

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

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May 5, 2014

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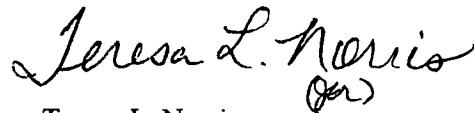
Re: *Mikal D. Mahdi v. State*, 09-CP-09-164 (Calhoun County Capital PCR)

Dear Mr. Hasty:

Please find enclosed, with proof of service, the Applicant's Objections to Respondent's Proposed Order of Dismissal in the above-referenced case.

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

Sincerely,



Teresa L. Norris

enc.

cc: The Honorable Doyet A. Early, III
Anthony Mabry
Robert Lominack

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CALHOUN	)	Case No. 2009-CP-09-164
	)	
Mikal D. Mahdi (SK #5238),	)	
Applicant,	)	
	)	OBJECTIONS TO RESPONDENT'S
v.	)	PROPOSED ORDER OF DISMISSAL
	)	
State of South Carolina,	)	
Respondent.	)	
	)	

Applicant, through the undersigned counsel, herein objects to Respondent's Proposed Order of Dismissal submitted in these Rule 59(e) proceedings, as follows:

Global Objections

1. Matters not Currently Before the Court.

Applicant objects to amending this Court's Order of Dismissal dated December 18, 2012, with respect to any basis or issue other than this Court's finding that counsel's conduct was deficient in Ground 10(a)/11(a)(iii). This is the only basis on which Respondent's Motion to Alter or Amend the Judgment, dated February 8, 2013, was made.

More specifically, Respondent's current proposed order of dismissal includes almost 20 pages related to "The Prejudice Prong" of the ineffective assistance question. Proposed Order 119-37. Respondent did not seek to alter or amend the judgment on this question in either the written motion or the hearing conducted on March 12, 2013, and this Court did not undertake to do so. Thus, Applicant objects entirely to this portion of the Proposed Order of Dismissal.

This Court's prior holdings on this and all other aspects of the case – which were not included in the Rule 59(e) motion – should not be amended. Thus, Applicant objects globally to consideration or adoption of any portion of the Proposed Dismissal Order found in pages 1-27

and pages 119-148, as these matters are not currently before the Court and this Court already entered its finding on those issues.

2. Consideration of the Testimony and File Information from Dr. Martin and Dr. McKee.

Applicant objects globally to any consideration of the testimony and files of Dr. Martin and Dr. McKee. Applicant objected previously to this Court's oral order compelling disclosure of the files of Dr. Martin and Dr. McKee. *See* Attachment 1 (Response to Respondent's Motion to Compel, February 23, 2011). This Order was appealed to the South Carolina Supreme Court, *see* Attachment 2 (Notice of Appeal); Attachment 3 (Petition for Writ of Certiorari), which denied the petition for review on the basis that it was an interlocutory order. The objection to the files and testimony of these doctors was renewed prior to the testimony of these doctors in the PCR hearing and this Court granted a "continuing objection" as to both Dr. Martin and Dr. McKee. PCR Tr. 509-10.

In short -- as set forth previously in argument, which is adopted *in toto* herein -- the files and testimony of these doctors should not have been considered as these doctors did not testify in the trial proceedings and their files were never obtained by trial counsel. While trial counsel were entitled to testify about their recollection of interactions and discussions with these witnesses, the actual files and testimony of these witnesses, which could not possibly have been considered by trial counsel prior to the trial proceedings, was not relevant before this Court and was admitted in violation of the attorney-client privilege.

Thus, Applicant objects globally to: (1) any reference to the testimony of the files and/or testimony of Dr. Martin and Dr. McKee; and (2) any reference to alleged homicides or homicide investigations in Virginia,¹ as this information was received solely through these witnesses and

¹ *See, e.g.*, Proposed Order at 78, 81, 83, 88, 90, 91, 94, 95, 97, 99, 105, 114, 132, 136, 145.

their files.² Indeed, the Sheriff of the County in which these alleged murders were committed testified in the trial sentencing proceedings and made no mention of any pending homicide investigations or even suspicion that Applicant had committed any homicides in Virginia. Presumably, he would have testified to this information if Applicant had indeed been the subject of one or more homicide investigations in Virginia.

**Specific Objections to the Proposed Order Regarding Counsel's Deficient Conduct
(Ground 10(a)/11(a)(iii))**

1. Discussion of ABA Guidelines for Appointment and Performance of Defense Counsel in Death Penalty Cases.

As the United States Supreme Court has recognized these guidelines are, at a minimum, "guides to determining what is reasonable," *Strickland v. Washington*, 466 U.S. 668, 688 (1984), and, more specifically, are "well-defined norms" for counsel in capital cases. *Wiggins v. Smith*, 539 U.S. 510, 524 (2003). The Guidelines have been relied on, as such, by the South Carolina Supreme Court, as well. See, e.g., *Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008); *Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007). Likewise, this Court stated in the hearing on the Rule 59 motion that "those guidelines are pretty good guidelines where someone defending a capital case should look to." Attachment 4 (March 12, 2013 Transcript) at 6. Nonetheless, Respondent would have this Court reject in toto the 2003 Guidelines, Proposed Order 31 n.15, even though Applicant was tried well after they were implemented, and rely on concurrences and dissenting opinions from the United States Supreme Court and South Carolina Supreme Court to distance itself from these Guidelines. Proposed Order 31-33. This Court should reject this invitation because it is inconsistent with the law and this Court's own prior statements.

² Dr. Schwartz-Watts was provided with the files of Dr. Martin and Dr. McKee after this Court ordered disclosure of this information to the State and merely acknowledged that she was aware of the information contained in those files. PCR Tr. 478-82.

2. Alleged Uncooperativeness and Lack of Credibility of Applicant's Lay Mitigation Witnesses.

Respondent includes in its proposed findings repeatedly that none of Applicant's family members that testified in the PCR proceedings were willing to testify in the sentencing proceedings. *See, e.g.*, Proposed Order 46. This is entirely inconsistent with the actual testimony of these witnesses, as well as that of trial counsel. While some of these witnesses may have previously expressed reluctance to testify, all stated that they would have been willing to testify if asked. Any reluctance previously expressed was because of counsel's inadequate investigation and interaction with these witnesses and failure to request that they testify. Moreover, all of these witnesses appeared voluntarily in these proceedings.³ Nonetheless, Respondent would have this Court find each one to be not credible, *see, e.g.*, Proposed Order 57, including Applicant's aunt and uncle whom this Court personally described as "impressive" in the Rule 59 hearing, Attachment 4 at 10.

3. Counsel's Alleged Mitigation Investigation Through Expert Witnesses -- Dr. Martin and Dr. McKee.

While Respondent would have this Court "find" that counsel's investigation was thorough and any failure not to present information was based on "strategy" rather than a simple failure to develop the relevant information this is simply not true. As this Court previously found in its Order of December 18, 2012, the PCR hearing revealed that trial counsel were narrowly focused on Mr. Mahdi 's competency to stand trial and a diminished capacity defense, because they did not understand the nature of mitigation.⁴ Mr. Walters seemed to believe that the universe of mitigation revolved around competency or insanity.

³ As addressed in the hearing, all of these witnesses were from out-of-state and Applicant had no subpoena power to compel their presence. Attachment 4 at 17.

⁴ *See Council v. State*, 380 S.C. at 173, 670 S.E.2d at 363 (trial counsel focused on competency to stand trial and criminal responsibility rather than a complete mitigation investigation).

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

PCR Tr. 610-11.

For his part, Mr. Koger explicitly linked their failure to present mitigation to his apparent belief that if it did not touch on competency or diminished capacity, it was not worth presenting.

[W]e didn't have any type of question about the competency of Mr. Mahdi and his ability to participate in his particular defense and it was nothing in those reports of record that would show a ... sentencing judge that he had diminished capacity. So, [presenting mitigation] was not advantageous in this particular case.

PCR Tr. 690.

The focus on Mr. Mahdi 's competence and mental state at the time of the crimes was also evidenced in the work of the defense experts, who were retained but not called to testify in the trial proceedings. For example, Dr. McKee -- the psychologist hired by trial counsel -- administered brief "screener" tests geared towards addressing competency or detecting malingering with both being "relevant to and specific to a court procedures [sic] and being in court." PCR Tr. 551, 557. Dr. McKee candidly admitted that he would not rely on these tests to learn everything about a person's life. PCR Tr. 557. For his part, Dr. Martin -- the psychiatrist hired by trial counsel -- conceded that his evaluation was focused on Mr. Mahdi's mental state at the time of the crime. PCR Tr. 543.

Moreover, the records that the experts reviewed -- and the records that they did not review -- are consistent with a team narrowly focused on competency to stand trial or insanity issues. Drs. Martin and McKee principally reviewed discovery -- police investigation file, necropsy and pathology reports -- provided by the prosecution. PCR Tr. 511, 554. On the other

hand, neither doctor reviewed Mr. Mahdi's school records, including his special education records (complete with psychological testing) or his juvenile or adult correctional records despite the fact that these records had been provided to trial counsel. PCR Tr. 530-32.

4. The Alleged Cumulative Nature of the Available Mitigation.

Respondent would have this Court find that all of the mitigation evidence presented in PCR was cumulative to that presented through Ms. Hammock, the social worker, in sentencing. Proposed Order at 61. This is simply not true.

First, even if the information were the same, there is a vast difference between having an expert relay this information in conclusory terms and in having actual eyewitnesses describe the events and the details. Specifically, while expert witnesses are important, experts may often speak only "in generalities that lack [] any details of the severe abuse and abject poverty" of a defendant's "formative years." *Sowell v. Anderson*, 663 F.3d 783 795 (6th Cir. 2011). In contrast, family members and other lay witnesses can offer "first-hand, eyewitness accounts of specific examples of extreme poverty and abuse. These specifics ha[ve] far more evidentiary power than the abstractions and oblique references" often contained in expert reports and testimony. *Id. See also Powell v. Collins*, 332 F.3d 376, 400 (6th Cir. 1987) (Family members and friends should testify to "first-hand accounts from those who [know] [the defendant] best").

Second, the information presented in the PCR was not simply cumulative. As Applicant's counsel asserted in the Rule 59 hearing, Ms. Hammock's testimony was primarily vague conclusions without any substantive details, which were provided in the PCR. Attachment 4 at 15-23. For example, while Ms. Hammock described Applicant's father as abusive and lacking in parenting skills, the actual details of his violence, even against his own mother, were missing. There was no information that his alleged "homeschooling" was prompted by his

paranoia of the “white man’s system” or what the homeschooling actually consisted of. Likewise, there was no information presented about Applicant’s grandmother, who lived in her own delusional world of wanting to “pass” for white and to pretend that everything was perfect in the world. Many other differences between the sentencing evidence and the PCR evidence are clear. These are but a few examples of how the evidence is not cumulative.

Finally, as addressed in the Rule 59 hearing, the PCR presentation “humanized” the Applicant, where Judge Newman found the sentencing presentation did not. Aside from just family members, Applicant presented the testimony of school teachers and community members in PCR. Attachment 4 at 17-21. None of these persons had even been interviewed previously, including the Sheriff of the County, who testified as a state’s witness in sentencing. He also provided significant mitigating information in an affidavit in PCR. PCR Exh. 3. *Marquez-Burrola v. State*, 157 P.3d 749, 766 (Okla. Crim. App. 2007) (“One important purpose of mitigation evidence is to humanize the defendant in the eyes of the jury and, if possible to explain what might have driven him to commit the crime”).

[There is a] *qualitative* difference between having a family member generally ask the jury to spare the life of the defendant, and having third parties offer the jury *more objective and specific* examples of *why* the defendant’s life should be spared. . . . Jurors may well . . . give different treatment, and perhaps greater weight, to the testimony of less biased witnesses which illuminates the man whose life is in their hands. . . .

Marquez-Burrola, 157 P.3d at 766-67.

5. The Alleged Reasonableness of Counsel’s Investigation.

While Respondent would have this Court to find that counsel’s investigation was reasonable, the facts are otherwise.

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

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

Documents Obtained by Trial Counsel

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

Documents Not Obtained or Not Reviewed by Anyone

- Special Education School Records
- School Records⁵
- Criminal records regarding Shareef Mahdi
- Psychiatric records regarding Shareef Mahdi
- Military records regarding Shareef Mahdi
- Virginia DJJ or DOC Records

The first list of documents represents the sum total of trial counsels' records collection effort with the exception of materials provided to the defense through discovery. As discussed in detail, *infra*, there were a large number of relevant records which trial counsel never obtained. So, even if the defense experts had reviewed all the mitigation records obtained by the defense, they would not have been well-informed. But not a single expert even reviewed the incomplete set of records trial counsel did manage to obtain. For her part, Ms. Hammock -- again, the only witness to testify about Mr. Mahdi's social history -- only reviewed a "synopsis" of Mr. Mahdi's

⁵ Drs. McKee and Martin did not review any school records. Ms. Hammock reviewed only a "synopsis" of the records.

school records and “a report” of his Walter Carter Center records. Trial Tr. 1747. Similarly, Drs. McKee and Martin reviewed only the Walter Carter Center records. They did not review his school records or his institutional records. PCR Tr. 530-32, 547, 554.

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

Ms. Hammock provided the Court with a “School Experience Summary” that purported to detail Mr. Mahdi’s schooling, but it failed to even note that Mr. Mahdi was placed in special education. As discussed *infra*, Mr. Mahdi’s school and psychiatric records portray him as depressed and in need of significant assistance. Moreover, trial counsel never obtained criminal and military records regarding Shareef Mahdi, Mr. Mahdi’s father. These records reveal that Shareef Mahdi was irrational, mentally ill to the point of being hospitalized, and violent.

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

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

Family Interviews Conducted by Trial Counsel and Defense Team

- Rose Gupton (maternal aunt)
- Nathan Burwell (paternal uncle)
- Carson and Lawanda Burwell (paternal uncle and aunt)
- Vera Artis (mother)

- Shareef Mahdi (father)
- Corliss Artis (maternal aunt)
- Sophia Gee (maternal aunt)
- Nancy Burwell (paternal grandmother)

Non-Family Interviews Conducted by Trial Counsel and Defense Team

- None

Non-Family Interviews Conducted in Preparation for PCR Hearing

- Sheriff James Woodley (affidavit)
- Dora Wynn (affidavit)
- Myra Harris
- Carol Wilson
- Mayor Douglas Pond (affidavit)
- George Smith
- Sharon Pond

6. The Alleged “Strategy” Not to Present Mitigation Because of Potentially Bad Information.

Respondent would have this Court repeatedly find that counsel had a strategy not to present mitigating information in order to avoid additional “bad” information. *See, e.g.*, Proposed Order at 62-65, 73, 83-84, 103, 110, 118. There are no record citations, however, because counsel did not say this. As addressed previously, they simply did not understand the nature of mitigating evidence. Because of this, trial counsel failed to present powerful mitigating evidence about which they were aware but expressed no particular strategy for the failure. The information they failed to present was detailed in Applicant’s Post-Hearing Memorandum, Attachment 5, and the Expert Reports of Nicholas Cooper-Lewter, M.S.W., and Donna Schwartz-Watts, M.D., Attachments 6-7, and will not be repeated herein. To the extent the Proposed Order contradicts this information, however, Applicant specifically objects. Whatever “bad” information was included was mostly already presented in the trial sentencing proceedings and otherwise was outweighed by the mitigating information.

7. The Alleged Requirement that Applicant Establish That the Trial Experts Would Have Reached Different Conclusions in Order to Show Deficient Conduct.

Respondent repeatedly includes in the Proposed Order that Applicant asserted that trial counsel should have “expert shopped” and presented “different” experts. *See, e.g.*, Proposed Order at 70, 97. That is not what Applicant asserted and Applicant objects to these characterizations.

On the flip side, however, Respondent repeatedly asserted and would have this Court find, based on *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2004), that Applicant could not show deficient conduct without showing that the experts that were retained by trial counsel would have changed their opinions. *See, e.g.*, Proposed Order at 72, 99, 100, 101, 106, 114, 116. That is simply not what *Von Dohlen* holds. While the trial expert in *Von Dohlen* was the same expert that provided a different opinion in post-conviction, this is not a requirement in order to establish that counsel’s conduct was inadequate in failing to adequately prepare and present the mitigation evidence. *See, e.g.*, *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008). Applicant objects.

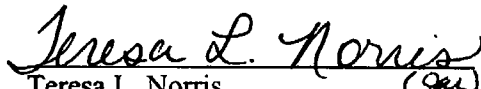
8. The Alleged Incredibility of Applicant’s Expert Witnesses.

Respondent would repeatedly have this Court find that Applicant’s expert witnesses – including Donna Schwartz-Watts, M.D., lacked “credibility,” *see, e.g.*, Proposed Order at 77, 88, 100, including on the apparent basis of this Court’s own reading of the DSM IV TR, which was not even included in the evidence in this case, Proposed Order at 100. Dr. Schwartz-Watts’ findings are included in her testimony and attached report and will not be included here. There is simply no basis for finding her testimony incredible. That is an entirely different question from whether counsel’s conduct was deficient in failing to develop and present this information.

Respondent specifically includes as an alleged basis for finding her testimony incredible that she did not specifically link Applicant's mental illnesses to the murder in this case. Proposed Order at 88. This does not make her testimony incredible and it does not mean that this information is not relevant mitigating evidence. In the mitigation presentation, there is no requirement that mitigating evidence even have a "nexus" to the offenses or that the defendant make any showing that "the criminal act was attributable" in any way to the mitigating factors. *Tennard v. Dretke*, 542 U.S. 274, 286 (2004). Relevant mitigating evidence includes any evidence that would be "mitigating" in the sense that it "might serve 'as a basis for a sentence less than death.'" *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)). At bottom, the sentencer must be allowed to consider any "compassionate or mitigating factors stemming from the diverse frailties of humankind." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). Thus, counsel must make every effort to "humanize" the defendant and allow the jury "to accurately gauge his moral culpability." *Porter v. McCollum*, 558 U.S. 30, 41 (2009). This is specifically the type of humanizing information that Judge Newman found lacking in the trial sentencing proceedings. Trial Tr. 1740.

Conclusion

For all the reasons set forth above, Applicant objects to Respondent's Proposed Order of Dismissal.


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Counsel for Applicant

May 5, 2014.

Attachment 1

STATE OF SOUTH CAROLINA)
)
COUNTY OF CALHOUN)

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

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

Response to Respondent's
Motion to Compel

Introduction

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

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

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

I. The attorney-client privilege

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

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

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

Whenever a defendant alleges that his trial counsel performed in a constitutionally-deficient manner, this Court must “eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and *to evaluate the conduct from counsel’s perspective at the time.*” *Strickland v. Washington*, 466 U.S. 668, 669 (1984). This Court “must judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, *viewed as of the time of counsel’s conduct.*” *Id.* at 690. Counsel’s “actions may be determined or substantially influenced by the defendant’s own statements or actions,” which allows “*inquiry into counsel’s conversations with the defendant*”, *id.* at 691.

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

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

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

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

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

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

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

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

- They did not testify in the trial proceedings.

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

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

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

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

CONCLUSION

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

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

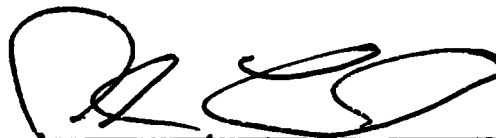
- 1) Mr. Mahdi OBJECTS to the rushed, blind-sided nature of the proceedings, due to Respondent's actions. Respondent never requested these files until less than two weeks ago. Respondent did not file a motion to compel (and whether it is officially filed by email to only one of two appointed counsel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

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

Respectfully submitted,

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ROBERT LOMINACK
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Counsel for Applicant

February 23, 2011

STATE OF SOUTH CAROLINA)

COUNTY OF CALHOUN)

Mikal D. Mahdi,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS

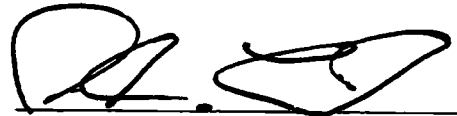
Case No. 2009-CP-09-164

Certificate of Service

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

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

February 23, 2011



Robert Lominack

Attachment 2

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CALHOUN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2009-CP-09-164

Mikal D. Mahdi, ...Appellant,

v.

State of South Carolina, ... Respondent.

NOTICE OF APPEAL

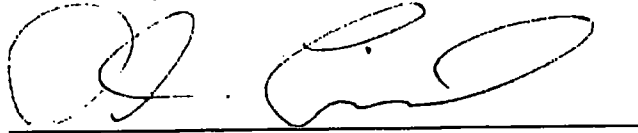
Mikal D. Mahdi appeals the order of the Honorable Doyet A. Early, III compelling Appellant to disclose information protected by the attorney-client privilege. This order was entered orally on February 23, 2011. As of the filing of this Notice of Appeal, Appellant has not been provided with a written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

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

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

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

February 24, 2011

A handwritten signature in black ink, consisting of a large, stylized 'R' followed by a series of loops and a horizontal line at the end.

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

Other Counsel of Record:

Teresa Norris
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Columbia, SC 29211

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CALHOUN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2009-CP-09-164

Mikal D. Mahdi, ...Appellant,

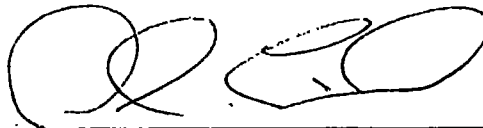
v.

State of South Carolina, ... Respondent.

PROOF OF SERVICE

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

February 24, 2011



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

Attachment 3

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CALHOUN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2009-CP-09-164

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

v.

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

PETITION FOR WRIT OF CERTIORARI

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Statement of the Case

I. Introduction

When a criminal defendant alleges ineffective assistance of prior counsel as a ground for post-conviction relief, the applicant waives the attorney-client privilege “to the extent necessary for prior counsel to respond to the allegation.” S.C. Code § 17-27-130; *see also Binney v State*, 384 S.C. 539, 683 S.E.2d 478 (2009) (permissible for trial counsel to provide entire trial file to Respondent because information in file was necessary for counsel to respond to the allegations of ineffectiveness).¹ The issue before this Court boils down to a straightforward application of the attorney-client privilege and the implied waiver of that privilege in the context of capital post-conviction relief proceedings. The attorney-client privilege applies to all communications between a defendant and experts retained by his counsel in preparation for trial. When a defendant subsequently alleges that his counsel were ineffective at trial, he waives this privilege *only to the extent necessary for counsel to respond to the allegations*. Despite this limitation on the implied waiver, here, Respondent sought – and the PCR court ordered –

¹ This holding has been called into question by the American Bar Association’s Standing Committee on Ethics and Professional Responsibility. *See* ABA Formal Opinion 10-546 (unethical for trial counsel to turn over information outside court-supervised proceedings). Here, however, it makes no difference whether *Binney* was rightly decided or not since Respondent seeks to expand the reach of that holding to include information not in the possession of trial counsel or even seen by trial counsel. In other words, the holding in *Binney* need not be revisited to reverse the lower court order at issue here.

disclosure of the entire files of two experts who were retained by the defense but did not testify and whose file had not been provided to trial counsel. As detailed below the Respondent has been provided with every document in the possession of trial counsel. This case is about whether the statute and *Binney* should be extended to reach the files of experts retained by the defense even if the information in those files was not known to trial counsel and, therefore, could not be used by trial counsel to explain their actions or inactions at trial.

II. Facts relevant to the petition

A. Petitioner's PCR application alleged one claim of ineffective assistance of trial counsel and four sets of supporting facts.

On July 29, 2010, Petitioner amended his application for post-conviction relief.² Petitioner's claims of trial counsel's ineffectiveness were:

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

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

² In *Binney* this Court found that it was the initial application that triggered the waiver of the attorney-client privilege. In this case, the issue is whether – as to non-testifying defense-retained experts' files – the privilege waiver is ever triggered. Therefore, it is of no import which application is used here.

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

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

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

B. Course of discovery

(1) *Petitioner provides trial counsels' entire files*

On October 4, 2010 Respondent requested discovery. Petitioner provided a timely response and in mid-December Respondent took possession of four boxes of files, which represented every document, photograph, and videotape provided to Petitioner by trial counsel. No materials were withheld. Respondent retained the files for almost 8 weeks for copying.

(2) *Respondent seeks the files of two non-testifying defense-retained experts*

Then, on February 10, 2011, counsel for Respondent emailed a request for the files of two mental health experts who were retained – but not called to testify – by trial counsel. Undersigned counsel objected to disclosing those files, because they are covered by the attorney-client privilege, were not

possessed by trial counsel, and, therefore not relevant to trial counsels' ability to respond to the allegations of ineffectiveness. Respondent then requested a conference call on the matter with the Court. Undersigned counsel objected to handling the matter without a motion filed and opportunity to respond. Counsel also objected to handling the matter off the record. On Friday, February 18, 2011, counsel for Respondent emailed a Motion to Compel these files.

(3) *The court convenes a hurried hearing and issues a ruling*

In a hurried hearing held on February 23 (the second business day after Respondent emailed its Motion to Compel), the PCR court ruled that the entire files of the experts should be disclosed pursuant to *Binney* and the statute.³ Judge Early came to this conclusion without an *in camera* review of the documents and without finding that trial counsel had any knowledge of the information in the files. *See Tucker v. Honda of South Carolina Mfg, Inc.*, 354 S.C. 574, 582 S.E.2d 405 (2003) (before privileged materials are disclosed the lower court should conduct a hearing to establish the existence of the privilege and the relevance of the materials).

³ The night before the hearing Respondent filed an affidavit signed by one of Mr. Mahdi's trial counsel, Glenn Walters. This affidavit purported to consent to the release of the trial experts' files. Of course, the attorney-client privilege is not for Mr. Walters to waive. The privilege belongs to Mr. Mahdi and to the extent he has implicitly waived it by filing an application for post-conviction relief, the scope of the waiver is determined by operation of law not by trial counsel. Moreover, in this affidavit Mr. Walters did not purport to have ever seen or have any knowledge of the information in these experts' files.

Counsel for Mr. Mahdi requested an appropriate amount of time so that counsel could put the matter before this Court in the proper manner and so that counsel could discuss the issue with their client who was not present at this hearing. The lower court denied that request and ordered that counsel provide the documents by 1:15 p.m. on February 24, 2011 – 24 hours from the oral order.⁴ This Court dismissed the subsequent Notice of Appeal that was filed but permitted Mr. Mahdi time to file this Petition.

Because the PCR court erroneously interpreted *Binney* and the statute to require disclosure even if counsel was unaware of the information in the files, this Court should grant certiorari and reverse the PCR court's order.

ARGUMENT

- I. **This court may grant certiorari because the lower court's order to disclose files never in trial counsels' possession is appealable. S.C. Code Ann. § 14-3-330 grants this Court jurisdiction to hear an immediate appeal from the PCR court's order that Petitioner disclose privileged information.**

The PCR court's order falls within the scope of § 14-3-330(2), which permits immediate appeal of orders "affecting a substantial right." To prevent irreparable harm, this Court should hear Mr. Mahdi's appeal before the privileged information is revealed.

⁴ As of the filing of this petition counsel have not been provided with a written order from Judge Early and do not know whether one has been entered.

A. The attorney client privilege is a substantial right.

S.C. Code Ann. § 14-3-330(2)⁵ authorizes immediate appeal of the lower court's order because the order affects Mr. Mahdi's substantial right to the attorney-client privilege and cannot be adequately remedied in an appeal from the final judgment.⁶ "The attorney-client privilege is based upon a public policy that the best interest of society is served by promoting a relationship between the attorney and the client whereby utmost confidence in the continuing secrecy of all confidential disclosures made by the client within the relationship is maintained." *Wilson v. Preson*, 378 S.C. 348, 359, 662 S.E.2d 580, 585 (2008); *see also State v. Doster*, 276 S.C. 647, 284 S.E.2d 218 (1981). Moreover the existence of the privilege furthers the broader public interests in the "observance of law and the administration of justice." *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998) (quotations omitted).

This Court has further recognized the importance of a confidential attorney-client relationship within the specific context of 14-3-330(2). *See*

⁵ § 14-3-330(2) grants this Court appellate jurisdiction over "[a]n order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action"

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

Hagood v. Sommerville, 362 S.C. 191, 197, 607 S.E.2d 707, 710 (2005) (noting "the importance of the attorney-client relationship, which demands a confidential, trusting relationship" as one of the reasons for concluding that an order disqualifying a party's attorney "affects a substantial right and may be immediately appealed under Section 14-3-330(2)").

B. Review of the PCR court's order is consistent with this Court's review in other cases.

Mr. Mahdi's right to the attorney-client privilege is clearly substantial. Thus, the lower court's decision, which severely undermines this right, is immediately appealable under § 14-3-330. Moreover, as in *Binney*, this case presents an "exceptional circumstance[]" and "the issue presented by this matter is novel and capable of arising in every PCR proceeding." *Binney*, 384 S.C. at 541, 683 S.E.2d at 479, n.1. Letting the PCR court order stand will invite the Respondent in every PCR case to seek and obtain the files of defense-retained, non-testifying experts without any showing that the information was (1) known to trial counsel at the time of the trial or (2) relevant to the actual claims for relief. And, if this Court finds this issue unreviewable it will force appointed counsel in PCR cases to choose between waiving a substantial right of their client or having to be held in contempt in order to obtain appropriate review. Indeed, review of the PCR court's order would not be unprecedented or even unusual. In addition to granting certiorari in *Binney v. State, supra*, this Court has previously granted immediate review when the rights of the parties involved could not be

vindicated upon appeal from a final judgment. See *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 8, 630 S.E.2d 464, 468 (2006) ("[W]e agree with courts which have been inclined to find such an order immediately appealable because, after a court file is unsealed and the information released, no appellate remedy is likely to repair any damage done by an improper disclosure."); *Hagood*, 362 S.C. at 198, 607 S.E.2d at 710 (justifying the decision to grant an immediate appeal, in part, because "an appeal after final judgment and a new trial, if granted, would not adequately protect a party's interests"); *Breland v. Love Chevrolet Olds Inc.*, 339 S.C. 89, 93, 529 S.E.2d 11, 13 (2000) ("Immediate appeals under subsection (2) have been allowed in situations where the substantial right could not be vindicated on appeal after the case."). Similarly, in *Laffitte v. Bridgestone Corp.*, this Court granted a petition for writ of certiorari to review a trial court's discovery order compelling Bridgestone to turn over a trade secret to the opposing party through discovery. 381 S.C. 460, 674 S.E.2d 154 (2009). Ruling that the trade secret was not necessary for the litigation, this Court reversed the lower court order compelling disclosure. In coming to this conclusion this Court recognized that a discovery order is not ordinarily appealable, but also acknowledged that it was a significant issue that would inevitably be raised in future cases. 381 S.C. at 471, 674 S.E.2d at 160.

II. This Court should grant certiorari to correct the lower court's erroneous determination that a claim of ineffective assistance of counsel waives the privilege as to information about which there is no evidence that trial counsel ever saw.

A. S.C. Code Ann. § 17-27-130 limits the scope of the waiver to that information which is necessary for trial counsel to respond to the allegations of ineffectiveness.

Under S.C. Code Ann. § 17-27-130, a post-conviction relief applicant's allegation of ineffective assistance of counsel operates as an implied waiver. But the waiver is limited – he waives the privilege only as to those materials necessary to respond to the claim. The statutory language is unambiguous:

Where a defendant alleges ineffective assistance of prior trial counsel or appellate counsel as a ground for post-conviction relief or collateral relief under any procedure, the applicant shall be deemed to have waived the attorney-client privilege with respect to both oral and written communications between counsel and the defendant, and between retained or appointed experts and the defendant, *to the extent necessary for prior counsel to respond to the allegation.*

[S.C. Code Ann. § 17-27-130 (West 2007) (emphasis added)]

It is clear from § 17-27-130 that the filing of an ineffective assistance of counsel claim does not permit the disclosure of information not known by trial counsel and, therefore, not relevant to trial counsels' response to the allegations.

South Carolina law zealously protects the privilege, but does recognize some limitations upon it. Like most jurisdictions, it follows the rule that a

criminal defendant's allegation of ineffective assistance of counsel partially waives the attorney-client privilege. S.C. Code Ann. § 17-27-130. However, the statute is explicit – and this Court found in *Binney* – that the waiver applies only to those portions of otherwise privileged communications “necessary for prior counsel to respond to the allegations.” S.C. Code Ann. § 17-27-130; *see also Binney v. State*, 384 S.C. 539, 683, S.E.2d 478 (2009). In contrast, the statute provides that collateral counsel are entitled to review “the complete file.” *Id.*

B. Other jurisdictions have recognized that waiver is limited to only those materials necessary for counsel to respond to the specific ineffective assistance of counsel claims.

Moreover, other courts have considered similar language and concluded that allegations of ineffective assistance of counsel waive the privilege “but only with respect to matters relevant to [the petitioner’s] allegations of ineffective assistance of counsel.” *See e.g., Waldrip v. Head*, 532 S.E.2d 380, 387 (Ga. 2000) (“[W]e hold that a petitioner who asserts a claim for ineffective assistance of counsel makes a limited waiver of the attorney-client privilege and work product doctrine and the state is entitled only to counsel’s documents and files relevant to the specific allegations of ineffectiveness”); *State v. Walen*, 563 N.W.2d 742, 753 (Minn. 1997) (waiver reaches only communications relevant to the issue of ineffective assistance of counsel); *State v. Taylor*, 393 S.E.2d 801, 805 (N.C. 1990) (waiver is limited to matters relevant to allegations of ineffective assistance of counsel); *In re*

Dean, 711 A.2d 257, 258 (N.H. 1998) (ineffective assistance of counsel claims constitute a waiver only to the extent relevant to the claim); *People v. Madera*, 112 P.3d 688, .691 (Colo. 2005) ("the court must impose a waiver no broader than needed to ensure the fairness of the proceedings before it"). See also *Mason v. Mitchell*, 293 F.Supp.2d 819 (2003) (court refused to disclose statements about the crime that the defendant had made to his trial counsel and a non-testifying defense-retained expert, because the court found that this information would not specifically relate to the claims of ineffectiveness); *Hunt v. Blackburn*, 128 U.S. 464 (1888) (when defendant in a civil case relied upon a defense that involved what she and her attorney had discussed, she waived the privilege but only insofar as the attorney could give his account of their discussions).

C. If counsel were unaware of information in the files of non-testifying experts then by definition, this information could not be used by trial counsel to respond to the allegations of ineffectiveness.

Whenever a defendant alleges that his trial counsel performed in a constitutionally-deficient manner, this Court must "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and *to evaluate the conduct from counsel's perspective at the time.*" *Strickland v. Washington*, 466 U.S. 668, 669 (1984). The court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, *viewed as of the time of counsel's conduct.*" *Id.* at 690. Counsel's "actions may be determined or substantially influenced by the

defendant's own statements or actions," which allows "*inquiry into counsel's conversations with the defendant.*" *Id.* at 691.

Thus, by alleging ineffective assistance of counsel, Mr. Mahdi implicitly waived his privilege but only to the extent necessary for **his trial counsel** to respond to the allegations. *Binney v. State*, 384 S.C. 539, 545, 683 S.E.2d 478, 481 (2009). It would therefore be proper for the Respondent to elicit testimony from trial counsel about conversations they had with their experts and what information their experts had imparted to them regarding their assessment. But that is a far cry from supplying trial counsel now with information they did not possess then. In other words, for information to be relevant and discoverable at this stage it has to have been (1) known to defense counsel at the time of trial and (2) relevant to the specific claims of ineffectiveness alleged by the counsel's former client. Put another way, if counsel were not aware of the information in the trial expert's files, then that information could not form the basis of counsel's defense of the allegations.

Here, counsel did not possess the information that the PCR court ordered to be disclosed. There is no evidence or even allegation in trial counsel's affidavit or Respondent's pleadings that counsel ever saw this information.

Likewise, these expert files are simply not relevant to the issues asserted by Mr. Mahdi. The allegations are, in essence, that counsel failed to adequately investigate mitigation information through lay witness interviews

and records collection. There is no allegation here that counsel was ineffective for failing to present the testimony of Dr. Martin or Dr. McKee. There is no allegation or possible constitutional assertion that these doctors were ineffective.

CONCLUSION

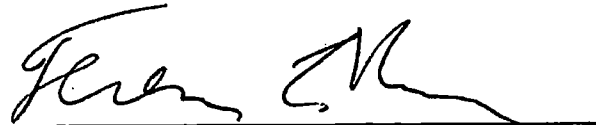
Compelling the production of these files would be an unprecedented encroachment on the attorney-client privilege and one that is not supported by the law. Indeed, Respondent has not cited a single case that has ordered the disclosure of information provided to experts who did not testify at trial. Because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

counsels' strategic decisions at trial, this Court should grant certiorari and reverse the PCR court's order.

Respectfully submitted,

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

Attorney for Petitioner

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM CALHOUN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2009-CP-09-164

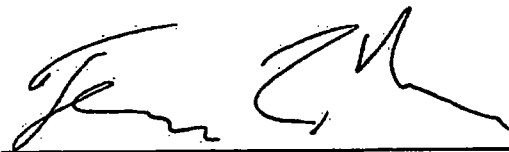
Mikal D. Mahdi,..... Petitioner,

v.

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

PROOF OF SERVICE

I certify that I have served the Petition for Writ of Certiorari on the Respondent by depositing a copy of it in the United States Mail, postage prepaid, on February 25, 2011, addressed to the attorney of record, Anthony Mabry, P.O. Box 11549, Columbia, SC 29211.



Teresa L. Norris
Blume, Weyble & Norris, LLC
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Columbia, SC 29211

Attachment 4

1 STATE OF SOUTH CAROLINA

2 COUNTY OF CALHOUN

CIRCUIT COURT
2009-CP-09-00164

3
4 MIKAL D. MAHDI,

5 -vs-

TRANSCRIPT OF RECORD

6 STATE OF SOUTH CAROLINA,
7 Defendant.

8
9 Heard on Tuesday, March 12, 2013

10 Aiken, South Carolina

11
12 BEFORE:

13 THE HONORABLE DOYET A. EARLY, III

14
15 APPEARANCES:

16 Counsel on Behalf of the Applicant:
17 Teresa L. Norris, Esq.

18 Counsel on Behalf of the State of SC:
19 J. Anthony Mabry, Esq.
Brendan J. McDonald, Esq.

20
21 Cheri L. Young, RPR
22 Circuit Court Reporter
23 P O Box 5232
Aiken, SC 29804-5232

1 ON TUESDAY, MARCH 12, 2013 AT 10:03 A.M.:

2 THE COURT: This is a motion to reconsider the case of
3 the State versus Mahdi.

4 MR. McDONALD: Yes, sir.

5 MR. MABRY: Mikal.

6 THE COURT: Mikal Mahdi. You've got the caption, do
7 you not, Madam Court Reporter?

8 THE COURT REPORTER: I do.

9 THE COURT: And as I understand from the
10 correspondence from the lawyers, y'all have waived his
11 appearance being here today; is that correct, Ms. Norris?

12 MS. NORRIS: Yes, Your Honor. And also Mr. Lominack,
13 my co-counsel, has been excused from this hearing as well.

14 THE COURT: That's correct. And I assume you
15 discussed with Mr. Mahdi that we were having a hearing
16 today, et cetera?

17 MS. NORRIS: I have not been able to see him since it
18 was scheduled, but I talked to him before, after the
19 motion was filed and let him know that there probably
20 would be a hearing outside of his presence.

21 THE COURT: Thank you very much.

22 MR. MABRY: Yes, sir, Your Honor. As the Court said,
23 Your Honor, this is a Rule 59 motion to alter, amend or
24 reconsider under Rule 59 of the South Carolina Rules of
25 Civil Procedure.

1 And as the Court is aware, the Court denied relief to
2 Mr. Mahdi but under ground 10A, 11A-iii, the Court found
3 that counsel was deficient in failing to investigate,
4 develop, present mitigation evidence about Applicant's
5 family, social, and mental health history.

6 The State disagrees, respectfully disagrees with the
7 Court's findings and -- in several respects. The first
8 would be, Your Honor, that in the Court's order the Court
9 cites several ABA guidelines, specific ABA guidelines for
10 counsel in capital cases. And basically the Court's
11 decision that counsel was deficient because they did not
12 follow those guidelines or comply with those specific
13 guidelines.

14 I believe that most of that language was taken from
15 the proposed order or post-trial brief of the defense in
16 this case, based on my recollection of the reading their
17 order.

18 What the Court was not aware of, may not have been
19 aware of, may have been aware of, in 2009, the US Supreme
20 Court subsequent to our State Supreme Court's decision in
21 Council and subsequent to the US Supreme Court case in
22 Wiggins, the US Supreme Court made it clear in a per
23 curiam opinion that the ABA guidelines for defense
24 attorneys in capital cases is not standard for ineffective
25 assistance of counsel. It's not. Simply because counsel

1 didn't follow a specific ABA guideline does not mean that
2 they were deficient.

3 THE COURT: It's not a per se deficiency.

4 MR. MABRY: Right. It's not per se --

5 THE COURT: But it's certainly something that the
6 Court can look at --

7 MR. MABRY: Correct.

8 THE COURT: -- in determining whether or not their
9 performance was not, or it was or it was not ineffective.

10 MR. MABRY: Right. It's -- I believe they term it a
11 guide --

12 THE COURT: Certainly

13 MR. MABRY: -- to the Court, but we believe the Court
14 considered it more as a, basically the standard.

15 THE COURT: So what you're saying, it's not like a
16 violation of a statute as negligence per se in our civil
17 arena. You're simply saying it's not negligence or not
18 ineffective per se but it's something I can consider in
19 determining whether or not counsel was ineffective.

20 MR. MABRY: Correct.

21 THE COURT: Did my order say that that was the
22 standard of care?

23 MR. MABRY: Yes, sir. I believe it does. I reviewed
24 it again coming down here this morning and it appears to
25 me that that, it says that is the standard of care.

1 THE COURT: So if I've said that, then I need to look
2 at that in connection with that case that you've cited to
3 me. Can you give us the cite on that, please?

4 MR. MABRY: Yes, sir. Van Hook is 558 US 4. And then
5 subsequent to Van Hook, the US Supreme Court came out with
6 Cullen versus Pinholster.

7 THE COURT: I'm sorry. Spell that first name.

8 MR. MABRY: Which one?

9 THE COURT: Cullen.

10 MR. MABRY: Yes. C-U-L-L-E-N.

11 THE COURT: Thank you.

12 MR. MABRY: Versus Pinholster, P-I-N-H-O-L-S-T-E-R,
13 which is 131 Supreme Court 1388. That's a 2011 case. It
14 also says that specific guidelines are not appropriate in
15 making an ineffective assistance determination. It is
16 basically, the issue is whether counsel conducted a
17 reasonable investigation under the facts and
18 circumstances.

19 And going back to Van Hook, that was the same thing.
20 The Sixth Circuit -- and it's not unusual to see this
21 because our Supreme Court in Council cites the same ABA
22 guidelines which was prior to Van Hook and prior to
23 Pinholster, but the US Supreme Court has made clear since
24 those decisions that that's not what they meant in
25 Wiggins, that you have to follow the specific ABA

1 guidelines.

2 THE COURT: They're simply guidelines.

3 MR. MABRY: Right. And the reason is because
4 everybody's not a member of the ABA and every lawyer in a
5 defense capital case, you've got to leave room for them to
6 make strategic decisions and make --

7 THE COURT: I understand. But you would agree with me
8 those guidelines are pretty good guidelines where someone
9 defending a capital case should look to.

10 MR. MABRY: I think they are good for somebody to look
11 at to get an idea if they've never handled a capital case
12 before.

13 But there are 131 pages of guidelines. And there's no
14 way you can do everything in those guidelines. For
15 instance, one of the guidelines says you should talk to
16 everybody that has ever known the defendant or known his
17 family.

18 Well, if I'm the capital defendant, there's no way you
19 could ever talk to everybody that has ever known me in my
20 life. Everybody in my first grade class, my second grade
21 class, every teacher I've ever had, everybody who ever had
22 any contact with me. That's simply impossible.

23 What collateral counsel has done is they cite those
24 guidelines that say you didn't follow that guideline, did
25 you. Well, no, we didn't talk to every single person that

1 ever knew him. Well, then you're deficient.

2 And that's why the Supreme Court has made it clear
3 that that's not the standard. It's reasonableness under
4 the facts and circumstances of the case. Did they conduct
5 reasonable mitigation investigation.

6 THE COURT: So I need -- you want me to go back and
7 revisit it under the two Supreme Court cases, US Supreme
8 Court cases that have been decided subsequent to our
9 Supreme Court case in Council wherein they stated that
10 those, they did, they being the guidelines, did set the
11 standard of care?

12 MR. MABRY: Yes, sir.

13 THE COURT: All right. That's a fair request.

14 MR. MABRY: Okay. The second ground, Your Honor, is
15 the order finds and specifically says in the order that
16 counsel conducted a superficial mitigation investigation
17 and one focused on competency and criminal responsibility.

18 And the record shows that is incorrect because what
19 counsel did was they -- the first thing they did was met
20 with the lawyers in North Carolina who were working on
21 another murder investigation in North Carolina. They got
22 everything that they had.

23 THE COURT: Well, he subsequently pled guilty to
24 that.

25 MR. MABRY: Right.

1 THE COURT: I think that was after the hearing we had
2 in Columbia.

3 MR. MABRY: Yes, sir. That was after that, but what
4 I'm talking about is their mitigation investigation.
5 Well, first counsel hired a forensic social worker which
6 didn't happen in the Council case. He hired a mitigation
7 investigator, hired a private investigator, and they went
8 and met with the North Carolina attorneys, got everything
9 that they had.

10 Then they go to Virginia and they interviewed the
11 defendant's mother, the defendant's two maternal aunts.
12 They also went to Philadelphia and interviewed a paternal
13 aunt and uncle. They also interviewed the grandmother and
14 another uncle in Virginia. They also interviewed the
15 father. They had trouble getting the mother and they
16 finally got her. She wouldn't talk to them except by
17 telephone. This whole case, the family wouldn't cooperate
18 with the --

19 THE COURT: But what -- didn't the defense counsel by
20 their own admission in the PCR hearing say that they were
21 concentrating more not on mitigation but on the mental
22 aspects of the case, of the defense?

23 MR. MABRY: I don't agree with that --

24 THE COURT: Okay.

25 MR. MABRY: -- assessment.

1 THE COURT: That's just my recollection. I may be
2 wrong.

3 MR. MABRY: They may have answered one question in the
4 PCR that way. But if you look at the totality of the
5 investigation, there's no question that they were not
6 focused simply on competency and whether he was insane at
7 the time of the crime.

8 Otherwise, why would they have gone to Virginia and
9 interviewed his family? Why wouldn't they have gone to
10 Pennsylvania and interviewed his family? Why wouldn't
11 they have gone to Baltimore? They were trying to develop
12 mitigation evidence from the family, but the only family
13 member who was willing to come and testify was the
14 grandmother. And the only thing she wanted to talk about
15 was what a great family they were and not explaining how
16 the defendant --

17 THE COURT: Well, if she was the only one willing to
18 come, how was the PCR counsel able to get all the family
19 members there?

20 MR. MABRY: Well, as typical in these cases, when the
21 crime is committed and the community is outraged, then so
22 is the defendant's family. They're embarrassed. They're
23 disappointed. They don't want to help him get out of
24 trouble.

25 THE COURT: But you don't know. You're just

1 speculating on that now.

2 MR. MABRY: I don't think I'm speculating on it
3 because the attorney said, you know, we went and talked to
4 these people. And at the PCR, if you'll remember his
5 mother didn't come, his brother didn't come, his father
6 didn't come and neither did the grandmother. Now she
7 supposedly has dementia now, but none of his immediate
8 family came to the PCR.

9 THE COURT: As I recall it was aunts and other members
10 of the family and community.

11 MR. MABRY: Yes, sir. But counsel in this case talked
12 to them. Not only did their mitigation investigator talk
13 to them, they went and talked to them. Mr. -- Uncle,
14 Mr. Burwell, Thomas Burwell and his wife came to the PCR
15 hearing. You'll remember she had a doctorate, I think a
16 PhD.

17 THE COURT: They were very impressive. He had lived
18 with them for some period of time.

19 MR. MABRY: Yes. He had lived with them, but at the
20 time of trial he told the North Carolina lawyers that
21 Mahdi was a demon and he faked child abuse and almost had
22 them locked up for child abuse.

23 And the trial counsel testified, they called us on the
24 phone and said we're not coming. We don't want to testify
25 and if we do, we're going to have bad things to say about

1 him.

2 So that, that's our second objection to the Court's
3 finding of deficient performance. This was not a
4 mitigation investigation that was focused solely on
5 competency to stand trial and mental insanity.

6 It was a mitigation investigation that was focused on
7 his life and how he got to where he was. In fact,
8 Ms. Hammock testified before Judge Newman at the
9 sentencing and that's what she laid out for him,
10 everything that those witnesses basically testified to at
11 the PCR; he came from a broken home, he witnessed domestic
12 violence, his father got in trouble with the law all the
13 time, his mother abandoned him when he was five years
14 old. And it went on and on and on as I've detailed in my
15 motion. That's our second basis.

16 And then our third basis, Your Honor -- if I could
17 have just a moment.

18 THE COURT: Certainly.

19 MR. MABRY: The Court found deficient performance as
20 far as the mitigation. That's what I was leading into.

21 Basically the same testimony that they brought out at
22 the PCR hearing is what was presented to Judge Newman but
23 it was presented through Ms. Hammock. They couldn't get
24 any of the family members to cooperate and come, and if
25 they did they said they were going to say bad things about

1 Mahdi.

2 So what they did was they used their social worker and
3 she presented everything, basically, that they presented
4 at the PCR hearing; broken home, abusive father, witnessed
5 domestic violence, was committed -- Mr. Mahdi was
6 committed to a psychiatric facility when he was nine after
7 he had to move in with his aunt and uncle, his mother
8 abandoned him, his father had all kind of troubles with
9 the law and could not raise him --

10 THE COURT: Hold on a second. All right. Young
11 couple on the back row, y'all step out. You two. That's
12 correct. Step out, please. Thank you.

13 Go ahead.

14 MR. MABRY: That's basically our third argument. It's
15 covered in the motion, Your Honor. And I detailed what
16 Ms. Hammock testified to before Judge Newman and it's
17 basically the same thing that they presented at the PCR,
18 but they presented it through live witnesses.

19 Counsel at the time didn't have that option. These
20 people wouldn't come to court. In fact, the aunt who had
21 the doctorate, she admitted she probably wouldn't -- she
22 was reluctant in 2006 to come but counsel said there's no,
23 none of them would come. Nobody wanted to come except the
24 grandmother. And then she didn't want to explain why
25 Mahdi had gotten to where he was. She wanted to talk

1 about what a great family he was from.

2 So they presented the mitigation the only way they
3 could present it, through Ms. Hammock.

4 THE COURT: Do you have an extra copy of your memo?

5 MR. MABRY: Yes, sir. I handed it up to you.

6 THE COURT: It apparently went to Saint Matthews. We
7 did not get it.

8 MR. MABRY: Can I approach?

9 THE COURT: You can just hand it right here, if you
10 would, please.

11 MR. MABRY: (Document handed to the Judge.)

12 THE COURT: Thank you. Ms. Norris?

13 MR. MABRY: I'm sorry. I'm sorry. Can I say one
14 other thing?

15 THE COURT: Sure. Absolutely.

16 MR. MABRY: I'm sorry. And other thing I addressed in
17 the motion, Judge, is they brought in several experts that
18 testified that like Ms -- Dr. Schwartz-Watts said, "I
19 think he was suffering from generalized anxiety disorder
20 at the time Ms. Mahdi killed Captain Myers."

21 Well, first of all, the only thing she said that led
22 her to that conclusion was Mr. Mahdi told her he was
23 anxious when Captain Myers was coming in the cabin, that
24 he had repented which is not, a pretty tenuous basis to
25 diagnose generalized anxiety disorder.

1 But regardless of that, it doesn't matter what
2 Dr. Schwartz-Watts or Dr. Hayne or one of these other
3 doctors they brought to the PCR hearing found seven, six
4 or seven years after the fact.

5 The cases that I've cited to the Court all say you can
6 always find an expert five, six, seven years after the
7 fact who's going to find something different. The issue
8 is: Did you investigate that question. And they have to
9 show that there was some record that counsel missed that
10 if they had provided that to their experts, they would
11 have come to a different diagnosis.

12 That's the Von Dohlen case. In Von Dohlen, the expert
13 said, yes, if I had these records I would have diagnosed
14 him differently and testified differently before the
15 jury.

16 That didn't happen here. In fact, they didn't call
17 any of the experts that counsel used. We called them. We
18 called Dr. McKey and Dr. Martin. And Dr. Martin said the
19 records that he saw at the PCR hearing would not change
20 his diagnosis. He had anti-social personalty disorder.

21 Dr. McKey said he didn't need to see any other records
22 to make his diagnosis. So basically as far as their
23 experts, it's all impressive and pretty after-the-fact,
24 but that's not really the issue.

25 The issue is: Did counsel do something wrong that

1 would have found something that was missed. And both of
2 counsel's psychological and psychiatric experts testified
3 at the hearing. They didn't establish deficient
4 performance under Von Dohlen.

5 That's all I have, Your Honor.

6 THE COURT: All right, sir.

7 MS. NORRIS: Thank you, Your Honor.

8 THE COURT: Yes, ma'am.

9 MS. NORRIS: In Mr. Mahdi's capital sentencing his
10 defense counsel called only two witnesses.

11 THE COURT: That's correct.

12 MS. NORRIS: One of those was a corrections expert and
13 the other, as Mr. Mabry has said, was Ms. Hammock, a
14 social worker. But what Mr. Mabry characterizes as her
15 testimony going on and on and on was in fact 14 pages of
16 actual testimony that included vague conclusions based on
17 an incomplete investigation. For example, she said, "We
18 can only speculate that his childhood was full of a great
19 deal of conflict and neglect." She wasn't able to give a
20 single story.

21 Never mind, you know, what we heard at the PCR that
22 the father was --

23 THE COURT: Well, if the family members were reluctant
24 to come forward, as Mr. Mabry says, how else could counsel
25 have gotten that information in except through that

1 particular witness?

2 MS. NORRIS: Well, Your Honor, it is simply untrue
3 that the family was uncooperative. We called an aunt and
4 uncle on the paternal side, two aunts on the maternal side
5 in the PCR hearing in addition to other folks. The
6 witnesses that Mr. Mabry referred to, Carson and Lawanda
7 Burwell, they --

8 THE COURT: That was the parent -- or not the
9 parents. That was the aunt and uncle that he lived
10 with --

11 MS. NORRIS: Yes, sir.

12 THE COURT: -- in Norfolk?

13 MR. MABRY: Baltimore.

14 MS. NORRIS: Baltimore.

15 THE COURT: Baltimore. That's correct.

16 MS. NORRIS: They testified. And, yes, they were
17 reluctant. I don't know of any witness that isn't
18 reluctant. But they came for the PCR and they said, had
19 they been asked they would have come for the trial.

20 And even though their testimony include some bad
21 things like nine-year-old Mikal was a demon who was
22 hospitalized involuntarily for depression with psychotic
23 features, obviously they had a lot more mitigating
24 testimony.

25 As for the father and the mother, Mr. Mabry only

1 assumes that they refused to testify in the PCR. There
2 was plenty of evidence about their mental illnesses, their
3 impairments, not the kind of folks who make good
4 witnesses.

5 And a father -- there was lots of testimony about his
6 home schooling of the children and his paranoid rants
7 about white people and the system. So, you know, they
8 weren't necessary as witnesses.

9 The witnesses we did call, though, made a difference.
10 Judge Newman said in his sentencing order that he always
11 tried to temper justice with mercy and to seek to find the
12 humanity in every person that he sentenced. But he
13 specifically said, that sense of humanity does not seem to
14 exist in Mikal Deen Mahdi.

15 In the PCR we had 12 mitigation witnesses, four
16 affidavits. There were eight lay witnesses. And all of
17 those were from Maryland and Virginia. And Your Honor is
18 aware, we have no subpoena power over them in common
19 pleas. These folks came voluntarily, including the family
20 that Mr. Mabry says is uncooperative. We had a school
21 teacher, Carol Wilson, who taught him in the fifth grade,
22 his last grade in school before the father took him out
23 because they, the school wanted to offer him counseling
24 due to emotional handicaps. The father saw that as the
25 white man system, even though most of his counselors and

1 teachers were black, took him out of school.

2 This lady 17 years later said, "I will never forget
3 him." That's a quote from the PCR. She had taught in
4 schools and prisons and juvenile facilities and she said,
5 "just never met anybody else that had no chance in life
6 from childhood."

7 And her testimony was emotional. Your Honor may
8 recall that she was even crying. The record doesn't show
9 that. It shows that I offered her some tissue. Your
10 Honor offered her water and offered her a break. She was
11 emotional.

12 Another third grade teacher said that she would have
13 been willing to foster him if she had been asked.

14 That speaks to humanity. All of those lay witnesses
15 brought the humanity that Judge Newman found lacking in 14
16 pages of dry, social worker, vague, conclusive testimony.

17 As for the focus on competence, Mr. Mabry is mixing
18 apples and oranges. What Your Honor found and what the
19 record shows is that the mental health evaluation, the two
20 experts retained by the trial attorneys were focused on
21 competence and capacity at the time of the crime.

22 Trial counsel said that. Your Honor even quotes their
23 testimony in your order. Those experts said that. They
24 weren't looking for mitigation. The mitigation going to
25 Virginia and Maryland, that's a separate story. But, as

1 in Council, the mental health experts weren't focused on
2 mitigation. And those experts were only provided very
3 basic discovery information, not even all the records that
4 the trial attorneys had.

5 Ms. Hammock wasn't given all the records. She realied
6 on a synopsis of school records which was incomplete.
7 They never got his special education records including
8 psychological testing showing that he had emotional
9 handicaps in the fourth grade. She did not see the actual
10 records of his involuntary hospitalization as a child.
11 She only saw a report or a synopsis of that from Paige
12 Tarr and of course with all the information available,
13 Dr. Watts says he has major depression, anxiety disorder,
14 paranoid personality disorder and attachment disorder in
15 addition to anti-social. With all the information it
16 makes a difference.

17 Counsel also did not obtain any records for anyone
18 other than Mr. Mahdi, didn't get anything on the father
19 when of course there was criminal records, psychiatric
20 records and military records showing much mitigation
21 information. This man was mentally ill and violent
22 throughout his life.

23 And, you know, there's substance there. It's not
24 just, yes, the jury heard that he may have been abusive.
25 They didn't hear what came out in PCR that he tied his own

1 mother to a tree and beat her. Her offense? She stopped
2 him from beating his wife when she wanted to take the kids
3 away to escape the violence. He beat his own sister.

4 Even the sheriff corroborates that. The sheriff who
5 testified in sentencing but trial counsel didn't bother to
6 ask him that information. The sheriff grew up next to the
7 father. He knew this. Everybody in the community knew
8 it.

9 Counsel didn't interview a single person outside of
10 Mr. Mahdi's family even though counsel testified the
11 family wasn't cooperative, they wasn't helpful. He didn't
12 try to talk to anybody else.

13 And whether you argue about it's impossible to find
14 everybody that ever knew him, you certainly can find
15 neighbors, school teachers. Ms. Tarr, their investigator,
16 testified at the PCR that she couldn't remember
17 specifically, she had no file, she thought she had gone to
18 interview schoolteachers but he only went to school for
19 five years. There weren't that many of them.

20 We called the fifth grade teacher, the third grade
21 teacher, had an affidavit from the first grade teacher.
22 They're still in the same place. They're not hard to -
23 find. She just didn't do it.

24 And Carson and Lawanda Burwell, Mikal lived with them
25 for a year. Ms. Hammock said he stayed there a brief

1 period. There was no description of that. These were --
2 as Your Honor recalls were very articulate, very
3 impressive lay witnesses. It's rare that you find lay
4 witnesses in the family with a master's degree, the uncle,
5 and the aunt, a Ph.D. from Harvard. They were able to lay
6 all of this out in a way that humanizes him. They
7 described the neglect from the father and why Mikal was
8 taken from the home. All of that wasn't explained in the
9 vague, conclusive testimony that the jury heard in
10 sentencing.

11 With respect to the ABA guidelines, Your Honor did say
12 in the order that they're the standard of practice and as
13 guides to determining what is reasonable. We can argue
14 about whether they're the standard of practice or not, but
15 it doesn't matter.

16 Your Honor cited numerous US Supreme Court cases and
17 South Carolina Supreme Court cases. So I submit that
18 doesn't matter.

19 The AG argues that Von Dohlen says that we can't show
20 deficient conduct if we can't show that the trial experts
21 would have changed their minds. Von Dohlen absolutely
22 does not say that.

23 In Von Dohlen, yes, it is true that the trial expert
24 came back with more information and changed his opinion.
25 That goes to prejudice. It doesn't go to deficient

1 conduct. I may be misreading it but I was the counsel in
2 Von Dohlen so I'm pretty sure it doesn't say that.

3 Mr. Mabry cites numerous times in his pleading that
4 we're saying that the trial counsel should have expert
5 shopped. They should have had a different social worker.
6 We're not saying that. We're also not saying that there
7 should have been different mental health experts. We're
8 saying those experts weren't given sufficient
9 information. It's not their fault. Counsel, it's
10 counsel's responsibility to investigate and provide that
11 information. They simply didn't do it.

12 As for the testimony being the same, if you look at
13 that 14 pages of testimony from Ms. Hammock, she says that
14 the father had limited parenting skills. He had no
15 parenting skills. The testimony about his home schooling,
16 there was no home schooling except his rant and his rave
17 against the white man's world, his paranoia that people
18 were going to come get him.

19 He had these kids out in the woods, training them for
20 some battle, some assault. That was fifth grade, 12-year-
21 old, 13, however-old Mikal Mahdi, that was his teaching.

22 Again, it was more than a brief stay in Baltimore.
23 Ms. Hammock said that the father had continuing depression
24 issues throughout his life. This man was mentally ill.
25 Even the sheriff, the civil rights leader who, if Your

1 Honor may recall, there was an incident where Mikal's
2 father jumped in the all-white pool in 1995. I don't know
3 how that happens, but it does in this county, but he
4 jumped in and he wouldn't get out. They called the civil
5 rights leader to get him out. He described the violence
6 and the mental illness.

7 There's a lot more than continuing depression. There
8 was nothing in the sentencing about the grandmother and
9 the grandmother is deceased now. Before she had dementia,
10 but she is deceased now. But she was present during his
11 sentencing.

12 And I don't disagree with trial counsel's testimony
13 that she only wanted to talk good about the family. We
14 had the testimony about that in the PCR from Aunt Lawanda
15 and Uncle Carson. This woman lived in her own delusional
16 world. She was a very light-skinned African-American.
17 She wanted to pass for white. She wanted her children to
18 pass for white to the extent that when they were children
19 she would pull their noses to straighten them. And Mikal
20 lived in her home as a child. So, of course, she would
21 not have made a good witness.

22 The other family members, again, some of them had bad
23 information. He's described as a demon child. Well, you
24 know, if you don't -- if you don't present the bad, you
25 don't get the good along with it in terms of mitigation.

1 The AG in their pleading argues that trial counsel had
2 a strategy not to present this evidence because they might
3 open the door to damaging evidence of criminal conduct in
4 the community and bad behavior and confinement, both DJJ
5 and the Department of Corrections.

6 They don't cite anything in the record though because
7 counsel didn't say that. They simply didn't say that.
8 And it's almost laughable to say that they didn't present
9 evidence in mitigation because his bad behavior and
10 confinement might come out because they called a
11 corrections expert. All of that information came out in
12 the sentencing anyway.

13 With respect to other homicides, there was testimony
14 in the sentencing from a neighbor that he boasted of a
15 plan to kill drug dealers. The sheriff of the county
16 testified in the sentencing in aggravation. Presumably
17 had there been any evidence that he was a suspect in an
18 ongoing investigation he would have testified about that.

19 And it doesn't add much to say that Mr. Mahdi told
20 trial experts that he did in fact kill several other
21 people. Well, where are the bodies? Where is the
22 investigation? Where is the evidence? It doesn't add
23 much.

24 With respect to the argument that the mental health
25 evidence was not tied to the crimes, it doesn't matter.

1 Tennard versus Dretke out of the US Supreme Court says
2 mitigation does not have to have a nexus to the crimes.
3 It is mitigating that he has all of these mental health
4 disorders, no matter how you look at it.

5 The rest of the AG's motion, and it's -- it goes on
6 close to 70 pages, much of that is simply repetitive
7 arguments about the crimes and what a bad character
8 Mr. Mahdi is. It's irrelevant to the question we're
9 addressing here; whether or not counsel's conduct was
10 deficient. All of that stuff goes to whether there was
11 prejudice or not.

12 Thank you, Your Honor.

13 THE COURT: Anything in response, Mr. Mabry?

14 MR. MABRY: Just briefly, Your Honor. Most of the
15 things Ms. Norris talked about are addressed in my
16 motion.

17 I would just point out to the Court, one of their
18 claims is they should have called the civil rights
19 activist from Virginia who would've testified that Mahdi's
20 father jumped in the all-white pool and wouldn't leave.
21 The testimony at the PCR was Mr. Mahdi was arrested, sent
22 to Richmond, evaluated and they found he had no mental
23 illness.

24 So how would that help the trial lawyers to present
25 evidence that Mahdi's father was not mentally ill when

1 Ms. Hammock testified before Judge Newman in the
2 sentencing that Mahdi's father did suffer from some mental
3 illness and an inability to care for the children because
4 of his personal problems.

5 Also, as the Court knows, there was specific testimony
6 that Mr. Mahdi related to counsel about the Virginia
7 crimes, the homicides that were committed there. Also he
8 related that to Dr. Martin and Dr. McKey. So, you know,
9 if you put them on the stand that comes out. You've got
10 not only the murder here and in North Carolina, you got
11 two more homicides in Virginia.

12 THE COURT: Are you saying that his background was so
13 atrocious, the killing in North Carolina, the killings in
14 Virginia coupled with the killing of the victim in this
15 case, everything is so bad that you just don't put up
16 anybody because all of that bad stuff will come out?

17 MR. MABRY: Well, no. Not that you don't put up
18 anybody. You put up who you can.

19 Their experts were going to testify he had -- their
20 experts, Dr. McKey and Martin, were going to testify he
21 had anti-social personality disorder. One of the things
22 that Dr. Schwartz-Watts found. And not only that, if you
23 put those specific witnesses on the stand and Solicitor
24 Pascoe gets up and says, well, what history did he give
25 you? Why did he leave Virginia in the first place?

1 Because he committed two murders in Virginia.

2 I mean, that just destroys your mitigation case.

3 Judge Newman never heard about that. All Judge Newman
4 knew about was the North Carolina murder and the South
5 Carolina murder.

6 But they presented the mitigation that they could
7 through Ms. Hammock. She laid out the whole family
8 history.

9 THE COURT: So when somebody's background is as
10 violent as Mahdi's was, you're saying that you just better
11 tiptoe through it and come up with a minimal amount so you
12 don't expose all the other stuff?

13 MR. MABRY: I think you just have to be careful. You
14 have to make a strategic decision as to each witness; what
15 is the good I'm going to get out of this witness, and what
16 is the potential bad that I'm going to get. I think that
17 is --

18 THE COURT: So if every witness has potential bad, you
19 just eliminate them and don't worry about the good?

20 MR. MABRY: No, sir. I didn't say that. I think you
21 have to weigh it according to the risks. What's the odds
22 that this is going to come out, and how bad do we need
23 this specific mitigation evidence.

24 But they made a reasonable decision in this case.
25 Their experts were just going to say anti-social

1 personality disorder. That was the best that they were
2 going to testify.

3 THE COURT: But that the opens the door to determine
4 why it was anti-social --

5 MR. MABRY: Correct.

6 THE COURT: -- disorder, hence the other murders come
7 in.

8 MR. MABRY: Correct.

9 THE COURT: All right. Well, I appreciate both of
10 you --

11 MR. MABRY: Yes, sir.

12 THE COURT: -- being here. I apologize, once again,
13 to you for being late. It just slipped our calendar.

14 Ms. Norris, can you give me your -- I think everything
15 went to Calhoun County. I don't know that we got
16 everything. Can you give me a copy of your motion, memo,
17 whatever?

18 I'll take it under advisement and get back with you
19 all shortly.

20 MS. NORRIS: Yes, sir. We did not file a written
21 reply to --

22 THE COURT: Very well.

23 MS. NORRIS: -- this, but we filed a post-hearing
24 memorandum. Is that what you want?

25 THE COURT: I got that. Thank you both very much.

1 MR. MABRY: Thank you, Your Honor. Thank you for your
2 time.

3 END OF CASE: 10:40 A.M.

4 CERTIFICATE OF REPORTER

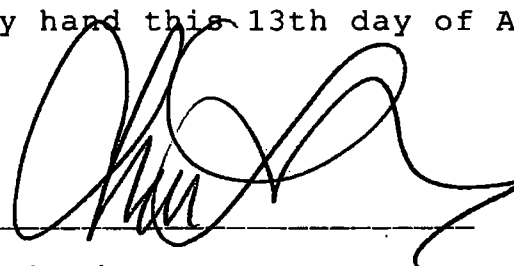
5 STATE OF SOUTH CAROLINA)

6 COUNTY OF AIKEN)

7 I, Cheri L. Young, Registered Professional Reporter
8 and Official Court Reporter for the State of South
9 Carolina, Second Circuit-At Large, do hereby certify that
10 the foregoing is a true, accurate and complete transcript
11 of record of the proceedings had and evidence introduced
12 in the hearing of the captioned case, relative to appeal,
13 in the Court of Common Pleas for Aiken County, on the 12th
14 day of March, 2013.

15 I do further certify that I am neither of kin,
16 counsel, nor interest to any party hereto.

17 I have hereunder set my hand this 13th day of April,
18 2013.

19
20
21 

22 Cheri L. Young, RPR
23 Official Court Reporter
24
25

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Attachment 5

STATE OF SOUTH CAROLINA)
)
COUNTY OF CALHOUN)

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

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

Applicant's Post-Hearing Memorandum

I. Introduction

The mitigation presentation at trial barely scratched the surface of the real story of Mr. Madhi's life. Indeed, trial counsel called only one witness – Marjorie Hammock, a social worker – to present Mr. Mahdi's social history.¹ Ms. Hammock's testimony was based on an incomplete investigation and it showed. Her testimony about Mr. Mahdi spanned only 14 pages and consisted of vague conclusions. Indeed, Ms. Hammock testified that "we can only speculate that [Mr. Mahdi's childhood] was full of a great deal of conflict," and she was unable to relate a single concrete story about the neglect and abuse of Mr. Mahdi. Trial Tr. 1760. Now with the benefit of a thorough and appropriate mitigation investigation, we no longer have to speculate. There is significant evidence – and it was available to trial counsel – that reveals the abuse and neglect suffered by Mr. Mahdi and how his childhood experiences shaped him. This information is mitigating on its own but would have also provided relevant information necessary for a thorough mental health evaluation, and powerful rebuttal to some of the state's evidence in aggravation, which went virtually unchallenged.

¹ The only other witness to testify was James Aiken who addressed the issue of Mr. Mahdi's adaptability to prison. Trial Tr. 1701.

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

II. Mitigating Evidence

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

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

III. Duties of Trial Counsel

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

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

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

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

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

thorough investigation requires an assessment of the following:

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

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

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

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

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

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

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

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

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

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

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

[ABA Guideline 10.11]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[PCR Tr. 610-11]

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

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

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

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

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

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

Documents Obtained by Trial Counsel

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

Documents Not Obtained or Not Reviewed by Anyone

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

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

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

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

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

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

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

Family Interviews Conducted by Trial Counsel and Defense Team

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

Non-Family Interviews Conducted by Trial Counsel and Defense Team

- None

Non-Family Interviews Conducted in Preparation for PCR Hearing⁷

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

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

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

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

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

V. What we know now.

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

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

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

A. Mikal was born into a troubled relationship.

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

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

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

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

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

B. Mikal's Mother Leaves.

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

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

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

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

[Cooper-Lewter Report at 17]

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

C. Mikal Goes to Live with Relatives

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

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

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

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

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

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

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

D. Mikal Returns to Live with Shareef

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

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

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

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

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

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

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

E. Mikal is arrested for the first time

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

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

F. Wallens Ridge State Prison.

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

G. Mikal Mahdi suffered from significant mental illnesses.

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

H. Missed Opportunities and Mercy.

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

I felt that we could have helped him because really and truly [the school psychologist] really wanted to help Mikal and I just feel so lost about the fact that it wasn't able to materialize because after Mikal was just – I felt he was sort of yanked out of my class by his dad and I would see his dad and his dad would say, Look, I am homeschooling him, you know. You can come over and see Mikal. But I never saw Mikal after that and it's just – I do wish I could have done more.

[PCR Tr. 146]

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

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

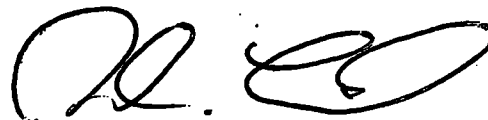
VI. Conclusion

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

Respectfully submitted,

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

Counsel for Mr. Mahdi

January 2, 2012

STATE OF SOUTH CAROLINA)
COUNTY OF CALHOUN)

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

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

Certificate of Service

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

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

January 3, 2012


Robert Lominack

Attachment 6

**Nicholas Cooper-Lewter, MSW, PHD, LISW-CP
Cooper-Lewter Consulting LLC**

Mikal Deen Mahdi Social History Assessment

Defendant: Mikal Deen Mahdi Interviewed

DOB: Redacted

POB: Petersburg, Virginia

Ethnicity/Race: African American

County: Petersburg

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

Vital Statistics Reviewed

Birth Certificate

School Records Reviewed

School Records – Henrico County Schools (Elementary)

School Records – Baltimore County Schools (Elementary)

School Records -- Overby Sheppard – Richmond Public Schools

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

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

Brunswick County Public Schools Lawrenceville Virginia

Commonwealth of Virginia Department of Correctional Education - Hanover

Employment History

Credit History

Military Records Reviewed

Not Accepted by Marines

Arrest/Jail Records Reviewed

Incident Report Regarding Vandalism of Car

Court Record – Felonious Assault

Court record – Break and Enter

Crutchfield Statement

Brunswick County Sheriff's Office Consent to Search

Parole/Probation and Prison Records Reviewed

SCDC Grievance and Discovery Records

Juvenile Records Reviewed

Virginia Department of Corrections

DJJ Reception & Evaluation

Virginia DJJ Records

Kembridge Youth Development System Records

Virginia DJJ Correspondence

120 Wildewood Park Dr., Columbia, SC 29223

A001123

Mikal Deen Mahdi Social History Assessment

Medical Records Reviewed

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

Media Records

News Article regarding Police Standoff

Additional Records Reviewed

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

Immediate Family

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

FATHER: Shareef Mahdi Interviewed

Carson Burwell – Paternal Uncle Interviewed
Lawanda Green Burwell – Wife of Paternal Uncle Interviewed
Frances Reid – Maternal Aunt Interviewed
Rose Gupton – Maternal Aunt Interviewed
Sophia Artis Gee – Maternal Aunt Interviewed
Sandra Wynn Burwell – Paternal Aunt by Marriage Interviewed
Deborah Grey, LCSW – Interviewed Paternal Grandmother Nancy Burwell Interviewed

Teacher's, Family and Friends

Pastor Myra Harris – Former Elementary School Teacher Interviewed
Carol Wilson -- Learning Disability Teacher Totaro Elem. School 4th/5th grades. Interviewed

Community and Demographic Profiles Reviewed:

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

Mikal Deen Mahdi Social History Assessment

SUMMARY OF FINDINGS

Mikal Deen Mahdi

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

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

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

Family and Cultural Context:

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

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

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

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

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

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

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

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

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

One Bright Hope - Missed

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

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

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

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

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

Socially Rejected -- Abandoned & Betrayed & Alone

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

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

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

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

Full social history

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

Mikal Deen Mahdi Social History Assessment

I. Mikal Deen Mahdi

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

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

Family Culture and Societal Context:

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

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

II. Maternal Family History

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

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

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

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

III. Paternal Family History

Mikal's father was born Thomas Burwell on February 24, 1954. His maternal great-grandmother was a white woman from Brodnax, Virginia. She was impregnated by the family's black gardener who is believed to have been subsequently murdered by her family. The great-grandmother took her son, William Anderson "Buck" Thomas to live in Boston. He was well educated and attended Harvard University. He returned to Brodnax where he bought land and worked as a farmer and a veterinarian. It was reported that he had medical training but could not

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get medical license so he settled on practicing as a veterinarian. One of his daughters, Nancy, is Shareef's mother. [*Nancy Burwell, Mikal Mahdi*].

Shareef's father, Nathan Burwell, Sr., was a high school and then college professor at St. Paul's college in Lawrenceville. Nathan married, but his wife and child died in childbirth. He was devastated by this loss. Ultimately he ended up with Nancy who was 20 years younger and had been his high school student. Nancy would later inform her children and their spouses that he coerced her into sex or raped her. Regardless, Nancy became pregnant and her family insisted she and Nathan marry. [*Carson Burwell, Lawanda Burwell*]. Nathan initially resisted and moved to New York City where he worked as a butler for a year. He missed the prestige of life as a professor, however, and returned to Virginia where the school rehired him only on condition that he marry Nancy. [*Carson Burwell*]. From all accounts their marriage was always an unhappy one with each of the children born to them conceived in rape. [*Carson Burwell, Lawanda Burwell*].

Shareef was the fifth of six children born to Nancy and Nathan. Nancy had never wanted children and requested a hysterectomy only moments after Shareef was born. But Nathan would not allow it. [*Carson Burwell*]. Some people in the family believed that Nathan was trying to kill Nancy through childbirth. [*Lawanda Burwell*]. Nevertheless and despite having small children, Nancy completed college at St. Paul's, she later earned a Master's Degree from the University of Virginia, and taught junior and senior high school for 25 years. [*Carson Burwell, Lawanda Burwell*].

Nathan taught agriculture at St. Paul's. In the evenings he went out to help black Brunswick County farmers, and consequently was rarely home for dinner or to spend time with his children. [*Lawanda Burwell*]. When he was home, he had a toxic relationship with his wife, with the two barely speaking to each other, except to argue. Nathan always compared Nancy

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unfavorably to his first wife, while degrading her and being disrespectful in every possible way. Nancy's children, particularly her sons, generally shared their father's views of Nancy and all are still openly critical of her even in her presence. [*Carson Burwell, Lawanda Burwell*]. Not surprisingly, Nancy left Nathan several times taking the children with her to Baltimore but always returned to his house, because she could not support the children on her own. [*Shareef Mahdi*].

Nancy was also unavailable, at least emotionally, to the children. Her maternal grandmother and paternal grandfather were Caucasian – Nancy is very light skinned. In the Jim Crow South, a light or near white skin often meant privilege – “having a pass.” Nancy tried to pass for white, and wanted her children to pass for white. This caused resentment in some people in the community and she was labeled “color struck”. Intent to pass on “the privilege,” she pulled her children's noses and pinched their nostrils together in an attempt to keep them from widening. Nancy insisted that her children not spend time in the sun for fear that their skin would darken. Some of her children resented the idea that they were encouraged “to pass.” Nancy was extremely invested in status within the local community and spent a great deal of energy and time cultivating a “near white” proper image. Nancy would spend hours in front of the mirror practicing her diction, posture, and mannerisms so that she would always appear “proper.” [*Carson Burwell*]. She often talked about her family's emphasis on education and was very proud of the fact that her father had attended Harvard University. According to her children, she was far more consumed with blending in and being respected in the social scene than anything pertaining to her own home and family. [*Carson Burwell, Lawanda Burwell*].

Nancy was very depressed after Shareef's birth. Shareef's mother often ignored his cries for attention. Nancy was withdrawn and did not seem interested in nurturing Shareef. Shareef's

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reaction to being “rejected” was to constantly act out and throw tantrums to get attention. He became hypervigilant and extremely sensitive to perceived insults and rejection. [Carson Burwell]. In addition to having an emotionally distant mother, Shareef also suffered a number of traumas during his childhood. When he was only seven years old he witnessed the rape of his five-year-old sister, Kathy, by his friend. Witnessing this violence – and not doing anything to stop it -- was demoralizing to Shareef. [Shareef Mahdi]. Indeed, in 2003 he reported to mental health counselors that he wanted to kill himself when he was 7 years old. The personal shame and blame continued for Shareef throughout his high school years, which were also troubled by the same friend entering the home eight years later when he knew Kathy would be alone and raping her again. Shareef blamed himself for this event, and Kathy blamed Shareef too. Aside from his struggles within the family, Shareef also found constant conflict in the school system. At the age of 10, he was forced to participate in the integration of schools. Virginia law at the time gave families the option of integrating. Shareef wanted to continue attending the same (segregated) schools as his older siblings. Nancy and Nathan insisted that he enter the all-white school when he was in the fifth grade. There were very few black children attending the integrated school at that time. He was taunted and beaten by white students which increased his anger at how unfair “certain” people and life could be. [Carson Burwell, Shareef Mahdi].

Shareef was the only child in his family not to finish school. When he was 15 years old and around the time of Kathy’s second rape, Shareef had a confrontation with the school principal on the first day of *mandatory* integration. Although many in the family and a number of white people in the community agreed with the reason Shareef was upset and believed that he was “in the right” in confronting the principal’s racism, his parents did not support Shareef. They refused

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to support him because they believed it was more important to blend in and get along. [Carson Burwell, Sandra Burwell].

After experiencing the unfairness of the principal's racism and humiliation of being "in the right" but unsupported, Shareef welcomed being transferred to a school in Baltimore. His mother's reason for moving was another attempt to leave her husband Nathan. Nancy returned to Brunswick County with Shareef when he was 18. He was informed that he would have to attend one more semester to graduate. Shareef experienced this as another example of "the unfairness of things." He was sure he really had enough credits to graduate and was simply being "wronged." Believing things would never be fair, Shareef quit school and went to New Jersey where he stayed with relatives. "Racism and the 'unfairness' seemed to be everywhere." Shareef found himself involved in a standoff with frightened blacks on one end of a field and an angry white crowd on the other end separated only by law enforcement. Shareef remembered a helicopter with a machine gun pointed at the blacks. Hoping to escape the unfairness of racism, and strengthen his sense of self, he joined the Marine Corps months later. [Shareef Mahdi].

Shareef adapted well and enjoyed the experience of his first tour in the Marines. He remained in the Marines for 2 years before being honorably discharged. Returning home, Shareef described himself as being very depressed. Depressed and very upset about the status quo which supported "unfairness," he rejected the family traditions and their "do anything to blend in and get along ideals. One answer was to convert to Islam, and get rid of his "slave name" Thomas Burwell. He changed his name to Shareef Mahdi.

In 1976 – two years after being discharged – Shareef enlisted in the Marines again. This enlistment did not go well. Within only a few months, Shareef was court-martialed for disrespect and disobeying orders. After less than a year Shareef was discharged "Under Other than

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Honorable Conditions/Good of the Service" in 1977. This stint in the Marines was marked by Shareef's disobedience and his complaints about the atmosphere of the Marines, which according to him was filled with profane language, drug abuse and "barbaric mannerisms." Shareef admitted that his outlook on life had changed drastically since his last enlistment. "I found my mental and spiritual thinking had changed drastically since [my] first enlistment." Four years after his discharge, Shareef was not content with the status of his discharge status. He applied for a review of the discharge status. He argued that he had been the target of religious and racial discrimination. His request to amend his discharge status was denied. [*Shareef Mahdi Military Records*].

IV. Shareef and Vera Meet

Shareef met his future wife and her family in the small Muslim community of Petersburg, Virginia. Shareef was 23 when he met the Artis family. Vera, who was around fourteen at the time, was one of ten siblings and was third from the youngest. Shareef wanted to marry Doris, who was Vera's older sister, but Doris declined. Shareef then arranged with Vera's mother to marry Vera. [*Shareef Mahdi, Rose Gupton, Sophia Gee*].

Shareef and Vera Artis were married in 1980. Vera's hope was to escape her family's poverty and daily struggle to make ends meet. [*Vera Mahdi*] Vera's sister described the wedding ceremony as the "saddest wedding" she has ever witnessed. Vera kept her head down the entire ceremony, not even a hint of a smile graced her face. According to her sister, Vera reported Shareef raped her on their wedding night. Vera told a number of her sisters and Shareef that she never wanted him sexually after that. [*Rose Gupton*].

After the marriage, Shareef changed his wife's name to Tilea. Shareef immediately moved her to Lawrenceville to live in his mother's home in Brunswick County. [*Shareef Mahdi*,

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Vera Mahdi]. Vera was shocked and distraught as she would not have married Shareef if she had known his plan. [*Vera Mahdi*] They lived in the one-bedroom finished basement and Vera came upstairs only to eat. Shareef became known to all in the county, including law enforcement, as “radicalized” in his dislike and distrust of white people and for his domineering behavior particularly with women. Vera, was very timid and her reputation of being difficult to engage, increased. In spite of this she did continue her education, obtaining her GED and entering a nursing program at the local community college. [*Sandra Burwell, Lawanda Burwell*]. Her “outside interests” of education did not sit well with her husband. Shareef believed his wife should stay home even though he found it hard to find work and was not consistently providing for his family. He isolated Vera from her own family. Her family had so little interaction with her during her marriage to Shareef that they were not aware she was expecting a child and first learned of Saleem – Mikal’s older brother – when she visited the family after his birth. [*Rose Gupton, Sophia Gee*]. After Saleem was born, Vera left school to care for him. A year and a half later, Mikal was born. He was described by both parents as a happy baby. [*Shareef Mahdi, Vera Mahdi*].

IV. Mikal’s Childhood

Mikal’s Toddler Years: Repeated Trauma, Unexpected Severe Loss, Confusion, Chronic Domestic Violence

The family continued living in the Burwell’s basement until Mikal was around two years old. They then moved to an apartment in Lawrenceville. By February 1988, Shareef was not maintaining steady employment. Vera joined the Army, hoping for a better life. However, she did not complete her basic training. Vera was discharged for failing to perform required tasks satisfactorily. [*Vera Mahdi*].

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After Vera's return to Virginia when Mikal was barely five years old, the family moved back into the Burwell's basement. Things deteriorated quickly. Mikal recalled occasions when his parents would argue. One occasion vividly recalled by Mikal, he saw his father pulling his mother's hair. His father then picked his mother up and body slammed her into their glass kitchen table, which shattered. His father was shouting "bitch you wanted the goddamn table, you got it." Mikal and his brother Saleem were screaming "don't hurt mom." Shareef responded, "Shut the hell up, ya'll are soft." Shareef left and was gone for several days. Gone most of a week, he only returned briefly at night. [*Mikal Mahdi*].

Vera Attempts to Leave Shareef

Eventually, Vera informed Shareef that she was leaving him and taking her sons. Mikal recalled his mother going around the house and gathering her Mikal and Saleem's clothes to pack them. Then an "argument abruptly started." Arguments eventually became violent and were "always physical." [*Mikal Mahdi*]. The boys watched their father beat their mother. Shareef told Vera that if she left, he would find her and bring her back. Shareef promised he would kill his sons before allowing her to take them. Taking him at his word, Vera left the boys with Shareef and made her escape. Free of Shareef, she abandoned Islam and changed her name back to Vera. [*Rose Gupton, Sophia Gee*].

Vera first stayed with her sister Doris in Reading, Pennsylvania for about six months. She then moved in with her sister, Rose, in Richmond. Shareef called constantly, day and night, insisting that she return. They would block the numbers he used, but he would just keep using different phones. While Vera wanted no contact with Shareef, she did attempt to send cards and letters and wanted to have contact with her children, but Shareef insisted that if she wanted contact with her children, she should return. He refused the cards and letters. [*Rose Gupton,*

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Sophia Gee]. After Vera left, Shareef constantly told Mikal and Saleem that their mother abandoned them, she did not love them, and eventually that she was dead. [*Rose Gupton, Sophia Gee, Sandra Burwell*].

As a toddler, one of Vera's sisters recalled how Mikal would be dressed up in all white and made to sit still quietly. Sitting still and being quiet was more important in the presence of others than allowing Mikal, the toddler, to play. Mikal's mother had always provided basic care. As he grew older, the care was not always warm. This did not interfere with Mikal's hunger for his mother's love and attention. His mother just seemed to enjoy him more as an infant.

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

Mikal understood his mother and father fought, but her leaving and not returning for he and his brother was an unfathomable personal loss from which he could not recover without damage

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

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

Mikal's brother Saleem was considered "his father's son" and Mikal was considered "his mother's child." Some in the family believed Mikal took the loss of mother and family the hardest. Emotionally overwhelmed, he started putting up a barrier to others, especially adults (and authority figures). He tried hard to please his father and gain his father's respect. He tried to protect his mother, and keep the family together. Mikal was unable to protect his mother, keep the family together or save himself from the pain of feeling "stupid" in the process. At the Walter Carter Psychiatric Center, at age 9, Mikal was asked to list three wishes. He listed one, " I want my family to be together, that's all I wish for." [*Mikal Mahdi, Shareef Mahdi, Carson Burwell, Lawanda Burwell*])

After Vera left, Shareef was consumed with depression and despair. He did not attend to the children, did not send them to school regularly and they were often left to fend for themselves. Mikal was grieved by the changes (losses), hopelessness, powerlessness, confusion and chronic

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preachments of his angry and depressed father. The constant preaching and raging of Shareef repeatedly begged one question, "What to do with righteously felt anger when dispossessed of outlets?" Mikal like his father before in his own childhood began to "act out." [*Shareef Mahdi, Carson Burwell, Mikal Mahdi*].

Mikal's Experiences with School - Tumultuous

Shareef and the boys moved to Richmond. Shareef enrolled them in the Sister Clara Mohammed School, a Nation of Islam School. Mikal was in kindergarten. Before Mikal completed a year of school, Shareef returned with the boys to Brunswick County and enrolled them in school at Totaro Elementary School. Shareef often did not have a vehicle or the emotional energy to get them to school, subsequently, the boys had a number of absences. During his partial year of kindergarten at Totaro, Mikal missed 23 days of school. [*Mikal Mahdi School Records*].

In January of 1990 – in the middle of what would be Mikal's first grade year – Mikal transferred to Chamberlayne Elementary School back in Richmond. According to his teachers, Mikal seemed to be struggling emotionally and academically.

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

Shortly after this notation was written on his progress report, Mikal was withdrawn from school following fifteen days of consecutive absenteeism. Mikal was transferred to the University of Islam for a short time before transferring to Short Pump Elementary School in November 1990. Both of these schools are in the Richmond area. Mikal was still in the first

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grade at this point and it appears that he only remained at this school until February 1991.

Teachers noted his significant reading struggles. [*Mikal Mahdi School Records*].

Mikal then transferred to Overby-Sheppard Elementary School in Richmond. His records there reveal that Shareef was "self-employed" and the family had a DSS caseworker as they lived on "welfare." Following only a portion of one semester at this school, Mikal left school and apparently did not attend school at all from the beginning of the summer session until late October 1991. [*Mikal Mahdi School Records*].

Mikal goes to live with relatives

In October 1991, Shareef's siblings intervened to care for his two sons because they became aware that Shareef did not have the boys in school and was not caring for them as they felt a father should. Saleem went with an aunt in Texas and Mikal went to Uncle Carson and Aunt Lawanda Burwell in Baltimore. Prior to this move, Shareef, Saleem, and Mikal were living in Section 8 housing and on welfare in Richmond. [*Carson Burwell, Lawanda Burwell*].

Mikal's physical circumstances improved a great deal. Carson and Lawanda were a middle class family with Carson making a decent living as a barber and Lawanda as a school administrator and educator. Mikal's bedroom was set up in a room that Lawanda also used as an office. Carson and Lawanda tried to help Mikal, who had trouble reading at that time. They provided the structure that was missing in Shareef's household. Mikal, however, wanted to be with his father and brother. [*Carson Burwell, Lawanda Burwell*].

Carson and his family insisted that Carson wanted Mikal and that Lawanda was resentful of Mikal's presence. Lawanda recalled it differently, as does Mikal. Mikal remembered Carson often told him, "I don't want you here." Lawanda and Mikal agree, Lawanda was the person who really tried to help him. [*Mikal Mahdi*]. Lawanda recalled Mikal as "an angry and hurt little boy"

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when he arrived and she attempted to treat him as her own. When her children were sent to summer camp, Mikal went as well. He was included in family vacations. When school officials sought a parent conference, Lawanda responded. The problem from her view was that Mikal "was a runner." Anytime he became upset with a situation, he would run away. He would run out of the school, the house, or a restaurant. Lawanda reported that the Burwell men did not really know how to have a warm relationship with a woman. The Burwell men grew up with their father belittling and degrading their mother. The Burwell men treated their own spouses similarly. This was the atmosphere from which Mikal came. From Lawanda's view, Mikal was doomed to this fate if no one intervened. Mikal became worse after his mother left and did not return. While Lawanda tried to fill the void, Mikal "wouldn't have it" and did not want her to be motherly ("his mother"). [*Lawanda Burwell*].

Lawanda recalled that Mikal talked about his dad all the time but mentioned his mother only once. Mikal believed his mother left the family because "I was too dumb." Mikal had lost his mother and became consumed with wanting his father. He thought "the sun and moon rose on Shareef" and he desperately wanted to be reunited with him. He constantly pined for him and repeatedly asked why he couldn't be with his father and his brother, Saleem. [*Lawanda Burwell*].

Although he should have been in the third grade, Mikal was enrolled as a second grader in Scott's Branch Elementary School in Baltimore in the fall of 1991. School officials wanted to test him and place him in special education courses but his Aunt Lawanda believed that his problems were only gaps in his learning due to the repeated moves and school changes. She also believed that Mikal, who already believed his mother did not want him because he "was dumb," would be traumatized and stigmatized by labeling him as a special education student. [*Lawanda Burwell*]. Mikal's reading struggles continued and he received Ds in language arts throughout

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the year. He also was described as needing to improve his behavior. The school became sufficiently concerned about Mikal's behavior and reading problems that it referred him for an Educational Management Team assessment.

In March of that school year the principal at Mikal's elementary school informed Carson and Lawanda that he had said, "Why doesn't somebody just shoot me? If I had a gun, I would shoot myself." School officials recommended psychiatric treatment, but the family did not pursue any treatment or counseling. [*Mikal Mahdi School Records*]. For about a month during the summer of 1992, Mikal returned to Brunswick County, Virginia, to visit his father, who was then living out in the country at a home provided for him by his mother. During this time, Shareef was also fixated on Vera's departure from the family and wanted to punish her and make her suffer as he and the boys had. He used the boys as bait to get Vera to come out of her sister's house in Richmond to his truck. She came out in her pajamas and was barefooted. He forced her into his truck by threatening her with a gun. The gun was a toy gun but no one but Shareef knew it was a toy. He drove her back to the family home in Brodnax. He hit her and verbally assaulted her throughout the drive with the boys begging their father not to hurt their mother. After they arrived at the family home, Shareef told the boys to go inside with their grandmother and took Vera into the woods near a creek. He tied her hands and was assaulting her, choking her, and drowning her until a family member intervened allowing Vera to escape to Shareef's cousin's car before Shareef could catch up with her. Mikal ran out of the house trying to save his mother. He was trying to pull her toward him while his father was pulling her out of the driver's seat through the passenger side of the car. She was finally able to escape when a family member drove her away. [*Shareef Mahdi*]. Although Vera was battered and bruised and her family encouraged her to report the incident to police, she did not. [*Sophia Gee*]. During this same visit home, with

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Mikal observing, Shareef assaulted his own mother by beating her legs with a leather belt. Some family members believe this was caused, in part, by Nancy helping Vera to escape from him. [Sandra Burwell]. Nancy filed charges against him and Shareef was taken to jail for a few weeks before his mother chose to dismiss the charges.

Mikal returned to his aunt and uncle's house soon after this incident and, according to Mikal's mental health records, his aunt noticed that he was noticeably sadder than before the visit and that he blamed himself for his family's break up.

Mikal is placed in a psychiatric hospital

Just two weeks after returning to his aunt and uncle's house, a police officer responded to the home to investigate Mikal's self-report of potential child abuse. Carson and Lawanda confirm that Lawanda had whipped Mikal with a belt for disobeying her and going outside, but both deny abuse. Mikal used some Halloween makeup to make sure he was believed by trying to create the appearance of bruises. [Carson Burwell, Lawanda Burwell]. While the officer was there, Mikal said that he had "nothing to live for and would like to die." He went on to ask the officer for his gun so that he could shoot himself. Mikal's uncle and aunt admitted to the officer that Mikal was frequently talking about suicide. [Mikal Mahdi School Records]. Mikal was admitted to a psychiatric hospital. After being admitted Mikal told the psychiatrist, "I will jump off a bridge, shoot myself or kill myself with my bow and arrows." When the psychiatrist asked him to list three wishes he had, he listed one – "I want my family to be together, that's all I wish for." [Walter Carter Center Records].

Psychological testing revealed a very sad boy who was suffering from "profound depression, significant losses, and preoccupation with death, anxiety and . . . some unconventional loose and disorganized thinking and the possibility of past experiences with

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trauma . . .” Indeed, Mikal’s depression and anxiety were significant enough that the psychologist believed that his IQ score – full scale of 95 – underestimated his ability. During the clinical interview “Mikal showed such a lack of self confidence and level of frustration. He easily became overwhelmed to the point that he would be openly oppositional and refuse to proceed.” But even when Mikal would act out, the interviewer noted that the underlying themes of depression and anxiety were prominent. For example, he refused to draw his dream house saying, “No, it will never happen.” It was noted that Mikal was at risk for impulsively acting out his sadness and anger because of possibly misinterpreting environmental cues and his negative thoughts about himself. Mikal was diagnosed with Major Depression, Single Episode; Oppositional Defiant Disorder; Post-Traumatic Stress Disorder, and; Bipolar Disorder. [*Walter Carter Center Records*].

Mikal leaves the hospital and goes back to school

After Mikal was discharged from the psychiatric hospital, he returned to Scott Branch in the third grade. In November of 1992, he was suspended for being disrespectful and openly defiant. Mikal was hypervigilant and sometimes ambivalent or avoidant or resistive and “always watchful”. His teacher, Myra Harris, took time with him and routinely spent lunch time listening to his concerns. Consistently she would take him out of detention after he reacted negatively to the lecture style of other teachers. Mikal had not liked his father’s unyielding preaching style lectures either. Mikal began to come around after school to see Ms. Harris. Ms. Harris said that behaviorally and academically Mikal was just like the other children in her care. She never brought up his past or previous hospitalization. He earned at least two certificates of achievement during his time in her class. Ms. Harris continued being firm, fair and listened to Mikal, subsequently he showed remarkable improvement. [*Myra Harris*]. His grades improved and his

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teacher commented that she was pleased with Mikal's "leaps and bounds in progress," Mikal was turning in assignments neat and accurate, that he was warm and pleasant, and worked well in small groups. [*Mikal Mahdi School Records*]. Lawanda also recalled being very proud of Mikal and his progress. In her view, he had transformed from a disruptive student to a fully engaged and enthusiastic student. In fact, she has a photo of a very happy looking Mikal dressed up for his third grade prom in this time period. [*Lawanda Burwell*]. When Mikal returned to school in the fall, he was placed in a class with a teacher who had only one year's experience. While Mikal did act out more than he had in the previous year, he still was progressing and behaving fairly well. When Saleem was sent home from Texas by his aunt to Shareef, the progress stopped. Although Mikal had always felt to some extent that neither parent wanted him, he was convinced then that his father did not want him but clearly wanted his brother, Saleem. Mikal began to display disruptive, angry and hurt behaviors. [*Carson Burwell, Lawanda Burwell*]. In the fall of 1993 Mikal was suspended for leaving the classroom without permission, disrupting the class, and refusing to cooperate. [*Mikal Mahdi School Records*]. The records indicate that Mikal would not be permitted back to school until a conference was held. Despite his behavior problems, a note indicated that "Mikal is an intelligent student who appears to be stifling his potential. He has the capacity to contribute and participate as an active learner but doesn't always appear motivated. Mikal began the year appearing more interested but seems to be in a rut . . ." [*Mikal Mahdi School Records*].

Rather than try to deal with the situation, Carson decided then, much to Lawanda's dismay, to send Mikal back to Shareef. [*Lawanda Burwell*]. He was withdrawn from school mid-semester in Baltimore and returned to Brodnax, Virginia, around Thanksgiving 1993 to live with

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his father and Saleem. He was re-enrolled at Totaro Elementary School where Shareef was actually teaching as a substitute teacher.

Dora Wynn, Mikal's kindergarten teacher, recalled that when his mother was still in the picture, Mikal was a "*cute little boy who was shy at first.*" She described him as a bright child and "more of an observer" who had to be encouraged to engage with other children. When he returned to Totaro in the fourth grade, Wynn was the school principal. *Mikal had changed.* He had developed emotional difficulties and was frequently brought to Wynn's office. Wynn recalled that upon his return he was withdrawn and had trust issues. On rare occasions she could get him to smile, but he would quickly return to his rigid stance. According to her, Mikal refused to do his work, refused to eat, and often just walked away from school. She recalled at least one occasion when she was in her car driving alongside Mikal while trying to get him to get into the car. He was always headed down the road to his grandmother's house. Wynn could never figure out why Mikal was "so angry." [Dora Wynn].

Mikal is found eligible for special education

In the spring of 1994 school records place Mikal in the Fifth Grade at Totaro Elementary School. [Mikal Mahdi School Records]. Mikal was referred for a special education assessment because of academic difficulties and behavioral problems. Psychological testing revealed a full scale IQ score of 118. The sociocultural report noted that Mikal had an outgoing personality when he was younger but that this had been replaced with low self-esteem and adjustment problems. The evaluators also noted the following tendencies in Mikal: negative attitude about being corrected; a preference to be with family rather than others; inappropriate behavior around adults; lack of fear and a failure to recognize dangerous situations, and; a decreased ability to retain information. [Mikal Mahdi School Records].

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Psychological testing administered as part of this assessment corroborated their observations. "Test findings indicate that Mikal is a very bright child who presents certain adjustment difficulties. These latter difficulties, engendered by family separation, various relocations, etc. have in turn reduced his feelings of self efficacy." [*Mikal Mahdi School Records*]. Projective testing consistently pointed to "depressive tendencies, lack of self esteem and feelings of hopelessness." In addition to the testing, a teacher, Carol Wilson, observed Mikal in the classroom. During the first couple of days of the observation, Mikal drew a picture of someone hanging himself. According to Wilson, Mikal was "just depressed, there was no reaching him," and he was "emotionally flat." Wilson noted that "Mikal has also exhibited periods of extreme sadness at times." [*Mikal Mahdi School Records*]. Mikal was recommended for special education and counseling. Despite his many problems, the staff believed that special education would be successful because of Mikal's intelligence and his positive personality traits. [*Carol Wilson*].

Based on the assessment Mikal was found to be eligible for the emotionally disabled program. Educators recalled that Shareef did not like hearing that Mikal had a severe emotional disturbance. Shareef was described as "difficult to deal with and disturbed." He responded to the view that Mikal needed special services as "bullshit" and stormed out of a meeting with school officials and teachers.

Rather than allow Mikal the special services and classes as recommended by school officials, teachers, and mental health experts, Shareef took Mikal out of school to "home school" him. [*Carol Wilson, Dora Wynn*]. Mikal left school at the end of the 5th grade when he was only 11 years old.

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Around the same time Mikal left school, Shareef was fired from his teaching position. Mikal recalled Shareef's teaching experience specifically as one of "ranting and raving" at students about anti-government, race, as well as what Mikal called "psychologically breaking them down." The other students would tell Mikal of the events and laugh about his "crazy" father. Mikal recalled three specific instances. One was a student who always had body odor. Shareef yelled and belittled him until he cried and a complaint was filed. Second was a girl that Shareef yelled at about "acting like an animal, defecating on the floor." Third was Shareef yelling at a lady who worked in the cafeteria about the salad being "bad." Mikal recalled that a big topic for a while was Shareef ranting "how do you fuck up a salad?" [Mikal Mahdi]. Carol Wilson, one of Mikal's teachers at the school, recalled that Shareef was terminated because Shareef yelled at some fifth grade girls, calling them "bitches" and "whores" and telling them to use birth control. [Carol Wilson].

Shareef's increasingly, unstable, bizarre behavior lands him in jail and a psychiatric hospital

When Mikal began his "home schooling," Shareef and his sons lived on Nancy Burwell's property in a home she provided in rural Brodnax, Virginia. Mikal describes Shareef generally as always "ranting and raving." That was "his thing." To Mikal and Saleem, "that's what father's did." He raved about the "New World Order" and "white folks coming to kill them." He did that before the move to an isolated, rural area and the "home schooling," but it intensified afterwards. He took the boys on trips to the woods to prepare them for this "New World Order." He taught them how to shoot guns, fight with knives, and how to fist-fight and box. [Shareef Mahdi, Mikal Mahdi].

Shareef did this ranting and raving and was "out of it all the time" throughout Mikal's childhood. It seemed to get worse when Mikal was around 11 and being "home schooled," which

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was more indoctrination of Shareef's beliefs than actual "schooling." Mikal does not know if it actually was worse or whether he just didn't notice it or think so much about it when he was younger. But from age 11 to 15, Mikal described a month as his father "being out of it 25 days and trying to be super dad the other 5 days." [*Mikal Mahdi*].

Within only a few months of Mikal leaving school, , Shareef was referred for mental health treatment following an incident when he jumped in an "all-white" private pool at an elite country club in the county. Law enforcement officers were called and they attempted to talk Shareef out of the pool. They considered draining it to get him out but ultimately got a respected black leader in the community to talk him out. At the jail, Shareef was noted to be "disoriented," "agitated and verbally abusive," and "paranoid and delusional." The Sheriff referred him for mental health evaluation. [*Central State Hospital Records*]. While the evaluators note that he engaged in delusional and paranoid behavior, they ultimately found that Shareef suffered from a personality disorder and discharged him back to the jail. [*Central State Hospital Records*].

Of the pool incident generally, Mikal recalled Shareef being on a "crusade" claiming that the pool was paid for by public money being funneled into private hands. He was raving about a corrupt county board and going to the newspapers about it, although they weren't printing it. As Mikal described it, they were "already socially isolated as Muslims and it just got worse" when Shareef became known basically as "the crazy guy" in town. [*Mikal Mahdi*].

While Shareef was in the jail/hospital, Mikal stayed with Ms. Dillworth, a friend of the family because his grandmother was renting out her house then and was staying in Baltimore or Philadelphia with family members. When Shareef got out of the hospital, Mikal went back to him and the "home-schooling." [*Mikal Mahdi*]. Although the sheriff of the county, who testified for the state in Mikal's capital sentencing hearing, recalled that he made a referral to the

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Department of Social Services due to the lack of any schooling and his concerns about Shareef's mental health, no record can be found of DSS or school officials ever following up on the situation. [James Woodley].

The remainder of Mikal's home-schooling experience

Aside from "learning" about the "New World Order" and how to use guns and knives, Mikal described the "home-schooling" experience as basically hours upon hours of Shareef's "ranting and raving" and giving him religious materials to read and digest. Shareef would constantly tell Mikal what he did wrong, but would provide him with no solutions. While he lectured on work ethic, he had no job and made no attempt to work. The family lived on public assistance, what his grandmother provided, and ultimately what Mikal could steal. While Shareef would spend hours lecturing Mikal about stealing being wrong, he would then "thank him" and keep the stolen property or funds. [Mikal Mahdi]. "My son took care of me and his brother." [Shareef Mahdi]

Shareef recalled the "home-schooling" as going for walks in the forests or woods with Shareef teaching the boys "about the evil empire of robber barons" who stripped the land and stripped the poor and people of color of everything. He also taught Mikal about Islam - Radical Islam at first. [Shareef Mahdi].

Shareef's mental state deteriorates

Shareef's mental state continued its downward spiral. In April 1997, he was arrested following an argument with his sister Loretta during which he smashed out her car windshield and her back window with a cinderblock. Mikal recalled that Loretta had been staying with them for about a month and a half prior to the incident, as she was separated from her husband in Georgia. Loretta was used to a different lifestyle and complained about things that were routine

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to Shareef and the boys. She complained about them not having a phone. She also complained about “livestock” (goats and cattle) roaming freely around the yard and property. She complained generally about the “backwoods” nature of the way they lived and Shareef would retort by yelling about her “bourgeoisie lifestyle.” As Mikal describes it, “the situation was bound to blow up” and the cinder block incident was the blow up. [*Mikal Mahdi*].

Following his arrest for the damage to Loretta’s property, **Shareef also attempted escape from the jail**. He thus stayed in confinement for a few months. While he was confined on this occasion, Mikal stayed with the Prescotts, a Rastafarian family, on a nearby farm. When Shareef got out, things went back to “normal” with Mikal staying with Shareef. As Mikal described it though, he was basically on his own, stealing to survive and continuing to get the preaching/lectures from Shareef, followed by Shareef keeping the property and thanking him. [*Mikal Mahdi*].

Mikal is arrested for the first time

When Mikal was just 14 years old he was charged with grand larceny and tampering with a vehicle. This appears to be the first time Mikal was arrested or criminally charged. Although Shareef was instructed to bring him to court, Shareef failed to bring him to court on several occasions, which resulted in a detention order being issued for Mikal, who was then placed in confinement prior to his actual adjudication due as much to Shareef’s behavior as his own. Mikal’s intake evaluation suggested that he had a poor attention span, poor impulse control, and poor anger control. Psychological testing indicated that he was sullen, aggressive, withdrawn, and had a flat affect. This evaluation established that Mikal was still suffering from depression but it also suggests – as is common in boys who suffer from depression at a young age – that his depression manifested itself in inappropriate behavior. The court evaluation emphasized

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Shareef's lack of engagement and his detachment from Mikal as a father, in addition to his failure to even ensure Mikal's court appearance in order to avoid incarceration prior to his adjudication. "Mr. Shareef Mahdi has attempted to exert minimal control over his son and seems content to stay detached and uninvolved as long as Mikal is not causing problems for him. . . . Mr. Mahdi let his son drop out of school ostensibly under the pretense of allowing for home school instruction which apparently was never followed up with." [*Virginia DJJ Records*]. Indeed, Shareef refused to assist DJJ as they conducted their evaluation and eventually a show cause was issued. Despite Mikal's behaviors the evaluators believed that he "would respond well to a structured setting." [*Virginia DJJ Records*].

As the evaluation of Mikal continued over the next 10 days, the degree of problems he had endured became evident. He reported that he smoked eight cigarettes each day and drank alcohol twice per week. Moreover, he reported that he had previously smoked marijuana on a daily basis. Evaluators also noted that he described his parents in a "detached manner" and demonstrated "depressive tendencies, feelings of hopelessness, [and] problems with self-esteem." [*Kenbridge Youth Development School Records*]. Not surprisingly the evaluators also noted conduct disorder, which they traced to "incompetent parenting and poor guidance, supervision and monitoring in an unstable nomadic dysfunctional family." [*Kenbridge Youth Development School Records*].

Mikal was scared when he went into DJJ. He was small and was placed in confinement with older, bigger kids, some with gang affiliations and many with violent offenses. Because his father had always taught him to "be a man" and to establish himself, he believed that he had to do something early to make sure no one would think he was weak. Within just several weeks of entering DJJ, he had some words with a 17 year old who told Mikal that he would "fuck him up

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later.” Mikal waited for his opportunity and jumped the older kid first. Mikal took quite a beating with the older, larger juvenile slamming his head into the floor, but in Mikal’s view, he had established himself as “crazy” such that other “cadets” would leave him alone. In DJJ, he also “learned” that if he acted out, “they” as in the staff wouldn’t attack the “act.” Rather, they would attack his “character” in an effort to convince him that he was “nothing.” After a while, the fighting and reacting due to fear, lack of respect and character “assassination,” just became “a lifestyle.” [*Mikal Mahdi*].

Mikal is incarcerated again

Following Mikal’s release from DJJ on June 14, 1998, at age 15, Mikal returned to his father’s home. He was determined to go back to school and to try to refocus himself but his renewed energy and focus was short-lived as he went back into confinement only two weeks later on June 30, 1998, when officers came to his home with a failure to appear warrant saying that he had failed to appear for court on the offenses for which he had just been released from confinement. Shareef insisted that they were going to have a “standoff” and they stayed in the home for eight hours while law enforcement remained outside unsure of whether there were any weapons in the home. [*Mikal Mahdi*]. Neighbors interviewed by the local newspapers described hearing Shareef yelling religious “slogans” in response to attempts by officers to negotiate a resolution. Neighbors also described Shareef as “disturbed.” Shareef recalled that Mikal was “frantic” during “the siege,” constantly reading religious materials and praying. [*Shareef Mahdi*].

Mikal recalled this event as the occasion when his father “betrayed” him and “threw him under the bus” because when officers entered the home, Shareef blamed the whole event on Mikal and claimed that he (Shareef) had been asleep in the bedroom. Mikal felt betrayed by him and by the system as he had already served time on the charges for which he was being arrested.

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[*Mikal Mahdi*]. When he was arrested after the "standoff," he reportedly told the officer that he would kill a police officer one day.

Mikal was convicted of obstruction of justice and again incarcerated at DJJ for an indeterminate sentence. Despite being written up for failure to comply on several occasions, Mikal was reportedly cooperative with his counselor though he minimized his behavior. Moreover, he claimed that he had failed to appear in court because he had already been tried on that charge. [*Dep't of Youth and Family Services Records*]. As it turns out, Mikal's claim appears to be true and the evaluator – recognizing that Mikal did not seem to have any new charges – seemed to agree. This evaluation came to many of the same conclusions as the prior assessment. Testing indicated an "emotionally immature" adolescent who experienced emotional states "in a global, poorly differentiated manner." The evaluator also noted that Mikal relied on denial and repression to deal with his unresolved feelings of abandonment and rejection. Over the next year, Mikal received numerous write-ups for refusing to obey orders, threatening officers, or fighting. Nevertheless, Mikal was apparently progressing well in Anger Control Group until he was terminated from the group because of one of his disciplinary charges. [*Dep't of Youth and Family Services Records*].

In October 1999, Mikal was placed in protective custody on suicide watch because he was threatening to harm himself. According to his records, he was not seen by the prison's behavioral services unit until a month later. During this assessment two psychologists noted that Mikal's thought patterns were distorted and that he frequently perceived everyone to "be against him and tend[ed] to minimize and rationalize his negative behavior." Moreover, much like Shareef and in keeping with the indoctrination of Shareef's "home-schooling," Mikal was

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preoccupied with “conspiracy theories along racial and institutional lines, [which] seemed to have a paranoid quality to them.” [*Dep’t of Youth and Family Services Records*].

The juvenile officials at one point placed Mikal on 15 minute watch status. One day later Mikal tried to electrocute himself. However, the officials noted a positive change in his emotional state – which they characterized as “brighten[ed]” – when Mikal was placed in a cell with a window. Indeed, during this time Mikal talked “more fluently,” smiled occasionally, and engaged in constructive activities. [*Dep’t of Youth and Family Services Records*]. But then Mikal began to engage in destructive behavior – covering up the camera in his room and breaking the desk off his wall. Eventually, Mikal was taken out of protective custody despite his desire to remain. It appears that only one day later Mikal indicated suicidal thoughts, which the staff took as an attempt to get back to protective custody. However, the examiner did note that Mikal had described an “unusual sensory experience,” during which time he saw paint peel up from the wall and then return to its place. In response medication was suggested but Mikal declined.

During this assessment, the evaluators believed that Mikal’s symptoms were consistent with a diagnosis of major depression. As for Mikal’s irrational thoughts, the evaluators opined that their origins could be psychotic features associated with his depression or immaturity associated with his youth or a mild thought disorder suggestive of an emerging paranoid personality disorder. Later one of the evaluators noted that “during times of increased stress, Mikal’s ability to think coherently and logically was compromised. At these times, his thinking became acutely paranoid and unavailable to therapeutic intervention.” [*Dep’t of Youth and Family Services Records*]. Mikal was released in May 2000.

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Mikal sees Vera

Around the time Mikal was released from DJJ the second time, Mikal's aunt, Sophia Gee, ran into Shareef in a store and gave him her number asking that the boys call her. To her surprise, Mikal did contact her and she attempted to reunite him with Vera. The reunion with Vera did not go well. [Sophia Gee]. What Mikal recalled of their brief reunion as most notable was that his mother showed almost no emotion. In fact, the only time he remembers her displaying any emotion occurred when they were going to the store and encountered a stray dog. Vera – rather than protecting Mikal – jumped behind him for protection. He was in disbelief, because she never protected him and this was the only time he ever saw any emotion from her. [Mikal Mahdi].

Mikal ended up being arrested for slitting Vera's car tires and damaging her car when Vera would not let him into her home after he ran up her credit cards. According to testimony by the Officer, Michael Koehler, after his hands were cuffed during the arrest, Mikal repeatedly asked the officers to kill him.

Mikal's friend is murdered

Also, around this time, Mikal's "good friend" was killed. Terrell Goodnight was a friend Mikal met while at DJJ. They had classes together and lived in the same unit. Terrell was released only a few weeks after Mikal and joined him back in Richmond, which is where Terrell was from. They partied and hung out together. Terrell had been a star tight end at Hermitage High and had college prospects, but he was "into the street mentality" and acting like "tough guys." As Mikal understands it from what he heard from Terrell then and others later, Terrell "jipped" some guys from D.C. in a drug deal and bought a used Cadillac with the profits. A few weeks later he was found dead from gunshots in an abandoned complex in a closet wrapped in plastic. [Mikal Mahdi].

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Mikal is incarcerated at Wallens Ridge State Prison

Five months after his release from DJJ, Mikal was charged with assaulting Moises Rivera. He was sentenced to 15 years in the Virginia Department of Corrections. There he continued with the same behavior as his prior incarceration and seemed to get even less attention or counseling. In January of 2003 –approximately a year and a half into his sentence – Mikal was transferred to Virginia’s Wallens Ridge State Prison, known for employing harsh techniques to control the inmates. [*Mikal Mahdi*].

Wallens Ridge is a supermax facility in rural Appalachia. Mikal describes Wallens Ridge as an isolated rural place with a blighted local economy. As a result, the guards were largely locals, white men who had never dealt much with urban life or minorities. The main local industry was a coal mine and the mine recruited directly from the prison. [*Mikal Mahdi*].

While Mikal was housed there, the overwhelming majority of the inmates were minorities while the overwhelming majority of the officers were Caucasian. The atmosphere was charged with racial tension. Mikal recalled that officers would often use racial epithets towards the inmates. Mikal would hear officers routinely say things like, “I can’t wait to kill me a nigger.” “We ought to round all you niggers up and put you in a concentration camp.” [*Mikal Mahdi*].

During his time at Wallens Ridge, Mikal was disciplined on numerous occasions for rules infractions, including: disobeying orders, throwing food, possession of contraband, and simple assault. In most instances, Mikal was punished with a fine and time in isolation. Indeed, Mikal spent a substantial amount of his time at Wallens Ridge in some form of isolation.

During the time when he was not isolation, Mikal experienced and witnessed extreme brutality. For example, he witnessed officers beat another inmate to the point where Mikal

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believed he was dead. The inmate was from New Mexico, which had a contract with Virginia to house inmates at Wallens Ridge. He was shackled up for transport back to New Mexico and was being walked by Mikal's cell when officers began subduing the inmate. Even after the inmate was down, the officers stomped, kicked, and beat the inmate until the floor and their boots were covered with blood and the inmate lay there unconscious and seemingly lifeless. He was taken out of the cellblock on a stretcher, but then left on the floor just outside the block for a while due to inmate movements. Mikal assumes the inmate was killed and heard rumors that that was the case, but he does not know for sure as he never saw anything in the news about the incident.

[Mikal Mahdi].

On as many as 14 to 15 occasions, lasting by his description for up to 10 minutes each time if not more, Mikal was "tasered" by officers, whose shields provided electric jolts. He would be called names and taunted, including officers calling him "camel monkey" and "towelhead" saying he looked like he was from Afghanistan. He would try not to cry, which extended the incidents. When he could not take it anymore and would scream, the tasering would stop and then he would just be belittled and berated. At least some of the events occurred with Mikal already cuffed and restrained. *[Mikal Mahdi].*

One of these tasering incidents occurred because Mikal spoke up for a disabled inmate. The inmate was housed in a nearby cell. He was in his 60's and had a tracheostomy speaking valve, which required a battery to operate. Without the battery, the inmate could not speak. When his battery died and he was attempting to get a replacement battery, officers just laughed at him and said he "didn't need a voice." When he became agitated due to this behavior, the inmate was extracted from his cell and tasered with electric shields until he defecated on himself.

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Following this event, he was strapped down and restrained on his bed for several days, during which officers continued to refuse to provide a replacement battery. [*Mikal Mahdi*].

Mikal also observed and experienced being shot with rubber pellets while on the floor. The pods all had guards placed in glass overhangs in the ceiling: these overhangs were equipped with slits through which the guards would aim rifles loaded with rubber pellets. The guards were supposed to fire off a warning round if they were going to fire the rifles but often they would just start firing. The rounds would start for a variety of infractions, from stepping on the line in recreation, to pushing something outside your cell, to pushing another inmate. The rifles could also be loaded with bullets and they were all aware that live rounds could and would be fired if anyone attempted to escape. Mikal recalled at least one occasion where rival gangs caused a disturbance on the recreation yard. Without warning officers began firing indiscriminately into all the inmates in the yard, including those not involved in the disturbance, and continued firing even after all of the inmates were laid prone on the ground as they had been instructed to do. [*Mikal Mahdi*].

Mikal was released from Wallens Ridge on May 12, 2004, after spending about a year and a half in that facility. Little more than two months later, Mikal was arrested and charged with the present offenses.

Shareef finally receives treatment for his mental illnesses

While Mikal was incarcerated at Wallens Ridge, Shareef finally sought mental health treatment at the McGuire VA Medical Center in Richmond. His records reflect that he was enrolled in the psychiatric day program due to chronic depression and social anxiety. Examiners noted that his "longest job has been for only 3 yrs in his life and he fails to get along with others well." He was "very paranoid as he describes his small town and even here in Richmond, that

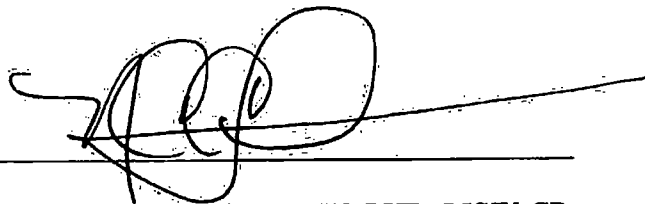
Mikal Deen Mahdi Social History Assessment

'they are looking for him. Seems focused on the Masons and white supremacist [sic] groups.'

[McGuire VA Medical Center Records].

Shareef left Richmond, where he was staying at the Salvation Army shelter, and moved to Philadelphia to stay with his Imam. The VA Hospital in Philadelphia records reflect treatment for depression and schizophrenia. [Philadelphia, PA VA Medical Center].

Shareef currently believes that if he had been a good father and husband to the mother of his two boys, things would be different. Shareef reminded the interviewers, "My son took care of me and his brother. It should have been the other way around. Mikal never got over losing his mother. All he wanted was -- a family." [Shareef Mahdi]

A handwritten signature in black ink, appearing to read 'N. Cooper-Lewter', written over a horizontal line.

Nicholas Cooper-Lewter, MSW, PHD, LISW-CP

Attachment 7

Psychiatric Evaluation
Name: Mikal Deen Mahdi
DOB: Redacted
Dates of Evaluation: 2/2/2010, 6/17/2010, 3/2/2011
Date of Report: 3/6/2011

Identifying Information: Mr. Mikal Mahdi is a 27-year-old single male evaluated pursuant to a request from his attorneys, Robert Lominack and Teresa Norris.

Reason for Evaluation: This evaluation was conducted as part of his PCR proceedings for his capital conviction in Calhoun County in 2006.

Sources of Information:

School records Henrico County
School records Brunswick County
School records Richmond County
Walter P. Carter Psychiatric Records 8/23/92-10/23/92
News Article Police Standoff
DJJ Reception and Evaluation Records
Virginia DJJ Records
Kenbridge Youth Development System records
Virginia Department of Education records
Virginia DJJ Correspondence
Incident report (Vandalism of car)
Court Record Felonious Assault
Court records Breaking and Entering
Virginia Department of Corrections Mental Health Screening
SCDC Grievance and Discovery Records
Court Records Obstruction of Justice (Shareef Mahdi)
Central State Hospital Records (Shareef Mahdi)
Criminal Court Records (Shareef Mahdi)
Military Records (Shareef Mahdi)
VA Records (Shareef Mahdi)
McGuire VA records (Shareef Mahdi)
School records (Shareef Mahdi)
School records (Saleem Mahdi)
Job Corps records (Saleem Mahdi)
Richard Elder Consent to Search and Interview
Anthony Crutchfield Statement 7/21/04
Trial Transcript
DVD *Up The Ridge*
SCDC MSU Notes
File Notes of Geoffrey McKee, PhD
File Notes Thomas Martin, M.D.
Consultation Nicholas Cooper-Lewter 1/16/2011, 3/2/11
Consultation Dr. deRosset Myers 1/16/11, 2/27/11

Pertinent Statements:**Developmental History:**

Mr. Mahdi's developmental history is significant for a lack of primary attachments. He had multiple moves and multiple caretakers. His mother left the home when he was four. He was raised by his father for a period of time until he and his brother were sent to different relatives. Mr. Mahdi was raised by a paternal uncle and aunt for a period of time, and then returned to his father. He describes his primary attachment to his paternal grandmother. He described her attachment to him like that of a "pet owner to a puppy." At times entertaining, but mostly a distraction." He does report some attachment to his father. He admits his father spent time with him but he viewed his father as "too self absorbed in his own philosophy" and not very pragmatic. Although there are a number of institutional social histories completed through his history, very little developmental history is gathered. Shareef Mahdi provided a developmental history in 1994 when Mikal Mahdi was being evaluated. Mr. Shareef Mahdi reported a normal pregnancy and delivery. He states Mikal met developmental milestones but was not sure of ages. He also reported Mikal had repeated ear infections from ages 2-6 and resultant speech difficulty. Records from Walter P. Carter Psychiatric Hospital indicate he fractured his arm at age 4 and his leg at age 5 from bicycle accidents.

In a social history provided by Department of Juvenile Justice in Virginia in 1997, his attachments to his caregivers was characterized as: "Contact with his mother is minimal and the subject and his father do not appear to have a close relationship but have no problems in getting along with each other. Mikal and his father seem to make efforts to stay out of each other's way."

In addition to multiple caretakers, and lack of attachment, Mikal Mahdi also had numerous school changes.

There is no evidence that he was physically or sexually abused. There is evidence that he witnessed his father physically abuse his mother and grandmother.

School History:

Mr. Mahdi has consistently tested in the high average range on IQ testing, with the exception at age 9 when his test results were average. Note, he was diagnosed with a Major depression at this time and most likely had cognitive deficits due to his depression. Despite being above average in intelligence, Mr. Mahdi had difficulty with reading. He did fail a hearing test on one occasion due to excessive cerumen in his ears.

His early school placements were multiple and disruptive. Later his extremist father "home schooled" him. He was characterized as depressed by his teachers around the 4th grade.

The following is an example of some of his school placements.

He attended Sister Clare Mohammed School (kindergarten) according to a 1994 school evaluation, although these records are not available.

He attended Totaro Elementary school for part of the 1st grade (according to 1994 school evaluation).

He attended Chamberlayne Elementary School in 89-90 for the 3rd semester of Grade 1. He withdrew from Chamberlayne on 5/90 for 15 consecutive absences.

He attended Short Pump Elementary School from 11/26/90-2/21/91.
He attended Overby Sheppard starting 2/27/91.
He attended Scotts Branch Elementary beginning 10/30/91.
During his second school year at Scotts Branch in 92-93, he was noted to make "leaps and bounds improvement" in his work.
In Grade 3 he transferred back to Totaro in 9/93.
By, 4/6/1994, he had intelligence testing at Totaro in the 4th grade, which showed above average intellectual functioning: V 114 P119 FS 118.
The DJJ report from 1997 indicates that in the 94/95 school year, he had 35 absences. He had an IEP at age 12 for a weakness in spelling. A Burks Behavior test administered on 5/30/95 showed poor ego strength, poor attention, poor impulse control, poor reality contact, poor anger control, poor social conformity, excessive assistance, and excessive aggressiveness.
The 1997 DJJ Social History reports his father had not had Mikal in school for the prior two years.

Family History:

Mr. Mahdi has a family history of mood disorders with psychotic features. His father has been treated for a mood disorder with psychotic features. Upon reviewing his history, the onset of his father's illness was most probably during his second enlistment in the Marine Corps but not documented until he was middle aged. Shareef Mahdi was also diagnosed with Dysthymia, which is a chronic depression. He has been prescribed various medications by the VA Hospital including: Ritalin®, Zoloft®, Trazodone, Paxil®, and Ativan.®

Medical History:

There are few medical records for Mikal Mahdi.
School records indicated that in 3/93, he failed a hearing exam due to wax buildup. In a school evaluation in 1994, Shareef Mahdi reported that Mikal had repeated ear infections from ages 2-6 years, and some speech difficulty was also noted.
Records from Walter P. Carter in 1992 report he had a tibial fracture at age 4 and a leg fracture at age five from bicycle wrecks.
According to a school health exam on 3/17/94, he was anemic and overweight (age 10). During a physical examination at DJJ in 1998, he was diagnosed with a systolic ejection murmur and reference was made to an early childhood murmur.
SCDC records refer to a motorcycle wreck.
He has been treated for fungal infections as an adult.
He complained of feeling tired and run down at supermax in early 2010.

Psychiatric History:

Mr. Mahdi had inpatient psychiatric treatment at age 9 with Dr. Beverly Allen at the Walter P Carter Center. Dr. Allen reported the following history:

"Mikal is a 9 year-old black male who was admitted to the Walter P. Carter Center on August 23, 1992, because of suicidal statements made to the police after he called them to report alleged child abuse. Reportedly that day, his aunt had asked him to practice his reading and

he stated that he wanted to go outside, so after she told him that he could not go outside, he went out anyway. After he returned, his aunt beat him on his behind and his legs with a belt. His aunt, Ms. Burwell, states that Mikal has been verbalizing suicidal ideations such as "Why not shoot me, there is no reason to live." since he came to live with her and his biological paternal uncle in October, 1991. Usually these statements were said after he did not get his way or he made a mistake. Two weeks prior to admission, Mikal had returned from a month long stay with his biological father and his paternal grandmother in South Hill, Virginia. During that stay, he observed his father beat up his grandmother who subsequently called the Police and his father was incarcerated. He also knew that when his biological mother came to visit, his father also beat up his mother at that time. It was after the incident where the father beat up his grandmother that he returned to Baltimore, to stay with his paternal uncle because of the chaos in south Hill, Virginia. After his return, Ms. Burwell states that Mikal, out of the blue, one day stated "You only have to pay someone \$200.00 to kill yourself." "This statement was said without any precipitating events."

Dr. Allen diagnosed him with Major depression with suicidal ideation. She wanted to treat him with antidepressants but his aunt and uncle refused. Haldol® prns were prescribed to him and he was administered them on occasion. He did require seclusion during his hospitalization.

While an inpatient, he had a psychological evaluation including intelligence testing which measured his IQ as V= 98, P=94, and FS= 95. Projective testing by psychologist, Stephanie Leedy-Ellis, PhD revealed profound depression, significant losses and preoccupation with death. Some disorganized thinking was also noted. This testing suggested that "Mikal experiences a need for more nurturance and protection from caregivers."

School and institutional records continued to record depressive symptoms throughout his childhood and adolescence.

On 3/8/94, he had psychological testing in the school system by AJ Veca. Projective measures consistently point to depressive tendencies, lack of self esteem and feelings of hopelessness.

On 4/6/94, observer C Wilson noted: "On the Burks Rating Scale, Mikal scored very significant in excessive self-blame, poor impulse control, and excessive resistance. Mikal also exhibited periods of extreme sadness at times. Mikal appears to be unable to cope with those feelings of low self-esteem. This makes him unable to function and effectively learn in school."

During a DJJ evaluation in 1997: the social history notes: "the subject indicated no interests or hobbies and stated he does not know what he would like to do when he grows up. He has no goals and no firm plans for what he would like to do with his life."

On 12/97, psychological information from Kenbridge remarks: "described parents in detached manner...projective testing suggests depressive tendencies, feelings of hopelessness, problems with self esteem."

10/22/98 Psychological Information from DJJ shows Major Depression, classified as moderate need for mental health services. Staffing team opinions showed moderate impairment in primary attachment relationships, parental control and supervision, parental nurturance and warmth and parental value system. They also found moderate psychosocial trauma based on parental abandonment/neglect and cumulative psychosocial stressors.

On 10/23/88, Mr. Mahdi complained of extreme tiredness and weight loss of 12 lbs since placed in detention.

Psychological evaluation on 11/17/98 noted: "Personality assessment revealed a dysphoric, emotionally immature adolescent child with a conduct disorder. Mikal experiences his emotional states in a global, poorly differentiated manner. He has not developed the ability to self soothe and does not use his emotional states to inform his decision making . Interpersonally, Mikal tends to be guarded and mistrustful of others..."

While detained in juvenile justice, Mr. Mahdi had periods of time where he acted on suicidal ideation. He tried to tie a sheet around his neck (11/16/99) and tried to electrocute himself (11/8/99). During that period of time, he was referred for treatment with Celena Gates and Marnita Floyd. The record notes that he developed paranoid ideation. The initial contact note on 11/8/99 described him as depressed with irrational thoughts. On 2/1/00 he was noted to have a depressed mood and angry and hostile affect. During times of increased stress, Mikal's ability to think coherently and logically was compromised. On 5/1/00, Celena Gates noted he had a preoccupation that there is a conspiracy against him.

At the age of 17, Officer Koehler testified that Mikal begged officers to shoot him when he was arrested for detention order and slashing his mother's tires.

On 10/24/01, he was diagnosed with Intermittent Explosive Disorder and Antisocial personality by psychologist Quiacho at Virginia DOC Mental Health Screening. He had denied prior inpatient treatment and had denied prior suicide attempts.

Anthony Crutchfield's statement on 7/21/04 noted: "but if I heard him say shit like, like he don't give a fuck, and he ain't got shit to live for,"...He wasn't a conversation type person."

Records from Lee County Safekeeping note he went on a hunger strike before his trial.

Substance Use History:

Mr. Mahdi has reported some alcohol use to various sources but there is no evidence he suffered from dependence (SCDC Lee Records, trial testimony Amanda Weaver). His probation officer testified that his drug screen was positive for cannabis two months after his release from Wallens Ridge.

Legal History:

He has no legal history until age 14.

On 12/2/97, he was adjudicated delinquent for Breaking and Entering two counts, Grand larceny two counts (stole two guns from Dulaney). The Social history from DJJ reveals that shortly before his crime, his father was in jail and he was residing with Mrs. Charlie Prescott. The DJJ discharge states he had no visits during his confinement.

Within weeks of his release from DJJ on June 30, 1998, he was involved in a Standoff with police/father. He was recommitted on 8/11/88, transferred to Hanover on 11/23/98, and later transferred Culpepper 6/29/99.

In 2001, he was convicted of the Malicious Wounding of Moises Rivera.

He was on probation at the time of his offenses.

He has charges pending in North Carolina, and he was investigated for charges in Virginia.

Corrections History:

Mr. Mahdi admits to being exposed to trauma while confined at Wallens Ridge. He described an incident where an inmate was denied a battery for his voice box and tortured to the point where Mr. Mahdi believed he was dead.

Prior to his trial in 2006, correctional records reveal he went on a hunger strike, assaulted officer G. Toney and threatened Ms. Driggers.

Captain Lane found contraband in Mr. Mahdi's cell at MSU and moved him to D Wing.

He was found with a handcuff key during his capital trial.

He assaulted a corrections officer at Lieber since his conviction.

Trauma History:

Collateral records document that Mr. Mahdi has been exposed to violent trauma. His father beat Mikal's grandmother with a belt in front of him. Documents also record that Shareef Mahdi assaulted Mikal's mother in his presence. Mr. Mahdi did disclose that he was shot at prior to his offenses at a cookout and confirms that he has witnessed inmate violence while confined at Wallens Ridge. He denies recurrent intrusive thoughts about any of these events.

Relationship History:

Mr. Mahdi has not had any significant relationships with peers.

Mental Status Examination:

Mr. Mahdi was seen by this examiner on three occasions. He was guarded, but cooperative during the first two evaluations but was irritable, hostile, and paranoid during the third evaluation. He called this examiner "a snake in the grass" and minimized all symptoms. He eventually calmed down and became cooperative at the advice of his attorney. He was not psychotic. He was not suicidal or homicidal. He denied any symptoms of depression. His cognitive functions were intact.

Results of Testing:

Review of case file of Dr. Geoffrey McKee indicated he has personality testing. Findings were consistent with this examiner's observations. "The client's responses indicate marked potential for problems within the Social Withdrawal domain. Item endorsement suggests significant potential for social detachment and discomfort in close relationships.

This client is likely to have little apparent interest or investment in social interactions. Others may view the client as cold, unfeeling, and unable to display affection and to commit to personal relationships...Social withdrawal can stem from apathy, marked shyness or anxiety, trauma-induced alienation, autistic withdrawal, distrust, or instability of relationships."

Diagnoses:

Axis I) Major Depression, recurrent with psychotic features in remission
Anxiety NOS (PTSD)
Reactive Attachment Disorder of Childhood, Inhibited Type
Axis II) Paranoid Personality Disorder
Antisocial Personality Disorder
Axis III) No diagnosis
Axis IV) confinement, lack of social support, pending litigation
Axis V) 40

Discussion of Diagnoses:

His major depressive episodes have been well documented throughout his development, beginning at age 9. On two occasions, his depression has been complicated by disorganized thinking (age 9 and while confined and treated at DJJ). He has a paternal history of the same illness.

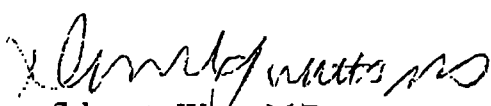
He also meets the diagnostic criteria for Anxiety Not Otherwise Specified. He does not meet the full diagnostic criteria for Post Traumatic Stress Disorder. He has been exposed to various traumas throughout his development that have threatened serious injury to himself and others. He avoids conversations about these events. He is detached and estranged from others. He has a documented history of belief in a foreshortened future. He is irritable and has outbursts of anger.

Because of the multiple caregivers, multiple placements, multiple school transfers, during his development, Mr. Mahdi has been unable to form stable attachments. Disturbances in attachment increase the risk for antisocial behavior in children and adolescents.

Mr. Mahdi meets the diagnostic criteria for Paranoid Personality Disorder and Antisocial Personality Disorder at this time.

Opinions:

1. Mr. Mahdi's age and mentality at the time of the crime is mitigating. Not only was he 21 years of age, but his emotional immaturity is well documented and cross referenced in records.
2. He suffered from depression, anxiety, the effects of a disorder of attachment and a personality disturbance at the time of his offenses.


Donna Schwartz-Watts, M.D.
Consulting Forensic Psychiatrist

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

IN THE COURT OF COMMON PLEAS

09-CP-09-164

Certificate of Service

I do hereby certify that I have served the Objections to Respondent's Proposed Order of Dismissal, in the above-referenced case, on the attorney for the Respondent by electronic mail and by depositing a copy of same in the United States Mail, first class, postage prepaid, addressed as follows:

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

This the 5th day of May, 2014.


TERESA L. NORRIS (gms)

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CALHOUN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2009-CP-09-164

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

v.

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

PETITION FOR WRIT OF CERTIORARI

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Statement of the Case

I. Introduction

When a criminal defendant alleges ineffective assistance of prior counsel as a ground for post-conviction relief, the applicant waives the attorney-client privilege “to the extent necessary for prior counsel to respond to the allegation.” S.C. Code § 17-27-130; *see also Binney v State*, 384 S.C. 539, 683 S.E.2d 478 (2009) (permissible for trial counsel to provide entire trial file to Respondent because information in file was necessary for counsel to respond to the allegations of ineffectiveness).¹ The issue before this Court boils down to a straightforward application of the attorney-client privilege and the implied waiver of that privilege in the context of capital post-conviction relief proceedings. The attorney-client privilege applies to all communications between a defendant and experts retained by his counsel in preparation for trial. When a defendant subsequently alleges that his counsel were ineffective at trial, he waives this privilege *only to the extent necessary for counsel to respond to the allegations*. Despite this limitation on the implied waiver, here, Respondent sought – and the PCR court ordered –

¹ This holding has been called into question by the American Bar Association’s Standing Committee on Ethics and Professional Responsibility. *See* ABA Formal Opinion 10-546 (unethical for trial counsel to turn over information outside court-supervised proceedings). Here, however, it makes no difference whether *Binney* was rightly decided or not since Respondent seeks to expand the reach of that holding to include information not in the possession of trial counsel or even seen by trial counsel. In other words, the holding in *Binney* need not be revisited to reverse the lower court order at issue here.

disclosure of the entire files of two experts who were retained by the defense but did not testify and whose file had not been provided to trial counsel. As detailed below the Respondent has been provided with every document in the possession of trial counsel. This case is about whether the statute and *Binney* should be extended to reach the files of experts retained by the defense even if the information in those files was not known to trial counsel and, therefore, could not be used by trial counsel to explain their actions or inactions at trial.

II. Facts relevant to the petition

A. Petitioner's PCR application alleged one claim of ineffective assistance of trial counsel and four sets of supporting facts.

On July 29, 2010, Petitioner amended his application for post-conviction relief.² Petitioner's claims of trial counsel's ineffectiveness were:

- 10(a) Appellant was denied the effective assistance of counsel during the sentencing phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution.
- 11(a) (i) Trial counsel failed to object when the trial judge improperly based his decision to impose a death sentence on petitioner's assertion of his right to a jury trial, thereby effectively punishing him for exercising this constitutional right. Counsel's deficient performance in failing to preserve this issue for appellate review deprived petitioner of the right to effective assistance of counsel.

² In *Binney* this Court found that it was the initial application that triggered the waiver of the attorney-client privilege. In this case, the issue is whether – as to non-testifying defense-retained experts' files – the privilege waiver is ever triggered. Therefore, it is of no import which application is used here.

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

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

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

B. Course of discovery

(1) *Petitioner provides trial counsels' entire files*

On October 4, 2010 Respondent requested discovery. Petitioner provided a timely response and in mid-December Respondent took possession of four boxes of files, which represented every document, photograph, and videotape provided to Petitioner by trial counsel. No materials were withheld. Respondent retained the files for almost 8 weeks for copying.

(2) *Respondent seeks the files of two non-testifying defense-retained experts*

Then, on February 10, 2011, counsel for Respondent emailed a request for the files of two mental health experts who were retained – but not called to testify – by trial counsel. Undersigned counsel objected to disclosing those files, because they are covered by the attorney-client privilege, were not

possessed by trial counsel, and, therefore not relevant to trial counsels' ability to respond to the allegations of ineffectiveness. Respondent then requested a conference call on the matter with the Court. Undersigned counsel objected to handling the matter without a motion filed and opportunity to respond. Counsel also objected to handling the matter off the record. On Friday, February 18, 2011, counsel for Respondent emailed a Motion to Compel these files.

(3) *The court convenes a hurried hearing and issues a ruling*

In a hurried hearing held on February 23 (the second business day after Respondent emailed its Motion to Compel), the PCR court ruled that the entire files of the experts should be disclosed pursuant to *Binney* and the statute.³ Judge Early came to this conclusion without an *in camera* review of the documents and without finding that trial counsel had any knowledge of the information in the files. *See Tucker v. Honda of South Carolina Mfg, Inc.*, 354 S.C. 574, 582 S.E.2d 405 (2003) (before privileged materials are disclosed the lower court should conduct a hearing to establish the existence of the privilege and the relevance of the materials).

³ The night before the hearing Respondent filed an affidavit signed by one of Mr. Mahdi's trial counsel, Glenn Walters. This affidavit purported to consent to the release of the trial experts' files. Of course, the attorney-client privilege is not for Mr. Walters to waive. The privilege belongs to Mr. Mahdi and to the extent he has implicitly waived it by filing an application for post-conviction relief, the scope of the waiver is determined by operation of law not by trial counsel. Moreover, in this affidavit Mr. Walters did not purport to have ever seen or have any knowledge of the information in these experts' files.

Counsel for Mr. Mahdi requested an appropriate amount of time so that counsel could put the matter before this Court in the proper manner and so that counsel could discuss the issue with their client who was not present at this hearing. The lower court denied that request and ordered that counsel provide the documents by 1:15 p.m. on February 24, 2011 – 24 hours from the oral order.⁴ This Court dismissed the subsequent Notice of Appeal that was filed but permitted Mr. Mahdi time to file this Petition.

Because the PCR court erroneously interpreted *Binney* and the statute to require disclosure even if counsel was unaware of the information in the files, this Court should grant certiorari and reverse the PCR court's order.

ARGUMENT

- I. This court may grant certiorari because the lower court's order to disclose files never in trial counsels' possession is appealable. S.C. Code Ann. § 14-3-330 grants this Court jurisdiction to hear an immediate appeal from the PCR court's order that Petitioner disclose privileged information.**

The PCR court's order falls within the scope of § 14-3-330(2), which permits immediate appeal of orders "affecting a substantial right." To prevent irreparable harm, this Court should hear Mr. Mahdi's appeal before the privileged information is revealed.

⁴ As of the filing of this petition counsel have not been provided with a written order from Judge Early and do not know whether one has been entered.

A. The attorney client privilege is a substantial right.

S.C. Code Ann. § 14-3-330(2)⁵ authorizes immediate appeal of the lower court's order because the order affects Mr. Mahdi's substantial right to the attorney-client privilege and cannot be adequately remedied in an appeal from the final judgment.⁶ "The attorney-client privilege is based upon a public policy that the best interest of society is served by promoting a relationship between the attorney and the client whereby utmost confidence in the continuing secrecy of all confidential disclosures made by the client within the relationship is maintained." *Wilson v. Preson*, 378 S.C. 348, 359, 662 S.E.2d 580, 585 (2008); *see also State v. Doster*, 276 S.C. 647, 284 S.E.2d 218 (1981). Moreover the existence of the privilege furthers the broader public interests in the "observance of law and the administration of justice." *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998) (quotations omitted).

This Court has further recognized the importance of a confidential attorney-client relationship within the specific context of 14-3-330(2). *See*

⁵ § 14-3-330(2) grants this Court appellate jurisdiction over "[a]n order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action"

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

Hagood v. Sommerville, 362 S.C. 191, 197, 607 S.E.2d 707, 710 (2005) (noting "the importance of the attorney-client relationship, which demands a confidential, trusting relationship" as one of the reasons for concluding that an order disqualifying a party's attorney "affects a substantial right and may be immediately appealed under Section 14-3-330(2)").

B. Review of the PCR court's order is consistent with this Court's review in other cases.

Mr. Mahdi's right to the attorney-client privilege is clearly substantial. Thus, the lower court's decision, which severely undermines this right, is immediately appealable under § 14-3-330. Moreover, as in *Binney*, this case presents an "exceptional circumstance[]" and "the issue presented by this matter is novel and capable of arising in every PCR proceeding." *Binney*, 384 S.C. at 541, 683 S.E.2d at 479, n.1. Letting the PCR court order stand will invite the Respondent in every PCR case to seek and obtain the files of defense-retained, non-testifying experts without any showing that the information was (1) known to trial counsel at the time of the trial or (2) relevant to the actual claims for relief. And, if this Court finds this issue unreviewable it will force appointed counsel in PCR cases to choose between waiving a substantial right of their client or having to be held in contempt in order to obtain appropriate review. Indeed, review of the PCR court's order would not be unprecedented or even unusual. In addition to granting certiorari in *Binney v. State, supra*, this Court has previously granted immediate review when the rights of the parties involved could not be

vindicated upon appeal from a final judgment. See *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 8, 630 S.E.2d 464, 468 (2006) ("[W]e agree with courts which have been inclined to find such an order immediately appealable because, after a court file is unsealed and the information released, no appellate remedy is likely to repair any damage done by an improper disclosure."); *Hagood*, 362 S.C. at 198, 607 S.E.2d at 710 (justifying the decision to grant an immediate appeal, in part, because "an appeal after final judgment and a new trial, if granted, would not adequately protect a party's interests"); *Breland v. Love Chevrolet Olds Inc.*, 339 S.C. 89, 93, 529 S.E.2d 11, 13 (2000) ("Immediate appeals under subsection (2) have been allowed in situations where the substantial right could not be vindicated on appeal after the case."). Similarly, in *Laffitte v. Bridgestone Corp.*, this Court granted a petition for writ of certiorari to review a trial court's discovery order compelling Bridgestone to turn over a trade secret to the opposing party through discovery. 381 S.C. 460, 674 S.E.2d 154 (2009). Ruling that the trade secret was not necessary for the litigation, this Court reversed the lower court order compelling disclosure. In coming to this conclusion this Court recognized that a discovery order is not ordinarily appealable, but also acknowledged that it was a significant issue that would inevitably be raised in future cases. 381 S.C. at 471, 674 S.E.2d at 160.

II. This Court should grant certiorari to correct the lower court's erroneous determination that a claim of ineffective assistance of counsel waives the privilege as to information about which there is no evidence that trial counsel ever saw.

A. S.C. Code Ann. § 17-27-130 limits the scope of the waiver to that information which is necessary for trial counsel to respond to the allegations of ineffectiveness.

Under S.C. Code Ann. § 17-27-130, a post-conviction relief applicant's allegation of ineffective assistance of counsel operates as an implied waiver. But the waiver is limited – he waives the privilege only as to those materials necessary to respond to the claim. The statutory language is unambiguous:

Where a defendant alleges ineffective assistance of prior trial counsel or appellate counsel as a ground for post-conviction relief or collateral relief under any procedure, the applicant shall be deemed to have waived the attorney-client privilege with respect to both oral and written communications between counsel and the defendant, and between retained or appointed experts and the defendant, *to the extent necessary for prior counsel to respond to the allegation.*

[S.C. Code Ann. § 17-27-130 (West 2007) (emphasis added)]

It is clear from § 17-27-130 that the filing of an ineffective assistance of counsel claim does not permit the disclosure of information not known by trial counsel and, therefore, not relevant to trial counsels' response to the allegations.

South Carolina law zealously protects the privilege, but does recognize some limitations upon it. Like most jurisdictions, it follows the rule that a

criminal defendant's allegation of ineffective assistance of counsel partially waives the attorney-client privilege. S.C. Code Ann. § 17-27-130. However, the statute is explicit – and this Court found in *Binney* – that the waiver applies only to those portions of otherwise privileged communications “necessary for prior counsel to respond to the allegations.” S.C. Code Ann. § 17-27-130; *see also Binney v. State*, 384 S.C. 539, 683, S.E.2d 478 (2009). In contrast, the statute provides that collateral counsel are entitled to review “the complete file.” *Id.*

B. Other jurisdictions have recognized that waiver is limited to only those materials necessary for counsel to respond to the specific ineffective assistance of counsel claims.

Moreover, other courts have considered similar language and concluded that allegations of ineffective assistance of counsel waive the privilege “but only with respect to matters relevant to [the petitioner’s] allegations of ineffective assistance of counsel.” *See e.g., Waldrip v. Head*, 532 S.E.2d 380, 387 (Ga. 2000) (“[W]e hold that a petitioner who asserts a claim for ineffective assistance of counsel makes a limited waiver of the attorney-client privilege and work product doctrine and the state is entitled only to counsel’s documents and files relevant to the specific allegations of ineffectiveness”); *State v. Walen*, 563 N.W.2d 742, 753 (Minn. 1997) (waiver reaches only communications relevant to the issue of ineffective assistance of counsel); *State v. Taylor*, 393 S.E.2d 801, 805 (N.C. 1990) (waiver is limited to matters relevant to allegations of ineffective assistance of counsel); *In re*

Dean, 711 A.2d 257, 258 (N.H. 1998) (ineffective assistance of counsel claims constitute a waiver only to the extent relevant to the claim); *People v.*

Madera, 112 P.3d 688, .691 (Colo. 2005) ("the court must impose a waiver no broader than needed to ensure the fairness of the proceedings before it"). *See also Mason v. Mitchell*, 293 F.Supp.2d 819 (2003) (court refused to disclose statements about the crime that the defendant had made to his trial counsel and a non-testifying defense-retained expert, because the court found that this information would not specifically relate to the claims of ineffectiveness); *Hunt v. Blackburn*, 128 U.S. 464 (1888) (when defendant in a civil case relied upon a defense that involved what she and her attorney had discussed, she waived the privilege but only insofar as the attorney could give his account of their discussions).

C. If counsel were unaware of information in the files of non-testifying experts then by definition, this information could not be used by trial counsel to respond to the allegations of ineffectiveness.

Whenever a defendant alleges that his trial counsel performed in a constitutionally-deficient manner, this Court must "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to *evaluate the conduct from counsel's perspective at the time.*"

Strickland v. Washington, 466 U.S. 668, 669 (1984). The court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, *viewed as of the time of counsel's conduct.*" *Id.* at 690.

Counsel's "actions may be determined or substantially influenced by the

defendant's own statements or actions," which allows "*inquiry into counsel's conversations with the defendant.*" *Id.* at 691.

Thus, by alleging ineffective assistance of counsel, Mr. Mahdi implicitly waived his privilege but only to the extent necessary for **his trial counsel** to respond to the allegations. *Binney v. State*, 384 S.C. 539, 545, 683 S.E.2d 478, 481 (2009). It would therefore be proper for the Respondent to elicit testimony from trial counsel about conversations they had with their experts and what information their experts had imparted to them regarding their assessment. But that is a far cry from supplying trial counsel now with information they did not possess then. In other words, for information to be relevant and discoverable at this stage it has to have been (1) known to defense counsel at the time of trial and (2) relevant to the specific claims of ineffectiveness alleged by the counsel's former client. Put another way, if counsel were not aware of the information in the trial expert's files, then that information could not form the basis of counsel's defense of the allegations.

Here, counsel did not possess the information that the PCR court ordered to be disclosed. There is no evidence or even allegation in trial counsel's affidavit or Respondent's pleadings that counsel ever saw this information.

Likewise, these expert files are simply not relevant to the issues asserted by Mr. Mahdi. The allegations are, in essence, that counsel failed to adequately investigate mitigation information through lay witness interviews

and records collection. There is no allegation here that counsel was ineffective for failing to present the testimony of Dr. Martin or Dr. McKee. There is no allegation or possible constitutional assertion that these doctors were ineffective.

CONCLUSION

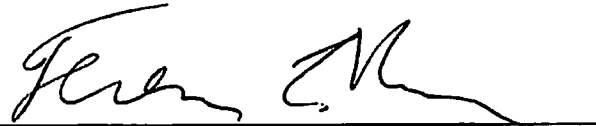
Compelling the production of these files would be an unprecedented encroachment on the attorney-client privilege and one that is not supported by the law. Indeed, Respondent has not cited a single case that has ordered the disclosure of information provided to experts who did not testify at trial. Because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

counsels' strategic decisions at trial, this Court should grant certiorari and reverse the PCR court's order.

Respectfully submitted,

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

Attorney for Petitioner

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM CALHOUN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2009-CP-09-164

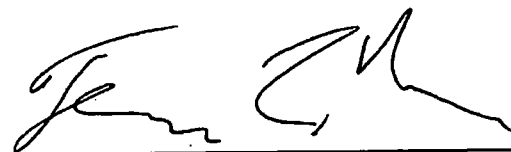
Mikal D. Mahdi,..... Petitioner,

v.

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

PROOF OF SERVICE

I certify that I have served the Petition for Writ of Certiorari on the Respondent by depositing a copy of it in the United States Mail, postage prepaid, on February 25, 2011, addressed to the attorney of record, Anthony Mabry, P.O. Box 11549, Columbia, SC 29211.



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

STATE OF SOUTH CAROLINA
COUNTY OF CALHOUN

COURT OF COMMON PLEAS
2009-CP-09-00164

MIKAL D. MAHDI
APPLICANT
VS.
STATE OF SOUTH CAROLINA
RESPONDENT

TRANSCRIPT OF RECORD

FEBRUARY 23, 2011
AIKEN, SOUTH CAROLINA

B E F O R E:

THE HONORABLE DOYET A. EARLY, III, JUDGE.

A P P E A R A N C E S:

TERESA NORRIS, ESQ.
ROBERT E. LOMINACK, ESQ.
ATTORNEYS FOR THE APPLICANT

ANTHONY MABRY, ESQ.
ATTORNEY FOR THE RESPONDENT

LISA H. DAVENPORT, RPR
OFFICIAL COURT REPORTER

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I N D E X O F W I T N E S S E S

Mikal Mahdi v SC 2 23 2011 FINAL.txt
STATEMENT BY MR. MABRY..... 3,12
STATEMENT BY MS. NORRIS..... 4

E X H I B I T S

NO.	DESCRIPTION	ID	EV
R-1	AFFIDAVIT	13	13

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(WHEREUPON, ON FEBRUARY 23, 2011 THE FOLLOWING
PROCEEDINGS WERE HELD:)

THE COURT: WE HAVE A MOTION TO COMPEL; IS THAT
CORRECT?

MR. MABRY: THAT'S CORRECT, YOUR HONOR.

THE COURT: I'LL BE GLAD TO HEAR FROM YOU.

MR. MABRY: YES, SIR. YOUR HONOR, THE STATE HAS
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FILED A MOTION TO COMPEL IN THIS CASE. WE SERVED
DISCOVERY INTERROGATORIES AND REQUESTS TO PRODUCE ON THE
APPLICANT IN OCTOBER. WE GOT RESPONSES AND THEN WE HAD
SOME MORE DISCUSSIONS BECAUSE THE RESPONSES WEREN'T
SUFFICIENT. THEY FILED SUPPLEMENTAL RESPONSES.
EVENTUALLY, I ASKED FOR A COPY OF DR. MCKEE'S FILE AND
DR. THOMAS MARTIN'S FILE.

THE COURT: AND THEY CLAIM IT'S PROTECTED BY
ATTORNEY-CLIENT PRIVILEGE.

MR. MABRY: THEY CLAIM IT'S PROTECTED BY
ATTORNEY-CLIENT PRIVILEGE.

THE COURT: WHY IS IT NOT?

MR. MABRY: IT IS WAIVED UNDER THE STATUTE WITH THE
FILING OF THE APPLICATION WHERE THE ALLEGATIONS OF THE
APPLICATION -- PCR APPLICATION -- DEAL DIRECTLY WITH THESE
TWO EXPERTS. THEY ARE RETAINED BY TRIAL COUNSEL TO
INVESTIGATE HIS MENTAL HEALTH, HIS MENTAL STABILITY, AND
OFFER MITIGATION EVIDENCE IN THIS CASE.

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THE COURT: AND THE STATUTE YOU'RE REFERRING TO IS
17-27-130?

MR. MABRY: YES, SIR. IN FACT, IT STATES WITHIN THE
STATUTE ITSELF THAT ALL COMMUNICATIONS BETWEEN THE CLIENT
AND THE EXPERTS APPOINTED OR RETAINED ARE WAIVED UPON THE
FILING OF THE APPLICATION BETWEEN THE EXPERT AND THE
DEFENDANT, THE DEFENDANT AND THE EXPERT.

THE COURT: ALL RIGHT. LET ME HEAR FROM THE
APPLICANT'S LAWYERS ON THAT.

WHY IS THE STATUTE NOT CONTROLLING IN THIS MATTER?
EITHER ONE.

Mikal Mahdi v SC 2 23 2011 FINAL.txt
MS. NORRIS: YOUR HONOR, THE STATUTE BASICALLY

ADDRESSES FROM TRIAL COUNSEL'S PERSPECTIVE. TRIAL COUNSEL'S ENTIRE FILE HAS BEEN PROVIDED TO THE ATTORNEY GENERAL. THE FILES OF THESE EXPERTS WERE NOT IN TRIAL COUNSEL'S FILE. THERE IS NO EVIDENCE THAT TRIAL COUNSEL EVER SAW THOSE FILES.

THE COURT: WELL, DOESN'T THE STATUTE SAY, MA'AM, THE APPLICANT SHALL BE DEEMED TO HAVE WAIVED THE ATTORNEY-CLIENT PRIVILEGE WITH RESPECT TO BOTH ORAL AND WRITTEN COMMUNICATIONS BETWEEN COUNSEL AND THE DEFENDANT AND BETWEEN RETAINED AND APPOINTED EXPERTS AND THE DEFENDANT TO THE EXTENT NECESSARY FOR PRIOR COUNSEL TO RESPOND TO THE ALLEGATIONS?

MS. NORRIS: YES, YOUR HONOR, IT DOES, AND THE LAST

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PART "TO THE EXTENT NECESSARY FOR TRIAL COUNSEL TO RESPOND" IS FOR US TO KEEP. WE ARE NOT OBJECTING TO TRIAL COUNSEL TESTIFYING TO ABOUT WHAT DR. MCKEE OR DR. MARTIN SAID TO TRIAL COUNSEL. YOU KNOW, IT ISN'T RELEVANT WHAT THOSE DOCTORS SAY NOW OR WHAT THEIR MATERIALS THAT TRIAL COUNSEL NEVER SAW SAY.

WHAT IS RELEVANT IS WHAT TRIAL COUNSEL CONSIDERED IN BASING THEIR STRATEGIES, THEIR JUDGMENTS, THEIR DECISIONS, AND WE ARE GOING BACK TO MR. MABRY'S POINT ABOUT THE ISSUES DEALING DIRECTLY WITH THESE EXPERTS. THEY DON'T. WE'RE NOT CHALLENGING THOSE EXPERTS. WE'RE CHALLENGING THE INVESTIGATION THAT TRIAL COUNSEL DIDN'T DO THAT WOULD HAVE FORMED THE BASIS FOR THOSE EXPERTS. WE'RE NOT SAYING THAT DR. MARTIN AND DR. MCKEE SHOULD HAVE DONE ANYTHING DIFFERENT.

THE COURT: WELL, I UNDERSTAND THAT, BUT YOU'RE
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SAYING THAT THE TRIAL COUNSEL FAILED TO INVESTIGATE, SO FORTH AND SO ON, HIS MENTAL HEALTH HISTORY AND HIS DEVELOPMENTAL DEFICITS. I ASSUME THAT THE TRIAL COUNSEL'S POSITION IS THAT WE CONTACTED DR. MARTIN AND MCKEE AND MADE THAT INQUIRY AND THAT'S WHERE WE'RE GOING TO SEE WHETHER OR NOT THEY DID OR DIDN'T AND THAT IS RELEVANT TO THIS CASE AND WHAT MCKEE AND MARTIN, I ASSUME, DID OR DIDN'T DO WOULD GO TO HELPING ME MAKE A DECISION AS TO WHETHER OR NOT YOU PROVED YOUR ALLEGATION THAT THEY FAILED

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TO ADEQUATELY DO THE INVESTIGATION CONCERNING MENTAL HEALTH AND OR DEVELOPMENTAL DEFICITS OR WHETHER THEY DID DO THAT.

I MEAN, THAT'S THE DECISION THAT I GOT TO MAKE TO DETERMINE WHETHER OR NOT YOU CAN PROVE THOSE ALLEGATIONS AND I WOULD THINK THAT DR. MARTIN AND MCKEE'S RECORDS WOULD BE RELEVANT, BUT GO AHEAD.

MS. NORRIS: WELL, YOUR HONOR, AS SORT OF A STARTING POINT -- AND I KNOW YOUR HONOR HAS LOOKED AT OUR RESPONSE.

THE COURT: I HAVE. I HAVE LOOKED AT EVERYTHING THAT WAS E-MAILED TO ME EVEN AS OF THIS MORNING AND I'VE READ THE MOTIONS, THE MEMORANDUMS, AND THE STATUTE, AND I'LL BE GLAD TO HEAR FROM YOU.

MS. NORRIS: JUST SO OUR RECORD IS CLEAR, I DO OBJECT TO GOING FORWARD WITHOUT MR. MAHDI HERE THIS MORNING. HE IS IN RESPONDENT'S CUSTODY. IT IS THEIR JOB TO GET HIM TO THE COURTROOM. HE IS NOT HERE. I ALSO OBJECT---

THE COURT: WHERE IS IT WRITTEN THAT THEY HAVE THE RESPONSIBILITY OF GETTING HIM HERE?

MS. NORRIS: SCDC TRANSPORTS THE CLIENTS.

Mikal Mahdi v SC 2 23 2011 FINAL.txt
THE COURT: IF YOU WANTED HIM HERE, WHY DIDN'T YOU

MAKE A MOTION TO HAVE -- SIGN AN ORDER TO GET HIM HERE?

MS. NORRIS: FRANKLY, YOUR HONOR, BECAUSE OF THE
RUSHED PROCESSING WE'RE DOING HERE. UP UNTIL LAST EVENING
AT 7:11 P.M. TO ME THIS WAS AN LEGAL ISSUE THAT DIDN'T

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REQUIRE MR. MAHDI, BUT AT 7:11 I GOT AN AFFIDAVIT FAXED TO
MY OFFICE -- I DON'T USUALLY WORK THAT LATE, BUT I DID
HAPPEN TO BE THERE -- FROM GLENN WALTERS, TRIAL COUNSEL,
PURPORTING TO CONSENT TO RELEASE FILES FROM DR. MARTIN AND
DR. MCKEE, AND, AGAIN, HE DIDN'T HAVE THOSE FILES. THERE
IS NO EVIDENCE THAT HE EVER SAW THOSE FILES; SO I DON'T
KNOW HOW YOU CONSENT TO SOMETHING LIKE THAT, BUT ONCE WE
GET INTO THE ISSUE WHERE I THINK COUNSEL, FRANKLY, CROSSED
AN ETHICAL LINE THERE, I THINK THIS AFFIDAVIT IS -- SHOWS
UNETHICAL BEHAVIOR.

THE COURT: UNETHICAL BY WHO?

MS. NORRIS: BY MR. WALTERS. I THINK WE'RE AT THE
POINT WHERE I NEED TO TALK TO MIKAL MAHDI ABOUT THIS STUFF
BECAUSE WE'RE AT THE POINT WHERE TRIAL COUNSEL IS TRYING
TO WAIVE A PRIVILEGE THAT BELONGS TO MAHDI, NOT HIM. SO,
YOU KNOW, I DO OBJECT TO THAT.

I OBJECT TO THE PROCEDURAL ASPECTS. MR. MABRY IS
CORRECT THAT HE DIDN'T FILE A DISCOVERY MOTION ON US UNTIL
OCTOBER. WE GAVE HIM THE ENTIRE TRIAL COUNSEL'S FILE IN
DECEMBER, GOT IT BACK EIGHT WEEKS LATER. IT WAS ONLY TWO
WEEKS AGO WHERE HE EVEN ASKED US FOR THESE FILES. HIS
WRITTEN MOTION WAS SERVED BY E-MAIL ON FRIDAY WITHOUT
MR. LOMINACK---

THE COURT: DO YOU NEED ADDITIONAL TIME TO GET READY
FOR TODAY?

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A001195

MS. NORRIS: YOUR HONOR, I DON'T. MY POINT IS THAT RATHER THAN VIOLATING ALL OF THE PROCEDURAL RULES ABOUT HOW LONG YOU GET TO RESPOND, ET CETERA, IF MR. MABRY NEEDS A CONTINUANCE HE CAN ASK FOR IT, BUT, YOU KNOW, THE SOLUTION ISN'T TO E-MAIL A MOTION ON FRIDAY, GET A WRITTEN RESPONSE THE VERY NEXT BUSINESS DAY FOR ME -- TUESDAY, AS MONDAY WAS A HOLIDAY -- AND THE NEXT DAY HAVE A HEARING.

THE COURT: WELL, LET'S LET THE RECORD BE FULLY COMPLETE THAT Y'ALL CALLED ME AND ASKED THAT IT BE HEARD IN AN EXPEDITIOUS MANNER. I SAID HERE ARE MY DAYS AVAILABLE. EVERYBODY PICKED TODAY.

MS. NORRIS: WELL, YOUR HONOR, I DIDN'T ASK FOR THE CONFERENCE CALL, AND, IN FACT, I HAD SENT A LETTER TO YOUR HONOR. I E-MAILED IT YOUR CLERK. I'M PRETTY SURE IT WAS MAILED OUT, TOO -- OBJECTING TO HANDLING IT IN A CONFERENCE CALL. YOU'RE ABSOLUTELY RIGHT.

THE COURT: AND, THEREFORE, WE'RE HANDLING IT ON THE RECORD --

MS. NORRIS: YES, SIR.

THE COURT: -- WHICH I HAVE NO PROBLEM WITH.

MS. NORRIS: BUT I DON'T HAVE -- MY ISSUE ISN'T BEING ON THE RECORD. MY ISSUE IS MR. MAHDI ISN'T HERE. MY ISSUE IS THAT WE'RE TRAMPLING OVER ATTORNEY-CLIENT PRIVILEGE WITHOUT MR. MAHDI HERE AND I'VE GOT A TRIAL COUNSEL'S AFFIDAVIT THAT I THINK IS UNETHICAL. YOU CANNOT

CONSENT TO RELEASE ATTORNEY-CLIENT PRIVILEGED INFORMATION. THE PRIVILEGE IS NOT HIS.

Mikal Mahdi v SC 2 23 2011 FINAL.txt
THE COURT: WELL, BUT IF I FIND THAT STATUTE TO BE
APPLICABLE -- 17-27-130 -- HAS NOT YOUR CLIENT WAIVED ANY
AND ALL ATTORNEY-CLIENT PRIVILEGE?

MS. NORRIS: HE HAS WITH RESPECT TO TRIAL COUNSEL'S
FILE, YES. IT'S ALL BEEN HANDED OVER. HE HAS WITH
RESPECT TO TRIAL COUNSEL'S TESTIMONY ABOUT WHAT HE -- BOTH
OF THEM RECALL FROM THESE DOCTORS BUT---

THE COURT: WELL, DOESN'T THE STATUTE SAY BOTH ORAL
AND WRITTEN COMMUNICATIONS BETWEEN COUNSEL?

MS. NORRIS: WELL, THAT'S WHAT I SAY. HE CAN TESTIFY
ABOUT WHAT THEY TOLD HIM OR WHAT THEY DIDN'T BECAUSE UNDER
STRICKLAND THE INEFFECTIVE ASSISTANCE OF COUNSEL LOOKS AT
AND THE ISSUE BEFORE YOUR HONOR IS BASICALLY FROM
COUNSEL'S PERSPECTIVE AT THE TIME; SO, YOU KNOW, WHAT
THESE DOCTORS SAY NOW DOESN'T MATTER. WHAT MATTERS IS
WHAT MR. WALTERS AND MR. KOGER RECALL OF WHAT THEY SAID TO
HIM AND HOW THAT IMPACTED THEIR STRATEGIES AND REASONING.

THAT'S A DIFFERENT ISSUE THAN PUTTING A DOCTOR ON THE
WITNESS STAND WHO DID NOT TESTIFY AT TRIAL. THEY WERE NOT
INVOLVED IN THE INVESTIGATION. THEY INTERVIEWED, TESTED
MAHDI. THAT'S THE EXTENT OF IT. I'M SURE IF MR. WALTERS
WAS HERE HE WOULD SAY THAT, AND, YOU KNOW, I DO OBJECT AND
I DON'T KNOW -- I ASSUME MR. MABRY HANDED IT TO YOU --

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THIS AFFIDAVIT.

I ALSO OBJECT TO GOING FORWARD WITH THIS HEARING
WITHOUT MR. WALTERS HERE TO TESTIFY BECAUSE---

THE COURT: WELL, I'LL LEAVE THE HEARING OPEN AND YOU
CAN PROVIDE HIS TESTIMONY BY DEPOSITION OR YOU CAN
SUBPOENA HIM HERE AND I'LL LISTEN TO HIM TODAY, THIS
AFTERNOON, TOMORROW, OR FRIDAY. THAT'S UP TO YOU, MA'AM.

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A001197

I DON'T WANT TO---

MS. NORRIS: YOU'RE ASKING ME TO SUBPOENA HIM? HE IS NOT MY WITNESS.

THE COURT: WELL, YOU KEEP COMPLAINING HE IS NOT HERE. IF YOU WANT HIM HERE I'LL BE GLAD -- IF YOU WANT TO GET HIM HERE I'LL BE GLAD TO HOLD THE HEARING OPEN.

MS. NORRIS: I SAY MR. MABRY NEEDS TO GET HIM HERE THIS AFTERNOON.

THE COURT: GO AHEAD.

MS. NORRIS: I MEAN, YOU KNOW, BEYOND THAT ON THE SUBSTANCE OF IT, YOU KNOW, AGAIN, OUR ISSUES DON'T DEAL WITH THESE MENTAL HEALTH EXPERTS. THE ISSUE IS THE INVESTIGATION THAT WASN'T DONE -- THAT HAD IT BEEN DONE AND PROVIDED TO THEM THEIR OPINIONS WOULD HAVE BEEN DIFFERENT, AND, YOU KNOW, I DON'T KNOW ANY OTHER WAY TO PUT IT, BUT, YOU KNOW, I THINK IT'S TRAMPLING ENTIRELY OVER ATTORNEY-CLIENT PRIVILEGE. THE PROCESSING, THE SPEEDY DOING-THIS-BY-E-MAIL-FASTER-THAN-LIGHTNING SORT OF

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STUFF IS JUST PROCEDURALLY UNACCEPTABLE IN A CAPITAL CASE.

THE COURT: DO YOU NEED ADDITIONAL TIME, MA'AM?

MS. NORRIS: I DON'T NEED ADDITIONAL TIME. WHAT I CAN---

THE COURT: WELL, THEN HOW ARE WE TRAMPLING ON ANYTHING OR PROCEDURALLY VIOLATING ANYTHING IF YOU DON'T NEED ADDITIONAL TIME?

MS. NORRIS: I DON'T NEED ADDITIONAL TIME. I NEED -- IF YOUR HONOR IS GOING TO CONSIDER THIS AFFIDAVIT I NEED GLENN WALTERS HERE.

THE COURT: I AM NOT GOING TO CONSIDER THE AFFIDAVIT.

Mikal Mahdi v SC 2 23 2011 FINAL.txt
I AM GOING TO CONSIDER THE STATUTE. I AM GOING TO
INTERPRET THE STATUTE.

MS. NORRIS: ALL RIGHT, YOUR HONOR. GIVE ME ONE
SECOND, PLEASE.

YOUR HONOR, THE ONLY OTHER POINT I WOULD MAKE ON
CONSTRUING THE STATUTE, THE ONLY CASE WE HAVE FROM THE
STATE SUPREME COURT CONSTRUING THE STATUTE IS, OF COURSE,
BENNY WHICH SAYS -- AND WHAT THEY WERE ARGUING ABOUT IN
BENNY WAS THE TRIAL COUNSEL'S FILE. WE AGREE. THAT'S WHY
WE HANDED THAT OVER. THAT'S A DIFFERENT ISSUE. IT
DOESN'T ENTIRELY THROW OPEN EVERY POSSIBLE FILE OF SOMEONE
THAT WAS CONSULTED ON A CASE. IT HAS TO BE RELEVANT TO
THE ISSUES. I SUBMIT IT'S NOT.

MR. WALTERS' TESTIMONY IS THE RELEVANT PART. IT HAS

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TO BE SOME -- YOU KNOW, TRIAL COUNSEL CLEARLY COULD NOT
HAVE CONSIDERED SOMETHING THEY DIDN'T SEE. THERE IS
ABSOLUTELY NO EVIDENCE THEY EVER SAW THESE DOCTORS' NOTES,
THEIR TESTING. THE FILES WEREN'T IN THEIR POSSESSION.
SO, YOU KNOW, I THINK UNDER BENNY THE STATE HAS BEEN
PROVIDED WITH EVERYTHING THEY'RE ENTITLED TO, BUT THE
STATUTE DOESN'T JUST THROW OPEN THE ENTIRE CAN.

THE COURT: THANK YOU, MA'AM.

ANYTHING ELSE ON BEHALF OF THE ATTORNEY GENERAL?

MR. MABRY: YES, SIR, JUST BRIEFLY TO CLEAR UP THE
RECORD, YOUR HONOR. THE ALLEGATIONS IN THE FINAL
APPLICATION AS THIS COURT IS AWARE ARE THAT COUNSEL FAILED
TO ADEQUATELY INVESTIGATE, DEVELOP, AND PRESENT MITIGATION
EVIDENCE CONCERNING CONCERNING APPLICANT'S FAMILY, SOCIAL,
INSTITUTIONAL, AND MENTAL HISTORY, AND, OF COURSE, COUNSEL
RETAINED THESE TWO PSYCHIATRIC OR PSYCHOLOGICAL EXPERTS TO

Page 10

DO THAT VERY THING TO INVESTIGATE HIS STATE OF MIND, HIS COMPETENCY, HIS MENTAL HEALTH, AND THEN THE REMAINING ALLEGATIONS THEY HAVE MADE DEAL WITH THEIR CLAIM THAT HE HAS DEVELOPMENTAL DEFICITS AND HE HAS A, QUOTE, JUVENILE MIND; SO THEREFORE, THE EXPERTS' ANALYSIS OF THEM WOULD BE RELEVANT AND THE STATUTE CLEARLY SAYS ANY COMMUNICATIONS BETWEEN THE DEFENDANT AND THE EXPERT OR ANY PRIVILEGE IS WAIVED, AND, THEREFORE, WE ARE ENTITLED TO IT.

THE COURT: WELL, ANYTHING ELSE BY ANYBODY?

13

MR. MABRY: I'M SORRY, YOUR HONOR. I KNOW YOUR HONOR HAS RULED HE IS NOT GOING TO CONSIDER THE AFFIDAVIT, BUT I WAS SUBMITTING THE AFFIDAVIT OF MR. WALTERS AS RESPONDENT'S EXHIBIT 1.

THE COURT REPORTER: THIS IS A CALHOUN CASE. I AM NOT GOING TO BE GOING TO CALHOUN.

THE COURT: JUST GIVE IT TO HIM. HE'LL FILE IT.

MR. MABRY: I'LL FILE IT.

THE COURT REPORTER: I'LL FILL OUT THE SHEET.

MR. MABRY: THAT'S ALL I HAVE, YOUR HONOR.

(WHEREUPON, RESPONDENT'S EXHIBIT NO. 1 WAS MARKED FOR IDENTIFICATION AND RECEIVED INTO EVIDENCE.)

THE COURT: ANYTHING ELSE BY ANYONE?

MS. NORRIS: NO, SIR.

THE COURT: ALL RIGHT. I AM GOING TO ORDER THE PRODUCTION OF THE TWO FILES. I FIND THAT 17-27-130 IS APPLICABLE IN THIS SITUATION AND THAT THE PRIVILEGE HAS BEEN WAIVED BY THE APPLICANT. IT PUT IN DIRECT CONTROVERSY THE ISSUES OF WHETHER OR NOT TRIAL COUNSEL DID OR DID NOT ADEQUATELY INVESTIGATE THE MENTAL HEALTH

Mikal Mahdi v SC 2 23 2011 FINAL.txt
HISTORY, HIS DEVELOPMENTAL DEFICITS, ET CETERA, AS SET
FORTH IN THE APPLICATION.

I FURTHER FIND THAT UNDER SECTION OR -- STRIKE
THAT -- UNDER RULE 401 OF OUR RULES OF EVIDENCE THAT THESE
TWO FILES WOULD BE RELEVANT EVIDENCE AND IT COMES WITHIN

14

THE DEFINITION AS SET FORTH IN RULE 401 AND I -- WHERE ARE
THOSE FILES?

DO YOU HAVE THEM, MA'AM?

MS. NORRIS: YOUR HONOR, AS FAR AS I'M AWARE THE
ORIGINALS -- THE EXPERTS HAVE THEM. I DO HAVE COPIES OF
IT. I UNDERSTAND YOUR RULING. I AM GOING TO ASK YOU TO
DELAY THAT BECAUSE THIS IS SUCH A SERIOUS ISSUE. I MEAN,
NOT DELAY YOUR RULING, BUT DELAY THE TIME FOR PRODUCTION
BECAUSE THIS IS SUCH A SERIOUS ISSUE THAT I THINK WE NEED
TO FILE A WRIT TO THE SUPREME COURT AND I WOULD ASK YOU TO
ORDER US TO RELEASE IT SHOULD THE STATE SUPREME COURT
AGREE OR DENY OUR WRIT, BUT I THINK WE NEED TO---

THE COURT: MA'AM, I AM GOING TO ORDER IT TO BE
PRODUCED TO HIM WITHIN 24 HOURS. IF YOU WANT TO GO TO THE
SUPREME COURT AND GET A STAY YOU'RE WELCOME TO DO WHATEVER
YOU LIKE.

MR. MABRY: THE STATE WOULD OBJECT TO ANY APPEAL
BECAUSE WE BELIEVE IT WOULD BE INTERLOCUTORY.

THE COURT: WELL, I GET APPEALED ALL THE TIME. IF
SHE APPEALS IT AND GETS IT STAYED AND SUPERCEDED, THAT'S
ANOTHER MATTER. I AM ORDERING IT BE PRODUCED OUT OF THIS
COURT IN 24 HOURS. DO ME AN ORDER.

MR. MABRY: YES, SIR, YOUR HONOR.

THE COURT: VERY BRIEF.

MR. MABRY: YES, SIR.

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A001201

THE COURT: OFF THE RECORD.

(WHEREUPON, A DISCUSSION WAS HELD OFF THE RECORD.)

(END OF TRANSCRIPT OF RECORD.)

CERTIFICATE OF REPORTER

Page 13

A001202

STATE OF SOUTH CAROLINA)
)
COUNTY OF AIKEN)

I, LISA H. DAVENPORT, OFFICIAL COURT REPORTER FOR THE
SECOND JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO
HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND
COMPLETE TRANSCRIPT OF RECORD OF THE PROCEEDINGS HAD AND
EVIDENCE INTRODUCED IN THE TRIAL OF THE CAPTIONED CASE,
RELATIVE TO APPEAL, IN THE COURT OF COMMON PLEAS FOR
CALHOUN COUNTY, SOUTH CAROLINA, ON THE 23RD DAY OF
FEBRUARY, 2011.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
COUNSEL NOR INTEREST TO ANY PARTY HERETO.

APRIL 21, 2013

LISA H. DAVENPORT, COURT REPORTER

♀

1 STATE OF SOUTH CAROLINA

2 COUNTY OF CALHOUN

CIRCUIT COURT
2009-CP-09-00164

3
4 MIKAL D. MAHDI,

5 -vs-

TRANSCRIPT OF RECORD

6 STATE OF SOUTH CAROLINA,
7 Defendant.

8
9 Heard on Tuesday, March 12, 2013

10 Aiken, South Carolina

11
12 BEFORE:

13 THE HONORABLE DOYET A. EARLY, III

14
15 APPEARANCES:

16 Counsel on Behalf of the Applicant:
17 Teresa L. Norris, Esq.

18 Counsel on Behalf of the State of SC:
19 J. Anthony Mabry, Esq.
Brendan J. McDonald, Esq.

20
21 Cheri L. Young, RPR
22 Circuit Court Reporter
23 P O Box 5232
Aiken, SC 29804-5232
24
25

1 ON TUESDAY, MARCH 12, 2013 AT 10:03 A.M.:

2 THE COURT: This is a motion to reconsider the case of
3 the State versus Mahdi.

4 MR. McDONALD: Yes, sir.

5 MR. MABRY: Mikal.

6 THE COURT: Mikal Mahdi. You've got the caption, do
7 you not, Madam Court Reporter?

8 THE COURT REPORTER: I do.

9 THE COURT: And as I understand from the
10 correspondence from the lawyers, y'all have waived his
11 appearance being here today; is that correct, Ms. Norris?

12 MS. NORRIS: Yes, Your Honor. And also Mr. Lominack,
13 my co-counsel, has been excused from this hearing as well.

14 THE COURT: That's correct. And I assume you
15 discussed with Mr. Mahdi that we were having a hearing
16 today, et cetera?

17 MS. NORRIS: I have not been able to see him since it
18 was scheduled, but I talked to him before, after the
19 motion was filed and let him know that there probably
20 would be a hearing outside of his presence.

21 THE COURT: Thank you very much.

22 MR. MABRY: Yes, sir, Your Honor. As the Court said,
23 Your Honor, this is a Rule 59 motion to alter, amend or
24 reconsider under Rule 59 of the South Carolina Rules of
25 Civil Procedure.

1 And as the Court is aware, the Court denied relief to
2 Mr. Mahdi but under ground 10A, 11A-iii, the Court found
3 that counsel was deficient in failing to investigate,
4 develop, present mitigation evidence about Applicant's
5 family, social, and mental health history.

6 The State disagrees, respectfully disagrees with the
7 Court's findings and -- in several respects. The first
8 would be, Your Honor, that in the Court's order the Court
9 cites several ABA guidelines, specific ABA guidelines for
10 counsel in capital cases. And basically the Court's
11 decision that counsel was deficient because they did not
12 follow those guidelines or comply with those specific
13 guidelines.

14 I believe that most of that language was taken from
15 the proposed order or post-trial brief of the defense in
16 this case, based on my recollection of the reading their
17 order.

18 What the Court was not aware of, may not have been
19 aware of, may have been aware of, in 2009, the US Supreme
20 Court subsequent to our State Supreme Court's decision in
21 Council and subsequent to the US Supreme Court case in
22 Wiggins, the US Supreme Court made it clear in a per
23 curiam opinion that the ABA guidelines for defense
24 attorneys in capital cases is not standard for ineffective
25 assistance of counsel. It's not. Simply because counsel

1 didn't follow a specific ABA guideline does not mean that
2 they were deficient.

3 THE COURT: It's not a per se deficiency.

4 MR. MABRY: Right. It's not per se --

5 THE COURT: But it's certainly something that the
6 Court can look at --

7 MR. MABRY: Correct.

8 THE COURT: -- in determining whether or not their
9 performance was not, or it was or it was not ineffective.

10 MR. MABRY: Right. It's -- I believe they term it a
11 guide --

12 THE COURT: Certainly

13 MR. MABRY: -- to the Court, but we believe the Court
14 considered it more as a, basically the standard.

15 THE COURT: So what you're saying, it's not like a
16 violation of a statute as negligence per se in our civil
17 arena. You're simply saying it's not negligence or not
18 ineffective per se but it's something I can consider in
19 determining whether or not counsel was ineffective.

20 MR. MABRY: Correct.

21 THE COURT: Did my order say that that was the
22 standard of care?

23 MR. MABRY: Yes, sir. I believe it does. I reviewed
24 it again coming down here this morning and it appears to
25 me that that, it says that is the standard of care.

1 THE COURT: So if I've said that, then I need to look
2 at that in connection with that case that you've cited to
3 me. Can you give us the cite on that, please?

4 MR. MABRY: Yes, sir. Van Hook is 558 US 4. And then
5 subsequent to Van Hook, the US Supreme Court came out with
6 Cullen versus Pinholster.

7 THE COURT: I'm sorry. Spell that first name.

8 MR. MABRY: Which one?

9 THE COURT: Cullen.

10 MR. MABRY: Yes. C-U-L-L-E-N.

11 THE COURT: Thank you.

12 MR. MABRY: Versus Pinholster, P-I-N-H-O-L-S-T-E-R,
13 which is 131 Supreme Court 1388. That's a 2011 case. It
14 also says that specific guidelines are not appropriate in
15 making an ineffective assistance determination. It is
16 basically, the issue is whether counsel conducted a
17 reasonable investigation under the facts and
18 circumstances.

19 And going back to Van Hook, that was the same thing.
20 The Sixth Circuit -- and it's not unusual to see this
21 because our Supreme Court in Council cites the same ABA
22 guidelines which was prior to Van Hook and prior to
23 Pinholster, but the US Supreme Court has made clear since
24 those decisions that that's not what they meant in
25 Wiggins, that you have to follow the specific ABA

1 guidelines.

2 THE COURT: They're simply guidelines.

3 MR. MABRY: Right. And the reason is because
4 everybody's not a member of the ABA and every lawyer in a
5 defense capital case, you've got to leave room for them to
6 make strategic decisions and make --

7 THE COURT: I understand. But you would agree with me
8 those guidelines are pretty good guidelines where someone
9 defending a capital case should look to.

10 MR. MABRY: I think they are good for somebody to look
11 at to get an idea if they've never handled a capital case
12 before.

13 But there are 131 pages of guidelines. And there's no
14 way you can do everything in those guidelines. For
15 instance, one of the guidelines says you should talk to
16 everybody that has ever known the defendant or known his
17 family.

18 Well, if I'm the capital defendant, there's no way you
19 could ever talk to everybody that has ever known me in my
20 life. Everybody in my first grade class, my second grade
21 class, every teacher I've ever had, everybody who ever had
22 any contact with me. That's simply impossible.

23 What collateral counsel has done is they cite those
24 guidelines that say you didn't follow that guideline, did
25 you. Well, no, we didn't talk to every single person that

1 ever knew him. Well, then you're deficient.

2 And that's why the Supreme Court has made it clear
3 that that's not the standard. It's reasonableness under
4 the facts and circumstances of the case. Did they conduct
5 reasonable mitigation investigation.

6 THE COURT: So I need -- you want me to go back and
7 revisit it under the two Supreme Court cases, US Supreme
8 Court cases that have been decided subsequent to our
9 Supreme Court case in Council wherein they stated that
10 those, they did, they being the guidelines, did set the
11 standard of care?

12 MR. MABRY: Yes, sir.

13 THE COURT: All right. That's a fair request.

14 MR. MABRY: Okay. The second ground, Your Honor, is
15 the order finds and specifically says in the order that
16 counsel conducted a superficial mitigation investigation
17 and one focused on competency and criminal responsibility.

18 And the record shows that is incorrect because what
19 counsel did was they -- the first thing they did was met
20 with the lawyers in North Carolina who were working on
21 another murder investigation in North Carolina. They got
22 everything that they had.

23 THE COURT: Well, he subsequently pled guilty to
24 that.

25 MR. MABRY: Right.

1 THE COURT: I think that was after the hearing we had
2 in Columbia.

3 MR. MABRY: Yes, sir. That was after that, but what
4 I'm talking about is their mitigation investigation.
5 Well, first counsel hired a forensic social worker which
6 didn't happen in the Council case. He hired a mitigation
7 investigator, hired a private investigator, and they went
8 and met with the North Carolina attorneys, got everything
9 that they had.

10 Then they go to Virginia and they interviewed the
11 defendant's mother, the defendant's two maternal aunts.
12 They also went to Philadelphia and interviewed a paternal
13 aunt and uncle. They also interviewed the grandmother and
14 another uncle in Virginia. They also interviewed the
15 father. They had trouble getting the mother and they
16 finally got her. She wouldn't talk to them except by
17 telephone. This whole case, the family wouldn't cooperate
18 with the --

19 THE COURT: But what -- didn't the defense counsel by
20 their own admission in the PCR hearing say that they were
21 concentrating more not on mitigation but on the mental
22 aspects of the case, of the defense?

23 MR. MABRY: I don't agree with that --

24 THE COURT: Okay.

25 MR. MABRY: -- assessment.

1 THE COURT: That's just my recollection. I may be
2 wrong.

3 MR. MABRY: They may have answered one question in the
4 PCR that way. But if you look at the totality of the
5 investigation, there's no question that they were not
6 focused simply on competency and whether he was insane at
7 the time of the crime.

8 Otherwise, why would they have gone to Virginia and
9 interviewed his family? Why wouldn't they have gone to
10 Pennsylvania and interviewed his family? Why wouldn't
11 they have gone to Baltimore? They were trying to develop
12 mitigation evidence from the family, but the only family
13 member who was willing to come and testify was the
14 grandmother. And the only thing she wanted to talk about
15 was what a great family they were and not explaining how
16 the defendant --

17 THE COURT: Well, if she was the only one willing to
18 come, how was the PCR counsel able to get all the family
19 members there?

20 MR. MABRY: Well, as typical in these cases, when the
21 crime is committed and the community is outraged, then so
22 is the defendant's family. They're embarrassed. They're
23 disappointed. They don't want to help him get out of
24 trouble.

25 THE COURT: But you don't know. You're just

1 speculating on that now.

2 MR. MABRY: I don't think I'm speculating on it
3 because the attorney said, you know, we went and talked to
4 these people. And at the PCR, if you'll remember his
5 mother didn't come, his brother didn't come, his father
6 didn't come and neither did the grandmother. Now she
7 supposedly has dementia now, but none of his immediate
8 family came to the PCR.

9 THE COURT: As I recall it was aunts and other members
10 of the family and community.

11 MR. MABRY: Yes, sir. But counsel in this case talked
12 to them. Not only did their mitigation investigator talk
13 to them, they went and talked to them. Mr. -- Uncle,
14 Mr. Burwell, Thomas Burwell and his wife came to the PCR
15 hearing. You'll remember she had a doctorate, I think a
16 PhD.

17 THE COURT: They were very impressive. He had lived
18 with them for some period of time.

19 MR. MABRY: Yes. He had lived with them, but at the
20 time of trial he told the North Carolina lawyers that
21 Mahdi was a demon and he faked child abuse and almost had
22 them locked up for child abuse.

23 And the trial counsel testified, they called us on the
24 phone and said we're not coming. We don't want to testify
25 and if we do, we're going to have bad things to say about

1 him.

2 So that, that's our second objection to the Court's
3 finding of deficient performance. This was not a
4 mitigation investigation that was focused solely on
5 competency to stand trial and mental insanity.

6 It was a mitigation investigation that was focused on
7 his life and how he got to where he was. In fact,
8 Ms. Hammock testified before Judge Newman at the
9 sentencing and that's what she laid out for him,
10 everything that those witnesses basically testified to at
11 the PCR; he came from a broken home, he witnessed domestic
12 violence, his father got in trouble with the law all the
13 time, his mother abandoned him when he was five years
14 old. And it went on and on and on as I've detailed in my
15 motion. That's our second basis.

16 And then our third basis, Your Honor -- if I could
17 have just a moment.

18 THE COURT: Certainly.

19 MR. MABRY: The Court found deficient performance as
20 far as the mitigation. That's what I was leading into.

21 Basically the same testimony that they brought out at
22 the PCR hearing is what was presented to Judge Newman but
23 it was presented through Ms. Hammock. They couldn't get
24 any of the family members to cooperate and come, and if
25 they did they said they were going to say bad things about

1 Mahdi.

2 So what they did was they used their social worker and
3 she presented everything, basically, that they presented
4 at the PCR hearing; broken home, abusive father, witnessed
5 domestic violence, was committed -- Mr. Mahdi was
6 committed to a psychiatric facility when he was nine after
7 he had to move in with his aunt and uncle, his mother
8 abandoned him, his father had all kind of troubles with
9 the law and could not raise him --

10 THE COURT: Hold on a second. All right. Young
11 couple on the back row, y'all step out. You two. That's
12 correct. Step out, please. Thank you.

13 Go ahead.

14 MR. MABRY: That's basically our third argument. It's
15 covered in the motion, Your Honor. And I detailed what
16 Ms. Hammock testified to before Judge Newman and it's
17 basically the same thing that they presented at the PCR,
18 but they presented it through live witnesses.

19 Counsel at the time didn't have that option. These
20 people wouldn't come to court. In fact, the aunt who had
21 the doctorate, she admitted she probably wouldn't -- she
22 was reluctant in 2006 to come but counsel said there's no,
23 none of them would come. Nobody wanted to come except the
24 grandmother. And then she didn't want to explain why
25 Mahdi had gotten to where he was. She wanted to talk

1 about what a great family he was from.

2 So they presented the mitigation the only way they
3 could present it, through Ms. Hammock.

4 THE COURT: Do you have an extra copy of your memo?

5 MR. MABRY: Yes, sir. I handed it up to you.

6 THE COURT: It apparently went to Saint Matthews. We
7 did not get it.

8 MR. MABRY: Can I approach?

9 THE COURT: You can just hand it right here, if you
10 would, please.

11 MR. MABRY: (Document handed to the Judge.)

12 THE COURT: Thank you. Ms. Norris?

13 MR. MABRY: I'm sorry. I'm sorry. Can I say one
14 other thing?

15 THE COURT: Sure. Absolutely.

16 MR. MABRY: I'm sorry. And other thing I addressed in
17 the motion, Judge, is they brought in several experts that
18 testified that like Ms -- Dr. Schwartz-Watts said, "I
19 think he was suffering from generalized anxiety disorder
20 at the time Ms. Mahdi killed Captain Myers."

21 Well, first of all, the only thing she said that led
22 her to that conclusion was Mr. Mahdi told her he was
23 anxious when Captain Myers was coming in the cabin, that
24 he had repented which is not, a pretty tenuous basis to
25 diagnose generalized anxiety disorder.

1 But regardless of that, it doesn't matter what
2 Dr. Schwartz-Watts or Dr. Hayne or one of these other
3 doctors they brought to the PCR hearing found seven, six
4 or seven years after the fact.

5 The cases that I've cited to the Court all say you can
6 always find an expert five, six, seven years after the
7 fact who's going to find something different. The issue
8 is: Did you investigate that question. And they have to
9 show that there was some record that counsel missed that
10 if they had provided that to their experts, they would
11 have come to a different diagnosis.

12 That's the Von Dohlen case. In Von Dohlen, the expert
13 said, yes, if I had these records I would have diagnosed
14 him differently and testified differently before the
15 jury.

16 That didn't happen here. In fact, they didn't call
17 any of the experts that counsel used. We called them. We
18 called Dr. McKey and Dr. Martin. And Dr. Martin said the
19 records that he saw at the PCR hearing would not change
20 his diagnosis. He had anti-social personalty disorder.

21 Dr. McKey said he didn't need to see any other records
22 to make his diagnosis. So basically as far as their
23 experts, it's all impressive and pretty after-the-fact,
24 but that's not really the issue.

25 The issue is: Did counsel do something wrong that

1 would have found something that was missed. And both of
2 counsel's psychological and psychiatric experts testified
3 at the hearing. They didn't establish deficient
4 performance under Von Dohlen.

5 That's all I have, Your Honor.

6 THE COURT: All right, sir.

7 MS. NORRIS: Thank you, Your Honor.

8 THE COURT: Yes, ma'am.

9 MS. NORRIS: In Mr. Mahdi's capital sentencing his
10 defense counsel called only two witnesses.

11 THE COURT: That's correct.

12 MS. NORRIS: One of those was a corrections expert and
13 the other, as Mr. Mabry has said, was Ms. Hammock, a
14 social worker. But what Mr. Mabry characterizes as her
15 testimony going on and on and on was in fact 14 pages of
16 actual testimony that included vague conclusions based on
17 an incomplete investigation. For example, she said, "We
18 can only speculate that his childhood was full of a great
19 deal of conflict and neglect." She wasn't able to give a
20 single story.

21 Never mind, you know, what we heard at the PCR that
22 the father was --

23 THE COURT: Well, if the family members were reluctant
24 to come forward, as Mr. Mabry says, how else could counsel
25 have gotten that information in except through that

1 particular witness?

2 MS. NORRIS: Well, Your Honor, it is simply untrue
3 that the family was uncooperative. We called an aunt and
4 uncle on the paternal side, two aunts on the maternal side
5 in the PCR hearing in addition to other folks. The
6 witnesses that Mr. Mabry referred to, Carson and Lawanda
7 Burwell, they --

8 THE COURT: That was the parent -- or not the
9 parents. That was the aunt and uncle that he lived
10 with --

11 MS. NORRIS: Yes, sir.

12 THE COURT: -- in Norfolk?

13 MR. MABRY: Baltimore.

14 MS. NORRIS: Baltimore.

15 THE COURT: Baltimore. That's correct.

16 MS. NORRIS: They testified. And, yes, they were
17 reluctant. I don't know of any witness that isn't
18 reluctant. But they came for the PCR and they said, had
19 they been asked they would have come for the trial.

20 And even though their testimony include some bad
21 things like nine-year-old Mikal was a demon who was
22 hospitalized involuntarily for depression with psychotic
23 features, obviously they had a lot more mitigating
24 testimony.

25 As for the father and the mother, Mr. Mabry only

1 assumes that they refused to testify in the PCR. There
2 was plenty of evidence about their mental illnesses, their
3 impairments, not the kind of folks who make good
4 witnesses.

5 And a father -- there was lots of testimony about his
6 home schooling of the children and his paranoid rants
7 about white people and the system. So, you know, they
8 weren't necessary as witnesses.

9 The witnesses we did call, though, made a difference.
10 Judge Newman said in his sentencing order that he always
11 tried to temper justice with mercy and to seek to find the
12 humanity in every person that he sentenced. But he
13 specifically said, that sense of humanity does not seem to
14 exist in Mikal Deen Mahdi.

15 In the PCR we had 12 mitigation witnesses, four
16 affidavits. There were eight lay witnesses. And all of
17 those were from Maryland and Virginia. And Your Honor is
18 aware, we have no subpoena power over them in common
19 pleas. These folks came voluntarily, including the family
20 that Mr. Mabry says is uncooperative. We had a school
21 teacher, Carol Wilson, who taught him in the fifth grade,
22 his last grade in school before the father took him out
23 because they, the school wanted to offer him counseling
24 due to emotional handicaps. The father saw that as the
25 white man system, even though most of his counselors and

1 teachers were black, took him out of school.

2 This lady 17 years later said, "I will never forget
3 him." That's a quote from the PCR. She had taught in
4 schools and prisons and juvenile facilities and she said,
5 "just never met anybody else that had no chance in life
6 from childhood."

7 And her testimony was emotional. Your Honor may
8 recall that she was even crying. The record doesn't show
9 that. It shows that I offered her some tissue. Your
10 Honor offered her water and offered her a break. She was
11 emotional.

12 Another third grade teacher said that she would have
13 been willing to foster him if she had been asked.

14 That speaks to humanity. All of those lay witnesses
15 brought the humanity that Judge Newman found lacking in 14
16 pages of dry, social worker, vague, conclusive testimony.

17 As for the focus on competence, Mr. Mabry is mixing
18 apples and oranges. What Your Honor found and what the
19 record shows is that the mental health evaluation, the two
20 experts retained by the trial attorneys were focused on
21 competence and capacity at the time of the crime.

22 Trial counsel said that. Your Honor even quotes their
23 testimony in your order. Those experts said that. They
24 weren't looking for mitigation. The mitigation going to
25 Virginia and Maryland, that's a separate story. But, as

1 in Council, the mental health experts weren't focused on
2 mitigation. And those experts were only provided very
3 basic discovery information, not even all the records that
4 the trial attorneys had.

5 Ms. Hammock wasn't given all the records. She realied
6 on a synopsis of school records which was incomplete.
7 They never got his special education records including
8 psychological testing showing that he had emotional
9 handicaps in the fourth grade. She did not see the actual
10 records of his involuntary hospitalization as a child.
11 She only saw a report or a synopsis of that from Paige
12 Tarr and of course with all the information available,
13 Dr. Watts says he has major depression, anxiety disorder,
14 paranoid personality disorder and attachment disorder in
15 addition to anti-social. With all the information it
16 makes a difference.

17 Counsel also did not obtain any records for anyone
18 other than Mr. Mahdi, didn't get anything on the father
19 when of course there was criminal records, psychiatric
20 records and military records showing much mitigation
21 information. This man was mentally ill and violent
22 throughout his life.

23 And, you know, there's substance there. It's not
24 just, yes, the jury heard that he may have been abusive.
25 They didn't hear what came out in PCR that he tied his own

1 mother to a tree and beat her. Her offense? She stopped
2 him from beating his wife when she wanted to take the kids
3 away to escape the violence. He beat his own sister.

4 Even the sheriff corroborates that. The sheriff who
5 testified in sentencing but trial counsel didn't bother to
6 ask him that information. The sheriff grew up next to the
7 father. He knew this. Everybody in the community knew
8 it.

9 Counsel didn't interview a single person outside of
10 Mr. Mahdi's family even though counsel testified the
11 family wasn't cooperative, they wasn't helpful. He didn't
12 try to talk to anybody else.

13 And whether you argue about it's impossible to find
14 everybody that ever knew him, you certainly can find
15 neighbors, school teachers. Ms. Tarr, their investigator,
16 testified at the PCR that she couldn't remember
17 specifically, she had no file, she thought she had gone to
18 interview schoolteachers but he only went to school for
19 five years. There weren't that many of them.

20 We called the fifth grade teacher, the third grade
21 teacher, had an affidavit from the first grade teacher.
22 They're still in the same place. They're not hard to
23 find. She just didn't do it.

24 And Carson and Lawanda Burwell, Mikal lived with them
25 for a year. Ms. Hammock said he stayed there a brief

1 period. There was no description of that. These were --
2 as Your Honor recalls were very articulate, very
3 impressive lay witnesses. It's rare that you find lay
4 witnesses in the family with a master's degree, the uncle,
5 and the aunt, a Ph.D. from Harvard. They were able to lay
6 all of this out in a way that humanizes him. They
7 described the neglect from the father and why Mikal was
8 taken from the home. All of that wasn't explained in the
9 vague, conclusive testimony that the jury heard in
10 sentencing.

11 With respect to the ABA guidelines, Your Honor did say
12 in the order that they're the standard of practice and as
13 guides to determining what is reasonable. We can argue
14 about whether they're the standard of practice or not, but
15 it doesn't matter.

16 Your Honor cited numerous US Supreme Court cases and
17 South Carolina Supreme Court cases. So I submit that
18 doesn't matter.

19 The AG argues that Von Dohlen says that we can't show
20 deficient conduct if we can't show that the trial experts
21 would have changed their minds. Von Dohlen absolutely
22 does not say that.

23 In Von Dohlen, yes, it is true that the trial expert
24 came back with more information and changed his opinion.
25 That goes to prejudice. It doesn't go to deficient

1 conduct. I may be misreading it but I was the counsel in
2 Von Dohlen so I'm pretty sure it doesn't say that.

3 Mr. Mabry cites numerous times in his pleading that
4 we're saying that the trial counsel should have expert
5 shopped. They should have had a different social worker.
6 We're not saying that. We're also not saying that there
7 should have been different mental health experts. We're
8 saying those experts weren't given sufficient
9 information. It's not their fault. Counsel, it's
10 counsel's responsibility to investigate and provide that
11 information. They simply didn't do it.

12 As for the testimony being the same, if you look at
13 that 14 pages of testimony from Ms. Hammock, she says that
14 the father had limited parenting skills. He had no
15 parenting skills. The testimony about his home schooling,
16 there was no home schooling except his rant and his rave
17 against the white man's world, his paranoia that people
18 were going to come get him.

19 He had these kids out in the woods, training them for
20 some battle, some assault. That was fifth grade, 12-year-
21 old, 13, however-old Mikal Mahdi, that was his teaching.

22 Again, it was more than a brief stay in Baltimore.
23 Ms. Hammock said that the father had continuing depression
24 issues throughout his life. This man was mentally ill.
25 Even the sheriff, the civil rights leader who, if Your

1 Honor may recall, there was an incident where Mikal's
2 father jumped in the all-white pool in 1995. I don't know
3 how that happens, but it does in this county, but he
4 jumped in and he wouldn't get out. They called the civil
5 rights leader to get him out. He described the violence
6 and the mental illness.

7 There's a lot more than continuing depression. There
8 was nothing in the sentencing about the grandmother and
9 the grandmother is deceased now. Before she had dementia,
10 but she is deceased now. But she was present during his
11 sentencing.

12 And I don't disagree with trial counsel's testimony
13 that she only wanted to talk good about the family. We
14 had the testimony about that in the PCR from Aunt Lawanda
15 and Uncle Carson. This woman lived in her own delusional
16 world. She was a very light-skinned African-American.
17 She wanted to pass for white. She wanted her children to
18 pass for white to the extent that when they were children
19 she would pull their noses to straighten them. And Mikal
20 lived in her home as a child. So, of course, she would
21 not have made a good witness.

22 The other family members, again, some of them had bad
23 information. He's described as a demon child. Well, you
24 know, if you don't -- if you don't present the bad, you
25 don't get the good along with it in terms of mitigation.

1 The AG in their pleading argues that trial counsel had
2 a strategy not to present this evidence because they might
3 open the door to damaging evidence of criminal conduct in
4 the community and bad behavior and confinement, both DJJ
5 and the Department of Corrections.

6 They don't cite anything in the record though because
7 counsel didn't say that. They simply didn't say that.
8 And it's almost laughable to say that they didn't present
9 evidence in mitigation because his bad behavior and
10 confinement might come out because they called a
11 corrections expert. All of that information came out in
12 the sentencing anyway.

13 With respect to other homicides, there was testimony
14 in the sentencing from a neighbor that he boasted of a
15 plan to kill drug dealers. The sheriff of the county
16 testified in the sentencing in aggravation. Presumably
17 had there been any evidence that he was a suspect in an
18 ongoing investigation he would have testified about that.

19 And it doesn't add much to say that Mr. Mahdi told
20 trial experts that he did in fact kill several other
21 people. Well, where are the bodies? Where is the
22 investigation? Where is the evidence? It doesn't add
23 much.

24 With respect to the argument that the mental health
25 evidence was not tied to the crimes, it doesn't matter.

1 Tennard versus Dretke out of the US Supreme Court says
2 mitigation does not have to have a nexus to the crimes.
3 It is mitigating that he has all of these mental health
4 disorders, no matter how you look at it.

5 The rest of the AG's motion, and it's -- it goes on
6 close to 70 pages, much of that is simply repetitive
7 arguments about the crimes and what a bad character
8 Mr. Mahdi is. It's irrelevant to the question we're
9 addressing here; whether or not counsel's conduct was
10 deficient. All of that stuff goes to whether there was
11 prejudice or not.

12 Thank you, Your Honor.

13 THE COURT: Anything in response, Mr. Mabry?

14 MR. MABRY: Just briefly, Your Honor. Most of the
15 things Ms. Norris talked about are addressed in my
16 motion.

17 I would just point out to the Court, one of their
18 claims is they should have called the civil rights
19 activist from Virginia who would've testified that Mahdi's
20 father jumped in the all-white pool and wouldn't leave.
21 The testimony at the PCR was Mr. Mahdi was arrested, sent
22 to Richmond, evaluated and they found he had no mental
23 illness.

24 So how would that help the trial lawyers to present
25 evidence that Mahdi's father was not mentally ill when

1 Ms. Hammock testified before Judge Newman in the
2 sentencing that Mahdi's father did suffer from some mental
3 illness and an inability to care for the children because
4 of his personal problems.

5 Also, as the Court knows, there was specific testimony
6 that Mr. Mahdi related to counsel about the Virginia
7 crimes, the homicides that were committed there. Also he
8 related that to Dr. Martin and Dr. McKey. So, you know,
9 if you put them on the stand that comes out. You've got
10 not only the murder here and in North Carolina, you got
11 two more homicides in Virginia.

12 THE COURT: Are you saying that his background was so
13 atrocious, the killing in North Carolina, the killings in
14 Virginia coupled with the killing of the victim in this
15 case, everything is so bad that you just don't put up
16 anybody because all of that bad stuff will come out?

17 MR. MABRY: Well, no. Not that you don't put up
18 anybody. You put up who you can.

19 Their experts were going to testify he had -- their
20 experts, Dr. McKey and Martin, were going to testify he
21 had anti-social personality disorder. One of the things
22 that Dr. Schwartz-Watts found. And not only that, if you
23 put those specific witnesses on the stand and Solicitor
24 Pascoe gets up and says, well, what history did he give
25 you? Why did he leave Virginia in the first place?

1 Because he committed two murders in Virginia.

2 I mean, that just destroys your mitigation case.

3 Judge Newman never heard about that. All Judge Newman
4 knew about was the North Carolina murder and the South
5 Carolina murder.

6 But they presented the mitigation that they could
7 through Ms. Hammock. She laid out the whole family
8 history.

9 THE COURT: So when somebody's background is as
10 violent as Mahdi's was, you're saying that you just better
11 tiptoe through it and come up with a minimal amount so you
12 don't expose all the other stuff?

13 MR. MABRY: I think you just have to be careful. You
14 have to make a strategic decision as to each witness; what
15 is the good I'm going to get out of this witness, and what
16 is the potential bad that I'm going to get. I think that
17 is --

18 THE COURT: So if every witness has potential bad, you
19 just eliminate them and don't worry about the good?

20 MR. MABRY: No, sir. I didn't say that. I think you
21 have to weigh it according to the risks. What's the odds
22 that this is going to come out, and how bad do we need
23 this specific mitigation evidence.

24 But they made a reasonable decision in this case.
25 Their experts were just going to say anti-social

1 personality disorder. That was the best that they were
2 going to testify.

3 THE COURT: But that the opens the door to determine
4 why it was anti-social --

5 MR. MABRY: Correct.

6 THE COURT: -- disorder, hence the other murders come
7 in.

8 MR. MABRY: Correct.

9 THE COURT: All right. Well, I appreciate both of
10 you --

11 MR. MABRY: Yes, sir.

12 THE COURT: -- being here. I apologize, once again,
13 to you for being late. It just slipped our calendar.

14 Ms. Norris, can you give me your -- I think everything
15 went to Calhoun County. I don't know that we got
16 everything. Can you give me a copy of your motion, memo,
17 whatever?

18 I'll take it under advisement and get back with you
19 all shortly.

20 MS. NORRIS: Yes, sir. We did not file a written
21 reply to --

22 THE COURT: Very well.

23 MS. NORRIS: -- this, but we filed a post-hearing
24 memorandum. Is that what you want?

25 THE COURT: I got that. Thank you both very much.

1 MR. MABRY: Thank you, Your Honor. Thank you for your
2 time.

3 END OF CASE: 10:40 A.M.

4 CERTIFICATE OF REPORTER

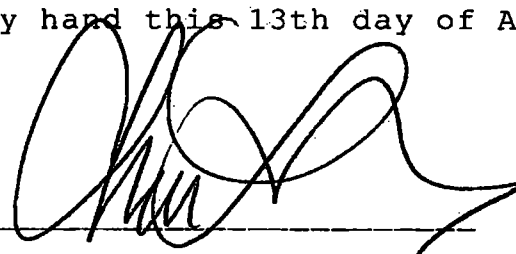
5 STATE OF SOUTH CAROLINA)

6 COUNTY OF AIKEN)

7 I, Cheri L. Young, Registered Professional Reporter
8 and Official Court Reporter for the State of South
9 Carolina, Second Circuit-At Large, do hereby certify that
10 the foregoing is a true, accurate and complete transcript
11 of record of the proceedings had and evidence introduced
12 in the hearing of the captioned case, relative to appeal,
13 in the Court of Common Pleas for Aiken County, on the 12th
14 day of March, 2013.

15 I do further certify that I am neither of kin,
16 counsel, nor interest to any party hereto.

17 I have hereunder set my hand this 13th day of April,
18 2013.

19
20
21 

22 Cheri L. Young, RPR
23 Official Court Reporter
24
25

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1388 (5:13)	always (14:6) (17:10)	based (3:16) (15:16)
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4	anyway (24:12)	Behalf (1:16) (1:18)
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5	appeal (29:12)	(28:12) (28:13)
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558 (5:4)	APPEARANCES (1:15)	(4:23)
59 (2:23) (2:24)	appears (4:24)	best (28:1)
	apples (18:18)	better (27:10)
7	Applicant (1:16)	black (18:1)
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