

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM CALHOUN COUNTY
Court of Common Pleas

S.C. Supreme Court

Doyet A. Early, III, Circuit Court Judge

Case No. 2014- 002131

Mikal D. Mahdi, #5238

Petitioner,

v.

State of South Carolina,

Respondent.

REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

The Petition for Writ of Certiorari raises a single issue: whether Petitioner Mikal Mahdi was 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 his background instead of calling available lay witnesses who could have provided detailed and specific testimony in mitigation.

The bulk of the State's 65-page response ignores that issue and, instead, addresses matters that Mahdi did not present to this Court. Thus, the State argues at length why trial counsels' decisions not to call members of Mahdi's family to testify and not to introduce Mahdi's school records were reasonable. (Return at 40-47.) But, the reasonableness of those decisions are not at issue in this Petition. Instead, Mahdi contends that the PCR court erred in denying his claim that available non-family members, *i.e.*, members of the community, including his former teachers, should have been called as witnesses. In contrast to the potential family witnesses (whom the PCR court found were unwilling to appear and would have provided harmful aggravating information had they testified), the nonfamily, lay witnesses were both available and willing to testify, and lacked the potentially aggravating "baggage" that the family witnesses allegedly carried.

Nor does the State have a proper response to Mahdi's legal arguments about the limitations of expert testimony. Relying on *Weik v. State*, 409 S.C. 214, 761 S.E.2d 757 (2014), *Powell v. Collins*, 332 F.3d 376 (6th Cir. 1987), and *Sowell v. Anderson*, 663 F.3d 783 (6th Cir. 2011), Mahdi argues that summary expert testimony about his background was an inadequate substitute for the vivid, first-person detail that available lay witnesses would have provided. The State does not contest this legal principle and does not even address these cases. In response, the State merely argues that such testimony would have been cumulative and that, in light of the

extensive aggravating evidence, its omission was in any event not prejudicial. Both arguments miss the point.

First, Mahdi does not contend that there was no evidence regarding his personal background. Rather, his argument is that the unnecessarily limited evidence presented at sentencing on this issue lacked probative force because it consisted only of the sterile conclusions of an expert witness. The State offers no response to this point.

Second, the fact that there was substantial evidence of aggravating circumstances does not answer the question of whether the omission of mitigating evidence was prejudicial. *Williams v. Taylor*, 529 U.S. 362, 398 (2000) (“Mitigating evidence . . . may alter the jury’s selection of penalty, even if it does not undermine or rebut the prosecution’s death-eligibility case.”). Trial counsel presented only a skeletal mitigation case. The record at PCR established the availability of a much more powerful mitigation presentation — a presentation that would have offered the sentencing judge a substantial counterweight to the aggravating evidence. Had trial counsel made such a presentation, the judge would have had to consider both aggravation and mitigation, and his determination may well have been different from the one that he made with virtually nothing on the mitigating side of the scale. Under these circumstances, and as this Court recognized in *Weik*, the omission of such mitigation evidence “undermines confidence in the outcome” and prejudices Mahdi. 409 S.C. at 233, 761 S.E.2d at 767.

I. Trial Counsel’s Performance Was Deficient For Relying Exclusively on Expert Testimony

A. The Expert Testimony Was A Poor and Inadequate Substitute for Lay Witnesses

In his Petition, Mahdi argues that trial counsel’s complete reliance on the expert testimony of Marjorie Hammock to present Mahdi’s tortured social and family history was constitutionally ineffective because her sterile, second-hand testimony necessarily lacked

illustrative details and examples. (Pet. at 12.) In its Return, the State offers only conclusory responses that are not supported by the record.

1. The Expert Testimony

The State asserts that Hammock testified “in detail” about Mahdi’s school difficulties. (Return at 48.) In fact, Hammock gave no specific examples of those difficulties. Instead, Hammock walked the sentencing court through a timeline she created – a timeline that she admitted was “just a chronological picture” of Mahdi’s childhood. (A003625.) Hammock gave no testimony about Mahdi’s academic potential and provided no specific information regarding how Mahdi’s father disrupted Mahdi’s education; rather, Hammock merely offered the general conclusion that “his education was disrupted many times,” with no explanation of why or how this disruption occurred. (A003632.) Hammock did conclude that Mahdi’s father had “his own issues that prohibited him from being a good father,” but, here, too, she could not provide any specific descriptions or narrative examples to support her assessment. (A003635.) Indeed, Hammock herself recognized the limitations of her testimony and admitted that, with respect to Mahdi’s family background, her timeline was “somewhat limited in terms of their experiences.” (A003624.)

2. The Non-Family Lay Witnesses

The State does not dispute Mahdi’s argument that the non-family lay witnesses would have offered additional mitigating evidence. Nonetheless, the State argues that such evidence would have been “cumulative” and that Hammock “presented through her testimony and the exhibits introduced through her basically the same information.” (Return at 44.) This argument fails because it rests upon a mistaken understanding of what it means for evidence to be “cumulative.”

In particular, evidence is not “cumulative” merely because another witness has already

discussed the same subject. The quality of the evidence — its impact — matters. Thus, testimony presented through a summary expert witness is qualitatively different testimony from testimony by lay witnesses who knew the defendant; who testify with emotion; who offer details of the defendant’s life; and who provide vivid, specific examples to support their conclusions. *See Powell*, 332 F.3d at 400 (family members and friends should testify to “first-hand accounts from those who [know] [the defendant] best”); *Sowell*, 663 F.3d at 795 (experts often speak only “in generalities that lack[] any details of the severe abuse and abject poverty” of a defendant’s “formative years”); *Weik*, 409 S.C. at 234, 761 S.E.2d at 767 (reasonable representation requires “thoroughly investigating and presenting mitigating evidence”). Indeed, the State’s argument at sentencing recognized this distinction and turned it against Mahdi. The solicitor derided Hammond as “their own expert, who gets paid to testify in death penalty trials” and noted that Mahdi’s “Defense Exhibit 2 [the timeline] is the best and only thing [the Defense] could come up with regards to getting any mitigation on [Mahdi’s] life.” (A003659.) The failure to “come up with” more — to offer testimony from unbiased, unpaid lay witnesses — permitted this devastating argument and was deficient performance.

B. The State’s Arguments Regarding Family Members and School Records Are Red Herrings

Much of the State’s Return is devoted to arguing that trial counsel acted reasonably in not calling Mahdi’s family members as witnesses. For example, the State asserts:

Counsel testified they wanted a family member at the sentencing hearing to testify on Mahdi’s behalf regarding his family and social mitigation; however, the only person who was willing to come and testify was Mahdi’s grandmother Nancy [whose testimony would have been unhelpful]; the rest of the family, including aunts, were not willing to participate.

(Return at 33; *see also id.* at. 42-43 (discussing findings regarding willingness of family members to testify).)

The State argues also argues that trial counsel reasonably decided not to call family members as witnesses because the witnesses would have said “bad things about Mahdi.” (Return at 45.)

In making these arguments, the State addresses a claim not presented in, and not relevant to, Mahdi’s Petition. Although Mahdi did raise a claim in his PCR Petition of ineffective assistance of counsel for failure to call family members to testify, Mahdi has not renewed that claim on appeal, in light of Judge Early’s factual findings. Instead, Mahdi presents the entirely separate issue of whether trial counsel was ineffective for failing to present testimony from non-family members. Judge Early made no such factual findings regarding those witnesses. Indeed, the fact that one category of witnesses were either unavailable or harmful does not excuse trial counsel’s failure to interview or to present testimony from other witnesses; to the contrary, if anything, the lack of helpful family witnesses should have underscored the urgency of developing and presenting mitigating evidence from non-family members. *Rompilla v. Beard*, 545 U.S. 374, 381-82 (2005) (counsel ineffective in capital sentencing for failing to investigate beyond interviewing the uncooperative defendant and his unhelpful family members, who provided minimal assistance in mitigation, and reviewing a few records; finding nothing “particularly helpful” in these sources, counsel did not conduct additional investigation for information “that might have cast light on [the defendant’s] mental condition”); *Johnson v. Bagley*, 544 F.3d 592, 603 (6th Cir. 2008) (“Uncooperative defendants and family members . . . do not shield a mitigation investigation (even under AEDPA’s deferential standards) if the attorneys unreasonably failed to utilize other available sources . . .”).

Similarly, the State also argues, “Judge Early properly found counsel was not deficient in failing to introduce Mahdi’s school records which contained bad things about Mahdi,” (Return at

49), notwithstanding that Mahdi does not renew this issue in his Petition, either. Once again, whether those records “reveal damaging information about Mahdi and his character,” (*Id.*), or “would have undercut counsel’s attempt to present mitigation,” is irrelevant to the issue presented in the Petition to this Court. The witnesses relevant to that issue are Mahdi’s former teachers, and there is no argument, much less evidence, that their testimony would have led to the introduction of the allegedly harmful records. Here, too, the lay witnesses offered trial counsel an opportunity to present mitigating information about Mahdi’s background — an opportunity which trial counsel unreasonably did not take.

C. The State’s Assertion That Sherriff Woodley’s Affidavit “Lacks Credibility” Is Meritless

Mitigating evidence from a law enforcement witness, particularly from a law enforcement witness called by the State to testify in aggravation, would have been particularly powerful. Not surprisingly, then, the State attempts to undercut the proffered testimony from Sheriff Woodley in several ways, none of which has merit. In doing so, the State asserts generally that Sheriff Woodley’s “affidavit presented to the PCR Court contains serious credibility problems.” (Return at 44.) However, the State made no such argument in the PCR proceedings and Judge Early made no such finding.¹ In any event, the record does not support a challenge to Sheriff Woodley’s credibility.

The State first attacks Sheriff Woodley by arguing that, in his affidavit, Sheriff Woodley “attempts to blame the 8 hour standoff with police on Mahdi’s father; however, at trial under oath blamed the standoff on both Mahdi and his father.” (Return at 44.) In fact, Sheriff

¹ The State cannot challenge Sheriff Woodley’s credibility for the first time in its Return. *See State v. Huggins*, 336 S.C. 200, 519 S.E.2d 574 (1999) (“It is well settled that issues cannot be raised for the first time on appeal.”); *see also Kramer v. Kramer*, No. 03-244 2003 WL 21743749, at *2 (Minn. Ct. App. July 29, 2003) (refusing to reassess credibility on appeal); *Bell v. Colvin*, 527 F. App’x 595 (8th Cir. 2013) (refusing to reassess credibility when raised for the first time on appeal.); *Xiu Zhen Pan v. U.S.*, 222 F. App’x 64, 65 (2d Cir. 2007) (same).

Woodley's trial testimony and affidavit are consistent. Trial counsel never asked Sheriff Woodley who should be blamed for the standoff. Rather, trial counsel inartfully asked, "if this incident here with the standoff was with the father," and Sheriff Woodley replied, "No, sir, it was both of them." (A003307.) The fact that both Mahdi and his father participated in the standoff is fully consistent with the fact that it was Mahdi's father who began the standoff, as Sheriff Woodley testified in his PCR affidavit. (A004150-51.)

The State next attacks Sheriff Woodley by claiming a contradiction between his trial testimony that "he was only aware of prior 'simple assaults' on family members by Mahdi's father" and the statement in his affidavit about Mahdi's father attempting to murder Mahdi's mother in front of Mahdi. (Return at 44.) Once again, the State distorts the record. At sentencing, Sheriff Woodley was never asked, and never purported to describe, all the bad conduct by Mahdi's father of which he was aware. To the contrary, at trial, Sheriff Woodley was merely asked whether Mahdi's father "had a law enforcement history with you," to which Woodley truthfully responded, "I wouldn't say a history, just a couple of — it was simple assault on family members." (A003309.) That answer — which responded to a narrow question about the charges that Mahdi's father faced — is again fully consistent with the additional testimony in the affidavit, which describes in detail a specific incident that was not the subject of inquiry at sentencing.

D. The State Misses the Point of George Smith's Testimony

The State's attempts to downplay the value of George Smith's testimony fare no better. The State tries to dismiss the significance of Smith's testimony about the incident involving Mahdi's father's refusal to leave a community pool by claiming Mahdi's father was "protesting the wrongful segregation" and noting that Mahdi's father was found "not to suffer from any major mental illness." (Ret. at 44.) Yet again, the State misses the point. It is the testimony about

Mahdi's father's conduct after his arrest at the pool that is significant — Mahdi's father went "wild" in his cell; "started throwing the chairs against the wall, breaking the tables" and showed a side of himself which was "as violent as anything" that Mr. Smith had ever seen in his life. (A001415.) That disturbingly vivid picture of Mahdi's father was never presented at sentencing.

II. There Was No Strategic Reason For The Failure to Call Non-Family Lay Witnesses

The State makes the conclusory assertion that trial counsel made a strategic decision to present evidence only through Hammock. (Return at 52.) However, the State cites no evidence in the record to support that contention, and, indeed, other than the testimony about sentencing counsel's reasons for not calling family witnesses, (A001360-61, A001825, A001851-63, A001868), there is none. In fact, Mahdi's trial counsel did not even interview the non-family lay witnesses, and could not have made any strategic decision to call or to not call them. (A001360-61 (Harris), A001388-9 (Wilson), A001415 (Smith); A001868 (admission of trial counsel that he never spoke to Mahdi's special education teachers).) *See Council v. State*, 380 S.C. 159, 175, 670 S.E. 2d 356, 364 (S.C. 2008) ("strategic choices made by counsel after an incomplete investigation are reasonable 'only to the extent that reasonable professional judgment supports the limitations on the investigation.'").

In an attempt to justify the failure to present these witnesses, one of Mahdi's trial counsel even goes so far as to suggest that he believed that there would have been no point in offering mitigating evidence about Mahdi's background because, in trial counsel's view, the impact of the video of Mahdi shooting a store clerk was so powerful that any such mitigation would not have mattered. (A001864-65.) That "strategy" (if it even deserves recognition as such) is misguided as a matter of law. It is precisely because there is aggravating evidence that there is a need for defense counsel to locate, present and argue countervailing mitigating evidence so that the judge or jury sentencing a defendant can weigh both. *Council*, 380 S.C. at 176, 670 S.E.2d at 365 (even

where overwhelming evidence existed as to guilt and aggravating factors, absence of meaningful mitigation evidence prejudiced defendant). Moreover, this is not a situation where the introduction of mitigating evidence about Mahdi's background would have led to the introduction of the aggravating evidence of the videotape of the store clerk murder, as that evidence was already in the case. Rather, this was a situation where counsel abdicated his responsibility to obtain and present a category of mitigating evidence because he assumed that its introduction would be pointless.

Finally, the State simply ignores Mahdi's argument that there was no valid strategic reason for not attempting to interview Sherriff Woodley. (Petition at 22-23). Although trial counsel offered a weak rationale for the failure to attempt to contact Woodley before trial, Mahdi explained in his petition why that rationale fails as a matter of law and, by not even mentioning this testimony, the State has abandoned the argument.

III. Trial Counsel's Deficient Performance Prejudiced Mahdi

A. The Legal Standard

The prejudice issue in this Petition is whether trial counsel's failure to present mitigating testimony from available lay witnesses prejudiced Mahdi. To assess that question:

[I]t is necessary to consider all the relevant evidence that the jury would have had before it if [trial counsel] had pursued the different path — not just the mitigation evidence [trial counsel] could have presented, but also the [additional aggravating] evidence that almost certainly would have come in with it.

Wong v. Belmontes, 558 U.S. 15, 20 (2009) (emphasis in original). Here, "the different path" would have been the introduction of testimony from Mahdi's teachers and from George Smith and the pre-trial interviewing of, and resulting additional trial testimony from, Sherriff Woodley. And, in determining whether the failure to introduce that evidence was prejudicial, a court must therefore consider "the additional aggravating evidence that almost certainly would have come in

with it.” *Id.* In this case, there is no additional aggravating evidence that would have come in with that testimony.

The State, however, contends that a prejudice inquiry also requires consideration of “**any aggravating** evidence would have likely come in with *all the new mitigation evidence [Mahdi] presented at PCR.*” (Return at 54 n.46 (emphases in original)). But, the fact that the testimony of other PCR witnesses, such as Mahdi’s family members, would have led to the introduction of additional aggravating evidence is irrelevant to the question of whether the failure to call the lay witnesses prejudiced Mahdi.

B. Mahdi Has Established Prejudice

The State’s argument that Mahdi has not established prejudice has three components, two of which have already been addressed. First, the State argues that the additional mitigating evidence would have brought with it additional aggravating evidence — an argument that is flawed, as explain in Point III.A above. Second, the State argues that the proffered mitigating evidence would have been “largely cumulative,” (Return at 62), an argument which is also flawed, as explained in Point I.A.2 above.

The State’s third point is that the evidence in aggravation was “overwhelming.” (Return at 65.) True, the State’s aggravating evidence was substantial. But, in capital murder cases, there is often substantial and horrible aggravating evidence, and in many such cases, sentencing judges or juries nonetheless return a verdict of life imprisonment rather than death.² The question in

² See, e.g., *State v. Smith* (S.C. 16th Cir. 1995) (defendant convicted of drowning her two children); *State v. Delacruz* (S.C. 5th Cir. 2000) (defendant convicted of kidnapping and killing an eight-year old boy); *State v. Knoten*, 555 S.E.2d 391 (2000) (defendant convicted of killing a three-year old girl by drowning her, after raping and killing her aunt); *United States v. Moussaoui*, 591 F.3d 263 (4th Cir. 2010) (conspiracies that led to the 9/11 attacks); *United States v. Hans*, 332 F. App’x 116, 117 (4th Cir. 2009) (defendant convicted of arson for a hotel fire that killed 6 people and injured 11 others); *United States v. Wills*, 346 F.3d 476 (4th Cir. 2003) (defendant convicted of kidnapping and murder of witness); *United States v. Beckford*, Nos. 97-4924, 97-4925, 97-4926, 97-4927, 2000 WL 376155 (4th Cir. May 3, 2000) (unpublished) (defendants convicted of multiple killings in furtherance of a CCE and RICO conspiracy); *United States v. Gooding*, Nos. 94-5405, 94-5406, 94-5407, 94-5408, 94-5409, 94-5410, 94-

capital cases is typically not whether aggravating factors exist, but whether there was meaningful evidence to mitigate against those aggravating factors and to humanize the defendants. *See Council*, 380 S.C. at 176, 670 S.E.2d at 365; *Mayes v. Gibson*, 210 F.3d 1284 (10th Cir. 2000) (“The presentation of mitigation evidence affords an opportunity to humanize and explain...”); *Marquez-Burrola v. State*, 157 P.3d 749 (Okla. 2007) (“One important purpose of mitigation evidence is to humanize the defendant in the eyes of the jury and, if possible, to explain what might have driven him to commit the crime.”).

Here, trial counsel did a wholly superficial and ineffective job of humanizing Mahdi. As explained in the Petition, Judge Newman expressly commented on the lack of any evidence of a “sense of humanity” in Mahdi. (A008565.) Had trial counsel presented the available evidence, Judge Newman would have seen that humanity and would have had a substantial counterweight to balance against the State’s aggravating evidence. Because there is a reasonable probability that the judge would have reached a different decision had he been allowed to do that balancing, Mahdi has established prejudice.

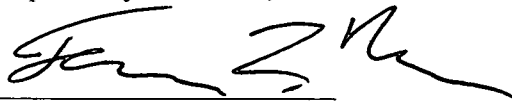
5444, 94-5445, 94 5448, 1995 WL 538690 (4th Cir. Sept. 11, 1995) (unpublished) (torture and murder of a woman and her boyfriend in furtherance of narcotics enterprise); *United States v. Cisneros*, 385 F. Supp. 2d 567 (E.D. Va. 2005) (gang members murdered pregnant teenager who was federal informant); *Georgia v. Nichols* (Ga. Super., Fulton County 2008) (defendant convicted of shooting a judge, court reporter, sheriff’s deputy and federal agent in an Atlanta courthouse).

CONCLUSION

For the reasons stated, Petitioner asks this Court to grant the Petition for a Writ of Certiorari.

August 24, 2015

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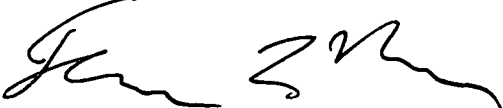
v.

State of South Carolina,Respondent.

PROOF OF SERVICE

I certify that I have served the Reply to Return to Petition for Writ of Certiorari by depositing a copy of it in the United States Mail, postage prepaid, on August 24, 2015, addressed to Respondent's counsel of record, Anthony Mabry, Assistant Attorney General, Post Office Box 11549, Columbia, SC 29211.

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