on Mahdi’s behalf, and their information was shared with Tarr. **(PCR. 569-75, Resp. Ex. 12)**.¹⁷ Tarr also traveled to Lawrenceville, VA and made contact with Mahdi’s grandmother Nancy and uncle Nathan, and traveled to Baltimore, MD and made contact with Mahdi’s aunt Lawanda, uncle Carson, and aunt Kathy. Tarr also located Mahdi’s maternal aunts Corliss Artis and Sophie Gee in Richmond, VA. Tarr also located Mahdi’s mother Vera. Tarr also attempted

¹⁷Mahdi’s N.C. defense attorneys were present at the PCR evidentiary hearing and did not contradict this testimony.

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

The record shows Marjorie Hammock, a forensic social worker, retained by Carl Grant, had previously worked as a forensic social worker in numerous capital cases in several states including S.C. At the time of sentencing, Hammock had testified and been qualified as an expert in clinical social work in approximately 14 cases, worked on 25 capital cases, and, was working on another 5 capital cases, here, in Florida, and Alabama. **(R. 1739-63)**. Hammock traveled with Tarr on the 2nd occasion to Lawrenceville, to meet with Mahdi's paternal grandmother Nancy and uncle Nathan. She interviewed both. Hammock also traveled to Richmond and attempted to speak in person with Mahdi's mother, who was not cooperative, and was finally able to speak with her but only by phone. Hammock also interviewed a family friend. She also interviewed Mahdi's maternal aunts Sophie Gee and Corlis Artis. She also traveled to Baltimore where she met and interviewed Mahdi's uncle and aunt, Carson and Lawanda Burwell. She also interviewed

Mahdi's father, Shareef Mahdi, while in Philadelphia, PA. **(R. 1739-63, PCR. 563-75).**

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

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

Counsel also talked with Mahdi's uncle Carson and aunt Lawanda. While Carson and Lawanda were cooperative in providing background information on Mahdi and his family, Carson informed counsel he would not be helpful to Mahdi if he testified in the case. Carson informed counsel Mahdi was defiant and manipulative in their home. Counsel testified Carson and Lawanda's position was they were glad Mahdi was out of their home. Carson also told counsel he

¹³Ms. Tarr also related to this Court that Mahdi's uncle Nathan was not helpful in the mitigation investigation. **(PCR. 576).**

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

Both Dr. Martin and Dr. McKee, counsel's psychiatric and psychological experts, also took a social history from Mahdi, and also a psychiatric history. Both Martin and McKee were aware of Mahdi's commitment to a psychiatric facility when he was age 9 and reviewed those records in detail. Dr. Martin also reviewed Tarr's interview summaries with Mahdi's family members. Both experts were also aware Mahdi had been placed in special education classes in elementary school. Both Martin and McKee were present at defense team meetings where

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

information was shared regarding the joint investigation into Mahdi's past. Both Dr. Martin and Dr. McKee found separately that Mahdi was not suffering from any major mental illness at the time he committed Myers' murder, and they diagnosed him with anti-social personality disorder at the time of this murder. While Dr. Martin testified he found Mahdi had suffered from some recurrent depression in his life, he did not find any evidence Mahdi was suffering from any depression at the time he committed Myers' murder. Dr. Martin testified at the PCR hearing the records introduced by Mahdi at PCR would not change his diagnosis. Dr. McKee testified at the PCR hearing he did not need additional records to make his diagnosis or issue his report. Neither Dr. Martin nor Dr. McKee changed their diagnosis based on records shown them by applicant at PCR. (PCR. 508-61).

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

The Mitigation Presentation at Sentencing

Marjorie Hammock conducted a bio-social assessment of Mahdi's life and family history and presented the same in the sentencing proceeding. **(R. 1739-63)**. Hammock informed Judge Newman she interviewed Madhi's grandmother Nancy, his uncle Carson, his uncle Nathan, his aunt Lawanda, his mother Vera Telea Artis, his aunt Sophie Gee, another aunt Corliss Artis, Mahdi's father Shareef, and a family friend. **(R. 1746-47)**. She conducted her bio-social assessment by interviewing family members, reviewing records, interviewing Mahdi, and taking information from anyone who would give information about him, his life, and his development. **(R. 1762)**. She also reviewed a synopsis of Madhi's school records and reviewed a report from his admission in Baltimore to the Walter Carter Center psychiatric facility at age 9. **(R. 1747)**. Hammock presented, through her testimony and the exhibits introduced through her, the following mitigation evidence at sentencing before Judge Newman:

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

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

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

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

Mahdi's father's involvement in the 8 hour stand-off with police.

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

Mahdi's parent's marriage was a pre-arranged marriage to which Mahdi's mother did not agree, and Mahdi's father was much older at the time of the marriage than Mahdi's mother, who was just 16. (R. 1751). The marriage was arranged by Mahdi's maternal grandmother, and Mahdi's father was 27 at the time. (Def. Ex. 2). Mahdi's mother had no choice but to join the marriage, and there was conflict in the marriage from its beginning. (R. 1751). After the wedding, Mahdi's father changed Mahdi's mother's birth name, Vera, to Tilea. (Def. Ex. 2). Mahdi's father was physically abusive to Mahdi's mother, and Mahdi's mother eventually left to escape from the abuse. (R. 1751). Mahdi's mother was in what she described *and others described* as an abusive relationship, with Mahdi's father, and she decided to leave because she could no longer stay with Mahdi's father even though it meant leaving her own children. (R. 1757).

Mahdi's childhood was chaotic. (R. 1751). Mahdi's brother and Mahdi were born into a

very unstable family. (R. 1751). The 2 boys were born within a 24 month period of time. (R. 1757). Mahdi's father could not provide for or take care of the family. (R. 1751). The family moved several times, ultimately ending up back in Lawrenceville living with Mahdi's grandmother. Once again, Mahdi's father was unable to sustain himself. (R. 1751).

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

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

Judge Newman was aware of the incident described by family members at PCR where Mahdi's father forced Mahdi's mother to return to Lawrenceville and assaulted her. (R. 1752). After Mahdi's mother left to escape from the abuse, she was literally forced to return from

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

Ultimately, Mahdi's father was unable to take care of Mahdi at all. **(R. 1753)**. Mahdi's father suffered from depression. **(Def. Ex. 2)**. At this point in time, when he was age 8, Mahdi is sent to live with his aunt and uncle in Baltimore, and his brother was sent to live with another aunt in Texas. **(R. 1753)**. As a result, Mahdi and his brother were separated from each other, and from their father. **(R. 1753, Def. Ex. 2)**.

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

Mahdi was hospitalized, psychiatrically, in Baltimore. **(R. 1747-49, 1756)**. This admission lasted approximately 2 months at a mental health facility, and Mahdi was released. **(R. 1756)**.²⁰ Mahdi was committed involuntarily to the Walter Carter Center psychiatric facility, after being

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

separated from his brother and father, where he was diagnosed with Major Depression with suicidal ideation, adjustment disorder, R/O Adjustment Disorder, Developmental Reading Disorder, and history of right arm and leg fractures.²¹ **(Def. Ex. 1)**. Mahdi spent 60 days in the facility. After Mahdi was released from the mental health facility, he stayed only a short time with Carson and Lawanda, because he was anxious to be reunited with his father and brother. **(R. 1756)**. Mahdi's behavior in Carson and Lawanda's home was defiant and became even more defiant when Mahdi learned his brother had already re-united with his father. As a result, Mahdi had to be returned to live with his father. **(Def. Ex. 2)**.

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

Mahdi's education was disrupted many times. **(R. 1752, 1756)**. This was reflected in the school records. **(R. 1752)**. The records also noted lateness and absences, but this was not consistent through the whole record. **(R. 1756)**. Mahdi also had to change residences several times. **(Def. Ex. 2)**. Mahdi was forced to change elementary schools 5 times. **(Def. Ex. 3)**.²²

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

²² Mahdi started out kindergarten at Sister Clara Muhammad School in Richmond, and he completed part of kindergarten at Totoro Elementary School in Lawrenceville. He was moved back to Richmond and attended

Even in his pre-teen years there was a lack of stability in terms of Mahdi's attending school, and it was reflected in the kinds of reports he received. **(R. 1760-61)**.

Mahdi constantly had difficulty in school academically. **(R. 1752)**. He was considered bright, but did not perform well. **(R. 1752-53)**. He was a particularly poor reader. **(R. 1753)**. Both Carson and Lawanda reported Mahdi had difficulty in school, could not read, and there was constant conflict in getting Mahdi to deal with his academic limitations. **(R. 1753-54)**. The school records during this time were consistent with this report. **(R. 1754)**. Mahdi had uneven skills in school. **(R. 1755)**. He was in the average math program, but in the below average reading program. **(R. 1755)**. While he excelled in science, his reading, vocabulary, and spelling remained below average. **(R. 1756)**. When he was involuntarily committed to the Carter Center, Mahdi's initial diagnosis included "Developmental Reading Disorder." **(Def. Ex. 2)**. Mahdi's difficulties in reading and writing remained at or below grade level throughout elementary school. **(R. 1755, Def. Ex. 3)**. Mahdi needed improvement in a number of areas, including standards for behavior and showing respect for authority. **(R. 1755)**. And, Mahdi had poor self-esteem throughout his academic time. **(R. 1753)**. It was noted several places in the records Mahdi had poor self-esteem and had difficulty in relationships with others. **(R. 1756)**. Mahdi had numerous absences in school, and Mahdi's father removed him from school in the 5th grade to home school him; however, there was no information the home schooling actually occurred. **(Def. Ex. 3)**. In summary, Mahdi's educational history was one of poor school progress. **(R. 1762)**.

Mahdi did not receive proper parenting while growing up. **(R. 1759)**. Mahdi's father was

Chamberlayne Elementary School for part of that year. Then he was removed from there and sent to Baltimore where he attended Scotts Branch Elementary School for 2 years. Then he was removed from that school while in the Carter Center, and ultimately returned to Lawrenceville to live with his father. **(R. 1754-56)**.

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

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

During her investigation of Mahdi's life, Hammock assessed whether certain risk factors were present or not. She testified before Judge Newman certain risk factors were present.

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

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

Furthermore, while the State introduced portions of Mahdi's DJJ records during sentencing as evidence of Mahdi's character, the records also confirmed much of what Hammock testified to before Judge Newman regarding Mahdi's upbringing and family. The records indicated Mahdi lacked appropriate parental discipline and support, and he was not supervised as a child or given appropriate structure and guidelines. **(State's Ex. 85 & See R. 1440, 1442, 1869-70, 1873-74)**. Mahdi began smoking marijuana at age 12, had been smoking marijuana every day since, and he began selling crack cocaine at age 14. **(R. 1440)**. Mahdi needed self-esteem training, family services, and values clarification. Mahdi suffered from the lack of a mother. **(R. 1446)**. Mahdi's father was not involved in his life; his father had a criminal record for malicious damage to property and escape; Mahdi had no supervision, no curfew, and Mahdi's father did not care about

Mahdi's criminal behavior. (R. 1869-70, 73-74). Mahdi came from a dis-functional 1 parent family. Mahdi's father believed the criminal justice system was prejudiced, and he also voiced his belief there were many white supremacists in the area. (R. 2146). And, a young Mahdi also made similar racial comments. (R. 2154).

The Lack of Merit of this Allegation

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

This Court viewed the witnesses in this case, listened to their testimony, observed their demeanor, and judged their credibility accordingly. This Court finds the testimony of counsel

and their defense team on this allegation *to be credible* and the present testimony of Mahdi's witnesses regarding their previous willingness to testify *to be not credible*. Accordingly, this Court finds Mahdi has failed to meet his burden of proof on this particular allegation, and has failed to show counsel was deficient. *Butler; Wiggins; Council*.

This Court does not find Carson Burwell's testimony credible regarding his willingness to come and testify on Mahdi's behalf at the time of sentencing for several reasons. First, Carson could not recall talking to any attorneys or investigators from S.C. prior to Mahdi's sentencing proceeding. The implication from his testimony was counsel and their investigators did not speak with him, and therefore, they were deficient in their mitigation investigation. However, the record clearly shows counsel's forensic social worker spoke to Carson before Mahdi's sentencing proceeding and obtained background information from him. The mitigation investigator also confirmed at PCR she spoke with Carson on more than 1 occasion. Tarr also confirmed Hammock traveled with her to Baltimore and interviewed Carson. Counsel also testified Carson was interviewed prior to trial. Additionally, at PCR, Tarr produced her notes which detailed exactly what Carson told her, that Mahdi was manipulative *and* the incident which led to Mahdi's commitment to the Carter Center was more of Mahdi's manipulative behavior, not a real suicide attempt. (PCR. 572-74). Counsel also testified they spoke with Carson prior to the sentencing, and Carson told them if he were called as a witness he would have bad things to say about Mahdi. Carson also informed them he and Lawanda, were not going to help Mahdi in his sentencing proceeding. (PCR. 618-20, 627-28, 649-50, 693-97). As a result, this Court finds Carson's

testimony regarding his willingness to come and testify at the time of sentencing is not credible.

Likewise, this Court does not find credible Carson's wife's testimony that even though she was reluctant to testify at the time of trial, she could have been coaxed into coming to S.C. to testify at sentencing. Again, counsel's mitigation investigator and social worker had met with Lawanda Burwell, and counsel also talked to her as well. Carson and Lawanda had indicated to counsel they did not want to be involved. Carson indicated to the N.C. defense team that when Mahdi lived with them he was a "demon." Carson and Lawanda had communicated to counsel they were glad Mahdi was out of their home. Carson admitted Mahdi was defiant and manipulative. Both Lawanda and Carson admitted Mahdi made a false claim of child abuse against Lawanda. This false claim of abuse also accompanied Mahdi's statement to the responding officer that led to his commitment to the Carter Center. Carson communicated to counsel prior to the sentencing hearing he and his wife Lawanda were not going to help Mahdi. As a result, this Court does not find credible Lawanda's claim, several years after sentencing, she could have been coaxed into coming to S.C. to testify on Mahdi's behalf even though she was admittedly reluctant to do so at the time.

Similarly, this Court does not find credible Rose Gupton's testimony she did not know about Mahdi's criminal charges for this murder or his trial until after he was sentenced to death. Counsel or their mitigation experts interviewed 2 of her sisters, Sophie Gee and Corliss Artis, regarding this very case, and Gupton testified she spoke with those sisters every day. This Court does not find credible her claim that if she had known about the sentencing proceeding she would

have testified, because her claim that she did not know about Mahdi's charges is simply not credible. Furthermore, counsel's credible testimony at PCR was that even Mahdi's aunts were not willing to assist in testifying. As a result, this Court finds that Mahdi's aunts and uncles were not willing to come to S.C. and testify on Mahdi's behalf in 2006.

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

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

resulting in their arrest. Mahdi had slashed his own mother's tires. Mahdi was involved in the destruction of another aunt's automobile.

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

Mahdi offered the testimony of 1 aunt by affidavit, therefore she was not subject to cross-examination about what she communicated to counsel prior to the sentencing proceeding and negative things she knew about Mahdi. One of Mahdi's relatives who did testify at PCR, Lawanda, admitted she would have been reluctant to testify at the time of sentencing. Counsel's credible testimony at PCR was Carson specifically told them if called to testify he would have bad things to say about Mahdi. Additionally, counsel testified Carson informed them he and his wife Lawanda would not be coming to S.C. to testify and help Mahdi, and Carson was speaking for both he and his wife. And, counsel testified Kathy Burwell informed them she did not want to be involved in Mahdi's sentencing proceeding either.

This Court finds counsel, its mitigation investigator, and forensic social worker attempted to develop live mitigation evidence witnesses from Mahdi's family but were unable to do so due to

the family members' reluctance and/or refusal to testify at the time of trial, or refusal or inability to testify in a helpful fashion. (PCR. 503-710). This Court further finds counsel and their investigators conducted a reasonable mitigation investigation, including talking with all of Mahdi's immediate family, and several members of his extended family, including several aunts and uncles, regarding Mahdi's family and social background. *Pinholster; Van Hook; Wiggins; Rompilla*.

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

Furthermore, if counsel did not present certain evidence Mahdi presented at PCR, there was an objectively reasonable strategic reason for not doing so. *Strickland; Council*. Mahdi presented several family members at the PCR hearing who were interviewed by Tarr, Hammock, and/or counsel prior to the sentencing proceeding, but not called before Judge Newman. Counsel testified that at the time of the sentencing proceeding these witnesses were not cooperative or were unwilling to testify at the sentencing proceeding. Further, counsel testified the witnesses related or their investigation uncovered the witnesses would say bad things about Mahdi. Carson Burwell related to Mahdi's N.C. defense team Mahdi "was a demon." This fact was established by a document generated by Tarr after meeting with the N.C. attorneys and shared with counsel in this case. **(PCR. 503-05, Resp. Ex. 7)**. Carson also related to counsel if he were called to testify he would have bad things to say about Mahdi. **(PCR. 618-19)**. Carson indicated Mahdi was manipulative and faked abuse and suicidal gestures. **(PCR. 572-74, 64)**. Both Lawanda and Carson admitted Mahdi almost had them arrested by police when he made a false claim of child abuse and manufactured false evidence of that abuse. **(PCR. 572-74, 58-61, 63-64, 266-67, 287-88, 290)**. They also related Mahdi acted out while at the Carter Center, and had to be placed in isolation. **(PCR. 66-67, 292)**. Carson also related to Tarr that Mahdi was manipulative. **(PCR. 572-74)**. Both Carson and Lawanda related Mahdi acted out after being released from the Carter Center and had to be returned to live with his father. **(PCR. 68-69, 293-94, 618-619)**. Both related Mahdi would only talk about suicide when he did not get his way or did something wrong. **(PCR. 572-74, 64-66, 288-89, 618-19)**. Carson also related the incident which led to Mahdi's

commitment to the Carter Center was more of Mahdi's manipulative behavior and was not a real suicide attempt. Lawanda also testified at PCR she did not believe Mahdi was actually suicidal and made similar statements in their home when he did not get his way or got in trouble. This testimony from Carson and Lawanda would have directly undercut the mitigation evidence presented before Judge Newman regarding Mahdi's commitment and diagnosis at the Carter Center. **(See Def. Ex. 2)**. Carson was also aware of an incident where Mahdi, his brother, and father were involved in maliciously destroying Carson's sister's car. **(PCR. 69)**. Carson and Lawanda also related that when Mahdi lived with his uncle Nathan as an adult, he could not abide by the rules of the home, and was forced to leave. **(PCR. 70, 278)**.

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

Counsel was not ineffective in failing to call witnesses from whom bad things could be elicited about Mahdi, or who indicated they were not going to be helpful to Mahdi. This Court finds it was an objectively reasonable trial strategy decision for counsel not to call Carson or Lawanda Burwell or Sophie Gee, who could be asked on cross-examination about instances of bad conduct by Mahdi and would have been required to answer truthfully to such questions. *Reed v.*

Florida Department of Corrections, 393 F.3d 1217 (11th Cir. 2010)(attorneys not ineffective in failing to call family members who would have opened the door to bad things about defendant's past); *Rutherford, supra* (attorneys' strategic decision not to call witnesses on alcoholism of defendant was objectively reasonable where it would have opened door to prior violent behavior of defendant the jury had not heard). *See Bell v. Kelly*, 260 Fed. App. 599 (4th Cir. 2008)(*Unpublished*)(state court's determination petitioner failed to prove prejudice was not unreasonable where he alleged counsel was ineffective for failing to investigate and present family members mitigation evidence where family members could have been cross-examined about defendant's prior bad conduct such as infidelity, abandonment of his children, wife, and girlfriend, domestic abuse, and failure to pay child support), *citing Barnes v. Thompson*, 58 F.3d 571 (1995)(counsel not ineffective in capital case in failing to offer family members who constituted "cross-purpose evidence."); *Moody v. Polk*, 408 F.3d 141, 154 (4th Cir. 2005)(to the extent affidavits presented new information, they were "double edged.").

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

educators, and 1 distant relative having graduated from Harvard. If Mahdi's family members had been called as witnesses, the State could have contrasted Mahdi's criminal history with other family members who were successful and did not engage in criminal conduct.

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

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

(b)The New Social Worker

At the PCR hearing, Mahdi called Nicholas Cooper-Lewter, Ph.D. who was qualified as an expert in clinical social work and psycho-social assessment, and who testified to his psychosocial assessment of Mahdi. (PCR. 187-89). In conducting the same, he testified he spoke with Carson and Lawanda Burwell, Frances Read, Rose Gupton, Sophia Gee, Sandra Burwell, Debra Gray, Pastor Myra Harris, Gerald Wilson, George Smith, and Sharon Pond, to name a few. (PCR. 190-91). Others were listed on the 2nd page of his report. Cooper-Lewter also indicated he reviewed 2 notebooks of documents provided by PCR counsel. He testified unlike a psychologist or psychiatrist, he does not do testing. (PCR. 193). As a social historian, he makes no diagnoses. He also consulted with deRossett Myers, Ph.D. and Donna Schwartz-Watts, M.D., 2 of Mahdi's PCR experts. (PCR. 193-94).

In Cooper-Lewter's opinion, Mahdi was born into a very fragile family with toxic relationships between husband and wife, and there were unpredictable repeated losses that would destabilize. He also saw an issue with Mahdi's relationship with his father, who had issues with depression and anger. According to Cooper Lewter, Mahdi's flawed father was Mahdi's role model and the person to whom he was most attached. (PCR. 194-95). Cooper-Lewter believed Mahdi's mother enjoyed Mahdi in the beginning. (PCR. 196). Mahdi's mother left him when he was around 4 or 5, and it was a traumatic experience for Mahdi. (PCR 196-97).

Cooper-Lewter believed Mahdi was not comforted by his father regarding his mother's abandonment; instead, he was exposed to physical violence in his father's home. (PCR. 197-98).

Cooper-Lewter indicated Mahdi attached to his father at a young age, which was not helpful. (PCR 199). Cooper-Lewter claimed Mahdi's father admitted he did not supervise his children as he should have and acknowledged he placed Mahdi in a situation where he was looking after his father and brother. (PCR. 200-201). According to Cooper-Lewter, when Mahdi was about age 8, he was both shocked and excited to discover his mother was alive. (PCR. 202). When Mahdi's father attempted to kidnap Mahdi's mother, Mahdi and his brother attempted to intervene. (PCR. 202-03). And, Mahdi was further traumatized when his mother left again. (PCR. 203). Cooper-Lewter testified Mahdi attended 5 different schools between pre-kindergarten and the 8th grade. (PCR. 204-05). And, it would have been difficult for Mahdi to connect with peers or teachers as a result of his frequent moves. (PCR. 207). According to Cooper-Lewter, Mahdi did not receive the type of intensive treatment he needed when he was at the Carter Center. (PCR. 208-09). He testified the documents from the Carter Center indicated Mahdi blamed himself for his family breaking up, and Mahdi wanted was his family back together. (PCR. 211-12). Mahdi was diagnosed with major depression recurrent with suicidal ideation; adjustment disorder and developmental reading disorder were both ruled out. (PCR. 212). Cooper-Lewter testified that while the records indicated that Mahdi never stopped looking for or wanting his mother, he did not know how to accomplish a reunion. (PCR. 218). Cooper-Lewter believed Mahdi did not have a lot of structure in his life, particularly between ages 5 and 8. (PCR. 219). In his opinion, after Mahdi was released from the Carter Center, there may have been some brief improvement in his behavior, but the same issues existing before would have re-emerged. (PCR. 220-21). The

structure and stability provided for Mahdi in Baltimore was not available when returned to his father's home. (PCR. 222-23). Cooper-Lewter noted it was a matter of months between Mahdi's return to his father and the Brunswick County School's assessment he should be enrolled in special education classes. (PCR. 224-25).

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

Cooper-Lewter noted when Mahdi went to DJJ, he was diagnosed with conduct disorder, which Cooper-Lewter alleged DJJ assessed was the result of incompetent parenting and lack of supervision. (PCR. 234-35). Two weeks lapsed between Mahdi's 1st stint in DJJ and his 2nd stint. (PCR. 299). Cooper-Lewter claimed the incident leading to Mahdi's 2nd stint in DJJ would have been a major betrayal because Mahdi's father blamed Mahdi for the standoff that led to his incarceration. (PCR. 300-01). Cooper-Lewter alleged Mahdi's mental status declined during his 2nd stint in DJJ, culminating in Mahdi threatening to commit suicide. (PCR. 302-07).

Cooper-Lewter contended Mahdi's mental state continued to decline. When Mahdi was released from DJJ at age 17, Cooper-Lewter argued Mahdi did not get better. (PCR. 308-09). Mahdi attempted to reconnect with his mother, but the attempt did not go well. (PCR. 309). Cooper-Lewter pointed to the fact Mahdi was incarcerated in adult prison within a month of his

release. (PCR. 309). Cooper-Lewter maintained Mahdi continued going downhill during his adult incarceration. (PCR. 309). Cooper-Lewter opined some of the incidents Mahdi witnessed in Wallens Ridge gave credence to the ideas Mahdi was taught by his father. (PCR. 309-11).

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

Cooper-Lewter acknowledged when Mahdi was in Virginia's DJJ, Mahdi had threatened to hurt others and act crazy if he was not released from DJJ on time. (PCR. 322-23). Cooper-Lewter also acknowledged Mahdi admitted he made 1 suicide threat because he wanted to go to special housing because he believed he would receive more recreational time there. (PCR.

324). He recalled Mahdi's aunt Lawanda stating Mahdi would say similar things [suicidal threats] in her home when he did not get his way. (PCR. 325-27). Similarly, Mahdi had informed personnel at the Carter Center he only wanted to hurt himself when he could not get his way. (PCR. 327). Cooper-Lewter also admitted Mahdi indicated to him he was embarrassed by his father's "rantings." (PCR. 331-32). He noted Mahdi indicated his father's rants would go on and on, and there was a point where Mahdi just stopped listening to his father. (PCR. 332).

The Lack of Merit of this Allegation

Mahdi alleges counsel should have called a different social worker, Cooper-Lewter, and related to Judge Newman what Cooper-Lewter related to this Court. However, Mahdi ignores counsel did retain and call a qualified forensic social worker who conducted a psycho-social assessment of Mahdi and interviewed Mahdi, Mahdi's immediately family, a family friend, and many members of Mahdi's extended family. As previously set forth above, Hammock testified in detail before Judge Newman to her psycho-social assessment, the problems in Mahdi's family including his father's difficulties in life, including depression, criminal arrests, inability to keep a job, inability to support the family, and inability to get along with the community and even with his own family. **(R. 1734-63 & Def. Ex. 2)**. She also testified to Mahdi's life of deprivation, including transience, lack of proper support, abandonment by his mother, witnessing domestic violence committed by his father on his mother and grandmother, lack of a proper male role model, poverty, and psychiatric commitment at the age of 9. **(R. 1734-63 & Def. Ex. 2)**. She also testified to the risk factors Mahdi was exposed to as a child and adolescent and how that affected

the rest of his life. (R. 1734-63). She also testified to Mahdi's numerous school disruptions, difficulties in school, and lack of any evidence Mahdi was home-schooled by his father. (R. 1734-63, Def. Ex. 2 & 3). The DJJ records introduced at sentencing also detailed Mahdi came from a dysfunctional 1 parent family; Mahdi was provided with no structure or guidelines as a child; Mahdi's father did not care about Mahdi's criminal behavior; Mahdi's father attributed his problems to white supremacists in the area, and Mahdi made similar statements as his father. Cooper-Lewter admitted at PCR this information was all before Judge Newman. (PCR. 328-40). This Court does not find counsel was deficient in failing to introduce the testimony of a different forensic social worker.

This Court finds Mahdi has failed to show deficient performance in failing to present the information presented by Cooper-Lewter because much of Cooper-Lewter's testimony was also testified to by Hammock and/or introduced through the exhibits during her testimony. *Simpson*, 367 S.C. at 605-07, 627 S.E.2d at 711-12 (counsel did in fact do adequate investigation and presented similar mitigation evidence); *Jones v. State*, (mitigation evidence presented at PCR was not that different from evidence presented at trial). Furthermore, the fact that one forensic social worker testified differently at PCR than the one who testified at sentencing, does not prove deficient performance of trial counsel. *Reed v. Florida Dept. of Corrections*, 593 F.3d 1219 (11th Cir. 2010)(fact that expert retained at trial and expert retained later at PCR differed, does not prove trial counsel was ineffective); *Davis v. Singletary*, 19 F.3d 1471, 1475 (11th Cir. 1997)("the mere fact that a defendant can find, years after the fact, a mental health expert who will testify favorably

for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial.”). Counsel is not required to expert shop. *See Poyner v. Murray*, 964 F.2d 1404, 1419 (4th Cir. 1992)(petitioner could not establish ineffective assistance because counsel did not “expert shop” until one could be found who would testify favorably). In order to show deficient performance, it was incumbent upon Mahdi to show that had counsel provided additional documents or information to their expert, Hammock, she would have come up with a different opinion or result in her psycho-social assessment. *Von Dohlen v. State*, 360 S.C. 598, 606-07, 602 S.E.2d 738, 742-43 (2004)(holding counsel was ineffective in failing to adequately prepare and present evidence in penalty phase defendant suffered from severe, chronic depression at the time of the murder given counsel failed to provide *their expert* witness with crucial medical records and related information which prevented *that witness* from conveying accurate diagnosis of defendant’s mental condition to the jury). Specifically, at PCR, Mahdi did not call Hammock and prove had she been provided with certain additional records or information, her opinion or the result of her psychosocial assessment would have been different. *Von Dohlen, supra.*²³ Hammock was simply not called at PCR. Mahdi had failed to meet his burden of proof on this issue. *Id.*; *Butler*.

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

Additionally, Cooper-Lewter's testimony was not all beneficial to Mahdi. If counsel had called Cooper-Lewter, the Solicitor would have impeached Cooper-Lewter or introduced many bad things about Mahdi as the State did at PCR. Cooper-Lewter specifically relied on Mahdi's DJJ records in forming his assessment. Mahdi committed over 40 disciplinary violations in the Virginia DJJ including assaulting a teacher; assaulting guards on numerous occasions; assaulting other inmates, leading an escape attempt, refusing to follow orders; refusing to be disciplined, cursing staff, and damaging and destroying property. Mahdi was diagnosed at DJJ with conduct disorder, a pre-cursor to anti-social personality disorder. Mahdi faked a suicide attempt at DJJ in order to manipulate the system to gain better conditions of confinement. Mahdi's aunt Lawanda informed Cooper-Lewter that in their home Mahdi would threaten to harm himself when he did not get his way. Mahdi also informed personnel at the Carter Center he only wanted to hurt himself when he did not get his way. Mahdi told Cooper-Lewter he never should have been placed in special education in elementary school, because he did not belong there. Cooper-Lewter basically agreed. Mahdi had numerous disciplinary violations within the Virginia adult DOC, including assaulting staff, setting fire to his cell, and possession of contraband. Mahdi's brother grew up in the same home as Mahdi, and Mahdi's brother did not commit violent criminal offenses against others. Mahdi held several different jobs during his life and even obtained college credits. And, Mahdi had never been physically or sexually abused by his father, mother, Uncle Carson, or Aunt Lawanda. **(PCR. 340-341).**

Cooper-Lewter was also impeached at the PCR hearing. He did not review any records on

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

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

(c)Dr. Haney

Craig Haney, Ph.D, who was qualified as an expert in social psychology with specific expertise in prison systems and the effects of incarceration on inmates, [and who is also an attorney] testified at PCR he reviewed Mahdi's school records, psychiatric records, DJJ records, and Virginia DOC records. (PCR. 362-63). Haney testified Mahdi was identified early as someone with a significant psychological/psychiatric disorder when he was diagnosed with depression at age 9 and treated as an inpatient at the Walter Carter Center. (PCR. 364-66). Haney opined there was no indication Mahdi was cured when released; instead, there was a recommendation he receive follow-up treatment or therapy, and according to Haney, Mahdi

received limited treatment and was not medicated. (PCR. 366-67). While Mahdi was in DJJ, he did receive some contact with therapists, but Haney believed that was in the context of the correctional institution whose primary purpose was not to provide therapy. (PCR 368). Haney *alleged* in Virginia's DJJ, Mahdi would have experienced victimization akin to what Mahdi saw when his father victimized his mother. (PCR. 370). Haney *asserted* the records indicated Mahdi projected a tough exterior as a defense to avoid being victimized by others in the institution. (PCR. 371-72). According to Haney, Mahdi's inability to deal with his anger resulted in a record replete with incidents of impulsive acting out, though some of his actions were done out of stupidity. (PCR. 373). Haney opined Mahdi's problems were deeper than DJJ understood them, and in light of the fact the problems Mahdi had in his 1st stint were reoccurring in his 2nd stint, DJJ should have considered using a different approach in handling his problems. (PCR. 378-79). Haney contended Mahdi was released from this 2nd stint with a record arguably indicating his behavior was getting worse, and in Haney's opinion, Mahdi left DJJ with many of the same problems he had when entering the system. (PCR. 377-80). Haney agreed some of the records indicated Mahdi's expression of suicidal thoughts could be viewed as attempts to manipulate his situation, but Haney alleged it was not inconsistent for someone to express suicidal thoughts and be manipulative. (PCR. 374-75).²⁴ Haney agreed Mahdi began acting out after his release from the Carter Center when he learned his brother was living with his father. (PCR. 398). He understood Lawanda Burwell as stating Madhi had said "why don't you shoot me" or "just shoot me" on a number of occasions, but Haney was not sure what that meant. (PCR. 399). Haney noted in Mahdi's stint

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

in Virginia's adult prisons, he had almost no psychological or psychiatric contact and characterized the overwhelming majority of Mahdi's infractions leading to his placement in Virginia's super-max as relatively minor. (PCR. 381-82). In reviewing the records from Wallens Ridge, Haney alleged Mahdi's pattern of behavior of acting out in irrational and impulsive ways evident in DJJ records continued. (PCR. 391). Haney claimed a connection between those actions and Mahdi's alleged underlying, untreated, psychological issues. (PCR. 392). Haney contended the overwhelming majority of offenses for which Mahdi was written up were impulsive, and Haney claimed Mahdi was *not one who devised elaborate plans or victimized others*. (PCR. 393). Haney alleged none of Mahdi's alleged lifelong mental health issues were addressed while he was in adult prison, and no effort was made by the prison system to ease Mahdi's transition to society. (PCR. 393-94). Haney did recall extensive testing was done on Mahdi when he entered DJJ, and DJJ recommended he be placed in an anger management program. (PCR. 400-01). Haney admitted Mahdi was kicked out of the anger management program. (PCR. 401). Haney also admitted Mahdi did have periodic visits with 1 or 2 different psychologists while he was in DJJ. (PCR. 401-02). Haney also acknowledged he was aware a psychologist diagnosed Mahdi with intermittent explosive disorder and antisocial personality disorder when admitted to the Virginia DOC. (PCR. 395). Haney testified he only examined Mahdi's institutional history. He did not examine Mahdi's employment history. (PCR. 410-11). While he talked with Mahdi, Haney did not discuss anything occurring after Wallens Ridge with him. Thus, he was not aware of what exactly may have influenced Mahdi when these present

crimes were committed. (PCR. 403-05). Haney admitted he had not seen any of Mahdi's prison records from S.C. (PCR. 402). Haney admitted Mahdi has a high I.Q. (PCR. 403). Haney contended Mahdi's prior untreated problems led him to engage in a lot of irrational, immature, and impulsive things he should not have done. (PCR. 407-09). Haney asserted Mahdi's choices were impaired by virtue of the experiences preceding them. (PCR. 408).

The Lack of Merit of this Allegation

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

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

The sentencing Court was aware Mahdi was committed to the Carter Center after being

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

The record shows the following. Mahdi stole items from victims because he wanted to and did not think he would get caught. Mahdi stabbed Moises Rivera because Rivera caught him breaking into an apartment as an adult. Mahdi murdered drug dealers in Virginia to create a false drought so he could make more money selling drugs. Mahdi burglarized a home in Lawrenceville so he could steal a gun. Mahdi stole a license plate and a car to leave Virginia because police were closing in on him for 1 of the homicides he committed there. Mahdi murdered Christopher Boggs to rob the Exxon in Winston-Salem. Mahdi car-jacked a car in Columbia, S.C. because his other car, the one stolen in Virginia, had broken down. Mahdi murdered Captain Myers because Mahdi had burglarized Myers' shed, and Myers came in on Mahdi inside the shed. Mahdi attempted to burn Myers' body to destroy evidence. And, Mahdi stole Myers' truck to escape from S.C. The record shows Mahdi is willing to commit crimes and committed crimes if necessary for his own personal benefit.

Nor does this Court accept Haney's testimony Mahdi is just an impulsive actor and does not victimize others. Mahdi's Virginia DJJ and DOC records show without question he is a

person who victimizes others and manipulates the system for his own benefit. Mahdi repeatedly assaulted guards in both DJJ and adult prisons in Virginia. Mahdi almost killed Moises Rivera. Further, Mahdi's records from the S.C. DOC, which Dr. Haney did not review, show Mahdi has repeatedly assaulted guards and threatened to assault guards. Additionally, Mahdi's conduct in murdering Christopher Boggs in N.C. shows his plan was to murder Boggs simply so he could rob the store's cash register. And, counsels' testimony, along with that of Dr. Martin and Dr. McKee at PCR, shows Mahdi plans out criminal behavior when necessary to benefit himself. As a result, this Court does not accept Haney's testimony as credible on this point and so finds.

Nor does this Court accept Haney's testimony Mahdi's incarceration in DJJ and in adult prison led to his later criminal conduct. Haney misses the point. The elephant in the courtroom is Mahdi's bad character and characteristics that led him to be confined, and which led him to be confined in the institutions in which he was confined. And, when released from confinement, Mahdi did not change his conduct so he would not go back to a harsh prison environment but committed even more and more violent offenses. Mahdi was not confined after his first brush with the law. He was arrested at age 14 after breaking into a car, stealing a purse, and escaping from police custody. Mahdi admitted to DJJ staff he had no problem in stealing and felt no remorse about it. He was placed on *juvenile probation* for this offense. **(PCR. 342-343, Va. DJJ Records)**. Mahdi did not adjust his behavior. He broke into 2 homes and stole firearms, one a .44 magnum pistol. As a result, he was confined at Virginia's DJJ. While there, Madhi led a pre-meditated assault on another inmate, in which he enlisted the support of other juveniles,

resulting in this inmate's injury and medical treatment. While there, Mahdi complained he should not be confined at all because he did not have a lengthy record. Mahdi admitted 1 of his strengths was robbing people. During this confinement, Mahdi engaged in other disruptive behavior and committed other disciplinary violations. After his release from DJJ, Mahdi was confined again after engaging in an 8 hour standoff with police. During this incident, Mahdi was heard to say "them mother-fuckers' got guns" and "I'm going to kill a police officer before I die." While Mahdi attempts to blame his father for this stand-off, Mahdi could have walked out of his home at any time during the standoff. When the stand-off ended, police found Mahdi in a back room of the house watching television. He was recommitted to DJJ for obstruction of justice and contempt of court. While incarcerated this 2nd time, Mahdi assaulted other inmates, destroyed property, assaulted staff, threatened staff, and generally refused to follow orders or comply with discipline. Mahdi threatened if he was not released from DJJ on time (i.e. when he expected to be released), he would "go around acting crazy" and assaulting people. True to his word, Mahdi fashioned a sheet into a noose and tied it around his neck, causing him to be placed on suicide watch. Later, Mahdi admitted to a staff counselor this suicide attempt was not genuine, and he only wanted better living conditions, specifically more recreation time, and was attempting to manipulate the system by the suicidal gesture. After this incident, Mahdi incurred other disciplinary violations, including an assault.

Mahdi was eventually released from DJJ. Rather than maintaining good behavior so he would not to return to prison, he slashed his mother's tires either because she would not come to

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

After being released from Wallens' Ridge, Mahdi did not change his behavior so he would not go back to a harsh prison environment. He initially lived with his uncle and grandmother, but would not live by the rules of the home and was asked to leave. Rather than obeying the law, Mahdi engaged in numerous criminal acts while on supervised probation knowing they could result in revocation of probation and return to prison. Mahdi possessed a 9 mm handgun, sold drugs, and was involved in the murder of a drug dealer. Mahdi told Dr. Martin he was involved in another murder in which police had yet to discover the body. Mahdi burglarized the home of Amanda Weaver and stole a .380 pistol, which he was not supposed to have under the conditions of his probation. He stole a car and a license plate and left the State of Virginia because detectives were closing in on him for 1 homicide. Under his probation, Mahdi was not supposed to leave Virginia. Shortly thereafter, Mahdi murdered Christopher Boggs in

N.C. so he could rob the store's cash register. He then drove to S.C., car-jacked a vehicle in Columbia, and attempted to pass a stolen credit card in Calhoun County. Mahdi then burglarized Myers' shed, murdered Myers, and stole Myers' truck and firearms and drove to Florida. While there, he impersonated a police officer and fled from police in Myers' police issued truck.

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

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

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

April 11, 1999 by hitting the victim in the head with a broom. Mahdi had 12 major institutional violations and 12 moderate violations while at Culpepper Juvenile Institution. Mahdi had anger management training in DJJ but did not practice what he learned. Mahdi committed several assaults on guards in DJJ including punching a guard in the face on September 29, 1999, assaulting a staff person on November 18, 1999, and another staff person on December 5, 1999. Mahdi also threatened to assault individuals on several occasions while a juvenile. Mahdi stabbed Moises Rivera multiple times. The record shows Mahdi was violent even at a young age. This Court finds Haney's testimony is not credible on this issue.

Nor does this Court accept Haney's theory Mahdi's incarceration caused him to commit crimes. Mahdi engaged in criminal behavior before ever being incarcerated. He had no remorse for stealing even as a juvenile. After being released from Wallens' Ridge, Madhi began to sell drugs and bragged to his grandmother's neighbor about his drug dealing. He also bragged he was going to kill drug dealers. The evidence produced at PCR shows he did exactly that, becoming involved in the murder of 2 drug dealers in Virginia.

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

juvenile and his assaultive and predatory behavior while in juvenile and adult prisons.

(d) Drs. Schwartz-Watts' and Myers' testimony

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

Dr. Donna Schwartz-Watts, a psychiatry expert, testified at PCR she reviewed 2 notebooks of records, transcripts of Mahdi's prior hearings, and records from Dr. McKee. (PCR. 458-60). She interviewed Mahdi 3 times; however, Mahdi did not trust her or provide her much information. (PCR. 460, 478). She obtained more information regarding Mahdi's thought process after he left Wallens Ridge from Dr. Martin's and Dr. McKee's notes. (PCR. 478-80). Schwartz-Watts diagnosed Mahdi as suffering from major depression, anxiety disorder, paranoid personality disorder, reactive attachment disorder, and antisocial personality disorder. (PCR. 460-61). She opined the depression was in remission at the PCR hearing. (PCR. 462). She alleged Mahdi's depression went into remission between the times she spoke with him. She opined Mahdi was suffering from these diagnoses when he went on the crime spree that included the murder of Myers. (PCR. 468-71). She also disagreed with the Virginia DOC's diagnosis Mahdi met the criteria for intermittent explosive disorder. (PCR. 473). Contradicting Dr. Haney, she stated Mahdi was not an impulsive person by nature. (PCR. 473).

²⁵Dr. Schwartz-Watts evaluated Mahdi beginning approximately 1 year before the merits hearing in this case. She issued her report approximately 3 days before the merits hearing. Absent from her report is any discussion of the crimes against Captain Myers, Christopher Boggs, or the drug dealer in Virginia and how Mahdi's alleged mental illnesses could have caused Mahdi to commit any of these crimes.

Schwartz-Watts testified reactive attachment disorder was a very rare disorder not seen in a lot of adults. (PCR. 463). She opined Mahdi suffered from the inhibited type of attachment disorder, noting the records indicate Mahdi was typically described as being detached. (PCR. 463). She noted the reactive attachment disorder would have been the result of numerous disruptions in relationships he had in his childhood. (PCR. 464). There was little stability in his early life. Mahdi's mother left when he was young; his father had some mental illness, was available to Mahdi only at times; Mahdi lived with his aunt and uncle for some time; and, he moved 6 times in that period. (PCR. 464-65).

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

Schwartz-Watts did not ask Mahdi about the murder in N.C., but she believed he would have been suffering from major depression at that time. (PCR. 482-83). The last documentation she saw evidencing Mahdi's depression was a statement from Mr. Crutchfield, Mahdi's co-defendant [in a homicide] from Virginia. (PCR. 483-85). She also asserted other documentation regarding Mahdi's depression dated back to 2001, when Mahdi denied he had been treated for mental illness and denied he had attempted suicide in his evaluation in the Virginia DOC. (PCR. 486). Schwartz-Watts admitted there was no evidence in any of Mahdi's adult prison records indicating he either complained of or received treatment for depression. (PCR. 487-90).

Schwartz-Watts stated Mahdi may not have been suffering from major depression on the day he shot Myers, but Mahdi would still have been affected by the condition. (PCR. 493-94). She noted the only illness that probably had anything to do with the crime was Mahdi's anxiety disorder. (PCR. 496-97).

deRossett Myers, Ph.D., a clinical psychologist qualified as an expert in child and adolescent psychology, evaluated Mahdi for developmental concerns he alleged were evident from his life as a juvenile. (PCR. 419). Myers was struck by the extent of poverty of Mahdi's family, the number of times Mahdi moved in a short period of time, and the amount of violence in the family. (PCR. 420). Myers indicated these were factors that put Mahdi at risk for mental health problems. (PCR 421). He opined Mahdi suffered from major depression and severe attachment disorder. (PCR 421).

Myers noted Mahdi was first formally diagnosed with major depression, single episode, when admitted to the Carter Center in Baltimore. (PCR. 424, 428-29, 442). Post-traumatic stress disorder was ruled out. (PCR. 428-29). He testified a diagnosis of major depression in a 9 year old was rare. (PCR. 426, 429). Myers also indicated there was evidence to support a diagnosis of oppositional defiant disorder, and he interpreted the Carter Center's decision not to diagnose Mahdi as such indicated the staff believed Mahdi's behavior was symptomatic of depression. (PCR. 442-43). He noted Mahdi was not treated with medication. (PCR. 430). In Myer's opinion, the diagnosis of major depression was consistent with the records. (PCR. 430). He believed Mahdi would have been a good candidate for a group home or going back to the Burwells

with a lot of support. He added he would have prescribed antidepressant medication to Mahdi even though he was 9. (PCR. 439-40).

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

Myers noted a psychologist during Mahdi's 1st stint at DJJ recommended Mahdi be placed in an out-of-home placement like a group home or residential treatment facility. Myers believed Shareef Mahdi's home did not comport with the recommendations. (PCR. 447-48). Myers believed the observations made in the psychological testing during Mahdi's 2nd stint at DJJ were consistent with attachment disorder and depression. (PCR. 450-52). He recalled in the DJJ records, someone indicated Mahdi would be very difficult to deal with in the future unless he got the treatment he needed. (PCR. 457). Myers noted the same individual indicated an untreated Mahdi would likely end up in adult prison, and Mahdi had aged well beyond his years in terms of some of his criminal behaviors. (PCR. 457).

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

The Lack of Merit of this Allegation

This Court finds counsel was not deficient in failing to call Drs. Schwartz-Watts or Myers. This Court finds Dr. Schwartz-Watts' testimony is not credible on these issues given the record before this Court. First, Dr. Schwartz-Watts admitted during her testimony that Mahdi's history of depression had nothing to do with the murder of Myers. **(PCR. 495-96)**. Additionally, she testified the only illness he suffered from that could have had anything to do with the murder of Myers was the generalized anxiety disorder she diagnosed him as having. **(PCR. 495-97)**. She based this determination mainly on the fact Mahdi told her he was anxious at the time he murdered Myers. However, she admitted Mahdi had broken into Myers' cabin, and it would be expected he would be anxious when he saw Myers entering his cabin and about to discover Mahdi unlawfully inside his shed. **(PCR. 496-97)**. This Court does not find this significantly mitigating given the circumstances. This Court also finds this a tenuous basis to diagnose generalized anxiety disorder and its relation to this crime. Further, while Dr. Martin's notes indicate Mahdi told him he was anxious and paranoid in Virginia, because he was being investigated for a homicide he committed, he stated he was no longer anxious or paranoid after he left Virginia. **(Resp. Ex. 8)**. Dr. Martin took a detailed history from Mahdi, which Schwartz-Watts relied on, and Martin did not diagnose Mahdi with generalized anxiety disorder. Additionally, at the time of the PCR hearing, the record showed Mahdi had been in the South Carolina DOC for 6-7 years and had not been treated for any anxiety disorder or any mental illness including depression. **(PCR. 488-91)**. Mahdi had received no psychotropic medications or attempted suicide since his arrest in 2004. **(PCR. 488-91)**.

Mahdi did go on a hunger strike prior to trial, but this was due to his objection to being kept as a safe-keeper prior to trial, i.e. his conditions of confinement. **(PCR. 489-90)**. Mahdi also denies he has any mental illness. **(PCR. 490)**. Mahdi was also examined by Dr. Michael Cross and Dr. Randy Pickens prior to trial for competency to stand trial. Dr. Cross found no evidence of any mental illness. **(R. 131, 136 & Court's Ex. 2)**. Dr. McKee also ran tests on Mahdi and took a history from him and did not diagnose him with generalized anxiety disorder.

Dr. Schwartz-Watts admitted Mahdi did not provide her with a lot of information and was not as forthcoming with her as he was with Drs. Martin and McKee. **(PCR. 479)**. She was forced to admit there are no records from the S.C. DOC where Mahdi has been treated for depression or any mental illness since his arrest for Myers' murder. **(PCR. 488-491)**. Schwartz-Watts claimed there was evidence in the DOC records Mahdi was suffering from depression; however, that claim was not credible. She was forced to admit Mahdi's hunger-strike was related to his being kept as a safe-keeper prior to trial, i.e. his conditions of confinement. **(PCR. 489-90)**. And, his physical complaint was for just not feeling well, i.e. tired and run down. **(PCR. 488-89)**. And, this Court does not find credible her claim Mahdi's aggressive and threatening conduct is definitive evidence of depression, because it is also consistent with Mahdi's repeated diagnoses of anti-social personality disorder. **(PCR. 489)**. Schwartz-Watts also admitted Mahdi has stated over the past 6 years there is nothing wrong with him. **(PCR. 491-92)**. And, she admitted he has not been given any medications for any mental illness. **(PCR. 491)**. This Court would also note at his guilty plea on the current charge, Mahdi told Judge Newman he was not suffering from any mental illness.

Dr. Cross found no evidence of any mental illness. (R. 131, 136; Court's Ex. 2). Schwartz-Watts also admitted that upon entry to Virginia's DOC in 2001, Mahdi was not diagnosed as suffering from depression but intermittent explosive disorder and anti-social personality disorder. (PCR. 486-487). She admitted there was nothing in Mahdi's adult prison records from Virginia, where he resided from 2001 to 2004, showing Mahdi was suffering from or was being treated for depression. (PCR. 487). She also admitted there was no documentation by a doctor, psychologist, parole officer, or any professional that Mahdi was suffering from depression before he left Virginia and committed this current crime. (PCR. 487). She further admitted there was no record of Mahdi being treated for depression or complaining of depression from his arrest in Florida until his return to S.C. to face these charges. (PCR. 487-488). She also admitted that Mahdi admitted his suicidal gesture in Virginia's DJJ was manipulative behavior on his part in order to obtain better living conditions and more recreation time. (PCR. 490; Resp. Ex. 4). And, this Court finds, if Mahdi was anxious or depressed shortly before fleeing Virginia, it was due to his own criminal conduct there and his fear he would be apprehended.²⁶ (Resp. Ex. 8). Schwartz-Watts further admitted it did not appear Mahdi was depressed the day of Myers' murder, based on his actions, and he may not have been depressed at all. (PCR. 493). This Court does not find credible her diagnosis Mahdi was suffering from depression at the time of Myers' murder.

In addition to the facts cited above, Mahdi's cold, calculated, and intelligent actions over several days from Virginia, to N.C., to Columbia, to Calhoun County, and finally to Florida, do not

²⁶Dr. Schwartz-Watts relied in large part in her diagnosis of depression at the time of the crime on the statements Mahdi made to a co-defendant in 1 Virginia homicide. The co-defendant stated Mahdi stated "he didn't have shit to live for," and Mahdi had a belief in a foreshortened future. Again, if these statements of this co-defendant are even credible, they are due to Mahdi's involvement in a robbery and a murder in Virginia and his belief that he was about to be arrested for his criminal activities while on supervised probation. This Court does not find this significantly mitigating. And, this Court finds Judge Newman would not have found this mitigating either.

indicate Mahdi was depressed. Mahdi burglarized a neighbor's home in Virginia and stole a gun. He then stole a license plate from 1 establishment, a car from another, and left Virginia to escape police who were investigating him for a homicide. Mahdi drove the stolen vehicle to Winston-Salem, N.C., entered a convenience store and pretended to be a patron, and when the clerk was distracted checking his I.D. to buy alcohol, Mahdi drew the stolen pistol and shot the clerk. He then shot the clerk again to render him helpless and attempted to rob the store's cash register. Mahdi then drove to Columbia, S.C. While here, he pretended to be a homeless person and stayed at the Oliver Gospel Mission. Mahdi then pretended to be a homosexual person so he could car-jack a vehicle and did so. He then switched the license plate on the car-jacked vehicle with the license plate he stole from Virginia. He then drove to Calhoun County and attempted to pass a stolen credit card, but the card had been cancelled. Mahdi then fled when he realized police were going to apprehend him. He then burglarized Myers' shed and while there altered a shotgun into a sawed off shogun and painted it black. Mahdi then murdered Myers and attempted to burn his body to destroy evidence of the crime. He then stole Myers' truck, but switched license plates on the vehicle before fleeing to Florida. He then drove all the way to Jacksonville, FLA where he sold the murder weapons used in N.C. and S.C.; however, Mahdi retained the assault rifle and sawed-off shotgun he had stolen from Myers' shed. He then impersonated a police officer when approached by a citizen in Florida. Mahdi then attempted to flee from police in Satellite Beach, FLA, and was arrested only after the use of a police dog.

Further, Dr. Martin and Dr. McKee, based in part on their interviews with Mahdi, found

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

Additionally, this Court does not find counsel was ineffective in failing to retain Dr. Myers, a clinical psychologist, or elicit the testimony he provided. Dr. Myers testified to many things that were not favorable to Mahdi and would not have helped his case in mitigation before Judge Newman. Specifically, Myers testified the Carter Center records reflected either a *diagnosis* of oppositional defiant disorder or a *rule out* oppositional defiant disorder, which Meyers admitted was a precursor to antisocial personality disorder. (PCR. 442-43). Myers also noted Mahdi had a history of being oppositional and a history of behaviorally acting out with aggression. (PCR. 443). While Myers testified his interpretation of the Carter Center records was the staff attributed Mahdi's oppositional behavior to his depression, Myers admitted a diagnosis of conduct disorder/oppositional defiant disorder is based exclusively on observation of overt behavior. (PCR. 443). Myers also related that when Mahdi returned to school in Lawrenceville he was tested because he was not doing well in school and his behavior wasn't particularly good at school. Myers also admitted that after Mahdi was committed to Virginia's DJJ Mahdi was described as a angry, alienated, tough youth. (PCR. 447). Myers testified that at that time Mahdi had already been involved in an altercation in a cottage he was housed in. (PCR. 447). Myers testified the DJJ psychologist noted Mahdi had a lot of negative attitudes towards authority, did not like rules,

did not like limits, was poorly socialized, and was not sensitive to the rights and privileges of others. (PCR. 447). Myers related the psychologist termed Mahdi's problem *a conduct disorder*. (PCR. 447). And, Mahdi only stayed out of DJJ 2 weeks before he was involved in a stand-off with police and was recommitted to DJJ where he was diagnosed with *conduct disorder*. (PCR. 449-450). Myers further admitted Mahdi was noted to be disruptive at DJJ and also engaged in oppositional defiance. (PCR. 451). Myers also admitted it was noted in DJJ records Mahdi had aged well beyond his years in terms of his criminal behaviors. (PCR. 457). Myers testified Mahdi's diagnosis of anti-social personality disorder in the adult DOC was justified at the time based on the record. (PCR. 456). Myers also agreed Mahdi's I.Q. of 118 was an accurate level of his intelligence. (PCR. 457).

More importantly, it is not what Drs. Schwartz-Watts or Myers allegedly found 6 to 7 years after trial that is critical to the issue before this Court. *Reed v. Florida Dept. of Corrections*, 593 F.3d 1219 (11th Cir. 2010)(fact that expert retained at trial and expert retained later at PCR differed, does not prove trial counsel was ineffective); *Davis v. Singletary*, 19 F.3d 1471, 1475 (11th Cir. 1997)("the mere fact that a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial."). This Court notes none of Mahdi's appointed attorneys, Mr. Grant, Mr. Walters, or Mr. Koger are psychiatrists or psychologists. They retained qualified experts to investigate this area of mitigation on Mahdi's behalf and relied on what their experts told them. Counsel had a right to rely on what their experts told them. *See Poyner v. Murray*, 964

F.2d 1404, 1419 (4th Cir. 1992)(Petitioner cannot establish ineffective assistance because counsel did not expert shop until one could be found who would testify favorably).

Counsel retained Dr. Thomas Martin, *a forensic psychiatrist*, who has testified in several capital cases, to evaluate Mahdi and determine if he suffered from any mental illness that would serve as mitigation. Dr. Martin found Mahdi had some history of recurrent depression, but there was no evidence he suffered from a mental illness at the time of the commission of the crimes against Myers. The only thing Dr. Martin found was Mahdi has anti-social personality disorder. That diagnosis *is* fully supported by the record. When Mahdi was admitted to Virginia's DOC, he was diagnosed with intermittent explosive disorder and anti-social personality disorder. At PCR, Dr. Martin testified Mahdi had no difficulty talking about killing people if necessary in order to achieve independence, and he appeared to have no remorse regarding any of his past violent acts. Dr. Martin related to counsel on several occasions what his findings were and they would not be helpful to Mahdi. Additionally, in conducting his evaluation, Dr. Martin took a history from Mahdi. Martin discussed with Mahdi the circumstances of the crimes against Myers and why Mahdi left Virginia in the first place. Mahdi related to Dr. Martin he left Virginia because he was involved in the homicide of a drug dealer, and detectives there were closing in on him. Mahdi also related to Martin he was involved in another homicide in which police had yet to find the body. Mahdi also related to Martin he shot Myers in the chest and head, and after Myers was on the floor of his cabin, Mahdi shot him several more times in the head to make sure he was dead. (PCR. 508-23).

Counsel also retained a *forensic psychologist*, Dr. Geoffrey McKee, to evaluate Mahdi with regard to mental health mitigation. Dr. McKee took a detailed history from Mahdi, conducted tests on Mahdi, and reviewed records including Mahdi's psychiatric records from when he was age 9. McKee found Mahdi was very intelligent and he suffered from no major mental illness at the time of the crime. McKee found, independent of Dr. Martin, Mahdi had anti-social personality disorder. McKee found nothing else. Mahdi also related to McKee he left Virginia because he was involved in the homicide of a drug dealer and police were closing in on him for that crime. (PCR. 545-561). McKee also related his findings to counsel. (PCR. 689-90, 626-27).

Counsel testified they made a strategic decision not call either psychiatric or psychological expert in the sentencing hearing before Judge Newman, because their testimony would not be helpful and damaging information would have come out if these witnesses were subject to cross-examination. (PCR. 689-90, 626-27). This Court finds this was an objectively reasonable strategic decision under the circumstances and is not subject to a claim of ineffective assistance of counsel. *Strickland; Wong; Council*.²⁷ This Court finds had either of these experts been called to testify, they would have been cross-examined by the Solicitor on the fact they took a history from Mahdi and what Mahdi related about why he stole a car and left Virginia and about the murder of Myers. Each expert's testimony would not have been helpful but would have been devastating to Mahdi's mitigation case because it would have revealed other homicides Mahdi had

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

committed in addition to the Boggs' and Myers' murders, and Mahdi shot Myers again after he was helpless on the floor. *Wong, supra* (calling mitigation witness would have exposed defendant to admission of evidence of other homicide not previously before the sentencing authority). Additionally, the experts would had to have related they found Mahdi was suffering from no major mental illness and had anti-social personality disorder. This would not have been helpful to the defense mitigation case. *Cullen, supra* (it was a reasonable penalty phase strategy to pursue evoking sympathy for mother where psychiatrist found defendant had no signs or symptoms of mental disorder other than his "psychopathic personality traits"); *Byrum v. Ozmint*, 339 F.3d 203, 210 (4th Cir. 2003)(counsel not ineffective in failing to present testimony by a psychiatrist and psychologist because the suggestions of antisocial behavior which experts found could have been harmful to the defense); *Satcher v. Pruett*, 126 F.3d 561 572 (4th Cir. 1997)(counsel not ineffective for not presenting testimony by a psychologist and psychiatrist who examined defendant for purpose of developing mitigating evidence where they found no psychiatric or neurological disorders, but also found antisocial personality disorder that might make defendant a "future danger"); *Reed v. Florida Dept. of Corrections*, 593 F.3d 1217 (11th Cir. 2010)(counsel made objectively reasonable trial strategy decision not to offer anti-social personality disorder diagnosis); *Fulks v. United_States, Slip Copy*, 2010 WL 3069390 (D.S.C. 2010)²⁸(attorneys not ineffective in avoiding testimony defendant met criteria of antisocial personality disorder); see *Truesdale v. Moore*, 142 F.3d 749, 755 (4th Cir. 1998)(mental health evidence is a "double edged

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

sword that might as easily condemn a defendant to death as excuse his actions.”); *St. Pierre v. Walls*, 297 F.3d 617, 633 (7th Cir. 2002)(facts showing defendant has a condition or proclivity toward violence are often aggravating, not redeeming or mitigating factors).²⁹

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

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

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

This would have been devastating to any mitigation case counsel was trying to present. *Wong*.

Finally, Drs. Schwartz-Watts and Myers also diagnosed Mahdi with antisocial personality disorder. As previously discussed, this testimony would not have been helpful to the mitigation case. *Cullen*, 131 S.Ct. 1388 (reasonable penalty phase strategy to pursue evoking sympathy for mother where psychiatrist found defendant had no signs or symptoms of mental disorder other than “psychopathic personality traits”); *Byrum*, 339 F.3d at 210 (counsel not ineffective in failing to present testimony by psychiatrist and psychologist because the suggestions of antisocial behavior which experts found could have been harmful); *Satcher*, 126 F.3d at 572 (counsel not ineffective for not presenting testimony by psychologist and psychiatrist who examined defendant for the purpose of developing mitigating evidence where they found no psychiatric or neurological disorders, but found antisocial personality disorder that might make him a “future danger”); *Reed*, 593 F.3d 1217 (counsel made objectively reasonable strategy decision not to offer anti-social personality disorder diagnosis); *Fulks*, *supra* (no ineffective assistance in avoiding testimony defendant met criteria of antisocial personality disorder). See *Truesdale*, 142 F.3d at 755 (mental health evidence is a “double edged sword that might as easily condemn a defendant to death as excuse his actions.”); *St. Pierre*, 297 F.3d at 633 (fact that a defendant has a condition or proclivity toward violence is often aggravating, not redeeming or mitigating).³⁰

Furthermore, this Court finds Mahdi has failed to prove counsel was deficient in failing to have Dr. Martin or Dr. McKee diagnose Mahdi with depression, generalized anxiety disorder, or

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

paranoid personality disorder.³¹ While Mahdi called 2 new experts who said Mahdi suffered from depression, one in his childhood, and the other in his childhood and as an adult, and Dr. Schwartz-Watts testified Mahdi had paranoid personality disorder and generalized anxiety disorder, this was not sufficient to prove counsel was deficient in this regard. *Reed, supra* (fact that expert retained at trial and expert retained later at PCR differed, does not prove trial counsel was ineffective); *Davis*, 19 F.3d at 1475 (“mere fact that a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial.”). It was incumbent upon Mahdi to show had counsel provided additional documents or information to their experts they would have reached a different diagnosis. *Von Dohlen*, 360 S.C. at 606-07, 602 S.E.2d at 742-43 (counsel was ineffective in failing to adequately prepare and present evidence in penalty phase defendant suffered from severe, chronic depression at the time of the murder given counsel failed to provide their expert witness with crucial medical records and related information which prevented *that witness* from conveying accurate diagnosis of defendant’s mental condition to the jury). Specifically, at PCR, Mahdi did not call Dr. Martin or Dr. McKee and prove had they been provided with certain additional records or information, their diagnosis would have been different, i.e. they would have diagnosed Mahdi with depression, paranoid personality disorder, and/or generalized anxiety disorder. *Von Dohlen, supra*. In fact, the State called Dr. Martin and Dr. McKee at the PCR hearing, and Mahdi did not establish through either expert that if they had been shown certain additional records or information their diagnosis would have been any of the above.

³¹Dr. Martin did diagnose Mahdi has having some recurrent depression during his life but not at the time of the offense. Counsel could not call Dr. Martin because of the other negative things he would had to have related to Judge Newman, including his diagnosis of anti-social personality disorder and things Mahdi had told him including committing 2 homicides in Virginia.

Id. As a result, Mahdi has failed to meet his burden of proof to show ineffective assistance in this regard. *Id.* In fact, Dr. Martin testified based on the records he saw and what he had heard at the PCR hearing, his diagnosis would not have been any different. Dr. McKee also testified he did not need any further records to make the diagnosis he made. Neither expert testified their opinion had changed. As a result, this Court finds Mahdi has failed to meet his burden in this regard. *Butler; Von Dohlen; Reed* (fact that expert retained at trial and expert retained later at PCR differed, does not prove counsel was ineffective); *Davis* (mere fact a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate counsel was ineffective for failing to produce that expert at trial).³²

Furthermore, this Court finds Mahdi has failed to prove counsel deficient in failing to have Dr. Martin or Dr. McKee diagnose Mahdi with reactive attachment disorder. Mahdi called 2 new experts, Drs. Schwartz-Watts and Myers, who testified Mahdi either had reactive attachment disorder or the evidence indicated Mahdi had reactive attachment disorder. This Court first notes that this diagnosis is questionable. The DSM IV TR provides that onset of reactive attachment disorder must be before age 5. There is no evidence in this case that there was onset of reactive attachment disorder before the age of 5. DSM-IV-TR, 4th edition, pp. 127-130.

More importantly, Mahdi did not prove *counsel* did not provide *their experts* with records or information that would have led *them* to diagnose Mahdi as having reactive attachment disorder.

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

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

(e)The DJJ Records

Mahdi alleges counsel should have introduced Mahdi's records from Virginia's DJJ at sentencing. He argues these records contained some mitigating evidence, that he was noted to be

suffering from depression while in DJJ. Mahdi introduced these DJJ records at the PCR hearing, and the State did as well, and this Court has reviewed them carefully. Counsel was not deficient in failing to introduce these records.

The Lack of Merit of this Allegation

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

The record shows counsel obtained Mahdi's DJJ records through the efforts of their mitigation investigator Ms. Tarr. (**PCR. 585**). Mahdi had over 40 disciplinary violations within Virginia's DJJ including assaults on guards, teachers, and inmates. (**PCR. 684**). He was also involved in destroying property on several occasions. Mahdi also led an escape attempt by assaulting a female guard, taking her radio away from her, and demanding keys from another guard. Mahdi also threatened if he was not released from DJJ when he thought he should be released, he would go around "acting crazy." The records show Mahdi later admitted faking a suicidal gesture in an attempt to manipulate the DJJ prison system into gaining more recreation time. The records, if admitted at sentencing, would also have shown Mahdi did not think he should have been incarcerated for any of his offenses, and threatened to assault other inmates or guards or harm himself if he was not released from DJJ when he thought he should be. The records also show Mahdi received various treatment programs provided to inmates by Virginia's

DJJ, but he did not practice what he had learned such as anger management. In fact, Mahdi was kicked out of the anger management program for disruptive behavior. In the same records, on January 14, 1998, it was reported Mahdi described his own criminal behavior “in a very calculated, almost professional way that is alarming.” The records indicated Mahdi “is behaving and developing like a teenager much older” than he was. Mahdi also admitted to DJJ staff he had difficulties in school adjustment, had been frequently suspended, had a history of verbal and physical aggression, conflicts with educational authorities, and difficulties getting along with classmates. **(DJJ record M00416)**. He also admitted he had injured someone in a fight, and he had hit or attacked someone who was not in his family. **(DJJ record M00495)**. One DJJ official indicated Mahdi was very dangerous *if he did not get his way*. **(DJJ record M00511)**. Counsel was not deficient in failing to introduce Mahdi’s DJJ records. *Wong, supra*. There were numerous bad things about Mahdi that would have been revealed to Judge Newman if these records had been introduced. If counsel had introduced only select portions of the records, the State would have introduced all of Mahdi’s DJJ records, which included his numerous disciplinary violations and his admission to faking a suicide gesture to manipulate the prison system.

This Court also finds counsel’s not introducing Mahdi’s DJJ records was an objectively reasonable trial strategy decision. *Strickland; Council*. This evidence would have further advanced the State’s argument Mahdi has a bad character and further advanced proof of his future dangerousness. *State v. Hughes*, 336 S.C. 585, 521 S.E.2d 500 (1999)(behavior in prison is admissible in capital sentencing because it bears on defendant’s character and future

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

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

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

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

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

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

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

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

Additionally, Dr. McKee also diagnosed Mahi with anti-social personality disorder. And, Mahdi also informed McKee that he left Virginia to escape from homicide detectives who were closing in on him. Counsel did not and could not call Dr. McKee to testify for these 2 reasons, which this Court finds were objectively reasonable trial strategy decisions under the circumstances. Providing the DJJ records to Dr. McKee would not have changed these negative factors that led to this strategic decision. Mahdi has failed to show deficient performance here.

Finally, Mahdi failed to meet his burden of proof with regard to this specific allegation.

Both Dr. Martin and Dr. McKee testified at the PCR hearing. Mahdi did not show either Dr. Martin or Dr. McKee the DJJ records and ask them if these records would have changed their opinion in this case.³⁴ *Von Dohlen, supra*. As a result, Mahdi has failed to meet his burden of proof to show counsel was deficient in this regard. *Butler, supra*.

(e) The School Records and School Witnesses

Mahdi also alleges counsel was ineffective for failing to introduce Mahdi's school records and in not calling elementary school officials. At PCR, Mahdi introduced school records, called several school officials, and provided the affidavit of another school official. These individuals either taught Mahdi or were involved in the decision to place him in special education. This Court has carefully reviewed the school records submitted, the testimony of the school officials who testified at PCR, and the 1 witness who submitted an affidavit. There is no merit to this allegation.

The Lack of Merit of this Allegation

The record and credible evidence at the merits hearing shows counsel retained a qualified mitigation investigator, Ms. Tarr, to investigate and develop mitigation in this case. Tarr had previously been a mitigation investigator in 30 to 40 capital cases. Tarr testified as part of her investigation she requested school records of Mahdi. **(PCR. 565)**. Although she no longer had her file in this case, she testified it was her common practice to request records from any school Mahdi or his family informed her Mahdi had attended. **(PCR. 565)**. She also testified she went to

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

the schools Mahdi attended. (PCR. 585). She also testified she spoke with teachers in Lawrenceville who were familiar with Mahdi; however, these teachers had not spent a lot of time with Mahdi. (PCR. 586). She also testified she spoke with individuals from a school Mahdi attended in Baltimore. (PCR. 586). Tarr testified she routinely provides summaries of school records in capital cases. (PCR. 587). She also testified if she had done a summary of school records in this case, she would have included all pertinent information she thought was helpful to Mahdi. (PCR. 586-87). The record shows a summary of the school records was done in this case and introduced at the sentencing hearing before Judge Newman. Counsel testified they relied on Tarr and also Hammock, the forensic social worker, to get all of the information with regards to Mahdi's school and education. (PCR. 629-30). Counsel also testified there were team meetings where the mitigation investigator and social worker shared with them and their experts what they had found in their investigation. (PCR. 631, 700). Counsel testified he was aware Mahdi was in special education. (PCR. 629). Dr. Martin and Dr. McKee also testified they were aware Mahdi was in special education. Counsel also testified they would have forwarded any records they received to their experts.

At Mahdi's sentencing proceeding before Judge Newman, Hammock testified to Mahdi's difficulties in school. She testified in her expert opinion Mahdi's education was disrupted many times, and this was reflected in the school records. (R. 1752, 1756). Mahdi had to move several times. (Def. Ex. 2). Mahdi was forced to change elementary schools 5 times. (Def. Ex. 3). The records also noted lateness and absences. (R. 1756). Mahdi started out kindergarten at Sister

Clara Muhammad School in Richmond and completed part of kindergarten at Totaro Elementary School in Lawrenceville. Mahdi then moved back to Richmond and attended Chamberlayne Elementary School for part of a year. Then he was removed from there and sent to Baltimore where he attended Scotts Branch Elementary School for 2 years. Then he was removed from that school while in the Carter Center, and ultimately returned back to Lawrenceville to live with his father. **(R. 1754-56)**. Even in his pre-teen years there was a lack of stability in terms of Mahdi's attending school, and it was reflected in the kinds of reports he received. **(R. 1760-61)**.

Hammock testified Mahdi constantly had difficulty in school. **(R. 1752)**. He was considered bright but did not perform well. **(R. 1752-53)**. He was particularly a poor reader. **(R. 1753)**. Both Carson and Lawanda Burwell reported Mahdi had difficulty in school. **(R. 1753)**. Carson reported Mahdi could not read when he came to live with them at age 8. Carson and Lawanda reported there was constant conflict in getting Mahdi to deal with his academic limitations. **(R. 1754)**. When Mahdi was involuntarily committed to the Carter Center his initial diagnosis included "Developmental Reading Disorder." **(Def. Ex. 2)**. Mahdi's had difficulties in school particularly in reading, and writing, which remained at below grade level throughout elementary school. **(Def. Ex. 3, R. 1755)**. Mahdi had numerous absences while in school. **(Def. Ex. 3)**. School records during this time were consistent with this report. **(R. 1754)**. Mahdi had uneven skills in school. **(R. 1755)**. He was in the average math program, but in the below average reading program. **(R. 1755)**. While he excelled in science, his reading, vocabulary, and spelling remained below average. **(R. 1756)**. Mahdi needed improvement in a number of areas, including

standards for behavior and showing respect for authority. (R. 1755). Mahdi was described as having poor self-esteem throughout his academic time. (R. 1753). And, it was noted several places he had poor self-esteem and had difficulty in relationships with others. (R. 1756). Mahdi's father removed him from school in the 5th grade to home school him, but there was no information this home schooling had ever occurred. (Def. Ex. 3). Mahdi's educational history was one of poor school progress. (R. 1762). While counsel did not introduce the records themselves, counsel conducted a reasonable investigation of Mahdi's school history and presented the same before Judge Newman. *Pinholster; Van Hook; Rompilla; Wiggins; Strickland; Rosemond; Simpson*.

The school records themselves reveal damaging information about Mahdi and his character, even at an early age. Mahdi was referred for special services not because he was mentally retarded, but because of "...behavior problems. He exhibits inappropriate and disruptive behavior." (Brunswick County Public Schools, 3/25/99). The same record also indicates Mahdi had a negative attitude about being corrected, did not always get along with other children, his behavior with adults was inappropriate at times, and most of his problems seemed to be getting along with people. The records indicate Mahdi had an I.Q. of 118, but had episodic acting-out behavior and an unwillingness to deal with difficult school tasks. (Confidential Psychological Evaluation). The records also indicate Mahdi was referred for special services, not because of mental retardation, but because of "*behavioral difficulties; such as leaving his seat inappropriately, physically and verbally aggressive towards others at times, talks out of turn, preoccupied, anxious, easily frustrated or angered, lacks respect for authority, and daydreams.* (Educational

evaluation)(emphasis added). A Burk's Behavior Rating Scale revealed very significant factors for poor impulse control, poor anger control, and excessive resistance. **(Appendix Y).** The records also indicate Mahdi's "intellectual functioning" was "in the high average range." **(M000065).** To have introduced Mahdi's school records would have introduced bad things about Mahdi to Judge Newman. It would also have introduced before Judge Newman that Mahdi's intellectual functioning was not impaired. This Court finds counsel was not deficient in failing to introduce Mahdi's school records which contained bad things about Mahdi. Counsel introduced through Hammock's testimony and through *exhibits* Mahdi's problems in school without introducing the bad things he had done while in school. Counsel's performance was not deficient in this regard. *Wong, supra.*

Mahdi further argues counsel should have introduced Mahdi's school records and called school witnesses to show Mahdi was diagnosed by school officials in the fourth grade as emotionally disturbed. However, the record shows Mahdi's emotional disturbance diagnosis was based in large part on his inappropriate behavior in school such as defiance and aggressiveness toward other students. Further, there was expert testimony in this case that a diagnosis of emotional disturbance many times means simply a misbehaving child. **(PCR. 542).** This testimony would have further exposed testimony regarding Mahdi's oppositional defiant disorder/intermittent explosive disorder and his conduct disorder, which is a pre-cursor to anti-social personality disorder, which would not have been favorable to Mahdi. Additionally, Mahdi was also referred for special education services because of his inability to read, which

Judge Newman already knew about through Hammock's testimony and the exhibits counsel introduced.

Additionally, the records contain information that would have undercut counsel's attempt to present mitigation. The records themselves indicate Mahdi was living in his grandmother Nancy Burwell's home, a modern 3 bedroom brick home with all facilities. The home was equipped with a stereo, television, and other educational materials for family use. There was a family support system for Mahdi's immediate family including grandparents and other relatives and friends. Mahdi met all developmental milestones at the appropriate age. Mahdi received prompt medical attention for any physical problems growing up. Mahdi's father was a high-school graduate who completed 2 years of community college, and Mahdi's mother had completed 2 years of college. Mahdi's father was involved in Mahdi's school evaluation process and believed Mahdi's behavior problems in school were due in large part because he was behind in reading, i.e. he became frustrated when he tried to read. Mahdi's father was willing to work with the public schools for his son's benefit. There were several notations in the records Mahdi's father was supportive, involved, and was seeking to help his son overcome his problems. And, the records also indicate Mahdi's relationship with his father was excellent. (**Resp. Ex. 1 & 2**). In essence, the records do not portray Mahdi's home life in as bad a light as counsel was able to portray Mahdi's childhood home life before Judge Newman at sentencing.

Furthermore, Mahdi's own mitigation witnesses undercut the validity of Mahdi's being placed in special education. Dr. Cooper-Lewter testified Mahdi himself informed him that he

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

As previously discussed, Mahdi also claims counsel was ineffective in failing to provide his psychiatric/psychological experts, Dr. Martin and Dr. McKee with records from Mahdi's school history, specifically the records regarding Mahdi being placed in special education classes. However, both Martin and McKee testified these records would not have changed their ultimate diagnosis. (PCR. 544, 561). Dr. Martin also testified at the PCR hearing that Mahdi informed him he had been placed in special education. (PCR. 515). Dr. Martin also testified Mahdi told him he should not have been placed in special education. (PCR. 515). Mahdi told Dr. Martin he begged the school principal to take him out of special education, but this was unsuccessful. (PCR. 516). And, he also asked his father to take him out of special education, and his father eventually pulled him out of public school and home schooled him. (PCR. 516). Dr. Martin also testified students are classified as emotionally disturbed and placed in special education classes because they are behavioral problems. (PCR. 542). Dr. Martin testified that sometimes this behavior is fueled by depression, sometimes its incorrigible behavior, or sometimes they are truant or having problems with conduct disorder. (PCR. 542). Dr. Martin also testified Mahdi's acting-out

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

behaviors such as irritability, talking back to teachers, and disrespectful attitude were in other reports he did review and also in information Mahdi provided to him. (PCR. 542). This Court had the opportunity to view the testimony of Dr. Martin and Dr. McKee and finds their testimony on this issue to be credible. Mahdi has failed to show counsel was deficient in failing to provide Dr. Martin or Dr. McKee with Mahdi's school records. *See Von Dohlen, supra.*

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

Dr. Martin testified he extensively reviewed Mahdi records from the Walter Carter Center that documented his diagnosis of major depression at age 9. He reviewed the summary prepared by Ms. Tarr of these records *and* the records themselves. Dr. McKee likewise reviewed Mahdi's commitment records from the Walter Carter Center at age 9. Both experts knew Mahdi had been diagnosed with major depression as a child. The special education records were generated approximately 18 months after Mahdi's release from the Carter Center. Dr. Martin further testified he interviewed Mahdi about his life. Mahdi informed him he had been placed in special education classes. Mahdi also indicated he had suffered from recurrent depression in his life. Dr. Martin further testified he participated in several team meetings where the findings of other members of the mitigation team were shared with him, including Mahdi's developmental and social history. Dr. McKee testified likewise. As previously stated, Ms. Tarr had subpoenaed Mahdi's school records and interviewed individuals who worked at 2 different elementary schools

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

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

education records would not change the negative factors that motivated this decision. *Strickland; Council.*

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

Finally, Mahdi has failed to meet his burden of proof with regard to this specific allegation. *Butler, supra.* Dr. Martin was shown Mahdi's special education records at PCR and testified they would not change his opinion in this case. Additionally, Mahdi did not show Dr. McKee the special education records and even ask him if they would have changed his opinion in this case.

As a result, Mahdi has failed to show counsel was deficient in failing to provide the special education records to their psychiatric/psychological experts. *Von Dohlen, supra*; *Reed* (fact expert retained at trial and expert retained later at PCR differed, does not prove trial counsel was ineffective); *Davis*, (mere fact a defendant can find, years later, a mental health expert who will testify favorably for him, does not demonstrate counsel was ineffective for failing to produce that expert at trial.); *See Poyner*, (petitioner cannot establish ineffective assistance because counsel did not expert shop until one could be found who would testify favorably).

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

(e)The Walter Carter Center Records

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

The Lack of Merit of this Allegation

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

The sentencing phase record shows, Ms. Hammock testified regarding Mahdi's commitment to the Walter Carter Center, his diagnosis there, and his discharge diagnosis. An exhibit introduced detailed Mahdi's involuntary commitment and diagnosis at the Carter Center. Judge Newman was well aware Mahdi was committed to the Carter Center at age 9 for depression and suicidal ideation. Judge Newman was also well aware Mahdi was diagnosed with major depression at this age, and it came on the heels of his being separated from his family, and being forced to move to Baltimore to live with his aunt and uncle. Judge Newman was also well aware Mahdi was confined at the Carter Center for 60 days, and he was discharged to his aunt and uncle. Counsel chose not to introduce the records themselves. **(R. 1739-63, Def. Ex. 2).** This Court has reviewed the Carter Center records thoroughly. The records themselves are cumulative to the testimony of Hammock at sentencing and the exhibit introduced through her.

Additionally, the records themselves contain damaging information about Mahdi. Mahdi was placed in isolation several times at the Carter Center due to his disruptive or inappropriate behavior. The records also show Mahdi assaulted other patients, assaulted staff, was verbally threatening or aggressive towards staff, and attempted to escape from the facility. On several occasions, Mahdi threw chairs or tables and attempted to damage property of the hospital. On 1 occasion, Mahdi falsely pulled a fire alarm. Mahdi also cursed staff members. On another occasion, Mahdi threatened to suffocate a staff member with a pillow. Additionally, the records detail Mahdi's making a false claim of child abuse against his aunt Lawanda, a fact Judge Newman was not aware of. The records show the claim of child abuse against Lawanda

was determined to be unfounded, and Mahdi admitted he only threatened suicide when he didn't get his way. The records also show the aunt reported Mahdi only talked about suicide when he didn't get his way or did something wrong, and Mahdi also admitted threatening suicide as a way of getting attention. These records would have undercut the mitigation value of and brought into question the diagnosis of major depression at the Carter Center that was testified to before Judge Newman. The records also indicate Mahdi had anti-social behavior and conduct disorder. Counsel was not deficient in failing to introduce the records themselves when bad things were contained within the records that would have been damaging to their client. (See **Walter Carter Center Records & Resp. Ex. 7**). *Wong, supra*. Counsel appropriately presented the Carter Center mitigation information to the sentencing court through Hammock, without the negative information about Mahdi that would have been before the sentencing court had the records themselves been introduced. *Id.*; *Strickland*. This allegation has no merit must be dismissed with prejudice. *Pinholster*; *Van Hook*; *Rompilla*; *Wiggins*; *Rosemond*; *Simpson*; *Jones*.

(e) The Father's Records

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

The Lack of Merit of this Allegation

To the extent counsel did not obtain these records, counsel's mitigation investigation revealed, and counsel presented the main information contained in these records at sentencing through Ms. Hammock. Judge Newman was aware Mahdi's father had been discharged from the

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

Conclusion to Deficiency Analysis

For the reasons stated above, this Court finds Mahdi has not met his burden of proof to show deficient performance under this ground. *Strickland; Pinholster; Van Hook; Wong.* Counsel conducted an adequate, thorough, and reasonable investigation of mitigation evidence, and presented what mitigation evidence counsel could present that was favorable to Mahdi under the circumstances at the time of sentencing. *Pinholster; Van Hook; Strickland; Rompilla; Wiggins; Rosemond; Council; Simpson; Jones.*

THE PREJUDICE PRONG

Regardless, Mahdi has not met the 2nd prong of the test articulated in *Strickland* and *Cherry* and discussed hereinabove. Considering the horrible facts of this murder, the aggravating circumstances, the mitigation presented at sentencing, the additional mitigation evidence

presented at the PCR hearing, and the aggravating evidence that would almost certainly have come in with the new mitigation, this Court finds there is no reasonable probability Judge Newman would have returned with a different sentence. *Wong, supra*; *Jones*, 332 S.C. at 333, 504 S.E.2d at 823.

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

The U.S. Supreme Court made clear in *Wong, supra*, the burden is *not* on the State to show the lack of prejudice, but the burden is on *the applicant* to show prejudice. *Id.* To establish prejudice, Mahdi must show a reasonable probability that had Judge Newman been confronted with the new mitigating evidence, there is a reasonable probability he would have returned with a different sentence. *Id.*, quoting *Wiggins*, 539 U.S. at 535-36. "In evaluating that question, it is necessary to consider *all* the relevant evidence that [the judge] would have had before [him]" if Mahdi "had pursued the different path - not just the mitigation evidence" Mahdi could have presented, but also" the aggravating evidence "that almost certainly would have come in with it."

Id., referencing *Strickland*, at 695-696, 700 (emphasis in original). See also *Porter v. McCollum*, 558 U.S. ____ (2009); *Sears v. Upton*, 130 S.Ct. 3259 (2010), quoting *Porter*, 130 S.Ct. at 453-54; *Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008), citing *Jones*, 332 S.C. at 333, 504 S.E.2d at 824.³⁶ This Court has analyzed Mahdi's claims of prejudice under this ground pursuant to the above cited standards and finds Mahdi has not met his burden of proof to show prejudice.

The Evidence in Aggravation

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

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

The Guilty Plea

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

The Sentencing Proceeding

In the sentencing phase, the State established the following evidence in aggravation. Mahdi burglarized the home of Amanda Weaver in Virginia and stole a chrome .380 pistol. Mahdi then stole a license plate from a car rental agency and a station wagon from a nearby car lot. He drove this vehicle eventually to Columbia, S.C., where he abandoned it in a church parking lot. Mahdi then car-jacked a Ford Expedition at gunpoint and drove to the Wilco Plaza in Calhoun County. He replaced the tag on the Expedition with the tag he stole in Virginia. He attempted to use a stolen credit card at the Wilco station and fled into some nearby woods when he believed police were about to apprehend him. Mahdi came upon Myers' shed/cabin and burglarized it using some type of tool. While inside, Mahdi manufactured a sawed-off shotgun, painted it black, and also armed himself with Myers' loaded .22 rifle. When Myers went to his cabin/shed,

late on the evening of June 16, 2004, Mahdi was lying in wait. Mahdi murdered Myers by shooting him 9 times with the .22 rifle. Mahdi shot Myers several times in the head after he was helpless on the floor of the cabin/shed. Mahdi stole Myers' truck keys, his guns, and his police issued truck and fled S.C. Before leaving, Mahdi attempted to burn Myers' body and his shed to conceal evidence. Myers' wife had the unfortunate circumstance of finding her husband's burned and bullet riddled body; she screamed for an unknown period of time before she was able to call 911, and she remained at the cabin, with her husband's body for approximately 30 minutes waiting on police and emergency workers to arrive.

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

The State also established Mahdi's bad character and characteristics. Mahdi had previously been adjudicated delinquent as a juvenile for car-breaking, petty larceny, escape from custody, breaking and entering (2 counts), obstruction of justice, and contempt of court. As an adult, Mahdi was convicted of malicious wounding, for the brutal stabbing of Moises Rivera, after Mahdi tried to burglarize an apartment in the complex where Rivera worked. Mahdi stabbed Rivera approximately 5 or 6 times and severely injured Rivera. Rivera's heart actually stopped in the

ambulance, and he had to be revived. He was hospitalized for several days and out of work for approximately 6 weeks because of Mahdi's actions.

The State also established the murder of Myers was not Mahdi's 1st murder. Mahdi had murdered Christopher Boggs, a convenience store clerk, on his way to S.C. from Virginia. Mahdi brutally murdered Boggs by shooting him in the face, and then shooting him again in the head after Boggs fell helpless on the floor. Store surveillance video portrays the heinousness of this murder, with Mahdi leaning over the counter to fire another bullet into Boggs' head. After murdering Boggs, Mahdi tried to rob the store's cash register. There is no question Mahdi committed this murder because his actions were captured clearly on the store's video-camera, his fingerprints were found on the store's counter, Mahdi's friends and relatives identified him in the videotape, and the weapon used to murder Boggs, the .380, was sold by Mahdi in Jacksonville and forensically matched to Boggs' murder by ballistics testing.

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

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

Myers' daughter, and Myers' best friend.

The PCR Evidence

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

(Family Members and Community Members)

Mahdi's family members and community members testified to the history of the family, particularly with regard to Mahdi's father, and his difficulties in life, and the difficulties Mahdi had to overcome in life. With regard to the family member testimony, it was largely cumulative to the testimony presented by counsel before Judge Newman through their forensic social worker. The family and community members described the difficulties Mahdi's father had in growing up, particularly that he was unwanted by his mother; he was forced to go to an integrated school that was traumatic; and he suffered from depression after his wife left he, Mahdi, and Mahdi's brother Saleem. The family and community members also described Mahdi's father's inability to get along with others, to parent effectively, to obey the law, and to hold a job. The family and community members also testified to the domestic violence within Mahdi's immediate family committed by Mahdi's father on both his wife and mother. This same evidence was presented at the sentencing hearing through Hammock's testimony before Judge Newman, and the time-line of Mahdi's life introduced through her. **(R. 1739-63; Def. Ex. 2)**. In fact, many of the details testified to by family members at PCR were related by Hammock in her sworn testimony or are set

forth in the Exhibit detailing Mahdi's family history. Her testimony was not challenged by the Solicitor at sentencing, nor was the Exhibit chronicling Mahdi's family and life history.

The family members at PCR also described how Mahdi was abandoned by his mother at a young age, around 4 or 5 years of age, and Mahdi's father was unable to care for Mahdi and his brother. They described how Mahdi had to fend for himself at a young age, and eventually was separated from his father and brother because of his father's inability to care for the children. They also testified to Mahdi witnessing domestic violence committed by their father on Mahdi's mother and on their grandmother. The family and community members also described Mahdi's father's defiant behavior in the community. They also described Mahdi's difficulties in school and his commitment to the Walter Carter Center at age 9.

This same evidence was also presented at the sentencing hearing before Judge Newman through Hammock in her sworn testimony and in the Exhibits chronicling Mahdi's family's life and his own life, and chronicling his school difficulties. Judge Newman was well-aware Mahdi had a life of deprivation, including being abandoned by his mother around the age of 5. Judge Newman was also aware Mahdi's father could not provide for the children, and as a result Mahdi and his brother were sent to live with different aunts and uncles. Judge Newman was fully aware Mahdi's family was split up because of these difficulties, and shortly thereafter, Mahdi was committed to the Walter Carter Center and diagnosed as suffering from major depression and suicidal ideation. Hammock also testified to Mahdi's father's defiant behavior in the community and the fact he had converted to Islam at a young age. Judge Newman was also fully aware

Mahdi and his brother witnessed their father assaulting their mother and their grandmother. Judge Newman was also aware Mahdi had difficulties in school, and he had particular difficulty in learning to read. Hammock also testified to Mahdi's lack of a proper role model, and Judge Newman was aware Mahdi's father suffered from depression and had a criminal record. (**R. 1739-63, Def. Ex. 2**). The evidence presented by Mahdi from his family and community members was largely cumulative and would not entitle Mahdi to relief. *Wong*, 130 S.Ct. at 387-88 (when substantial mitigation case was presented, evidence that is merely cumulative to the evidence actually presented fails to demonstrate the prejudice necessary to meet the prejudice prong of Strickland); *Buckner v. Polk*, 453 F.3d 195, 206 (4th Cir. 2006)(counsel's failure to present merely cumulative mitigating evidence does not prejudice a defendant's case); *Simpson v. Moore*, 367 S.C. 587, 627 S.E.2d 701 (2006)(finding where substantial mitigation case was presented, applicant had failed to show prejudice from failure to call other mitigation witnesses that were in essence cumulative); *Jones v. State*, 332 S.C. 329, 504 S.E.2d 822 (1998)(holding that "fancier mitigation case" does not render the prior case inadequate).

Furthermore, this Court cannot divorce from its prejudice analysis the bad information that would have come in through the family witnesses had they been called at the sentencing hearing as Mahdi proposes. *Wong* (in making prejudice determination, the Court must consider the bad information that in all likelihood would have come in with the good mitigation evidence). Mahdi's family members were aware of bad things regarding Mahdi, and this Court finds these bad things in all likelihood would have come in on cross-examination or reply. Carson and

Lawanda Burwell were aware that as an adult Mahdi had to move out of his grandmother's home because he would not abide by the rules of the home set down by his uncle Nathan. This occurred shortly after Mahdi's release from adult prison and while he was on supervised probation. Carson related to Mahdi's N.C. attorneys Mahdi "was a demon." Carson also related to counsel here, if he were called to testify, he would have bad things to say about Mahdi. Since this was Carson's mind-set at that time, these bad matters would have come out on the stand as they did at PCR. Both Lawanda and Carson admitted Mahdi almost had them arrested by making a false claim of child abuse and manufacturing false evidence of the abuse. Both also related Mahdi acted out at the Carter Center and had to be placed in isolation. Carson related to Tarr that Mahdi was manipulative in their home. Lawanda related Mahdi acted out and had to be returned to live with his father. Both related Mahdi would only talk about suicide when he did not get his way or did something wrong, more manipulative behavior. Carson also related to counsel Mahdi's statement to the responding officer that led to his commitment to the Carter Center was not real but more of Mahdi's manipulative behavior. Lawanda likewise testified she did not believe Mahdi was suicidal.

These bad things about Mahdi would not have been helpful to Mahdi's mitigation case. If counsel had called Carson and Lawanda as Mahdi contends, then Mahdi's manipulative behavior, specifically making a false claim of child abuse to police, which almost had Carson and Lawanda Burwell arrested, would have been admitted. Further, Mahdi's disruptive behavior at the Carter Center, would have been brought out, such as Mahdi hitting other patients, attempting to escape

from the facility, cursing staff, falsely pulling a fire alarm, and throwing chairs. Due to Mahdi's disruptive behavior at the Carter Center, he had to be placed in isolation on several occasions. Additionally, testimony that Mahdi talked about suicide only when he didn't get his way or did something wrong, and was about to be punished, would have been brought out, i.e. additional manipulative behavior on Mahdi's part. Further, Mahdi's disruptive behavior within the Burwell home, which Mahdi wanted to cause, and which eventually did cause his return to his father, would have been elicited on cross-examination, further underscoring Mahdi's manipulative behavior and nature. Testimony would also have been elicited from Carson that Mahdi could not obey the rules of Nathan's home when he resided there as an adult, and was eventually asked to leave. Carson was also aware of an incident where Mahdi, his brother Saleem, and their father were involved in maliciously damaging an aunt's motor vehicle. Mahdi through a cement block through the aunt's car window. It is clear this bad testimony would have been elicited. The State had introduced this event through 1 of the police officers during the penalty phase. Further, emphasis before Judge Newman would not have helped the mitigation case. *Wong, supra.*

Mahdi's aunt Sophie Gee was also aware of Mahdi slashing his mother's car tires. She testified at PCR Mahdi slashed his mother's tires simply because she would not let him use the car. This information would have been brought out on cross-examination had she testified at sentencing and would have further emphasized this incident before Judge Newman. *Wong, supra.*

(The New Social Worker)

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

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

(Mahdi's Father's Records)

Mahdi's father's military, medical/psychiatric, and criminal records would have been

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

(Dr. Haney's testimony)

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

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

Further, Mahdi was a violent, manipulative, and disruptive individual before he was incarcerated at Wallens Ridge. He was violent, disruptive, and manipulative when he was incarcerated the 1st time in Virginia's DJJ. He was violent, disruptive, and manipulative during his 2nd incarceration in DJJ. He continued his violent behavior after being released from DJJ, seriously wounding Moises Rivera during a burglary attempt. After this incident, as in the present case, Mahdi had to be captured with the use of a police dog. Mahdi continued his violent and disruptive behavior in the adult prison system resulting in his eventual incarceration at Wallens Ridge, and, he continued to violate institutional rules at Wallens Ridge. Rather than conforming his behavior when he was released from Wallens Ridge, so he would never have to go back to a maximum security prison, Mahdi repeatedly violated not only the law but the rules of his supervised probation. Mahdi sold drugs, possessed handguns, used marijuana, and committed 2 homicides in Virginia. Mahdi burglarized a home, stole a handgun, stole a car and a license plate, and left Virginia. Mahdi then committed 2 additional murders during his flight through the southeastern U.S. And, Mahdi has engaged in the same or similar conduct while incarcerated in S.C., over and over again.

Further, Mahdi engaged in criminal conduct before he was ever incarcerated. In fact, he was placed on juvenile probation for his first series of crimes and continued to engage in criminal conduct, burglarizing a home and stealing firearms. And, after each incarceration, he committed even more and more violent offenses. And, while Mahdi has been incarcerated he has attacked guards and inmates. The record shows Mahdi has had an impact on each institution he has been

detained in, not the opposite. And, Mahdi has not changed his conduct to avoid going back to a harsh prison environment, but engaged in more serious and violent offenses.

Additionally, Haney's attempt to blame all of Mahdi's criminal behavior on alleged undiagnosed or untreated mental illnesses or the failures of the criminal justice system would also have been impeached and is not credible. Mahdi informed Judge Newman he had no mental illnesses. Dr. Michael Cross also found Mahdi had no mental illnesses. The record shows Mahdi engaged in criminal activity such as stealing because he could and believed he would not get caught. Mahdi assaulted other individuals because it was in his own self-interests. Mahdi was not victimized in DJJ as Haney contends, but Mahdi victimized others including inmates and guards and attempted to manipulate the juvenile prison system. And, Mahdi's actions over several days from Virginia, to N.C., to S.C., and to Florida, show he was not suffering from any mental illness.

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

(The Virginia DJJ Records)

Additionally, had Mahdi's juvenile records been introduced as Mahdi alleges they should have been, Mahdi's long list of 40 disciplinary violations in Virginia's DJJ would have been before Judge Newman. As previously stated, those records indicate Mahdi repeatedly assaulted

other inmates, assaulted staff, destroyed property, led an escape attempt, and engaged in manipulative behavior. **(Resp. Ex. 6)**. While there was some indication in these records that Mahdi was treated for depression while at DJJ, the records also indicate Mahdi later admitted he fabricated a suicidal gesture in order to gain additional privileges in DJJ, i.e. was attempting to manipulate the DJJ prison system. Furthermore, Mahdi failed to establish at the PCR hearing that these records would have changed any of his experts' opinions at sentencing. *Von Dohlen, supra*.

(The School Records and School Officials)

This Court carefully reviewed Mahdi's school records and the testimony of school officials. It must be first noted Judge Newman was familiar with Mahdi's school difficulties through the testimony of the forensic social worker and the exhibit chronically his school difficulties. Judge Newman was aware Mahdi's schooling was interrupted several times; Mahdi had many absences, and his father pulled him out of school after the 5th grade to home school Mahdi, and there was no indication this had occurred. Judge Newman was also aware Mahdi had difficulty in reading throughout his school history. While the records show he was placed in special education, Mahdi was not mentally retarded but had an I.Q. of 118 and functioned on grade level or higher in all classes except reading, spelling, and writing. And while the records indicate Mahdi was diagnosed as emotionally disturbed, and had some depressive symptoms at that time, the records also show Mahdi was placed in special education or classified as emotionally disturbed based in large part on his misconduct and aggressive behavior in school, including toward other students, and his inability to read. Judge Newman was already aware Mahdi had been committed

to a psychiatric facility approximately 18 months before for major depression, and Mahdi told the sentencing court at his guilty plea that he was not suffering from any mental illness. And, Judge Newman already knew of Mahdi's inability to read. Further, the mitigating impact of these records is minimal given Dr. Cooper Lewter testified Mahdi should not have been in special education and this had a negative impact on Mahdi's school performance. Lawanda Burwell also testified she did not believe Mahdi should have been placed in special education. Importantly, the records also included bad things about Mahdi. Had Mahdi's school records been introduced or the school officials testified, further evidence of Mahdi's bad behavior would have been before Judge Newman, including Mahdi's misbehavior and aggressiveness and assaults on other children and resistance to authority. Furthermore, Mahdi failed to establish at the PCR hearing that his experts' opinions would have changed at sentencing if they had been provided these records. *Von Dohlen, supra.*

(The Walter Carter Center Records)

While the Walter Carter Center records themselves would have been before Judge Newman, Judge Newman already knew of Mahdi's commitment there, diagnosis, and length of stay. The records themselves detail Mahdi's disruptive and manipulative behavior. Mahdi assaulted other patients, attempted to escape, admitted he fabricated a child abuse claim, damaged property, and used profanity against staff of the hospital. Mahdi also threw furniture at hospital staff, falsely pulled a fire alarm, and threatened to suffocate a staff member with a pillow. These records also indicate Mahdi's anti-social behavior and conduct disorder. Mahdi's commitment to

the Walter Carter Center, the reason for his commitment there, and his length of commitment was before Judge Newman, without the negative and damaging information contained in those records. Furthermore, Mahdi failed to establish at the PCR hearing that his experts' opinions would have changed if they had been provided with these records. *Von Dohlen, supra*.

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

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

Furthermore, Dr. Schwartz-Watts' questionable diagnosis of anxiety disorder at the time of this murder would have been impeached by the Solicitor. Further, Schwartz-Watts' diagnosis Mahdi had depression but was not suffering from it at the time of Myers' murder would have been impeached by the State and contradicted by the evidence and testimony. Additionally, her diagnoses would have been contradicted by Mahdi's sworn testimony before Judge Newman during his guilty plea, and the testimony of Dr. Cross during the *Blair* hearings. (R. 1329-39, 1343-68, 125-40, 1339-43). Further, Dr. Schwartz-Watts admitted Mahdi's mental illnesses or

personality disorders did not rise to the level of a statutory mitigator. Additionally, Dr. Myers' testimony regarding bad characteristics of Mahdi contained in the DJJ records, including conduct disorder, would have been brought out on cross-examination. And, Mahdi's previous diagnosis of intermittent explosive disorder and anti-social personality disorder in the Virginia DOC would have been emphasized before Judge Newman with either of these 2 witnesses. Finally, both Dr. Schwartz-Watts and Dr. Meyers concurred in the diagnosis of Mahdi having anti-social personality disorder. This information would not have been helpful before Judge Newman.

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

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

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

On this allegation, Applicant has failed to state a claim upon which relief may be granted. Assuming Mahdi is referring to his alleged "mental age" allegation in Ground 10(b)/11(b)[below], the record shows Mahdi was 21 years old at the time of the crime. *Roper v. Simmons*, 543 U.S.

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

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

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

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

There is no merit to this ground factually. Counsel had Mahdi evaluated by order of the circuit court for competency. (R. 8-10). As a result of that examination, it was determined Mahdi had no mental illness and was not mentally retarded. (R. 131; Court's Exhibit 2). It was determined Mahdi was competent to stand trial. (R. 139-140). Mahdi was 23 years old at the time of his guilty plea, had obtained his GED, and had attended some community college. (R. 1346). Mahdi had been previously employed in mostly roofing and brick laying. (R. 1346). Mahdi denied ever having been treated for abuse of alcohol, drugs or for any mental disease. (R. 1346). Ms. Hammock testified that Mahdi had been hospitalized on 1 occasion as an adolescent, a voluntary admission to a mental health facility, and Mahdi was released. (R. 1747, 1756). Mahdi was competent to plead guilty. (R. 1342). He understood the charges he faced, including murder, and the legal consequences of a conviction, including the death penalty. (R. 1339-68). Mahdi denied any emotional or nervous problem that might prevent him from understanding what he was doing when he pled guilty. (R. 1347). Mahdi had a good understanding of the legal process and the legal system. (R. 1340-41).

Mahdi cannot show counsel was deficient in failing to object to the imposition of the death penalty against him for the above stated reason, given the law and this record, nor can he show

prejudice under *Strickland* and *Wong*, because the law does not recognize Mahdi's contention and the record demonstrates Mahdi is educated, has an above average I.Q., is streetwise, was 21 years old at the time of the murder, and has a criminal mentality. Mahdi cannot show a reasonable probability that, had counsel objected to the sentence on the asserted grounds, the objection would have been sustained and there would have been a different sentence. The record and credible evidence demonstrates that Mahdi does not have a juvenile mentality, if this is what Mahdi is referring to in this ground, but an adult criminal mentality and bad character. This ground must be dismissed with prejudice.

D. 10(b)/11(b)

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

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

There is no merit to this ground. First, this is a claim of trial court error, and a direct appeal issue that was not preserved for appellate review because there was no objection at sentencing,³⁸ not raised in the direct appeal, and, being a direct appeal claim, is not cognizable in a PCR action. *Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001)(citations omitted)("Allegations of trial court error are not cognizable on PCR. In PCR cases, a defendant

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

asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel.”); *Drayton v. Evatt*, 312 S.C. 4, 430 S.E.2d 517 (1993)(issues that could have been raised at trial or on direct appeal cannot be raised in a PCR application absent a claim of ineffective assistance of counsel), citing *S.C. Code Ann. Section 17-27-20(b)* (1985); *Hyman v. State*, 278 S.C. 501, 299 S.E.2d 330 (1983); *Peeler v. State*, 277 S.C. 70, 283 S.E.2d 826 (1981); *Simmons v. State*, 264 S.C. 417, 215 S.E.2d 883 (1975), also referencing *Cummings v. State*, 274 S.C. 26, 260 S.E.2d 187 (1979); *Ashley v. State*, 260 S.C. 436, 196 S.E.2d 501 (1973); *Sellers v. Boone*, 261 S.C. 462, 200 S.E.2d 686 (1973). As a result, this ground is dismissed with prejudice.

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

Third, applicant has failed to state a claim upon which relief may be granted. The record shows Mahdi was 21 years old and not mentally retarded at the time of the crime. As set forth above, there is no evidence in the record that Mahdi was insane at the time of the crime, is insane now, or is not competent to be executed, nor that he fits under any class of persons recognized by the U.S. Supreme Court or the S.C. Supreme Court as being excluded from application of the death

penalty. This ground must be dismissed.

No federal or state authority would support such an objection by trial counsel. *See e.g. State v. Irick*, 320 S.W.3d 284, 297-98 (Tenn. 2010); *Mays v. State*, 318 S.W.3d 368, 379-80 (Tex. Crim. App. 2010); *Johnson v. State*, 27 So.3d 11, 26-27 (Fla. 2010). *See also e.g. Shisinday v. Quarterman*, 511 F.3d 514 (5th Cir. 2007); *In re Neville*, 440 F.3d 220, 221 (5th Cir. 2006), *citing In re Woods*, 155 Fed. Appx. 132, 136, 2005 WL 3087882, *3 (5th Cir. Nov. 17, 2005)(unpublished); *State v. Ketterer*, 111 Ohio ST. 3d 70, 855 N.E.2d 48 (2006); *Matheney v. State*, 833 N.E.2d 454 (Ind. 2005); *Hall v. Brannan*, 284 Ga. 716, 670 S.E.2d 87 (2008); *Coleman v. State*, No. W2007-0267-CCA-R3-PD, 2010 WL 118696 (Tenn. Crim. App. Jan 13, 2010)(unpublished). Furthermore, even if applicant could show he suffers from a mental illness, this would not prevent his execution, where our Supreme Court has rejected a similar argument and held that a defendant found guilty but mentally ill may be sentenced to death. *State v. Weik*, 356 S.C. 76, 587 S.E.2d 683 (2002), *cert. denied* June 16, 2003; *State v. Wilson*, 306 S.C. 498, 413 S.E.2d 19 (1992).

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

alleged, but an adult criminal mentality and bad character.

Mahdi was evaluated by 2 psychiatric or psychological experts retained by trial/plea counsel (the defense). Both Dr. Thomas Martin, a psychiatrist, and Dr. Geoffrey McKee, a psychologist, found Mahdi had anti-social personality disorder, which is not a mental illness. Both mental health professionals found Mahdi was not suffering from any mental illness at the time he committed the offenses against Myers. Both testified at the PCR hearing that Mahdi was very intelligent. Neither testified that Mahdi was immature or had a “juvenile mentality.” (PCR Tr. 508-61).

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

Mahdi was also examined by Dr. Donna Schwartz-Watts prior to the PCR hearing. While Schwartz-Watts testified Mahdi’s immaturity was cross-referenced in the records, she did not testify Mahdi had a “juvenile mentality” nor did she testify to what mental age Mahdi was, nor his mentality at the time of Myers’ murder. There is absolutely no evidence in the record Mahdi has a “juvenile mentality.” Mahdi has failed to meet his burden of proof on this issue. *Butler, supra*.

Contrary to his assertion, the Virginia DJJ records reveal Mahdi had matured beyond his age, especially with regard to his criminal activities. As a teenager, Mahdi stated his friends were other 14 and 15 year olds, and he was a “leader among his peers,” and was his “own person.” (Va. DJJ Records MOO431). At the Virginia DJJ, Mahdi admitted his criminal behaviors involved a great deal of thought and planning. (Va. DJJ records). A counselor noted: “He described his

current criminal charges in a very calculated, almost professional way that is alarming.” (Va. DJJ records M000410). “He is developing and behaving like a teenager much older.” (See Va. DJJ records M000410). Mahdi was described as a teenager with many negative attitudes toward authority, rules, limits, and rights and privileges of others. (See Va. DJJ records M00410).

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

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

Mahdi was tested in 1994 when he was in the 4th grade and his overall level of functioning was at a mid-fourth grade level. At that time, his current level of educational functioning fell in the average range. His mathematics equivalent yielded a grade equivalent of 5.8. Other tests showed his general information skills at a 6.8 grade level. Mahdi did struggle with reading during this time; however, psychological data revealed Mahdi’s intellectual functioning was in the high average range. (See Brunswick County School Records).

Trial counsel testified at the PCR merits hearing, that Mahdi was very intelligent,

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

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

criminal mentality. This ground has no merit and must be dismissed with prejudice.

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

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

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

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

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

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

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

VI. CONCLUSION

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

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

March , 2014

CERTIFICATE FOR SERVICE

I, Anthony Mabry, hereby certify that I have served the Proposed Order of Dismissal 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 28th day of February, 2014.

ANTHONY MABRY
Assistant Attorney General