

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Appeal from Calhoun County  
The Honorable Doyet A. Early, III, Circuit Court Judge

Appellate Case No. 2014-002131

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S.C. Supreme Court

MIKAL D. MAHDI,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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RETURN TO PETITION FOR WRIT OF CERTIORARI

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## **PETITIONER'S QUESTION PRESENTED**

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

## STATEMENT OF THE CASE

This is an appeal from the denial of post-conviction relief (PCR) to death row inmate Mikal D. Mahdi (“Mahdi”). The application was denied by the Honorable Doyet A. Early, III.

Mahdi murdered James E. Myers on June 18, 2004 in Calhoun County. Mahdi was arrested on June 21, 2004 in Florida on a fugitive warrant, returned to South Carolina, and charged with Myers’ murder, the theft of his truck, and the burglary of his shed/cabin.<sup>1</sup> Mahdi was indicted by the Calhoun County grand jury on August 23, 2004 for murder, grand larceny > \$5,000, and burglary 2nd degree (violent) (2004-GS-09-243 - 244). The State sought the death penalty. Carl Grant and Glenn Walters, Esquires, were appointed to represent Mahdi. This Court assigned the Honorable Clifton Newman, to preside over the capital trial. The case was originally scheduled for trial in January of 2006. Mahdi’s capital counsel moved for a continuance based on the need for more time to complete their mitigation investigation. (PCR 597-98)(See Resp. Ex. 16). Judge Newman granted the continuance request, and the trial was moved from January to November of 2006. (PCR 597-98 & Resp. Ex. 17).<sup>2</sup> From November 26-29, 2006, jury selection was completed with a jury and 4 alternates impaneled. Prior to the swearing of the jury, on November 30, 2006, Mahdi waived his right to a jury trial and entered pleas of guilty to all charges. (R 123-1336).<sup>3</sup>

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<sup>1</sup> The building described as the “shed” is more like a workshop or cabin. It is located on the victim’s farm. Myers and his wife were married there. Myers’ wife had an office inside the “shed”. A television and chairs were also located in the “shed.” (R 1357-67, 1395-1425).

<sup>2</sup> Mr. Grant was involved in a motorcycle accident in the early summer of 2006 and suffered a serious injury and was relieved as counsel. Glenn Walters was substituted as 1<sup>st</sup> chair counsel and Josh Kroger, Esquire was appointed to replace Mr. Walters as 2<sup>nd</sup> chair counsel.

<sup>3</sup> Prior to his pleas, Mahdi was re-examined by Dr. Michael Cross, and determined to be competent to plead guilty. (R 1254-59, 1336-43). Mahdi was previously evaluated by court order for competency to stand trial. (R 8-10). It was determined Mahdi had no mental illness, was not mentally retarded, and was competent. (R 131, 139-40; Court’s Ex. 2). Mahdi was 23 years old at the time of his pleas, had obtained his GED, and had attended some community college. He was previously employed in mostly roofing and brick laying. Mahdi denied ever having been treated for abuse of alcohol, drugs, or any mental disease. (R 1346). He had been hospitalized on 1 occasion as an adolescent to a mental health facility, and was released. (R 1747, 1756). Mahdi understood the charges he faced, including murder, and the legal consequences of a conviction, including the death penalty. (R 1339-68). He denied any emotional or nervous problem that might prevent him from understanding what he was doing when he pled guilty. (R 1347). Mahdi had a

Judge Newman accepted Mahdi's pleas and ensured they were knowingly, voluntarily, and intelligently entered by extensive questioning of Mahdi under oath. (R 1259-84).<sup>4</sup> After the 24 hour waiting period, the sentencing proceeding was conducted December 1-5, 2006, and final arguments on December 6th. On December 8, 2006, Judge Newman issued his sentencing decision by reading into the record his written sentencing order, filed the same date. (R 1726-42, 1810-26, 1842-53; Order 1-12). Judge Newman found 2 statutory aggravating circumstances proven beyond a reasonable doubt: (1) the murder was committed in the commission of a grand larceny; and (2) the murder was committed in the commission of a burglary. (R 1730-31, 1814-15, 1845; Order 4). After considering all of the evidence in extenuation, aggravation, and mitigation of punishment, Judge Newman sentenced Mahdi to death for the murder of James Myers. (R 1726-42, 1810-26).<sup>5</sup>

Mahdi appealed his death sentence to this Court. On June 15, 2009, this Court affirmed. Mahdi v. State, 383 S.C. 135, 678 S.E.2d 807 (2009). Mahdi did not seek certiorari to the U.S. Supreme Court. Mahdi filed a Motion for Stay of Execution to pursue PCR. On July 23, 2009, this Court granted the stay assigning Judge Early to hear the application.

Mahdi filed a PCR application on August 18, 2009 and subsequent amended applications. The State filed a Return to each. On March 9, 2011, an evidentiary merits hearing was convened at the Broad River Correctional Institution.<sup>6</sup> Present were Mahdi, his PCR attorneys, along with the Attorney General's Office and the victim's widow. Mahdi called several witnesses to testify at the hearing: Carson Burwell, Rose Gupton, Sophie Gee, Myra Harris, Carol Wilson, George Smith, Sharon Pond, Lawanda Burwell, Doctors Craig Haney, DeRossett Myers, Nicholas Cooper-Lewter, and Donna M. Schwartz-Watts. Mahdi also submitted sworn affidavits of James

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good understanding of the legal process and the legal system. Judge Newman found Mahdi was competent to plead guilty. (R 1258-59, 1342-43).

<sup>4</sup> After acceptance of the pleas, the impaneled unsworn jury and alternates were dismissed.

<sup>5</sup> Mahdi was sentenced to 15 years for burglary 2nd degree and 10 years for grand larceny, to run consecutively to one another and to the murder sentence. (R 1741, 1825).

<sup>6</sup> The PCR hearing was held in Broad River prison due to security concerns regarding Mahdi. Mahdi and a fellow death row inmate were charged with stabbing a guard while on death row.

Woodley, Dora Wynn, Doug Pond, and Sandra Burwell. Mahdi did not testify at the PCR hearing. Respondent called the following witnesses at the evidentiary hearing: Carl Grant, Esq., Glenn Walters, Esq., Josh Koger, Esq., Paige Tarr Haas Munn, James Gordan, Doctors Thomas Martin and Geoffrey McKee. Additionally, exhibits were introduced by both parties. At the evidentiary hearing, Judge Early had the opportunity to view and hear the witnesses who testified in person, and make a credibility assessment with regard to each witness.

On December 18, 2012, after reviewing the record, including trial record and exhibits, and after reviewing all of the evidence submitted in this case, including the testimony of each witness and the PCR exhibits, and after making a credibility assessment regarding the witnesses and evidence introduced, Judge Early found the application to be without merit and denied and dismissed the application with prejudice in an Order of Dismissal, filed January 8, 2013. The State filed a timely Rule 59, SCRPC, Motion to Alter or Amend 1 of the findings in the Order.<sup>7</sup> On February 11, 2013, Judge Early heard argument on the Rule 59 Motion. After careful consideration of the entire record, the arguments of Respondent and Mahdi, and after careful reconsideration of the law and all of the evidence and testimony in the case, Judge Early granted the State's Rule 59 Motion as to that 1 portion of the Order and entered an Amended Order of Dismissal as the Final Order in this case. Mahdi's Petition for Writ of Certiorari followed.

### **RESPONDENT'S STATEMENT OF FACTS**

Mahdi murdered James Myers, an off-duty police officer, on July 18, 2004 in Calhoun County. Myers had 31 years of service as both a fireman and as a police officer, with the rank of Captain. Mahdi was a fugitive wanted for several crimes he committed outside South Carolina. (R 1341-68).

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<sup>7</sup> In its Rule 59 Motion, the State objected to the Court's finding of deficient performance under Ground 10(a)/11(a)iii. The State's reasons for the Motion are fully set forth in its Motion to Alter or Amend. The State did not object to the Court's finding Mahdi had not established prejudice under the same ground.

## **A. Crimes**

### ***Virginia***

On July 14, 2004 in Lawrenceville, VA, *Mahdi*, a resident of Virginia, burglarized a home stealing a .380 caliber chrome pistol. The same day, he stole license plates from a car at a car rental agency, and then stole a Mercury Sable station wagon from a nearby car lot. Mahdi then left Virginia, where homicide detectives were pursuing him for his involvement in the murder of a drug dealer. Mahdi would later indicate he was involved in another homicide in which the body was never discovered.<sup>8</sup> Mahdi was traveling to Florida, where he had friends. (R 1498-1527, 1357-67, PCR 480-82, 513, 514, 550, 604, 688-89).

### **North Carolina**

On July 15, 2004, about 7:00 p.m., Mahdi entered an Exxon station in Winston-Salem, N.C. armed with the stolen .380 pistol. He took a beer from the cooler and placed it on the counter. While the clerk verified Mahdi's age, Mahdi pulled out the gun, shot the clerk, and leaned over the counter and shot the clerk again as he lay on the floor. The event was captured clearly on surveillance video, and Mahdi's fingerprints were found on a mat lying on the store's counter. After shooting the clerk, Mahdi attempted to rob the cash register, but was unable to open it. He then left the store with only the beer. The clerk, Christopher Boggs, died. (R 1483-98, 1567-96, 1693-94, 1777-78; State's Ex. 94).<sup>9</sup>

### ***South Carolina* (Columbia)**

At 3:30 a.m. on July 17, 2004, Corey Pitts was sitting at a traffic light at Bull and Washington Streets in Columbia, S.C., when Mahdi car-jacked him of his red 2000 Ford Expedition. Pitts' description of his assailant was consistent with Mahdi's appearance. Pitts told police the assailant was carrying a chrome pistol. Pitts identified Mahdi at sentencing as the man

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<sup>8</sup>This information was not presented at the plea or sentencing proceeding. Mahdi's involvement in homicides in Virginia was developed at the PCR hearing as a result of Mahdi's allegations.

<sup>9</sup> Subsequent to the PCR hearing, Mahdi pled guilty to 1st degree murder for Boggs' death.

who stuck the gun in his face, forced him out of his SUV, and stole his vehicle.<sup>10</sup> (R 1528-40).

**(Calhoun County)**

About 30 minutes later, Mahdi drove the stolen Expedition to the Wilco Hess station at Exit 139 off I-26 in Calhoun County. The SUV now bore the stolen license plate from Virginia. Mahdi's fingerprints were found inside the SUV, and on the tag and the frame surrounding it. Mahdi attempted for about 50 minutes to use a credit card at 1 of the Wilco gas pumps, but it would not accept the card. Due to this suspicious behavior, store clerks notified police. Mahdi abandoned the SUV behind the station; and, as police arrived, fled into woods nearby. Police searched for Mahdi and concluded he had obtained a ride at a nearby restaurant. Mahdi was, instead, on foot in the woods near the store, headed toward victim James Myers' farm. (R 1360-62).

James Myers owned a farm approximately 1/3 of a mile from the Wilco station. While fleeing on foot, Mahdi came upon Myers' shed and broke into it. While there, he watched T.V., converted Myers's shotgun into a sawed off shotgun, and painted it black. He went through SLED investigation files maintained by Myers' wife, a SLED agent. He armed himself with Myers' .22 caliber rifle, which was kept in the shed with other guns. (R 1362, 1399-1401, 1411, 1603-04, 1414-16).

Myers was off work June 18, 2004, having returned with his wife from Edisto, after celebrating the birthdays of his wife, sister, and daughter. After returning home, Myers drove to his father's home, as he routinely did, to visit and help his father with the loss of Myers' mother, who had died 2 years earlier. After visiting with his father, Myers left around 6:45 p.m. and headed to his farm, where Mahdi was lying in wait at the shed. Mahdi confronted Myers in the shed, and shot him 9 times with the victim's own .22 caliber rifle, killing him.<sup>11</sup> Mahdi then

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<sup>10</sup>The Mercury Sable station wagon stolen from Lawrenceville, VA was found in the parking lot of Washington Street United Methodist Church near the scene of the car-jacking. (R 1359).

<sup>11</sup>There is evidence after Mahdi confronted Myers at the cabin, he forced Myers to empty his pockets on a table or chair inside the cabin. (R 1419-21, 1774). It is also possible Mahdi emptied Myers' pockets after he murdered him.

poured diesel fuel on and around the body and set it on fire. He then stole Myers' police issued Dodge truck and a license plate from another vehicle located near the shed. In addition to the .22 rifle, Mahdi stole Captain Myers' police issued Ruger assault rifle and the converted shotgun. (R 1402-25, 1363-65, 1541-66, 1696)

Myers' wife began missing him around 9:00 p.m., when he did not come home. She called and paged him, with no response. Finally, she contacted Myers' father and discovered what time Myers left his father's home. Mrs. Myers drove to their farm, and finding the gate to the property open, drove to the shed and found her husband's truck missing. She then went into the shed and found her husband's burned and bullet riddled body lying in a pool of blood. She knew immediately he was dead and screamed for an unknown period of time. When she finally calmed down enough to use her phone, she called 911 and waited for police. (R 1395-1425).

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

### *Florida*

On July 21, 2004, in Satellite Beach, FLA, Mahdi was spotted by police in Myers' truck.<sup>12</sup> He jumped out of the truck while moving and fled. Mahdi ran for the beach, carrying the fully-loaded Ruger assault rifle. Police were about to use deadly force when Mahdi dropped the gun and continued running into a condominium complex and was eventually apprehended on the 5th floor with the use of a police dog. While transporting Mahdi to jail, the arresting officer thanked him for not shooting him with the assault rifle, to which Mahdi responded the gun was "stuck on a three shot." Mahdi said with "cold eyes," "I don't think I could have got you - - I

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<sup>12</sup>By this time, police in Virginia and S.C. had connected the crimes there and here to Mahdi. A nationwide BOLO was issued for Mahdi's arrest. Florida police noticed Mahdi's erratic driving and thought he might be a drunk driver and began following him. Mahdi refused to stop for police. He eventually ran over a stop sign near the end of the pursuit. (R 1365-66, 1379-82).

couldn't have shot you, the other cop, and excuse my language, that fucking dog.” (R 1377-94).

After Mahdi's arrest, police discovered the license plate on Myers' police-issued Dodge truck had been replaced with the plate off Myers' personal GMC truck. Clothing found inside the Dodge truck matched clothing Mahdi was wearing at the Wilco station in Calhoun County. Shorts found in the truck matched shorts worn by Mahdi in the video of the murder in N.C. Shoes found in the truck matched footwear impressions found near the scene of Myers' murder. The Ruger assault rifle was recovered, and the sawed off shotgun and ammunition were found in the truck, as was an "Atlas" taken from Myers' shop, with Mahdi's fingerprints on the Jacksonville, FLA map page. This led police to 2 witnesses in Jacksonville, who purchased a .380 pistol and a .22 rifle from Mahdi shortly after Myers' murder. The witnesses identified Myers' Dodge truck as the vehicle Mahdi was driving at the time, and identified Mahdi in a photo lineup, as the person who sold them the .380 and the .22. The only personal item belonging to Myers never recovered was his police badge, which he kept in his truck or his pants pocket. Ballistics confirmed the recovered .380 pistol was the gun used to murder Christopher Boggs in Winston-Salem, and the .22 rifle was used to murder Myers. (R 1559-62, 1394-95, 1366, 1565, 1418-21 1592-96).

The autopsy determined Myers died from multiple gunshot wounds, after being shot 9 times, including 4 in the chest and 3 in the head. The pathologist, Dr. Janice Ross, opined Myers was shot first in the chest and possibly once in the head. After he collapsed to the floor of the shed, he possibly raised his head and was shot again, and then was shot again in the head while his head was lying on the floor. (R 1702).

## **B. Aggravation Factors**

### **(Mahdi's Prior Criminal Acts)**

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

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

At age 17, Mahdi was arrested for slashing his mother's tires and for resisting arrest. During this arrest, Mahdi grabbed the holstered pistol of 1 of the police officers. He later told 1 of the officers he should have killed "that bitch," referring to his own mother. Mahdi was also convicted as a juvenile of contempt of court and obstruction of justice. (R 1457-62, 1612).

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

Mahdi was released from prison on May 12, 2004. At the time of Myers' murder, Mahdi was on supervised probation for the Rivera assault, with requirements he not to leave Virginia, violate any laws, or possess a gun. Mahdi tried to get a neighbor to help him assemble a 9mm pistol. He bragged to her he was dabbling in drug dealing to make money, and was going to knock off some drug dealers. On June 14, 2004, the day before the .380 pistol was stolen, as a condition of his supervised probation, Mahdi was required to submit to a drug screen. The test showed he was using marijuana less than 2 months after getting out of prison. He then stole the gun, the

Mercury Sable, and the license tag and drove to North Carolina. (R 1483-97, 1500-02).

### **(Mahdi's Prison Conduct)**

Judge Newman also received evidence regarding Mahdi's prior behavior in prison. During Mahdi's juvenile incarceration, he assaulted another inmate causing bodily injury. Mahdi was incarcerated in Virginia's DJJ from August 1999 until May 2000, for contempt of court and obstruction of justice. His record while incarcerated was plagued by maladaptive behavior. Records from DJJ also document his committing several assaults during this incarceration. (R 1435-52, 1612-13; State's Ex. 95).<sup>13</sup>

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

As a South Carolina pre-trial detainee, Mahdi was charged with assaulting a correctional officer, who sustained a concussion. At the disciplinary hearing, Mahdi looked at the officer and said, the next chance he got, he would kill the "motherfucking officer." During a search of Mahdi's cell, officers found a 3-4 foot piece of rope and some pieces of metal. Mahdi was housed by himself. He was caught damaging a conference room and hiding metal fragments from a wall socket on his person. On another occasion, Mahdi was found with a 15 foot rope made of blankets. Another piece of metal was found in his cell on a different occasion. Mahdi also wrote

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<sup>13</sup>At the plea and sentencing hearing, the State did not introduce all of Mahdi's disciplinary violations in DJJ, only a small number. At PCR, in response Mahdi's allegations, the State introduced all of Mahdi's disciplinary violations in DJJ. They totaled over 40.

a grievance discussing killing DOC' employees. Mahdi made additional threats toward a DOC' employee at the disciplinary hearing. Capt. Gary Lane testified that at the time of trial, Mahdi was kept on the High D Wing of the super-max portion of Kirkland prison. This facility houses the 6 most difficult to manage inmates in the entire DOC. These inmates are kept differently than the other 23,000 inmates in the DOC. Their cells are more secure than death-row. While in 1 of these super-secure cells, Mahdi made a rope and obtained 2 pieces of contraband metal, of which 1 was sharpened to a point. Mahdi was transferred to the High D Wing, from the High C Wing, because of a history of making objects and a "hammer-like" weapon was found in his cell. (R 1616-19, 1622-24, 1627-29, 1646-48, 1652-53, 1661-62, 1655-57).

During jury selection before Judge Newman, a homemade handcuff key was found in Mahdi's possession, after he had persuaded his security detail to remove leg braces or irons and replace them with shackles. Mahdi admitted he made the key in the DOC, kept it secreted in his mouth during the trial, and took it out when he was away from guards for a meeting with his attorneys. Mahdi had attempted to use it in the county jail but had not had an opportunity to use it in the courtroom, due to the guards' watchfulness. Sheriff Summers testified he tried the handcuff key on 3 handcuff sets, and was able to open 2 of them. He testified Mahdi could have easily used the key to remove his restraints and assault someone in the courtroom. (R 1319-21, 1664-70).

### **C. The Sentencing Order**

On December 8, 2006, Judge Newman issued his 12-page sentencing order, which he read into the record. He found the State proved 2 aggravating circumstances beyond a reasonable doubt: (1) the murder of Myers was committed during the commission of a larceny; and (2) the murder was committed during the commission of a burglary. (R 1845; Order, p. 4).<sup>14</sup>

Judge Newman found the State presented compelling evidence of prior and subsequent bad

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<sup>14</sup> Judge Newman also found while there was strong evidence of 2 other alleged aggravating circumstances, the State did not prove those circumstances beyond a reasonable doubt. These 2 alleged circumstances were the murder was committed during the commission of an armed robbery and Myers was murdered because he was a policeman. Therefore, he did not consider or give any weight to these alleged circumstances. (R 1845-46; Order 4-5).

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

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

Judge Newman considered Mahdi's age (21) and mentality at the time of this murder. Judge Newman noted the last time Mahdi's I.Q. was tested, at age 14, his I.Q. was 108, slightly above average. While he considered this statutory mitigating circumstance, he did not give it great weight because Mahdi began his criminal career at an early age, 14. At 21, Mahdi was experienced in the world of crime. By the time Mahdi committed these crimes, he was aware of the severity of his crimes and the possible consequences. Judge Newman found given the evidence in this case, there was nothing in Mahdi's age or mentality that in any way mitigated, excused, or lessened his culpability, nor should it be given any significant weight in his ultimate decision as to the appropriate sentence. (R 1848-49; Order 7-8).

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

circumstance, he did not believe that it should be given any significant weight in his ultimate sentencing determination. (R 1849; Order 8).

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

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

Judge Newman also considered the impact of the crime upon the victim's family and the community. He found the victim, James Myers, was a husband, father, grandfather, son and friend

to many. He found Myers was a well-respected police officer, an outdoorsman, a mentor, and a treasured member of humanity. Further, he found Mahdi burglarized Myers's shed and stole his family's sense of security and serenity. Moreover, he found Mahdi, by committing these crimes, robbed Myers' family and friends of their right to peaceful enjoyment of life. (R 1851; Order, 10).

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

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

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

I find as an affirmative fact that the evidence in this case warrants the imposition of the death penalty and that its imposition is not the result of prejudice, passion, or any other arbitrary factor. (R 1852).

Judge Newman then formally sentenced Mahdi to death. (R 1853; Order, 12).

## ARGUMENT

**The evidence in the record supports Judge Early's findings of fact and conclusions of law that Mahdi was not entitled to post-conviction relief.**

### *Standard of Review* (Appellate)

“This Court gives great deference to the PCR court’s findings of fact and conclusions of law.” Miller v. State, 379 S.C. 108, 115, 665 S.E.2d 596, 599 (2008). The existence in the appendix of any evidence of probative value is sufficient to uphold the PCR Court’s ruling. Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000). If matters of credibility are involved, this

Court gives deference to the PCR court's findings because this Court lacks the opportunity to directly observe the witnesses. Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999). This Court will affirm the PCR Court's denial of an application for post-conviction relief if there is any evidence of probative value in the record to support the PCR Court's ruling. Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014). This Court will reverse the decision of the PCR Court when it is controlled by an error of law. Id.; Goins v. State, 397 S.C. 568, 726 S.E.2d 1 (2012).

*(The PCR Court)*

In a PCR action, the applicant has the burden of proving his allegations by a preponderance of the evidence. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler, *supra*. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler. An applicant must overcome this presumption to prevail on PCR. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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

"Surmounting Strickland's high bar is never an easy task[.]" Premo v. Moore, 131 S.Ct. 733 (2011) *citing* Harrington v. Richter, 131 S.Ct. 770 (2011), *quoting* Padilla v. Kentucky, 130 S.Ct. 1473 (2010). "It is 'all too tempting' to 'second-guess counsel's assistance after conviction

or adverse sentence.” Harrington v. Richter, 131 S.Ct. 770 (2011), *citations omitted*. “The question is whether an attorney’s representation amounted to incompetence under ‘prevailing professional norms,’ not whether it deviated from best practices or most common custom.” Id.; Strickland, 466 U.S. at 690.<sup>15</sup>

Mahdi challenges counsel’s performance in the penalty phase before Judge Newman. In the context of sentencing phase issues, the applicant must also prove deficient performance as defined above. Strickland; Harrington.

Mahdi must also prove prejudice. To show prejudice, the applicant must show that “there is a reasonable probability that ... the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.” Strickland, 466 U.S. at 695; *see also* Wiggins, 539 U.S. at 537; Jones v. State, 332 S.C. 329, 344-45, 504 S.E.2d 822, 829-30 (1998). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Jones, 504 S.E.2d at 823-824.

The United States Supreme Court has made clear the burden is *not on the State* to show the lack of prejudice, but **the burden is on the applicant to show prejudice**. Wong v. Belmontes, 130 S.Ct. 383 (2009), *citing* Strickland. The applicant must prove had counsel acted competently there is a reasonable probability a different sentence would have resulted. Id.; Wiggins v. Smith, 539 U.S. 510, 535, 536 (2003); *see also* Terry v. State, 394 S.C. 62, 714 S.E.2d 326 (2011).<sup>16</sup> Therefore, the appropriate standard for prejudice in this case is whether considering the new mitigation evidence presented at PCR, along with the original mitigation evidence, along with the

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<sup>15</sup> In the context of a guilty plea, the applicant also must establish deficient performance and prejudice. Hill v. Lockhart, 474 U.S. 52, 59 (1985). Mahdi does not challenge his guilty pleas on appeal from the denial of PCR. (BOA).

<sup>16</sup> In his petition, Mahdi repeatedly cites prior holdings of the U.S. Supreme Court and this Court that the standard for prejudice in the penalty phase is if one (1) juror might have found the balance of aggravating and mitigating factors favored a life sentence (BOA); however, this is not the proper standard in this case. Mahdi **pled guilty** and was **sentenced by Judge Newman** not a jury of 12 individuals.

evidence in aggravation produced at the sentencing hearing, and the aggravating evidence that would likely come in with the new mitigation evidence, is there a reasonable probability *Judge Newman* would have returned with a different sentence. Sears v. Upton; Wong v. Belmontes. Such a showing “requires a substantial, not just conceivable, likelihood of a different result.” Cullen v. Pinholster, 131 S.Ct. 1388, 1403 (2011), *citing* Harrington, 131 S.Ct. at 791 (2011).

### ***The Lack of Merit of Mahdi’s Petition***

In his final amended Application, Mahdi alleged the following ground:

#### **A. Ground 10(a)/11(a)(iii)**

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

(Final Application). In fact, this is the ground Mahdi focused on at the PCR hearing.<sup>17</sup> At the PCR hearing, under this ground, Mahdi raised several different specific allegations of ineffective assistance of counsel:

- a) Counsel should have interviewed and called at sentencing several of Mahdi’s extended family members and also community members to testify to his family, social, scholastic, and mental health history.
- b) Counsel should have presented the testimony Mahdi presented [at PCR] through a different forensic social worker than the one counsel used at sentencing.
- c) Counsel should have introduced testimony from an expert regarding the effect of Mahdi’s life of incarceration on Mahdi.
- d) Counsel failed to adequately investigate, develop, and present evidence concerning his mental health history or mentality; specifically, counsel should have discovered and presented the testimony Mahdi presented through Drs. Schwartz-Watts and Myers [at PCR], and counsel failed to provide certain records to their own psychiatric/psychological experts;
- e) Finally, counsel failed to introduce certain documents and records at sentencing such as his school records, his DJJ records, records from his commitment to the Walter Carter Center at age 9, and his father’s records.

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<sup>17</sup> As Mahdi admits in his Petition, he has now abandoned all other grounds in his PCR application raised to Judge Early; and, as will be discussed below, he now raises only a subpart of this ground to this Court.

At the PCR hearing before Judge Early, the vast majority of the testimony and evidence in support of these allegations came from *Mahdi's extended family members*,<sup>18</sup> *several PCR experts*,<sup>19</sup> *and records of Mahdi's commitment to the Walter Carter Center, to DJJ, and his school records*.<sup>20</sup> Mahdi has now abandoned all of these witnesses' testimony, the records themselves, and the above claims, except one (1), and only raises *a subpart of that one (1) claim*. Mahdi alleges counsel was ineffective for not calling *community members / school officials* from Mahdi's earlier life.

Mahdi has abandoned the other claims under this Ground because the credible testimony at PCR established (1) Mahdi's immediate and extended family was not cooperative with counsel, except for providing background information, and refused to testify or would say bad things about Mahdi if called to testify; (2) calling the experts Mahdi presented at PCR would have resulted in testimony before Judge Newman that Mahdi was involved in other homicides before the Boggs' and Myers' murders along with a diagnosis of anti-social personality disorder (ASPD);<sup>21</sup> and, (3) introduction of the records would have resulted in the introduction of Mahdi's bad behavior in

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18 At the PCR hearing, Mahdi called several aunts and 1 uncle to testify, and offered the affidavit of another aunt, on Mahdi's and his family's background. Mahdi called Carson Burwell (a paternal uncle), Rose Gupton (a maternal aunt), Sophie Gee (a maternal aunt), and Lawanda Burwell (a paternal aunt and Carson's wife). Mahdi offered the affidavit of Sandra Burwell (a paternal aunt). Mahdi did not call at PCR his father, mother, or brother. Nor were any affidavits offered by them.

19 Mahdi retained for the purpose of the PCR hearing and called: Dr. Donna Schwartz-Watts, Dr. deRossett Myers, Dr. Craig Haney, and Dr. Nicholas Cooper-Lewter.

20 Mahdi introduced at PCR his records from his commitment to the Walter Carter Center, all of his DJJ records, and his school records.

21 Dr. Donna Schwartz-Watts, a PCR psychiatry expert, testified in forming her opinion she relied on records from Dr. McKee [the trial psychological expert]. (PCR 458-60). She interviewed Mahdi 3 times; however, he did not trust her or provide her much information. (PCR 460, 478). She obtained more information on Mahdi's thought process after he left Virginia prison from Dr. Martin's and Dr. McKee's notes [trial experts]. (PCR 478-80). She admitted Mahdi told Drs. Martin and McKee he had committed another homicide in Virginia. Dr. DeRossett Myers [another PCR expert] stated the Virginia DOC's diagnosis Mahdi had ASPD was justifiable at the time. (PCR 455-56). Dr. Craig Haney [another PCR expert] reviewed Mahdi's DJJ records and his adult prison records. Mahdi had 41 disciplinary violations in DJJ, and Haney admitted Mahdi was diagnosed with intermittent explosive disorder and ASPD in Virginia's DOC.

school,<sup>22</sup> extensive testimony of his disciplinary violations in DJJ,<sup>23</sup> and his horrible behavior in the Carter Center.<sup>24</sup>

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22 The school records reveal damaging information about Mahdi and his character, even at an early age. Mahdi was referred for special services not because he was mentally retarded, but because of “..behavior problems. He exhibits inappropriate and disruptive behavior.” (**App. 007536**). The same record indicates Mahdi had a negative attitude about being corrected, did not always get along with other children, his behavior with adults was inappropriate at times, and most of his problems seemed to be getting along with people. The records indicate Mahdi had an I.Q. of 118, but had episodic acting-out behavior and an unwillingness to deal with difficult school tasks. (**App. 007533**). The records also indicate Mahdi was referred for special education because of “*behavioral difficulties*; such as leaving his seat inappropriately, *physically and verbally aggressive towards others* at times, talks out of turn, preoccupied, anxious, *easily frustrated or angered, lacks respect for authority*, and daydreams.” (**App. 005498**)(**emphasis added**). A Burk’s Behavior Rating Scale revealed very significant factors for poor impulse control, poor anger control, and excessive resistance. (**App. 007535**). The records also indicate Mahdi’s “intellectual functioning” was “in the high average range.” (**App. 004345**). To have introduced Mahdi’s school records would have introduced bad things about Mahdi to Judge Newman. It would also have introduced that Mahdi’s intellectual functioning was not impaired. Counsel was not deficient in failing to introduce Mahdi’s school records which contained bad things about Mahdi. Counsel artfully introduced through Hammock’s *testimony* and through *exhibits* Mahdi’s problems in school without introducing the bad things he had done while in school. *Wong, supra*.

23 At the sentencing hearing before Judge Newman, the State introduced a minimal amount of Mahdi’s DJJ records. (**See ROA**). Those records document just a few of Mahdi’s disciplinary violations; however they do not document the extensive and aggravated nature of his violations in DJJ. Counsel obtained Mahdi’s DJJ records through the efforts of their mitigation investigator. (**PCR 585**). They did not introduce them because Mahdi had over 40 disciplinary violations in DJJ including assaults on *guards, teachers, and inmates*. (**PCR 684**). He was involved in destroying property multiple times. He led an escape attempt by assaulting a female guard, taking her radio away, and demanding keys from another guard. He also admitted faking a suicide attempt to gain better conditions of confinement.

24 Counsel had possession of these records, and Tarr summarized them for counsel and the experts. (**Resp. Ex. 11; App. 007884, PCR 565-66**). Drs. Martin and McKee also had the actual records. (**PCR 511-12, 553-54**). They reviewed them in conducting their evaluation of Mahdi. (**PCR 511-12, 553-54**). The records contain damaging information about Mahdi. Mahdi was placed in isolation several times at the Carter Center due to his disruptive or inappropriate behavior. Mahdi assaulted other patients, assaulted staff, was verbally threatening or aggressive towards staff, and attempted to escape from the facility. On several occasions, Mahdi threw chairs or tables and attempted to damage property of the hospital. On 1 occasion, Mahdi falsely pulled a fire alarm. He also cursed staff. On another occasion, Mahdi threatened to suffocate a staff member with a pillow. Also, the records detail Mahdi’s making a false claim of child abuse against his aunt Lawanda, a fact Judge Newman was not aware of. The records show the claim of abuse was determined to be unfounded, and Mahdi admitted he only threatened suicide when he didn’t get his way. Lawanda also reported Mahdi only talked about suicide when he didn’t get his way or did something wrong, and Mahdi also admitted threatening suicide as a way of getting attention. These records would have undercut the mitigation value of and brought into question the diagnosis of major depression at the Carter Center testified to before Judge Newman. The records also indicate Mahdi had anti-social behavior and conduct disorder. Counsel was not deficient in

Mahdi now asks this Court to grant certiorari *alleging* Judge Early erred in finding counsel was not deficient in its mitigation investigation and presentation, where Judge Early based his decision **on all of the mitigation evidence Mahdi presented at PCR**, not just the select portion he now raises on appeal, which contained much aggravating evidence that would have come in with the additional mitigation evidence. *See Sears v. Upton, supra.* Mahdi also alleges Judge Early erred in finding he failed to prove prejudice, while only raising a select portion of the mitigation evidence he presented at the PCR hearing and not the entirety of the mitigation evidence he presented which contained much aggravating evidence, **which Judge Early was required to consider** in determining whether Mahdi had shown prejudice. *See Sears; Wong v. Belmontes.*

In his Petition, in order to create a coherent mitigation narrative, Mahdi has also now “cherry picked” from the testimony of extended family members and expert witnesses he called at PCR **but whom he does not now claim on appeal counsel should have called.** Mahdi has done this in an attempt to show deficient performance *and* prejudice under this newly limited ground. **(Petition for Certiorari, pp. 6-8).**<sup>25</sup>

### *Analysis*

This Court has analyzed claims of failure to investigate, discover, and present mitigation evidence under *Strickland*, *Wiggins* and its progeny.<sup>26</sup> To establish deficient performance, a

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failing to introduce the records themselves when bad things were contained within them damaging to their client. **(See App. 007884 & App. 007863).** *Wong, supra.* Counsel appropriately presented the Carter Center mitigation information to the sentencing court through Hammock, without the negative information about Mahdi that would have been before Judge Newman had the records been introduced. *Id.*; *Strickland*; *Pinholster*; *Van Hook*; *Wiggins*.

<sup>25</sup> In his Petition, Mahdi glosses over the fact it is undisputed his immediate family [his father, mother, and brother] were uncooperative with trial counsel and Mahdi’s extended family was uncooperative or knew bad things about Mahdi that would have come out had they testified before Judge Newman.

<sup>26</sup> *See Weik v. State*, 409 S.C. 214, 761 S.E.2d 757 (2014); *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009)(failure to present any mental health testimony in mitigation where counsel thought he could not present such evidence where defendant was competent and not insane or GBMI); *Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008)(relying on *Wiggins* and *Rompilla v. Beard*, 545 U.S. 374 (2005), finding counsel deficient and defendant prejudiced by failure to investigate, develop, or present any mitigation evidence regarding defendant’s violent upbringing, abuse at home, and mental illness other than limited testimony by his mother); *Nance v. Ozmint*,

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

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

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

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367 S.C. 547, 557 n. 8, 626 S.E.2d 878, 883 n. 8 (2006)(citing Wiggins and concluding counsel should have investigated and presented evidence of adaptability to prison and mitigating social history evidence outlining defendant’s troubled childhood and mental illness); Von Dohlen v. State, 360 S.C. 598, 606-07, 602 S.E.2d 738, 742-43 (2004)(counsel ineffective in failing to adequately prepare and present evidence in penalty phase defendant suffered from severe, chronic depression at time of murder given he failed to provide expert witness with crucial medical records and related information which prevented expert from conveying an accurate diagnosis of defendant’s mental condition); Simpson v. Moore, 367 S.C. 587, 605-07, 627 S.E.2d 701, 711-12 (2006)(reversing PCR court’s decision defendant suffered prejudice from failure to offer sufficient social history mitigation where record showed counsel did in fact do adequate investigation and presented similar mitigation evidence); Jones v. State, 332 S.C. 329,344-45, 504 S.E.2d 822, 829-30 (1998)(fancier mitigation case does not establish ineffective assistance of counsel).

Van Hook; Strickland, at 688. The ABA Guidelines for Appointment and Performance of Defense Counsel in Death Penalty Cases are not the definition of what reasonableness means under Strickland, and they are not “inexorable commands with which all capital defense counsel must comply.” Van Hook.<sup>27</sup> In fact, as Justice Alito pointed out in his concurring opinion in Van Hook:

I join the Court’s *per curiam* opinion but emphasize my understanding that the opinion in no way suggests that the American Bar Association’s Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003)(2003 Guidelines or ABA Guidelines) have special relevance in determining whether an attorney’s performance meets the standard required by the Sixth Amendment. The ABA is a venerable organization with a history of service to the bar, but it is, after all, a private group with limited membership. The views of the association’s members, not to mention the views of the members of the advisory committee that formulated the 2003 Guidelines, do not necessarily reflect the views of the American bar as a whole. It is the responsibility of courts to determine the nature of the work that a defense attorney must do in a capital case in order to meet the obligations imposed by the Constitution, and I see no reason why the ABA Guidelines should be given a privileged position in making that determination.<sup>28</sup>

While the ABA Guidelines provide noble standards for legal representation in capital cases and are intended to improve that representation, they are not minimum constitutional standards, which counsel must follow or they are ineffective. Yarborough v. Johnson, 520 F.3d 329 (4<sup>th</sup> Cir. 2008); Walker v. True, 401 F.3d 574, 583 n. 7 (4<sup>th</sup> Cir. 2005)(Strickland inquiry “does not entail the application of *per se* rules derived from ABA standards), *vacated on other grounds*, 546 U.S. 1086

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

28 Chief Justice Toal and Justice Burnett noted similarly in their dissenting opinion in Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007), the ABA Guidelines are not the standard for ineffective assistance of counsel, but the standard remained reasonableness under Strickland. Their position has been supported by recent decisions of the U.S. Supreme Court. *See generally* State v. Blakely, 402 S.C. 650, 742 S.E.2d 29 (Ct. App. 2013), *citing* Rompilla, 545 U.S. at 400, *citing* Strickland. *See also* Medlin v. State, 276 S.C. 540, 544, 280 S.E.2d 648, 650 (1981)(Littlejohn and Gregory, JJ, concurring in part and dissenting in part)(ABA Standards are not controlling or dispositive of an issue). *And see* Weik v. State (not citing ABA Standards at all).

(2006). See Roe v. Flores-Ortega, 528 U.S. 470, 479 (2000); Strickland, 466 U.S. 688-89 (cautioning against the fallacy of treating guidelines as a “checklist for judicial evaluation of attorney performance”). Subsequent to Van Hook, the Court handed down Cullen v. Pinholster, 131 S.Ct. 1388 (2011) in which it reiterated the determination of whether counsel’s performance was deficient and ultimately ineffective cannot be made based on specific guidelines. Id. In fact, the Court pointed out “[b]eyond the general requirement of reasonableness, ‘specific guidelines are not appropriate.’” Id., citing Strickland at 688. The Court went on to state: “No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions...” Id., quoting Strickland, at 688-89. The Pinholster Court went further in stating:

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

As a result, it is clear that since the decisions by the United States Supreme Court and this Court referencing the ABA guidelines, the Supreme Court has made clear the mere fact an attorney did not follow the ABA Guidelines in general or specific ABA Guidelines does not mean counsel’s performance was deficient in performing a mitigation investigation in a capital case. Pinholster; Van Hook; Strickland. What the Sixth Amendment requires is counsel in a capital case conduct a reasonable and thorough investigation into mitigation evidence and present the same at sentencing. Wiggins v. Smith, 539 U.S. 510 (2003); Williams v. Taylor, 529 U.S. 362, 296 (2000); Strickland.

The PCR Court reviewed Mahdi's allegations under this ground under the above cited standards. (Final Order of Dismissal). The Court correctly found Mahdi had failed to show deficient performance, and Mahdi had also failed to show prejudice for the reasons set forth below. As a result, there is no merit to this issue. The Petition for Writ of Certiorari should be denied.

*The Alleged Failure to Present Community Witnesses/School Officials*

At the PCR hearing, Mahdi offered the testimony of 2 community witnesses and the affidavits of 2 community witnesses on this issue. Mahdi also called 2 school official and the affidavit of 1 school official. Mahdi now contends counsel was deficient only in failing to call these *community witnesses / school officials* at sentencing before Judge Newman, and he alleges he was prejudiced by this. Specifically, at PCR, Mahdi called a community activist, George Smith, and another member of Mahdi's community, Virginia Pond. Mahdi also offered affidavits from Sheriff James Woodley, who testified for the State in the penalty phase, and Douglas Pond, 2 more members of Mahdi's community. Mahdi called Myra Harris and Carrol Wilson, 2 of Mahdi's elementary school teachers, and offered the affidavit of Dora Wynn, Mahdi's kindergarten teacher and elementary school principal for a period of time.

At PCR, George Smith, by affidavit James Woodley, by affidavit of Vernon Pond, and Sharon Pond testified to Mahdi's father's behavior in the community. Both Smith, Mr. Pond [by affidavit], Ms. Pond, and Mr. Woodley [by affidavit] testified or averred to an incident where Mahdi's father jumped into a segregated [all white] swimming pool and would not leave in protest. Mahdi's father is African-American. He was arrested and began throwing items at the jail. As a result, he was sent for a mental evaluation. That evaluation eventually determined Mahdi's father had no major mental illness. Mr. Smith also testified Mahdi's father did not like white people and he especially disliked Jews, though Mr. Smith thought this might be because Mahdi's father was a Muslim. Mr. Woodley also averred to Mahdi's father's conversion to Islam, his defiant behavior in the community, his inability to hold a job, and his physically abusive behavior and acts toward his wife and his mother which were witnessed by Mahdi and his brother. Woodley did not

witness this domestic violence, he found out this information from others. **(PCR 166-86 & Affidavits of James Woodley and Vernon Pond).**

The school officials testified as follows: Myra Harris testified she was Mahdi's 3<sup>rd</sup> grade teacher after he was released from the Walter Carter Center for what she termed a suicide attempt.<sup>29</sup> She testified she worked with Mahdi, and he improved over the course of the year. She admitted Mahdi was a discipline problem in her class at the beginning of the year but she was able to correct that. Mahdi remained a discipline problem in other classrooms, and she would often see him in detention. If she would have been called as a witness at sentencing she would have asked Judge Newman for mercy. She admitted when Mahdi was not in her class, he would refuse to do his work or was defiant, he would engage in angry outbursts in other classrooms or in the hallway, including making loud verbal gestures, and he would leave the classroom without permission. She admitted she was not surprised Mahdi's I.Q. was tested as high at 118. She admitted her classroom was one in which children with discipline problems were placed. **(PCR 109-27).**

Carol Wilson testified Mahdi was in her class in the 5<sup>th</sup> grade. She taught special education, but Mahdi was not mentally retarded as he had an I.Q. of 118 and was very intelligent. Mahdi was classified as emotionally disabled (ED) and referred for services in reading and language skills. She admitted his emotional outbursts and refusal to do school work were probably the reason he was evaluated and referred to her class, and records showed he had difficulty in reading, which could cause him to be frustrated with school work and then become angry. Counseling was also recommended. She testified he was sad/depressed at times, when in her class, but she did not know the reason for the sadness.<sup>30</sup> Mahdi had low self-esteem, and

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29 Carson and Lawanda Burwell [Mahdi's uncle and aunt with whom he resided at the time of his commitment] informed counsel Mahdi's commitment to the Carter Center was not a real suicide attempt but more of Mahdi's manipulative behavior, which will be discussed further herein.

30 Mahdi informed counsel and Dr. Martin [trial psychiatric expert] he never should have been in special education, and he basically quit working in school when he was placed there. He told Dr. Martin he became ODD (Oppositional Defiant Disorder) when he was placed in special education,

officials believed his changing school numerous times may have contributed to his school difficulties. She had to put Mahdi's desk next to hers to make him do his school work. She testified Mahdi's father initially was adamant and upset school officials wanted to place him in special education, but he eventually acquiesced and agreed to the placement. Mahdi was eventually pulled out of her class by Mr. Mahdi to home school him. Mahdi's father was fired as a substitute teacher after he told 5<sup>th</sup> grade girls in a class he was teaching they should use birth control, not have babies out of wedlock, and end up on welfare. Wilson believed Mahdi fell through the cracks, and she would have asked Judge Newman for mercy if called to testify because she felt Mahdi's father interrupted Mahdi's schooling. She admitted however the records generated by the school district showed Mahdi's father was strongly concerned about Mahdi. She contradicted other witnesses, who testified at PCR there was not enough food in Mahdi's home, describing Mahdi as plump, chubby, and overweight when in her class.

Ms. Wynn averred when Mahdi was in her kindergarten class, he was a bright child, but quiet and shy. He was more of an observer than participant, and she had to encourage him to engage with other children. When Mahdi was in the 4<sup>th</sup> grade, she was his principal. Mahdi misbehaved often and was regularly in her office. She believed Mahdi had trust issues. He refused to do his work, refused to eat, and would just walk away from school. She also described him as angry. He was recommended for placement in special education. Mahdi was not in special education long before his father pulled him out of school. She also averred Mahdi's father was a substitute teacher but she stopped him from teaching because he was engaging in what she termed "irrational behavior" and was cursing students.

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and he begged the principal and his father to take him out of special education, and his father finally did and home schooled him. Madhi told a PCR expert something similar.

*Respondent's presentation at PCR*

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

*Counsels' Mitigation Investigation*

The record shows counsel (Mr. Grant and Mr. Walters) retained a mitigation investigator (Tarr), a forensic social worker (Marjorie Hammock), and a private investigator (James Gordon), to investigate and develop Mahdi's family and social history for mitigation evidence to be presented at sentencing. Counsel also retained 2 experts, Dr. Thomas Martin (a forensic psychiatrist) and Dr. Geoffrey McKee (a forensic psychologist), to investigate Mahdi's psychiatric history and mentality at the time of the crime *and* uncover any mental deficiencies or disorders that would mitigate punishment. **(PCR. 503-710)**. The record shows the mitigation investigator and forensic social worker interviewed numerous members of Mahdi's family, a member of Mahdi's community, and school officials, and counsel also interviewed potential mitigation witnesses themselves. **(R. 1746-47, PCR. 503-710)**. Counsel and the investigators also consulted with Mahdi's North Carolina defense team [on the Boggs' murder] and obtained from them mitigation evidence they had uncovered. **(PCR. 503-710)**. Counsel also moved for, and obtained, a continuance for almost 1 year in order to completely and thoroughly investigate and develop the mitigation case on Mahdi's behalf. **(PCR 597-98, Resp. Ex. 16[Continuance Motion], Resp. Ex. 17 [Continuance Order])**.

The mitigation investigator, Tarr, was retained by Carl Grant on the recommendation of Jeff Bloom, an experienced capital defense attorney. **(PCR. 589)**. Tarr had previously served as

mitigation investigator or specialist in 30 to 40 capital cases. **(PCR. 562-63)**. As a result, she was thoroughly familiar with the necessity of, and how to conduct, a capital mitigation investigation.

Tarr investigated Mahdi's social, family, school, institutional, and mental health history by interviewing Mahdi, his father, mother, grandmother, paternal uncle Carson, paternal aunt Lawanda, paternal aunt Kathy Burwell, maternal aunt Sophie Gee, maternal aunt Corlis Artis, paternal uncle Nathan, and school officials, and by obtaining records of Mahdi's background including his DJJ records, his *school records*, and his records of commitment to a psychiatric facility (the Walter Carter Center) in Baltimore at age 9. **(PCR 563-75; Resp. Ex. 12)**. Tarr also summarized these particular psychiatric records for counsel and their retained experts. **(PCR 565-66)**. Tarr also summarized Mahdi's *school records* for counsel and the retained experts.

As part of her investigation, Tarr requested Mahdi's school records. **(PCR 565)**. Although she no longer had her file in this case, she testified it was her common practice to request records from any school Mahdi or his family informed her Mahdi had attended. **(PCR 565)**. She also testified she went to the schools Mahdi attended. She spoke with teachers in Lawrenceville who were familiar with Mahdi; however, these teachers had not spent a lot of time with Mahdi. She also testified she spoke with individuals from a school Mahdi attended in Baltimore. Tarr testified she routinely provides summaries of school records in capital cases. She also testified if she had done a summary of school records in this case, she would have included all pertinent information she thought *was helpful* to Madhi. **(PCR 585-87)**. A summary of the school records was done in this case and introduced at the sentencing hearing before Judge Newman.

Tarr also traveled to North Carolina and met with Mahdi's attorneys representing him on the Boggs' murder; because, they had conducted a mitigation investigation themselves on Mahdi's behalf, and their information was shared with Tarr. **(PCR 569-75; Resp. Ex. 12)**.<sup>31</sup> Tarr learned from the N.C. attorneys Mahdi's Uncle Carson had told them Mahdi was a "demon" when he lived

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<sup>31</sup>Mahdi's N.C. attorneys were present at the PCR hearing and did not contradict this testimony.

with Carson and Lawanda. This fact was established by a document generated by Tarr after meeting with those attorneys and shared with counsel in this case. **(PCR 503-05, Resp. Ex. 7)**.

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

The record shows Marjorie Hammock, a forensic social worker, retained by Carl Grant, had previously worked as a forensic social worker in numerous capital cases in several states including South Carolina. At the time of sentencing, Hammock had testified and been qualified as an expert in clinical social work in approximately 14 cases, worked on 25 capital cases, and, was working on another 5 capital cases, here, in Florida, and Alabama. **(R 1739-63)**.

Hammock traveled with Tarr the 2<sup>nd</sup> occasion to Lawrenceville, to meet with Mahdi's paternal grandmother Nancy and Uncle Nathan. She interviewed both. Hammock also traveled to Richmond and attempted to speak in person with Mahdi's mother, who was not cooperative, and was finally able to speak with her but only by phone. Hammock also interviewed a family friend. She also interviewed Mahdi's maternal aunts Sophie Gee and Corlis Artis. She also traveled to Baltimore where she interviewed Mahdi's uncle and aunt, Carson and Lawanda Burwell. She also

interviewed Mahdi's father, Shareef Mahdi, while in Philadelphia, PA. **(R 1739-63, PCR 563-75)**.

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

Counsel testified they also interviewed Mahdi with regard to mitigation information or evidence.<sup>32</sup> Mahdi was intelligent, and they had no problems communicating with him. Counsel testified they were aware Mahdi had been placed in special education classes in elementary school, but Mahdi also informed them he never should have been placed in special education classes. **(PCR 592-93, 603-11, 629, 688-90)**. As previously stated, counsel had obtained Mahdi's DJJ records through Tarr. In those records, Mahdi admitted he had difficulties in school adjustment, had been frequently suspended, had a history of verbal and physical aggression, conflicts with educational authorities, and difficulties getting along with classmates. **(DJJ record M00416)**. He also admitted he had injured someone in a fight and had hit or attacked someone who was not in his family. **(DJJ record M00495)**. Counsel testified they relied on Tarr and also Hammock, the forensic social worker, to get all of the information with regards to Mahdi's school and education. **(PCR 629-30)**. Counsel testified Mahdi was dysfunctional in the school system and from Mahdi's own statements to counsel he had problems within the school system. **(PCR 637, II. 22-26)**. Counsel also testified there were team meetings where the mitigation investigator and

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<sup>32</sup> Counsel Walters testified Mahdi was very intelligent, recounting Mahdi informed him that he had hatched a plan when he lived in Virginia whereby he would eliminate all other drug dealers in his area, resulting in a "false drought" of drugs. As a result, Mahdi would make more money selling drugs because everyone would have to come to him for the illegal product. Mahdi also related to counsel he left Virginia because detectives were closing in on him for a homicide committed in the Richmond area. Counsel testified Mahdi was calculating and intelligent in being able to disguise himself as someone else. Mahdi informed counsel he impersonated a homeless person in Columbia in order to gain entrance into the Oliver Gospel Mission when the car he stole from Virginia broke down; Mahdi pretended to be a homosexual in order to accomplish the carjacking here; Mahdi impersonated a police officer in Florida, including investigating a crime reported by a citizen.

social worker shared with them and their experts what they had found in their investigation. (PCR 631, 700). Counsel also testified they would have forwarded any records they received to their experts. Drs. Martin and McKee also testified they were aware Mahdi was in special education.

Counsel also traveled to Virginia and spoke with Mahdi's grandmother Nancy and his Uncle Nathan. Nathan was not cooperative in their mitigation investigation, and counsel was hesitant to call Nathan as a witness because he assisted police in identifying Mahdi from the video of the N.C. murder and was proud of that fact.<sup>33</sup> Counsel testified Mahdi's grandmother was cooperative in their mitigation investigation, and they had her present at sentencing to testify, but she was unwilling to assist Mahdi regarding mitigation testimony, stating she was there [at sentencing] to defend the Burwell family name.

Counsel also talked with Mahdi's Uncle Carson and Aunt Lawanda. While Carson and Lawanda were cooperative in providing background information on Mahdi and his family, Carson informed counsel he would not be helpful to Mahdi if he testified. Carson informed counsel Mahdi was defiant and manipulative in their home. Carson related Mahdi almost had he and Lawanda arrested when Mahdi made a false claim of child abuse and manufactured false evidence of abuse. Carson and Lawanda's position was they were glad Mahdi was out of their home. Carson also told counsel he and his wife were not going to help Mahdi. Carson told counsel if he were called to testify he would have bad things to say about Mahdi. (PCR 618-20, 627-28, 649-50, 693-97). Lawanda testified at PCR she would have been reluctant to testify at Mahdi's sentencing proceeding in 2006. Carson admitted at PCR he may have told Mahdi's N.C. attorneys Mahdi was a "demon" because of Mahdi's disruptive conduct in their home. Also, at PCR, Tarr produced her notes detailing exactly what Carson told her, that Mahdi was manipulative *and* the incident leading to Mahdi's commitment to the Carter Center was more of Mahdi's

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<sup>33</sup>Tarr also related to Judge Early that Mahdi's Uncle Nathan was not helpful in the mitigation investigation. (PCR 576).

manipulative behavior, not a real suicide attempt. **(PCR 572-74)**.<sup>34</sup>

Counsel also interviewed Mahdi's aunt Kathy Burwell, and she indicated she did not wish to participate in Mahdi's sentencing hearing. Counsel also interviewed Mahdi's brother, Saleem; however, he was not particularly helpful or interested in testifying.<sup>35</sup> Counsel testified Mahdi's father was not cooperative ("standoffish") and did not want to be involved. **(PCR 636)**. Counsel testified Mahdi himself indicated to them he did not want his father involved in his trial or sentencing proceeding. Counsel testified Mahdi's mother was completely uncooperative and did not want to participate in Mahdi's sentencing proceeding. **(PCR 602-710)**. Neither Mahdi's mother, nor father, or brother testified at the PCR hearing or offered any affidavits. **(PCR 1-720)**.

Both Dr. Martin and Dr. McKee, counsel's psychiatric and psychological experts, also took a social history from Mahdi, and also a psychiatric history. Both Martin and McKee were aware of Mahdi's commitment to a psychiatric facility when age 9 and reviewed those records in detail. Dr. Martin also reviewed Tarr's interview summaries with Mahdi's family members. Dr. Martin also testified at the PCR hearing that Mahdi informed him he had been placed in special education. Mahdi told him he should not have been placed in special education. **(PCR 515)**. Mahdi also told Dr. Martin he became ODD (Oppositional Defiant Disorder) after being placed in special education because he did not belong there. **(Resp. Ex. 8)**. Mahdi begged the school principal to take him out of special education, but this was unsuccessful. **(PCR 516)**. And, he also asked his father to take him out of special education, and his father eventually pulled him out of public school and home schooled him. **(PCR 516)**. Dr. Martin also testified students are classified as emotionally disabled and placed in special education classes because they are

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<sup>34</sup> Mahdi's aunt Lawanda informed Mahdi's PCR experts Nicholas Cooper-Lewter and Dr. Haney that in their home Mahdi would threaten to harm himself when he did not get his way. Mahdi also informed personnel at the Carter Center he only wanted to hurt himself when he did not get his way.

<sup>35</sup> Collateral counsel's forensic social worker, Nicholas Cooper-Lewter, admitted at PCR Mahdi's brother, Saleem, would not talk to him either. **(PCR 317-18)**.

behavioral problems. **(PCR 542)**. Sometimes this behavior is fueled by depression, sometimes its incorrigible behavior, or sometimes they are truant or having problems with conduct disorder. **(PCR 542)**. Martin testified Mahdi's acting-out behaviors such as irritability, talking back to teachers, and disrespectful attitude were in other reports he did review and also in information Mahdi provided to him. **(PCR 542)**. Dr. McKee also testified he was aware Mahdi had been placed in special education as a child. Both testified there were team meetings where they shared their findings with counsel and the other experts.

The PCR Court had the opportunity to view the testimony of counsel, their investigators and experts and found their testimony on this issue to be credible. Both Martin and McKee were present at defense team meetings where information was shared regarding the joint investigation into Mahdi's past. Both Drs. Martin and McKee found separately Mahdi was not suffering from any major mental illness at the time he committed Myers' murder, and they diagnosed him with ASPD at the time of this murder. While Dr. Martin testified he found Mahdi had suffered from some recurrent depression in his life, he did not find any evidence Mahdi was suffering from any depression at the time he committed Myers' murder. Dr. Martin testified at the PCR hearing the records introduced by Mahdi at PCR would not change his diagnosis. Dr. McKee testified at the PCR hearing he did not need additional records to make his diagnosis or issue his report. Neither Dr. Martin nor Dr. McKee changed their diagnosis based on records shown them by Mahdi at PCR. **(PCR 508-61)**.<sup>36</sup> Both also testified at the PCR hearing Mahdi was very intelligent. **(PCR 508-61)**. Both also related Mahdi informed them he left Virginia, before the Boggs' and Myers' murders, because detectives were closing in on him for the murder of a drug dealer. Mahdi also related to 1 of the doctors he was involved in another homicide where the body had yet to be

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<sup>36</sup> *Von Dohlen v. State*, 360 S.C. 598, 606-07, 602 S.E.2d 738, 742-43 (2004)(holding counsel was ineffective in failing to adequately prepare and present evidence in penalty phase defendant suffered from severe, chronic depression at the time of the murder given counsel failed to provide *their expert* witness with crucial medical records and related information which prevented *that witness* from conveying accurate diagnosis of defendant's mental condition to the jury).

found.<sup>37</sup>

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

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37 Mahdi's diagnosis of ASPD is fully supported by the record. When admitted to Virginia's DOC, Mahdi was diagnosed with intermittent explosive disorder and ASPD. At PCR, Dr. Martin testified Mahdi had no difficulty talking about killing people if necessary in order to achieve independence and appeared to have no remorse regarding any of his past violent acts. Martin related to counsel what his findings were *and* they would not be helpful to Mahdi. Also, in conducting his evaluation, Dr. Martin took a history from Mahdi and discussed with him the circumstances of the crimes against Myers and why Mahdi left Virginia. Mahdi related *he left Virginia because of the drug dealer homicide, and* he was involved in another homicide where the body had not been found. Mahdi also related he shot Myers in the chest and head, and after Myers was on the floor of his cabin, Mahdi shot him several more times in the head to make sure he was dead. (PCR 508-23). Dr. McKee took a detailed history from Mahdi, conducted tests on Mahdi, and reviewed records including Mahdi's psychiatric records from when he was 9. McKee found Mahdi was very intelligent and did not suffer from a major mental illness at the time of the crime. McKee found, independent of Dr. Martin, Mahdi had ASPD. McKee found nothing else. Mahdi also related to McKee he left Virginia because he was involved in the homicide of a drug dealer and police were closing in on him. (PCR 545-561). McKee also related his findings to counsel. (PCR 689-90, 626-27). Counsel testified they made a strategic decision not call either expert at sentencing before Judge Newman, because their testimony would not be helpful and damaging information would have come out on cross-examination. (PCR 689-90, 626-27). This was objectively reasonable under the circumstances. Strickland; Council. Wong, *supra* (calling mitigation witness would have exposed defendant to admission of evidence of other homicide not before the sentencing authority); *See Cullen, supra* (reasonable penalty phase strategy to pursue evoking sympathy for mother where psychiatrist found defendant had no signs or symptoms of mental disorder other than his ASPD traits); Byrum v. Ozmint, 339 F.3d 203, 210 (4<sup>th</sup> Cir. 2003)(counsel not ineffective in failing to present testimony by a psychiatrist and psychologist because the suggestions of ASPD which experts found could have been harmful to the defense); Satcher v. Pruett, 126 F.3d 561 572 (4<sup>th</sup> Cir. 1997)(similar); Reed v. Florida Dept. of Corrections, 593 F.3d 1217 (11<sup>th</sup> Cir. 2010)(similar); Fulks v. United States, *Slip Copy*, 2010 WL 3069390 (D.S.C. 2010)(similar).

cooperation from the family, including extended family, counsel presented the mitigation evidence including Mahdi's family, social, scholastic, and mental health history through their forensic social worker. **(PCR 624, II. 17-22)**.

### ***The Mitigation Presentation at Sentencing***

Marjorie Hammock conducted a bio-social assessment of Mahdi's life and family history and presented the same in the sentencing proceeding. **(R 1739-63)**. Hammock informed Judge Newman she interviewed Madhi's grandmother Nancy, his uncle Carson, his uncle Nathan, his aunt Lawanda, his mother Vera Telea Artis, his aunt Sophie Gee, another aunt Corliss Artis, Mahdi's father Shareef, and a family friend. **(R 1746-47)**. She conducted her bio-social assessment by interviewing family members, reviewing records, interviewing Mahdi, and taking information from anyone who would give information about him, his life, and his development. **(R 1762)**. She also reviewed a synopsis of Madhi's school records [prepared by Tarr] and reviewed a report from his admission in Baltimore to the Walter Carter Center psychiatric facility at age 9. **(R 1746-47, 1762)**. Hammock presented, through her testimony and the exhibits introduced through her, the following mitigation evidence at sentencing before Judge Newman:

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

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

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

Mahdi's father was unable to get along with his own family and others in the community and was constantly in conflict with those around him. Mahdi's father had committed assaults on some of his own family members. Mahdi's father did not finish high school; he was the only sibling not to graduate, and this was a source of consternation between him and his family. Mahdi's father was unable to hold a job, and he eventually converted to Islam. His conversion and changing his name from Thomas Burwell to Shareef Mahdi brought grief to the Burwell family. **(R 1750-51, 1433)**.

Mahdi's father was suffering from depression as early as 1971. Mahdi's father was discharged from the Marines under less than honorable conditions. Mahdi's father was not able to function well, and there was some description of Mahdi's father suffering continuing depression. There were a number of incidents involving Mahdi's father with local law enforcement. He was involved in a series of misdemeanors, all said to be racially motivated. **(1750-51, 1433, Def. Ex. 2)**.<sup>38</sup> And, Mahdi's father's involvement in the 8 hour stand-off with police was testified to before Judge Newman.

Mahdi's mother was different. She was *very, very withdrawn* and did not want to talk to Hammock at all. It appeared Mahdi's mother was frightened about being involved with the Burwell family again because of her previous experiences with Mahdi's father. While Mahdi's mother did eventually educate herself, join the military, and at the present time worked and took care of herself, she was totally isolated from her own family, as well as Mahdi's father's family.

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38 Dr. Nicholas Cooper-Lewter, Mahdi's PCR social work expert admitted Mahdi indicated to him he was embarrassed by his father's "rantings." **(PCR 331-32)**. He noted Mahdi indicated his father's rants would go on and on, and there was a point where Mahdi just stopped listening to his father. **(PCR 332)**.

While she may occasionally speak to some members of the family, there was a disconnection. The information regarding Mahdi's mother came from Mahdi's mother, her siblings, and the Burwell family and was all consistent. **(R 1756-57)**.

Mahdi's parent's marriage was a pre-arranged marriage to which Mahdi's mother did not agree, and Mahdi's father was much older at the time of the marriage than Mahdi's mother, who was just 16. The marriage was arranged by Mahdi's maternal grandmother, and Mahdi's father was 27 at the time. Mahdi's mother had no choice but to join the marriage, and there was conflict in the marriage from its beginning. After the wedding, Mahdi's father changed Mahdi's mother's birth name, Vera, to Tilea. Mahdi's father was physically abusive to Mahdi's mother, and Mahdi's mother eventually left the home to escape from the abuse. Mahdi's mother was in what she described *and others described* as an abusive relationship, and she decided to leave because she could no longer stay with Mahdi's father even though it meant leaving her own children. **(R 1751, Def. Ex. 2, 1757)**.

Mahdi's childhood was chaotic. Mahdi and his brother were born into a very unstable family. The 2 boys were born within a 24 month period of time. Mahdi's father could not provide for or take care of the family. The family moved several times, ultimately ending up back in Lawrenceville living with Mahdi's grandmother. Once again, Mahdi's father was unable to sustain himself. **(R 1751, 1757)**.

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

After Mahdi's mother left, the chaos continued. Mahdi's father tried to take care of the children, and the grandmother, Nancy, also tried to provide assistance during this time, but the

relationship between Mahdi's father and the grandmother and the rest of the family was constantly confrontational. Mahdi and his brother witnessed their father commit domestic violence on their grandmother, Nancy. During this period of time, there were several moves in terms of schooling for Mahdi from Lawrenceville to Richmond and back to Lawrenceville. **(R 1751-52, Def. Ex. 2).**

Judge Newman was aware of the incident described by family members at PCR and by Sheriff Woodley in his affidavit where Mahdi's father forced Mahdi's mother to return to Lawrenceville and assaulted her. After Mahdi's mother left initially to escape from the abuse, Mahdi's mother was taken from Richmond to Lawrenceville by Mahdi's father, who then assaulted and abused Mahdi's mother. Mahdi's uncle Nathan actually rescued Mahdi's mother, but as a result of this incident, Mahdi witnessed more abuse and violence, specifically his father committing domestic violence on his mother. After this incident, Mahdi's mother moved to Pottsdale, without the children, in order to again escape from Mahdi's father. **(R. 1752, Def. Ex. 2).**<sup>39</sup>

Ultimately, Mahdi's father was unable to take care of Mahdi at all. Mahdi's father suffered from depression. At this point in time, when he was age 8, Mahdi was sent to live with his aunt and uncle in Baltimore, and his brother was sent to live with another aunt in Texas. As a result, Mahdi and his brother were separated from each other, and from their father. **(R 1753, Def. Ex. 2).**

Mahdi had to live with his aunt and uncle because of his father's inability to care for him. Lawanda and Carson related Mahdi was a bright and energetic young boy, but very, very troubled, who had difficulty in school. Carson related that when Mahdi came to live with them he could not read. And, there was conflict at this time in getting Mahdi to deal with the fact he had academic limitations. **(R 1753-54).**

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<sup>39</sup> Sheriff Woodley in his affidavit describes this incident as an attempted murder. However, at the sentencing hearing before Judge Newman, under oath, Sheriff Woodley testified the only violations of the criminal law Mahdi's father had committed that he was aware of were "simple assaults" on family members. Sheriff Woodley did not appear at the PCR hearing and subject himself to cross-examination on his affidavit. Nor did he witness this incident.

Mahdi was hospitalized, psychiatrically, in Baltimore for 2 months [60 days].<sup>40</sup> Mahdi was committed involuntarily to the Walter Carter Center psychiatric facility, after being separated from his brother and father, where he was diagnosed with Major Depression with suicidal ideation, adjustment disorder, R/O Adjustment Disorder, Developmental Reading Disorder, and history of right arm and leg fractures.<sup>41</sup> After Mahdi was released from the facility, he stayed only a short time with his aunt and uncle, because he was anxious to be reunited with his father and brother. Mahdi's behavior in Carson and Lawanda's home was defiant and became even more defiant when Mahdi learned his brother had already re-united with his father. As a result, Mahdi had to be returned to live with his father. **(R 1747-49, 1756, Def. Ex. 1, Def. Ex. 2).**

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

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

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<sup>40</sup>The testimony at the original Blair hearing was Mahdi was not suffering from any mental illness. **(R 131).** Mahdi also stated at his guilty plea under oath, that he had not been previously treated for alcohol abuse, drug abuse or mental illness. **(R 1346).** When asked if he had any physical, emotional or nervous problem that might keep him from understanding what he was doing, Mahdi stated "I have none of those problems, Your Honor." **(R 1347).**

<sup>41</sup>Mahdi suffered broken bones as child while riding a bicycle and falling off of monkey bars. There was no contention at PCR that Mahdi was ever physically or sexually abused by anyone. **(PCR 571-72).**

schools 5 times.<sup>42</sup> Even in his pre-teen years there was a lack of stability in terms of Mahdi's attending school, and it was reflected in the kinds of reports he received. **(R 1752, 1756, Def. Ex. 2, Def. Ex. 3, R 1760-61).**

Mahdi constantly had difficulty in school academically. He was considered bright, but did not perform well. He was a particularly poor reader. Both Carson and Lawanda reported Mahdi had difficulty in school, could not read, and there was constant conflict in getting Mahdi to deal with his academic limitations. The school records during this time were consistent with this report. Mahdi had uneven skills in school. He was in the average math program, but in the below average reading program. While he excelled in science, his reading, vocabulary, and spelling remained below average. When he was involuntarily committed to the Carter Center, Mahdi's initial diagnosis included "Developmental Reading Disorder." Mahdi's difficulties in reading and writing remained at or below grade level throughout elementary school. Mahdi needed improvement in a number of areas, including standards for behavior and showing respect for authority. And, Mahdi had poor self-esteem throughout his academic time. It was noted several places in the records Mahdi had poor self-esteem and difficulty in relationships with others. Mahdi had numerous absences in school, and Mahdi's father removed him from school in the 5<sup>th</sup> grade to home school him; however, there was no information the home schooling actually occurred. In summary, Mahdi's educational history was one of poor school progress. **(R 1752-56, Def. Ex. 2, Def. Ex. 3, 1762).**

Mahdi did not receive proper parenting while growing up. Mahdi's father was not equipped to provide consistency, positive reinforcement, support, care giving, to teach social values in the community, and how to develop relationships with others, i.e. those things a child

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42 Mahdi started out kindergarten at Sister Clara Muhammad School in Richmond, and he completed part of kindergarten at Totoro Elementary School in Lawrenceville. He was moved back to Richmond and attended Chamberlayne Elementary School for part of that year. Then he was removed from there and sent to Baltimore where he attended Scotts Branch Elementary School for 2 years. Then he was removed from that school while in the Carter Center, and ultimately returned to Lawrenceville to live with his father. **(R 1754-56).**

needs to grow up healthy. Mahdi's father had his own personal issues, which prohibited him from being a good father. Mahdi's father and mother were not really available to Mahdi on any kind of consistent basis while growing up. Mahdi was exposed to a lot of conflict and chaos. In his preteen years, Mahdi was exposed to more chaos, more movement, more change, a lack of stability even in terms of his attending school, and this was reflected in the school reports he received. In his adolescent years, Mahdi was exposed to more chaos. He was exposed to his father's outbursts and problems. His father was known to be at odds with people in the community, with his own family, and with law enforcement. While Mahdi cares about his father, wanted more than anything else to have an intact family and an ongoing relationship, it simply did not happen. Mahdi did not receive from his mother or father consistent help in growing up, developing good skills, or a sense of value. While some people in Mahdi's life tried to provide these things, it was not consistent enough for him to learn how to do these things. **(R 1759-61)**.

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

During her investigation of Mahdi's life, Hammock assessed whether certain risk factors were present or not. She testified before Judge Newman certain risk factors were present. Mahdi had been abused and neglected. Mahdi suffered from abandonment. Mahdi was never exposed to the right kind of socialization. And, he has poor self-esteem. He also has a poor history of school progress and a poor sense of self. Mahdi was someone who had been neglected, abandoned, suffered from poor parenting, and as a result was likely to end up in a situation where he was out of control and did damage to himself and others. Mahdi fit the typical profile of persons who end up in the kind of situation before Judge Newman, because Mahdi never really had a chance to develop appropriately. **(R 1762-63)**

The State did not cross-examine Hammock or challenge her mitigation testimony. The State did not challenge the accuracy of the exhibits introduced through Hammock. **(R 1739-63)**.

All of this evidence was before Judge Newman [the sentencing court] uncontested.

Further, while the State introduced portions of Mahdi's DJJ records during sentencing as evidence of Mahdi's character, the records also confirmed much of what Hammock testified to before Judge Newman regarding Mahdi's upbringing and family. The records indicated Mahdi lacked appropriate parental discipline and support, and he was not supervised as a child or given appropriate structure and guidelines. (**State's Ex. 85 & See R 1440, 1442, 1869-70, 1873-74**). Mahdi began smoking marijuana at age 12, had been smoking marijuana every day since, and he began selling crack cocaine at age 14. (**R 1440**). Mahdi needed self-esteem training, family services, and values clarification. Mahdi suffered from the lack of a mother. (**R 1446**). Mahdi's father was not involved in his life; his father had a criminal record for malicious damage to property and escape; Mahdi had no supervision, no curfew, and Mahdi's father did not care about Mahdi's criminal behavior. (**R 1869-70, 73-74**). Mahdi came from a dis-functional 1 parent family. Mahdi's father believed the criminal justice system was prejudiced, and he also voiced his belief there were many white supremacists in the area. (**R 2146**). And, a young Mahdi also made similar racial comments. (**R 2154**).

#### **The Lack of Merit of this Allegation**

With regard to this Ground alleged in the application, Judge Early carefully reviewed *the mitigation evidence presented at the PCR hearing* in comparison with *the mitigation evidence presented at the sentencing hearing*, and considered counsels', their mitigation specialist's, private investigator's, and experts' testimony regarding their mitigation investigation, and counsels' testimony why they presented the mitigation evidence they did present, and why they did not present other mitigation evidence. The record supports counsel in this case conducted a reasonable and thorough mitigation investigation and presented what mitigation they could that was favorable to Mahdi at the time of the sentencing proceeding. Van Hook; Pinholster; Wiggins; Rompilla; Williams; Rosemond; Council; Simpson; Jones. Based on the entire record, and the credible evidence presented, Judge Early correctly and reasonably found Mahdi had not met his

burden of proof to show counsel's performance was deficient in this regard. Van Hook; Pinholster; Strickland; Wiggins; Rompilla; Wong; Rosemond; Council; Simpson; Jones.

Judge Early viewed the witnesses in this case, listened to their testimony, observed their demeanor, and judged their credibility accordingly. The Court found the testimony of counsel and their defense team on the above Ground *to be credible* and the present testimony of Mahdi's witnesses regarding their previous willingness to testify *to be not credible*. Accordingly, the Court found Mahdi had failed to meet his burden of proof on this particular allegation, and had failed to show counsel was deficient. Butler; Wiggins; Council.<sup>43</sup>

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43 Judge Early found Carson Burwell's testimony not credible regarding his willingness to come and testify on Mahdi's behalf at the time of sentencing for several reasons. First, Carson could not recall talking to any attorneys or investigators from South Carolina prior to Mahdi's sentencing proceeding; the implication being counsel and their investigators did not speak with him, and therefore, they were deficient in their mitigation investigation. However, the record clearly showed counsel's Hammock spoke to Carson before Mahdi's sentencing proceeding and obtained background information from him. Tarr also confirmed at PCR she spoke with Carson on more than 1 occasion and Hammock traveled with her to Baltimore and interviewed Carson. Counsel also testified Carson was interviewed prior to trial. Also, Tarr produced her notes which detailed exactly what Carson told her, that Mahdi was manipulative *and* the incident which led to Mahdi's commitment to the Carter Center was more of Mahdi's manipulative behavior, not a real suicide attempt. (PCR 572-74). Counsel testified they spoke with Carson prior to the sentencing, and Carson told them if he were called as a witness he would have bad things to say about Mahdi. Carson informed counsel he and Lawanda, were not going to help Mahdi in his sentencing proceeding. (PCR 618-20, 627-28, 649-50, 693-97). Likewise, the Court did not find credible Carson's wife's testimony that even though she was reluctant to testify at the time of trial, she could have been coaxed into coming to testify at sentencing. Again, Tarr and Hammock met with Lawanda, and counsel also talked to her as well. Carson and Lawanda indicated they did not want to be involved. Carson indicated to the N.C. attorneys that when Mahdi lived with them he was a "demon." Carson and Lawanda communicated to counsel they were glad Mahdi was out of their home. Carson admitted Mahdi was defiant and manipulative. Both Lawanda and Carson admitted Mahdi made a false claim of child abuse against Lawanda which accompanied Mahdi's statement to the responding officer that led to his commitment to the Carter Center. Carson communicated to counsel prior to sentencing he and his wife Lawanda were not going to help Mahdi. Similarly, the Court did not find credible Rose Gupton's testimony she did not know about Mahdi's criminal charges for this murder or his trial until after he was sentenced to death. Counsel or their mitigation experts interviewed 2 of her sisters, Sophie Gee and Corliss Artis, regarding this very case, and Gupton testified she spoke with those sisters every day. The Court did not find credible her claim that if she had known about the sentencing proceeding she would have testified, because her claim she did not know about Mahdi's charges was simply not credible. Further, counsel's credible testimony at PCR was even Mahdi's aunts were not willing to assist in testifying. As a result, the Court correctly found Mahdi's aunts and uncles were not willing to come here and testify on Mahdi's behalf in 2006. Mahdi does not challenge this finding of the PCR Court, and it is the law of the case.

The circumstances counsel faced are similar to those faced by counsel in Rutherford v. Crosby, 385 F.3d 1300 (11<sup>th</sup> Cir. 2000). In that case, the defendant's family was uncooperative at the time of trial. The behavior of Mahdi's family is understandable in this type of case. When the crime has been recently committed and the community and those who knew the victim are still outraged, the defendant's family and friends are likewise shocked, angry, embarrassed, and disappointed in the defendant's behavior. In this case, as in others, they are in no mood to assist the defendant in escaping responsibility for his crimes at the time of trial. (See PCR 619, II. 19-24, 636, II. 20-25). It is only after the passage of many years, when the case is on post-conviction relief, and the case is no longer in the forefront of the community's or the victim's family's mind, and the defendant's family's anger and embarrassment has dissipated, that witnesses become cooperative and insist they would have cooperated at the time of trial, when in fact they were originally hesitant, did not want to be involved, or refused to testify. Along the same lines, the record in this case shows Mahdi had engaged in conduct within his own family which would have caused and did cause family members to be reluctant to assist him. Mahdi had faked a claim child abuse against Carson and Lawanda, almost resulting in their arrest. Mahdi had slashed his own mother's tires. Mahdi was involved in the destruction of another aunt's automobile.

The PCR Court correctly found counsel, its mitigation investigator, and forensic social worker attempted to develop live mitigation evidence witnesses from Mahdi's family, including extended family, but were unable to do so due to the family members' reluctance and/or refusal to testify at the time of trial, or refusal or inability to testify in a helpful fashion. (PCR 503-710). The Court further found counsel and their investigators conducted a reasonable mitigation investigation, which included talking with all of Mahdi's immediate family, several members of his extended family, including several aunts and uncles, and a family friend, regarding Mahdi's family and social background. Pinholster; Van Hook; Wiggins; Rompilla. See Wiggins (Strickland does not require counsel to investigate every conceivable line of mitigation evidence no matter how unlikely the effort would be to assist the defendant at sentencing).

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

Additionally, Sheriff Woodley testified under oath at the sentencing proceeding. His affidavit presented to the PCR Court contains serious credibility problems. In the affidavit, he attempts to blame the 8 hour standoff with police on Mahdi's father; however, at trial under oath he blamed the standoff on both Mahdi and his father. He also speculates throughout the affidavit, which would not have been admissible at trial. Further, in his affidavit, Woodley refers to the incident where Mahdi's mother was kidnapped as an attempted murder; however, at trial under oath he testified he was only aware of prior "simple assaults" on family members by Mahdi's father. Woodley was anything but a cooperative witness at sentencing. Finally, Woodley did not witness any of these events.

Further, the mitigating value of the incident related by community members where Mahdi's father jumped into a segregated swimming pool is negligible. Mahdi's father was protesting the wrongful segregation of that facility and was determined at that time not to suffer from any major mental illness.

Furthermore, if counsel did not present certain evidence Mahdi presented at PCR, there was an objectively reasonable strategic reason for not doing so. Strickland; Council. Mahdi presented several extended family members at the PCR hearing who were interviewed by Tarr, Hammock, and/or counsel prior to the sentencing proceeding, but not called before Judge Newman. Counsel testified that at the time of the sentencing proceeding these witnesses were not cooperative, were unwilling to testify at the sentencing proceeding, or the witnesses related or their investigation uncovered the witnesses would say bad things about Mahdi.<sup>44</sup>

Counsel was not ineffective in failing to call witnesses from whom bad things could be elicited about Mahdi, or who indicated they were not going to be helpful to Mahdi. Judge Early properly found it was an objectively reasonable trial strategy decision for counsel not to call Carson or Lawanda Burwell or Sophie Gee, who could be asked on cross-examination about instances of bad conduct by Mahdi and would have been required to answer truthfully to such

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<sup>44</sup> Carson related to the N.C. attorneys Mahdi “was a demon.” This fact was proved by a document generated by Tarr after meeting with those attorneys and shared with counsel in this case. (PCR 503-05, Resp. Ex. 7). Carson also related to counsel if he were called to testify he would have bad things to say about Mahdi. (PCR 618-19). Carson indicated Mahdi was manipulative and faked abuse and suicidal gestures. (PCR 572-74, 64). Both Lawanda and Carson admitted Mahdi almost had them arrested by police when he made a false claim of child abuse and manufactured false evidence of that abuse. (PCR 572-74, 58-61, 63-64, 266-67, 287-88, 290). And, Mahdi acted out while at the Carter Center, and had to be placed in isolation. (PCR 66-67, 292). Carson also related to Tarr that Mahdi was manipulative. (PCR 572-74). Both Carson and Lawanda related Mahdi acted out after being released from the Carter Center and had to be returned to live with his father. (PCR 68-69, 293-94, 618-619). Both related Mahdi would only talk about suicide when he did not get his way or did something wrong and was going to be punished. (PCR 572-74, 64-66, 288-89, 618-19). Carson related the incident which led to Mahdi’s commitment to the Carter Center was more of Mahdi’s manipulative behavior and was not a real suicide attempt. Lawanda testified at PCR she did not believe Mahdi was actually suicidal and made similar statements in their home when he did not get his way or got in trouble. This testimony would have directly undercut the mitigation evidence presented before Judge Newman regarding Mahdi’s commitment and diagnosis at the Carter Center. (Def. Ex. 2). Carson was also aware of an incident where Mahdi was involved in maliciously destroying Carson’s sister’s car. (PCR 69). Carson and Lawanda stated when Mahdi lived with his uncle Nathan as an adult, he could not abide by the rules of the home, and was forced to leave. (PCR 70, 278). Sophie Gee was aware of the incident where Mahdi slashed his mother’s tires. Gee testified Mahdi slashed his mother’s tires because she would not let him use the car. She was also aware Mahdi was arrested for this incident. (PCR 105-06). If she had been called at sentencing, she would have been questioned about this incident, further underscoring this incident to the sentencing court, and also informing the court Mahdi slashed his mother’s tires simply because she would not let him use her car.

questions. Reed v. Florida Department of Corrections, 393 F.3d 1217 (11<sup>th</sup> Cir. 2010)(attorneys not ineffective in failing to call family members who would have opened the door to bad things about defendant's past); Rutherford, *supra* (attorneys' strategic decision not to call witnesses on alcoholism of defendant was objectively reasonable where it would have opened door to prior violent behavior of defendant the jury had not heard). *See* Bell v. Kelly, 260 Fed. App. 599 (4<sup>th</sup> Cir. 2008)(*Unpublished*)(state court's determination petitioner failed to prove prejudice was not unreasonable where he alleged counsel was ineffective for failing to investigate and present family members mitigation evidence where family members could have been cross-examined about defendant's prior bad conduct such as infidelity, abandonment of his children, wife, and girlfriend, domestic abuse, and failure to pay child support), *citing* Barnes v. Thompson, 58 F.3d 571 (1995)(counsel not ineffective in capital case in failing to offer family members who constituted "cross-purpose evidence."); Moody v. Polk, 408 F.3d 141, 154 (4<sup>th</sup> Cir. 2005)(to the extent affidavits presented new information, they were "double edged.").

Further, calling Mahdi's family members as mitigation witnesses during the sentencing proceeding would have exposed Mahdi to testimony that none of Mahdi's cousins had engaged in violent criminal activity against another. **(PCR 278-82, 284-85)**. *See* Reed, *supra* (similar). In fact, Mahdi's own brother Saleem grew up in the same household as Mahdi, under similar circumstances, and had not engaged in, been arrested for, or convicted of any violent behavior toward other persons during his life. **(PCR 284-85, 318-19)**. *Id.* Further, the record shows Mahdi's family is well-educated with many family members employed as professionals or educators, and 1 distant relative having graduated from Harvard. If Mahdi's family members had been called as witnesses, the State could have contrasted Mahdi's criminal history with other family members who were successful and did not engage in criminal conduct.

Judge Early had the opportunity to view the witnesses' testimony at the merits hearing, and make a credibility assessment accordingly, and found the testimony of counsel to be credible on this issue. Counsel's testimony on this issue is also supported and corroborated by the evidence

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

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

Mahdi has also failed to show counsel was ineffective for failing to call elementary school officials. At PCR, Mahdi introduced school records, called several school officials, and provided the affidavit of another school official. These individuals either taught Mahdi or were involved in the decision to place him in special education. Judge Early carefully reviewed the school records submitted, the testimony of the school officials who testified at PCR, and the 1 witness who submitted an affidavit. Judge Early correctly found there was no merit to this allegation. Mahdi now alleges only that counsel should have called the school officials and has dropped the claim counsel should have introduced his school records.

As previously set forth, counsel obtained Mahdi's school records. Tarr also interviewed school officials at various schools Mahdi attended. Counsel also obtained Mahdi's DJJ records. Counsel and their experts also interviewed Mahdi regarding his time in school. Counsel discovered through their investigation, *including talking to Mahdi*, that Mahdi was a discipline

problem in the school system. Strickland (what investigation decisions are reasonable depends critically on *such information*); DeCastro v. Branker, 642 F.3d 442, 456 (4<sup>th</sup> Cir. 2011); Soria v. Johnson, 207 F.3d 232, 251 (5<sup>th</sup> Cir. 2000) Sims v. Singletary, 155 F.3d 1297, 1316 (11<sup>th</sup> Cir. 1998). See United States v. Pellerito, 878 F.2d 1535, 1543 (1<sup>st</sup> Cir. 1989) (“If counsel was ineffective in any sense, it was only because the client rendered him so .... That is not the sort of “ineffectiveness” for which relief can be granted”). The school records reflect the same, the DJJ records reflect this, and this is what Mahdi told counsel and his experts. Mahdi also related to counsel and his experts he never should have been placed in special education. Mahdi was placed in special education mainly because of his misconduct or bad behavior in school. Mahdi’s I.Q. was 118 and he was not mentally retarded. Counsel made a reasonable and thorough investigation into Mahdi’s school experience and was entitled to stop its investigation at this point as it did not believe it would produce favorable evidence for Mahdi. Van Hook. Further, it was objectively reasonable for counsel to use surrogates, such as Tarr and Hammock, to attempt to locate and interview potential witnesses. *E.g.*, Walls v. Bowersox, 151 F.3d 827, 834, n. 4 (8<sup>th</sup> Cir. 1998) (interviews conducted by second chair and social worker); Rhode v. Hall, 582 F.3d 1273, 1283-84 (11<sup>th</sup> Cir. 2009) (counsel utilized investigators, reviewed their investigative product, and thereby satisfied investigative responsibilities).

At Mahdi’s sentencing proceeding before Judge Newman, Hammock testified in detail to Mahdi’s difficulties in school. She testified how his education was disrupted many times, how Mahdi struggled in reading and language skills, how he suffered from low self-esteem, and needed instruction in behavior and getting along with others. She also testified to Mahdi’s father pulling Mahdi out of school in the 5<sup>th</sup> grade to home school him, and there was no evidence this homeschooling ever occurred. What she did not testify to was Mahdi’s extensive misconduct and bad behavior in school.

While counsel did not call the 2 elementary school teachers, the 1 who provided an affidavit, or introduce the school records themselves, counsel conducted a reasonable investigation

of Mahdi's school history and presented the same before Judge Newman. Pinholster; Van Hook; Rompilla; Wiggins; Strickland; Rosemond; Simpson.

The school records themselves reveal damaging information about Mahdi and his character. Mahdi was referred for special services not because he was mentally retarded, but because of “..behavior problems. He exhibits inappropriate and disruptive behavior.” (**App. 007536**). The same record indicates Mahdi had a negative attitude about being corrected, did not always get along with other children, his behavior with adults was inappropriate at times, and most of his problems seemed to be getting along with people. The records indicate Mahdi had an I.Q. of 118, but had episodic acting-out behavior and an unwillingness to deal with difficult school tasks. (**App. 007533**). The records also indicate Mahdi was referred for special education because of “*behavioral difficulties*; such as leaving his seat inappropriately, *physically and verbally aggressive towards others* at times, talks out of turn, preoccupied, anxious, *easily frustrated or angered, lacks respect for authority*, and daydreams.” (**App. 005498**)(**emphasis added**). A Burk's Behavior Rating Scale revealed very significant factors for poor impulse control, poor anger control, and excessive resistance. (**App. 007535**). The records also indicate Mahdi's “intellectual functioning” was “in the high average range.” (**App. 004345**).

To have introduced Mahdi's school records would have introduced bad things about Mahdi to Judge Newman. It would also have introduced Mahdi's intellectual functioning was not impaired. Judge Early properly found counsel was not deficient in failing to introduce Mahdi's school records which contained bad things about Mahdi. **Mahdi now concedes this on appeal.** Counsel artfully introduced through Hammock's testimony and through *exhibits* Mahdi's problems in school without introducing the bad things he had done while in school. Counsel's performance was not deficient in this regard. Wong, supra.

Mahdi further argued below counsel should have introduced Mahdi's school records and called school witnesses to show Mahdi was diagnosed by school officials in the 4th grade as ED. However, the record shows Mahdi's ED diagnosis was based in large part on his inappropriate

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

Additionally, the records contain information that would have undercut counsel's attempt to present mitigation. The records themselves indicate Mahdi was living in his grandmother Nancy's home, a modern 3 bedroom brick home with all facilities. The home was equipped with a stereo, television, and other educational materials for family use. There was a family support system for Mahdi's immediate family including grandparents and other relatives and friends. Mahdi met all developmental milestones at the appropriate age. Mahdi received prompt medical attention for any physical problems growing up. Mahdi's father was a high-school graduate who completed 2 years of community college, and Mahdi's mother had completed 2 years of college. Mahdi's father was involved in Mahdi's school evaluation process and believed Mahdi's behavior problems in school were due in large part because he was behind in reading, i.e. he became frustrated when he tried to read. Mahdi's father was willing to work with the public schools for his son's benefit. There were several notations in the records Mahdi's father was supportive, involved, and was seeking to help his son overcome his problems. And, the records also indicate Mahdi's relationship with his father was excellent. **(Resp. Ex. 1 & 2)**. In essence, the records do not portray Mahdi's home life in as bad a light as counsel was able to portray Mahdi's childhood home life before Judge Newman at sentencing.

Further, Mahdi's own PCR witnesses undercut the validity of Mahdi's being placed in special education. Dr. Cooper-Lewter testified Mahdi himself informed him that he should not have been placed in special education. Mahdi informed Cooper-Lewter that after being placed in

special education he put forth no effort, because he did not belong there. Cooper-Lewter basically agreed with Mahdi's assessment. Lawanda Burwell, Mahdi's aunt, and a credentialed school administrator, who has a master's degree from Harvard, also testified she did not believe Mahdi should have been in special education.<sup>45</sup> Similarly, Dr. Martin [the trial psychiatric expert] also testified at the PCR hearing Mahdi informed him he had been placed in special education and should not have been placed in special education. **(PCR 515)**. Mahdi told Dr. Martin he begged the school principal to take him out of special education, but this was unsuccessful. **(PCR 516)**. And, he also asked his father to take him out of special education, and his father eventually pulled him out of public school and home schooled him. **(PCR 516)**. Dr. Martin also testified students are classified as ED and placed in special education classes because they are behavioral problems. **(PCR 542)**. Martin testified sometimes this behavior is fueled by depression, sometimes its incorrigible behavior, or sometimes they are truant or having problems with conduct disorder. **(PCR 542)**. Dr. Martin also testified Mahdi's acting-out behaviors such as irritability, talking back to teachers, and disrespectful attitude were in other reports he did review and also in information Mahdi provided to him. **(PCR 542)**. Dr. McKee [the trial psychological expert] also testified he was aware Mahdi had been placed in special education as a child. These experts were at team meeting with counsel and the defense team and shared their findings with counsel. The PCR Court had the opportunity to view the testimony of Dr. Martin and Dr. McKee and found their testimony on this issue to be credible.

Further, the school officials' testimony at PCR was not all favorable. All indicated Mahdi had behavioral problems in school. He was often in the principal's office or detention. He engaged in angry outbursts and left class without permission. He was placed in a class for children with disciplinary problems and still misbehaved in other classes. Counsel made an

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<sup>45</sup> Mahdi also told Dr. Martin he became ODD (Oppositional Defiant Disorder) after being placed in special education because he did not belong there. **(Resp. Ex. 8)**.

objectively reasonable decision to present Mahdi's school difficulties through Hammock in a sanitized fashion that removed Mahdi's bad school behavior.

As a result of all of the above, Mahdi has failed to show deficient performance in counsel's failure to call school officials as witnesses. Pinholster; Van Hook; Rompilla; Wiggins; Strickland; Rosemond; Simpson; Jones. As a result, this ground must be dismissed with prejudice.

### **Conclusion to Deficiency Analysis**

For the reasons stated above, Judge Early correctly found Mahdi had not met his burden of proof to show deficient performance under this ground. Strickland; Pinholster; Van Hook; Wong. Counsel conducted an adequate, thorough, and reasonable investigation of mitigation evidence, and presented what mitigation evidence counsel could present that was favorable to Mahdi under the circumstances at the time of sentencing. Pinholster; Van Hook; Belmontes; Strickland; Rompilla; Wiggins; Rosemond; Council; Simpson; Jones.

### **THE PREJUDICE PRONG**

Regardless, Mahdi has not met the 2nd prong of the test articulated in Strickland and Jones. Considering the horrible facts of this murder, the aggravating circumstances, the mitigation presented at sentencing, the additional mitigation evidence presented at the PCR hearing, and the aggravating evidence that would almost certainly have come in with the new mitigation, Judge Early did not err in finding there was no reasonable probability Judge Newman would have returned with a different sentence. Wong, supra; Jones, supra.

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

complete failure to present mitigation evidence undermined confidence in the outcome where the jury deliberated over 2 days before reaching a death sentence).

The United States Supreme Court made clear in Wong, *supra*, the burden *is not* on the State to show the lack of prejudice, but **the burden is on *the applicant to show prejudice***. Id. To establish prejudice, Mahdi must show that had Judge Newman been confronted with the new mitigating evidence, there is a reasonable probability he would have returned with a different sentence. Id., *quoting Wiggins*, 539 U.S. at 535-36. “In evaluating that question, it is necessary to consider *all* the relevant evidence that [Judge Newman] would have had before [him]” if Mahdi “had pursued the different path - not just the mitigation evidence” Mahdi could have presented, but also” the aggravating evidence “that almost certainly would have come in with it.” Id., *referencing Strickland*, at 695-696, 700 (emphasis in original). *See also* Sears v. Upton, 130 S.Ct. 3259 (2010), *quoting* Porter v. McCollum, 130 S.Ct. at 453-54 (2009); Council v. State, 380 S.C. 159, 670 S.E.2d 356 (2008), *citing* Jones, 332 S.C. at 333, 504 S.E.2d at 824.

It must be noted here Judge Early [the PCR Court] was required to reweigh the evidence in aggravation against all the new evidence in mitigation, along with the mitigation evidence presented at the original sentencing hearing, along with any additional evidence in aggravation that would likely have come in with the new mitigation evidence. Sears. Judge Early did not simply ***weigh the new mitigation Mahdi raises on appeal*** from the denial of PCR [*community/school witnesses*], but all of the mitigation evidence presented at the PCR hearing including Mahdi’s extended family members, Mahdi’s PCR experts and the records from the Carter Center, DJJ, and the school records, along with any evidence in aggravation that would in all likelihood have come in with the new mitigation evidence presented at PCR, which would have included Mahdi’s involvement in 2 additional homicides in Virginia, his manipulative and disruptive behavior in Carson’s home, his faking of suicidal gestures including 1 that led to his commitment to the Walter Carter Center, Madhi’s extensive record of 40 disciplinary infractions in DJJ including leading an escape attempt and faking a suicidal gesture to manipulate the DJJ

prison system, his bad behavior in school, and his horrible behavior at the Carter Center.<sup>46</sup> Sears; Wong. Judge Early correctly analyzed Mahdi's claims of prejudice under this ground pursuant to the above cited standards and found Mahdi had not met his burden of proof to show prejudice. As a result, the petition for certiorari should be denied. And, even only considering *the select mitigation Mahdi now raises on appeal*, Mahdi cannot establish prejudice.

### **The Evidence in Aggravation**

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

### ***The Guilty Plea***

First, Mahdi admitted he murdered James Myers, burglarized his cabin before murdering him, and stole his guns and police issued truck after murdering him. There is no question Mahdi is the person who murdered Myers; he was alone when he murdered him, and he acted completely alone. Mahdi also admitted he murdered Myers during the entering or remaining in the cabin after the burglary and stole Myers' guns and truck, the statutory aggravating circumstances.

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<sup>46</sup> Mahdi asks this Court to grant certiorari arguing Judge Early erred in finding he failed to prove Strickland prejudice; however, Mahdi asks this Court to ignore the fact Judge Early was required in making this determination to reweigh *all of the new mitigation evidence Mahdi presented at PCR*, against all of the aggravating evidence, including *any aggravating* evidence that would have likely come in *with all the new mitigation evidence he presented at PCR*. By only raising the failure to call community/school witnesses in mitigation, Mahdi has implicitly conceded the other mitigation evidence he introduced at PCR, which would include his extended family, PCR experts, and the records, including those from DJJ, school, and the Carter Center, would have come at the expense of horrible aggravation evidence. Judge Early did not and could not limit himself to just the mitigation evidence Mahdi now raises on appeal, because Mahdi did not abandon the other mitigation before the PCR Court. (Final Order of Dismissal). Sears v. Upton. As a result, Judge Early could not have erred in this determination as Mahdi now argues.

Mahdi also admitted the facts surrounding the murder as recited by the Solicitor were correct. (R. 1254-84, 1336-43).

### *The Sentencing Proceeding*

In the sentencing phase, the State established the following evidence in aggravation: Mahdi burglarized a home in Virginia and stole a chrome .380 pistol. Mahdi then stole a license plate from a car rental agency and a station wagon from a nearby car lot. He drove this vehicle eventually to Columbia, S.C., where he abandoned it. Mahdi then car-jacked a Ford Expedition at gunpoint and drove to the Wilco Plaza in Calhoun County. He replaced the tag on the Expedition with the tag he stole in Virginia. He attempted to use a stolen credit card at the Wilco station and fled into some nearby woods when he realized police were about to apprehend him. Mahdi came upon Myers' shed/cabin and burglarized it using some type of tool. While inside, Mahdi manufactured a sawed-off shotgun, painted it black, and also armed himself with Myers' loaded .22 rifle. When Myers went to his cabin/shed on June 16, 2004, Mahdi was lying in wait. Mahdi murdered Myers by shooting him 9 times with the .22 rifle. Mahdi shot Myers several times in the head after he was helpless on the floor of the cabin/shed. Before leaving, Mahdi attempted to burn Myers' body and his shed to conceal evidence. Mahdi stole Myers' truck keys, his guns, and his police issued truck and fled South Carolina. Mahdi also replaced the tag on Myers' police issued truck with a tag Mahdi stole from Myers' personal truck.

Myers' wife had the unfortunate circumstance of finding her husband's burned and bullet riddled body. She screamed for an unknown period of time before she was able to call 911, and she remained at the cabin with her husband's body for approximately 30 minutes waiting on police and emergency workers to arrive.

Mahdi drove to Jacksonville, FLA and sold the .380 pistol he stole from Virginia and the .22 rifle he used to murder Myers; however, Mahdi retained several other weapons including the assault rifle and the sawed-off shotgun. Mahdi was not captured until an extensive police chase, after which he fled from Myers' stolen truck, and the use of a police dog, and Mahdi considered

shooting officers before being arrested. Myers' stolen shotgun and other incriminating evidence were recovered in or near the truck Mahdi had been driving before his capture.

The State also established Mahdi's bad character and characteristics. Mahdi had previously been adjudicated for car-breaking, petty larceny, escape from custody, breaking and entering (2 counts), grand larceny, obstruction of justice, and contempt of court. As an adult, Mahdi was convicted of malicious wounding, for the brutal stabbing of Moises Rivera, after Mahdi tried to burglarize an apartment in the complex where Rivera worked. Mahdi stabbed Rivera approximately 5-6 times and severely injured Rivera. Rivera's heart actually stopped in the ambulance, and he had to be revived. He was hospitalized for several days and out of work for 6 weeks because of Mahdi's actions. Mahdi served time in adult prison for this offense but was not rehabilitated.

Upon his release from prison, Mahdi was placed on supervised probation. The record shows Mahdi knew and understood that use of illegal drugs, criminal activity, or possession of a weapon would result in violation of his adult probation. **(R 1487-91)**. The record shows he chose to engage in such conduct anyway. **(R 1492-1511)**.

The State also proved the murder of Myers was not Mahdi's first murder. Mahdi murdered Christopher Boggs, a convenience store clerk, on Mahdi's way to South Carolina from Virginia. Mahdi brutally murdered Boggs by shooting him in the face, and then shooting him again in the head after Boggs fell helpless on the floor. Store surveillance video portrays the heinousness of this murder, with Mahdi leaning over the counter to fire another bullet into Boggs' head. After murdering Boggs, Mahdi tried to rob the store's cash register. Mahdi did not even give Boggs the opportunity to comply with the armed robbery, but murdered him first. There is no question Mahdi committed this murder because his actions were captured clearly on video, his fingerprints were found on the store's counter, Mahdi's friends and relatives identified him in the video, and the weapon used to murder Boggs, the .380, was sold by Mahdi in Jacksonville and matched to Boggs' murder by ballistics testing.

The State also proved Mahdi's bad character by introducing some of Mahdi's DJJ records. Mahdi stated his only strength was robbing people. Mahdi admitted he was previously engaged in the sale of crack cocaine. Mahdi was described as a teenager with many negative attitudes toward authority, rules, limits, and rights and privileges of others.

The State also proved Mahdi's bad prison behavior through the introduction of some of Mahdi's DJJ records. These records contained just a few of his disciplinary violations in DJJ. Mahdi assaulted another inmate almost immediately upon entry into DJJ. Mahdi assaulted guards on several occasions and cursed DJJ staff and threatened staff.<sup>47</sup>

The State also introduced all of Mahdi's disciplinary violations while in Virginia's adult DOC. These included setting fire to his cell, refusing to obey orders, and assault on a non-inmate. Mahdi's poor institutional behavior led to his being confined at a maximum security institution where his disciplinary violations continued. Mahdi was diagnosed in the adult DOC with

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<sup>47</sup> Had counsel introduced all of Mahdi's DJJ records as Mahdi contended below, the evidence in aggravation would have only gotten worse. Mahdi committed over 40 disciplinary violations in DJJ including assaulting a teacher; assaulting guards on numerous occasions; assaulting other inmates, leading an escape attempt, refusing to follow orders; refusing to be disciplined, cursing staff, and damaging and destroying property. (**PCR 684**). Mahdi faked a suicide attempt at DJJ in order to manipulate the system to gain better conditions of confinement. Mahdi planned an assault on another inmate and enlisted the support of other juveniles in this assault. (**App. 004709**). The victim was injured in this assault. Mahdi exhibited a negative attitude with staff, and stated the attitude would continue until he got his way. Mahdi cursed staff profusely. Another record indicated Mahdi's teachers should be aware that "he has demonstrated the capacity to plot, and carry out, apparently unprovoked assaults on peers. He requires extraordinarily close supervision." (**App. 004710**). Mahdi assaulted a DJJ inmate on April 11, 1999 by hitting the victim in the head with a broom. Mahdi had 12 major institutional violations and 12 moderate violations while at one institution. Mahdi had anger management training but did not practice what he learned; he was kicked out of that program. Mahdi punched a DJJ guard in the face on September 29, 1999, assaulted a staff person on November 18, 1999, and another staff person on December 5, 1999. He was also involved in destroying property on several occasions. In the escape attempt he assaulted a female guard, taking her radio away from her, and demanded keys from another guard. Mahdi also threatened if he was not released from DJJ when he thought he should be released, he would go around "acting crazy." Mahdi did not think he should have been incarcerated for any of his offenses, and threatened to assault other inmates or guards or harm himself if he was not released from DJJ when he thought he should be. This evidence would have further established Mahdi's future dangerousness and also further undercut Mahdi's prison adaptability expert. *State v. Hughes*, 336 S.C. 585, 521 S.E.2d 500 (1999); *State v. Woomer*, 278 S.C. 468, 299 S.E.2d 317 (1982)(prior escape refuted evidence of good conduct while in prison).

intermittent explosive disorder and ASPD.

The State also introduced Mahdi's disciplinary violations in the S.C. DOC including assaulting a guard, threatening to kill a guard, making a hammer type weapon, and threatening other guards. Finally the State introduced Mahdi's escape attempt during the trial itself by the use of a homemade handcuff key Mahdi had fashioned while in maximum security and which he kept secreted in his mouth during the trial. The State thoroughly proved Mahdi was not adaptable to prison and was a danger to guards, inmates, and prison personnel. State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999)(behavior in prison is admissible in sentencing because it bears on character and future dangerousness); State v. Whipple, 324 S.C. 43, 476 S.E.2d 683 (1996).

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

Mahdi's crimes in Virginia, North Carolina, and South Carolina, his acts surrounding Myers' murder, and his conduct in prison and as a pretrial detainee reveal he has above-average intelligence, is streetwise, and has a keen criminal mentality. The record of the sentencing shows Mahdi stole items from victims because he wanted to and did not think he would get caught. Mahdi stabbed Moises Rivera because Rivera caught him breaking into an apartment as an adult.<sup>48</sup> Mahdi burglarized a home in Virginia so he could steal a gun. Mahdi stole a license plate and a car to leave Virginia in part because his supervised probation was going to be revoked, and he would return to prison. Mahdi murdered Christopher Boggs to rob the Exxon in Winston-Salem. Mahdi car-jacked a car in Columbia, S.C. because his other car, the one stolen in Virginia, had broken down. Mahdi murdered Captain Myers because Mahdi had burglarized Myers' shed, and Myers came in on Mahdi inside the shed. Mahdi attempted to burn Myers' body to destroy

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<sup>48</sup> The record of the PCR hearing shows Mahdi murdered drug dealers in Virginia to create a false drought so he could make more money selling drugs himself. And, Mahdi stole the license plate and the station wagon and fled Virginia because police were closing in on him for 1 of the homicides he committed there. And, counsels' testimony, along with that of Dr. Martin and Dr. McKee at PCR, shows Mahdi plans out criminal behavior when necessary to benefit himself.

evidence. And, Mahdi stole Myers' truck to escape from S.C. The record shows Mahdi is willing to commit crimes and committed crimes if necessary for his own personal benefit.

Further, Mahdi's Virginia DJJ and DOC records show without question he is a person who victimizes others and manipulates the system for his own benefit. Mahdi repeatedly assaulted guards in both DJJ and adult prisons in Virginia. Mahdi almost killed Moises Rivera. Further, Mahdi's records from the SCDOC show Mahdi has repeatedly assaulted guards and threatened to assault guards. Additionally, Mahdi's conduct in murdering Christopher Boggs in N.C. shows his plan was to murder Boggs simply so he could rob the store's cash register.

The State also introduced the 8 hour standoff with police after which Mahdi prophetically stated: "I'm going to kill a police officer before I die." While Mahdi attempts to blame his father for this stand-off, Mahdi could have walked out of his home at any time during the standoff. When the stand-off ended, police found Mahdi in a back room of the house watching television.

The State proved Mahdi's actions over several days from Virginia, to North Carolina, to Columbia, to Calhoun County, and finally to Florida were cold, calculated, premeditated, and intelligent. These criminal acts included a burglary in Virginia, the theft of a firearm, the theft of a license plate and an automobile, the murder of a store clerk and the attempted armed robbery of a convenience store, the carjacking of another vehicle, the attempt to pass a stolen credit card, and finally the burglary of Myers' shed and the murder of Myers and the theft of his guns and truck.

### **The PCR Evidence**

Mahdi's PCR mitigation presentation centered on extended family members' testimony, expert witness' testimony regarding Mahdi's mentality, and documents not introduced by counsel at sentencing including records from the Carter Center, DJJ, and school records. As previously stated, Mahdi has now abandoned on appeal his claim counsel should have presented this mitigation. Mahdi does not contend on appeal that any of this mitigation changes the sentencing

equation, because he does not raise it.<sup>49</sup>

However, Judge Early could not ignore Mahdi's claim below that counsel should have investigated, uncovered, and presented extended family members, experts, or records in conducting his prejudice analysis because Mahdi did not abandon this mitigation below. Sears v. Upton. In determining prejudice, Judge Early also had to consider the aggravating evidence that would have come in with all the new mitigation. Id.; Wong (in making prejudice determination, the Court must consider the bad information that in all likelihood would have come in with the new mitigation evidence). By raising only a select portion of the mitigation he raised below, Mahdi is asking this Court to find Judge Early erred in making a decision he did not make.

If counsel had called Mahdi's extended family members, his PCR experts, or introduced the records he offered below the following evidence in aggravation would have come out. Mahdi was "a demon" when he lived with Carson and Lawanda and engaged in manipulative behavior and only talked of suicide or hurting himself when he did not get his way or was about to be punished. Mahdi's "suicide attempt" was not a real suicide attempt but more manipulative behavior that Mahdi engaged in while in Carson and Lawanda Burwell's home, undercutting Mahdi's diagnosis at the Carter Center which counsel offered in mitigation. Mahdi almost had Carson and Lawanda arrested based on a false claim of child abuse and evidence manufactured by Mahdi. Mahdi engaged in disruptive behavior at the Carter Center such as hitting other patients, attempting to escape from the facility, cursing staff, falsely pulling a fire alarm, throwing chairs, and threatening to suffocate someone. When Mahdi was released from the Carter Center he engaged in more manipulative behavior to force his return to this father. Later, Mahdi threw a cement block through an aunt's car window. Mahdi slashed his mother's tires because she would not let him use her car. Mahdi never should have been placed in special education in elementary school, because he did not belong there. Mahdi had over 40 disciplinary violations in DJJ

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<sup>49</sup> Mahdi only raises on appeal the fail to call community members / school officials he called below or submitted affidavits. (Petition for Writ of Certiorari).

including assaulting a teacher; assaulting guards on numerous occasions, assaulting other inmates, leading an escape attempt, refusing to follow orders; refusing to be disciplined, cursing staff, and damaging and destroying property. Mahdi was diagnosed in DJJ with conduct disorder. Mahdi had numerous disciplinary violations within Virginia's adult DOC including setting fire to a cell, possession of contraband, failure to follow orders, and assaulting a non-inmate. Mahdi was diagnosed in the adult prison system with intermittent explosive disorder and ASPD. Mahdi was moved to a maximum security prison in Virginia because of his bad prison conduct. After being released from adult prison, Mahdi had to move out of his grandmother's home because he would not abide by the rules of the home set down by his uncle Nathan. Mahdi had a high I.Q., 118, obtained his GED, had held several jobs, and obtained college credits at a college in Lawrenceville, but rather than maintain gainful employment, chose to deal drugs and commit 2 additional murders in Virginia. Mahdi is not an impulsive actor but committed many criminal offenses in a premeditated and planned fashion simply because he could and to benefit himself. And, Mahdi repeatedly victimized others in premeditated assaults or attacks. Further, Mahdi was a violent, manipulative, and disruptive individual before he was incarcerated in prison, when he was incarcerated the 1st time in DJJ, during his 2nd stint in DJJ, after his release from DJJ, seriously wounding Moises Rivera during a burglary attempt, continued his violent and disruptive behavior in the adult prison system, and rather than conforming his behavior when he was released, Mahdi repeatedly violated not only the law but the rules of his supervised probation. He sold drugs, possessed handguns, used marijuana, and committed 2 homicides in Virginia. Mahdi burglarized a home, stole a handgun, stole a car and a license plate, and left Virginia. Mahdi then committed 2 additional murders during his flight through the southeastern United States. And, Mahdi has engaged in the same or similar conduct while incarcerated in South Carolina, over and over again. Further, Mahdi engaged in criminal conduct before he was ever incarcerated. In fact, he was placed on juvenile probation for his first series of crimes and continued to engage in criminal conduct, burglarizing a home and stealing firearms. And, after each incarceration, he

committed even more and more violent offenses. Mahdi engaged in criminal activity such as stealing because he could and believed he would not get caught. Mahdi assaulted other individuals because it was in his own self-interests. Mahdi was not victimized but Mahdi victimized others including inmates and guards and attempted to manipulate the juvenile prison system. And, Mahdi's actions over several days from Virginia, to North Carolina, to South Carolina, and to Florida, show he was not suffering from any mental illness.

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

The community members and school officials also described Mahdi's father's defiant behavior in the community. They also described Mahdi's difficulties in school. This same evidence was also presented at the sentencing hearing before Judge Newman through Hammock in her sworn testimony and in the Exhibits chronicling Mahdi's family's life and his own life, and chronicling his school difficulties. Judge Newman was well-aware Mahdi had a life of deprivation, including being abandoned by his mother around the age of 5. Judge Newman was also aware Mahdi's father could not provide for the children, and as a result Mahdi and his brother

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

The school officials also added aggravating evidence. They admitted Mahdi was a discipline problem in school and was in the principal's office or detention often. He was aggressive with other students and prone to outbursts, and would leave class without permission. As a result, he was placed in a class for children with discipline problems. Judge Newman was not aware of this aggravating evidence.

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

difficulties. Judge Newman was aware Mahdi's schooling was interrupted several times; Mahdi had many absences, and his father pulled him out of school after the 5th grade to home school Mahdi, and there was no indication this had occurred. Judge Newman was also aware Mahdi had difficulty in reading throughout his school history. Mahdi was tested in 1994 when he was in the 4<sup>th</sup> grade and his overall level of functioning was at a mid-fourth grade level. At that time, his current level of educational functioning fell in the average range. His mathematics equivalent yielded a grade equivalent of 5.8. Other tests showed his general information skills at a 6.8 grade level. Mahdi did struggle with reading during this time; however, psychological data revealed Mahdi's intellectual functioning was in the high average range. (See Brunswick County School Records). While the records show he was placed in special education, Mahdi was not mentally retarded but had an I.Q. of 118 and functioned on grade level or higher in all classes except reading, spelling, and writing. And while the records indicate Mahdi was diagnosed as emotionally disabled, and had some depressive symptoms at that time, the records also show Mahdi was placed in special education or classified as ED based in large part on his misconduct and aggressive behavior in school, including toward other students, and his inability to read. Judge Newman was already aware Mahdi had been committed to a psychiatric facility approximately 18 months before for major depression, and Mahdi told the sentencing court, at his guilty plea, he was not suffering from any mental illness. And, Judge Newman already knew of Mahdi's inability to read. Further, the mitigating impact of these records is minimal given Dr. Cooper Lewter testified Mahdi should not have been in special education and this had a negative impact on Mahdi's school performance. Lawanda Burwell, Mahdi's aunt, and a credentialed school administrator, also testified she did not believe Mahdi should have been placed in special education. Importantly, the records also included bad things about Mahdi. Had Mahdi's school records been introduced or the school officials testified, further evidence of Mahdi's bad behavior would have been before Judge Newman, including Mahdi's misbehavior and aggressiveness and assaults on other children and resistance to authority. Furthermore, Mahdi failed to establish at the

PCR hearing that his experts' [Dr. Martin and Dr. Morgan] opinions would have changed at sentencing if they had been provided these records. Von Dohlen, *supra*.

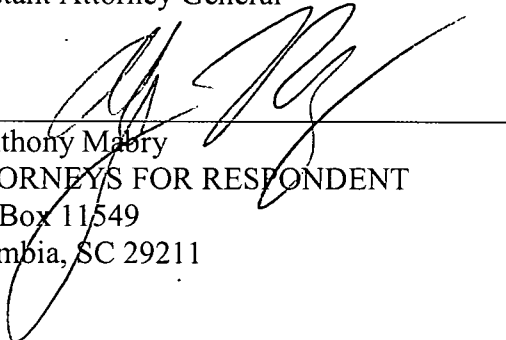
Considering the evidence in aggravation, which was overwhelming, along with all the evidence in mitigation Mahdi alleged below should have been presented, along with the aggravating evidence that would have almost certainly come in on cross-examination, rebuttal, or contained within the evidence itself, and the mitigation evidence presented at sentencing before Judge Newman, there is no reasonable probability Judge Newman would have returned with a different sentence. Wong; Sears; Strickland, Rosemond; Council; Jones. Mahdi has failed to meet his burden of proof to prove prejudice. Id. As a result, this petition must be dismissed.

### CONCLUSION

For the above stated reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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July 8, 2015

**CERTIFICATE OF SERVICE**

I, **Anthony Mabry**, hereby certify that I have served *Return to Petition for Writ of Certiorari* in the foregoing action by depositing copies in the United States Mail to:

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This 8<sup>th</sup> day of July, 2015.



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