

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Appeal from Calhoun County
Court of Common Pleas
Doyet A. Early, III, Circuit Court Judge

S.C. SUPREME COURT

Case No. 2017-CP-09-00004

MIKAL MAHDI,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent

Appellate Case No. 2017-002212

RESPONSE TO RULE 243(c), SCACR EXPLANATION

Mikal Mahdi (“Mahdi”), a death sentenced inmate, has filed a Rule 243(C), SCACR, Explanation in this Court from the dismissal of his second (2nd) and successive post-conviction relief (PCR) Application by Circuit Court Judge Doyet Early, III. (“the 2nd PCR Court”). This Court requested that Respondent file this Response to Mahdi’s Rule 243(C) Explanation. There is absolutely no merit to Mahdi’s Rule 243(C) Explanation for the reasons more particularly set forth in the 2nd PCR Court’s Order of Dismissal, the 1st PCR Court’s Order of Dismissal, and as set forth herein.

PROCEDURAL HISTORY

Mahdi murdered James Myers on June 18, 2004 in Calhoun County. Mahdi was arrested on June 21, 2004 in Florida, returned to South Carolina, and formally arrested for Myers’

murder, stealing Myers' truck, and burglarizing his shed/cabin. Mahdi was indicted for murder, grand larceny, and burglary 2nd degree (Ind. #2004-GS-09-243-44). The State sought the death penalty for the murder. Counsel was appointed to represent Mahdi. Circuit Court Judge Clifton E. Newman was appointed to preside over the case. From November 26-29, 2006, capital jury selection was completed with a jury and alternates impaneled.

The Guilty Pleas

Prior to swearing the jury, on November 30, 2006, Mahdi waived his right to a jury determination of guilt and sentencing, and entered pleas of guilty to all charges.¹ Judge Newman accepted Mahdi's guilty pleas and ensured they were knowingly, voluntarily, and intelligently entered by extensive questioning of Mahdi under oath. The jury and alternates were then dismissed.

The Sentencing Proceeding

A sentencing proceeding was conducted December 1-6, 2006. On December 8, 2006, Judge Newman issued his sentencing decision by reading into the record his sentencing order, filed the same date. Judge Newman found 2 statutory aggravating circumstances proven beyond a reasonable doubt: the murder was committed in the commission of (1) a burglary; and (2) a larceny with a deadly weapon. After considering all of the evidence in extenuation, aggravation, and mitigation of punishment, Judge Newman sentenced Mahdi to death for the murder.²

¹ 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. It was determined Mahdi had no mental illness, was not mentally retarded, and was competent. (R 8-10, 131, 139-40; Court's Ex. 2).

² 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.

The Direct Appeal

Mahdi appealed only his death sentence to this Court, which affirmed. Mahdi v. State, 383 S.C. 135, 678 S.E.2d 807 (2009). The Remittitur issued July 1, 2009. Mahdi did not seek certiorari to the U.S. Supreme Court. Mahdi obtained a stay of execution to pursue PCR. This Court assigned Judge Doyet Early, III. (“the 1st PCR Court) to hear the 1st PCR application.

The 1st PCR Action

Mahdi filed a PCR application on August 18, 2009 (C.A. # 2009-CP-09-164). He was appointed **2 statutorily qualified capital PCR attorneys** to represent him in the action, Teresa Norris and Robert Lominack, pursuant to S.C. Code Ann. § 17-27-160(B)(identifying requisite qualifications for counsel appointed to represent an indigent, capital PCR applicant). *See Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29 (2016). Norris and Lominack filed several amendments to the application raising numerous grounds. The State filed a Return to each application and amendment.

The PCR Hearing

On March 9-10, 2011, an evidentiary (PCR) merits hearing was held before the 1st PCR Court. Present were Mahdi, his PCR attorneys, and Respondent’s attorneys. Mahdi called numerous witnesses who testified, submitted sworn affidavits from several witnesses, and introduced documentary exhibits. Mahdi did not testify. Respondent called numerous witnesses who testified and introduced exhibits. The 1st PCR Court had the opportunity to view and hear the witnesses who testified in person, and make a credibility assessment with regard to each witness and the evidence introduced.

The Amended Order of Dismissal

On December 18, 2012, after reviewing the record, including the plea/sentencing transcript and exhibits, the evidence submitted in the PCR case, including the testimony of each witness and the exhibits, and after making a credibility assessment regarding the witnesses and evidence introduced, the 1st PCR Court found the application to be without merit and denied and dismissed the application and all grounds with prejudice in an Order of Dismissal, filed January 8, 2013. The State filed a Rule 59, SCRPC, Motion to Alter or Amend 1 of the findings in the Order.³ On February 11, 2013, the PCR Court heard argument on that Motion. After careful consideration of the entire record, the arguments of the parties, and after careful reconsideration of the law and all of the evidence and testimony in the case, the Court granted the State's Rule 59 Motion as to that 1 portion of the Order and entered an Amended Order of Dismissal ("AOD") denying and dismissing all grounds as the final order. Mahdi's Rule 59 Motion was denied.

The Appeal from the Denial of PCR

Mahdi appealed the denial of his 1st PCR application (2009-CP-09-164) by way of a Petition for Writ of Certiorari [a merits petition] filed in this Court. Mahdi was represented by Seth Farber, Brandon Duke, and Teresa Norris, Esquires. Those 3 PCR appellate attorneys, including 1 of Mahdi's PCR attorneys, chose to raise only 1 issue from the denial of PCR by the 1st PCR Court:

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?

³ 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 did not object to the Court's finding Mahdi had not established prejudice under the same ground.

(P.W.C., p. 2). The State filed a Return to the Petition.⁴ Mahdi filed a Reply. On September 8, 2016, this Court denied certiorari. The Remittitur was issued on September 26, 2016.

The Petition for Writ of Certiorari in the U.S. Supreme Court

Mahdi appealed from this Court's denial of certiorari to the U.S. Supreme Court by way of a Petition for Writ of Certiorari raising the same issue. Respondent filed a Brief in Opposition. Mahdi filed a Reply. On February 21, 2017, the Supreme Court denied certiorari.

The Federal Habeas Petition

Mahdi filed for a stay of execution in the U.S. District Court to file a federal habeas petition (Mahdi v. Stirling, C/A No 16-mc-402 (D.S.C. filed Oct. 5, 2016)). A 90 day stay was granted. Counsel was appointed. Mahdi filed a place-holder federal habeas petition. Mahdi was granted a further stay until September of 2017. Mahdi then filed an amended federal habeas petition, and Respondent filed a Return and Motion for Summary Judgment. In the federal habeas petition, Mahdi alleges grounds previously raised in state court but which were denied and the unexhausted federal constitutional claims raised in his 2nd or successive PCR application and will attempt to raise those claims pursuant to Martinez v. Ryan, 132 S.Ct. 1309 (2012).

The 2nd Successive PCR Action

While his federal stay was pending, Mahdi filed a 2nd or successive PCR application through federal habeas counsel on January 10, 2017. (C.A. #2017-CP-09-0004). In the application, Mahdi raised direct appeal grounds, ineffective assistance of plea/sentencing counsel ("IAC") grounds, a claim he is entitled to an Austin⁵ appeal of issues not raised by PCR appellate

⁴ As set forth in Respondent's Return to the Petition for Writ of Certiorari, Mahdi narrowed the issues raised on appeal from PCR to prevent the discussion of overwhelming evidence in aggravation that came out at PCR through PCR witnesses including 2 additional homicides in Virginia and Mahdi's DJJ disciplinary record in Virginia.

⁵ Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

counsel in his 1st PCR appeal, and he requested rulings by the 2nd PCR Court on any issues abandoned at his 1st PCR hearing by 1st PCR counsel. Specifically, in his 2nd or successive PCR Application, Mahdi asserted the following claims:

10(a)/11(a) S.C. Code Ann. Section 16-3-20, which requires a judge to sentence the defendant following a guilty plea, violates the Sixth Amendment of the United States Constitution, which is applicable to the states through the Fourteenth Amendment, because a judge rather than a jury finds facts required for imposition of a death sentence. Hurst v. Florida, ___ U.S. ___, 136 S.Ct. 616 (2016). S.C. Code Ann. Section 16-3-20, as written by the General Assembly and construed by the South Carolina Supreme Court, denied Mr. Mahdi his right to have a jury determine the existence of aggravating circumstances, consider statutory and non-statutory mitigation circumstances, and determine whether a death sentence should be imposed.

10(b)/11(b) Mr. Mahdi was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Sections 3 and 14 of the South Carolina Constitution—during the guilt or innocence phase of his capital trial because his trial counsel advised him that the guilty plea would be considered as mitigation. Trial counsel advised Mr. Mahdi that pleading guilty to murder, second-degree burglary, and grand larceny would be considered mitigation. Relying on that advice, Mr. Mahdi pleaded guilty. Judge Newman did not consider the guilty plea as mitigation. Judge Newman sentenced Mr. Mahdi to death.

10(c)/11(c) Pursuant to Austin v. State, 305 S.C. 453, 409 S.E. 395 (1991), Mr. Mahdi seeks an appeal on the following grounds for relief and supporting facts raised in the initial application for post-conviction relief (Case No. 2009-CP-09-164), as amended:

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

- Trial counsel failed to object when the trial judge improperly based his decision to impose a death sentence on petitioner's assertion of his right to a jury trial, thereby effectively punishing him for exercising this constitutional right. Counsel's deficient performance in failing to preserve the issue for appellate review deprived Petitioner of the right to effective assistance of counsel.
- Counsel failed to adequately advise Applicant of the advantages of jury sentencing, which resulted in the Applicant pleading guilty and purporting to waive his right to jury sentencing.
- Counsel failed to adequately investigate, develop, and present mitigation evidence concerning Applicant's family, social, institutional, and mental health history.
- Counsel failed to assert that Applicant's death sentence violates the Cruel and

Unusual Punishment Clause of the Eighth Amendment to the United States Constitution due to Applicant's developmental deficits.

- Counsel failed to assert that S.C. Code Ann. Section 16-3-20 is unconstitutional in that it automatically precludes jury sentencing following a guilty plea in violation of the Sixth, Eighth, and Fourteenth Amendments as addressed in Ring v. Arizona, 536 U.S. 584 (2001). Moreover, this statute forces a capital defendant to choose between his right to a jury trial and his right to present mitigating evidence namely that he has accepted responsibility for the crime. While this issue has been rejected by state courts, *see State v. Downs*, 361 S.C. 141, 604 S.E.2d 377 (2004), it has not been reviewed by federal courts and counsel were thus ineffective in failing to adequately preserve the record for subsequent litigation.

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

- At the time of the offenses, Applicant was developmentally impaired such that he had the "mental age" of a juvenile due to his atrocious background of deprivation, neglect, abuse, and institutionalization. The Cruel and Unusual Punishment Clause precludes the infliction of the death penalty upon him, just as it precludes execution of those under the age of 18 at the time of the offenses, because of these grave developmental deficits. *See Roper v. Simmons*, 543 U.S. 551 (2005).⁶

Prior post-conviction relief counsel abandoned numerous grounds for relief that were included in Mr. Mahdi's application for post-conviction relief.

10(d)/11(d) If the State contends that any of the grounds for relief identified in paragraph 10(c) were not ruled upon by the initial post-conviction relief judge, then Mr. Mahdi seeks a ruling so that he may appeal. In prior pleadings, the State has contended that prior post-conviction relief counsel abandoned grounds for relief at the evidentiary hearing.

(See C.A. # 2017-CP-09-00004, pp. 2-4).

This Court appointed the Honorable Doyet Early, III. ("the 2nd PCR Court") to hear this application and all motions regarding the same. Respondent filed a Return and Motion to Dismiss this PCR action as it was: time barred; improperly successive; barred by laches; several

⁶ Respondent believes Mahdi is not raising this ground as a free-standing ground but under his *Austin* appeal claim as a ground PCR appellate counsel should have raised in his PCR appeal, because this free-standing claim as well as an IAC claim asserting the same ground was decided by the 1st PCR Court. (AOD, pp. 126-31, 123-26). If he is asserting in his 2nd PCR as a free-standing claim, the claim would obviously be barred, by res judicata, collateral estoppel, judicial estoppel, and "the law of the case."

grounds are barred by res judicata, collateral estoppel, judicial estoppel, and the law of the case; the direct appeal grounds are not cognizable on PCR; and, finally, the direct appeal grounds have no merit based on extant case law and the Record in this case. For all of these reasons, Respondent asserted the application must be denied and dismissed with prejudice pursuant to S.C. Code Ann. § 17-27-45 (the PCR statute of limitations); § 17-27-90 (the successiveness bar) and § 17-27-70 (b)(summary dismissal may be allowed “[w]hen a court is satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings...”) & (c)(summary disposition is allowed “when it appears from the pleadings, depositions, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.”). *See also* Rule 56, SCRCP (defining the standard for granting a motion for summary judgment).⁷

In support of its Motion, Respondent attached the following relevant documents to its Motion: (1) the Amended Order of Dismissal denying and dismissing the 1st PCR action; (2) the Order Denying Mahdi’s Rule 59(e) Motion in the 1st PCR Action; (3) the Petition for Writ of Certiorari in the PCR Appeal; (4) the Return to Petition for Writ of Certiorari in the PCR Appeal; (5) the Order of this Court denying certiorari in the PCR appeal; (6) the Remittitur in the PCR Appeal; (7) the Petition for Writ of Certiorari to the U.S. Supreme Court in the PCR Appeal; (8) the Brief in Opposition in the U.S. Supreme Court in the PCR Appeal; (9) the Reply Brief in the

⁷ Mahdi contended below and still contends the State moved to dismiss this 2nd or successive application pursuant to Rule 12(b)(6), SCRCP; however, Respondent moved to dismiss this application pursuant to §§ 17-27-45 (the PCR statute of limitations); 17-27-90 (the successiveness bar) and 17-27-70(b) & (c). Section 17-27-70(c) provides the same standard for dismissal of a PCR application as a motion for summary judgment under Rule 56, SCRCP. Further, Mahdi admits the SCRCP are applicable to PCR actions. So, Rule 56, SCRCP would be just as applicable as Rule 12(b)(6). Further, Rule 71.1(a), SCRCP, provides where there is an applicable PCR statute, the statute controls over the Rule of Procedure.

U.S. Supreme Court in the PCR Appeal; (10) the Order of the U.S. Supreme Court denying certiorari in the PCR Appeal, and (11) Mahdi v. State, *supra* [the Direct Appeal Opinion].

Mahdi filed a Response opposing Respondent's Motion. Respondent filed a detailed Reply to that Response. On April 13, 2017, the 2nd PCR Court notified counsel for both Mahdi and the State that a hearing would be held on the State's motion on May 1, 2017 at 10:30 a.m. at the Bamberg County Courthouse.

The Hearing

On May 1, 2017, the 2nd PCR Court held the hearing on Respondent's motion to dismiss. Present were Mahdi's federal habeas counsel E. Charles Grose Jr. and John L. Warren, III. Respondent was represented by undersigned counsel. Mahdi waived his presence at the hearing.⁸ No evidence or affidavits were submitted by either party at the motion hearing. The Court heard argument from both parties and considered the legal authority submitted at the hearing. On June 6, 2017, the Court notified counsel for both parties by e-mail that: (1) pursuant to § 17-25-45, the Court found the current 2nd PCR application to be outside the statute of limitations for PCR actions; (2) pursuant to § 17-27-90, the current application was improperly successive under South Carolina law; (3) pursuant to § 17-27-70(b) summary disposition was proper and is allowed under the terms of the statute; and, (4) based on a review of the pleadings, past procedural history, memos, briefs, applicable case law, and arguments of counsel, there was no genuine issue of material fact and Respondent was entitled to judgment as a matter of law pursuant to § 17-27-70(c) and Rule 56, SCRPC. The Court directed Respondent to submit a proposed Order of Dismissal consistent with the Court's findings using its previous briefs

⁸ On April 12, 2017, counsel for Mahdi notified the Court by e-mail that after conferring with Mahdi, Mahdi waived his presence at the hearing and the hearing could proceed in his absence. Counsel for Mahdi also agreed the hearing on the State's motion could proceed in Mahdi's absence and notified the Court of the same by e-mail.

submitted to the Court as an outline for the Order. The proposed Order consistent with the Court's direction was submitted to the Court and opposing counsel; and, the 2nd PCR Court then issued its Order of Dismissal on June 29, 2017. (Attached).

The Order of Dismissal

After consideration of Respondent's Motion, Mahdi's response, Respondent's Reply, and the arguments of counsel at the hearing on the motion and the legal authority submitted, the 2nd PCR Court found and concluded this application must be denied and dismissed with prejudice for the following reasons: (1) the application was time barred under the South Carolina statute of limitations for PCR actions (§ 17-27-45); (2) the application was improperly successive under South Carolina law (§ 17-27-90); (3) based on the pleadings and the record Respondent was entitled to judgment as a matter of law (§ 17-27-70(b)); and, (4) based on a review of the pleadings, past procedural history, memos, briefs, applicable case law, and arguments of counsel, there was no genuine issue of material fact and Respondent was entitled judgment as a matter of law (§ 17-27-70(c) and/or Rule 56, SCRPC).

Specifically, the 2nd PCR Court found Hurst v. Florida 136 S.Ct. 616 (2016) did not create a new rule of constitutional law or one retroactive and applicable to Mahdi, and Lafler v. Cooper, 132 S.Ct. 1376 (2012) and Missouri v. Frye, 132 S.Ct. 1399 (2012), did not create new rules of constitutional law retroactive and applicable to Mahdi. Therefore, Mahdi could not rely on those Supreme Court decisions to overcome the statute of limitations or the successiveness bars to this application. And, the 2nd PCR Court found Mahdi had not demonstrated there is evidence of material facts not previously presented and heard that required vacation of his conviction and sentence as those facts were within Mahdi's knowledge and/or could have been discovered or presented at his 1st PCR hearing. The 2nd PCR Court further found that Mahdi's

direct appeal grounds were not cognizable in PCR and were barred by the legal doctrines of res judicata, collateral estoppel, judicial estoppel and the law of the case as they had been decided by the 1st PCR Court and not appealed. Finally, the 2nd PCR Court found Mahdi's claim for an Austin appeal had to be dismissed because Mahdi had already had an appeal from the denial of his 1st PCR Application to this Court and the United States Supreme Court.

Mahdi filed a Rule 59(e), SCRCF, Motion to Alter or Amend or to Reconsider. The State filed a detailed Response to that motion. On October 10, 2017, the 2nd PCR Court denied the Rule 59(e) motion by written Order. (Attached).

Mahdi has filed a Rule 243(C), SCACR explanation wishing to appeal from the 2nd PCR Court's Order of Dismissal.

ARGUMENT

There is no merit to Mahdi's Rule 243(c), SCACR, Explanation and this appeal should be dismissed.

As the 2nd PCR Court correctly found, Mahdi has already had a full round of PCR remedies prior to the instant action. Mahdi's 2009 PCR action challenging his guilty plea convictions and sentence of death [raising numerous grounds] was denied and dismissed with prejudice after a full evidentiary (PCR) merits hearing by the 1st PCR Court. (Amended Order of Dismissal ("AOD"), C.A. # 2009-CP-09-164). (Attached). Mahdi's Rule 59, SCRCF, Motion to Alter or Amend that Order was also denied.

During the pendency of his 2009 PCR action and at the PCR merits hearing, Mahdi was represented by **2 statutorily qualified PCR counsel**, Teresa Norris and Robert Lominack. S.C. Code Ann. § 17-27-160(B) (identifying requisite qualifications for counsel appointed to represent an indigent, capital PCR applicant). *Compare Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29 (2016). Mahdi conceded at the motion hearing in the present action that Norris and

Lominack were statutorily qualified PCR counsel pursuant to § 17-27-160(B). In his Rule 59 Motion, Mahdi admitted he is not alleging a ground for relief in his 2nd PCR action that his 1st PCR counsel were not statutorily qualified.⁹ Mahdi has not submitted an affidavit of either PCR counsel asserting they were not statutorily qualified to represent him in his 1st PCR action. *Compare Robertson, supra.*

Mahdi appealed the denial of his 1st PCR action to this Court by way of a Petition for Writ of Certiorari [a merits petition]. Mahdi was represented by 3 PCR appellate attorneys. Respondent filed a responsive brief. This Court denied certiorari. The Remittitur was issued. Mahdi filed a Petition for Writ of Certiorari in the U.S. Supreme Court. The State filed a Brief in Opposition. Mahdi filed a Reply. The U.S. Supreme Court denied certiorari. As a result, Mahdi has had 1 complete round of PCR remedies including an appeal from the denial of his 1st PCR action to this Court and the U.S. Supreme Court.

On December 14, 2016, this Court decided Robertson v. State, 418 S.C. 505, 795 S.E.2d 29. This Court ruled Martinez v. Ryan, 132 S.Ct. 1309, was not a reason to allow the filing of a 2nd or successive PCR application in a capital case. The Court also ruled the fact a capital PCR applicant was not represented by statutorily qualified PCR counsel at his 1st PCR was a sufficient reason to allow the filing of a 2nd or successive PCR application. The Court remanded the case to the Circuit Court solely to determine: (1) if 1st PCR counsel were statutorily qualified or not; and, (2) if not statutorily qualified, whether Robertson was prejudiced by the fact that his 1st PCR attorneys were not statutorily qualified. Id. Subsequent to Robertson, Mahdi filed this 2nd or successive PCR action. Respondent filed its Motion to Dismiss relying on Robertson and other South Carolina case law asserting this application is time barred and improperly successive.

⁹(See Successive Application for PCR, Amended Successive Application for PCR).

The PCR statute provides both a time limitation and a bar to successive applications. S.C. Code Ann. §§17-27-45 (A); 17-27-90; Wade v. State, 348 S.C. 255, 264, 559 S.E.2d 843, 847 (2002) (“An individual under PCR effectively is granted one chance to argue for relief and must do so within a year of his final appeal”).

The time bar or PCR Statute of Limitations, §17-27-45(A) reads as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

Id. The PCR Statute of Limitations, § 17-27-45, also provides exceptions to the 1 year time bar:

When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.

If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

S.C. Code Ann. § 17-27-45(B) & (C).

In addition to the statutory provisions listed, this Court has made specific exceptions, as well. To ensure 1 full round of remedies, the Court has found the 1 year limitations period does not apply; (1) where an applicant was denied a direct appeal due to ineffective assistance, *see Wilson v. State*, 348 S.C. 215, 218, 559 S.E.2d 581, 582-83 (2002); and (2) where an applicant was denied an appeal from denial of post-conviction relief, *see Odom v. State*, 337 S.C. 256, 263, 523 S.E.2d 753, 756 (1999). Mahdi cannot claim any of these exceptions.

As will be shown, Mahdi is time barred by over 6 years and he does not fall under any of the exceptions. And, he had a direct appeal *and* an appeal from the denial of his 1st PCR action. Thus, neither the statutory exceptions nor the Court's exceptions apply to the instant action. This action, consequently, is not timely filed, and is barred by the South Carolina statute of limitations for PCR actions.

Further, as the 2nd PCR Court correctly found, the present application is barred as improperly successive. *Cf. Graham v. State*, 378 S.C. 1, 661 S.E.2d 337 (2008) (error in applying statute of limitations in regard to claim of denial of right to appeal, but finding claim barred as successive). Successive applications are historically disfavored, but are not categorically disallowed. *See S.C. Code Ann.* §17-27-45 (B) and (C) (exceptions to statute of limitations and successiveness bar include applications based upon a new retroactively applied substantive standard in criminal law, or new "evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence" if filed within one-year "after the date when the facts could have been ascertained by the exercise of reasonable diligence"); *Odom v. State*, 337 S.C. 256, 523 S.E.2d 753 (1999)(belated review of appellate issues in an Austin appeal or "rare procedural circumstances" are reasons to allow successive actions). As will be shown, none of the exceptions, however, can be met with regard to Mahdi's new allegations. Mahdi's prior 1st PCR counsel could have discovered the facts and claims asserted in the present application at the time of Mahdi's 1st PCR. And, as previously discussed, Mahdi is not entitled to an Austin appeal under South Carolina law because Mahdi had an appeal from the denial of his 1st PCR to this Court and to the United States Supreme Court.

“In order to be entitled to a successive PCR application, the applicant must establish that the grounds raised in the subsequent application could not have been raised in the previous application.” Graham v. State, 378 S.C. 1, 3, 661 S.E.2d 337, 338 (2008). Mahdi cannot do so.

To the extent Mahdi would claim PCR counsel was ineffective in failing to raise these claims, it is well-established that such an assertion alone is not sufficient cause and such an argument does not allow for another “bite at the apple.” Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991); Robertson v. State, 418 S.C. 505, 795 S.E.2d 29 (2016).

Further, to the extent Mahdi is seeking to establish cause to excuse the default of previously unexhausted claims in his federal litigation, he has mixed concepts. This Court so found in Kelly v. State, 404 S.C. 365, 745 S.E.2d 377 (2013). Accord Robertson, *supra*. In Kelly, a PCR applicant attempted to rely on U.S. Supreme Court precedent establishing a narrow exception within federal habeas corpus litigation as announced in Martinez v. Ryan, 132 S.Ct. 1309 to avoid the state successiveness bar. This Court rejected the argument, noting a great agreement among the States in similarly interpreting the exception:

Like other states, we hereby recognize that the holding in Martinez is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions.

Kelly, 404 S.C. at 366, 745 S.E.2d at 378 (collecting cases). The Court reaffirmed its holding in Kelly in Robertson. Thus, the applicability of Martinez is limited to federal habeas corpus actions. Any reliance Mahdi should make on same to avoid the state successiveness and time bars is misplaced. Robertson v. State.

Again, it has long been a settled principle in our jurisprudence that ineffective assistance of PCR counsel alone does not demonstrate sufficient reason as to why available claims were not asserted. This Court has noted the dangers of a contrary position, specifically in capital cases:

Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice. At some juncture judicial review must stop, with only the very rarest of exceptions, when the system has simply failed a defendant and where to continue the defendant's imprisonment without review would amount to a gross miscarriage of justice. See Butler v. State, 397 S.E.2d 87 (S.C.1990). We can envision successive PCR applications filed for the purpose of delaying a just execution in a capital case, as well as other abuses of the reviewing system Aice urges that we establish. For these reasons, we hold the contention that prior PCR counsel was ineffective is not *per se* a "sufficient reason" allowing for a successive PCR application under § 17-27-90. This Court has implied such a holding in the past. See Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980) (applicant pointed to his attorney's "inadequate" performance; held not a "sufficient reason" warranting a successive application).

Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991).

Mahdi fails to argue any valid basis for exercise of a "rare exception" of allowing a successive application. See e.g. Odom v. State, 337 S.C. 256, 523 S.E.2d 753 (1999)(permitting successive PCR application where applicant did not receive an appeal from the dismissal of his 1st PCR Application or any appellate counsel assistance in seeking an appeal); Washington v. State, 324 S.C. 232, 478 S.E.2d 833 (1996)(permitting successive PCR application where multiple procedural irregularities, including the denial of a direct appeal, prohibited applicant the benefit of due process); Carter v. State, 293 S.C. 528, 362 S.E.2d 20 (1987)(authorizing a successive PCR application where the applicant did not have PCR counsel that differed from his trial counsel); Case v. State, 277 S.C. 474, 289 S.E.2d 413 (1982)(allowing successive PCR application where applicant's first PCR application was dismissed without assistance of legal counsel and without a hearing). Successive capital PCR applications filed in an attempt to exhaust previously unexhausted claims are no exception to the rule barring successive applications. Robertson v. State, 418 S.C. 505, 795 S.E.2d 29 (2016).

Further, in the present case, Mahdi was represented at his 1st PCR by Norris and Lominack, both **statutorily qualified PCR counsel**. See S.C. Code Ann. § 17-27-160(B) (2014).

Mahdi does not even contend his 1st PCR attorneys were not statutorily qualified. *Compare Robertson*, 418 S.C. 505, 795 S.E.2d 29. As a result, there is no merit to this successive PCR application. *Id.* All of Mahdi's allegations in his 2nd PCR Application, including those alleging ineffective assistance of counsel, are improperly successive.

South Carolina's bar to raising direct appeal issues on PCR does not provide exception to the successiveness bar either. *Cf. Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) ("Errors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings"); *Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) ("The *Simmons* rule gives effect to the Legislature's clear intent that the post-conviction relief procedure is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal.").

The 2nd PCR Application is Time Barred

This present 2nd PCR Application is time barred under the S.C. Statute of Limitations for PCR actions and must be dismissed with prejudice. S.C. Code Ann. § 17-27-45(A). Mahdi was convicted on November 30, 2006 and sentenced to death on December 8, 2006. The final decision in the appeal was issued by this Court on June 15, 2009. *Mahdi v. State*, 383 S.C. 135, 678 S.E.2d 807. The Remittitur was issued on **July 1, 2009**. Mahdi was therefore required to file this application on or before **July 1, 2010**. S.C. Code Ann. § 17-27-45(A). The current application was filed on January 10, 2017, which was **more than six (6) years after the statutory filing period expired**.

To overcome the time bar, Mahdi must show he fits under either § 17-27-45 (B) or (C) which state:

When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States

or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.

If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

Id. Mahdi cannot show he fits under either § 17-27-45 (B) or (C). Based on the undisputed facts and the law, all of Mahdi's claims raised in this 2nd PCR Application, except his so-called "Austin" claim, could have been raised timely **at his plea/sentencing** before Judge Newman *or at his 1st PCR hearing*. And, Mahdi is not entitled to an Austin appeal because he has already had an appeal from the denial of his 1st PCR to this Court and to the U.S. Supreme Court.

Hurst v. Florida does not overcome the time or successiveness bars

Mahdi relies first on Hurst v. Florida, 136 S.Ct. 616 (2016), in an effort to overcome the time and successiveness bars. In his 2nd or successive PCR Application, Mahdi alleges a free-standing direct appeal ground, specifically he challenges the constitutionality of South Carolina's death penalty statute, § 16-3-20(B), alleging it is unconstitutional because it requires judge sentencing after a guilty plea. **However, Mahdi has not established a new rule of constitutional law or one to be retroactively applied and applicable to him.** S.C. Code Ann. § 17-27-45 (B). And, nothing supports the presence of an "undiscoverable" fact either at plea/sentencing in **2006** or the prior PCR action in **2009**. S.C. Code Ann. § 17-27-45(C). In fact, the 1st PCR Court decided this issue in the 1st PCR action and found it had no merit. (AOD,

123-33).¹⁰

Mahdi alleges § 16-3-20(B) is unconstitutional in that it automatically precludes jury sentencing following a guilty plea. In making this argument, Mahdi asserts Hurst, *supra*, announced a new rule of constitutional law retroactive and applicable to him so he should be allowed to file this successive and time barred PCR Application. However, Hurst did not announce a new rule of constitutional law or one retroactive to Mahdi but was an application of Ring v. Arizona, 536 U.S. 584 (2002), and Apprendi v. New Jersey, 530 U.S. 466 (2000), to Florida's capital sentencing scheme, where the defendant exercised his right to jury fact finding at sentencing. Hurst, 136 S.Ct. 616; Runyon v. United States, 228 F.Supp.3d 569 (E.D. Va. 2017); Lawlor v. Zook, No. 2:15CV113, 2017 WL 2603521 (E.D. Va. June 15, 2017)(citations omitted); Boggs v. Ryan, No. CV-14-02165-PHX-GMS, 2017 WL 67522 (D. Ariz. Jan. 6, 2017); Garza v. Ryan, No. CV-14-01901-PHX-SRB, 2017 WL 105983 (D.Ariz. Jan. 11, 2017); Lambrix v. Sec'y. Florida Dep't of Corr., 851 F.3d 1158, 1165, n. 2 (11th Cir. 2017); In re Jones, 847 F.2d 1293, 1295 (10th Cir. 2017); United States v. Bazemore, 839 F.3d 379 (5th Cir. 2016); In re Bohannon v. State, 222 So.3d 525 (Ala. 2016); Russell v. State, ___ So.3d ___, CR-10-1910, 2016 WL 7322331 (Ala. Crim. App. Dec. 16, 2016); Ex parte State v. Billups, 223 So.3d 954 (Ala. Crim. App. 2016).

Additionally, Hurst only applied to Florida's capital sentencing scheme, which is different than South Carolina's. State v. Downs, 361 S.C. 141, 146, 604 S.E.2d 377, 380 (2004).

¹⁰ The 1st PCR Court decided this issue under a claim of IAC but found there was no merit to the underlying constitutional challenge to § 16-3-20(B) citing to this Courts' numerous decisions on this issue. (AOD, pp. 19, 131-32 attached). As a result, this Ground **is also barred** by the doctrines of *res judicata*, *judicial estoppel* and *collateral estoppel*. See generally Lifshultz Fast Frieight, Inc. v. Haynsworth, Marion, McKay & Guerard, 335 S.C. 244, 513 S.E.2d 96 (1999).

Finally, Hurst is not even applicable to Mahdi because Mahdi pled guilty and intentionally waived his right to jury sentencing **by the jury he had selected and impaneled** so he could be sentenced by Judge Newman. Mullens v. State, 197 So.3d 16, 38 (Fla. 2016)(*citing State v. Downs*, 361 S.C. 141, 146, 604 S.E.2d 377, 380 (2004)), *cert. denied* 2017 W.L. 69535, U.S. Fla, January 9, 2017; Twilegar v. State, ___ So.3d ___, 2017 WL 4985519 (Fla. Nov. 2, 2017)(*Not yet released for publication*).

The sentencing method at issue in Hurst found unconstitutional allowed for the jury to hear the facts but make only an advisory recommendation to the judge **when the defendant exercised his right to jury fact finding at sentencing**, and, the trial judge in turn, could reject that recommendation, and made the critical findings to impose death. 136 S.Ct. at 620. Hurst is not a new rule of constitutional law and does not implicate nor address the voluntary waiver of the right to a trial by jury on guilt and sentencing encompassed when a defendant pleads guilty in a capital case under South Carolina's capital sentencing scheme. Id. 136 S.Ct. at 620-22; Downs, 361 S.C. at 146, 604 S.E.2d at 380.¹¹ Hurst found Florida's capital sentencing scheme

¹¹ See Mosely v. State, 209 So.3d 1248 (Fla. 2016)(recognizing in Hurst, the Supreme Court specifically relied, not on new jurisprudential developments in the 6th Amendment case law, but rather on its 2002 opinion in Ring and determined the analysis of Ring previously applied to Arizona's sentencing scheme also applied equally to Florida's [*quoting Hurst*, 136 S.Ct. at 621-22]; and, therefore the Florida Supreme Court applied the holding in Hurst retroactively to defendants who exercised their right to jury fact finding at sentencing whose sentence became final after Ring, since Florida's sentencing scheme has been unconstitutional since Ring for those who exercised their right to a jury determination; however, the ruling in Hurst was not applicable nor would it be retroactively applied to those defendants who waived their right to a jury determination [*citing Mullens v. State*, 197 So.3d 16 (Fla. 2016)]. Subsequent to Hurst and Mullens, the Florida Supreme Court has consistently held Hurst is not applicable to a defendant who waives his right to jury fact finding or a jury in sentencing. Twilegar v. State, ___ So.3d ___, 2017 WL 4985519 (Fla. Nov. 2, 2017)(*Not yet released for publication*); Brandt v. State, 197 So.3d 1051, 1079 (Fla. 2016); Knight v. State, 211 So.3d 1 (Fla. 2016); Robertson v. State, 2016 W.L. 7043020 (Fla. Dec. 1, 2016)(*Unpublished*); Wright v. State, 213 So.3d 881 (Fla. 2017), *vacated on other grounds Wright v. Florida*, 2017 WL 3480760 (U.S. 2017); Davis v. State, 207 So.3d 177 (Fla. 2016).

violated the holdings of Ring and Apprendi when the defendant exercised his right to jury fact finding at sentencing, because the jury's recommendation was only an advisory opinion, which the trial judge could reject. Id. In summary, the Supreme Court found that when a defendant exercised his right to jury fact finding at sentencing under Florida's capital sentencing scheme, the jury and only the jury could determine those facts necessary for the defendant to be sentenced to death. Hurst, supra.

Subsequent to the decision in Hurst, the Supreme Court of Florida has considered the same argument in regard to their statute as raised here by Mahdi. That Court found:

During the pendency of Mullen's appeal, the United States Supreme Court issued its decision in Hurst v. Florida, ___ U.S. ___, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016). The Court held that Florida's capital sentencing scheme violated the Sixth Amendment under Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Following that decision, Mullens requested leave to file supplemental briefing to address the effects of Hurst on his appeal, which we granted.

We need not extensively consider the implications of Hurst to determine that Mullens cannot avail himself of relief pursuant to Hurst. Hurst said nothing about whether a defendant would waive the Sixth Amendment right to jury fact-finding in sentencing procedures as recognized by Ring and Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). In light of the fact that Mullens waived this right, his argument that his sentence must be commuted to life imprisonmentfails.

Mullens v. State, 197 So.3d 16, 38 (Fla. 2016)(citing State v. Downs, 361 S.C. 141, 146, 604 S.E.2d 377, 380 (2004)), cert. denied 2017 W.L. 69535, U.S. Fla, January 9, 2017. Accord Twilegar v. State, ___ So.3d ___, 2017 WL 4985519 (Fla. Nov. 2, 2017)(Not yet released for publication); Brandt v. State, 197 So.3d 1051, 1079 (Fla. 2016); Knight v. State, 211 So.3d 1 (Fla. 2016); Robertson v. State, 2016 W.L. 7043020 (Fla. Dec. 1, 2016)(Unpublished); Wright v. State, 213 So.3d 881 (Fla. 2017), vacated on other grounds; Davis v. State, 207 So.3d 177 (Fla. 2016); Mosely v. State, 209 So.3d 1248 (Fla. 2016).

Similarly, this Court held in State v. Downs, 361 S.C. 141, 604 S.E.2d 377 (2004):

The capital-sentencing procedure invalidated in Ring does not exist in South Carolina. Arizona's statute required the judge to factually determine whether there existed an aggravating circumstance supporting the death penalty regardless whether the judge or a jury had determined guilt. Ariz. Rev. Stat. Section 13-703(C) (2001) (amended 2002); Ring 536 U.S. at 597, 122 S.Ct. at 2437, 153 L.Ed.2d at 569. In South Carolina conversely, a defendant convicted by a jury can be sentenced to death only if the jury also finds an aggravating circumstance and recommends the death penalty. S.C. Code Ann. Section 16-3-20(B) (2003); Sheppard v. State, 357 S.C. 646, 652, 594 S.E.2d 462, 466 (2004).

In any event, Ring did not involve jury-trial waivers and is not implicated when a defendant pleads guilty. Other courts have also reached this conclusion. See e.g. Leone v. Indiana, 797 N.E.2d 743, 749-50 (Ind. 2003); Colwell v. Nevada, 118 Nev. 8907, 59 P.3d 463, 473-74 (2003); Illinois v. Altom, 338 Ill. App.3d 355, 362, 272 Ill. Dec. 751, 788 N.E.2d 55, 61 (5 Dist.), *app. denied* 204 Ill.2d 663, 275 Ill. Dec. 77, 792 N.E.2d 308 (2003).

Downs, 361 S.C. at 146, 604 S.E.2d at 380.

The holding in Hurst is simply not a new rule of constitutional law as a Ring and/or Apprendi challenge could have been raised at Mahdi's plea or sentencing in 2006, and Hurst is not even applicable to Mahdi. **Runyon v. United States, 228 F.Supp.3d 569 (E.D. Va. 2017)**(Hurst does not represent an intervening change in the law set forth in Ring with respect to the issue raised on appeal); **Lawlor v. Zook, No. 2:15CV113, 2017 WL 2603521 (E.D. Va. June 15, 2017)**(Hurst does not establish a right "newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review")(citations omitted); **Boggs v. Ryan, CV-14-02165-PHX-GMS, 2017 WL 67522 (D. Ariz. Jan. 6, 2017)**(Hurst is not a change in the law, the U.S. Supreme Court simply applied Ring to Florida's capital sentencing scheme); **Garza v. Ryan, No. CV-14-01901-PHX-SRB, 2017 WL 105983 (D.Ariz. Jan. 11, 2017)**(Hurst is not a significant change in the law; the Supreme Court applied Ring to Florida's sentencing scheme, and Hurst is not retroactive because the Supreme Court held that Ring announced a new

procedural rule that does not apply retroactively to cases already final on direct review); **Lambrix v. Sec’y. Florida Dep’t of Corr.**, 851 F.3d 1158, 1165, n. 2 (11th Cir. 2017)(“[U]nder federal law Hurst like Ring, is not retroactively applicable on collateral review.”); **In re Jones**, 847 F.2d 1293, 1295 (10th Cir. 2017)(“The Supreme Court has not held that its decision in Hurst is retroactively applicable to cases on collateral review.”); **United States v. Bazemore**, 839 F.3d 379 (5th Cir. 2016)(Hurst does not provide a new basis for challenging defendant’s sentence; defendant could have brought an Apprendi challenge in his direct appeal); **In re Bohannon v. State**, 222 So.3d 525 (Ala. 2016)(Hurst was based on application, not an expansion, of Apprendi and Ring); **Russell v. State**, ___ So.3d ___, CR-10-1910, 2016 WL 7322331 (Ala. Crim. App. Dec. 16, 2016)(Hurst was based on 2 cases: Apprendi and Ring)(*Not yet released for publication*); **Ex parte State v. Billups**, 223 So.3d 954 (Ala. Crim. App. 2016)(The Supreme Court in Hurst did nothing more than apply its previous holdings in Apprendi and Ring to Florida’s capital sentencing scheme; it did not announce a new rule of constitutional law, nor did it expand its holdings in Apprendi and Ring.)¹²

Further, Hurst is only applicable to those sentenced under Florida’s sentencing scheme or one like it, which is different than South Carolina’s. Downs. And, it is only applicable to those who exercised their right to a jury determination at sentencing under Florida’s capital sentencing

¹² Mahdi also argues Blakely v. Washington, 542 U.S. 296 (2004). However, Mahdi ignores he could have raised a Blakely challenge at his guilty plea/sentencing in 2006, but he did not. He also could have raised an IAC claim at his 1st PCR in 2009 relying on Blakely, however, he did not. As a result, any such claim is time barred and improperly successive. Furthermore, Blakely would have no application to Mahdi. As previously stated, and as will be shown, Mahdi did not want to be sentenced by the jury he had selected and impaneled but by Judge Newman, because he felt he had a better chance at a life sentence before Judge Newman. As a result, he pled guilty and waived his right to a jury trial and jury sentencing; and, the jury he had selected and impaneled, but which was not sworn, was dismissed.

scheme or one like it, which Mahdi did not. Simply stated, Hurst is not a new rule of constitutional law entitling Mahdi to relief.

Mahdi argues Hurst shows the law is evolving. As just shown, Mahdi is wrong.

As of the date of this Return, the U.S. Supreme Court has not found § 16-3-20(B) unconstitutional in requiring judge sentencing after entry of a guilty plea in a capital case and waiver of a jury. *See Lewis v. Wheeler*, 609 F.3d 291, 309 (4th Cir. 2010); *see also Nunley v. Bowersox*, 784 F.3d 468, 472 (8th Cir. 2015)(*citing Lewis v. Wheeler* as persuasive). Nor has the Fourth Circuit. In fact, it found Virginia's statute, which is similar to South Carolina's, was not unconstitutional in requiring judge sentencing when a defendant pleads guilty in a capital case. *Lewis v. Wheeler*, 609 F.3d at 309; *see also Nunley v. Bowersox*, 784 F.3d at 472 (*citing Lewis* as persuasive). And, as will be discussed more fully below, this Court has repeatedly upheld the constitutionality of § 16-3-20(B) numerous times on direct appeal in response to a Ring or Apprendi challenge. *State v. Inman*, 395 S.C. 539, 555-56, 720 S.E.2d 31, 40 (2011); *State v. Allen*, 386 S.C. 93, 687 S.E.3d 21, 25-26 (2009); *State v. Crisp*, 362 S.C. 412, 608 S.E.2d 429 (2005); *State v. Downs*, 361 S.C. 141, 146, 604 S.E.2d 377, 380 (2004); *State v. Wood*, 362 S.C. 135, 607 S.E.2d 57 (2004).

As a result of all of the above, Mahdi has not shown a new rule of constitutional law. Ring was decided in **2002** and Apprendi was decided in **2000** long before Mahdi's guilty plea/sentencing. In fact, Mahdi raised an IAC claim for failing to raise a Ring or Apprendi challenge to South Carolina's death penalty statute in his 1st PCR. Hurst is not a new rule of constitutional law but was merely an application of the holdings in Ring and Apprendi to Florida's sentencing scheme where the defendant exercised his right to jury fact finding at sentencing. Mahdi could have raised a Ring and/or Apprendi challenge to the death penalty

statute at the time of his guilty plea/sentencing in **2006**. As will be shown below, counsel did not raise a Ring or Apprendi challenge to our death penalty statute at the plea/sentencing because there was no merit to the challenge; and, more importantly, Mahdi did not want jury sentencing but wanted to waive jury sentencing and to be sentenced by Judge Newman.

This Court has repeatedly rejected this constitutional challenge to § 16-3-20(B). State v. Inman, 395 S.C. 539, 555-56, 720 S.E.2d 31, 40 (2011); State v. Allen, 386 S.C. 93, 687 S.E.3d 21, 25-26 (2009)(§ 16-3-20(B) is constitutional because it comports with the right to a jury trial as established by this Court and the U.S. Supreme Court in interpreting the state and federal constitutions); State v. Crisp, 362 S.C. 412, 608 S.E.2d 429 (2005)(allowing appellant to argue against precedent and again rejecting claim that § 16-3-20(B) is unconstitutional); State v. Downs, 361 S.C. 141, 146, 604 S.E.2d 377, 380 (2004)(when a defendant pleads guilty in a capital case, statutorily mandated sentencing by the trial judge does not violate the holding in Ring. Ring did not involve jury trial waivers and is not implicated when a defendant pleads guilty); State v. Wood, 362 S.C. 135, 607 S.E.2d 57 (2004)(finding § 16-3-20(B) constitutional). The decisions in Downs, Wood, and Crisp were all decided before Mahdi entered his guilty pleas. Subsequently, Inman and Allen have reaffirmed the holdings in those cases. In summary, South Carolina's capital sentencing scheme is not unconstitutional under Ring or Apprendi.

Additionally, this Court has repeatedly reversed the plea and death sentence in cases where a defendant was allowed to plead guilty and have jury sentencing in contravention of the statute. State v. Patterson, 278 S.C. 319, 322, 295 S.E.2d 264, 266 (1982), *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); State v. Truesdale, 278 S.C. 368, 369, 296 S.E.2d 528, 529 (1982).

Numerous other federal and state courts considering this same constitutional challenge to similar state statutes have found no merit to it. Lewis v. Wheeler, 609 F.3d 291, 309 (4th Cir. 2010); Nunley v. Bowersox, 784 F.3d 468, 472 (8th Cir. 2015); State v. Nunley, 341 S.W.3d 611, 620 (Mo. 2011); Leon v. State, 797 N.E.2d 743, 750 (Ind. 2003); Byrom v. State, 927 So.2d 709, 728 (Miss. 2006); Mack v. State, 75 P.3d 803, 806 (2003); Colwell v. State, 59 P.3d 463, 474 (Nev. 2002); People v. Altom, 788 N.E.2d 55, 60-61 (Ill. 2003); State v. Ketterer, 855 N.E.2 48, 69 (Ohio 2006); Thacker v. State, 100 P.3d 1052 (OK 2004); Moore v. State, 771 N.E.2d 46 (Ind. 2002). As a result, there is no merit to the claim South Carolina's death penalty statute violates Ring and Appendi.

As set forth in Inman, this Court noted:

Furthermore, even if Inman preserved his challenge to section 16-3-20(B), he specifically abandoned this issue on appeal **as he correctly recognizes that this issue has been decided against his position**. See State v. Allen, 386 S.C. 93, 687 S.E.2d 21 (2009), *cert. denied*, ___ U.S. ___, 130 S.Ct. 3329, 176 L.Ed. 1229 (2010)(noting, in appeal of guilty plea and capital sentence, South Carolina precedent finding that Section 16-3-20 does not violate the Sixth Amendment to the United States Constitution and concluding that it also did not violate the Eighth and Fourteenth Amendments: noting that the statute requires the sentencing judge to consider any mitigating circumstances allowed by law and that a defendant is not precluded from offering evidence of his remorse and acceptance of responsibility); State v. Crisp, 362 S.C. 412, 608 S.E.2d 429 (2005)(adhering to Downs and rejecting claims that section 16-3-20(B) was unconstitutional); State v. Wood, 362 S.C. 135, 607 S.E.2d 57 (2004)(citing Downs and concluding section 16-3-20(B) was constitutional); Downs, 361 S.C. at 146, 604 S.E.2d at 380 (discussing constitutionality of section 16-3-20(B) and finding capital defendant who pleaded guilty waived his right to jury trial on both guilt and sentencing).

Inman, 395 S.C. at 556, 720 S.E.2d 31 (emphasis added). As a result, this Court has repeatedly held there is no merit to this issue. Inman, at 556, 720 S.E.2d 31; Allen, 386 S.C. 93, 687 S.E.3d at 25-26; Crisp, 362 S.C. 412, 608 S.E.2d 429; Downs, 361 S.C. at 146, 604 S.E.2d at 380; Wood, 362 S.C. 135, 607 S.E.2d 57. A Ring or Appendi challenge in this regard has been

repeatedly raised **before** and **after** Mahdi's guilty plea and sentencing and rejected. Lewis v. Wheeler; Nunley v. Bowersox; Inman, Allen, Crisp; Downs, Wood.

Finally, Mahdi did not want jury sentencing, but waived sentencing by the jury he had selected and impaneled, and instead wished to be sentenced by Judge Newman. The record indicates Mahdi was fully advised of his rights to jury sentencing and the pros and cons of having a jury conduct his sentencing verses a judge determining his sentence. (See R 1324-68; See also R. 354-56, 434, 454-55, 481, 509, 518-19, 645). After Mahdi indicated a possible guilty plea, Judge Newman recessed overnight, and Mahdi was given additional time to talk to his lawyers about whether he wanted to plead guilty and have the judge determine his sentence or proceed with a jury trial and have a jury determine his guilt and sentence. (R 1332-36). The record reflects that discussions in this regard had already occurred before counsel indicated to the Court that Mahdi might change his plea to guilty. (R 1329-32). Mahdi clearly understood his right to have a jury determine his sentence, because several days of individual *voir dire* and jury selection had been completed, and a panel of 12 jurors and 4 alternates had been seated but not sworn at the time Mahdi indicated he might plead guilty. (R 1370-71). After the overnight recess, Mahdi told the Court he wanted to enter a plea of guilty. (R 1336).

Additionally, prior to Mahdi's entry of a plea of guilty, Judge Newman conducted a Blair hearing to determine whether Mahdi was competent to plead guilty. (R 1336-43). Dr. Michael Cross testified that Mahdi had a rational understanding of what a guilty plea meant, and the risks, benefits, and possible consequences. (R 1340). Mahdi told the Court that he was competent to plead guilty, and he wanted to move forward with the guilty plea. (R 1342). Judge Newman found on the record that Mahdi was competent to plead guilty. (R 1343). Judge Newman's finding in this regard is fully supported by the record.

During the lengthy colloquy with the Court, Mahdi was placed under oath. (R 1343). Mahdi testified that he understood that if he pled guilty in front of Judge Newman that the possible sentences were life in prison and the death penalty. (R 1347). Mahdi testified under oath that he understood he had the right to a jury sentencing, and that in order to sentence him to death all 12 jurors would have to unanimously agree that he should be sentenced to death. (R 1347-48). Mahdi also stated under oath that he understood that if he pled guilty, the Judge would solely determine the sentence, not the 12 jurors. (R 1349).

Mahdi told Judge Newman that he had had sufficient time to discuss with his attorneys and his family his decision to plead guilty. (R 1351). Mahdi stated he had no complaints against his attorneys, was fully satisfied with them, and did not need any more time to discuss anything with them. (R 1268). Mahdi acknowledged that, understanding the nature of the charges, the possible penalties, including death, the other possible consequences of his guilty plea, and his constitutional rights, he wanted to plead guilty. (R 1356). The record shows Mahdi knowingly, intelligently, and voluntarily made the decision to enter a plea of guilty and have Judge Newman sentence him, rather than the jury he had selected and impaneled. (R 1324-68). See Boykin v. Alabama, 395 U.S. 238; Rayford v. State, 314 S.C. 46, 443 S.E.2d 805 (record of plea proceeding, including applicant's answers to the trial judge's questions, clearly establishes that applicant could not have had misconceptions regarding sentencing).

Additionally, counsel testified at the 1st PCR hearing Mahdi decided he wanted Judge Newman to sentence him rather than the jury he had selected and impaneled. (PCR 682-84). Mahdi offered no testimony on this issue and offered no evidence contradicting counsel's sworn testimony on this issue. The 1st PCR Court found counsel's testimony on this issue to be credible. The 1st PCR Court found counsel's testimony on this issue was supported and

corroborated by Mahdi's responses to Judge Newman's questions during the guilty plea itself. The 1st PCR Court found Mahdi made a strategic decision, after selecting a jury, that he wanted Judge Newman to sentence him, **not** the jury he had selected and was impaneled. (AOD, pp. 131-32). Accordingly Mahdi's guilty pleas were valid, and he is not entitled to relief under Hurst. See Mullens v. State, 197 So.3d at 39 (where defendants have strategically chosen to proceed before a judge alone in an attempt to avoid a death sentence, their plea of guilty and waiver of jury sentencing has been upheld); Taylor, 341 S.W.3d at 647-48 (similar).¹³

Furthermore, counsel testified at the PCR hearing Mahdi did not want to plead guilty **and** have the jury sentence him. (PCR 682-84). Mahdi had selected 12 jurors and 4 alternates to hear his trial and decide his sentence. Mahdi decided to plead guilty because Mahdi believed he had a better chance of receiving a life sentence from Judge Newman than from the jury he had selected. (PCR 682-84). As counsel correctly testified at the PCR hearing, the jury, composed

¹³ Mahdi argues in his Rule 243(C) Explanation that counsel did not advise Mahdi that if he went to trial the jury would have to find unanimously the statutory aggravating circumstances rather than Judge Newman. However, because Mahdi offered no evidence in support of this ground at his 1st PCR, there was no evidence offered by Mahdi at PCR that counsel did not advise Mahdi of this. Further, the record of jury selection at which Mahdi was present indicates Mahdi was fully aware if he proceeded to a jury trial, at sentencing, the jury would determine the existence of any statutory aggravating circumstance. (R. 354-56, 434, 454-55, 481, 509, 518-19, 645). The 1st PCR Court appropriately denied this ground. (AOD, pp. 24-27). Furthermore, the record shows the evidence of the statutory aggravating circumstances was overwhelming and Mahdi cannot show Strickland prejudice. Mahdi burglarized Myers' cabin and murdered Myers while still burglarizing Myers' cabin with a .22 rifle that Mahdi had armed himself with. S.C. Code Ann. § 16-3-20(C)(a)(1)(d)(the murder was committed while in the commission of a burglary in any degree). After murdering Myers, Mahdi stole multiple guns belonging to Myers, Myers' truck keys, and Myers' police issued truck and fled the State. S.C. Code Ann. § 16-3-20(C)(a)(1)(f)(the murder was committed while in the commission of larceny with use of a deadly weapon). The record of the plea and 1st PCR shows Mahdi wanted to be sentenced by Judge Newman not the jury he had selected for strategic reasons, so he pleaded guilty and waived his right to a jury determination in both the guilt and sentencing phases. As a result, there is no reasonable probability Mahdi would not have pled guilty and would have proceeded to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985). Regardless, this argument could have been raised at Mahdi's 1st PCR as this information was within Mahdi's knowledge and/or in the plea/sentencing transcript or the Sentencing Order.

or ordinary citizens, would not have been accustomed to seeing murders, as Judge Newman, an experienced circuit judge, and when confronted with the brutality of Mahdi's murder of Myers, and the videotape of the murder of Christopher Boggs in North Carolina and its brutality, would in all likelihood have sentenced Mahdi to death for the murder of Myers. Additionally, the jury would have heard Mahdi's extensive criminal record, both adult and juvenile, Mahdi's horrible prison behavior record while in Virginia's DJJ, Virginia's DOC, and the S.C. DOC., and of Mahdi's attempted escape during jury selection with the use of a homemade handcuff key he had fashioned and secreted on his person. The 1st PCR Court had the opportunity to view the witnesses and hear their testimony on this issue. The 1st PCR Court found counsel's testimony on these issues to be credible. Mahdi offered no testimony to contradict counsel's testimony on these issues. The 1st PCR Court found based on counsel's credible testimony and the record in this case, Mahdi wanted to be sentenced by Judge Newman, not the jury he had initially selected and impaneled. The record shows Mahdi wanted to be sentenced by Judge Newman not the jury he had selected. Hurst is simply not applicable to Mahdi.¹⁴ Further, as a result of the 1st PCR Court's decision on this issue, this present claim is also barred by the doctrines of *res judicata*, *judicial estoppel* and *collateral estoppel* as this issue was previously decided by the 1st PCR Court. *See generally* Lifshultz Fast Frieight, Inc., 335 S.C. 244, 513 S.E.2d 96; Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981).

¹⁴ Nor is Blakely v. Washington, 542 U.S. 296 (2004) applicable to Mahdi. As recognized in Blakely and Apprendi, a defendant may waive his right to a jury in sentencing. Id. at 310; Apprendi, 530 U.S. at 488; Duncan v. Louisiana, 391 U.S. 145 (1968). As the record shows, Mahdi did not want to be sentenced by the jury he had selected and impaneled but by Judge Newman, for strategic reasons. As a result, he pleaded guilty and waived his right to jury sentencing. Regardless, this argument could have been raised at Mahdi's plea/sentencing in 2006 as Blakely was decided in 2004, two (2) years before Mahdi's plea/sentencing, or at his 1st PCR in 2009 as an IAC claim. He did neither.

Mahdi also waived and abandoned this issue on appeal from the denial of PCR. (P.W.C.). Mahdi was represented by 3 capital PCR appellate attorneys and did not raise the denial of this claim on appeal from the denial of his 1st PCR. As a result, the 1st PCR Court's previous determination, on this issue, is "**the law of the case**," and Mahdi waived and abandoned this issue. Bailes v. Young, 315 S.C. 166, 432 S.E.2d 482 (1993)(discussing "law of the case"); Lindsay v. Lindsay, 328 S.C. 329, 491 S.E.2 583 (Ct. App. 1997); Charleston Lumber Co. v. Miller Hous. Corp., 338 S.C. 171, 525 S.E.2d 869 (2000)(an unappealed order, right or wrong, is ordinarily the law of the case); Resolution Trust Corp. v. Eagle Lake & Golf Condominiums, 310 S.C. 473 427 S.E.2d 646 (1993)(the trial judge's procedural ruling is the law of the case since it has not been appealed); Anderson v. Short, 323 S.C. 522, 476 S.E.2d 475 (1996)(unappealed ground becomes the law of the case); Ross v. Medical University of S.C., 328 S.C. 51, 492 S.E.2d 62 (1997)(the law of the case applies both to those issues explicitly decided and to those issues which were necessarily decided in the former case); Nelson v. Charleston & Western Carolina RR Co., 231 S.C. 351, 98 S.E.2d 798 (1957); See Lifshultz Fast Frieight, Inc., *supra* (discussing the difference between the law of the case and res judicata).

As a result of all of the above, Mahdi has not shown a new rule of constitutional law or material facts that could not have been raised at his guilty plea/sentencing **in 2006** or his 1st PCR merits hearing **in 2009** entitling him to file a untimely or successive PCR application. See S.C. Code Ann. § 17-27-45 (B) & (C). Ring was decided in **2002** and Apprendi was decided in **2000**, long before Mahdi's guilty plea/sentencing and his 1st PCR Application and PCR hearing. Hurst is not a new rule of constitutional law but was merely an application of the holdings in Ring and Apprendi to Florida's sentencing scheme where the defendant exercised his right to jury fact finding at sentencing. Mahdi could have raised a Ring and/or Apprendi challenge to the death

penalty statute at the time of his guilty plea/sentencing in **2006**, as others have, and did raise an IAC claim for failure to raise a Ring and/or Apprendi challenge to the death penalty statute at his 1st PCR but did not prevail. Further, Mahdi may not raise this issue now because he is bound by the 1st PCR Court's previous determination in the 1st PCR that Mahdi made a strategic decision he wanted to be sentenced by Judge Newman and not the jury he had selected, because he believed he had a better chance of receiving a life sentence before Judge Newman. (AOD). As a result, the 2nd PCR Court correctly found this ground is time barred and improperly successive.

Additionally, this ground is barred in PCR because it is not cognizable as a direct appeal claim that could have been raised previously. *Cf. Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975); *Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). Mahdi is actually raising a Ring or Apprendi challenge to South Carolina's death penalty statute. This could have been raised at this plea/sentencing in 2006.

Lafler and Frye do not overcome the time and successiveness bars

Mahdi also relies on Lafler v. Cooper, 132 S.Ct. 1376 (2012) and Missouri v. Frye, 132 S.Ct. 1399 (2012) in an attempt to overcome the statute of limitations time bar and the successiveness bar. Mahdi argues these cases created a new rule of constitutional law and one retroactive and applicable to him or this claim would present material new facts not previously presented. Mahdi is wrong. Lafler and Frye did not create new rules of constitutional law or new rules of constitutional law that are to be retroactively applied to Mahdi [S.C. Code Ann. § 17-27-45(B)]. Waters v. United States, 2015 WL 5317516, at *2 (D. Del. Sept. 10, 2015). And, Mahdi has not shown new material facts not previously presented because those facts were known to Mahdi at the time of his guilty plea and sentencing **and** before his 1st PCR action. *See*

S.C. Code Ann. § 17-27-45 (C).¹⁵

Every federal appellate Court to consider the issue has held that Lafler and Frye did not establish a “new rule of constitutional law” but were applications of Strickland v. Washington, 466 U.S. 668 (1984). See Wert v. United States, 596 Fed.Appx. 914, 917–18 (11th Cir. 2015); United States v. Crisp, 573 Fed.Appx. 706, 708–09 (10th Cir. 2014); Navar v. Warden Fort Dix FCI, 569 Fed.Appx. 139, 140 n.1 (3d Cir. 2014); Gallagher v. United States, 711 F.3d 315, 316 (2d Cir. 2013); In re Liddell, 722 F.3d 737, 738 (6th Cir. 2013); Pagan San Miguel v. United States, 736 F.3d 44, 45 (1st Cir. 2013)(*per curiam*); In re King, 697 F.3d 1189 (5th Cir. 2012); Hare v. United States, 688 F.3d 878, 878–80 (7th Cir. 2012); Buenrostro v. United States, 697 F.3d 1137, 1140 (9th Cir. 2012); Williams v. United States, 705 F.3d 293, 294

¹⁵ Again, Mahdi argues in his Explanation that counsel did not advise Mahdi that if he went to trial the jury would have to find unanimously the statutory aggravating circumstances rather than Judge Newman. However, because Mahdi offered no evidence in support of this ground at his 1st PCR, there was no evidence offered by Mahdi at PCR that counsel did not advise Mahdi of this. Further, the record of jury selection at which Mahdi was present indicates Mahdi was fully aware if he proceeded to a jury trial, at sentencing, the jury would determine the existence of any statutory aggravating circumstance. (R. 354-56, 434, 454-55, 481, 509, 518-19, 645). The 1st PCR Court appropriately denied this ground because Mahdi offered no evidence in support of this ground at all. (AOD, pp. 24-27). Furthermore, the record shows the evidence of the statutory aggravating circumstances was overwhelming and Mahdi cannot show prejudice. Mahdi burglarized Myers’ cabin and murdered Myers while still burglarizing Myers’ cabin with a .22 rifle Mahdi had armed himself with [§ 16-3-20(C)(a)(1)(d)(the murder was committed while in the commission of a burglary in any degree)]. After murdering Myers, Mahdi stole multiple guns belonging to Myers, Myers’ truck keys, and Myers’ police issued truck and fled the State [§ 16-3-20(C)(a)(1)(f)(the murder was committed while in the commission of larceny with use of a deadly weapon)]. As the record of both the guilty plea and the 1st PCR shows, Mahdi wanted to be sentenced by Judge Newman, for strategic reasons, and not the jury he had selected and impaneled. As a result, he waived his right to a jury at both the guilt and sentencing phases. Therefore, there is no reasonable probability Mahdi would not have pled guilty and would have proceeded to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985). Mahdi also argues counsel advised him Judge Newman would consider his guilty plea as evidence in mitigation and Judge Newman did not consider his guilty plea as mitigation. However, this is incorrect. Judge Newman considered the guilty plea as mitigation, he simply chose not to give it great weight given the other evidence in the case. (See Sentencing Order, attached). Regardless, both of these arguments above could have been raised at Mahdi’s 1st PCR as this information was within Mahdi’s knowledge or in the plea/sentencing transcript or the Sentencing Order.

(8th Cir. 2013); In re Graham, 714 F.3d 1181, 1183 (10th Cir. 2013); United States v. Lawton, 506 Fed. Appx. 722, 725 (10th Cir. 2012); In re Perez, 682 F.3d 930, 932–34 (11th Cir. 2012); Miller v. Thaler, 714 F.3d 897, 902 (5th Cir. 2013); Hough v. United States, 177 F. Supp. 3d 782, 785 (W.D.N.Y. 2016); Landron-Class v. United States, 86 F. Supp. 3d 64, 75 (D.P.R. 2015) (collecting cases).¹⁶

Other states considering this same issue have agreed. *See* Commonwealth v. Feliciano, 69 A.3d 1270 (Pa.Super. 2013); Commonwealth v. Hernandez, 79 A.3d 649 (Pa.Super. 2013); Commonwealth v. Gallman, No. 885 EDA 2015, 2016 WL 1436489, at *5 (Pa. Super. Ct. Apr. 12, 2016); Commonweath v. Norris, No. 2512, EDA, 2015, 2016 WL 1064472, at *6 (Pa. Super. Ct. Mar. 17, 2016); Black v. State, No. 66882, 2016 WL 763163, at *1 (Nev. App. Feb. 17, 2016), *cert. denied*, 2017 WL 69340 (U.S. Jan. 9, 2017); Young v. State, 2013 Ark. 513, 2, n. 1 (2013).

¹⁶ *See also* Hestle v. United States, No. 05-40245, 2013 WL 1147712 (E.D.Mich. March 19, 2013)(compiling cases); Stewart v. Stephens, Civil No. 7:13-CV-013-0, 2015 WL 6522828, at *2 (N.D. Tex. Oct. 26, 2015); Alvarado v. Stephens, Civil Action No. H-14-2587, 2015 WL 3775416, at *3 (S.D. Tex. June 16, 2015); Etheridge v. Morgan, Civil Action No. 3:15-CV-0486, 2015 WL 4041707, at *5 (W.D. La. May 11, 2015), adopted, 2015 WL 4042152 (W.D. La. July 1, 2015); Brown v. Director, TDCJ-CID, Civil Action No. 9:13-CV-50, 2014 WL 892170, at *3 (E.D. Tex. Mar. 3, 2014); Johnson v. Rader, Civil Action Nos. 13-2996, 13-3677, 2014 WL 198165, at *5 (E.D. La. Jan. 14, 2014); Suitt v. McCain, Civil Action No. 16-3887, 2016 WL 5395843, at *5 (E.D. La. Sept. 6, 2016), *report and recommendation adopted*, 2016 WL 5390396 (E.D. La. Sept. 27, 2016); Williams v. Cain, Civil Action No. 15-3852, 2016 WL 4063863, at *1 (E.D. La. July 29, 2016); United States v. Cruz, Criminal No. 99-10172-GAO, 2016 WL 4083326, at *2 (D. Mass. July 20, 2016); Hough v. Snyder-Norris, Civil Action No.):16-CV-43-HRW, 2016 WL 3820562, at *6 (E.D. Ky. July 12, 2016); Nechovski v. Snyder-Norris, Civil Action No. 0:16-CV-3-HRW, 2016 WL 3552196, at *6 (E.D. Ky. June 23, 2016); Shawley v. Bear, Civ-15-1168-C, 2016 WL 1643460, at *3 (W.D. Okla. Mar. 24, 2016), *report and recommendation adopted*, 2016 WL 1629397 (W.D. Okla. Apr. 22, 2016), *certificate of appealability denied*, 2016 WL 5543291 (10th Cir. Sept. 29, 2016); Armour v. Brewer, Case No. 16-10937, 2016 WL 1259113, at *3 (E.D. Mich. Mar. 31, 2016), *appeal dismissed* (Aug. 22, 2016); Leon v. Ryan, No. CV-14-01755-PHX-DLR(ESW), 2015 WL 6769146, at *2 (D. Ariz. Sept. 17, 2015), *report and recommendation adopted*, 2015 WL 6749743 (D. Ariz. Nov. 5, 2015).

Moreover, even if Lafler or Frye announced a new rule of constitutional law, neither case contains any language regarding the retroactivity of the rule, and no subsequent Supreme Court case has held the rule applies retroactively on collateral review. Gallagher v. United States, 711 F.3d 315; Baker v. Ryan, 497 Fed.Appx. 771, 773 (9th Cir. 2012); United States v. Ocampo, 919 F. Supp. 2d 898, 915 (E.D. Mich. 2013); *See* Tyler v. Cain, 533 U.S. 656, 663 (2001).¹⁷ In short, neither Lafler nor Frye satisfies § 17-23-45. Therefore, the one-year period of limitations began to run when Mahdi's conviction became final. Waters v. United States, Civ. Act. No. 12-1593-LPS, 2015 WL 5317516, at *2 (D. Del. Sept. 10, 2015); Villega-Angulo v. United States, 213 F.Supp.3d 305, 316 (2016). Conclusively, the statute of limitations has well run, as has Mahdi's time limit. Villega-Angulo, *supra*; Suitt v. McCain, No. CV 16-3887, 2016 WL 5395843, at *5 (E.D. La. Sept. 6, 2016), *report and recommendation adopted*, 2016 WL 5390396 (E.D. La. Sept. 27, 2016). This 2nd or successive Application was not brought within one (1) year of a newly recognized right made retroactively applicable to cases on collateral review.

Further, this current Application was brought more than 1 year after Frye and Lafler were decided. Leon v. Ryan, No. CV-14-01755-PHX-DLR(ESW), 2015 WL 6769146, at *2 (D. Ariz. Sept. 17, 2015), *report and recommendation adopted*, 2015 WL 6749743 (D. Ariz. Nov. 5, 2015). Therefore, this claim is time barred for this reason as well.

Finally, Mahdi does not advance any facts supporting his claim, which rests primarily on counsel's purported pre-plea advice and the Court's sentence, which would have been obvious to him at the time he changed his plea and was subsequently sentenced. *See* United States v. Cruz,

¹⁷ *See also* Armour v. Brewer, Case No. 16-10937, 2016 WL 1259113, at *3 (E.D. Mich. Mar. 31, 2016), *appeal dismissed* (Aug. 22, 2016); Shawley v. Bear, Civ-15-1168-C, 2016 WL 1643460, at *3 (W.D. Okla. Mar. 24, 2016), *report and recommendation adopted*, 2016 WL 1629397 (W.D. Okla. Apr. 22, 2016), *certificate of appealability denied*, 2016 WL 5543291 (10th Cir. Sept. 29, 2016);

Criminal No. 99-10172-GAO, 2016 WL 4083326, at *2 (D. Mass. July 20, 2016); Hough v. Snyder-Norris, Civil Action No. 0:16-CV043-HRW, 2016 WL 3820562, at *6 (E.D. Ky. July 12, 2016). As a result, he cannot fit under the time bar exception of Section 17-27-45(C). Mahdi has not shown evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, because in order to fit under this exception the application must be filed under this chapter within 1 year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. § 17-27-45 (C). Mahdi cannot meet this test. As stated above, Lafler and Frye are not new rules of constitutional law, but a simple application of Strickland. Gallagher, 711 F.3d at 316; Miller, 714 F.3d at 902; In re King, 697 F.3d 1189; Gallman, 2016 WL 1436489, at *5. Mahdi knew all these facts under this allegation at the time of his plea and sentencing and could have raised a Strickland claim in this regard at his 1st PCR hearing in 2009.

Mahdi's Austin claim has no merit

Finally, the Austin claim was properly dismissed by the 2nd PCR Court because Mahdi is not entitled to an Austin appeal under South Carolina law. Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991); Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991); Odom v. State, 337 S.C. at 261-262, 523 S.E.2d 753; Hope v. State, 328 S.C. 78, 492 S.E.2d 76 n. 1 (1997); King v. State, 308 S.C. 348, 348-49, 417 S.E.2d 868 (1992). In his 2nd or successive PCR application, Mahdi *alleges* he is entitled to an Austin v. State, 305 S.C. 453, 409 S.E.2d 395, appeal because PCR appellate counsel did not raise certain issues on appeal from the denial of his 1st PCR that he now wishes to raise. Mahdi is not entitled to an Austin appeal under these circumstances. Austin, supra. Mahdi's 1st PCR counsel filed an appeal from the denial of his 1st PCR application and 3

collateral appellate attorneys appointed to represent Mahdi chose to raise only 1 issue from the denial of his 1st PCR application. (Petition for Writ of Certiorari [merits petition]). This Court denied certiorari in the PCR appeal. Mahdi then filed a Petition for Writ of Certiorari in the U.S. Supreme Court raising the same issue and certiorari was denied. As a result, Mahdi has already had 1 full round of PCR appeals to this Court and the U.S. Supreme Court. However, Austin does not entitle Mahdi to another appeal from the denial of his 1st PCR where PCR appellate counsel chose not to raise certain issues in the 1st PCR appeal. Austin “is applicable to its particular factual situation...” Aice, 305 S.C. at 452, 409 S.E.2d at 394. That is where the applicant wished to appeal from the denial of PCR but was denied **the opportunity** to seek appellate review or the right to appellate review of a previous PCR order **was not knowingly and intelligently waived**. Austin, supra; Aice, supra; Odom, 337 S.C. at 261-262, 523 S.E.2d 753; Hope v. State, 328 S.C. 78, 492 S.E.2d 76 n. 1; King, 308 S.C. at 348-49, 417 S.E.2d 868. Neither of these occurred in this case.¹⁸ Mahdi is not entitled to an Austin appeal under South Carolina law. Thus, as the 2nd PCR Court correctly found, Mahdi cannot overcome the time and successiveness bar and this application must be dismissed.

Further, ineffective assistance of PCR appellate counsel is not an exception or an excuse allowing the filing of a 2nd or successive PCR application in violation of the statute of

¹⁸ To accept Mahdi’s argument would result in every capital *and* non-capital PCR Applicant being entitled to a 2nd PCR appeal when they did not agree **or** later claimed they did not agree with the issues raised by PCR appellate counsel. Additionally, there would have to be an additional hearing to determine why PCR appellate counsel did not raise certain issues [i.e. whether Mahdi did not want to raise those issues or PCR appellate counsel made a strategic decision to not raise certain issues]; and, if there was any prejudice to the applicant. As set forth in Respondent’s Return to the Petition for Writ of Certiorari in the 1st PCR Appeal, many PCR issues were abandoned on appeal because they lacked any merit and to remove the aggravating evidence that would have been before this Court with such PCR claims. (See Return to P.W.C., Mahdi v. State, 1st PCR Appeal & AOD).

limitations for PCR actions or the successiveness bar. Robertson v. State; Kelly v. State, 404 S.C. 365, 366, 745 S.E.2d 377, 378 (2013).

Mahdi's Grounds are barred by the defense of laches

As the 2nd PCR Court correctly found, Mahdi's grounds asserted in his 2nd PCR Application are also barred by the defense of laches. Ex parte Stokes, 256 S.C. 260, 182 S.E.2d 306 (1971); Bray v. State, 366 S.C. 137, 140, 620 S.E.2d 743, 745 (2005) ("Laches is "neglect for an unreasonable and unexplained length of time, under circumstances affording the opportunity for diligence, to do what in law should have been done."); Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002), *citing* Hallums v. Hallums, 296 S.C. 195, 198-99, 371 S.E.2d 525, 527 (1988). The claims Mahdi is raising in his 2nd Application could have been raised at plea/sentencing, at his 1st PCR, and/or on appeal from the denial of his 1st PCR. Mahdi was represented by 2 death penalty qualified counsel at trial/plea and sentencing. Mahdi was represented at PCR by 2 statutorily qualified counsel. And, Mahdi was represented on appeal from the denial of PCR by 3 competent counsel, including 1 of his PCR attorneys. Mahdi has waited an unreasonable and unexplained length of time to assert the present grounds. As a result, all of Mahdi's Grounds asserted in his 2nd PCR Application are barred by the defense of laches.

The 2nd PCR Court could not address grounds abandoned or not addressed in the 1st PCR

Finally, in his 2nd or Successive PCR Application, Mahdi also asked 2nd PCR Court to rule on any grounds not addressed or abandoned *at the 1st PCR*. Respondent is not aware of any legal authority or rule that would allow the 2nd PCR Court to address any issue not addressed at the 1st PCR or abandoned by prior statutorily qualified PCR counsel at the 1st PCR. As a result, this ground is also time barred and improperly successive under South Carolina law in that it sought the 2nd PCR Court to rule on an issue or issues raised at the 1st PCR but not ruled on or

abandoned at the 1st PCR. The 2nd PCR Court also properly dismissed this claim as not cognizable before the Court and barred by laches, res judicata, collateral estoppel, judicial estoppel, and/or the law of the case.

CONCLUSION

Consequently, for all the foregoing reasons, the 2nd PCR Court properly dismissed Mahdi's 2nd or successive PCR action as time barred under South Carolina law pursuant to § 17-27-45; improperly successive under South Carolina law pursuant to § 17-27-90; properly found Mahdi's claims in this successive PCR Application are barred by the doctrines of laches; and, Mahdi's direct appeal grounds are not cognizable in PCR and/or barred by the doctrines of res judicata, collateral estoppel, judicial estoppel and the law of the case. Additionally, the 2nd PCR Court properly denied Mahdi's request for an Austin appeal where he has already had 1 full PCR appeal to this Court and the U.S. Supreme Court. As a result, based on all of the foregoing, this 2nd or successive PCR Application was also properly dismissed with prejudice pursuant to § 17-27-70 (b) (summary dismissal may be allowed "[w]hen a court is satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings...."). Finally, based on all the foregoing, there was no genuine issue of material fact and this action was properly dismissed pursuant to § 17-27-70 (c) (summary disposition is allowed "when it appears from the pleadings, depositions, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."). *See also* Rule 56, SCRCF (defining the standard for granting a motion for summary judgment). As a result of all of the foregoing, Mahdi's Rule 243(c), SCACR Explanation is insufficient and this appeal should be dismissed.

Respectfully submitted,

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Assistant Deputy Attorney General

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By: 
ANTHONY MABRY
ATTORNEYS FOR RESPONDENT

March 5, 2018

CERTIFICATE OF SERVICE

I, **Anthony Mabry**, do hereby certify that I have served the *Response to Rule 243 (c)*, *SCACR Explanation* on Petitioner by depositing one copy of same in the United States mail, postage prepaid, and addressed to the following:

E. Charles Grose, Jr., Esquire
The Grose Law Firm
404 Main Street
Greenwood, SC 29646

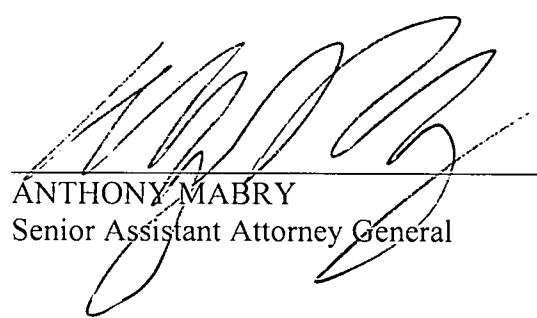
Derek A. Shoemake, Esquire
Simmons Law Firm, LLC
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Columbia, SC 29201

RECEIVED

MAR 05 2018

S.C. SUPREME COURT

This 5th day of March, 2018.



ANTHONY MABRY
Senior Assistant Attorney General

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STATE OF SOUTH CAROLINA

COUNTY OF CALHOUN

Mikal Mahdi, SCDC #5238,

Applicant,

vs.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FILED

C/A No. 2017-CP-09-00004

2017 JUL 6 P 2: 12

CAPITAL PCR

KENNETH HASTY
CLERK OF COURT
CALHOUN COUNTY
ST. MATTHEWS, SC

ORDER OF DISMISSAL

On January 10, 2017, Applicant, Mikal Mahdi ("Mahdi"), a death sentenced inmate, filed the above captioned second (2nd) or successive PCR action in the Court of Common Pleas for Calhoun County, again collaterally challenging his guilty plea convictions and sentence of death previously imposed by the Honorable Clifton Newman, Circuit Court Judge. Mahdi first (1st) collaterally challenged his guilty plea convictions and death sentence in a 2009 PCR application (2009-CP-09-00164) that was denied and dismissed by this Court, after a PCR evidentiary merits hearing, in an Amended Order of Dismissal. Mahdi's appeal from the denial of his 2009 PCR application was denied by both the South Carolina Supreme Court and the United States Supreme Court. By Order, the South Carolina Supreme Court has re-appointed this Court to preside over this current action and hear all motions.

Respondent's Motion

On February 10, 2017, Respondent filed a "Return and Motion to Dismiss" this 2nd or successive PCR action for the following reasons: (1) the action is time barred and improperly successive under South Carolina law; (2) the action is barred by the doctrine of laches; (3) several of Mahdi's grounds are barred by the doctrines of res judicata, collateral estoppel, judicial estoppel, and the principle of "the law of the case;" (4) Mahdi's direct appeal grounds

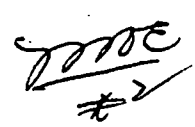


are not cognizable on post-conviction relief; and (5) there is no merit to any of Mahdi's direct appeal grounds because of extant case law and the record in this case. For all of these reasons, Respondent asserted the application must be denied and dismissed with prejudice pursuant to: (1) S.C. Code Ann. § 17-27-45 (the PCR statute of limitations); (2) S.C. Code Ann. Section 17-27-90 (the successiveness bar); (3) S.C. Code § 17-27-70 (b) (summary dismissal may be allowed "[w]hen a court is satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings...."); and, (4) S.C. Code Ann. § 17-27-70 (c) (summary disposition is allowed "when it appears from the pleadings, depositions, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."). *See also Rule 56, SCRCP* (defining the standard for granting a motion for summary judgment).¹ Mahdi filed a Response opposing Respondent's Motion. Respondent filed a detailed Reply to that Response. On April 13, 2017, this Court notified counsel for both Mahdi and the State that a hearing would be held on the State's motion on May 1, 2017 at 10:30 a.m. at the Bamberg County Courthouse.

The Hearing on the Motion to Dismiss

On May 1, 2017, at the Bamberg County Courthouse, this Court held a hearing on Respondent's motion to dismiss this current action for the above stated reasons. Present were Mahdi's federal habeas counsel E. Charles Grose Jr. and John L. Warren, III., Esquires.

¹ Mahdi contends the State moved to dismiss this 2nd or successive application pursuant to Rule 12(b)(6), SCRCP; however, Respondent moved to dismiss this application pursuant to S.C. Code Ann. Sections 17-27-45 (the PCR statute of limitations); 17-27-90 (the successiveness bar) and 17-27-70(b) & (c). Section 17-27-70(c) provides the same standard for dismissal of a PCR application as a motion for summary judgment under Rule 56, SCRCP. Further, Mahdi admits the SCRCP are applicable to PCR actions. As a result, Rule 56, SCRCP would be just as applicable as Rule 12(b)(6). Further, Rule 71.1(a), SCRCP provides where there is an applicable PCR statute, the statute controls over the Rule of Procedure.


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Respondent was represented by Assistant Attorney General J. Anthony Mabry who filed the motion on behalf of Respondent. Mahdi waived his presence at the hearing.² No evidence or affidavits were submitted by either party at the motion hearing. This Court heard argument from both Respondent and the Applicant and considered the legal authority submitted at the hearing on the motion. On June 6, 2017, this Court notified counsel for both parties that: (1) pursuant to S.C. Code Ann. § 17-25-45, this Court found the current 2nd or successive PCR application to be outside the statute of limitations for PCR actions; (2) pursuant to S.C. Code Ann. § 17-27-90, this Court found the current application was improperly successive under South Carolina law; (3) pursuant to S.C. Code Ann. § 17-27-70(b) summary disposition was proper and is allowed under the terms of the statute; and, (4) based on a review of the pleadings, past procedural history, memos, briefs, applicable case law, and arguments of counsel, this Court found there was no genuine issue of material fact and Respondent was entitled to judgment as a matter of law pursuant to S.C. Code Ann. § 17-27-70(c) and Rule 56, S.C.R.C.P. This Court directed Mr. Mabry to submit a proposed Order of Dismissal consistent with these findings using his previous briefs submitted to the Court as an outline for the Order. This Order of Dismissal follows.

This Court's Ruling on the Motion

After consideration of Respondent's Motion, Mahdi's response, Respondent's Reply, and the arguments of counsel at the hearing on the motion and the legal authority submitted, this Court finds and concludes this application must be denied and dismissed with prejudice for the following reasons: (1) the application is time barred under the South Carolina statute of limitations for PCR actions (*S.C. Code Ann. § 17-27-45*); (2) the application is improperly

² On April 12, 2017, counsel for Mahdi notified this Court by e-mail that after conferring with Mr. Mahdi, Mr. Mahdi waived his presence at the hearing on the State's motion and the motion hearing could proceed in his absence. Counsel for Mahdi also agreed the hearing on the State's motion could proceed in Mahdi's absence and notified this Court of the same by e-mail.


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successive under South Carolina law (*S.C. Code Ann. § 17-27-90*); (3) based on the pleadings and the record Respondent is entitled to judgment as a matter of law (*S.C. Code Ann. § 17-27-70(b)*); and, (4) based on a review of the pleadings, past procedural history, memos, briefs, applicable case law, and arguments of counsel, there is no genuine issue of material fact and Respondent is entitled judgment as a matter of law (*S.C. Code Ann. § 17-27-70(c)* and/or *Rule 56, SCRPC*).

I.

PROCEDURAL HISTORY

Mahdi murdered James E. Myers on June 18, 2004 in Calhoun County. Mahdi was arrested on June 21, 2004 in Florida on a fugitive warrant, returned to South Carolina, and formally charged with Myers' murder, the theft of his truck, and the burglary of his shed/cabin.³ Mahdi was indicted by the Calhoun County grand jury on August 23, 2004 for murder, grand larceny > \$5,000, and burglary 2nd degree (violent) (Ind. #s 2004-GS-09-243 - 44). The State sought the death penalty for the murder. Carl Grant and Glenn Walters, Esquires, were appointed to represent Mahdi.⁴ The South Carolina Supreme Court assigned the Honorable Clifton Newman, Circuit Court Judge, to preside over the capital trial. From November 26-29, 2006, individual juror *voir dire* and capital jury selection was completed with a jury and 4 alternates impaneled.

³ The building referred to in the record as "the shed" is more like a cabin. It is located on victim James Myers' farm, and contains furniture and a television. Myers' and his wife were married there. Myers' wife had an office in the "shed"/cabin.

⁴ Mr. Grant suffered a serious injury the early summer of 2006 and was relieved as counsel. Glenn Walters was substituted as 1st chair counsel and Josh Kroger, Esquire was appointed to replace Mr. Walters as 2nd chair counsel.

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The Guilty Pleas

Prior to the swearing of the jury, on November 30, 2006, Mahdi waived his right to a jury determination of guilt and sentencing, and entered pleas of guilty to all charges. (R 123-1336). Judge Newman accepted Mahdi's pleas of guilty and ensured they were knowingly, voluntarily, and intelligently entered by extensive questioning of Mahdi under oath. After acceptance of the pleas, the impaneled unsworn jury and alternates were dismissed. (R 1259-84).

The Sentencing Proceeding

After the required 24 hour waiting period, the sentencing proceeding was conducted December 1-6, 2006. 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). 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). After considering all of the evidence in extenuation, aggravation, and mitigation of punishment, Judge Newman sentenced Mahdi to death for the murder of James Myers. (R 1726-42, 1810-26). Mahdi was sentenced to 15 years for burglary 2nd degree and 10 years for grand larceny, to run consecutively to one another and to the murder sentence. (R 1741, 1825).

The Direct Appeal

Mahdi directly appealed only his death sentence to the South Carolina Supreme Court. On June 15, 2009, the Court affirmed. *Mahdi v. State*, 383 S.C. 135, 678 S.E.2d 807 (2009). The Remittitur was issued on July 1, 2009. Mahdi did not seek certiorari to the U.S. Supreme Court. Mahdi filed a Motion for Stay of Execution to pursue PCR. On July 23, 2009, the South Carolina Supreme Court granted the stay assigning this Court to hear the PCR action.

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The 1st PCR Action

Mahdi filed a PCR application on August 18, 2009 (C/A # 2009-CP-09-00164) and several subsequent amended applications raising numerous grounds. Mahdi was appointed two (2) statutorily qualified capital PCR attorneys pursuant to S.C. Code Ann. § 17-27-160(B) (2014)(identifying requisite qualifications for counsel appointed to represent an indigent, capital PCR applicant), to represent him in the PCR action, Teresa Norris and Robert Lominack, Esquires. See *Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29 (2016). The State filed a Return to each PCR application and amendment.

On March 9, 2011, an evidentiary (PCR) merits hearing was held before this Court. Present were Mahdi, his PCR attorneys, along with the Attorney General's Office. 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 Woodley, Dora Wynn, Doug Pond, and Sandra Burwell and introduced documentary exhibits. 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 Respondent. At the evidentiary hearing, this Court had the opportunity to view and hear the witnesses who testified in person, and make a credibility assessment with regard to each witness.

On December 18, 2012, after reviewing the record, including trial record and exhibits, and after reviewing all of the evidence submitted in the case, including the testimony of each witness and the PCR exhibits, and after making a credibility assessment regarding the witnesses

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and evidence introduced, this Court found the application to be without merit and denied and dismissed the application and all grounds with prejudice in an Order of Dismissal, filed January 8, 2013. The State filed a timely Rule 59, SCRPC, Motion to Alter or Amend one (1) of the findings in the Order.⁵ On February 11, 2013, this Court 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, this Court granted the State's Rule 59 Motion as to that one (1) portion of the Order and entered an Amended Order of Dismissal denying and dismissing all grounds as the final Order of Dismissal. Mahdi filed a Rule 59 Motion, which was denied by this Court.

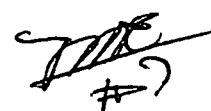
The Appeal from the Denial of PCR

Mahdi appealed the denial of his PCR application (2009-CP-09-00164) by way of a Petition for Writ of Certiorari [a merits petition] in the South Carolina Supreme Court. Mahdi was represented by Seth Farber, Brandon Duke, and Teresa Norris, Esquires. Those three (3) PCR appellate attorneys, including one (1) of Mahdi's PCR attorneys, chose to raise only one (1) issue from the denial of PCR. The State filed a Return to the Petition. Mahdi filed a Reply to the State's Return. On September 8, 2016, the South Carolina Supreme Court denied the Petition for Writ of Certiorari. The Remittitur was issued on September 26, 2016.

The Petition for Writ of Certiorari in the U.S. Supreme Court

Mahdi appealed from the South Carolina Supreme Court's denial of certiorari from PCR to the United States Supreme Court by way of a Petition for Writ of Certiorari. Respondent filed its Brief in Opposition to the same. Mahdi filed a Reply to Respondent's Brief in Opposition.

⁵ 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.

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On February 21, 2017, the Petition for Writ of Certiorari was denied by the United States Supreme Court.

The Federal Habeas Petition

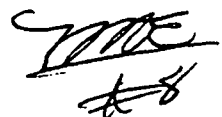
Mahdi previously filed an application for a stay of execution in the United States District Court for South Carolina to file a federal habeas petition (*Mahdi v. Stirling*, C/A No 16-mc-402, D.S.C. filed Oct. 5, 2016). The stay request was granted Oct. 5, 2016. Counsel was appointed on October 13, 2016. When the stay expired, Mahdi filed a place-holder petition and was granted a further stay of execution. Mahdi has not yet filed his final amended federal habeas petition. It is anticipated, in the federal habeas petition, Mahdi will allege grounds he previously raised in state court but which were denied *and* attempt to raise pursuant to *Martinez v. Ryan*, 132 S.Ct. 1309 (2012) the unexhausted, but technically exhausted, claims he raises in this 2nd or successive PCR application.⁶

The 2nd Successive PCR Action

After filing his federal habeas stay request and while that stay was still pending, Mahdi filed this 2nd or successive PCR application, through federal habeas counsel, in this Court on January 10, 2017. In this 2nd PCR application, Mahdi raises the following grounds:

10(a)/11(a) S.C. Code Ann. Section 16-3-20, which requires a judge to sentence the defendant following a guilty plea, violates the Sixth Amendment of the United States Constitution, which is applicable to the states through the Fourteenth Amendment, because a judge rather than a jury

⁶ *Martinez* held, when a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim in two circumstances: (1) where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial, and (2) where appointed PCR counsel in the initial-review collateral proceeding, should have raised the claim, i.e. counsel was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668 (1984). To overcome the default, a prisoner must also demonstrate the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit. *Martinez*, at 1318-19.



finds facts required for imposition of a death sentence. *Hurst v. Florida*, ___ U.S. ___, 136 S.Ct. 616 (2016). S.C. Code Ann. Section 16-3-20, as written by the General Assembly and construed by the South Carolina Supreme Court, denied Mr. Mahdi his right to have a jury determine the existence of aggravating circumstances, consider statutory and non-statutory mitigation circumstances, and determine whether a death sentence should be imposed.

10(b)/11(b) Mr. Mahdi was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Sections 3 and 14 of the South Carolina Constitution—during the guilt or innocence phase of his capital trial because his trial counsel advised him that the guilty plea would be considered as mitigation. Trial counsel advised Mr. Mahdi that pleading guilty to murder, second-degree burglary, and grand larceny would be considered mitigation. Relying on that advice, Mr. Mahdi pleaded guilty. Judge Newman did not consider the guilty plea as mitigation. Judge Newman sentenced Mr. Mahdi to death.

10(c)/11(c) Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E. 395 (1991), Mr. Mahdi seeks an appeal on the following grounds for relief and supporting facts raised in the initial application for post-conviction relief (Case No. 2009-CP-09-164), as amended:

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

- Trial counsel failed to object when the trial judge improperly based his decision to impose a death sentence on petitioner's assertion of his right to a jury trial, thereby effectively punishing him for exercising this constitutional right. Counsel's deficient performance in failing to preserve the issue for appellate review deprived Petitioner of the right to effective assistance of counsel.
- Counsel failed to adequately advise Applicant of the advantages of jury sentencing, which resulted in the Applicant pleading guilty and purporting to waive his right to jury sentencing.
- Counsel failed to adequately investigate, develop, and present mitigation evidence concerning Applicant's family, social, institutional, and mental health history.
- Counsel failed to assert that Applicant's death sentence violates the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution due to Applicant's developmental deficits.
- Counsel failed to assert that S.C. Code Ann. Section 16-3-20 is unconstitutional in that it automatically precludes jury sentencing following a guilty plea in violation of the Sixth, Eight, and Fourteenth Amendments as addressed in *Ring v. Arizona*, 536 U.S. 584 (2001). Moreover, this statute forces a capital defendant to choose between his right to a jury trial and his right to present mitigating evidence namely that he has accepted responsibility for the crime. While this issue has been rejected by state

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courts, *see State v. Downs*, 361 S.C. 141, 604 S.E.2d 377 (2004), it has not been reviewed by federal courts and counsel were thus ineffective in failing to adequately preserve the record for subsequent litigation.

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

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

Prior post-conviction relief counsel abandoned numerous grounds for relief that were included in Mr. Mahdi's application for post-conviction relief.

10(d)/11(d) If the State contends that any of the grounds for relief identified in paragraph 10(c) were not ruled upon by the initial post-conviction relief judge, then Mr. Mahdi seeks a ruling so that he may appeal. In prior pleadings, the State has contended that prior post-conviction relief counsel abandoned grounds for relief at the evidentiary hearing.

(See C.A. # 2017-CP-09-00004, pp. 2-4).

II.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Mahdi has already had a full round of PCR remedies (C/A No. 2009-CP-09-00164). Mahdi's 2009 PCR action challenging his guilty plea convictions and sentence of death [raising numerous grounds] was denied and dismissed with prejudice after a full evidentiary (PCR) merits hearing by this Court ("the PCR Court"). (Amended Order of Dismissal, C.A. # 2009-CP-09-164). Mahdi's Rule 59, SCRPC, Motion to Alter or Amend was also denied by this Court.

During the pendency of his 2009 PCR action and at the evidentiary PCR merits hearing, Mahdi was represented by **two (2) statutorily qualified PCR counsel**, Teresa Norris and Robert Lominack, Esquires. *S.C. Code Ann. § 17-27-160(B)* (identifying requisite qualifications for

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counsel appointed to represent an indigent, capital PCR applicant). Compare *Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29 (2016).

Mahdi conceded at the hearing on the present motion that Ms. Norris and Mr. Lominack were statutorily qualified PCR counsel pursuant to Section 17-27-160(B). This Court would also note that Mahdi has never alleged as a ground for relief in this 2nd or successive PCR Application that his 1st PCR counsel were not statutorily qualified.⁷ Mahdi has not submitted the affidavit of either PCR counsel asserting they were not statutorily qualified to represent him in his 1st PCR action. Compare *Robertson, supra*.

Mahdi appealed the denial of his 1st PCR action to the South Carolina Supreme Court by way of a Petition for Writ of Certiorari [a merits petition]. On appeal from the denial of PCR, Mahdi was represented by three (3) PCR appellate attorneys, and Mahdi raised the following issue to the South Carolina Supreme Court:

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?

(Petition for Writ of Certiorari, p. 2). Respondent filed a responsive brief. The South Carolina Supreme Court denied certiorari. The Remittitur was issued.

Mahdi filed a Petition for Writ of Certiorari in the United States Supreme Court. The State filed a Brief in Opposition. Mahdi filed a Reply. The United States Supreme Court denied the Petition for Writ of Certiorari. As a result, Mahdi has had one (1) complete round of PCR remedies.

⁷ (See Successive Application for PCR, Amended Successive Application for PCR).

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On December 14, 2016, the South Carolina Supreme Court decided *Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29 (2016). The Court ruled *Martinez v. Ryan*, 132 S.Ct. 1309, was not a reason to allow the filing of a 2nd or successive PCR application in a capital case. The Court also ruled the fact that a capital PCR applicant was not represented by statutorily qualified PCR counsel at his first (1st) PCR was a sufficient reason to allow the filing of a 2nd or successive PCR application. The Court remanded the case to the Circuit Court solely to determine: (1) if Robertson's 1st PCR counsel were statutorily qualified or not; and, (2) if not statutorily qualified, whether Robertson was prejudiced by the fact that his 1st PCR attorneys were not statutorily qualified. *Id.* Subsequent to the Court's opinion in *Robertson*, Mahdi filed this 2nd or successive PCR action. Mahdi does not assert in this 2nd or successive PCR application that his 1st PCR attorneys were not statutorily qualified. Respondent filed its Motion to Dismiss relying on *Robertson* and other South Carolina case law asserting this application is time barred and improperly successive.

The PCR statute provides both a time limitation and a bar to successive applications. S.C. Code Ann. § 17-27-45 (A) provides a PCR action "must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later." S.C. Code Ann. § 17-27-90 provides "[a]ll grounds for relief available to an applicant ... must be raised in his original, supplemental or amended application." As a result, for the reasons set forth herein, Mahdi is not entitled to file this 2nd or successive PCR application. *Robertson v. State*, *supra*. Mahdi's present application must be dismissed as untimely and improperly successive. *Robertson*. See *Wade v. State*, 348 S.C. 255, 264, 559 S.E.2d 843, 847 (2002) ("An individual under PCR effectively is granted one chance to argue for relief and must do so within

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a year of his final appeal”). *Accord In re Stays of Execution in Capital Cases*, 321 S.C. 544, 548, 471 S.E.2d 140, 142 (1996) (to receive a stay from the state to pursue “a successive action for post-conviction relief or habeas corpus in the circuit court or in the original jurisdiction of this Court” death-sentenced applicant “must demonstrate that there are *exceptional circumstances* warranting the issuance of the stay”) (emphasis added).

A. The Present Action is Time Barred

This present 2nd PCR Application is time barred under the South Carolina Statute of Limitations for PCR actions and must be dismissed with prejudice. South Carolina Code Ann. § 17-27-45(a) reads as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

Mahdi was convicted on November 30, 2006 and sentenced to death on December 8, 2006. The final decision in the appeal was issued by the South Carolina Supreme Court on June 15, 2009. *Mahdi v. State*, 383 S.C. 135, 678 S.E.2d 807 (2009). The Remittitur was issued on **July 1, 2009**. Mahdi was therefore required to file this application before **July 1, 2010**. The current application was filed on January 10, 2017, which was **more than six (6) years after the statutory filing period expired**.

However, § 17-27-45 also states:

When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.

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If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

S.C. Code Ann. § 17-2745(B)&(C). Thus, to overcome the time bar, Mahdi must show he fits under one (1) of the categories of Section 17-27-45 (B) or (C). This Court has carefully reviewed the allegations of Mahdi's 2nd or successive PCR Application and is thoroughly familiar with the Record in this case. Based on the undisputed facts and the law, all of Mahdi's claims raised in this 2nd or successive PCR Application, except his so-called "Austin" claim, could have been raised timely at his plea/sentencing before Judge Newman or at his previous 1st PCR hearing before this Court. (See discussion, *infra*).

Hurst v. Florida does not overcome the time bar

Mahdi relies first on *Hurst v. Florida*, 136 S.Ct. 616 (2016) in an effort to overcome the statute of limitations time bar. In his 2nd or successive PCR Application, Mahdi alleges a direct appeal ground, specifically he challenges the constitutionality of South Carolina's death penalty statute, S.C. Code Ann. § 16-3-20(B), alleging it is unconstitutional because it requires judge sentencing after a guilty plea. **However, Mahdi has not established a new rule of constitutional law to be retroactively applied and applicable to him.** And, nothing supports the presence of an "undiscoverable" fact either at trial [i.e. plea or sentencing] in 2006 or during the prior PCR action in 2009. In fact, this Court decided this issue in the 1st PCR proceeding and found there was no merit to it. (Amended Order of Dismissal, pp. 123-33).⁸

⁸ This Court decided this issue in the 1st PCR action under a claim of ineffective assistance of counsel but found there was no merit to the underlying constitutional challenge to S.C. Code Ann. Section 16-3-20(B). As a result, this Ground is also barred by the doctrines of *res judicata*, *judicial estoppel* and *collateral estoppel*. See generally *Lifshultz Fast Freight, Inc. v. Haynsworth, Marion, McKay & Guerard*, 335 S.C. 244, 513 S.E.2d 96 (1999).

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Mahdi argues *Hurst* created a new constitutional rule applicable and retroactive to him. However, *Hurst* did not create a new rule of constitutional law or a new rule retroactive and applicable to Mahdi; *Hurst* simply applied *Ring v. Arizona*, 536 U.S. 584 (2002) and *Apprendi v. New York*, 530 U.S. 466 (2000) to Florida's capital sentencing scheme, where the defendant exercised his right to jury fact finding at sentencing. *Hurst*, 136 S.Ct. 616; *Runyon v. United States*, ___ F.Supp.3d ___, 2017 W.L. 253963 (E.D. Va. 2017); *Boggs v. Ryan*, 2017 WL 67522 (D. Ariz. 2017)(*Slip Copy*); *Garza v. Ryan*, 2017 WL 105983 (D. Ariz. 2017)(*Slip Copy*); *United States v. Bazemore*, 839 F.3d 379 (5th Cir. 2016); *Mullens v. State*, 197 So.3d 16, 38 (Fla. 2016), cert. denied 2017 W.L. 69535, U.S. Fla, January 9, 2017; *Brandt v. State*, 197 So.3d 1051, 1079 (Fla. 2016) *In re Bohannon v. State*, ___ So.3d ___, 2016 WL 5817692 (Ala. 2016)(*Not yet released for publication*); *Ryan v. Russell*, ___ So.3d ___, 2016 WL 7322331 (Ala. 2016) (*Not yet released for publication*); *Ex parte State v. Billups*, ___ So.3d ___, 2016 W.L. 3364689 (Ala. 2016)(*Not yet released for publication*).

The sentencing method at issue in *Hurst* that was found unconstitutional allowed for the jury to hear the facts but make only an advisory recommendation to the judge when the defendant exercised his right to jury fact finding at sentencing, and, the trial judge in turn, could reject that recommendation, and made the critical findings to impose death. 136 S.Ct. at 620. *Hurst* is not a new rule of constitutional law and does not implicate nor address the voluntary waiver of the right to a trial by jury on guilt and sentencing encompassed when a defendant pleads guilty in a capital case under South Carolina's capital sentencing scheme. *Id.* 136 S.Ct. at 620-22; *State v. Downs*, 361 S.C. 141, 146, 604 S.E.2d 377, 380 (2004). *Hurst* found Florida's capital sentencing scheme violated the holdings of *Ring* and *Apprendi* when the



defendant exercised his right to jury fact finding at sentencing, because the jury's recommendation was only an advisory opinion, which the trial judge could reject.⁹

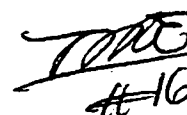
Subsequent to the decision in *Hurst*, the Supreme Court of Florida considered the same argument in regard to their statute as raised here by Mahdi. That Court found:

During the pendency of Mullen's appeal, the United States Supreme Court issued its decision in *Hurst v. Florida*, ___ U.S. ___, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016). The Court held that Florida's capital sentencing scheme violated the Sixth Amendment under *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Following that decision, Mullens requested leave to file supplemental briefing to address the effects of *Hurst* on his appeal, which we granted.

We need not extensively consider the implications of *Hurst* to determine that Mullens cannot avail himself of relief pursuant to *Hurst*. *Hurst* said nothing about whether a defendant would waive the Sixth Amendment right to jury fact-finding in sentencing procedures as recognized by *Ring* and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). In light of the fact that Mullens waived this right, his argument that his sentence must be commuted to life imprisonmentfails.

Mullens v. State, 197 So.3d 16, 38 (Fla. 2016)(citing *Downs*, 361 S.C. at 146, 604 S.E.2d at 380), cert. denied 2017 W.L. 69535, U.S. Fla, January 9, 2017. Accord *Brandt v. State*, 197 So.3d 1051, 1079 (Fla. 2016); *Knight v. State*, 211 So.3d 1 (Fla. 2016); *Robertson v. State*, 2016

⁹ See *Mosely v. State*, 209 So.3d 1248 (Fla. 2016)(recognizing in *Hurst*, the Supreme Court specifically relied, not on new jurisprudential developments in the 6th Amendment case law, but rather on its 2002 opinion in *Ring v. Arizona* and determined the analysis of *Ring* previously applied to Arizona's sentencing scheme also applied equally to Florida's [quoting *Hurst*, 136 S.Ct. at 621-22]; and, therefore the Florida Supreme Court applied the holding in *Hurst* retroactively to defendants who exercised their right to jury fact finding at sentencing whose sentence became final after *Ring*, since Florida's sentencing scheme has been unconstitutional since *Ring* for those who exercised their right to a jury determination; however, the ruling in *Hurst* was not applicable nor would it be retroactively applied to those defendants who waived their right to a jury determination [citing *Mullens v. State*, 197 So.3d 16 (Fla. 2016)]. Subsequent to *Hurst* and *Mullens*, the Florida Supreme Court has consistently held *Hurst* is not applicable to a defendant who waives his right to jury fact finding in sentencing. *Brandt v. State*, 197 So.3d 1051, 1079 (Fla. 2016); *Knight v. State*, 211 So.3d 1 (Fla. 2016); *Robertson v. State*, 2016 W.L. 7043020 (Fla. Dec. 1, 2016)(Unpublished); *Wright v. State*, 213 So.3d 881 (Fla. 2017); *Davis v. State*, 207 So.3d 177 (Fla. 2016).



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W.L. 7043020 (Fla. Dec. 1, 2016); *Wright v. State*, 213 So.3d 881 (Fla. 2017); *Davis v. State*, 207 So.3d 177 (Fla. 2016); *Mosely v. State*, 209 So.3d 1248 (Fla. 2016).

Similarly, the South Carolina Supreme Court held in *State v. Downs*:

The capital-sentencing procedure invalidated in *Ring* does not exist in South Carolina. Arizona's statute required the judge to factually determine whether there existed an aggravating circumstance supporting the death penalty regardless whether the judge or a jury had determined guilt. Ariz. Rev. Stat. Section 13-703(C) (2001) (amended 2002); *Ring* 536 U.S. at 597, 122 S.Ct. At 2437, 153 L.Ed.2d at 569. In South Carolina conversely, a defendant convicted by a jury can be sentenced to death only if the jury also finds an aggravating circumstance and recommends the death penalty. S.C. Code Ann. Section 16-3-20(B) (2003); *Sheppard v. State*, 357 S.C. 646, 652, 594 S.E.2d 462, 466 (2004).

In any event, *Ring* did not involve jury-trial waivers and is not implicated when a defendant pleads guilty. Other courts have also reached this conclusion. See e.g. *Leone v. Indiana*, 797 N.E.2d 743, 749-50 (Ind. 2003); *Colwell v. Nevada*, 118 Nev. 8907, 59 P.3d 463, 473-74 (2003); *Illinois v. Altom*, 338 Ill. App.3d 355, 362, 272 Ill. Dec. 751, 788 N.E.2d 55, 61 (5 Dist.), *app. denied* 204 Ill.2d 663, 275 Ill. Dec. 77, 792 N.E.2d 308 (2003).

Downs, 361 S.C. 141, 146, 604 S.E.2d 377, 380 (2004). As a result, the holding in *Hurst* is not a new rule of constitutional law as a *Ring* and/or *Apprendi* challenge could have been raised at Mahdi's plea or sentencing or at his 1st PCR, and *Hurst* is not even applicable to Mahdi. *Runyon v. United States*, ___ F.Supp.3d ___, 2017 W.L. 253963 (E.D. Va. 2017)(*Hurst* does not represent an intervening change in the law set forth in *Ring* with respect to the issue raised on appeal); *Boggs v. Ryan*, 2017 WL 67522 (D. Ariz. 2017)(*Slip Copy*)(*Hurst* is not a change in the law, the U.S. Supreme Court simply applied *Ring* to Florida's capital sentencing scheme); *Garza v. Ryan*, 2017 WL 105983 (D.Ariz. 2017)(*Slip Copy*)(*Hurst* is not a significant change in the law; the Supreme Court applied *Ring* to Florida's sentencing scheme, and *Hurst* is not retroactive because the Supreme Court held that *Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review); *United States v. Bazemore*, 839 F.3d 379

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(5th Cir. 2016)(*Hurst* does not provide a new basis for challenging defendant's sentence; defendant could have brought an *Apprendi* challenge in his direct appeal); *In re Bohannon v. State*, ___ So.3d ___, 2016 WL 5817692 (Ala. 2016)(*Not yet released for publication*)(*Hurst* was based on application, not an expansion, of *Apprendi* and *Ring*); *Ryan v. Russell*, ___ So.3d ___, 2016 WL 7322331 (Ala. 2016)(*Hurst* was based on two case: *Apprendi* and *Ring*)(*Not yet released for publication*); *Ex parte State v. Billups*, ___ So.3d ___, 2016 W.L. 3364689 (Ala. 2016)(*Not yet released for publication*)(The Supreme Court in *Hurst* did nothing more than apply its previous holdings in *Apprendi* and *Ring* to Florida's capital sentencing scheme; it did not announce a new rule of constitutional law, nor did it expand its holdings in *Apprendi* and *Ring*). *Hurst* is only applicable to those sentenced under Florida's sentencing scheme, which is different than South Carolina's *Downs*. And, it is only applicable to those who exercised their right to a jury determination at sentencing under Florida's capital sentencing scheme, which Mahdi did not.

As of the date of this Return, the United States Supreme Court has not found S.C. Code Ann. § 16-3-20(B) unconstitutional in requiring judge sentencing after entry of a guilty plea in a capital case and waiver of a jury. *See Lewis v. Wheeler*, 609 F.3d 291, 309 (4th Cir. 2010); *see also Nunley v. Bowersox*, 784 F.3d 468, 472 (8th Cir. 2015)(citing *Lewis v. Wheeler* as persuasive). Nor has the Fourth Circuit Court of Appeals. In fact, the Fourth Circuit found Virginia's statute, which is similar to South Carolina's, was not unconstitutional in requiring judge sentencing when a defendant pleads guilty in a capital case. *Lewis*, 609 F.3d at 309; *see also Nunley*, 784 F.3d at 472 (citing *Lewis* as persuasive). And, the South Carolina Supreme Court has repeatedly upheld the constitutionality of this provision numerous times on direct appeal after a *Ring* and/or *Apprendi* challenge. *State v. Inman*, 395 S.C. 539, 555-56, 720 S.E.2d



31, 40 (2011); *State v. Allen*, 386 S.C. 93, 687 S.E.3d 21, 25-26 (2009); *State v. Crisp*, 362 S.C. 412, 608 S.E.2d 429 (2005); *State v. Downs*, 361 S.C. 141, 146, 604 S.E.2d 377, 380 (2004)(when a defendant pleads guilty in a capital case, statutorily mandated sentencing by the trial judge does not violate the holding in *Ring v. Arizona*, 536 U.S. 584 (2002). *Ring* did not involve jury trial waivers and is not implicated when a defendant pleads guilty); *State v. Wood*, 362 S.C. 135, 607 S.E.2d 57 (2004)(finding Section 16-3-20(B) constitutional).¹⁰ Numerous other federal and state courts considering this constitutional challenge to similar state statutes have found no merit to it. *Lewis v. Wheeler*, 609 F.3d 291, 309 (4th Cir. 2010); *Nunley v. Bowersox*, 784 F.3d 468, 472 (8th Cir. 2015); *State v. Nunley*, 341 S.W.3d 611, 620 (Mo. 2011); *State ex rel. Taylor v. Steele*, 341 S.W.2d 634, 646-49 (Mo. 2011); *Leon v. State*, 797 N.E.2d 743, 750 (Ind. 2003); *Byrom v. State*, 927 So.2d 709, 728 (Miss. 2006); *Mack v. State*, 75 P.3d 803, 806 (2003); *Colwell v. State*, 59 P.3d 463, 474 (Nev. 2002); *People v. Altom*, 788 N.E.2d 55, 60-61 (Ill. 2003); *State v. Ketterer*, 855 N.E.2 48, 69 (Ohio 2006); *Thacker v. State*, 100 P.3d 1052 (OK 2004); *Moore v. State*, 771 N.E.2d 46 (Ind. 2002). In summary, Mahdi could have raised a *Ring* and/or *Apprendi* challenge in 2006 or 2009 as was raised in the above cited cases.

Furthermore, the record indicates Mahdi was fully advised of his rights to jury sentencing and the pros and cons of having a jury conduct his sentencing verses a judge determining his sentence. (See R. 1324-68). After Mahdi indicated a possible guilty plea, Judge Newman recessed overnight, and Mahdi was given additional time to talk to his lawyers about whether he wanted to plead guilty and have the judge determine his sentence or proceed with a jury trial and

¹⁰ Additionally, the South Carolina Supreme Court has repeatedly reversed the plea and death sentence in cases where a defendant was allowed to plead guilty and have jury sentencing in contravention of the statute. *State v. Patterson*, 278 S.C. 319, 322, 295 S.E.2d 264, 266 (1982), overruled on other grounds by *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991); *State v. Truesdale*, 278 S.C. 368, 369, 296 S.E.2d 528, 529 (1982).

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have a jury determine his guilt and sentence. (R. 1332-36). The record reflects that discussions in this regard had already occurred before counsel indicated to the Court that Mahdi might change his plea to guilty. (R. 1329-32). Mahdi clearly understood his right to have a jury determine his sentence, because several days of individual *voir dire* and jury selection had been completed, and a panel of twelve (12) jurors and four (4) alternates had been seated but not sworn at the time Mahdi indicated he might plead guilty. (R. 1370-71). After the overnight recess, Mahdi told the Court he wanted to enter a plea of guilty. (R. 1336).

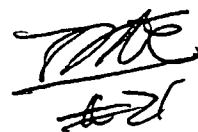
Additionally, prior to Mahdi's entry of a plea of guilty, Judge Newman conducted a *Blair* hearing to determine whether Mahdi was competent to plead guilty. (R. 1336-43). Dr. Michael Cross testified that Mahdi had a rational understanding of what a guilty plea meant, and the risks, benefits, and possible consequences. (R. 1340). Mahdi told the Court that he was competent to plead guilty, and he wanted to move forward with the guilty plea. (R. 1342). Judge Newman found on the record that Mahdi was competent to plead guilty. (R. 1343). Judge Newman's finding in this regard is fully supported by the record.

During the lengthy colloquy with the Court, Mahdi was placed under oath. (R. 1343). Mahdi testified that he understood that if he pled guilty in front of Judge Newman that the possible sentences were life in prison and the death penalty. (R. 1347). Mahdi testified under oath that he understood he had the right to a jury sentencing, and that in order to sentence him to death all twelve (12) jurors would have to unanimously agree that he should be sentenced to death. (R. 1347-48). Mahdi also stated under oath that he understood that if he pled guilty, the Judge [Judge Newman] would solely determine the sentence, not the twelve (12) jurors. (R. 1349).

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Mahdi told Judge Newman that he had had sufficient time to discuss with his attorneys and his family his decision to plead guilty. (R. 1351). Mahdi stated he had no complaints against his attorneys, was fully satisfied with them, and did not need any more time to discuss anything with them. (R. 1268). Mahdi acknowledged that, understanding the nature of the charges, the possible penalties, including death, the other possible consequences of his guilty plea, and his constitutional rights, he wanted to plead guilty. (R. 1356). The record shows Mahdi knowingly, intelligently, and voluntarily made the decision to enter a plea of guilty and have Judge Newman sentence him, rather than the jury he had selected and impaneled. (R. 1324-68). *See Boykin v. Alabama*, 395 U.S. 238 (1969); *Rayford v. State*, 314 S.C. 46, 443 S.E.2d 805 (1994)(record of plea proceeding, including applicant's answers to the trial judge's questions, clearly establishes applicant could not have had misconceptions regarding sentencing).

Additionally, counsel testified at the 1st PCR hearing before this Court that Mahdi decided he wanted Judge Newman to sentence him rather than the jury he had selected and impaneled. (PCR Tr. 682-84). At the 1st PCR, Mahdi offered no testimony on this issue and offered no evidence that contradicted counsel's sworn testimony on this issue. This Court previously found counsel's testimony on this issue to be credible. This Court previously found counsel's testimony on this issue was supported and corroborated by Mahdi's responses to Judge Newman's questions during the guilty plea itself. This Court previously found Mahdi made a strategic decision, after selecting a jury, that he wanted Judge Newman to sentence him, **not** the jury he had selected and was impaneled. (Amended Order of Dismissal, pp. 131-32). As a result, Mahdi's plea of guilty and waiver of his jury sentencing was valid. *See Mullens*, 197 So.3d at 39 (where defendants have strategically chosen to proceed before a judge alone in an attempt to avoid a death sentence, their plea of guilty and waiver of jury sentencing has been

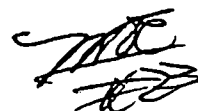
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upheld); *Taylor*, 341 S.W.3d at 647-48 (similar). As a result, this Ground is also barred by the doctrines of *res judicata*, *judicial estoppel* and *collateral estoppel* as this issue was previously decided by this Court in the 1st PCR action. (Amended Order of Dismissal). See generally *Lifshultz Fast Freight, Inc. v. Haynsworth, Marion, McKay & Guerard*, 335 S.C. 244, 513 S.E.2d 96 (1999); *Foxworth v. State*, 275 S.C. 615, 274 S.E.2d 415 (1981).

Mahdi also waived and abandoned this issue on appeal from the denial of PCR. (Petition for Writ of Certiorari). Mahdi was represented by three (3) capital PCR appellate attorneys and did not raise the denial of this claim on appeal from the denial of his 1st PCR in his Petition for Writ of Certiorari [merits petition]. As a result, this Court's previous determination, on this issue, is "the law of the case," and Mahdi waived and abandoned this issue. *Bailes v. Young*, 315 S.C. 166, 432 S.E.2d 482 (1993)(discussing "law of the case"); *Lindsay v. Lindsay*, 328 S.C. 329, 491 S.E.2 583 (Ct. App. 1997); *Charleston Lumber Co. v. Miller Hous. Corp.*, 338 S.C. 171, 525 S.E.2d 869 (2000)(an unappealed order, right or wrong, is ordinarily the law of the case); *Resolution Trust Corp. v. Eagle Lake & Golf Condominiums*, 310 S.C. 473 427 S.E.2d 646 (1993)(the trial judge's procedural ruling is the law of the case since it has not been appealed); *Anderson v. Short*, 323 S.C. 522, 476 S.E.2d 475 (1996)(unappealed ground becomes the law of the case); *Ross v. Medical University of S.C.*, 328 S.C. 51, 492 S.E.2d 62 (1997)(the law of the case applies both to those issues explicitly decided and to those issues which were necessarily decided in the former case); *Nelson v. Charleston & Western Carolina RR Co.*, 231 S.C. 351, 98 S.E.2d 798 (1957); See *Lifshultz Fast Freight, Inc. v. Haynsworth, Marion, McKay & Guerard*, 335 S.C. 244, 513 S.E.2d 96 (1999)(discussing the difference between the law of the case and *res judicata*).



As a result of all of the above, Mahdi has not shown a new rule of constitutional law or material facts that could not have been raised at his guilty plea/sentencing in 2006 or his 1st PCR merits hearing in 2009 entitling him to file a untimely successive PCR application. *See S.C. Code § 17-27-45 (B) & (C)*. *Ring* was decided in 2002 and *Apprendi* was decided in 2000 long before Mahdi's guilty plea/sentencing and his 1st PCR Application and 1st PCR hearing. *Hurst* is not a new rule of constitutional law but was merely an application of the holdings in *Ring* and *Apprendi* to Florida's sentencing scheme where the defendant exercised his right to jury fact finding at sentencing. Mahdi could have raised a *Ring* and/or *Apprendi* challenge to the death penalty statute at the time of his guilty plea/sentencing in 2006 or in his 1st PCR action in 2009. Furthermore, Mahdi may not raise this issue now because he is bound by this Court's previous determination in the 1st PCR case that he [Mahdi] made a strategic decision that he wanted to be sentenced by Judge Newman and not the jury he had selected, because he believed he had a better chance of receiving a life sentence before Judge Newman. (Amended Order of Dismissal). As a result, this Ground is time barred. Additionally, this ground is barred in PCR because it is not cognizable as a direct appeal claim that could have been raised previously. *Cf. Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) ("Errors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings"); *Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) ("The *Simmons* rule gives effect to the Legislature's clear intent that the post-conviction relief procedure is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal."). Further, this Ground is barred by the doctrines of *res judicata*, *judicial estoppel*, *collateral estoppel*, and *the law of the case*.



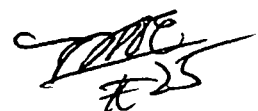
Lafler and Frye do not overcome the time bar

Mahdi also relies on *Lafler v. Cooper*, 132 S.Ct. 1376 (2012) and *Missouri v. Frye*, 132 S.Ct. 1399 (2012) in an attempt to overcome the statute of limitations time bar. Again Mahdi argues these cases created a new rule of constitutional law and one retroactive and applicable to him or this claim would present material new facts not previously presented. However, *Lafler* and *Frye* did not issue new rules of constitutional law or new rules of constitutional law that are to be retroactively applied to Mahdi. *Waters v. United States*, 2015 WL 5317516, at *2 (D. Del. Sept. 10, 2015). And, Mahdi has not shown new material facts not previously presented because those facts were known to Mahdi at the time of his guilty plea and sentencing and before his first PCR. See *S.C. Code Ann. Section 17-27-45 (C)*.

Every federal appellate Court to consider the issue has held that *Lafler and Frye* did not establish a “new rule of constitutional law.” See *Wert v. United States*, 596 Fed.Appx. 914, 917–18 (11th Cir.2015) (“As we conclude that *Lafler* did not involve a newly recognized right, we do not consider whether *Lafler* applies retroactively.”); *United States v. Crisp*, 573 Fed.Appx. 706, 708–09 (10th Cir.2014) (“No reasonable jurist would debate the district court’s determination that *Frye* and *Lafler* did not announce a new constitutional right that would extend the limitations period under § 2255(f)(3).”); *Navar v. Warden Fort Dix FCI*, 569 Fed.Appx. 139, 140 n.1 (3d Cir.2014) (“[N]either *Lafler* nor *Frye* announced a new rule of constitutional law, as required for authorization to file a second or successive section 2255 motion.”); *Gallagher v. United States*, 711 F.3d 315, 316 (2d Cir.2013) (“Neither *Lafler* nor *Frye* announced a new rule of constitutional law; both are applications of *Strickland v. Washington*.”); *In re Liddell*, 722 F.3d 737, 738 (6th Cir. 2013); *Pagan San Miguel v. United States*, 736 F.3d 44, 45 (1st Cir.2013)(per curiam); *In re King*, 697 F.3d 1189 (5th Cir.2012); *Hare v. United States*, 688 F.3d

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878, 878–80 (7th Cir.2012); *Buenrostro v. United States*, 697 F.3d 1137, 1140 (9th Cir.2012) (“[W]e join the Eleventh Circuit in concluding that neither case decided a new rule of constitutional law.”); *Williams v. United States*, 705 F.3d 293, 294 (8th Cir.2013); *In re Graham*, 714 F.3d 1181, 1183 (10th Cir. 2013); *United States v. Lawton*, 2012 WL 6604576 at *3 (10th Cir., Dec. 19, 2012); *In re Perez*, 682 F.3d 930, 932–34 (11th Cir. 2012); *Miller v. Thaler*, 714 F.3d 897, 902 (5th Cir. 2013)(The Fifth Circuit has repeatedly held that *Lafler* and *Frye* did not announce new constitutional rules; they merely applied the Sixth Amendment right to counsel, as defined in *Strickland v. Washington*, 466 U.S. 668 (1984), to a specific factual context); *In re King*, 697 F.3d 1189 (5th Cir. 2012)(“we agree with the Eleventh Circuit’s determination in *In re Perez*, 682 F.3d 930, 933–34 (11th Cir.2012), that *Cooper* and *Frye* did not announce new rules of constitutional law because they merely applied the Sixth Amendment right to counsel to a specific factual context.”). Most of these cases are compiled in *Hestle v. United States*, 2013 WL 1147712 (E.D.Mich., March 19, 2013). See also *Hough v. United States*, 177 F. Supp. 3d 782, 785 (W.D.N.Y. 2016); *Stewart v. Stephens*, Civ. 2015 WL 6522828, at *2 (N.D. Tex. Oct. 26, 2015); *Ahvarado v. Stephens*, 2015 WL 3775416, at *3 (S.D. Tex. June 16, 2015); *Etheridge v. Morgan*, 2015 WL 4041707, at *5 (W.D. La. May 11, 2015), adopted, 2015 WL 4042152 (W.D. La. July 1, 2015); *Brown v. Director, TDCJ-CID*, 2014 WL 892170, at *3 (E.D. Tex. Mar. 3, 2014); *Johnson v. Rader*, 2014 WL 198165, at *5 (E.D. La. Jan. 14, 2014); *Suitt v. McCain*, 2016 WL 5395843, at *5 (E.D. La. Sept. 6, 2016), report and recommendation adopted, 2016 WL 5390396 (E.D. La. Sept. 27, 2016); *Williams v. Cain*, 2016 WL 4063863, at *1 (E.D. La. July 29, 2016); *United States v. Cruz*, 2016 WL 4083326, at *2 (D. Mass. July 20, 2016); *Landron-Class v. United States*, 86 F. Supp. 3d 64, 75 (D.P.R. 2015) (collecting cases); *Hough v. Snyder-Norris*, 2016 WL 3820562, at *6 (E.D. Ky. July 12, 2016); *Nechovski v. Snyder-Norris*, 2016 WL

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3552196, at *6 (E.D. Ky. June 23, 2016); *Shawley v. Bear*, 2016 WL 1643460, at *3 (W.D. Okla. Mar. 24, 2016), report and recommendation adopted, 2016 WL 1629397 (W.D. Okla. Apr. 22, 2016), certificate of appealability denied, 2016 WL 5543291 (10th Cir. Sept. 29, 2016); *Armour v. Brewer*, 2016 WL 1259113, at *3 (E.D. Mich. Mar. 31, 2016), appeal dismissed (Aug. 22, 2016); *Leon v. Ryan*, 2015 WL 6769146, at *2 (D. Ariz. Sept. 17, 2015), report and recommendation adopted, 2015 WL 6749743 (D. Ariz. Nov. 5, 2015)


Moreover, even if *Lafler* or *Frye* announced a new rule of constitutional law, neither case contains any language regarding the retroactivity of the rule, and no subsequent Supreme Court case has held that the rule applies retroactively on collateral review. *Gallagher v. United States*, 2013 WL 1235668 [711 F.3d at 315]; *Baker v. Ryan*, 497 Fed.Appx. 771, 773 (9th Cir. 2012) (the cases of *Missouri v. Frye* and *Lafler v. Cooper* did not announce a “newly recognized” right that has been made retroactively applicable to cases on collateral review, so as to extend the one year limitations period); *United States v. Ocampo*, 919 F. Supp. 2d 898, 915 (E.D. Mich. 2013); *Armour v. Brewer*, 2016 WL 1259113, at *3 (E.D. Mich. Mar. 31, 2016), appeal dismissed (Aug. 22, 2016); *Shawley v. Bear*, 2016 WL 1643460, at *3 (W.D. Okla. Mar. 24, 2016), report and recommendation adopted, 2016 WL 1629397 (W.D. Okla. Apr. 22, 2016), certificate of appealability denied, 2016 WL 5543291 (10th Cir. Sept. 29, 2016); See *Tyler v. Cain*, 533 U.S. 656, 663 (2001) (“[A] new rule is not made retroactive to cases on collateral review unless the Supreme Court holds it to be retroactive.”). In short, neither *Lafler* nor *Frye* satisfies § 17-23-45. Therefore, the one-year period of limitations began to run when Mahdi’s conviction became final. *Waters v. United States*, 2015 WL 5317516, at *2 (D. Del. Sept. 10, 2015); *Villega-Angulo v. United States*, 2016 WL 7030741, at *8 (D.P.R. Sept. 30, 2016). Conclusively, the statute of limitation has well run, as has Mahdi’s time limit. *Villega-Angulo v. United States*, 2016 WL

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7030741, at *8 (D.P.R. Sept. 30, 2016); *Suitt v. McCain*, No. CV 16-3887, 2016 WL 5395843, at *5 (E.D. La. Sept. 6, 2016), report and recommendation adopted, 2016 WL 5390396 (E.D. La. Sept. 27, 2016).

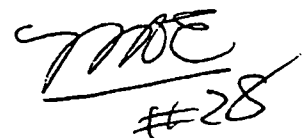
Other states considering this same issue have agreed. See *Commonwealth v. Feliciano*, 69 A.3d 1270 (Pa.Super. 2013) (explaining *Lafler* and *Frye* simply applied Sixth Amendment right to counsel and ineffectiveness test to circumstances where counsel's conduct resulted in lapse or rejection of plea offer, to petitioner's detriment; petitioner's reliance on these decisions to satisfy Section 9545(b)(1)(iii) exception to PCRA's time restrictions is unavailing). See also *Commonwealth v. Hernandez*, 79 A.3d 649 (Pa.Super. 2013) (holding appellant's claim that his petition fits within Section 9545(b)(1)(iii) exception lacks merit because neither *Lafler* nor *Frye* created new constitutional right); *Commonwealth v. Gallman*, 2016 WL 1436489, at *5 (Pa. Super. Ct. Apr. 12, 2016) ("neither *Frye* nor *Lafler* created a new constitutional right." Rather, they "simply applied the Sixth Amendment right to counsel, and the *Strickland* test for demonstrating counsel's ineffectiveness, to the particular circumstances at hand[.]") Accordingly, Appellant has failed to prove that the newly recognized constitutional right exception applies); *Commonweath v. Norris*, 2016 WL 1064472, at *6 (Pa. Super. Ct. Mar. 17, 2016)(Defendant's reliance on *Lafler* and *Frye* to avoid the time-bar is misplaced. Contrary to his claims, neither case announced a new constitutional right in Pennsylvania which would allow Defendant to avoid the time-bar); *Black v. State*, 2016 WL 763163, at *1 (Nev. App. Feb. 17, 2016), cert. denied, 2017 WL 69340 (U.S. Jan. 9, 2017); *Young v. State*, 2013 Ark. 513, 2, n. 1 (2013). Thus, Mahdi's current PCR application remains time barred, and the court must dismiss it as untimely.

This 2nd or successive Application was not brought within one year of a newly recognized right made retroactively applicable to cases on collateral review. Further, this Application was

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brought more than one (1) year after *Frye* and *Lafler* were decided. *Leon v. Ryan*, 2015 WL 6769146, at *2 (D. Ariz. Sept. 17, 2015), report and recommendation adopted, 2015 WL 6749743 (D. Ariz. Nov. 5, 2015).

Finally, Mahdi does not advance any facts supporting his claim, which rest primarily on counsel's purported pre-plea advice and the Court's sentence, which would have been obvious to him at the time he changed his plea and was subsequently sentenced. See *United States v. Cruz*, 2016 WL 4083326, at *2 (D. Mass. July 20, 2016); *Hough v. Snyder-Norris*, 2016 WL 3820562, at *6 (E.D. Ky. July 12, 2016). As a result, he cannot fit under the time bar exception of Section 17-27-45(C). Mahdi has not shown evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, because in order to fit under this exception the application must be filed under this chapter within one (1) year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence. *S.C. Code § 17-27-45 (C)*. Mahdi cannot meet this test. As stated above, *Lafler* and *Frye* are not new rules of constitutional law, but a simple application of *Strickland*. *Gallagher*, 711 F.3d at 316 (“Neither *Lafler* nor *Frye* announced a new rule of constitutional law; both are applications of *Strickland v. Washington*.”); *Miller*, 714 F.3d at 902 (“*Lafler* and *Frye* did not announce new constitutional rules; they merely applied the Sixth Amendment right to counsel, as defined in *Strickland*, to a specific factual context); *In re King*, 697 F.3d 1189 (“we agree with the Eleventh Circuit's determination in *In re Perez*, [citation omitted], that *Cooper* and *Frye* did not announce new rules of constitutional law because they merely applied the Sixth Amendment right to counsel to a specific factual context.”); *Gallman*, 2016 WL 1436489, at *5 (“neither *Frye* nor *Lafler* created a new constitutional right.” Rather, they “simply applied the Sixth Amendment right to counsel, and the

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Strickland test for demonstrating counsel's ineffectiveness, to the particular circumstances at hand[.]"). Mahdi knew all these facts under this allegation at the time of his plea and sentencing and could have raised a *Strickland* claim in this regard at his 1st PCR hearing.

Mahdi is not entitled to an *Austin* appeal

Finally, the *Austin* claim simply must be dismissed because Mahdi is not entitled to an *Austin* appeal under South Carolina law. Mahdi has already had an appeal from the denial of his 1st PCR application to both the South Carolina Supreme Court and the United States Supreme Court, which he lost. *Austin* is only applicable where the applicant wished to appeal from the denial of PCR but was denied the opportunity to seek appellate review or the right to appellate review of a previous PCR order was not knowingly and intelligently waived. *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991); *Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991); *Odom v. State*, 337 S.C. at 261-262, 523 S.E.2d 753; *Hope v. State*, 328 S.C. 78, 492 S.E.2d 76 n. 1 (1997); *King v. State*, 308 S.C. 348, 348-49, 417 S.E.2d 868 (1992). Neither of which occurred in this case.

Furthermore, ineffective assistance of PCR appellate counsel is not an exception or an excuse allowing the filing of a second or successive PCR application in violation of the statute of limitations for PCR actions. *Robertson v. State*; *Kelly v. State*, 404 S.C. 365, 366, 745 S.E.2d 377, 378 (2013)

In addition to the statutory provisions listed, our Supreme Court has made specific exceptions, as well. To ensure one full round of remedies, the Court has found the one year limitations period does not apply; (1) where an applicant was denied a direct appeal due to ineffective assistance, see *Wilson v. State*, 348 S.C. 215, 218, 559 S.E.2d 581, 582-83 (2002); and (2) where an applicant was denied an appeal from denial of post-conviction relief, see *Odom*

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v. *State*, 337 S.C. 256, 263, 523 S.E.2d 753, 756 (1999). Mahdi cannot claim any of these exceptions. He had both a direct appeal and an appeal from the denial of his 1st PCR action.

Thus, neither the statutory exceptions nor the Court's exceptions apply to the instant action.¹¹ This action, consequently, is not timely filed, and is barred by the South Carolina statute of limitations for PCR actions.

B. The Present Action is Improperly Successive

Further, the application is barred as improperly successive. *Cf. Graham v. State*, 378 S.C. 1, 3-4, 661 S.E.2d 337, 338 (2008) (error in applying statute of limitations in regard to claim of denial of right to appeal, but finding claim barred as successive). Successive applications are historically disfavored, but are not categorically disallowed. See *S.C. Code §17-27-45 (B) and (C)* (exceptions to statute of limitations and successiveness bar include applications based upon a new retroactively applied substantive standard in criminal law, or new "evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence" if filed within one-year "after the date when the facts could have been ascertained by the exercise of reasonable diligence"); *Odom v. State*, 337 S.C. 256, 523 S.E.2d 753 (1999) ("belated review of appellate issues," in an *Austin* appeal or "rare procedural circumstances" are reasons to allow successive actions). None of the exceptions, however, can be met with regard to Mahdi's new

¹¹ Mahdi has not shown the bases for these claims could not have been discovered previously or that such was not discovered. The statute requires:

(C) If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter *within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.*

S.C. Code Ann. § 17-27-45 (C) (emphasis added).

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allegations. Mahdi's prior PCR counsel could have discovered the facts and claims asserted in the present application at the time of Mahdi's 1st PCR. And, Mahdi is not entitled to an *Austin* appeal under South Carolina law.

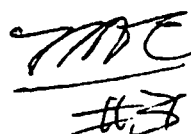
"In order to be entitled to a successive PCR application, the applicant must establish that the grounds raised in the subsequent application could not have been raised in the previous application." *Graham v. State*, 378 S.C. 1, 3, 661 S.E.2d 337, 338 (2008). Mahdi cannot do so. As a result, this application must be dismissed with prejudice.

To the extent that Mahdi would claim PCR counsel was ineffective in failing to raise these claims, it is well-established that such an assertion alone is not sufficient cause and such an argument does not allow for another "bite at the apple." *Aice v. State*, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991); *Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29 (2016).

Further, to the extent Mahdi is seeking to establish cause to excuse the default of previously unexhausted claims in his federal litigation, he has mixed concepts. The Supreme Court of South Carolina so found in *Kelly v. State*, 404 S.C. 365, 745 S.E.2d 377 (2013). Accord *Robertson v. State*, supra. In *Kelly*, a PCR applicant attempted to rely on United States Supreme Court precedent establishing a narrow exception within federal habeas corpus litigation as announced in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) to avoid the state successiveness bar. Our Supreme Court rejected the argument, noting a great agreement among the States in similarly interpreting the exception:

Like other states, we hereby recognize that the holding in *Martinez* is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions.

Kelly v. State, 404 S.C. 365, 366, 745 S.E.2d 377, 378 (2013) (collecting cases). The South Carolina Supreme Court reaffirmed its holding in *Kelly* in *Roberison*, supra. Thus, the

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applicability of *Martinez* is limited to federal habeas corpus actions. Any reliance Mahdi should make on same to avoid the state successiveness and time bars is misplaced. *Robertson v. State*.

Again, it has long been a settled principle in our state jurisprudence that ineffective assistance of PCR counsel alone does not demonstrate sufficient reason as to why available claims were not asserted. Our Supreme Court has noted the dangers of a contrary position, specifically in capital cases:

Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice. At some juncture judicial review must stop, with only the very rarest of exceptions, when the system has simply failed a defendant and where to continue the defendant's imprisonment without review would amount to a gross miscarriage of justice. See *Butler v. State*, 397 S.E.2d 87 (S.C.1990). We can envision successive PCR applications filed for the purpose of delaying a just execution in a capital case, as well as other abuses of the reviewing system Aice urges that we establish. For these reasons, we hold the contention that prior PCR counsel was ineffective is not *per se* a "sufficient reason" allowing for a successive PCR application under § 17-27-90. This Court has implied such a holding in the past. See *Land v. State*, 274 S.C. 243, 262 S.E.2d 735 (1980) (applicant pointed to his attorney's "inadequate" performance; held not a "sufficient reason" warranting a successive application).

Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991).

Mahdi fails to argue any valid basis for exercise of a "rare exception" of allowing a successive application. See e.g. *Odom v. State*, 337 S.C. 256, 523 S.E.2d 753 (1999)(permitting successive PCR application where applicant did not receive an appeal from the dismissal of his 1st PCR Application or any appellate counsel assistance in seeking an appeal); *Washington v. State*, 324 S.C. 232, 478 S.E.2d 833 (1996)(permitting successive PCR application where multiple procedural irregularities, including the denial of a direct appeal, prohibited applicant the benefit of due process); *Carter v. State*, 293 S.C. 528, 362 S.E.2d 20 (1987)(authorizing a successive PCR application where the applicant did not have PCR counsel that differed from his trial counsel); *Case v. State*, 277 S.C. 474, 289 S.E.2d 413 (1982)(allowing successive PCR

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application where applicant's first PCR application was dismissed without assistance of legal counsel and without a hearing). Successive capital PCR applications filed in an attempt to exhaust previously unexhausted claims are no exception to the rule barring successive applications. *Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29 (2016).

Furthermore, in the present case, Mahdi was represented at PCR before this Court by Teresa Norris and Robert Lominack, Esquires. See *S.C. Code Ann. § 17-27-160(B)* (2014)(identifying requisite qualifications for counsel appointed to represent an indigent, capital PCR applicant). Both of these attorneys were **statutorily qualified** to represent Mr. Mahdi in his 1st PCR action. Mahdi does not even contend in his 2nd PCR Application that his 1st PCR attorneys were not statutorily qualified. Compare *Robertson*, 418 S.C. 505, 795 S.E.2d 29. As a result, there is no merit to this successive PCR application. *Id.* All of Mahdi's allegations in his 2nd PCR Application, including those alleging ineffective assistance of counsel, are improperly successive.

South Carolina's bar to raising direct appeal issues on PCR does not provide exception to either the successiveness bar or the time bar. *Cf. Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) ("Errors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings"); *Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) ("The *Simmons* rule gives effect to the Legislature's clear intent that the post-conviction relief procedure is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal.").

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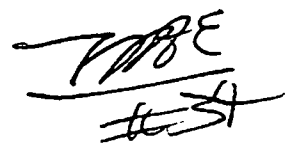
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In his successive PCR Application, Mahdi alleges a direct appeal ground, specifically he challenges the constitutionality of South Carolina's death penalty statute, because it requires judge sentencing after a guilty plea. Again, nothing supports the presence of an "undiscoverable" fact either at trial [i.e. plea or sentencing] in 2006 or during the prior PCR action in 2009. In fact, this Court decided this issue and found there was no merit to it. (Amended Order of Dismissal, pp. 123-33).¹² Nor has Mahdi established a new rule of constitutional law to be retroactively applied and applicable to him.

***Hurst v. Florida* does not overcome the successiveness bar**

Again, Mahdi relies upon the recently decided case of *Hurst v. Florida*, 136 S.Ct. 616, decided January 12, 2016, which dealt with Florida's capital sentencing scheme, in an attempt to overcome the successiveness bar, but his position fares no better for essentially the same reason. The sentencing method at issue in *Hurst* that was found unconstitutional allowed for the jury to hear the facts but make only an advisory recommendation to the judge **when the defendant exercised his right to jury fact finding at sentencing**, and, the trial judge in turn, could reject that recommendation, and made the critical findings to impose death. 136 S.Ct. at 620. *Hurst* is not a new rule of constitutional law and does not implicate nor address the voluntary waiver of the right to a trial by jury on guilt and sentencing encompassed when a defendant pleads guilty in a capital case under South Carolina's capital sentencing scheme. *Id.* 136 S.Ct. at 620-22. See *Downs*, 361 S.C. at 146, 604 S.E.2d at 380. *Hurst* found Florida's capital sentencing scheme

¹² This Court decided this issue under a claim of ineffective assistance of counsel but found there was no merit to the underlying constitutional challenge to S.C. Code Ann. § 16-3-20(B). As a result, this Ground is also barred by the doctrines of *res judicata*, *judicial estoppel* and *collateral estoppel*. See generally *Lifshultz Fast Freight, Inc. v. Haynsworth, Marion, McKay & Guerard*, 335 S.C. 244, 513 S.E.2d 96 (1999).

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violated the holdings of *Ring*, 536 U.S. 584, 122 S.Ct. 2428 and *Apprendi*, 530 U.S. 466, 120 S.Ct. 2348, when the defendant exercised his right to jury fact finding at sentencing, because the jury's recommendation was only an advisory opinion, which the trial judge could reject.¹³

Subsequent to the decision in *Hurst*, the Supreme Court of Florida considered the same argument in regard to their statute as raised here by Mahdi. That Court found:

During the pendency of Mullen's appeal, the United States Supreme Court issued its decision in *Hurst v. Florida*, ___ U.S. ___, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016). The Court held that Florida's capital sentencing scheme violated the Sixth Amendment under *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Following that decision, Mullens requested leave to file supplemental briefing to address the effects of *Hurst* on his appeal, which we granted.

We need not extensively consider the implications of *Hurst* to determine that Mullens cannot avail himself of relief pursuant to *Hurst*. *Hurst* said nothing about whether a defendant would waive the Sixth Amendment right to jury fact-finding in sentencing procedures as recognized by *Ring* and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). In light of the fact that Mullens waived this right, his argument that his sentence must be commuted to life imprisonmentfails.

Mullens v. State, 197 So.3d 16, 38 (Fla. 2016)(citing *Downs*, 361 S.C. at 146, 604 S.E.2d at 380), cert. denied 2017 W.L. 69535, U.S. Fla, January 9, 2017. *Accord Brandt v. State*, 197

¹³ See *Mosely v. State*, 209 So.3d 1248 (Fla. 2016)(recognizing in *Hurst*, the Supreme Court specifically relied, not on new jurisprudential developments in the 6th Amendment case law, but rather on its 2002 opinion in *Ring v. Arizona* and determined the analysis of *Ring* previously applied to Arizona's sentencing scheme also applied equally to Florida's [quoting *Hurst*, 136 S.Ct. at 621-22]; and, therefore the Florida Supreme Court applied the holding in *Hurst* retroactively to defendants who exercised their right to jury fact finding at sentencing whose sentence became final after *Ring*, since Florida's sentencing scheme has been unconstitutional since *Ring* for those who exercised their right to a jury determination; however, the ruling in *Hurst* was not applicable nor would it be retroactively applied to those defendants who waived their right to a jury determination [citing *Mullens v. State*, 197 So.3d 16 (Fla. 2016)]. Subsequent to *Hurst* and *Mullens*, the Florida Supreme Court has consistently held *Hurst* is not applicable to a defendant who waives his right to jury fact finding in sentencing. *Brandt v. State*, 197 So.3d 1051, 1079 (Fla. 2016); *Knight v. State*, 211 So.3d 1 (Fla. 2016); *Robertson v. State*, 2016 W.L. 7043020 (Fla. Dec. 1, 2016)(Unpublished); *Wright v. State*, 213 So.3d 881 (Fla. 2017); *Davis v. State*, 207 So.3d 177 (Fla. 2016).

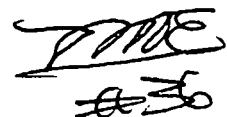
So.3d 1051, 1079 (Fla. 2016); *Knight v. State*, 211 So.3d 1 (Fla. 2016); *Robertson v. State*, 2016 W.L. 7043020 (Fla. Dec. 1, 2016); *Wright v. State*, 213 So.3d 881 (Fla. 2017); *Davis v. State*, 207 So.3d 177 (Fla. 2016); *Mosely v. State*, 209 So.3d 1248 (Fla. 2016).

Similarly, our Supreme Court held in *Downs*:

The capital-sentencing procedure invalidated in *Ring* does not exist in South Carolina. Arizona's statute required the judge to factually determine whether there existed an aggravating circumstance supporting the death penalty regardless whether the judge or a jury had determined guilt. Ariz. Rev. Stat. Section 13-703(C) (2001) (amended 2002); *Ring* 536 U.S. at 597, 122 S.Ct. At 2437, 153 L.Ed.2d at 569. In South Carolina conversely, a defendant convicted by a jury can be sentenced to death only if the jury also finds an aggravating circumstance and recommends the death penalty. S.C. Code Ann. Section 16-3-20(B) (2003); *Sheppard v. State*, 357 S.C. 646, 652, 594 S.E.2d 462, 466 (2004).

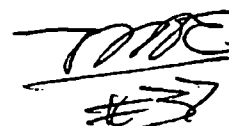
In any event, *Ring* did not involve jury-trial waivers and is not implicated when a defendant pleads guilty. Other courts have also reached this conclusion. See e.g. *Leone v. Indiana*, 797 N.E.2d 743, 749-50 (Ind. 2003); *Colwell v. Nevada*, 118 Nev. 8907, 59 P.3d 463, 473-74 (2003); *Illinois v. Altom*, 338 Ill. App.3d 355, 362, 272 Ill. Dec. 751, 788 N.E.2d 55, 61 (5 Dist.), app. denied 204 Ill.2d 663, 275 Ill. Dec. 77, 792 N.E.2d 308 (2003).

Downs, 361 S.C. at 146, 604 S.E.2d at 380. As a result, the holding in *Hurst* is not a new rule of constitutional law as a *Ring* and/or *Apprendi* challenge could have been raised at Mahdi's plea or sentencing or at his 1st PCR, and *Hurst* is not even applicable to Mahdi. *Runyon v. United States*, ___ F.Supp.3d ___, 2017 W.L. 253963 (E.D. Va. 2017)(*Hurst* does not represent an intervening change in the law set forth in *Ring* with respect to the issue raised on appeal); *Boggs v. Ryan*, 2017 WL 67522 (D. Ariz. 2017)(*Slip Copy*)(*Hurst* is not a change in the law, the U.S. Supreme Court simply applied *Ring* to Florida's capital sentencing scheme); *Garza v. Ryan*, 2017 WL 105983 (D.Ariz. 2017)(*Slip Copy*)(*Hurst* is not a significant change in the law; the Supreme Court applied *Ring* to Florida's sentencing scheme, and *Hurst* is not retroactive because the Supreme Court held that *Ring* announced a new procedural rule that does not apply retroactively

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to cases already final on direct review); *United States v. Bazemore*, 839 F.3d 379 (5th Cir. 2016)(*Hurst* does not provide a new basis for challenging defendant's sentence; defendant could have brought an *Apprendi* challenge in his direct appeal); *In re Bohannon v. State*, ___ So.3d ___, 2016 WL 5817692 (Ala. 2016)(*Not yet released for publication*)(*Hurst* was based on application, not an expansion, of *Apprendi* and *Ring*); *Ryan v. Russell*, ___ So.3d ___, 2016 WL 7322331 (Ala. 2016)(*Hurst* was based on two case: *Apprendi* and *Ring*)(*Not yet released for publication*); *Ex parte State v. Billups*, ___ So.3d ___, 2016 W.L. 3364689 (Ala. 2016)(*Not yet released for publication*)(The Supreme Court in *Hurst* did nothing more than apply its previous holdings in *Apprendi* and *Ring* to Florida's capital sentencing scheme; it did not announce a new rule of constitutional law, nor did it expand its holdings in *Apprendi* and *Ring*). *Hurst* is only applicable to those sentenced under Florida's sentencing scheme, which is different than South Carolina's. *Downs*. And, it is only applicable to those who exercised their right to a jury determination at sentencing under Florida's capital sentencing scheme, which Mahdi did not.

As of the date of this Order, the United States Supreme Court has not found S.C. Code Ann. Section 16-3-20(B) unconstitutional in requiring judge sentencing after entry of a guilty plea in a capital case and waiver of a jury. See *Lewis v. Wheeler*, 609 F.3d 291, 309 (4th Cir. 2010); see also *Nunley v. Bowersox*, 784 F.3d 468, 472 (8th Cir. 2015) (citing *Lewis v. Wheeler* as persuasive). Nor has the Fourth Circuit Court of Appeals. In fact, it found Virginia's statute, which is similar to South Carolina's, was not unconstitutional in requiring judge sentencing when a defendant pleads guilty in a capital case. *Lewis*, 609 F.3d at 309; see *Nunley*, 784 F.3d at 472 (citing *Lewis* as persuasive). And, the South Carolina Supreme Court has repeatedly upheld the constitutionality of this provision numerous times on direct appeal after a *Ring* and/or *Apprendi* challenge. *Inman*, 395 S.C. at 555-56, 720 S.E.2d at 40; *Allen*, 386 S.C. 93, 687

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S.E.3d at 25-26; *Crisp*, 362 S.C. 412, 608 S.E.2d 429; *Downs*, 361 S.C. at 146, 604 S.E.2d at 380; *Wood*, 362 S.C. 135, 607 S.E.2d 57. Numerous other federal and state courts considering this constitutional challenge to similar state statutes have found no merit to it. *Lewis*, 609 F.3d at 309; *Nunley*, 784 F.3d at 472; *State v. Nunley*, 341 S.W.3d at 620; *Steele*, 341 S.W.2d at 646-49; *Leon*, 797 N.E.2d at 750; *Byrom*, 927 So.2d at 728; *Mack*, 75 P.3d at 806; *Colwell*, 59 P.3d at 474; *Altom*, 788 N.E.2d at 60-61; *Ketterer*, 855 N.E.2 at 69; *Thacker*, 100 P.3d 1052; *Moore*, 771 N.E.2d 46. In summary, Mahdi could have raised a *Ring* and/or *Apprendi* challenge in 2006 or 2009 as raised in the above-cited cases. He chose not to.

Furthermore, the record indicates Mahdi was fully advised of his rights to jury sentencing and the pros and cons of having a jury conduct his sentencing verses a judge determining his sentence. (See R. 1324-68). After Mahdi indicated a possible guilty plea, Judge Newman recessed overnight, and Mahdi was given additional time to talk to his lawyers about whether he wanted to plead guilty and have the judge determine his sentence or proceed with a jury trial and have a jury determine his guilt and sentence. (R. 1332-36). The record reflects discussions in this regard had already occurred before counsel indicated to the Court that Mahdi might change his plea to guilty. (R. 1329-32). Mahdi clearly understood his right to have a jury determine his sentence, because several days of individual *voir dire* and jury selection had been completed, and a jury and alternates had been seated but not sworn at the time Mahdi indicated he might plead guilty. (R. 1370-71). After the overnight recess, Mahdi told the Court he wanted to enter a plea of guilty. (R. 1336).

Additionally, prior to Mahdi's entry of a plea of guilty, Judge Newman conducted a *Blair* hearing on Mahdi's competency to plead guilty. (R. 1336-43). Dr. Cross testified Mahdi had a rational understanding of what a guilty plea meant, and the risks, benefits, and possible

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consequences. (R. 1340). Mahdi told the Court that he was competent to plead guilty, and he wanted to move forward with the guilty plea. (R. 1342). Judge Newman found Mahdi was competent to plead guilty. (R. 1343). Judge Newman's finding is fully supported by the record.

During the lengthy colloquy with the Court, Mahdi was placed under oath. (R. 1343). Mahdi testified he understood if he pled guilty in front of Judge Newman the possible sentences were life in prison and the death penalty. (R. 1347). Mahdi testified under oath he understood he had the right to a jury sentencing, and in order to sentence him to death all twelve (12) jurors would have to unanimously agree he should be sentenced to death. (R. 1347-48). Mahdi also stated under oath he understood if he pled guilty, Judge Newman would solely determine the sentence, not the twelve (12) jurors. (R. 1349).

Mahdi told Judge Newman that he had sufficient time to discuss with his attorneys and his family his decision to plead guilty. (R. 1351). Mahdi stated he had no complaints against his attorneys, was fully satisfied with them, and did not need any more time to discuss anything with them. (R. 1268). Mahdi acknowledged that, understanding the nature of the charges, the possible penalties, including death, the other possible consequences of his guilty plea, and his constitutional rights, he wanted to plead guilty. (R. 1356). The record shows Mahdi knowingly, intelligently, and voluntarily made the decision to enter a plea of guilty and have Judge Newman sentence him, rather than the jury he had selected and impaneled. (R. 1324-68). *See Boykin*, 395 U.S. 238; *Rayford*, 314 S.C. 46, 443 S.E.2d 805 (record of plea proceeding, including applicant's answers to the trial judge's questions, clearly establishes applicant could not have had misconceptions regarding sentencing).

Additionally, counsel testified at the PCR hearing before this Court that Mahdi decided he wanted Judge Newman to sentence him rather than the jury he had selected and impaneled.

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(PCR Tr. 682-84). At his 1st PCR, Mahdi offered no testimony on this issue and offered no evidence contradicting counsel's sworn testimony on this issue. This Court previously found counsel's testimony on this issue to be credible. This Court previously found counsel's testimony on this issue was supported and corroborated by Mahdi's responses to Judge Newman's questions during the guilty plea. This Court found Mahdi made a strategic decision, after selecting a jury, he wanted Judge Newman to sentence him, not the jury he had selected and impaneled. (Amended Order of Dismissal, pp. 131-32). As a result, Mahdi's plea of guilty and waiver of his jury sentencing was valid. *See Mullens*, 197 So.3d at 39 (where defendants have strategically chosen to proceed before a judge alone in an attempt to avoid a death sentence, their plea of guilty and waiver of jury sentencing has been upheld); *Taylor*, 341 S.W.3d at 647-48 (similar). As a result, this Ground is barred by the doctrines of *res judicata*, *judicial estoppel* and *collateral estoppel*. *See generally Lifshultz Fast Freight, Inc.*, 335 S.C. 244, 513 S.E.2d 96 (1999); *Foxworth v. State*, 275 S.C. 615, 274 S.E.2d 415.

Mahdi also waived and abandoned this issue on appeal from the denial of PCR. (Petition for Writ of Certiorari). Mahdi was represented by three (3) capital PCR appellate attorneys and did not raise the denial of this claim on appeal from the denial of PCR in his Petition for Writ of Certiorari [merits petition]. As a result, this Court's previous determination, that this issue had no merit, is **the law of the case**, and Mahdi waived and abandoned this issue. *Bailes*, 315 S.C. 166, 432 S.E.2d 482 (discussing "law of the case"); *Lindsay*, 328 S.C. 329, 491 S.E.2 583; *Charleston Lumber Co.*, 338 S.C. 171, 525 S.E.2d 869 (2000)(an unappealed order, right or wrong, is ordinarily the law of the case); *Resolution Trust Corp.*, 310 S.C. 473 427 S.E.2d 646 (trial judge's procedural ruling is the law of the case since it has not been appealed); *Anderson*, 323 S.C. 522, 476 S.E.2d 475 (unappealed ground becomes the law of the case); *Ross*, 328 S.C.

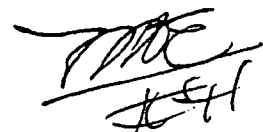
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51, 492 S.E.2d 62 (the law of the case applies both to those issues explicitly decided and to those issues which were necessarily decided in the former case); *Nelson*, 231 S.C. 351, 98 S.E.2d 798; *See Lifshultz Fast Freight, Inc.*, supra (discussing the difference between law of the case and res judicata).

As a result of all of the above, Mahdi has not shown a new rule of constitutional law or material facts that could not have been raised at his guilty plea/sentencing in 2006 or his 1st PCR merits hearing in 2009 entitling him to file a successive PCR application. *See S.C. Code § 17-27-90*. *Ring* was decided in 2002 and *Apprendi* was decided in 2000 long before Mahdi's guilty plea/sentencing and his 1st PCR Application and PCR hearing. *Hurst* is not a new rule of constitutional law but was merely an application of the holdings in *Ring* and *Apprendi* to Florida's sentencing scheme where the defendant exercised his right to jury fact finding at sentencing. Furthermore, Mahdi may not raise this issue because he made a strategic decision that he wanted to be sentenced by Judge Newman and not the jury he had selected, because he believed he had a better chance of receiving a life sentence before Judge Newman. (Amended Order of Dismissal). As a result, this Ground is time barred and improperly successive. Additionally, this ground is barred in PCR because it is not cognizable as a direct appeal claim. Further, this Ground is barred by the doctrines of *res judicata*, *judicial estoppel*, *collateral estoppel*, and *the law of the case*.

2.

Mahdi also relies on *Lafler*, 132 S.Ct. 1376 and *Frye*, 132 S.Ct. 1399 in an attempt to overcome the successiveness bar. Again Mahdi argues these cases created a new rule of constitutional law and one retroactive and applicable to him. However, *Lafler* and *Frye* did not issue new rules of constitutional law or new rules of constitutional law to be retroactively applied

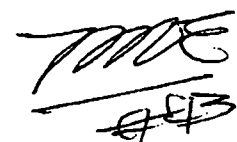
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to Mahdi. *Waters*, 2015 WL 5317516, at *2. Every federal appellate Court to consider the issue has held *Lafler* and *Frye* did not establish a “new rule of constitutional law.” See *Wert*, 596 Fed.Appx. at 917–18 (“As we conclude that *Lafler* did not involve a newly recognized right, we do not consider whether *Lafler* applies retroactively.”); *Crisp*, 573 Fed.Appx. at 708–09 (“No reasonable jurist would debate the district court’s determination that *Frye* and *Lafler* did not announce a new constitutional right that would extend the limitations period under § 2255(f)(3).”); *Navar*, 569 Fed.Appx. at 140 n.1 (“[N]either *Lafler* nor *Frye* announced a new rule of constitutional law, as required for authorization to file a second or successive section 2255 motion.”); *Gallagher*, 711 F.3d at 316 (“Neither *Lafler* nor *Frye* announced a new rule of constitutional law; both are applications of *Strickland v. Washington*.”); *In re Liddell*, 722 F.3d at 738; *Pagan San Miguel*, 736 F.3d at 45; *In re King*, 697 F.3d 1189; *Hare*, 688 F.3d at 878–80; *Buenrostro*, 697 F.3d at 1140 (“[W]e join the Eleventh Circuit in concluding that neither case decided a new rule of constitutional law.”); *Williams*, 705 F.3d at 294; *In re Graham*, 714 F.3d at 1183; *Lawton*, 2012 WL 6604576; *In re Perez*, 682 F.3d at 932–34; *Miller*, 714 F.3d at 902 (*Lafler* and *Frye* did not announce new constitutional rules; they merely applied the Sixth Amendment right to counsel, as defined in *Strickland*, to a specific factual context); *In re King*, 697 F.3d 1189 (“...*Cooper* and *Frye* did not announce new rules of constitutional law because they merely applied the Sixth Amendment right to counsel to a specific factual context.”). Thus, Mahdi’s current PCR application remains time barred, and the court must dismiss it as untimely. See also *Hough*, 177 F. Supp. 3d at 785; *Hestle*, 2013 WL 1147712; *Stewart*, 2015 WL 6522828, at *2; *Alvarado*, 2015 WL 3775416, at *3; *Etheridge*, 2015 WL 4041707, at *5, adopted, 2015 WL 4042152; *Brown*, 2014 WL 892170, at *3; *Johnson*, 2014 WL 198165, at *5; *Suitt*, 2016 WL 5395843, at *5, report and recommendation adopted, 2016 WL 5390396; *Williams*, 2016

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WL 4063863, at *1; *Cruz*, 2016 WL 4083326, at *2; *Landron-Class*, 86 F. Supp. 3d at 75 (collecting cases); *Hough*, 2016 WL 3820562, at *6; *Nechovski*, 2016 WL 3552196, at *6; *Shawley*, 2016 WL 1643460, at *3, report and recommendation adopted, 2016 WL 1629397, certificate of appealability denied, 2016 WL 5543291; *Armour*, 2016 WL 1259113, at *3, appeal dismissed; *Leon*, 2015 WL 6769146, at *2, report and recommendation adopted, 2015 WL 6749743. Other states considering this same issue have agreed. See *Feliciano*, 69 A.3d 1270 (*Lafler* and *Frye* simply applied Sixth Amendment right to counsel and ineffectiveness test to circumstances where counsel's conduct resulted in lapse or rejection of plea offer, to petitioner's detriment); *Hernandez*, 79 A.3d 649 (neither *Lafler* nor *Frye* created new constitutional right); *Gallman*, 2016 WL 1436489, at *5 ("neither *Frye* nor *Lafler* created a new constitutional right." Rather, they "simply applied the Sixth Amendment right to counsel, and the *Strickland* test for demonstrating counsel's ineffectiveness, to the particular circumstances at hand[.]") Accordingly, Appellant has failed to prove that the newly recognized constitutional right exception applies); *Norris*, 2016 WL 1064472, at *6 (Defendant's reliance on *Lafler* and *Frye* is misplaced. Contrary to his claims, neither case announced a new constitutional right); *Black*, 2016 WL 763163, at *1, cert. denied, 2017 WL 69340; *Young*, 2013 Ark. 513, 2, n. 1.

Moreover, even if *Lafler* or *Frye* announced a new rule of constitutional law, neither case contains any language regarding the retroactivity of the rule, and no subsequent Supreme Court case has held that the rule applies retroactively on collateral review. *Gallagher*, 2013 WL 1235668 [711 F.3d at 315]; *Baker*, 497 Fed.Appx. at 773 (the cases of *Frye* and *Lafler* did not announce a "newly recognized" right that has been made retroactively applicable to cases on collateral review, so as to extend the one year limitations period); *Ocampo*, 919 F. Supp. 2d at 915; *Armour*, 2016 WL 1259113, at *3; *Shawley*, 2016 WL 1643460, at *3, report and

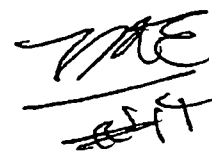
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recommendation adopted, 2016 WL 1629397, certificate of appealability denied, 2016 WL 5543291; See *Tyler*, 533 U.S. at 663 (“[A] new rule is not made retroactive to cases on collateral review unless the Supreme Court holds it to be retroactive.”).

Finally, Mahdi does not advance any facts supporting his claim, which rest primarily on counsel's purported pre-plea advice and the Court's sentence, which would have been obvious to him at the time he changed his plea and was subsequently sentenced. See *Cruz*, 2016 WL 4083326, at *2; *Hough*, 2016 WL 3820562, at *6. As a result, Mahdi has not shown new material facts not previously presented because those facts were within his knowledge at the time of his plea and sentencing and prior to his 1st PCR hearing. *S.C. Code Ann. § 17-27-45(C)*(If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence). As *Lasler* and *Frye* did not announce new rules of constitutional law, but were applications of *Strickland*, Mahdi could have brought a *Strickland* claim on pre-plea advice at his 1st PCR. As a result, this claim is improperly successive and must be dismissed with prejudice.

3.

In his successive PCR application, Mahdi also alleges he is entitled to an *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), appeal because PCR appellate counsel did not raise certain issues on appeal from the denial of his 1st PCR that he now wishes to raise. Mahdi is not entitled to an *Austin* appeal under these circumstances. *Austin*, 305 S.C. 453, 409 S.E.2d 395. Mahdi's 1st PCR counsel filed an appeal from the denial of his 1st PCR application and collateral appellate counsel chose to raise only one (1) issue from the denial of his PCR application. (Petition for

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Writ of Certiorari [merits petition]). The South Carolina Supreme Court denied certiorari in the PCR appeal. Mahdi then filed a Petition for Writ of Certiorari in the United States Supreme Court raising the same issue and certiorari was denied. However, *Austin* does not entitle Mahdi to another appeal from the denial of his 1st PCR where PCR appellate counsel chose not to raise certain issues in the 1st PCR appeal. *Austin* “is applicable to its particular factual situation...” *Aice*, 305 S.C. at 452, 409 S.E.2d at 394. That is where the applicant wished to appeal from the denial of PCR but was denied **the opportunity** to seek appellate review or the right to appellate review of a previous PCR order **was not knowingly and intelligently waived**. *Austin*, supra; *Aice*, supra; *Odom v. State*, 337 S.C. at 261-262, 523 S.E.2d 753; *Hope v. State*, 328 S.C. 78, 492 S.E.2d 76 n. 1 (1997); *King v. State*, 308 S.C. at 348-49, 417 S.E.2d 868. Neither of these occurred in this case.¹⁴ Mahdi is not entitled to an *Austin* appeal under South Carolina law. Thus, he cannot overcome the successiveness bar and this application must be dismissed.

Furthermore, ineffective assistance of PCR appellate counsel is not an exception allowing the filing of a second or successive PCR application or an excuse to avoid the statute of limitations for PCR actions. *Robertson v. State*; *Kelly v. State*.

C. Applicant’s Grounds are barred by the defense of laches

Mahdi’s Grounds asserted in his 2nd Application for post-conviction relief are also barred by the defense of laches. Laches is an equitable doctrine, which “arises upon the failure to assert a known right. *Ex parte Stokes*, 256 S.C. 260, 182 S.E.2d 306 (1971). As the Court explained in *Bray v. State*, 366 S.C. 137, 140, 620 S.E.2d 743, 745 (2005): “Laches is “neglect for an unreasonable and unexplained length of time, under circumstances affording the opportunity for

¹⁴ To accept Mahdi’s argument would result in every capital *and* non-capital PCR Applicant being entitled to a 2nd PCR appeal when they did not agree or later claimed they did not agree with the issues raised by PCR appellate counsel.

diligence, to do what in law should have been done.” *Whitehead v. State*, 352 S.C. 215, 574 S.E.2d 200 (2002), citing *Hallums v. Hallums*, 296 S.C. 195, 198-99, 371 S.E.2d 525, 527 (1988). The claims Mahdi is raising in this 2nd Application for post-conviction relief could have been raised at plea/sentencing, at his 1st PCR, and/or on appeal from the denial of PCR. Mahdi was represented by death penalty qualified counsel at trial/plea and sentencing. Mahdi was represented at PCR by statutorily qualified counsel. See *Robertson v. State*. And, Mahdi was represented on appeal from the denial of PCR by three (3) competent counsel, including one (1) his PCR attorneys. Mahdi has waited an unreasonable and unexplained length of time to assert the grounds he is now asserting. As a result, all of Mahdi’s Grounds asserted in this successive PCR Application are barred by the defense of laches.

D. This Court cannot address grounds abandoned or not addressed in the 1st PCR

In his 2nd or Successive PCR Application, Mahdi also asks this Court to rule on any grounds that were not addressed or that were abandoned *at the 1st PCR*. This Court is not aware of any legal authority or rule that would allow this Court to address any issue that was not addressed at the 1st PCR or was abandoned by prior PCR counsel at the 1st PCR. As a result, this ground is also time barred and improperly successive under South Carolina law in that it seeks this Court to rule on an issue or issues raised at the 1st PCR but not ruled on or abandoned at the 1st PCR. This Court also dismisses this claim as not cognizable before this Court and barred by laches, res judicata, collateral estoppel, judicial estoppel, and/or the law of the case.

CONCLUSION

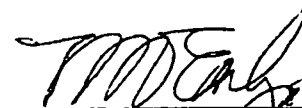
Consequently, for all the foregoing reasons, this Court dismisses this action as time barred under South Carolina law pursuant to S.C. Code Ann. § 17-27-45. This Court also dismisses this action because it is improperly successive under South Carolina law pursuant to

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S.C. Code Ann. § 17-27-90. This Court also finds Mahdi's claims in this successive PCR Application are barred by the doctrines of laches; and, Mahdi's direct appeal ground is not cognizable in PCR and/or is barred by the doctrines of res judicata, collateral estoppel, judicial estoppel and the law of the case. Finally, Mahdi is not entitled to an *Austin* appeal under South Carolina law where he has already had one (1) full PCR appeal. As a result, based on all of the foregoing, this 2nd or successive PCR Application is properly dismissed with prejudice pursuant to S.C. Code Ann. § 17-27-70 (b) (summary dismissal may be allowed "[w]hen a court is satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings..."). Finally, based on all the foregoing, there is no genuine issue of material fact and this action must be dismissed pursuant to S.C. Code Ann. § 17-27-70 (c) (summary disposition is allowed "when it appears from the pleadings, depositions, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."). *See also Rule 56, SCRPC* (defining the standard for granting a motion for summary judgment).

IT IS SO ORDERED.

By: _____



The Honorable Doyet A. Early, III.
Presiding Judge

29
June, 2017

STATE OF SOUTH CAROLINA)
)
COUNTY OF CALHOUN)

FILED

2017 JUL -6 P 2:12

Mikal Mahdi, SCDC #5238,

KENNETH MABRY, 2017-CP-09-00004
CLERK OF COURT
CALHOUN COUNTY
ST MATTHEWS, SC *CAPITAL PCR*

Applicant,

vs.

CERTIFICATE OF SERVICE

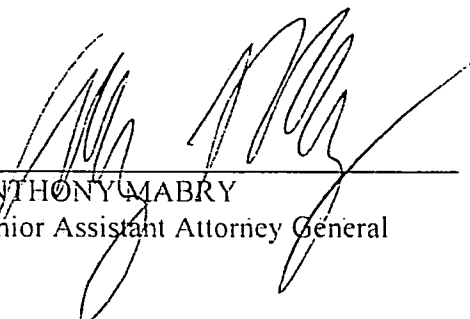
State of South Carolina,

Respondent.

I, Anthony Mabry, Assistant Attorney General, certify that I have served the foregoing *Order of Dismissal* on Applicant by depositing one copy of same in the United States mail, postage prepaid, addressed to Applicant's present counsel as follows:

E. Charles Grose, Jr., Esquire
404 Main Street
Greenwood, SC 29646

John L. Warren, III, Esquire
Simmons Law Firm, LLC
1711 Pickens Street
Columbia, SC 29201



ANTHONY MABRY
Senior Assistant Attorney General

This 3rd day of July, 2017.

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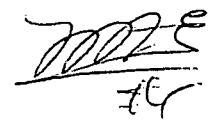
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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CALHOUN)	C/A No. 2017-CP-09-00004
)	
Mikal Mahdi, SCDC #5238,)	*CAPITAL PCR*
)	
Applicant,)	
vs.)	ORDER DENYING APPLICANT'S
)	RULE 59, SCRPC, MOTION TO
)	ALTER OR AMEND OR RECONSIDER
State of South Carolina,)	THE ORDER OF DISMISSAL
)	
Respondent.)	
_____)	

This matter is before this Court on Applicant, Mikal Mahdi's Rule 59, SCRPC, Motion to Alter or Amend or Reconsider this Court's previous Order of Dismissal, denying and dismissing this 2nd or successive PCR Application, issued on June 29, 2017 and filed July 6, 2017. Madhi filed the Rule 59, Motion on July 12, 2017. The State filed a Response to the Rule 59, Motion.

On August 15, 2017, at the Aiken County Courthouse, this Court held a hearing and heard argument on the Rule 59, Motion by both parties. Applicant was represented by E. Charles Grose, Esquire. Respondent was represented by Assistant Attorney General Anthony Mabry.

This Court has carefully reviewed the Record in this case and considered the arguments presented in the Rule 59 Motion to Alter or Amend or Reconsider and those made at the hearing on the Motion, and finds no cause to alter or amend or reconsider the prior Order of Dismissal of this Court. Therefore, based on complete review of the Record, the Motion and the Response, the arguments presented, and the legal authority submitted, this Court denies the Rule 59, SCRPC, Motion to Alter of Amend or to Reconsider the Court's Order of Dismissal in this matter. For the reasons fully set forth in this Court's Order of Dismissal, this 2nd or successive PCR application is denied and dismissed with prejudice.



By: 
The Honorable Doyet A. Early, III.
Presiding Judge

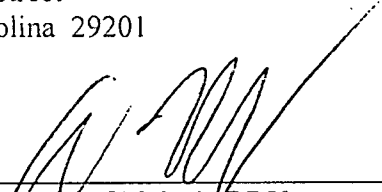
October 10, 2017

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CALHOUN)	
)	
Mikal Mahdi, SCDC #5238,)	C/A No. 2017-CP-09-00004
)	
Applicant,)	*CAPITAL PCR*
vs.)	
)	CERTIFICATE OF SERVICE
)	
State of South Carolina,)	
)	
Respondent.)	
_____)	

I, Anthony Mabry, Assistant Attorney General, do hereby certify that on this date, I served the *Order Denying Applicant's Rule 59, SCRPC Motion to Alter or Amend or Reconsider the Order of Dismissal*, on Applicant by depositing one copy of the same in the United States mail, postage prepaid, and addressed as follows:

E. Charles Grose, Jr., Esq.
 Grose Law Firm
 404 Main Street
 Greenwood, South Carolina 29646

John L. Warren, III
 Simmons Law Firm, LLC
 1711 Pickens Street
 Columbia, South Carolina 29201



 J. ANTHONY MABRY
 Senior Assistant Attorney General

This 11th day of October, 2017.

Tab

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of
SOUTH CAROLINA
ALHOUN

#5238,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

C/A No. 09-CP-09-164

AMENDED ORDER OF DISMISSAL

FILED
2011 AUG 20 P 1:00
KENT HASTY
CLERK OF COURT
CALHOUN COUNTY
SOUTH CAROLINA

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

The State subsequently filed a timely Rule 59, SCRCP Motion to Alter or Amend one (1) of the findings in the Order of Dismissal.¹ On February 11, 2013, this Court heard argument on

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

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

I. PROCEDURAL HISTORY

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

The Continuances

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

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

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as first chair capital counsel, and attorney Joshua Koger, Jr., was appointed to represent Mahdi as second chair capital counsel. Shortly before trial, the case was continued again until November 26, 2006.

Jury Selection

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

The Guilty Plea

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

The Sentencing Proceeding

After the statutorily required 24 hour waiting period, the sentencing proceeding began on December 1, 2006, with evidence concluding on December 5, 2006, and final arguments on December 6, 2006. On December 8, 2006, Judge Newman issued his sentencing decision by reading into the record his written sentencing order, filed on the same date. (R. 1726-42, 1810-26, 1842-53; Sentencing Order pp. 1-12). Judge Newman found the following statutory

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

The Appeal

Mahdi appealed his death sentence to the South Carolina Supreme Court. He was represented by attorney Katherine Hudgins of the Office of Appellate Defense. On appeal, Mahdi raised one issue: "Did the trial judge improperly consider Mikal Mahdi's initial exercise of his constitutional right to a trial by jury in imposing a death sentence?" (Final Brief of Appellant/Petitioner, p. 3). The State, represented by Assistant Attorney General Anthony Mabry, filed a responsive brief. (See Final Brief of Respondent). On June 15, 2009, the South Carolina Supreme Court affirmed Mahdi's death sentence. *Mahdi v. State*, 383 S.C. 135, 678 S.E.2d 807 (2009). The Remittitur was issued July 1, 2009. Mahdi did not seek certiorari to the United States Supreme Court.

The Motion for Stay of Execution

Mahdi, through attorney Hudgins, filed a Motion for a Stay of Execution on June 23, 2009 before the South Carolina Supreme Court, to pursue potential PCR remedies. Pursuant to *In Re Stays of Execution*, the State filed a Return and did not oppose the Stay request to pursue potential PCR remedies. On July 23, 2009, the Supreme Court issued its Order granting the stay and assigning this Court to hear Mahdi's PCR application.

The Appointment of Collateral Counsel Hearing

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

The PCR Application

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

II. FACTS

Mahdi murdered James Myers, an off-duty police captain, on July 18, 2004 in Calhoun County, South Carolina, during a crime spree. (R. 1341-68). At the time of his murder, Myers had thirty-one years of service as both a fireman and as a police officer, with the rank of Captain. (R. 1357). Mahdi was a fugitive wanted for several crimes he committed outside South

Carolina.

A. Crimes

Virginia

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

North Carolina

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

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

Christopher J. Boggs, died from his wounds. (R. 1567-82, 1585).⁴

South Carolina

(Columbia)

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

(Calhoun County)

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

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

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

⁵ 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).

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nearby Waffle House. Mahdi was, instead, on foot in the woods near the store, headed toward victim James Myers's farm.

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

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

Myers's wife began missing him around 9:00 p.m., when he did not come home as expected. She called him several times and paged him, with no response. Finally, she

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

contacted Myers's father and discovered what time he left his father's home. Mrs. Myers drove to their farm, and finding the gate to the property open, she drove to the shed and found her husband's truck missing. Mrs. Myers then went into the shed and found her husband's burned and bullet riddled body lying in a pool of blood. She knew immediately he was dead and screamed for an unknown period of time. When she finally calmed down enough to use her phone, she contacted 911 and waited until the police arrived. (R. 1395-1425).

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

Florida

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

While transporting Mahdi to the police station, the arresting officer thanked him for not shooting him with the assault rifle, to which Mahdi responded that the gun was "stuck on a three shot." Mahdi said with "cold eyes," "You don't think I could have got you - - I couldn't have shot you, the other cop, and excuse my language, that fucking dog." (R. 1394).

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

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

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

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

B. Aggravation Factors

(Mahdi's Prior Criminal Acts)

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

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

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

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

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

(Mahdi's Prison Conduct)

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

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

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

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

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

discussed killing DOC employees. (R. 1629). Mahdi made additional threats toward a DOC employee at the disciplinary hearing. (R. 1646-48).

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

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

C. The Sentencing Order

On December 8, 2006, Judge Newman issued his twelve page sentencing order, which he

read into the record. Judge Newman found that the State proved two aggravating circumstances beyond a reasonable doubt: (1) the murder of James Myers was committed during the commission of a larceny; and (2) the murder of Myers was committed during the commission of a burglary. (R. 1845; Sentencing Order, p. 4).

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

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

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

Judge Newman considered Mahid's age (21 years) and mentality at the time of this murder. Judge Newman noted the last time Mahdi's I.Q. was tested, at age fourteen, his I.Q.

⁹ These two alleged aggravating circumstances were that the murder was committed during the commission of an armed robbery and that Captain Myers was murdered because he was a police officer.

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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, fourteen. Judge Newman found that at twenty-one Mahdi was experienced in the world of crime. Judge Newman found that by the time Mahdi committed these crimes, he was well aware of the severity of his crimes and the possible consequences. Judge Newman found that given the evidence in this case, there was nothing in Mahdi's age or mentality that in any way mitigated, excused, or lessened his culpability, nor should it be given any significant weight in his ultimate decision as to the appropriate sentence. (R. 1848-49; Sentencing Order, p. 7-8).

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

Judge Newman also considered Mahdi's offered testimony of prison adaptability. While he considered the testimony of defense expert James Aiken, Judge Newman pointed out that he had reviewed and considered Mahdi's records regarding his prior behavior in various correctional institutions. Judge Newman found Mahdi had consistently been disruptive and uncooperative and had threatened to kill prison employees. Judge Newman found prison officers had repeatedly

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

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

Judge Newman also considered the impact of the crime upon the victim's family and the community. Judge Newman found the victim, James Myers, was a husband, father, grandfather, son and friend to many. Judge Newman found Myers was a well-respected police officer, an outdoorsman, a mentor, and a treasured member of humanity. Furthermore, Judge Newman found Mahdi burglarized Myers's farm shed and stole his family's sense of security and serenity.

Moreover, Judge Newman found Mahdi, by committing these crimes, robbed the Myers family and their friends of their right to peaceful enjoyment of life. (R. 1851; Sentencing Order, p. 10).

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

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

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

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

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

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

III. PCR ALLEGATIONS/GROUNDS

Based on Mahdi's PCR application, amended applications, and Motion to Amend, Mahdi

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alleges the following grounds entitle him to post-conviction relief:

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

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

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

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

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

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

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

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

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

The PCR Merit's Hearing

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

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

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Standard of Review

In a PCR action, the applicant has the burden of proving his allegations by a preponderance of the evidence. *Rule 71.1(e), SCRPC; Butler v. State*, 286 S.C. 441, 334 S.E.2d

813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); *Butler, supra*.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Butler, supra*. An applicant must overcome this presumption to prevail on PCR. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

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

"Surmounting *Strickland*'s high bar is never an easy task[.]" *Premo v. Moore*, 131 S.Ct. 733 (2011) citing *Harrington v. Richter*, 131 S.Ct. 770 (2011), quoting *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010). "It is 'all too tempting' to 'second-guess counsel's assistance after conviction or adverse sentence.'" *Harrington v. Richter*, 562 U.S. ___, (2011), citations omitted. "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Id.*; *Strickland*, 466 U.S., at 690.

In the context of a guilty plea, the applicant also must establish prejudice by proving "counsel's constitutionally-ineffective performance affected the outcome of the plea process."

Hill v. Lockhart, 474 U.S. 52, 59 (1985). The applicant must show, but for counsel's ineffective assistance, there is a reasonable probability he would not have pled guilty but would have proceeded to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

In the context of sentencing phase issues, the applicant must show deficient performance and prejudice. To show prejudice is to show that "there is a reasonable probability that ... the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695; *see also Wiggins*, 539 U.S. at 537; *Jones v. State*, 332 S.C. 329, 344-45, 504 S.E.2d 822, 829-30 (1998). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Jones*, 504 S.E.2d at 823-824. The United States Supreme Court made clear that the burden is *not on the State* to show the lack of prejudice, but the burden is *on the applicant* to show prejudice. *Wong v. Belmontes*, 130 S.Ct. 383 (2009), *citing Strickland, supra*. The applicant must prove that had counsel acted competently there is a reasonable probability that a different sentence would have resulted. *Id.*; *Wiggins v. Smith*, 539 U.S. 510, 535, 536 (2003); *see also Terry v. State*, 394 S.C. 62, 714 S.E.2d 326 (2011). Such a showing "requires a substantial, not just conceivable, likelihood of a different result." *Cullen v. Pinholster*, 131 S.Ct. 1388, 1403 (2011), *citing Harrington*, 131 S.Ct. at 791 (2011).

IV. Mahdi's Grounds Lack Merit

A. Ground 10(a)/11(a)(i)

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

Mahdi had the burden of proving this allegation. *Butler, supra*. He offered no evidence, however, in support of this ground at his hearing. (PCR Tr. 20-710). Mahdi failed to prove counsel was ineffective in this regard. *Id.* Furthermore, Judge Newman did not base his decision to sentence Mahdi to death on Mahdi's assertion of his right to a jury trial. At the plea and sentencing, Mahdi asked the Court to consider his guilty plea as a non-statutory mitigating circumstance. Judge Newman did consider the guilty plea as a non-statutory mitigating circumstance, but chose not to give this non-statutory mitigating circumstance great weight. (R. 1848, 1850; Sentencing Order, pp. 7, 9). In his sentencing order, Judge Newman stated:

The defense further argues a non-statutory mitigating circumstance that the Court should consider the defendant's guilty plea in determining the appropriate sentence to be imposed. The defendant's guilty plea occurred during the fourth day of his trial following jury selection, but prior to the jury being sworn. This was one day following his attempted escape through the use of a homemade key. In addition, Mr. Mahdi has failed to demonstrate any remorse for his actions at any point in time known to this Court. Therefore, I conclude that no significant weight should be given to this non-statutory mitigating circumstance in the Court's ultimate decision as to the sentence to be imposed.

(R. 1738-39, 1822-23, 1850, Sentencing Order, p. 9).

Mahdi engages in a strained reading of one sentence of this one paragraph of a twelve page capital sentencing order in an attempt to vacate his death sentence. In his direct appeal brief, Mahdi selected a single sentence from this paragraph and alleged the selected sentence evidenced the trial judge considered the initial exercise of Mahdi's right to a jury trial as a circumstance supporting the imposition of the death penalty.¹³ (See BOA, p. 9, 11, 18-21).

Judge Newman did not consider Mahdi's participation in *voir dire* and selecting a jury as an aggravating circumstance. See *State v. Ray*, 310 S.C. 431, 437, 427 S.E.2d 171, 174-75

¹³ The sentence reads, "The defendant's guilty pleas occurred during the fourth day of his trial following jury selection, but prior to the jury being sworn." (See BOA).

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(1993) (trial judges are presumed to know the law and apply a narrowing definition of this state's death penalty statute), *referencing Walton v. Arizona*, 497 U.S. 639 (1990).

Mahdi's allegation of ineffective assistance of counsel in this regard is without merit. Mahdi offered no evidence on this ground at the PCR evidentiary hearing, and Judge Newman did not sentence Mahdi to death for participating in *voir dire* and selecting a jury. Mahdi's assertion is not supported by the sentencing order or the record. Mahdi was sentenced to death only for the appropriate reasons, the circumstances of the crime and his character. Therefore, counsel was not ineffective in failing to object to this portion of the sentencing order. Mahdi cannot show deficient performance or resulting prejudice from counsel's alleged failure to object. See, *Strickland, supra; Wong, supra; Wiggins, supra; Jones, supra*. This ground must be dismissed with prejudice.

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

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

There is no merit to this second allegation. Mahdi does not specify the jury sentencing advantages to which he alludes; nor how counsel inadequately advised him of those advantages. This ground must be dismissed as vague and ambiguous.

Mahdi did not testify, and offered no testimony or other evidence at the merits hearing on this issue.¹⁴ Mahdi did not question any of his former appointed attorneys on this issue. (PCR Tr. pp. 587-710). Mahdi has failed to meet his burden of proof on this allegation, which must therefore be dismissed with prejudice. *Butler, supra; Hill, supra*. Furthermore, having offered no

¹⁴ At the close of Mahdi's PCR case presentation, Respondent moved for a directed verdict due to lack of any evidence or proof offered on his ground. When asked for a response, collateral counsel gave none. This Court held the motion for a directed verdict in abeyance until the completion of the PCR merits hearing. At the conclusion of the merits hearing, there was still not evidence offered on this ground by applicant Mahdi. (PCR Tr. 1-719).

proof, Mahdi waived and abandoned this issue. *Parks v. Morris Homes Corp.*, 245 S.C. 461, 471, 141 S.E.2d 129, 134 (1965) (Further, it is a litigant's duty to bring to the court's attention any perceived error, and "the failure to do so amounts to a waiver of the alleged error."). See also *Gibbs v. Kimbrell*, 311 S.C. 261, 267, 428 S.E.2d 725, 729 (Ct. App. 1993) (discussing waiver).

Furthermore, the record indicates Mahdi was fully advised of his rights to jury sentencing and the pros and cons of having a jury conduct his sentencing verses a judge determining his sentence. (See R. 1324-68). After Mahdi indicated a possible guilty plea, court recessed overnight, and Mahdi was given additional time to talk to his lawyers about whether he wanted to plead guilty and have the judge determine his sentence or proceed with a jury trial and have a jury determine his guilt and sentence. (R. 1332-36). The record reflects that discussions in this regard had already occurred before counsel indicated to the Court that Mahdi might change his plea to guilty. (R. 1329-32). Mahdi clearly understood his right to have a jury determine his sentence, because several days of individual *voir dire* and jury selection had been completed, and a panel of twelve jurors and four alternates had been seated but not sworn at the time Mahdi indicated he might plead guilty. (R. 1370-71). After the overnight recess, Mahdi told the Court he wanted to enter a plea of guilty. (R. 1336).

Additionally, prior to Mahdi's entry of a plea of guilty, Judge Newman conducted a *Blair* hearing to determine whether Mahdi was competent to plead guilty. (R. 1336-43). Dr. Michael Cross testified that Mahdi had a rational understanding of what a guilty plea meant, and the risks, benefits, and possible consequences. (R. 1340). Mahdi told the Court that he was competent to plead guilty, and he wanted to move forward with the guilty plea. (R. 1342). Judge Newman found on the record that Mahdi was competent to plead guilty. (R. 1343). Judge Newman's finding in this regard is fully supported by the record.

During the lengthy colloquy with the Court, Mahdi was placed under oath. (R. 1343).

Mahdi testified that he understood that if he pled guilty in front of Judge Newman that the possible sentences were life in prison and the death penalty. (R. 1347). Mahdi testified under oath that he understood he had the right to a jury sentencing, and that in order to sentence him to death all twelve jurors would have to unanimously agree that he should be sentenced to death. (R. 1347-48). Mahdi also stated under oath that he understood that if he pled guilty, the Judge would solely determine the sentence, not the twelve jurors. (R. 1349).

Mahdi told Judge Newman that he had had sufficient time to discuss with his attorneys and his family his decision to plead guilty. (R. 1351). Mahdi stated he had no complaints against his attorneys, was fully satisfied with them, and did not need any more time to discuss anything with them. (R. 1268). Mahdi acknowledged that, understanding the nature of the charges, the possible penalties, including death, the other possible consequences of his guilty plea, and his constitutional rights, he wanted to plead guilty. (R. 1356). The record shows Mahdi knowingly, intelligently, and voluntarily made the decision to enter a plea of guilty and have Judge Newman sentence him, rather than the jury he had selected and impaneled. (R. 1324-68). See *Boykin v. Alabama*, 395 U.S. 238 (1969); *Rayford v. State*, 314 S.C. 46, 443 S.E.2d 805 (1994) (record of plea proceeding, including applicant's answers to the trial judge's questions, clearly establishes that applicant could not have had misconceptions regarding sentencing).

Additionally, counsel testified at the PCR hearing that Mahdi decided he wanted Judge Newman to sentence him rather than the jury he had selected and impaneled. (PCR Tr. 682-84). Mahdi offered no testimony on this issue and offered no evidence that contradicted counsel's sworn testimony on this issue. This Court finds counsel's testimony on this issue to be credible. This Court also finds that counsel's testimony on this issue is supported and corroborated by Mahdi's responses to Judge Newman's questions during the guilty plea itself.

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Given the vague allegations of this ground, the lack of any supportive evidence in the record, and the clear record before this Court that Mahdi understood the advantages and disadvantages of jury sentencing, this ground must be dismissed with prejudice. See *Strickland, supra*; *Hill, supra*; *Butler, supra*. There is no proof that counsel was deficient in any manner in this regard. See *Strickland, supra*; *Hill, supra*; *Butler, supra*.

Additionally, as a result of this record, Mahdi cannot show prejudice. *Hill, supra*. Given this record, including counsel's credible testimony, the record of the plea proceeding, and the evidence that would have been submitted to the chosen jury, including the horrendous facts of Myers's murder, the murder of Christopher Boggs in North Carolina, and Mahdi's maladaptive prison behavior and atrocious criminal record, Mahdi has not met and cannot meet his burden of proof that there is a reasonable probability he would not have pled guilty, and would have proceeded to trial with a different outcome. This ground must be dismissed with prejudice.

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

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

At the merits hearing, under this ground, Mahdi raised several different specific allegations of ineffective assistance of counsel:

- a) Counsel should have interviewed and called at sentencing several of Mahdi's extended family members and also community members to testify to his family, social, scholastic, and mental health history.
- b) Counsel should have presented the testimony collateral counsel presented [at PCR] through a different forensic social worker than the one counsel used at sentencing.
- c) Counsel should have introduced testimony from an expert regarding the effect of Mahdi's life of incarceration on Mahdi.

- d) Counsel failed to adequately investigate, develop, and present evidence concerning his mental health history or mentality; specifically, counsel should have discovered and presented the testimony Mahdi presented through Drs. Schwartz-Watts and Myers at PCR, and counsel failed to provide certain records to their own psychiatric/psychological experts;
- e) Finally, counsel failed to introduce certain documents at sentencing such as certain school records, his DJJ records, records from his commitment to the Walter Carter Center at age nine, his father's records, and counsel failed to call school officials.

This Court finds there is no merit to these allegations for the reasons set forth below.

Our Supreme Court has analyzed claims of failure to investigate, discover, and present mitigation evidence under *Strickland, Wiggins v. Smith*, 539 U.S. 510 (2003) and its progeny. See *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009); *Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008) (relying on *Wiggins* and *Rompilla v. Beard*, 545 U.S. 374 (2005), finding counsel deficient and defendant prejudiced by failure to investigate, develop, or present any mitigation evidence regarding defendant's violent upbringing, abuse at home, and mental illness other than limited testimony by his mother); *Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007); *Nance v. Ozmint*, 367 S.C. 547, 557 n. 8, 626 S.E.2d 878, 883 n. 8 (2006) (citing *Wiggins* and concluding counsel should have investigated and presented evidence of adaptability to prison and mitigating social history evidence outlining defendant's troubled childhood and mental illness); *Von Dohlen v. State*, 360 S.C. 598, 606-07, 602 S.E.2d 738, 742-43 (2004) (concluding counsel was ineffective in failing to adequately prepare and present evidence in penalty phase defendant suffered from severe, chronic depression at time of murder given counsel failed to provide expert witness with crucial medical records and related information which prevented that witness from conveying an accurate diagnosis of defendant's mental condition to the jury); *Simpson v. Moore*, 367 S.C. 587, 605-07, 627 S.E.2d 701, 711-12 (2006) (reversing PCR court's conclusion capital defendant suffered prejudice from failure to offer sufficient social history evidence in

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mitigation where record showed counsel did in fact do adequate investigation and presented similar mitigation evidence); *Jones v. State*, 332 S.C. 329,344-45, 504 S.E.2d 822, 829-30 (1998) (fancier mitigation case does not establish ineffective assistance of counsel).

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

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

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

representation took place.” *Bobby v. Van Hook; Strickland*, at 688. The ABA Guidelines for Appointment and Performance of Defense Counsel in Death Penalty Cases are not the definition of what reasonableness means under *Strickland*, and they are not “inexorable commands with which all capital defense counsel must comply.” *Van Hook, supra*.¹⁵ In fact, as Justice Alito pointed out in his concurring opinion in *Van Hook*:

I join the Court’s *per curiam* opinion but emphasize my understanding that the opinion in no way suggests that the American Bar Association’s Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003) (2003 Guidelines or ABA Guidelines) have special relevance in determining whether an attorney’s performance meets the standard required by the Sixth Amendment. The ABA is a venerable organization with a history of service to the bar, but it is, after all, a private group with limited membership. The views of the association’s members, not to mention the views of the members of the advisory committee that formulated the 2003 Guidelines, do not necessarily reflect the views of the American bar as a whole. It is the responsibility of courts to determine the nature of the work that a defense attorney must do in a capital case in order to meet the obligations imposed by the Constitution, and I see no reason why the ABA Guidelines should be given a privileged position in making that determination.¹⁶

While the ABA Guidelines provide noble standards for legal representation in capital cases and are intended to improve that representation, they are not minimum constitutional standards, which defense counsel must follow or they are ineffective. *Yarborough v. Johnson*, 520 F.3d 329 (4th Cir. 2008); *Walker v. True*, 401 F.3d 574, 583 n. 7 (4th Cir. 2005) (the *Strickland* inquiry

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

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

“does not entail the application of *per se* rules derived from ABA standards), *vacated on other grounds*, 546 U.S. 1086 (2006). See *Roe v. Flores-Ortega*, 528 U.S. 470, 479 (2000); *Strickland*, 466 U.S. 688-89 (cautioning against the fallacy of treating guidelines as a “checklist for judicial evaluation of attorney performance”).

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

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

As a result, it is clear that since the decisions by the United States Supreme Court and the South Carolina Supreme Court referencing the ABA guidelines, the United States Supreme Court has made clear that the mere fact that an attorney did not follow the ABA Guidelines in general or specific ABA Guidelines does not mean counsel’s performance was deficient in

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performing a mitigation investigation in a capital case. See *Pinholster, supra*; *Van Hook, supra*; *Strickland, supra*.

What the Sixth Amendment requires is counsel in a capital case conduct a reasonable and thorough investigation into mitigation evidence. *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362, 296 (2000); *Strickland*, 466 U.S. 668 (1984).

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

(a) The Alleged Failure to Present Family Member and Community Witnesses

At the PCR hearing, Mahdi called several aunts and one uncle to testify to Mahdi's background and that of his family. Mahdi also offered the affidavit of another aunt. He offered the testimony of two community witnesses and the affidavits of two community witnesses on the same issue. Mahdi contends counsel was deficient in failing to call these family members and community witnesses at sentencing, and he alleges he was prejudiced by this alleged deficient performance. At PCR, Mahdi called the following family members as mitigation witnesses: Carson Burwell (a paternal uncle), Rose Gupton (a maternal aunt), Sophie Gee (a maternal aunt), and Lawanda Burwell (a paternal aunt and Carson's wife). Mahdi also offered the affidavit of Sandra Burwell (a paternal aunt). Mahdi also called a community activist, George Smith, and Virginia Pond, another member of Mahdi's community. Mahdi also offered affidavits from James Woodley and Douglas Pond, two more members of Mahdi's community.

Carson Burwell testified as follows. His brother, Shareef Mahdi [Mahdi's father], was an unwanted child who also experienced problems when attending integrated schools, and

eventually converted to Islam and changed his name from Thomas Burwell to Shareef Mahdi. Mahdi's father and mother's marriage was an arranged marriage, and Mahdi's mother left Mahdi's father when Mahdi was a small child leaving Mahdi and his brother with Mahdi's father. Mahdi's father lacked supervision and parenting skills, and Mahdi's father was unable to hold a job. Carson and his wife, Lawanda, attempted to help Mahdi by taking him into their home when he was eight years old. Mahdi could not read, and Carson taught Mahdi how to read. Mahdi made a false accusation of child abuse against Carson's wife, and Carson and Lawanda were almost arrested based on this accusation. Mahdi also asked the responding police officer for his pistol so he could kill himself, which resulted in Mahdi's commitment to the Walter Carter Center [a psychiatric center] at age nine. Carson testified to Mahdi's manipulative behavior in Carson's home both before and after the commitment to the Carter Center, and Mahdi's misbehavior while in the Carter Center. He testified to Mahdi's disruptive behavior at school after being released from the Carter Center and after Mahdi found out his brother had re-united with their father, which forced Carson and Lawanda to return Mahdi to live with his father. Carson also testified to Mahdi's being asked to leave his uncle Nathan's home as an adult because Mahdi would not abide by the rules of that home. Finally, Carson testified he could not recall ever meeting with any defense attorneys or mitigation investigators from South Carolina prior to trial, and if they had asked him to appear as a witness he would have and asked the Court to spare Mahdi's life. (PCR. 21-77).

Rose Gupton, a maternal aunt, testified she was one of ten children, and her sister, Mahdi's mother, was very timid and withdrawn because of verbal abuse by their father. Gupton's mother converted to Islam after separating from Gupton's father [Mahdi's maternal grandfather]. Mahdi's mother and father's marriage was an arranged marriage, which Mahdi's mother did not really want. Mahdi's mother was seventeen when she married Mahdi's father.

Gupton claimed Mahdi's mother later told her Mahdi's father raped her on their wedding night; however, there is no evidence Mahdi ever knew of this accusation or was told of it until his PCR counsel related it to him. (PCR. 84). Mahdi's mother lived with Gupton for several months after she left Mahdi's father. Mahdi came and stayed with his mother during this time, and he was angry and would throw bowls and hit his mother. Mahdi's mother did not want to leave the children with Mahdi's father, but she was afraid of him because he had threatened her. There was no contact between Mahdi and his mother, after she left Mahdi's father, until Mahdi was a teenager, when he lived with her. Gupton said she was not talked to prior to Mahdi's death sentence. If she had been, she would have testified in his behalf and asked for mercy. Gupton could not explain why her sisters, Sophie Gee and Corliss Artis, who were interviewed by the defense team, did not tell her about Mahdi's arrest for murder until after he was convicted and sentenced to death. She claimed they must not have known about the trial because she talks to her sisters every day, and they never told her of an impending trial. (PCR. 77-92).

Sophie Gee, a maternal aunt, testified she is a registered nurse and is one of ten children. Mahdi's maternal grandfather was verbally abusive to Mahdi's mother. Mahdi's mother was shy and withdrawn. Gee's mother and four of her siblings converted to Islam, which was restrictive regarding clothing and socialization. She was not allowed to date and neither was her sister, Mahdi's mother, but she recalled two teenage friends Mahdi's mother had while growing up. Mahdi's mother was seventeen when she married Mahdi's father. Mahdi's mother interacted with her family the same when married as before. Mahdi's mother is an introvert and doesn't like socializing. Mahdi's mother was very protective of her children, dressed them in all white, and was afraid to let them play when they were small because they would get dirty. Mahdi's mother lived with Gee for a time after she left Mahdi's father. She did not want to leave her children, but Mahdi's father threatened her life. Mahdi's mother left

Mahdi's father because he was physically abusive and controlling. Mahdi's mother tried to maintain contact with the boys and sent toys and clothes, but Mahdi's father would not let her see them. Gee did not think Mahdi's father was stable. Gee saw the boys again when they were about seventeen, and Mahdi wanted to meet his mother. She claimed Mahdi thought his mother was dead. Gee admitted she and her sister Corlis Artis were interviewed by Mahdi's defense team prior to trial. Gee claimed had she been asked to testify she would have. She stated she loved Mahdi and would have asked the judge to spare his life. Gee admitted she was aware Mahdi slashed his mother's tires after reuniting and living with her; he slashed her tires because she would not let him use the car, and he was arrested for this crime. Gee stated this incident ended the relationship between Mahdi and his mother. Gee admitted she knew counsel's forensic social worker and mitigation investigator were in Virginia acting on Mahdi's behalf; she answered their questions, and there was nothing that prevented her from telling them any other information that might be helpful to Mahdi. (PCR. 92-108).

Lawanda Burwell, Carson's wife, testified to Mahdi's family background. She described Mahdi's paternal grandparents and how their marriage was not particularly a happy one. The paternal grandparents were both educators. Mahdi lived in a modular home with his father on his grandmother, Nancy's farm. Mahdi's grandmother received government subsidies from tobacco allotments, and she owned a house in Lawrenceville and another on the family farm. There were six children by Mahdi's paternal grandparents. One child was a nutritionist in Texas, and one was a stewardess who had lived all over the United States. Carson has a master's degree in education, and Lawanda has a doctorate from Harvard. None of the other children or grandchildren have been involved in criminal conduct like Mahdi. Mahdi's brother, Saleem, was in the United States Army and served two tours in Afghanistan. Mahdi came to live with Lawanda and Carson because his father was unable to take care of the boys. Mahdi

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fabricated a claim of physical abuse against Lawanda and told a police officer he wanted to kill himself, which resulted in his being placed in the Carter Center. Mahdi had made similar statements in the past regarding shooting himself, but Lawanda did not believe he was suicidal. Lawanda was not impressed with the Carter Center. After Mahdi's release from there, he began to misbehave and eventually had to be returned to his father. Lawanda attributed this misbehavior to Mahdi's attempt to force his return to his father. She admitted she would have been reluctant to testify at trial, because she had not seen Mahdi since he was a small child but claimed she probably would have come around and testified as she did at PCR. (PCR. 239-95).

Sandra Burwell submitted an affidavit. She averred she was previously married to Nathan Burwell, Mahdi's paternal uncle. Mahdi's family was highly regarded in the black community in Lawrenceville, Virginia. Mahdi's great grandfather was caucasian. While Mahdi's grandmother Nancy could be "snooty" and put on airs, his grandfather Nathan was a sweet man. After finishing the day teaching agriculture, Nathan would visit and help black-owned Brunswick County farmers and consequently was rarely home to spend time with his children. The grandfather's first marriage ended when his wife and child died in childbirth. He then married Mahdi's grandmother after getting her pregnant and being forced to marry her. All of the Burwell children are intelligent and well-educated; however, none of the men have accomplished much on their own. According to Sandra, the men in the family were supported by their spouses, as she did Nathan. Mahdi's father is Nathan's brother. His problems started when he was forced to attend an all-white school when integration was voluntary. She recalled an incident in high-school when Madhi's father stood up for himself and other black students, but Mahdi's grandparents and the black community did not support him because of possible repercussions, even though he was in the right. Mahdi's father then went to live with a paternal uncle and aunt in New Jersey but had to leave because of his behavior. Not long after, Mahdi's

father joined the Marines. When he returned from service, he joined the Nation of Islam and married Mahdi's mother. He brought Mahdi's mother to Lawrenceville and moved in with his parents. They lived in the one bedroom finished basement. Mahdi's mother would come upstairs basically to eat. Mahdi's mother was very timid and difficult to engage in conversation. Mahdi's father was very domineering with her. While Mahdi's mother never spoke of any unhappiness, Sandra believed Mahdi's mother was making moves to provide her a way out of her situation. She finished high school/got her GED. She then gave birth to Mahdi. She enrolled in a nursing program in a junior college. After completing it, she convinced Mahdi's father, who had no job, the best plan would be for her to join the military. When she came home, she informed him she wanted a divorce and had only returned for the children. Mahdi's father would not allow this, and, according to Sandra, ultimately tried to kill Mahdi's mother with the sons watching. Mahdi's father constantly told Mahdi and Saleem that their mother abandoned them and did not love them. Sandra also recalled when Mahdi was first sent to jail as a juvenile, she was in the courtroom, and after being released, Mahdi was to report to his probation officer. He did not report. She alleged he was a juvenile and had no way of getting there, and he was under his father's custody. When he did not report, he was picked up and the standoff with police occurred. She feels the failure to report was not his fault. She wanted to visit Mahdi when he was confined, but Mahdi's father had to approve visitors and would not allow her to visit. She felt so bad for Mahdi she even considered adopting him, though she never did. (Affidavit of Sandra Burwell).

At PCR, Mahdi also presented the testimony of a community activist George Smith, an affidavit of James Woodley, an affidavit of Vernon Pond, and the testimony of Sharon Pond, who all testified to Mahdi's father's behavior in the community. Both Smith and Pond testified to an incident where Mahdi's father jumped into a segregated [all white] swimming pool and

would not leave in protest. He was arrested and began throwing items at the jail. As a result, he was sent for a mental evaluation. The evaluation eventually determined Mahdi's father had no major mental illness. Mr. Woodley averred to Mahdi's father's conversion to Islam, his defiant behavior in the community, and his physically abusive behavior toward his wife and his mother. (PCR. 166-86, & Affidavits of James Woodley and Vernon Pond).

Counsels' Mitigation Investigation

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

The record shows counsel (Mr. Grant and Mr. Walters) retained a mitigation investigator (Paige Tarr Haas Munn), a forensic social worker (Marjorie Hammock), and a private investigator (James Gordon), to investigate and develop Mahdi's family and social history for mitigation evidence to be presented at sentencing. Counsel also retained two psychiatric or psychological experts, Dr. Thomas Martin (a forensic psychiatrist) and Dr. Geoffrey McKee (a forensic psychologist), to investigate Mahdi's psychiatric history and mentality at the time of the crime *and* uncover any mental deficiencies or disorders that would mitigate punishment. (PCR. 503-710). The record shows the mitigation investigator and forensic social worker interviewed numerous members of Mahdi's family, and counsel also interviewed potential mitigation witnesses themselves. (R. 1746-47, PCR. 503-710). Counsel and the investigators also consulted with Mahdi's North Carolina defense team [on the Boggs murder] and obtained from

them mitigation evidence or information they had uncovered. (PCR. 503-710). Counsel also moved for and obtained a continuance for almost one year in order to completely and thoroughly investigate and develop the mitigation case on Mahdi's behalf. (PCR. 597-98, Resp. Ex. 16[Continuance Motion], Resp. Ex. 17[Continuance Order]).

Ms. Tarr Haas Munn (hereinafter "Tarr"), the mitigation investigator, was retained by attorney Carl Grant on the recommendation of Jeff Bloom, an experienced capital defense attorney. (PCR. 589). She had previously served as mitigation investigator or specialist in thirty to forty 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 nine. (PCR. 563-75; Resp. Ex. 12). Tarr also summarized these particular psychiatric records for counsel and their retained experts. (PCR. 565-66). Tarr also summarized Mahdi's school records for counsel and the retained experts. Tarr also traveled to 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).¹⁷ Tarr also traveled to Lawrenceville, Virginia and made contact with Mahdi's grandmother Nancy and uncle Nathan, and traveled to Baltimore, Maryland and made contact with Mahdi's aunt Lawanda, uncle

¹⁷Mahdi's North Carolina defense attorneys were present at the PCR evidentiary hearing and did not contradict this testimony.

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Carson, and aunt Kathy. Tarr also located Mahdi's maternal aunts Corliss Artis and Sophie Gee in Richmond, Virginia. Tarr also located Mahdi's mother Vera. 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 where they were able to interview members of Mahdi's immediate and extended family. As of November 6, 2006, a month before Mahdi's sentencing, Tarr had spent approximately 170 hours interviewing witnesses, collecting documents, and producing data in her quest to put together an appropriate mitigation presentation at sentencing. At that time, she anticipated working an additional seventy-five 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 fourteen cases, worked on twenty-five capital cases, and, was working on another five capital cases, here, in Florida, and Alabama. (R. 1739-63). Hammock traveled with Tarr on the second occasion to Lawrenceville; to meet with Mahdi's paternal grandmother Nancy and uncle Nathan. She interviewed both. Hammock also traveled to Richmond and attempted to speak in person with Mahdi's mother; who was not cooperative, and was finally able to speak with her but only by phone. Hammock also interviewed a family friend. She also interviewed Mahdi's maternal aunts Sophie Gee and Corlis Artis. She also traveled to Baltimore where she met and interviewed Mahdi's uncle and aunt, Carson and Lawanda Burwell. She also interviewed Mahdi's father, Shareef Mahdi, while in Philadelphia, Pennsylvania. (R. 1739-63, PCR. 563-75).

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

Counsel testified they also interviewed Mahdi with regard to mitigation information or evidence. Counsel also traveled to Virginia and spoke with Mahdi's grandmother Nancy and uncle Nathan. Mahdi's uncle Nathan was not cooperative in their mitigation investigation, and counsel was hesitant to call Nathan as a witness because he assisted police in identifying Mahdi from the video of the North Carolina murder and was proud of that fact.¹⁸ Counsel testified Mahdi's grandmother was cooperative in their mitigation investigation, and they had her present at sentencing to testify, but she was unwilling to assist Mahdi regarding mitigation testimony, stating she was there [at sentencing] to defend the Burwell family name.

Counsel also talked with Mahdi's uncle Carson and aunt Lawanda. While Carson and Lawanda were cooperative in providing background information on Mahdi and his family, Carson informed counsel he would not be helpful to Mahdi if he testified in the case. Carson informed counsel Mahdi was defiant and manipulative in their home. Counsel testified Carson and Lawanda's position was they were glad Mahdi was out of their home. Carson also told counsel he and his wife were not going to help Mahdi. Carson told counsel prior to the sentencing proceeding if he were called to testify he would have bad things to say about Mahdi. Lawanda testified at PCR she would have been reluctant to testify at Mahdi's sentencing

¹⁸Ms. Tarr also related to this Court that Mahdi's uncle Nathan was not helpful in the mitigation investigation. (PCR. 576).

proceeding in 2006. Carson admitted at PCR he may have told Mahdi's North Carolina attorneys Mahdi was a "demon" because of Mahdi's disruptive conduct in their home. Counsel also interviewed Mahdi's aunt Kathy Burwell, and she indicated she did not wish to participate in Mahdi's sentencing hearing, because she was still angry and resentful at Mahdi's brother for almost burning her house down. Counsel also interviewed Mahdi's brother, Saleem; however, he was not particularly helpful or interested in testifying.¹⁹ Counsel testified Mahdi's father was not cooperative ("standoffish") and did not want to be involved. (PCR 636). Counsel testified Mahdi himself indicated to them he did not want his father involved in his trial or sentencing proceeding. Counsel testified Mahdi's mother was completely uncooperative and did not want to participate in Mahdi's sentencing proceeding. (PCR. 602-710). Neither Mahdi's mother, nor father or brother testified at the PCR hearing or offered any affidavits. (PCR. 1-720).

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

¹⁹ Collateral counsel's forensic social worker, Nicholas Cooper-Lewter, admitted at PCR that Mahdi's brother, Saleem, would not talk to him either. (PCR. 317-18).

from some recurrent depression in his life, he did not find any evidence Mahdi was suffering from any depression at the time he committed Myers' murder. Dr. Martin testified at the PCR hearing the records introduced by Mahdi at PCR would not change his diagnosis. Dr. McKee testified at the PCR hearing he did not need additional records to make his diagnosis or issue his report. Neither Dr. Martin nor Dr. McKee changed their diagnosis based on records shown them by applicant at PCR. (PCR. 508-61).

Counsel testified they wanted someone at the sentencing hearing to testify on Mahdi's behalf regarding his family and social history mitigation; however, the only person who was willing to come and testify was Mahdi's grandmother Nancy; the rest of the family, including aunts, were not willing to participate. (PCR. 636, 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). As a result of the lack of cooperation from the family, counsel presented the mitigation evidence including Mahdi's family and social history through their forensic social worker. (PCR. 624, 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 Mahdi's grandmother Nancy, his uncle Carson, his uncle Nathan, his aunt Lawanda, his mother Vera Telea Artis, his aunt Sophie Gee, another aunt Corliss Artis, Mahdi's father Shareef, and a family friend. (R. 1746-47). She conducted her bio-social assessment by interviewing family members, reviewing records, interviewing Mahdi, and taking

information from anyone who would give information about him, his life, and his development. (R. 1762). She also reviewed a synopsis of Madhi's school records and reviewed a report from his admission in Baltimore to the Walter Carter Center psychiatric facility at age nine. (R. 1747). Hammock presented, through her testimony and the exhibits introduced through her, the following mitigation evidence at sentencing before Judge Newman:

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

Mahdi's father, like Mahdi, was extremely troubled as a child. (R. 1749-50). Mahdi's father was described as disturbed as a young child, and he threw tantrums. Mahdi's father's childhood was difficult, and he grew up in a situation feeling alienated from everyone around him. (R. 1750).

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

Mahdi's father was unable to get along with his own family and others in the community and was constantly in conflict with those around him. (R. 1750). Mahdi's father had committed assaults on some of his own family members. (R. 1433). Mahdi's father did not finish high

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school; he was the only sibling not to graduate, and this was a source of consternation between him and his family. (R. 1750). Mahdi's father was unable to hold a job, and he eventually converted to Islam. (R. 1750-51). His conversion to Islam and changing his name from Thomas Burwell to Shareef Mahdi brought grief to the Burwell family. (R. 1750). Mahdi's father was suffering from depression as early as 1971. (Def. Ex. 2). Mahdi's father was discharged from the Marines under less than honorable conditions. (R. 1750). Mahdi's father was not able to function well, and there was some description of Mahdi's father suffering continuing depression. (R. 1751). There were a number of incidents involving Mahdi's father with local law enforcement. (R. 1751, 1433). He was involved in a series of misdemeanors, all said to be racially motivated. (Def. Ex. 2). And, Mahdi's father's involvement in the 8 hour stand-off with police.

Mahdi's mother was different. She was *very, very withdrawn* and did not want to participate in Hammock's interview at all. (R. 1756). It appeared Mahdi's mother was frightened about being involved with the family again because of her previous experiences with Mahdi's father. (R. 1757). While Mahdi's mother did eventually educate herself, join the military, and at the present time worked and took care of herself, she was totally isolated from her own family, as well as Mahdi's father's family. (R. 1757). While she may occasionally speak to some members of the family, there was a disconnection. (R. 1757). The information regarding Mahdi's mother came from Mahdi's mother, her siblings, and the Burwells and was all consistent. (R. 1757).

Mahdi's parent's marriage was a pre-arranged marriage to which Mahdi's mother did not agree, and Mahdi's father was much older at the time of the marriage than Mahdi's mother, who was just sixteen. (R. 1751). The marriage was arranged by Mahdi's maternal grandmother, and Mahdi's father was twenty-seven at the time. (Def. Ex. 2). Mahdi's mother had no choice but to

join the marriage, and there was conflict in the marriage from its beginning. (R. 1751). After the wedding, Mahdi's father changed Mahdi's mother's birth name, Vera, to Tilea (Def. Ex. 2). Mahdi's father was physically abusive to Mahdi's mother, and Mahdi's mother eventually left to escape from the abuse. (R. 1751). Mahdi's mother was in what she described *and others described* as an abusive relationship, with Mahdi's father, and she decided to leave because she could no longer stay with Mahdi's father even though it meant leaving her own children. (R. 1757).

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

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

After Mahdi's mother left, the chaos continued. (R. 1752). Mahdi's father tried to take care of the children, and the grandmother, Nancy, also tried to provide assistance during this time, but the relationship between Mahdi's father and the grandmother and the rest of the family was constantly confrontational. (R. 1752). Mahdi and his brother witnessed their father commit domestic violence on their grandmother, Nancy. (Def. Ex. 2). During this period of time, there were several moves in terms of schooling for Mahdi from Lawrenceville to Richmond and back

to Lawrenceville. (R. 1752).

Judge Newman was aware of the incident described by family members at PCR where Mahdi's father forced Mahdi's mother to return to Lawrenceville and assaulted her. (R. 1752). After Mahdi's mother left to escape from the abuse, she was literally forced to return from Richmond to Lawrenceville, ostensibly to see the boys, but this ultimately resulted in physical conflict, and she left again not to see her children for a number of years. (R. 1752). Mahdi's mother was taken from Richmond to Lawrenceville by Shareef Mahdi, who then abused Mahdi's mother. Mahdi's uncle Nathan actually rescued Mahdi's mother, but as a result of this incident, Mahdi witnessed more abuse and violence. (Def. Ex. 2). After this incident, Mahdi's mother moved to Pottsdale, without the children, in order to escape from Shareef. (Def. Ex. 2).

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

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

Mahdi was hospitalized, psychiatrically, in Baltimore. (R. 1747-49, 1756). This admission lasted approximately two months at a mental health facility, and Mahdi was released.

(R. 1756).²⁰ Mahdi was committed involuntarily to the Walter Carter Center psychiatric facility, after being separated from his brother and father, where he was diagnosed with Major Depression with suicidal ideation, adjustment disorder, R/O Adjustment Disorder, Developmental Reading Disorder, and history of right arm and leg fractures.²¹ (Def. Ex. 1). Mahdi spent sixty days in the facility. After Mahdi was released from the mental health facility, he stayed only a short time with Carson and Lawanda, because he was anxious to be reunited with his father and brother. (R. 1756). Mahdi's behavior in Carson and Lawanda's home was defiant and became even more defiant when Mahdi learned his brother had already re-united with his father. As a result, Mahdi had to be returned to live with his father. (Def. Ex. 2).

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

Mahdi's education was disrupted many times. (R. 1752, 1756). This was reflected in the school records. (R. 1752). The records also noted lateness and absences, but this was not consistent through the whole record. (R. 1756). Mahdi also had to change residences several

²⁰The testimony at the original *Blair* hearing was that Mahdi was not suffering from any mental illness. (R 131). Mahdi also stated at his guilty plea under oath, that he had not been previously treated for alcohol abuse, drug abuse or mental illness. (R 1346). When asked if he had any physical, emotional or nervous problem that might keep him from understanding what he was doing, Mahdi stated "I have none of those problems. Your Honor." (R 1347).

²¹Mahdi suffered broken bones as child while riding a bicycle and falling off of monkey bars. There was no contention at PCR that Mahdi was ever physically or sexually abused by anyone. (PCR. 571-72).

times. (Def. Ex. 2). Mahdi was forced to change elementary schools five times. (Def. Ex. 3).²² Even in his pre-teen years there was a lack of stability in terms of Mahdi's attending school, and it was reflected in the kinds of reports he received. (R. 1760-61).

Mahdi constantly had difficulty in school academically. (R. 1752). He was considered bright, but did not perform well. (R. 1752-53). He was a particularly poor reader. (R. 1753). Both Carson and Lawanda reported Mahdi had difficulty in school, could not read, and there was constant conflict in getting Mahdi to deal with his academic limitations. (R. 1753-54). The school records during this time were consistent with this report. (R. 1754). Mahdi had uneven skills in school. (R. 1755). He was in the average math program, but in the below average reading program. (R. 1755). While he excelled in science, his reading, vocabulary, and spelling remained below average. (R. 1756). When he was involuntarily committed to the Carter Center, Mahdi's initial diagnosis included "Developmental Reading Disorder." (Def. Ex. 2). Mahdi's difficulties in reading and writing remained at or below grade level throughout elementary school. (R. 1755, Def. Ex. 3). Mahdi needed improvement in a number of areas, including standards for behavior and showing respect for authority. (R. 1755). And, Mahdi had poor self-esteem throughout his academic time. (R. 1753). It was noted several places in the records Mahdi had poor self-esteem and had difficulty in relationships with others. (R. 1756). Mahdi had numerous absences in school, and Mahdi's father removed him from school in the fifth grade to home school him; however, there was no information the home schooling actually occurred. (Def. Ex. 3). In summary, Mahdi's educational history was one of poor school progress. (R. 1762).

²² Mahdi started out kindergarten at Sister Clara Muhammad School in Richmond, and he completed part of kindergarten at Totoro Elementary School in Lawrenceville. He was moved back to Richmond and attended Chamberlayne Elementary School for part of that year. Then he was removed from there and sent to Baltimore where he attended Scotts Branch Elementary School for two years. Then he was removed from that school while in the Carter Center, and ultimately returned to Lawrenceville to live with his father. (R. 1754-56).

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

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

During her investigation of Mahdi's life, Hammock assessed whether certain risk factors were present or not. She testified before Judge Newman certain risk factors were present. Mahdi had been abused and neglected. Mahdi suffered from abandonment. Mahdi was never exposed to the right kind of socialization. And, he has poor self-esteem. He also has a poor

history of school progress and a poor sense of self. (R. 1762). Mahdi was someone who had been neglected, abandoned, suffered from poor parenting, and as a result was likely to end up in a situation where he was out of control and did damage to himself and others. Mahdi fit the typical profile of persons who end up in the kind of situation before Judge Newman, because Mahdi never really had a chance to develop appropriately. (R. 1762-63)

The State did not cross-examine Hammock or challenge her mitigation testimony. (R. 1763). The State did not challenge the accuracy of the exhibits introduced through Hammock. (R. 1739-63). All of this evidence was before Judge Newman [the sentencing court] uncontested.

Furthermore, while the State introduced portions of Mahdi's DJJ records during sentencing as evidence of Mahdi's character, the records also confirmed much of what Hammock testified to before Judge Newman regarding Mahdi's upbringing and family. The records indicated Mahdi lacked appropriate parental discipline and support, and he was not supervised as a child or given appropriate structure and guidelines. (State's Ex. 85 & See R. 1440, 1442, 1869-70, 1873-74). Mahdi began smoking marijuana at age twelve, had been smoking marijuana every day since, and he began selling crack cocaine at age fourteen. (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 one-parent family. Mahdi's father believed the criminal justice system was prejudiced, and he also voiced his belief there were many white supremacists in the area. (R. 2146). And, a young Mahdi also made similar racial comments. (R. 2154).

The Lack of Merit of this Allegation

This Court has carefully reviewed the mitigation evidence presented *at the PCR hearing* with regards to this particular allegation in comparison with the mitigation evidence presented *at the sentencing hearing*, and considered counsels', their mitigation specialists', private investigator's, and experts' testimony regarding their mitigation investigation, and counsels' testimony why they presented the mitigation evidence they did present, and why they did not present other mitigation evidence. The record supports counsel in this case conducted a reasonable and thorough mitigation investigation and presented what mitigation they could that was favorable to Mahdi at the time of the sentencing proceeding. *See Van Hook, supra; Pinholster, supra; Wiggins, supra; Rompilla, supra; Williams, supra; Rosemond, supra; Council, supra; Simpson, supra; Jones, supra.* Contrary to Mahdi's assertion, the record shows counsel's investigation was based on more than just guilt/innocence. Based on the entire record, and the credible evidence presented, this Court finds Mahdi has not met his burden of proof to show counsel's performance was deficient in this regard. *See Van Hook, supra; Pinholster, supra; Strickland, supra; Wiggins, supra; Rompilla, supra; Wong, supra; Rosemond, supra; Council, supra; Simpson, supra; Jones, supra.*

This Court viewed the witnesses in this case, listened to their testimony, observed their demeanor, and judged their credibility accordingly. This Court finds the testimony of counsel and their defense team on this allegation *to be credible* and the present testimony of Mahdi's witnesses regarding their previous willingness to testify *to be not credible*. Accordingly, this Court finds Mahdi has failed to meet his burden of proof on this particular allegation, and has failed to show counsel was deficient. *See Butler, supra; Wiggins, supra; Council, supra.*

This Court does not find Carson Burwell's testimony credible regarding his willingness to come and testify on Mahdi's behalf at the time of sentencing for several reasons. First,

Carson could not recall talking to any attorneys or investigators from South Carolina prior to Mahdi's sentencing proceeding. The implication from his testimony was counsel and their investigators did not speak with him, and therefore, they were deficient in their mitigation investigation. However, the record clearly shows counsel's forensic social worker spoke to Carson before Mahdi's sentencing proceeding and obtained background information from him. The mitigation investigator also confirmed at PCR she spoke with Carson on more than one occasion. Tarr also confirmed Hammock traveled with her to Baltimore and interviewed Carson. Counsel also testified Carson was interviewed prior to trial. Additionally, at PCR, Tarr produced her notes which detailed exactly what Carson told her, that Mahdi was manipulative *and* the incident which led to Mahdi's commitment to the Carter Center was more of Mahdi's manipulative behavior, not a real suicide attempt. (PCR. 572-74). Counsel also testified they spoke with Carson prior to the sentencing, and Carson told them if he were called as a witness he would have bad things to say about Mahdi. Carson also informed them he and Lawanda, were not going to help Mahdi in his sentencing proceeding. (PCR. 618-20, 627-28, 649-50, 693-97). As a result, this Court finds Carson's testimony regarding his willingness to come and testify at the time of sentencing is not credible.

Likewise, this Court does not find credible Carson's wife's testimony that even though she was reluctant to testify at the time of trial, she could have been coaxed into coming to South Carolina to testify at sentencing. Again, counsel's mitigation investigator and social worker had met with Lawanda Burwell, and counsel also talked to her as well. Carson and Lawanda had indicated to counsel they did not want to be involved. Carson indicated to the North Carolina defense team that when Mahdi lived with them he was a "demon." Carson and Lawanda had communicated to counsel they were glad Mahdi was out of their home. Carson admitted Mahdi was defiant and manipulative. Both Lawanda and Carson admitted Mahdi

made a false claim of child abuse against Lawanda. This false claim of abuse also accompanied Mahdi's statement to the responding officer that led to his commitment to the Carter Center. Carson communicated to counsel prior to the sentencing hearing he and his wife Lawanda were not going to help Mahdi. As a result, this Court does not find credible Lawanda's claim, several years after sentencing, she could have been coaxed into coming to South Carolina to testify on Mahdi's behalf even though she was admittedly reluctant to do so at the time.

Similarly, this Court does not find credible Rose Gupton's testimony she did not know about Mahdi's criminal charges for this murder or his trial until after he was sentenced to death. Counsel or their mitigation experts interviewed two of her sisters, Sophie Gee and Corliss Artis, regarding this very case, and Gupton testified she spoke with those sisters every day. This Court does not find credible her claim that if she had known about the sentencing proceeding she would have testified, because her claim that she did not know about Mahdi's charges is simply not credible. Furthermore, counsel's credible testimony at PCR was that even Mahdi's aunts were not willing to assist in testifying. As a result, this Court finds that Mahdi's aunts and uncles were not willing to come to South Carolina and testify on Mahdi's behalf in 2006.

The circumstances counsel faced are similar to those faced by counsel in *Rutherford v. Crosby*, 385 F.3d 1300 (11th Cir. 2000). In that case, the defendant's family was uncooperative at the time of trial. This Court notes the behavior of Mahdi's family is understandable in this type of case. When the crime has been recently committed and the community and those who knew the victim are still outraged, the defendant's family and friends are likewise shocked, angry, embarrassed, and disappointed in the defendant's behavior. In this case, as in others, they are in no mood to assist the defendant in escaping responsibility for his crimes at the time of trial. (See PCR. 619, ll. 19-24, 636, ll. 20-25). It is only after the passage of many years, when the case is on post-conviction relief, and the case is no longer in the forefront of the community's

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or the victim's family's mind, and the defendant's family's anger and embarrassment has dissipated, that witnesses become cooperative and insist they would have cooperated at the time of trial, when in fact they were originally hesitant, did not want to be involved, or refused to testify. Along the same lines, the record in this case shows Mahdi had engaged in conduct within his own family which would have caused and did cause family members to be reluctant to assist him in his mitigation case. Mahdi had faked a claim child abuse against Carson and Lawanda, almost resulting in their arrest. Furthermore, Mahdi had slashed his own mother's tires and was involved in the destruction of another aunt's automobile.

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

Mahdi offered the testimony of one aunt by affidavit, therefore she was not subject to cross-examination about what she communicated to counsel prior to the sentencing proceeding and negative things she knew about Mahdi. One of Mahdi's relatives who did testify at PCR, Lawanda, admitted she would have been reluctant to testify at the time of sentencing. Counsel's credible testimony at PCR was Carson specifically told them if called to testify he would have bad things to say about Mahdi. Additionally, counsel testified Carson informed them he and his wife Lawanda would not be coming to South Carolina to testify and help Mahdi, and Carson was speaking for both he and his wife. Counsel furthermore testified Kathy Burwell informed them she did not want to be involved in Mahdi's sentencing proceeding either.

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

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

Furthermore, if counsel did not present certain evidence Mahdi presented at PCR, there was an objectively reasonable strategic reason for not doing so. See *Strickland, supra*; *Council*,

supra. Mahdi presented several family members at the PCR hearing who were interviewed by Tarr, Hammock, and/or counsel prior to the sentencing proceeding, but not called before Judge Newman. Counsel testified that at the time of the sentencing proceeding these witnesses were not cooperative or were unwilling to testify at the sentencing proceeding. Further, counsel testified the witnesses related or their investigation uncovered the witnesses would say bad things about Mahdi. Carson Burwell related to Mahdi's North Carolina defense team Mahdi "was a demon." This fact was established by a document generated by Tarr after meeting with the North Carolina attorneys and shared with counsel in this case. (PCR. 503-05, Resp. Ex. 7). Carson also related to counsel if he were called to testify he would have bad things to say about Mahdi. (PCR. 618-19). Carson indicated Mahdi was manipulative and faked abuse and suicidal gestures. (PCR. 572-74, 64). Both Lawanda and Carson admitted Mahdi almost had them arrested by police when he made a false claim of child abuse and manufactured false evidence of that abuse. (PCR. 572-74, 58-61, 63-64, 266-67, 287-88, 290). They also related Mahdi acted out while at the Carter Center, and had to be placed in isolation. (PCR. 66-67, 292). Carson also related to Tarr that Mahdi was manipulative. (PCR. 572-74). Both Carson and Lawanda related Mahdi acted out after being released from the Carter Center and had to be returned to live with his father. (PCR. 68-69, 293-94, 618-619). Both related Mahdi would only talk about suicide when he did not get his way or did something wrong. (PCR. 572-74, 64-66, 288-89, 618-19). Carson also related the incident which led to Mahdi's commitment to the Carter Center was more of Mahdi's manipulative behavior and was not a real suicide attempt. Lawanda also testified at PCR she did not believe Mahdi was actually suicidal and made similar statements in their home when he did not get his way or got in trouble. This testimony from Carson and Lawanda would have directly undercut the mitigation evidence presented before Judge Newman regarding Mahdi's commitment and diagnosis at the Carter Center. (See Def. Ex.

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

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

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

about defendant's prior bad conduct such as infidelity, abandonment of his children, wife, and girlfriend, domestic abuse, and failure to pay child support), citing *Barnes v. Thompson*, 58 F.3d 571 (1995) (counsel not ineffective in capital case in failing to offer family members who constituted "cross-purpose evidence."); *Moody v. Polk*, 408 F.3d 141, 154 (4th Cir. 2005) (to the extent affidavits presented new information, they were "double edged.").

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

This Court had the opportunity to view the witnesses' testimony at the merits hearing, and make a credibility assessment accordingly, and finds the testimony of counsel to be credible on this issue. Counsel's testimony on this issue is also supported and corroborated by the evidence and testimony introduced at the PCR hearing. Counsel made an objectively reasonable trial strategy decision 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, supra* (objectively reasonable trial strategy decisions are not subject to claims of ineffective assistance of counsel); *Wong, supra* (it was an objectively reasonable trial strategy decision for counsel not to call witnesses who would expose

on cross-examination bad character evidence about the defendant); *Council, supra* (counsel's strategic decisions will be judged on an objective standard of reasonableness).

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

(b) The New Social Worker

At the PCR hearing, Mahdi called Nicholas Cooper-Lewter, Ph.D. who was qualified as an expert in clinical social work and psycho-social assessment, and who testified to his psychosocial assessment of Mahdi. (PCR. 187-89). In conducting the same, he testified he spoke with Carson and Lawanda Burwell, Frances Read, Rose Gupton, Sophia Gee, Sandra Burwell, Debra Gray, Pastor Myra Harris, Gerald Wilson, George Smith, and Sharon Pond, to name a few. (PCR. 190-91). Others were listed on the second page of his report. Cooper-Lewter also indicated he reviewed two notebooks of documents provided by PCR counsel. He testified unlike a psychologist or psychiatrist, he does not do testing. (PCR. 193). As a social historian, he makes no diagnoses. He also consulted with deRossett Myers, Ph.D. and Donna Schwartz-Watts, M.D., two of Mahdi's PCR experts. (PCR. 193-94).

In Cooper-Lewter's opinion, Mahdi was born into a very fragile family with toxic relationships between husband and wife, and there were unpredictable repeated losses that would destabilize. He also saw an issue with Mahdi's relationship with his father, who had issues with depression and anger. According to Cooper Lewter, Mahdi's flawed father was Mahdi's role

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model and the person to whom he was most attached. (PCR. 194-95). Cooper-Lewter believed Mahdi's mother enjoyed Mahdi in the beginning. (PCR. 196). Mahdi's mother left him when he was around four or five, and it was a traumatic experience for Mahdi. (PCR 196-97).

Cooper-Lewter believed Mahdi was not comforted by his father regarding his mother's abandonment; instead, he was exposed to physical violence in his father's home. (PCR. 197-98). Cooper-Lewter indicated Mahdi attached to his father at a young age, which was not helpful. (PCR 199). Cooper-Lewter claimed Mahdi's father admitted he did not supervise his children as he should have and acknowledged he placed Mahdi in a situation where he was looking after his father and brother. (PCR. 200-201). According to Cooper-Lewter, when Mahdi was about age eight, he was both shocked and excited to discover his mother was alive. (PCR. 202). When Mahdi's father attempted to kidnap Mahdi's mother, Mahdi and his brother attempted to intervene. (PCR. 202-03). Mahdi was further traumatized when his mother left again. (PCR. 203). Cooper-Lewter testified Mahdi attended five different schools between pre-kindergarten and the eight grade and it would have been difficult for Mahdi to connect with peers or teachers as a result of his frequent moves. (PCR. 204-05, 207). According to Cooper-Lewter, Mahdi did not receive the type of intensive treatment he needed when he was at the Carter Center. (PCR. 208-09). He testified the documents from the Carter Center indicated Mahdi blamed himself for his family breaking up, and Mahdi wanted was his family back together. (PCR. 211-12). Mahdi was diagnosed with major depression recurrent with suicidal ideation; adjustment disorder and developmental reading disorder were both ruled out. (PCR. 212). Cooper-Lewter testified that while the records indicated that Mahdi never stopped looking for or wanting his mother, he did not know how to accomplish a reunion. (PCR. 218). Cooper-Lewter believed Mahdi did not have a lot of structure in his life, particularly between ages five and eight. (PCR. 219). In his opinion, after Mahdi was released from the Carter Center, there may have been

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

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

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

Cooper-Lewter contended Mahdi's mental state continued to decline. When Mahdi was released from DJJ at age seventeen, Cooper-Lewter argued Mahdi did not get better. (PCR. 308-09). Mahdi attempted to reconnect with his mother, but the attempt did not go well. (PCR. 309). Cooper-Lewter pointed to the fact Mahdi was incarcerated in adult prison within a month of his release. (PCR. 309). Cooper-Lewter maintained Mahdi continued going downhill during his adult incarceration. (PCR. 309). Cooper-Lewter opined some of the incidents Mahdi

witnessed in Wallens Ridge gave credence to the ideas Mahdi was taught by his father. (PCR. 309-11).

Cooper-Lewter admitted he did not include any details of Mahdi's employment history in his report, asserting he did not do so because he did not believe it important in terms of impacting Mahdi's psycho-social history. (PCR. 315-17). Cooper-Lewter did not review Hammock's notes, Dr. McKee's notes, or Dr. Martin's notes. (PCR. 328-29). Cooper-Lewter did not interview Mahdi's brother, Saleem. (PCR. 317-18). He admitted Saleem had the same mother and father, and lived with the father during the same periods of time as Mahdi. (PCR. 318-19). He admitted Saleem went to the Job Corps, but Mahdi ended up in DJJ. (PCR. 319). Cooper-Lewter also testified he was only asked to assess Mahdi's history until he was released from Wallens Ridge. (PCR. 319-21). Cooper-Lewter also did not talk with Nathan Burwell, Mahdi's uncle. (PCR. 329-30). He also did not review the videotaped statement of Nancy Burwell, Mahdi's grandmother, made by trial counsel. (PCR. 330). He could not say why Mahdi left the State of Virginia, or what psycho-social stressors Mahdi was under, if any, when he left shortly before Christopher Boggs's murder in North Carolina or Myers's murder in South Carolina (PCR. 321).

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

his father's "rantings." (PCR. 331-32). He noted Mahdi indicated his father's rants would go on and on, and there was a point where Mahdi just stopped listening to his father. (PCR. 332).

The Lack of Merit of this Allegation

Mahdi alleges counsel should have called a different social worker, Cooper-Lewter, and related to Judge Newman what Cooper-Lewter related to this Court. However, Mahdi ignores counsel did retain and call a qualified forensic social worker who conducted a psycho-social assessment of Mahdi and interviewed Mahdi, Mahdi's immediately family, a family friend, and many members of Mahdi's extended family. As previously set forth above, Hammock testified in detail before Judge Newman to her psycho-social assessment, the problems in Mahdi's family including his father's difficulties in life, including depression, criminal arrests, inability to keep a job, inability to support the family, and inability to get along with the community and even with his own family. (R. 1734-63 & Def. Ex. 2). She also testified to Mahdi's life of deprivation, including transience, lack of proper support, abandonment by his mother, witnessing domestic violence committed by his father on his mother and grandmother, lack of a proper male role model, poverty, and psychiatric commitment at the age of 9. (R. 1734-63 & Def. Ex. 2). She also testified to the risk factors Mahdi was exposed to as a child and adolescent and how that affected the rest of his life. (R. 1734-63). She also testified to Mahdi's numerous school disruptions, difficulties in school, and lack of any evidence Mahdi was home-schooled by his father. (R. 1734-63, Def. Ex. 2 & 3). The DJJ records introduced at sentencing also detailed Mahdi came from a dysfunctional one parent family, Mahdi was provided with no structure or guidelines as a child, Mahdi's father did not care about Mahdi's criminal behavior, Mahdi's father attributed his problems to white supremacists in the area, and Mahdi made similar statements as his father. Cooper-Lewter admitted at PCR this information was all before Judge

Newman. (PCR. 328-40). This Court does not find counsel was deficient in failing to introduce the testimony of a different forensic social worker.

This Court finds Mahdi has failed to show deficient performance in failing to present the information presented by Cooper-Lewter because much of Cooper-Lewter's testimony was also testified to by Hammock and/or introduced through the exhibits during her testimony. *Simpson*, 367 S.C. at 605-07, 627 S.E.2d at 711-12 (counsel did in fact do adequate investigation and presented similar mitigation evidence); *Jones v. State*, 677 S.E.2d 20, 382 S.C. 589 (2009) (mitigation evidence presented at PCR was not that different from evidence presented at trial). Furthermore, the fact that one forensic social worker testified differently at PCR than the one who testified at sentencing, does not prove deficient performance of trial counsel. *Reed v. Florida Dept. of Corrections*, 593 F.3d 1219 (11th Cir. 2010) (fact that expert retained at trial and expert retained later at PCR differed, does not prove trial counsel was ineffective); *Davis v. Singletary*, 19 F.3d 1471, 1475 (11th Cir. 1997) ("the mere fact that a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial."). Counsel is not required to expert shop. *See Poyner v. Murray*, 964 F.2d 1404, 1419 (4th Cir. 1992) (petitioner could not establish ineffective assistance because counsel did not "expert shop" until one could be found who would testify favorably). In order to show deficient performance, it was incumbent upon Mahdi to show that had counsel provided additional documents or information to their expert, Hammock, she would have come up with a different opinion or result in her psycho-social assessment. *Von Dohlen v. State*, 360 S.C. 598, 606-07, 602 S.E.2d 738, 742-43 (2004) (holding counsel was ineffective in failing to adequately prepare and present evidence in penalty phase defendant suffered from severe, chronic depression at the time of the murder given counsel failed to provide *their expert* witness with crucial medical records and related information which

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prevented *that witness* from conveying accurate diagnosis of defendant's mental condition to the jury). Specifically, at PCR, Mahdi did not call Hammock and prove had she been provided with certain additional records or information, her opinion or the result of her psychosocial assessment would have been different. *Von Dohlen, supra.*²³ Hammock was simply not called at PCR. Mahdi had failed to meet his burden of proof on this issue. *Id.; Butler, supra.*

Additionally, Cooper-Lewter's testimony was not all beneficial to Mahdi. If counsel had called Cooper-Lewter, the Solicitor would have impeached Cooper-Lewter or introduced many bad things about Mahdi as the State did at PCR. Cooper-Lewter specifically relied on Mahdi's DJJ records in forming his assessment. Mahdi committed over forty disciplinary violations in the Virginia DJJ including assaulting a teacher, assaulting guards on numerous occasions, assaulting other inmates, leading an escape attempt, refusing to follow orders, refusing to be disciplined, cursing staff, and damaging and destroying property. Mahdi was diagnosed at DJJ with conduct disorder, a pre-cursor to anti-social personality disorder. Mahdi faked a suicide attempt at DJJ in order to manipulate the system to gain better conditions of confinement. Mahdi's aunt Lawanda informed Cooper-Lewter that in their home Mahdi would threaten to harm himself when he did not get his way. Mahdi also informed personnel at the Carter Center he only wanted to hurt himself when he did not get his way. Mahdi told Cooper-Lewter he never should have been placed in special education in elementary school, because he did not belong there. Cooper-Lewter basically agreed. Mahdi had numerous disciplinary violations within the Virginia adult DOC, including assaulting staff, setting fire to his cell, and possession

²³ This includes Mahdi's assertion counsel was deficient for failing to provide their expert Hammock with Mahdi's father's military, medical/psychiatric, and criminal records. Further, Mahdi cannot demonstrate deficient performance with regard to these records because Hammock testified before Judge Newman to the information contained in those records, i.e. Mahdi's father's less than honorable discharge from the military, his suffering from depression, inability to hold a job, support his family, parent his children, get along with others, and his record of assaults and misdemeanors. Mahdi's father's criminal record was also contained in the DJJ records introduced at sentencing, and a State's witness testified to Mahdi's father's criminal assaults on family members.

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of contraband. Mahdi's brother grew up in the same home as Mahdi, and Mahdi's brother did not commit violent criminal offenses against others. Mahdi held several different jobs during his life and even obtained college credits. Mahdi had never been physically or sexually abused by his father, mother, Uncle Carson, or Aunt Lawanda. (PCR. 340-341).

Cooper-Lewter was also impeached at the PCR hearing. He did not review any records on Mahdi after he was released from Virginia's DOC. He did not review Dr. Martin's notes, he did not review Dr. McKee's notes, and he did not even review Hammock's interview notes even though these notes dealt with Mahdi's life history, including before he was released from Virginia's adult DOC. Cooper-Lewter could not opine what stressors, if any, Mahdi was under or caused him to commit the murder of Christopher Boggs or Captain Myers. Cooper-Lewter admitted he did not include any details regarding Mahdi's employment history in his report, and he asserted he did not do so because he did not believe it was important in terms of impacting Mahdi's psycho-social history.

Given all of these factors, this Court does not find counsel was deficient in failing to call another forensic social worker, Cooper-Lewter, at sentencing before Judge Newman. See *Pinholster, supra*; *Van Hook, supra*; *Rompilla, supra*; *Wiggins, supra*; *Strickland, supra*.

(c) *Dr. Haney*

Craig Haney, Ph.D, who was qualified as an expert in social psychology with specific expertise in prison systems and the effects of incarceration on inmates, [and who is also an attorney] testified at PCR he reviewed Mahdi's school records, psychiatric records, DJJ records, and Virginia DOC records. (PCR. 362-63). Haney testified Mahdi was identified early as someone with a significant psychological/psychiatric disorder when he was diagnosed with depression at age nine and treated as an inpatient at the Walter Carter Center. (PCR. 364-66). Haney opined there was no indication Mahdi was cured when released; instead, there was a

recommendation he receive follow-up treatment or therapy, and according to Haney, Mahdi received limited treatment and was not medicated. (PCR. 366-67). While Mahdi was in DJJ, he did receive some contact with therapists, but Haney believed that was in the context of the correctional institution whose primary purpose was not to provide therapy. (PCR. 368). Haney *alleged* in Virginia's DJJ, Mahdi would have experienced victimization akin to what Mahdi saw when his father victimized his mother. (PCR. 370). Haney *asserted* the records indicated Mahdi projected a tough exterior as a defense to avoid being victimized by others in the institution. (PCR. 371-72). According to Haney, Mahdi's inability to deal with his anger resulted in a record replete with incidents of impulsive acting out, though some of his actions were done out of stupidity. (PCR. 373). Haney opined Mahdi's problems were deeper than DJJ understood them, and in light of the fact the problems Mahdi had in his first stint were reoccurring in his second stint, DJJ should have considered using a different approach in handling his problems. (PCR. 378-79). Haney contended Mahdi was released from this second stint with a record arguably indicating his behavior was getting worse, and in Haney's opinion, Mahdi left DJJ with many of the same problems he had when entering the system. (PCR. 377-80). Haney agreed some of the records indicated Mahdi's expression of suicidal thoughts could be viewed as attempts to manipulate his situation, but Haney *alleged* it was not inconsistent for someone to express suicidal thoughts and be manipulative. (PCR. 374-75).²⁴ Haney agreed Mahdi began acting out after his release from the Carter Center when he learned his brother was living with his father. (PCR. 398). He understood Lawanda Burwell as stating Mahdi had said "why don't you shoot me" or "just shoot me" on a number of occasions, but Haney was not sure what that meant. (PCR. 399). Haney noted in Mahdi's stint in Virginia's

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

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adult prisons, he had almost no psychological or psychiatric contact and characterized the overwhelming majority of Mahdi's infractions leading to his placement in Virginia's super-max as relatively minor. (PCR. 381-82). In reviewing the records from Wallens Ridge, Haney alleged Mahdi's pattern of behavior of acting out in irrational and impulsive ways evident in DJJ records continued. (PCR. 391). Haney claimed a connection between those actions and Mahdi's alleged underlying, untreated, psychological issues. (PCR. 392). Haney contended the overwhelming majority of offenses for which Mahdi was written up were impulsive, and Haney claimed Mahdi was *not one who devised elaborate plans or victimized others* (PCR. 393). Haney alleged none of Mahdi's alleged lifelong mental health issues were addressed while he was in adult prison, and no effort was made by the prison system to ease Mahdi's transition to society. (PCR. 393-94). Haney did recall extensive testing was done on Mahdi when he entered DJJ, and DJJ recommended he be placed in an anger management program. (PCR. 400-01). Haney admitted Mahdi was kicked out of the anger management program. (PCR. 401). Haney also admitted Mahdi did have periodic visits with one or two different psychologists while he was in DJJ. (PCR. 401-02). Haney also acknowledged he was aware a psychologist diagnosed Mahdi with intermittent explosive disorder and antisocial personality disorder when admitted to the Virginia DOC. (PCR. 395). Haney testified he only examined Mahdi's institutional history. He did not examine Mahdi's employment history. (PCR. 410-11). While he talked with Mahdi, Haney did not discuss anything occurring after Wallens Ridge with him. Thus, he was not aware of what exactly may have influenced Mahdi when these present crimes were committed. (PCR. 403-05). Haney admitted he had not seen any of Mahdi's prison records from South Carolina (PCR. 402). Haney admitted Mahdi has a high I.Q. (PCR. 403). Haney contended Mahdi's prior untreated problems led him to engage in a lot of irrational, immature, and impulsive things he should not have done. (PCR. 407-09). Haney asserted Mahdi's choices

were impaired by virtue of the experiences preceding them. (PCR. 408).

The Lack of Merit of this Allegation

Mahdi alleges counsel should have called Dr. Haney or a similar expert at sentencing to elicit the testimony above and underscore the impact of Mahdi's confinement on him. There is no merit to this allegation. This Court observed Dr. Haney's testimony. This Court finds his testimony is not credible or persuasive, nor are his conclusions supported by the evidence in the record. This Court does not accept Haney's attempt to place the blame for Mahdi's criminal conduct on the criminal justice system, be it juvenile, adult, or both, or on *alleged* untreated psychological issues. This Court finds this testimony is not credible on this record. Nor does this Court believe Judge Newman would have found this testimony credible or persuasive.

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

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

The record shows the following. Mahdi stole items from victims because he wanted to

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

Nor does this Court accept Haney's testimony Mahdi is just an impulsive actor and does not victimize others. Mahdi's Virginia DJJ and DOC records show without question he is a person who victimizes others and manipulates the system for his own benefit. Mahdi repeatedly assaulted guards in both DJJ and adult prisons in Virginia. Mahdi almost killed Moises Rivera. Further, Mahdi's records from the South Carolina DOC, which Dr. Haney did not review, show Mahdi has repeatedly assaulted guards and threatened to assault guards. Additionally, Mahdi's conduct in murdering Christopher Boggs in North Carolina shows his plan was to murder Boggs simply so he could rob the store's cash register. Furthermore, counsels' testimony, along with that of Dr. Martin and Dr. McKee at PCR, shows Mahdi plans out criminal behavior when necessary to benefit himself. As a result, this Court does not accept Haney's testimony as credible on this point and so finds.

Nor does this Court accept Haney's testimony Mahdi's incarceration in DJJ and in adult prison led to his later criminal conduct. Haney misses the point. The elephant in the

courtroom is Mahdi's bad character and characteristics that led him to be confined, and which led him to be confined in the institutions in which he was confined. And, when released from confinement, Mahdi did not change his conduct so he would not go back to a harsh prison environment but committed even more and more violent offenses. Mahdi was not confined after his first brush with the law. He was arrested at age fourteen after breaking into a car, stealing a purse, and escaping from police custody. Mahdi admitted to DJJ staff he had no problem in stealing and felt no remorse about it. He was placed on *juvenile probation* for this offense. (PCR. 342-343, Va. DJJ Records). Mahdi did not adjust his behavior. He broke into two homes and stole firearms, one a .44 magnum pistol. As a result, he was confined at Virginia's DJJ. While there, Mahdi led a pre-meditated assault on another inmate, in which he enlisted the support of other juveniles, resulting in this inmate's injury and medical treatment. While there, Mahdi complained he should not be confined at all because he did not have a lengthy record. Mahdi admitted one of his strengths was robbing people. During this confinement, Mahdi engaged in other disruptive behavior and committed other disciplinary violations. After his release from DJJ, Mahdi was confined again after engaging in an eight-hour standoff with police. During this incident, Mahdi was heard to say "them mother-fuckers' got guns" and "I'm going to kill a police officer before I die." While Mahdi attempts to blame his father for this stand-off, Mahdi could have walked out of his home at any time during the standoff. When the stand-off ended, police found Mahdi in a back room of the house watching television. He was recommitted to DJJ for obstruction of justice and contempt of court. While incarcerated this second time, Mahdi assaulted other inmates, destroyed property, assaulted staff, threatened staff, and generally refused to follow orders or comply with discipline. Mahdi threatened if he was not released from DJJ on time (i.e. when he expected to be released), he would "go around acting crazy" and assaulting people. True to his word, Mahdi fashioned a

sheet into a noose and tied it around his neck, causing him to be placed on suicide watch. Later, Mahdi admitted to a staff counselor this suicide attempt was not genuine, and he only wanted better living conditions, specifically more recreation time, and was attempting to manipulate the system by the suicidal gesture. After this incident, Mahdi incurred other disciplinary violations, including an assault.

Mahdi was eventually released from DJJ. Rather than maintaining good behavior so he would not return to prison, he slashed his mother's tires either because she would not come to the door of her residence, or she would not let him use her car. At that time, Mahdi stated to police he should have killed "the bitch," referring to his own mother. Subsequently, as an adult, Mahdi attempted to break into an apartment. When caught in this act, he severely stabbed Moises Rivera, a maintenance worker at the complex. Mahdi fled the scene and was apprehended by police using dogs. He was sentenced to adult prison for this brutal assault. While in prison, Mahdi engaged in the same behavior he had in DJJ. He disobeyed direct orders, was found in possession of contraband, set fire to his cell, and committed other disciplinary violations. As a result of his prison misconduct, Mahdi was assigned to a Super-Max facility, Wallens' Ridge. There, Mahdi engaged in similar conduct including assaulting a non-inmate and other disciplinary violations.

After being released from Wallens's Ridge, Mahdi did not change his behavior so he would not go back to a harsh prison environment. He initially lived with his uncle and grandmother, but would not live by the rules of the home and was asked to leave. Rather than obeying the law, Mahdi engaged in numerous criminal acts while on supervised probation knowing they could result in revocation of probation and return to prison. Mahdi possessed a 9 mm handgun, sold drugs, and was involved in the murder of a drug dealer. Mahdi told Dr. Martin he was involved in another murder in which police had yet to discover the body. Mahdi

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burglarized the home of Amanda Weaver and stole a .380 pistol, which he was not supposed to have under the conditions of his probation. He stole a car and a license plate and left the State of Virginia because detectives were closing in on him for one homicide. Under his probation, Mahdi was not supposed to leave Virginia. Shortly thereafter, Mahdi murdered Christopher Boggs in North Carolina so he could rob the store's cash register. He then drove to South Carolina, car-jacked a vehicle in Columbia, and attempted to pass a stolen credit card in Calhoun County. Mahdi then burglarized Myers's shed, murdered Myers, and stole Myers's truck and firearms and drove to Florida. While there, he impersonated a police officer and fled from police in Myers's police issued truck.

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

As a result, this Court does not find Haney's testimony on the impact of prison on Mahdi to be credible or persuasive. Nor would it have been to Judge Newman. Quite the opposite is true. The record shows Mahdi has had an impact on each prison or institution he has been in, not the reverse.

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

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only strength was robbing people. Mahdi assaulted inmates while incarcerated in DJJ including on April 11, 1999 by hitting the victim in the head with a broom. Mahdi had twelve major institutional violations and twelve moderate violations while at Culpepper Juvenile Institution. Mahdi had anger management training in DJJ but did not practice what he learned. Mahdi committed several assaults on guards in DJJ including punching a guard in the face on September 29, 1999, assaulting a staff person on November 18, 1999, and another staff person on December 5, 1999. Mahdi also threatened to assault individuals on several occasions while a juvenile. Mahdi stabbed Moises Rivera multiple times. The record shows Mahdi was violent even at a young age. This Court finds Haney's testimony is not credible on this issue.

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

This Court finds counsel was not deficient in failing to investigate, develop, and present the testimony presented by Dr. Haney. See *Pinholster, supra*; *Van Hook, supra*; *Rompilla, supra*; *Wiggins, supra*; *Strickland, supra*; *Rosemond, supra*. The evidence is not credible, nor would it have been to Judge Newman, the sentencing court. Haney's position is refuted by the evidence and Mahdi's record. Further, if counsel had called Haney as a witness, the State would have been able to highlight Mahdi's lengthy criminal career including his commission of crimes before he was ever incarcerated as a juvenile and his assaultive and predatory behavior while in juvenile and adult prisons.

(d) Dr. Schwartz-Watts's and Dr. Myers's testimony

Mahdi alleges counsel did not adequately investigate his mentality both before and at the time of the crime. He asserts counsel should have discovered what Dr. Schwartz-Watts (a psychiatrist) and Dr. Myers (a psychologist) found, that Mahdi was suffering from serious mental illnesses during his life and at the time of the murder of Captain Myers.²⁵

Dr. Donna Schwartz-Watts, a psychiatry expert, testified at PCR she reviewed two notebooks of records, transcripts of Mahdi's prior hearings, and records from Dr. McKee. (PCR. 458-60). She interviewed Mahdi three times; however, Mahdi did not trust her or provide her much information. (PCR. 460, 478). She obtained more information regarding Mahdi's thought process after he left Wallens Ridge from Dr. Martin's and Dr. McKee's notes. (PCR. 478-80). Dr. Schwartz-Watts diagnosed Mahdi as suffering from major depression, anxiety disorder, paranoid personality disorder, reactive attachment disorder, and antisocial personality disorder. (PCR. 460-61). She opined the depression was in remission at the PCR hearing. (PCR. 462). She alleged Mahdi's depression went into remission between the times she spoke with him. She opined Mahdi was suffering from these diagnoses when he went on the crime spree that included the murder of Myers. (PCR. 468-71). She also disagreed with the Virginia DOC's diagnosis Mahdi met the criteria for intermittent explosive disorder. (PCR. 473). Contradicting Dr. Haney, she stated Mahdi was not an impulsive person by nature. (PCR. 473).

Dr. Schwartz-Watts testified reactive attachment disorder was a very rare disorder not seen in a lot of adults. (PCR. 463). She opined Mahdi suffered from the inhibited type of attachment disorder, noting the records indicate Mahdi was typically described as being

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

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detached. (PCR. 463). She noted the reactive attachment disorder would have been the result of numerous disruptions in relationships he had in his childhood. (PCR. 464). There was little stability in his early life; Mahdi's mother left when he was young, his father had some mental illness, was available to Mahdi only at times, Mahdi lived with his aunt and uncle for some time, and he moved six times in that period. (PCR. 464-65).

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

Dr. Schwartz-Watts did not ask Mahdi about the murder in North Carolina, but she believed he would have been suffering from major depression at that time. (PCR. 482-83). The last documentation she saw evidencing Mahdi's depression was a statement from Mr. Crutchfield, Mahdi's co-defendant [in a homicide] from Virginia. (PCR. 483-85). She also asserted other documentation regarding Mahdi's depression dated back to 2001, when Mahdi denied he had been treated for mental illness and denied he had attempted suicide in his evaluation in the Virginia DOC. (PCR. 486). Dr. Schwartz-Watts admitted there was no evidence in any of Mahdi's adult prison records indicating he either complained of or received treatment for depression. (PCR. 487-90). Dr. Schwartz-Watts stated Mahdi may not have been suffering from major depression on the day he shot Myers, but Mahdi would still have been affected by the condition. (PCR. 493-94). She noted the only illness that probably had anything to do with the crime was Mahdi's anxiety disorder. (PCR. 496-97).

deRossett Myers, Ph.D., a clinical psychologist qualified as an expert in child and adolescent psychology, evaluated Mahdi for developmental concerns he alleged were evident from his life as a juvenile. (PCR. 419). Myers was struck by the extent of poverty of Mahdi's

family, the number of times Mahdi moved in a short period of time, and the amount of violence in the family. (PCR. 420). Myers indicated these were factors that put Mahdi at risk for mental health problems. (PCR 421). He opined Mahdi suffered from major depression and severe attachment disorder. (PCR 421).

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

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

Myers noted a psychologist during Mahdi's first stint at DJJ recommended Mahdi be placed in an out-of-home placement like a group home or residential treatment facility. Myers believed Shareef Mahdi's home did not comport with the recommendations. (PCR. 447-48). Myers believed the observations made in the psychological testing during Mahdi's second stint

at DJJ were consistent with attachment disorder and depression. (PCR. 450-52). He recalled in the DJJ records, someone indicated Mahdi would be very difficult to deal with in the future unless he got the treatment he needed. (PCR. 457). Myers noted the same individual indicated an untreated Mahdi would likely end up in adult prison, and Mahdi had aged well beyond his years in terms of some of his criminal behaviors. (PCR. 457).

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

The Lack of Merit of this Allegation

This Court finds counsel was not deficient in failing to call Dr. Schwartz-Watts or Dr. Myers. First, Dr. Schwartz-Watts admitted during her testimony that Mahdi's history of depression had nothing to do with the murder of Myers. (PCR. 495-96). Additionally, she testified the only illness he suffered from that could have had anything to do with the murder of Myers was the generalized anxiety disorder she diagnosed him as having. (PCR. 495-97). She based this determination mainly on the fact Mahdi told her he was anxious at the time he murdered Myers. However, she admitted Mahdi had broken into Myers's cabin, and it would be expected he would be anxious when he saw Myers entering his cabin and about to discover Mahdi unlawfully inside his shed. (PCR. 496-97). This Court does not find this significantly mitigating given the circumstances. Further, while Dr. Martin's notes indicate Mahdi told him he was anxious and paranoid in Virginia, because he was being investigated for a homicide he committed, he stated he was no longer anxious or paranoid after he left Virginia. (Resp. Ex. 8). Dr. Martin took a detailed history from Mahdi, which Dr. Schwartz-Watts relied on, and Martin

did not diagnose Mahdi with generalized anxiety disorder. Additionally, at the time of the PCR hearing, the record showed Mahdi had been in the South Carolina DOC for six to seven years and had not been treated for any anxiety disorder or any mental illness including depression. (PCR. 488-91). Mahdi had received no psychotropic medications or attempted suicide since his arrest in 2004. (PCR. 488-91). Mahdi did go on a hunger strike prior to trial, but this was due to his objection to being kept as a safe-keeper prior to trial, i.e. his conditions of confinement. (PCR. 489-90). Mahdi also denies he has any mental illness. (PCR. 490). Mahdi was also examined by Dr. Michael Cross and Dr. Randy Pickens prior to trial for competency to stand trial. Dr. Cross found no evidence of any mental illness. (R. 131, 136 & Court's Ex. 2). Dr. McKee also ran tests on Mahdi and took a history from him and did not diagnose him with generalized anxiety disorder.

Dr. Schwartz-Watts admitted Mahdi did not provide her with a lot of information and was not as forthcoming with her as he was with Drs. Martin and McKee. (PCR. 479). She was forced to admit there are no records from the South Carolina DOC where Mahdi has been treated for depression or any mental illness since his arrest for Myers's murder. (PCR. 488-491). Dr. Schwartz-Watts claimed there was evidence in the DOC records Mahdi was suffering from depression; however, there are other reasons to explain his behavior. She was forced to admit Mahdi's hunger-strike was related to his being kept as a safe-keeper prior to trial, i.e. his conditions of confinement. (PCR. 489-90). Furthermore, his physical complaint was for just not feeling well, i.e. tired and run down. (PCR. 488-89). This Court does not find Mahdi's aggressive and threatening conduct is definitive evidence of depression, because it is also consistent with Mahdi's repeated diagnoses of anti-social personality disorder. (PCR. 489). Dr. Schwartz-Watts also admitted Mahdi has stated over the past six years there is nothing wrong with him. (PCR. 491-92). She further admitted he has not been given any medications for any

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mental illness. (PCR. 491). This Court would also note at his guilty plea on the current charge, Mahdi told Judge Newman he was not suffering from any mental illness. Dr. Cross found no evidence of any mental illness. (R. 131, 136; Court's Ex. 2). Dr. Schwartz-Watts also admitted that upon entry to Virginia's DOC in 2001, Mahdi was not diagnosed as suffering from depression but intermittent explosive disorder and anti-social personality disorder. (PCR. 486-487). She admitted there was nothing in Mahdi's adult prison records from Virginia, where he resided from 2001 to 2004, showing Mahdi was suffering from or was being treated for depression. (PCR. 487). She also admitted there was no documentation by a doctor, psychologist, parole officer, or any professional that Mahdi was suffering from depression before he left Virginia and committed this current crime. (PCR. 487). She further admitted there was no record of Mahdi being treated for depression or complaining of depression from his arrest in Florida until his return to South Carolina to face these charges. (PCR. 487-488). She also admitted that Mahdi admitted his suicidal gesture in Virginia's DJJ was manipulative behavior on his part in order to obtain better living conditions and more recreation time. (PCR. 490; Resp. Ex. 4). Dr. Schwartz-Watts further admitted it did not appear Mahdi was depressed the day of Myers's murder, based on his actions, and he may not have been depressed at all. ²⁶ (PCR. 493).

In addition to the facts cited above, Mahdi's cold, calculated, and intelligent actions over several days from Virginia, to North Carolina, to Columbia, to Calhoun County, and finally to Florida, do not indicate Mahdi was depressed. Mahdi burglarized a neighbor's home in Virginia and stole a gun. He then stole a license plate from one establishment, a car from another, and

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

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left Virginia to escape police who were investigating him for a homicide. Mahdi drove the stolen vehicle to Winston-Salem, North Carolina, entered a convenience store and pretended to be a patron, and when the clerk was distracted checking his I.D. to buy alcohol, Mahdi drew the stolen pistol and shot the clerk. He then shot the clerk again to render him helpless and attempted to rob the store's cash register. Mahdi then drove to Columbia, South Carolina. While here, he pretended to be a homeless person and stayed at the Oliver Gospel Mission. Mahdi then pretended to be a homosexual person so he could car-jack a vehicle and did so. He then switched the license plate on the car-jacked vehicle with the license plate he stole from Virginia. He then drove to Calhoun County and attempted to pass a stolen credit card, but the card had been cancelled. Mahdi then fled when he realized police were going to apprehend him. He then burglarized Myers's shed and while there altered a shotgun into a sawed off shogun and painted it black. Mahdi then murdered Myers and attempted to burn his body to destroy evidence of the crime. He then stole Myers's truck, but switched license plates on the vehicle before fleeing to Florida. He then drove all the way to Jacksonville, Florida where he sold the murder weapons used in North Carolina and South Carolina; however, Mahdi retained the assault rifle and sawed-off shotgun he had stolen from Myers's shed. He then impersonated a police officer when approached by a citizen in Florida. Mahdi then attempted to flee from police in Satellite Beach, Florida, and was arrested only after the use of a police dog.

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

Additionally, this Court does not find counsel was ineffective in failing to retain Dr. Myers, a clinical psychologist, or elicit the testimony he provided. Dr. Myers testified to many things that were not favorable to Mahdi and would not have helped his case in mitigation before Judge Newman. Specifically, Dr. Myers testified the Carter Center records reflected either a *diagnosis* of oppositional defiant disorder or a *rule out* oppositional defiant disorder, which Myers admitted was a precursor to antisocial personality disorder. (PCR. 442-43). Myers also noted Mahdi had a history of being oppositional and a history of behaviorally acting out with aggression. (PCR. 443). While Myers testified his interpretation of the Carter Center records was the staff attributed Mahdi's oppositional behavior to his depression, Myers admitted a diagnosis of conduct disorder/oppositional defiant disorder is based exclusively on observation of overt behavior. (PCR. 443). Myers also related that when Mahdi returned to school in Lawrenceville he was tested because he was not doing well in school and his behavior wasn't particularly good at school. Myers also admitted that after Mahdi was committed to Virginia's DJJ, Mahdi was described as an angry, alienated, tough youth. (PCR. 447). Myers testified that at that time Mahdi had already been involved in an altercation in a cottage he was housed in. (PCR. 447). Myers testified the DJJ psychologist noted Mahdi had a lot of negative attitudes towards authority, did not like rules, did not like limits, was poorly socialized, and was not sensitive to the rights and privileges of others. (PCR. 447). Myers related the psychologist termed Mahdi's problem a *conduct disorder*. (PCR. 447). Mahdi only stayed out of DJJ two weeks before he was involved in a stand-off with police and was recommitted to DJJ where he was diagnosed with *conduct disorder*. (PCR. 449-450). Myers further admitted Mahdi was noted to be disruptive at DJJ and also engaged in oppositional defiance. (PCR. 451). Myers also admitted it was noted in DJJ records Mahdi had aged well beyond his years in terms of his criminal behaviors. (PCR. 457). Myers testified Mahdi's diagnosis of anti-social personality

disorder in the adult DOC was justified at the time based on the record. (PCR. 456). Myers also agreed Mahdi's I.Q. of 118 was an accurate level of his intelligence. (PCR. 457).

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

Counsel retained Dr. Thomas Martin, a forensic psychiatrist, who has testified in several capital cases, to evaluate Mahdi and determine if he suffered from any mental illness that would serve as mitigation. Dr. Martin found Mahdi had some history of recurrent depression, but there was no evidence he suffered from a mental illness at the time of the commission of the crimes against Myers. The only thing Dr. Martin found was Mahdi has anti-social personality disorder. That diagnosis is fully supported by the record. When Mahdi was admitted to Virginia's DOC, he was diagnosed with intermittent explosive disorder and anti-social personality disorder. At PCR, Dr. Martin testified Mahdi had no difficulty talking about killing people if necessary in order to achieve independence, and he appeared to have no remorse

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regarding any of his past violent acts. Dr. Martin related to counsel on several occasions what his findings were and they would not be helpful to Mahdi. Additionally, in conducting his evaluation, Dr. Martin took a history from Mahdi. Martin discussed with Mahdi the circumstances of the crimes against Myers and why Mahdi left Virginia in the first place. Mahdi related to Dr. Martin he left Virginia because he was involved in the homicide of a drug dealer, and detectives there were closing in on him. Mahdi also related to Martin he was involved in another homicide in which police had yet to find the body. Mahdi also related to Martin he shot Myers in the chest and head, and after Myers was on the floor of his cabin, Mahdi shot him several more times in the head to make sure he was dead. (PCR. 508-23).

Counsel also retained a *forensic psychologist*, Dr. Geoffrey McKee, to evaluate Mahdi with regard to mental health mitigation. Dr. McKee took a detailed history from Mahdi, conducted tests on Mahdi, and reviewed records including Mahdi's psychiatric records from when he was age nine. McKee found Mahdi was very intelligent and he suffered from no major mental illness at the time of the crime. McKee found, independent of Dr. Martin, Mahdi had anti-social personality disorder. McKee found nothing else. Mahdi also related to McKee he left Virginia because he was involved in the homicide of a drug dealer and police were closing in on him for that crime. (PCR. 545-561). McKee also related his findings to counsel. (PCR. 689-90, 626-27).

Counsel testified they made a strategic decision not call either psychiatric or psychological expert in the sentencing hearing before Judge Newman, because their testimony would not be helpful and damaging information would have come out if these witnesses were subject to cross-examination. (PCR. 689-90, 626-27). This Court finds this was an objectively reasonable strategic decision under the circumstances and is not subject to a claim of ineffective

assistance of counsel. See *Strickland, supra*; *Wong, supra*; *Council, supra*.²⁷ This Court finds had either of these experts been called to testify, they would have been cross-examined by the Solicitor on the fact they took a history from Mahdi and what Mahdi related about why he stole a car and left Virginia and about the murder of Myers. Each expert's testimony would not have been helpful but would have been devastating to Mahdi's mitigation case because it would have revealed other homicides Mahdi had committed in addition to the Boggs's murder and Myers's murder. The testimony would have also revealed Mahdi shot Myers again after he was helpless on the floor. *Wong, supra* (calling mitigation witness would have exposed defendant to admission of evidence of other homicide not previously before the sentencing authority). Additionally, the experts would had to have related they found Mahdi was suffering from no major mental illness and had anti-social personality disorder. This would not have been helpful to the defense mitigation case. See *Cullen, supra* (it was a reasonable penalty phase strategy to pursue evoking sympathy for mother where psychiatrist found defendant had no signs or symptoms of mental disorder other than his "psychopathic personality traits"); *Byrum v. Ozmint*, 339 F.3d 203, 210 (4th Cir. 2003) (counsel not ineffective in failing to present testimony by a psychiatrist and psychologist because the suggestions of antisocial behavior which experts found could have been harmful to the defense); *Satcher v. Pruett*, 126 F.3d 561 572 (4th Cir. 1997) (counsel not ineffective for not presenting testimony by a psychologist and psychiatrist who examined defendant for purpose of developing mitigating evidence where they found no

²⁷The fact Mahdi committed another homicide would clearly have been admissible at sentencing before Judge Newman. See *State v. George*, 476 S.E.2d 903, 913 (fact defendant had attempted to commit similar crime in past was proper as evidence of individual characteristics and pre-disposition to commit similar crimes); *State v. Owens*, 552 S.E.2d 745 (2001) (confession to another murder during 24 hour waiting period was admissible in penalty phase since it went to defendant's character); *State v. Ray*, 498 S.E.2d 640, 641-42 (photographs of prior victim in ABIK admissible in penalty phase); *State v. Green*, 392 S.E.2d 157, 162-63 (1990) (prior crimes of defendant admissible in penalty phase); *State v. Howard*, 369 S.E.2d 132, 295 S.C. 462 (1988) (*cert denied*, 490 U.S. 1113).

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psychiatric or neurological disorders, but also found antisocial personality disorder that might make defendant a "future danger"); *Reed v. Florida Dept. of Corrections*, 593 F.3d 1217 (11th Cir. 2010) (counsel made objectively reasonable trial strategy decision not to offer antisocial personality disorder diagnosis); *Fulks v. United States*, Slip Copy, 2010 WL 3069390 (D.S.C. 2010)²⁸ (attorneys not ineffective in avoiding testimony defendant met criteria of anti-social personality disorder); see *Truesdale v. Moore*, 142 F.3d 749, 755 (4th Cir. 1998) (mental health evidence is a "double edged sword that might as easily condemn a defendant to death as excuse his actions."); *St. Pierre v. Walls*, 297 F.3d 617, 633 (7th Cir. 2002) (facts showing defendant has a condition or proclivity toward violence are often aggravating, not redeeming or mitigating factors).²⁹

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

²⁸In *Fulks*, U.S. District Judge Joseph Anderson cited several articles written by attorney John Blume discussing antisocial personality disorder being a diagnosis to be avoided. See John H. Blume & David Voisin, *Avoiding or Challenging a Diagnosis of Antisocial Personality Disorder*, 24 *Champion* 69 (Apr. 2000) (antisocial personality disorder diagnosis "can be the kiss of death, because to many people, and most judges, this means that the defendant is little more than a remorseless sociopath."). *Fulks*, at p. 18, n. 21.

²⁹This Court recognizes a diagnosis of anti-social personality disorder would entitle a defendant to a jury charge on certain statutory mitigating circumstances. See *State v. Caldwell*, 308 S.C. 494, 388 S.E.2d 816 (1990). However, as the above cited authority shows, that does not mean counsel is deficient for failing to offer testimony their client suffers from anti-social personality disorder. Furthermore, there was no real contention at PCR, counsel was deficient in failing to call Dr. Martin or Dr. McKee in this regard.

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trial tactics and strategies.”). Mahdi has failed to show deficient performance on the part of counsel. *See Strickland, supra; Wong, supra.*

Furthermore, even if counsel had retained and called Drs. Schwartz-Watts and Myers at sentencing, the devastating evidence of Mahdi’s involvement in the Virginia homicides would have been elicited at trial, as it was at PCR. Dr. Schwartz-Watts’s report lists Dr. Martin’s and Dr. McKee’s records as part of the materials she relied upon in conducting her evaluation. She admitted at PCR she relied, in part, and reviewed Dr. Martin’s and Dr. McKee’s files in rendering her opinion. She admitted Mahdi told Dr. Martin and Dr. McKee the reason he left Virginia was because police were closing in on him for a homicide he was involved with there. (PCR. 481). This would have been devastating to any mitigation case counsel was trying to present. *Wong, supra.*

Finally, Dr. Schwartz-Watts and Dr. Myers also diagnosed Mahdi with antisocial personality disorder. As previously discussed, this testimony would not have been helpful to the mitigation case. *Cullen*, 131 S.Ct. 1388 (reasonable penalty phase strategy to pursue evoking sympathy for mother where psychiatrist found defendant had no signs or symptoms of mental disorder other than “psychopathic personality traits”); *Byrum*, 339 F.3d at 210 (counsel not ineffective in failing to present testimony by psychiatrist and psychologist because the suggestions of antisocial behavior which experts found could have been harmful); *Satcher*, 126 F.3d at 572 (counsel not ineffective for not presenting testimony by psychologist and psychiatrist who examined defendant for the purpose of developing mitigating evidence where they found no psychiatric or neurological disorders, but found antisocial personality disorder that might make him a “future danger”); *Reed*, 593 F.3d 1217 (counsel made objectively reasonable strategy decision not to offer antisocial personality disorder diagnosis); *Fulks, supra* (no ineffective assistance in avoiding testimony defendant met criteria of antisocial personality disorder). *See*

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Truesdale, 142 F.3d at 755 (mental health evidence is a “double edged sword that might as easily condemn a defendant to death as excuse his actions.”); *St. Pierre*, 297 F.3d at 633 (fact that a defendant has a condition or proclivity toward violence is often aggravating, not redeeming or mitigating).³⁰

Furthermore, this Court finds Mahdi has failed to prove counsel was deficient in failing to have Dr. Martin or Dr. McKee diagnose Mahdi with depression, generalized anxiety disorder, or paranoid personality disorder.³¹ While Mahdi called two new experts who said Mahdi suffered from depression, one in his childhood, and the other in his childhood and as an adult, and Dr. Schwartz-Watts testified Mahdi had paranoid personality disorder and generalized anxiety disorder, this was not sufficient to prove counsel was deficient in this regard. *Reed*, *supra* (fact that expert retained at trial and expert retained later at PCR differed, does not prove trial counsel was ineffective); *Davis*, 19 F.3d at 1475 (“mere fact that a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial.”). It was incumbent upon Mahdi to show, had counsel provided additional documents or information to their experts, they would have reached a different diagnosis. *Von Dohlen*, 360 S.C. at 606-07, 602 S.E.2d at 742-43 (counsel was ineffective in failing to adequately prepare and present evidence in penalty phase defendant suffered from severe, chronic depression at the time of the murder given counsel

³⁰ Again, this Court recognizes testimony of an expert that a defendant suffers from antisocial personality disorder would entitle a defendant to a charge on certain statutory mitigating circumstances. *Caldwell*, *supra*. However, as the above authority shows, this does not mean counsel is deficient in failing to offer such testimony. This Court finds this testimony would have been harmful to the defense mitigation case had this testimony been presented before Judge Newman and counsel made an objectively reasonable trial strategy decision not to offer this evidence from their retained psychiatrist and psychologist. *See Strickland*, *supra*; *Council*, *supra*.

³¹ Dr. Martin did diagnose Mahdi as having some recurrent depression during his life but not at the time of the offense. Counsel could not call Dr. Martin because of the other negative things he would had to have related to Judge Newman, including his diagnosis of antisocial personality disorder and things Mahdi had told him including committing two homicides in Virginia.

failed to provide their expert witness with crucial medical records and related information which prevented *that witness* from conveying accurate diagnosis of defendant's mental condition to the jury). Specifically, at PCR, Mahdi did not call Dr. Martin or Dr. McKee and prove, had they been provided with certain additional records or information, their diagnosis would have been different, i.e. they would have diagnosed Mahdi with depression, paranoid personality disorder, and/or generalized anxiety disorder. *Von Dohlen, supra.* In fact, the State called Dr. Martin and Dr. McKee at the PCR hearing, and Mahdi did not establish through either expert that if they had been shown certain additional records or information their diagnosis would have been any of the above. *Id.* As a result, Mahdi has failed to meet his burden of proof to show ineffective assistance in this regard. *Id.* In fact, Dr. Martin testified based on the records he saw and what he had heard at the PCR hearing, his diagnosis would not have been any different. Dr. McKee also testified he did not need any further records to make the diagnosis he made. Neither expert testified their opinion had changed. As a result, this Court finds Mahdi has failed to meet his burden in this regard. *See Butler, supra; Von Dohlen, supra; Reed, supra* (fact that expert retained at trial and expert retained later at PCR differed, does not prove counsel was ineffective); *Davis, supra* (mere fact a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate counsel was ineffective for failing to produce that expert at trial).³²

Furthermore, this Court finds Mahdi has failed to prove counsel deficient in failing to

32 This finding includes Mahdi's allegation counsel was deficient in failing to provide their experts: Dr. Martin and Dr. McKee with Mahdi's father's military, medical/psychiatric, and criminal records. *See Von Dohlen, supra; Butler, supra.* Further, Dr. Martin and Dr. McKee testified they were present at team meetings with counsel, the mitigation investigator, the forensic social worker, and the private investigator where the information gathered in the mitigation investigation was shared with them. This would have included the information contained in these particular records, i.e. that Mahdi's father had been discharged from the military under less than honorable conditions, Mahdi's father suffered from depression and could not get along with others including members of his own family, Mahdi's father could not hold a job or support his family or parent his children, and Mahdi's father had a criminal record of assaults. Mahdi has failed to show deficient performance in this regard. *Id.*

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

More importantly, Mahdi did not prove *counsel* did not provide *their experts* with records or information that would have led *them* to diagnose Mahdi as having reactive attachment disorder. *Von Dohlen*, 360 S.C. at 606-07, 602 S.E.2d at 742-43. Specifically, Mahdi did not call Dr. Martin or McKee and prove had they been provided with certain additional records or information, their diagnosis would have been different, i.e. reactive attachment disorder. *Von Dohlen, supra*. In fact, the State called Dr. Martin and Dr. McKee at the PCR hearing, and Mahdi did not establish through either expert that if they had been shown certain additional records or information their diagnosis would have been reactive attachment disorder. *Id.* As a result, Mahdi has failed to meet his burden of proof to show ineffective assistance in this regard. *Id.* In fact, Dr. Martin testified that based on the records he saw and what he had heard at the PCR hearing, his diagnosis would not have been any different. McKee also testified that he did not need any further records to make the diagnosis he made. Neither testified, if they had been shown additional records, they would have diagnosed reactive attachment disorder. This Court finds Mahdi has failed to meet his burden in this regard. *See Butler, supra; Von Dohlen, supra; Reed, supra* (fact expert retained at trial and expert retained at PCR differed, does not prove counsel was ineffective); *Davis, supra* (mere fact a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate counsel was

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ineffective for failing to produce that expert at trial.). As a result of the above, counsel was not deficient in failing to investigate, develop, and present mental health mitigation evidence. See *Pinholster, supra*; *Van Hook, supra*; *Rompilla, supra*; *Wiggins, supra*; *Strickland, supra*; *Rosemond, supra*.

(e)The DJJ Records

Mahdi alleges counsel should have introduced Mahdi's records from Virginia's DJJ at sentencing. He argues these records contained some mitigating evidence, that he was noted to be suffering from depression while in DJJ. Mahdi introduced these DJJ records at the PCR hearing, and the State did as well, and this Court has reviewed them carefully. Counsel was not deficient in failing to introduce these records.

The Lack of Merit of this Allegation

At Mahdi's sentencing hearing before Judge Newman, the State introduced a minimal amount of Mahdi's DJJ records. (See R., Vol. IV. and IV.). Those records document just a few of Mahdi's disciplinary violations; however, they do not document the extensive and aggravated nature of his disciplinary violations while in Virginia's DJJ.

The record shows counsel obtained Mahdi's DJJ records through the efforts of their mitigation investigator Ms. Tarr. (PCR. 585). Mahdi had over forty disciplinary violations within Virginia's DJJ including assaults on guards, teachers, and inmates. (PCR. 684). He was also involved in destroying property on several occasions. Mahdi also led an escape attempt by assaulting a female guard, taking her radio away from her, and demanding keys from another guard. Mahdi also threatened if he was not released from DJJ when he thought he should be released, he would go around "acting crazy." The records show Mahdi later admitted faking a suicidal gesture in an attempt to manipulate the DJJ prison system into gaining more recreation

time. The records, if admitted at sentencing, would also have shown Mahdi did not think he should have been incarcerated for any of his offenses, and threatened to assault other inmates or guards or harm himself if he was not released from DJJ when he thought he should be. The records also show Mahdi received various treatment programs provided to inmates by Virginia's DJJ, but he did not practice what he had learned such as anger management. In fact, Mahdi was kicked out of the anger management program for disruptive behavior. In the same records, on January 14, 1998, it was reported Mahdi described his own criminal behavior "in a very calculated, almost professional way that is alarming." The records indicated Mahdi "is behaving and developing like a teenager much older" than he was. Mahdi also admitted to DJJ staff he had difficulties in school adjustment, had been frequently suspended, had a history of verbal and physical aggression, conflicts with educational authorities, and difficulties getting along with classmates. (DJJ record M00416). He also admitted he had injured someone in a fight, and hit or attacked someone who was not in his family. (DJJ record M00495). One DJJ official indicated Mahdi was very dangerous *if he did not get his way*. (DJJ record M00511). Counsel was not deficient in failing to introduce Mahdi's DJJ records. *Wong, supra*. There were numerous unfavorable reports about Mahdi that would have been revealed to Judge Newman if these records had been introduced. If counsel had introduced only select portions of the records, the State would have introduced all of Mahdi's DJJ records, which included his numerous disciplinary violations and his admission to faking a suicide gesture to manipulate the prison system. This Court also finds counsel's not introducing Mahdi's DJJ records was an objectively reasonable trial strategy decision. *See Strickland, supra; Council, supra*. This evidence would have further advanced the State's argument Mahdi has a bad character and further advanced proof of his future dangerousness. *State v. Hughes*, 336 S.C. 585, 521 S.E.2d 500 (1999) (behavior in prison is admissible in capital sentencing because it bears on defendant's

character and future dangerousness); *State v. Whipple*, 324 S.C. 43, 476 S.E.2d 683 (1996). It would also have further undercut Mahdi's prison adaptability expert's testimony. *See Hughes, supra; State v. Woomeer*, 278 S.C. 468, 299 S.E.2d 317 (1982) (prior escape refuted evidence of good conduct while in prison).

This allegation has no merit. Counsel was not deficient in failing to introduce Mahdi's DJJ records. *See Pinholster, supra; Van Hook, supra; Rompilla, supra; Wiggins, supra; Strickland, supra; Rosemond, supra.*

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

Both Dr. Martin and Dr. McKee had reviewed Mahdi's psychiatric records of his commitment to the Walter Carter Center. Both knew Mahdi had been diagnosed with major depression as a child. Dr. Martin testified he also interviewed Mahdi, and based on his interviews with Mahdi and his participation in the mitigation team meetings where the other experts shared their background information on Mahdi, he determined Mahdi had a history of recurrent depression in his life.³³ However, even with this determination, Dr. Martin testified he found that Mahdi was not suffering from any mental illness at the time the crime was committed. Therefore, even with this information from DJJ, Dr. Martin's diagnosis would not change because he was already aware Mahdi had a history of recurrent depression during his life.

Additionally, as previously set forth above, this Court does not find credible the claim that Mahdi was suffering from depression at the time of Myers's murder. The evidence

³³Ms. Farr testified at the PCR hearing that she received the DJJ records.

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introduced at trial and the PCR does not support a conclusion Mahdi was depressed or was suffering from depression at the time he murdered Myers.

Additionally, even if counsel had provided these documents to their psychiatric experts, they could not call either Dr. Martin or Dr. McKee in the sentencing phase because of what Mahdi told both doctors that would have come out on cross-examination and their diagnosis of antisocial personality disorder. *Wong, supra*. Counsel could not call Dr. Martin to testify to Mahdi's history of recurrent depression for several reasons: (1) Martin did not find Mahdi was suffering from depression at the time of the crime; (2) Martin diagnosed Mahdi with antisocial personality disorder, and (3) Mahdi told Dr. Martin he had committed two homicides in Virginia, and he fled from Virginia to get away from detectives who were closing in on him for one of the homicides. Again, this was an objectively reasonable trial strategy decision under the circumstances, and providing the DJJ records to Dr. Martin would not have changed these negative factors that led to this strategic decision. Mahdi has failed to show deficient performance here.

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

Finally, Mahdi failed to meet his burden of proof with regard to this specific allegation. Both Dr. Martin and Dr. McKee testified at the PCR hearing. Mahdi did not show either Dr. Martin or Dr. McKee the DJJ records and ask them if these records would have changed their

opinion in this case.³⁴ *Von Dohlen, supra.* As a result, Mahdi has failed to meet his burden of proof to show counsel was deficient in this regard. *Butler, supra.*

(f) The School Records and School Witnesses

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

The Lack of Merit of this Allegation

The record and credible evidence at the merits hearing shows counsel retained a qualified mitigation investigator, Ms. Tarr, to investigate and develop mitigation in this case. Tarr had previously been a mitigation investigator in thirty to forty capital cases. Tarr testified as part of her investigation she requested school records of Mahdi. (PCR. 565). Although she no longer had her file in this case, she testified it was her common practice to request records from any school Mahdi or his family informed her Mahdi had attended. (PCR. 565). She also testified she went to the schools Mahdi attended. (PCR. 585). She also testified she spoke with teachers in Lawrenceville who were familiar with Mahdi; however, these teachers had not spent a lot of time with Mahdi. (PCR. 586). She also testified she spoke with individuals from a school

³⁴In fact, Dr. Martin testified that based on what he saw and heard discussed at the PCR hearing, his opinion regarding Mahdi's mental state had not changed. Dr. McKee testified he did not need to see any additional records to make his diagnosis in this case. Neither testified that had they been shown the DJJ records their diagnosis would have been different.

Mahdi attended in Baltimore. (PCR. 586). Tarr testified she routinely provides summaries of school records in capital cases. (PCR. 587). She also testified if she had done a summary of school records in this case, she would have included all pertinent information she thought was helpful to Mahdi. (PCR. 586-87). The record shows a summary of the school records was done in this case and introduced at the sentencing hearing before Judge Newman. Counsel testified they relied on Tarr and also Hammock, the forensic social worker, to get all of the information with regards to Mahdi's school and education. (PCR. 629-30). Counsel also testified there were team meetings where the mitigation investigator and social worker shared with them and their experts what they had found in their investigation. (PCR. 631, 700). Counsel testified he was aware Mahdi was in special education. (PCR. 629). Dr. Martin and Dr. McKee also testified they were aware Mahdi was in special education. Counsel also testified they would have forwarded any records they received to their experts.

At Mahdi's sentencing proceeding before Judge Newman, Hammock testified to Mahdi's difficulties in school. She testified in her expert opinion Mahdi's education was disrupted many times, and this was reflected in the school records. (R. 1752, 1756). Mahdi had to move several times. (Def. Ex. 2). Mahdi was forced to change elementary schools five times. (Def. Ex. 3). The records also noted lateness and absences. (R. 1756). Mahdi started kindergarten at Sister Clara Muhammad School in Richmond and completed part of kindergarten at Totaro Elementary School in Lawrenceville. Mahdi then moved back to Richmond and attended Chamberlayne Elementary School for part of a year. Then he was removed from there and sent to Baltimore, where he attended Scotts Branch Elementary School for two years. Then he was removed from that school while in the Carter Center, and ultimately returned back to Lawrenceville to live with his father. (R. 1754-56). Even in his pre-teen years there was a lack of stability in terms of Mahdi's attending school, and it was reflected in the kinds of reports he

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received. (R. 1760-61).

Hammock testified Mahdi constantly had difficulty in school. (R. 1752). He was considered bright but did not perform well. (R. 1752-53). He was particularly a poor reader. (R. 1753). Both Carson and Lawanda Burwell reported Mahdi had difficulty in school. (R. 1753). Carson reported Mahdi could not read when he came to live with them at age 8. Carson and Lawanda reported there was constant conflict in getting Mahdi to deal with his academic limitations. (R. 1754). When Mahdi was involuntarily committed to the Carter Center his initial diagnosis included "Developmental Reading Disorder." (Def. Ex. 2). Mahdi's had difficulties in school particularly in reading, and writing, which remained at below grade level throughout elementary school. (Def. Ex. 3, R. 1755). Mahdi had numerous absences while in school. (Def. Ex. 3). School records during this time were consistent with this report. (R. 1754). Mahdi had uneven skills in school. (R. 1755). He was in the average math program, but in the below average reading program. (R. 1755). While he excelled in science, his reading, vocabulary, and spelling remained below average. (R. 1756). Mahdi needed improvement in a number of areas, including standards for behavior and showing respect for authority. (R. 1755). Mahdi was described as having poor self-esteem throughout his academic time. (R. 1753). It was noted several places he had poor self-esteem and had difficulty in relationships with others. (R. 1756). Mahdi's father removed him from school in the 5th grade to home school him, but there was no information this home schooling had ever occurred. (Def. Ex. 3). Mahdi's educational history was one of poor school progress. (R. 1762). While counsel did not introduce the records themselves, counsel conducted a reasonable investigation of Mahdi's school history and presented the same before Judge Newman. See *Pinholster, supra*; *Van Hook, supra*; *Rompilla, supra*; *Wiggins, supra*; *Strickland, supra*; *Rosemond, supra*; *Simpson, supra*.

The school records themselves reveal damaging information about Mahdi and his

character, even at an early age. Mahdi was referred for special services not because he was mentally retarded, but because of "...behavior problems. He exhibits inappropriate and disruptive behavior." (Brunswick County Public Schools, 3/25/99). The same record also indicates Mahdi had a negative attitude about being corrected, did not always get along with other children, his behavior with adults was inappropriate at times, and most of his problems seemed to be getting along with people. The records indicate Mahdi had an I.Q. of 118, but had episodic acting-out behavior and an unwillingness to deal with difficult school tasks. (Confidential Psychological Evaluation). The records also indicate Mahdi was referred for special services because of "*behavioral difficulties*; such as leaving his seat inappropriately, *physically and verbally aggressive towards others* at times, talks out of turn, preoccupied, anxious, *easily frustrated or angered*, *lacks respect for authority*, and daydreams; (Educational evaluation)(emphasis added). A Burk's Behavior Rating Scale revealed very significant factors for poor impulse control, poor anger control, and excessive resistance. (Appendix Y). The records also indicate Mahdi's "intellectual functioning" was "in the high average range." (M000065). Introducing Mahdi's school records would have introduced unfavorable information about Mahdi to Judge Newman. It would also have introduced before Judge Newman that Mahdi's intellectual functioning was not impaired. This Court finds counsel was not deficient in failing to introduce Mahdi's school records. Counsel introduced, through Hammock's testimony and through *exhibits*, Mahdi's problems in school without introducing the bad things he did while in school. Counsel's performance was not deficient in this regard. *Wong, supra.*

Mahdi further argues counsel should have introduced Mahdi's school records and called school witnesses to show Mahdi was diagnosed by school officials in the fourth grade as emotionally disturbed. However, the record shows Mahdi's emotional disturbance diagnosis

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

Additionally, the records contain information that would have undercut counsel's attempt to present mitigation. The records themselves indicate Mahdi was living in his grandmother Nancy Burwell's home, a modern three 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 two years of community college, and Mahdi's mother had completed two 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. The the records also indicate Mahdi's relationship with his father was excellent. (Resp. Ex. 1 & 2). In essence, the records do not portray Mahdi's home life in as bad a light as

counsel was able to portray Mahdi's childhood home life before Judge Newman at sentencing.

Furthermore, Mahdi's own mitigation witnesses undercut the validity of Mahdi's being placed in special education. Dr. Cooper-Lewter testified Mahdi himself informed him that he should not have been placed in special education. Mahdi informed Cooper-Lewter that after being placed in special education he put forth no effort, because he did not belong there. Cooper-Lewter basically agreed with Mahdi's assessment. Lawanda Burwell, Mahdi's aunt, and a credentialed school administrator, also testified she did not believe Mahdi should have been in special education.³⁵ This ground has no merit. Counsel was not deficient under this allegation. *See Pinholster, supra; Van Hook, supra; Rompilla, supra; Wiggins, supra; Strickland, supra; Rosemond, supra; Simpson, supra; Jones, supra.*

As previously discussed, Mahdi also claims counsel was ineffective in failing to provide his psychiatric/psychological experts, Dr. Martin and Dr. McKee with records from Mahdi's school history, specifically the records regarding Mahdi being placed in special education classes. However, both Martin and McKee testified these records would not have changed their ultimate diagnosis. (PCR. 544, 561). Dr. Martin also testified at the PCR hearing that Mahdi informed him he had been placed in special education. (PCR. 515). Dr. Martin also testified Mahdi told him he should not have been placed in special education. (PCR. 515). Mahdi told Dr. Martin he begged the school principal to take him out of special education, but this was unsuccessful. (PCR. 516). He also asked his father to take him out of special education, and his father eventually pulled him out of public school and home schooled him. (PCR. 516). Dr. Martin also testified students are classified as emotionally disturbed and placed in special

³⁵Mahdi also told Drs. Martin and McKee that he should not have been in special education. Mahdi also told Dr. Martin he became ODD (Oppositional Defiant Disorder) after being placed in special education because he did not belong there. (Respondent's Ex. 8).

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education classes because they are behavioral problems. (PCR. 542). Dr. Martin testified that sometimes this behavior is fueled by depression, sometimes its incorrigible behavior, or sometimes they are truant or having problems with conduct disorder. (PCR. 542). Dr. Martin also testified Mahdi's acting-out behaviors such as irritability, talking back to teachers, and disrespectful attitude were in other reports he did review and also in information Mahdi provided to him. (PCR. 542). This Court had the opportunity to view the testimony of Dr. Martin and Dr. McKee and finds their testimony on this issue to be credible. Mahdi has failed to show counsel was deficient in failing to provide Dr. Martin or Dr. McKee with Mahdi's school records. *See Von Dohlen, supra.*

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

Dr. Martin testified he extensively reviewed Mahdi records from the Walter Carter Center that documented his diagnosis of major depression at age nine. He reviewed the summary prepared by Ms. Tarr of these records and the records themselves. Dr. McKee likewise reviewed Mahdi's commitment records from the Walter Carter Center at age nine. Both experts knew Mahdi had been diagnosed with major depression as a child. The special education records were generated approximately eighteen months after Mahdi's release from the Carter Center. Dr. Martin further testified he interviewed Mahdi about his life. Mahdi informed him he had been placed in special education classes. Mahdi also indicated he had suffered from recurrent depression in his life. Dr. Martin further testified he participated in several team meetings where the findings of other members of the mitigation team were shared with him, including Mahdi's developmental and social history. Dr. McKee testified likewise. As previously stated, Ms. Tarr had subpoenaed Mahdi's school records and interviewed

individuals who worked at two different elementary schools Mahdi attended. Based on his interviews with Mahdi regarding his life, and his review of the Carter Center records, along with the information he received from the mitigation investigators, Dr. Martin determined Mahdi had suffered from recurrent depression during his life. Dr. Martin further testified at PCR that the records Mahdi presented at PCR, the special education records, would not change his opinion in this case. Dr. McKee also testified he was aware Mahdi had been placed in special education as a child. Dr. McKee also testified he did not need any further records to make his diagnosis in this case. (PCR Tr. 508-45, 545-61). As a result, Mahdi has not shown deficient performance on the part of counsel for failing to provide Dr. Martin or Dr. McKee with Mahdi's school records regarding special education. *Von Dohlen, supra.*

Additionally, Mahdi cannot show deficient performance from the failure to provide these records because counsel could not call either of these witnesses because they found Mahdi had antisocial personality disorder, and Mahdi had related to both Dr. Martin and Dr. McKee that he had been involved in at least one homicide in Virginia. Mahdi also related to Dr. Martin other damaging things: (1) Dr. Martin noted Mahdi had no difficulty talking about killing people if necessary to achieve independence; (2) Mahdi informed Dr. Martin of another homicide he had committed in Virginia, where police had yet to find the body; (3) Dr. Martin testified Mahdi's outlook on life was quite violent and his interactions with others were hostile, aggressive, and sometimes quite violent. (PCR. Tr. 508-61). As previously stated above, this Court finds counsels' decision not to call these witnesses in mitigation was an objectively reasonable trial strategy decision under the circumstances, and providing these experts with Mahdi's special education records would not change the negative factors that motivated this decision. See *Strickland, supra; Council, supra.*

Dr. Martin also testified there was no evidence Mahdi was depressed at the time he

committed Myers' murder. Mahdi did not state he was depressed or psychotic at the time. There was no evidence of depression from the way Mahdi described the events surrounding Myers's murder. Mahdi's description of the events of Myers's murder were quite coherent. He described very clearly to Dr. Martin what he was feeling and perceiving at the time of Myers's murder. Mahdi described extensive details regarding his actions during Myers's murder. Mahdi described murdering Myers because Myers discovered Mahdi in Myers's cabin, and Mahdi thought Myers's was going to shoot him. Mahdi also described burning Myers's body to cover-up or destroy evidence. Mahdi was coherent and had no problem remembering events. As a result, Dr. Martin opined at the time of the offense, Mahdi only had a personality disorder, antisocial personality disorder. Likewise, Dr. McKee found no evidence Mahdi was suffering from depression at the time of Myers's murder. Dr. Martin testified the special education records would not change his opinion in this case. Dr. McKee testified that he did not need to see any other records to make his diagnosis in this case. (PCR. Tr. 508-561).

Finally, Mahdi has failed to meet his burden of proof with regard to this specific allegation. See *Butler, supra*. Dr. Martin was shown Mahdi's special education records at PCR and testified they would not change his opinion in this case. Additionally, Mahdi did not show Dr. McKee the special education records and even ask him if they would have changed his opinion in this case. As a result, Mahdi has failed to show counsel was deficient in failing to provide the special education records to their psychiatric/psychological experts. See *Von Dohlen, supra; Reed, supra* (fact expert retained at trial and expert retained later at PCR differed, does not prove trial counsel was ineffective); *Davis, supra* (mere fact a defendant can find, years later, a mental health expert who will testify favorably for him, does not demonstrate counsel was ineffective for failing to produce that expert at trial.); *Poyner, supra* (petitioner cannot establish ineffective assistance because counsel did not expert shop until one could be found who

would testify favorably).

As a result of all of the above, this Court finds Mahdi has failed to show deficient performance in counsel's failure to introduce Mahdi's school records, failure to call school officials as witnesses, or failure to provide his school records to his psychiatric/psychological experts. See *Pinholster, supra*; *Van Hook, supra*; *Rompilla, supra*; *Wiggins, supra*; *Strickland, supra*; *Rosemond, supra*; *Simpson, supra*; *Jones, supra*. As a result, this ground must be dismissed with prejudice.

(g) The Walter Carter Center Records

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

The Lack of Merit of this Allegation

First, the record shows counsel had possession of these records, and Ms. Tarr summarized them for counsel and the experts. (Resp. Ex. 11; PCR. 565-66). Counsel's experts, Dr. Martin and Dr. McKee, also had the actual records from the Carter Center. (PCR. 511-12, 553-54). They reviewed them in conducting their evaluation of Mahdi. (PCR. 511-12, 553-54).

The sentencing phase record shows, Ms. Hammock testified regarding Mahdi's commitment to the Walter Carter Center, his diagnosis there, and his discharge diagnosis. An exhibit introduced detailed Mahdi's involuntary commitment and diagnosis at the Carter Center. Judge Newman was well aware Mahdi was committed to the Carter Center at age nine for depression and suicidal ideation. Judge Newman was also well aware Mahdi was diagnosed with major depression at this age, and it came on the heels of his being separated from his family, and being forced to move to Baltimore to live with his aunt and uncle. Judge Newman was also

well aware Mahdi was confined at the Carter Center for sixty days, and he was discharged to his aunt and uncle. Counsel chose not to introduce the records themselves. (R. 1739-63, Def. Ex. 2). This Court has reviewed the Carter Center records thoroughly. The records themselves are cumulative to the testimony of Hammock at sentencing and the exhibit introduced through her.

Additionally, the records themselves contain damaging information about Mahdi. Mahdi was placed in isolation several times at the Carter Center due to his disruptive or inappropriate behavior. The records also show Mahdi assaulted other patients, assaulted staff, was verbally threatening or aggressive towards staff, and attempted to escape from the facility. On several occasions, Mahdi threw chairs or tables and attempted to damage property of the hospital. On one occasion, Mahdi falsely pulled a fire alarm. Mahdi also cursed staff members. On another occasion, Mahdi threatened to suffocate a staff member with a pillow. Additionally, the records detail Mahdi's making a false claim of child abuse against his aunt Lawanda, a fact Judge Newman was not aware of. The records show the claim of child abuse against Lawanda was determined to be unfounded, and Mahdi admitted he only threatened suicide when he didn't get his way. The records also show the aunt reported Mahdi only talked about suicide when he didn't get his way or did something wrong, and Mahdi also admitted threatening suicide as a way of getting attention. These records would have undercut the mitigation value of and brought into question the diagnosis of major depression at the Carter Center that was testified to before Judge Newman. The records also indicate Mahdi had antisocial behavior and conduct disorder. Counsel was not deficient in failing to introduce the records themselves when unfavorable things were contained within the records that would have been damaging to their client. (See **Walter Carter Center Records & Resp. Ex. 7**). *Wong, supra*. Counsel appropriately presented the Carter Center mitigation information to the sentencing court through Hammock, without the negative information about Mahdi that would

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have been before the sentencing court had the records themselves been introduced. *Id.*; *Strickland, supra*. This allegation has no merit must be dismissed with prejudice. *See Pinholster, supra; Van Hook, supra; Rompilla, supra; Wiggins, supra; Rosemond, supra; Simpson, supra; Jones, supra.*

(h) The Father's Records

Mahdi alleges counsel was deficient in failing to introduce his father's military, medical/psychiatric, and criminal records.

The Lack of Merit of this Allegation

To the extent counsel did not obtain these records, counsel's mitigation investigation revealed, and counsel presented the main information contained in these records at sentencing through Ms. Hammock. Judge Newman was aware Mahdi's father had been discharged from the military under less than honorable conditions; Mahdi's father had a history of mental illness, i.e. depression during his lifetime, and he could not hold a job, support his family, get along with others, and effectively parent; and, Mahdi's father had a criminal record for assaults on his own family including his wife and his mother. Additional records and testimony at sentencing established Mahdi's father had been arrested for assaults on his family, escape, and malicious damage to property. (See DJJ records introduced at sentencing & Testimony of Sheriff James Woodley at sentencing). The State did not contest any of this information. Therefore, Mahdi has failed to prove deficient performance, and there is no merit to this allegation. *See Van Hook, supra; Simpson, supra; Jones, supra.*

Conclusion to Deficiency Analysis

For the reasons stated above, this Court finds Mahdi has not met his burden of proof to

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show deficient performance under this ground. See *Strickland, supra; Pinholster, supra; Van Hook, supra; Wong, supra*. 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. See *Pinholster, supra; Van Hook, supra; Strickland, supra; Rompilla, supra; Wiggins, supra; Rosemond, supra; Council, supra; Simpson, supra; Jones, supra*.

THE PREJUDICE PRONG

Regardless, Mahdi has not met the second prong of the test articulated in *Strickland* and *Cherry* and discussed hereinabove. Considering the horrible facts of this murder, the aggravating circumstances, the mitigation presented at sentencing, the additional mitigation evidence presented at the PCR hearing, and the aggravating evidence that would almost certainly have come in with the new mitigation, this Court finds there is no reasonable probability Judge Newman would have returned with a different sentence. See *Wong, supra; Jones*, 332 S.C. at 333, 504 S.E.2d at 823.

When determining if want of mitigation evidence resulted in prejudice, the Court must determine whether the mitigation evidence, taken as a whole, might well have influenced the judge's appraisal of Mahdi's culpability. *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009), quoting *Wiggins*, 539 U.S. at 538, quoting *Williams*, 529 U.S. at 398; see also *Rompilla*, 545 U.S. at 393. Accordingly, if counsel's failure to present mitigation evidence undermines confidence in the outcome, then Mahdi suffered prejudice. *Rosemond, supra* (finding counsel's complete failure to present mitigation evidence undermined confidence in the outcome where the jury deliberated over two 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 a reasonable probability that had Judge Newman been confronted with the new mitigating evidence, there is a reasonable probability he would have returned with a different sentence. *Id.*, quoting *Wiggins*, 539 U.S. at 535-36. "In evaluating that question, it is necessary to consider *all* the relevant evidence that [the judge] would have had before [him]" if Mahdi "had pursued the different path - not just the mitigation evidence" Mahdi could have presented, but also" the aggravating evidence "that almost certainly would have come in with it." *Id.*, referencing *Strickland*, at 695-696, 700 (emphasis in original). See also *Porter v. McCollum*, 558 U.S. ___ (2009); *Sears v. Upton*, 130 S.Ct. 3259 (2010), quoting *Porter*, 130 S.Ct. at 453-54; *Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008), citing *Jones*, 332 S.C. at 333, 504 S.E.2d at 824.³⁶ This Court has analyzed Mahdi's claims of prejudice under this ground pursuant to the above cited standards and finds Mahdi has not met his burden of proof to show prejudice.

The Evidence in Aggravation

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

³⁶ "That same standard applies and will necessarily require a court to 'speculate' as to the effect of the new evidence-regardless of how much or how little mitigation evidence was presented during the initial penalty phase. Indeed, it is exactly this kind of probing inquiry that ... the [lower court] failed to do. In all circumstances, this is the proper prejudice standard for evaluating a claim of ineffective representation in the context of penalty phase mitigation investigation." *Sears v. Upton*, 130 S.Ct. 3259 (2010).

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The Guilty Plea

First, Mahdi admitted he murdered James Myers, burglarized his cabin before murdering him, and stole his guns and police issued truck after murdering him. There is no question Mahdi is the person who murdered Myers; he was alone when he murdered him, and he acted completely alone. Mahdi also admitted he murdered Myers during the entering or remaining in the cabin after the burglary and stole his guns and truck. Mahdi also admitted the facts surrounding the murder as recited by the Solicitor were correct. (R. 1254-84, 1336-43).

The Sentencing Proceeding

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

Myers's 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 thirty minutes waiting on police and emergency workers to arrive.

Mahdi drove to Jacksonville, Florida and sold the .380 caliber pistol he stole from Virginia and the .22 rifle he used to murder Myers; however, Mahdi retained several other weapons including the assault rifle and the sawed-off shotgun. Mahdi was not captured until an extensive police chase, after which he fled from Myers's stolen truck, and the use of a police dog, and Mahdi considered shooting officers before being arrested. Myers's stolen assault rifle and stolen shotgun were recovered in or near the truck Mahdi had been driving before his capture.

The State also established Mahdi's bad character and characteristics. Mahdi had previously been adjudicated delinquent as a juvenile for car-breaking, petty larceny, escape from custody, breaking and entering (two counts), obstruction of justice, and contempt of court. As an adult, Mahdi was convicted of malicious wounding, for the brutal stabbing of Moises Rivera, after Mahdi tried to burglarize an apartment in the complex where Rivera worked. Mahdi stabbed Rivera approximately five or six times and severely injured Rivera. Rivera's heart actually stopped in the ambulance, and he had to be revived. He was hospitalized for several days and out of work for approximately six weeks because of Mahdi's actions.

The State also established the murder of Myers was not Mahdi's first murder. Mahdi had murdered Christopher Boggs, a convenience store clerk, on his 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's head. After murdering Boggs, Mahdi tried to rob the store's cash register. There is no question Mahdi committed this murder because his actions were captured clearly on the store's video-camera, his fingerprints were found on the store's counter, Mahdi's friends and relatives identified him in the videotape, and the weapon used to murder Boggs, the .380, was sold by Mahdi in Jacksonville and forensically matched to Boggs's murder by ballistics testing.

The State also established Mahdi's bad prison behavior by introducing some of Mahdi's disciplinary violations while in Virginia's DJJ and all of Mahdi's disciplinary violations while in Virginia's adult DOC. The State also introduced Mahdi's disciplinary violations in the South Carolina DOC, including assaulting a guard and threatening other guards. Finally the State introduced Mahdi's escape attempt during the trial itself by the use of a homemade handcuff key Mahdi had fashioned while in maximum security and which he kept secreted in his mouth during the trial.

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

The PCR Evidence

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

(Family Members and Community Members)

Mahdi's family members and community members testified to the history of the family, particularly with regard to Mahdi's father, and his difficulties in life, and the difficulties Mahdi

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

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

This same evidence was also presented at the sentencing hearing before Judge Newman

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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 five. Judge Newman was also aware Mahdi's father could not provide for the children, and as a result Mahdi and his brother were sent to live with different aunts and uncles. Judge Newman was fully aware Mahdi's family was split up because of these difficulties, and shortly thereafter, Mahdi was committed to the Walter Carter Center and diagnosed as suffering from major depression and suicidal ideation. Hammock also testified to Mahdi's father's defiant behavior in the community and the fact he had converted to Islam at a young age. Judge Newman was also fully aware Mahdi and his brother witnessed their father assaulting their mother and their grandmother. Judge Newman was also aware Mahdi had difficulties in school, and he had particular difficulty in learning to read. Hammock also testified to Mahdi's lack of a proper role model, and Judge Newman was aware Mahdi's father suffered from depression and had a criminal record. (R. 1739-63, Def. Ex. 2). The evidence presented by Mahdi from his family and community members was largely cumulative and would not entitle Mahdi to relief. *Wong*, 130 S.Ct. at 387-88 (when substantial mitigation case was presented, evidence that is merely cumulative to the evidence actually presented fails to demonstrate the prejudice necessary to meet the prejudice prong of *Strickland*); *Buckner v. Polk*, 453 F.3d 195, 206 (4th Cir. 2006) (counsel's failure to present merely cumulative mitigating evidence does not prejudice a defendant's case); *Simpson v. Moore*, 367 S.C. 587, 627 S.E.2d 701 (2006) (finding where substantial mitigation case was presented, applicant had failed to show prejudice from failure to call other mitigation witnesses that were in essence cumulative); *Jones v. State*, 332 S.C. 329, 504 S.E.2d 822 (1998) (holding that "fancier mitigation case" does not render the prior case inadequate).

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Furthermore, this Court cannot divorce from its prejudice analysis the unfavorable information that would have come in through the family witnesses, had they been called at the sentencing hearing as Mahdi proposes. *Wong, supra* (in making prejudice determination, the Court must consider the bad information that in all likelihood would have come in with the good mitigation evidence). Mahdi's family members were aware of bad things regarding Mahdi, and this Court finds these bad things in all likelihood would have come in on cross-examination or reply. Carson and Lawanda Burwell were aware that as an adult Mahdi had to move out of his grandmother's home because he would not abide by the rules of the home set down by his uncle Nathan. This occurred shortly after Mahdi's release from adult prison and while he was on supervised probation. Carson related to Mahdi's North Carolina attorneys Mahdi "was a demon." Carson also related to counsel here, if he were called to testify, he would have bad things to say about Mahdi. Since this was Carson's mind-set at that time, these bad matters would have come out on the stand as they did at PCR. Both Lawanda and Carson admitted Mahdi almost had them arrested by making a false claim of child abuse and manufacturing false evidence of the abuse. Both also related Mahdi acted out at the Carter Center and had to be placed in isolation. Carson related to Tarr that Mahdi was manipulative in their home. Lawanda related Mahdi acted out and had to be returned to live with his father. Both related Mahdi would only talk about suicide when he did not get his way or did something wrong, more manipulative behavior. Carson also related to counsel Mahdi's statement to the responding officer that led to his commitment to the Carter Center was not real but more of Mahdi's manipulative behavior. Lawanda likewise testified she did not believe Mahdi was suicidal.

These negative things about Mahdi would not have been helpful to Mahdi's mitigation case. If counsel had called Carson and Lawanda as Mahdi contends, then Mahdi's manipulative behavior, specifically making a false claim of child abuse to police, which almost had Carson

and Lawanda Burwell arrested, would have been admitted. Further, Mahdi's disruptive behavior at the Carter Center, would have been brought out, such as Mahdi hitting other patients, attempting to escape from the facility, cursing staff, falsely pulling a fire alarm, and throwing chairs. Due to Mahdi's disruptive behavior at the Carter Center, he had to be placed in isolation on several occasions. Additionally, testimony that Mahdi talked about suicide only when he didn't get his way or did something wrong, and was about to be punished, would have been brought out, i.e. additional manipulative behavior on Mahdi's part. Further, Mahdi's disruptive behavior within the Burwell home, which Mahdi wanted to cause, and which eventually did cause his return to his father, would have been elicited on cross-examination, further underscoring Mahdi's manipulative behavior and nature. Testimony would also have been elicited from Carson that Mahdi could not obey the rules of Nathan's home when he resided there as an adult, and was eventually asked to leave. Carson was also aware of an incident where Mahdi, his brother Saleem, and their father were involved in maliciously damaging an aunt's motor vehicle. Mahdi through a cement block through the aunt's car window. It is clear this negative testimony would have been elicited. The State had introduced this event through one of the police officers during the penalty phase. Further, emphasis before Judge Newman would not have helped the mitigation case. *Wong, supra.* Mahdi's aunt, Sophie Gee, was also aware of Mahdi slashing his mother's car tires. She testified at PCR Mahdi slashed his mother's tires simply because she would not let him use the car. This information would have been brought out on cross-examination had she testified at sentencing and would have further emphasized this incident before Judge Newman. *Wong, supra.*

(The New Social Worker)

Dr. Nicolas Cooper-Lewter's testimony would have been before Judge Newman;

however, most of the information related by Cooper Lewter was before Judge Newman through Hammock's testimony and the exhibits introduced through her. This Court finds the information related by Cooper-Lewter that was not presented by Hammock does not change the sentencing equation. *See, Wong, supra; Rosemond, supra.* Further, if counsel had called Cooper-Lewter, on cross-examination the State would have introduced Mahdi's numerous disciplinary violations [over 40] within Virginia's DJJ. *Wong, supra.* Cooper-Lewter specifically relied on these records in forming his assessment and was cross-examined about these at the PCR hearing. The violations included Mahdi assaulting a teacher, assaulting guards on numerous occasions, assaulting other inmates, leading an escape attempt, refusing to follow orders, refusing to be disciplined, cursing staff, and damaging and destroying property. Cooper-Lewter would also have been cross-examined about Mahdi's numerous disciplinary violations within Virginia's adult DOC including setting fire to a cell, possession of contraband, failure to follow orders, and assaulting a non-inmate. Cooper-Lewter admitted at the PCR hearing, Mahdi was confined to Wallens's Ridge Prison in Virginia because of his behavior in other facilities. Cooper-Lewter could also have been questioned about Mahdi's statements to Cooper-Lewter that he never should have been placed in special education in elementary school, because he did not belong there. Cooper-Lewter also admitted Mahdi had an I.Q. of 118, obtained his GED after his release from adult prison, had held several jobs, and obtained college credits from a local college in Lawrenceville, Virginia.

(Mahdi's Father's Records)

Mahdi's father's military, medical/psychiatric, and criminal records would have been before Judge Newman; however, the main information contained in those records was presented to Judge Newman in Ms. Hammock's sentencing proceeding testimony. Judge Newman was

aware Mahdi's father had been discharged from the military under less than honorable conditions. Judge Newman was aware Mahdi's father had a history of depression and inability to get along with others, including his own family. Judge Newman was aware Mahdi's father could not hold a job or support his family, and he was not equipped to parent because his personal issues. Judge Newman was aware of Mahdi's father's history of criminal assaults and racially motivated crimes, including assaulting his wife on several occasions and assaulting his own mother. (See also DJJ records introduced at sentencing & Testimony of James Woodley at sentencing). Further, Mahdi failed to establish at the PCR hearing that any of these records would have changed his experts' opinions at sentencing. *Von Dohlen, supra*.

(Dr. Haney's testimony)

Haney's PCR testimony would have been before the sentencing Court; however, as set forth in the deficiency section under this ground, Haney's claim Mahdi is an impulsive actor who does not victimize others or that Mahdi is a product of his incarceration at Wallens Ridge, and to a lesser extent, at other facilities, would have been impeached. The testimony is simply not credible or supported by the record.

The record shows Mahdi is not an impulsive actor but committed many criminal offenses in a premeditated and planned fashion simply because he could and to benefit himself. Furthermore, Mahdi repeatedly victimized others in premeditated assaults or attacks.

Further, Mahdi was a violent, manipulative, and disruptive individual before he was incarcerated at Wallens Ridge. He was violent, disruptive, and manipulative when he was incarcerated the first time in Virginia's DJJ. He was violent, disruptive, and manipulative during his second incarceration in DJJ. He continued his violent behavior after being released from DJJ, seriously wounding Moises Rivera during a burglary attempt. After this incident, as in

the present case, Mahdi had to be captured with the use of a police dog. Mahdi continued his violent and disruptive behavior in the adult prison system resulting in his eventual incarceration at Wallens Ridge and he continued to violate institutional rules at Wallens Ridge. Rather than conforming his behavior when he was released from Wallens Ridge, so he would never have to go back to a maximum security prison, Mahdi repeatedly violated, not only the law, but the rules of his supervised probation. Mahdi sold drugs, possessed handguns, used marijuana, and committed two homicides in Virginia. Mahdi burglarized a home, stole a handgun, stole a car and a license plate, and left Virginia. Mahdi then committed two additional murders during his flight through the southeastern United States. In addition, 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. After each incarceration, he committed even more violent offenses. While Mahdi was incarcerated he attacked guards and inmates. The record shows Mahdi has had an impact on each institution he has been detained in, not the opposite. Mahdi has not changed his conduct to avoid going back to a harsh prison environment, but engaged in more serious and violent offenses.

Additionally, Haney's attempt to blame all of Mahdi's criminal behavior on alleged undiagnosed or untreated mental illnesses or the failures of the criminal justice system would also have been impeached and is not credible. Mahdi informed Judge Newman he had no mental illnesses. Dr. Michael Cross also found Mahdi had no mental illnesses. The record shows Mahdi engaged in criminal activity such as stealing because he could and believed he would not get caught. Mahdi assaulted other individuals because it was in his own self-interest. Mahdi was not victimized in DJJ as Haney contends, but Mahdi victimized others including

inmates and guards and attempted to manipulate the juvenile prison system. 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.

Further, if Haney had testified at sentencing, the State would have brought out through him all of Mahdi's disciplinary violations in Virginia's DJJ and re-emphasized all of Mahdi's disciplinary violations in Virginia's adult DOC along with his numerous disciplinary violations in the South Carolina DOC. *Wong, supra.*

(The Virginia DJJ Records)

Additionally, had Mahdi's juvenile records been introduced as Mahdi alleges they should have been, Mahdi's long list of forty disciplinary violations in Virginia's DJJ would have been before Judge Newman. As previously stated, those records indicate Mahdi repeatedly assaulted other inmates, assaulted staff, destroyed property, led an escape attempt, and engaged in manipulative behavior. (**Resp. Ex. 6**). While there was some indication in these records that Mahdi was treated for depression while at DJJ, the records also indicate Mahdi later admitted he fabricated a suicidal gesture in order to gain additional privileges in DJJ, i.e. was attempting to manipulate the DJJ prison system. Furthermore, Mahdi failed to establish at the PCR hearing that these records would have changed any of his experts' opinions at sentencing. *Von Dohlen, supra.*

(The School Records and School Officials)

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

had many absences, and his father pulled him out of school after the fifth grade to home school Mahdi, and there was no indication this had occurred. Judge Newman was also aware Mahdi had difficulty in reading throughout his school history. While the records show he was placed in special education, Mahdi was not mentally retarded but had an I.Q. of 118 and functioned on grade level or higher in all classes except reading, spelling, and writing. While the records indicate Mahdi was diagnosed as emotionally disturbed, and had some depressive symptoms at that time, the records also show Mahdi was placed in special education or classified as emotionally disturbed based in large part on his misconduct and aggressive behavior in school, including toward other students, and his inability to read. Judge Newman already knew of Mahdi's inability to read. Judge Newman was also already aware Mahdi had been committed to a psychiatric facility approximately eighteen months before for major depression, and Mahdi told the sentencing court at his guilty plea that he was not suffering from any mental illness. Further, the mitigating impact of these records is minimal given Dr. Cooper Lewter testified Mahdi should not have been in special education and this had a negative impact on Mahdi's school performance. Lawanda Burwell also testified she did not believe Mahdi should have been placed in special education. Importantly, the records also included negative things about Mahdi. Had Mahdi's school records been introduced or the school officials testified, further evidence of Mahdi's bad behavior would have been before Judge Newman, including Mahdi's misbehavior and aggressiveness and assaults on other children and resistance to authority. Furthermore, Mahdi failed to establish at the PCR hearing that his experts' opinions would have changed at sentencing if they had been provided these records. *Von Dohlen, supra*

(The Walter Carter Center Records)

While the Walter Carter Center records themselves would have been before Judge

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Newman, Judge Newman already knew of Mahdi's commitment there, diagnosis, and length of stay. The records themselves detail Mahdi's disruptive and manipulative behavior. Mahdi assaulted other patients, attempted to escape, admitted he fabricated a child abuse claim, damaged property, and used profanity against staff of the hospital. Mahdi also threw furniture at hospital staff, falsely pulled a fire alarm, and threatened to suffocate a staff member with a pillow. These records also indicate Mahdi's anti-social behavior and conduct disorder. Mahdi's commitment to the Walter Carter Center, the reason for his commitment there, and his length of commitment was before Judge Newman, without the negative and damaging information contained in those records. Furthermore, Mahdi failed to establish at the PCR hearing that his experts' opinions would have changed if they had been provided with these records. *Von Dohlen, supra.*

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

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

Furthermore, Dr. Schwartz-Watts's diagnosis of anxiety disorder at the time of this murder would have been impeached by the Solicitor. Dr. Schwartz-Watts's diagnosis that Mahdi had depression but was not suffering from it at the time of Myers's murder would have

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been impeached by the State and contradicted by the evidence and testimony. Additionally, her diagnoses would have been contradicted by Mahdi's sworn testimony before Judge Newman during his guilty plea, and the testimony of Dr. Cross during the *Blair* hearings (R. 1329-39, 1343-68, 125-40, 1339-43). Further, Dr. Schwartz-Watts admitted Mahdi's mental illnesses or personality disorders did not rise to the level of a statutory mitigator. Additionally, Dr. Myers's testimony regarding bad characteristics of Mahdi contained in the DJJ records, including conduct disorder, would have been brought out on cross-examination. Mahdi's previous diagnosis of intermittent explosive disorder and anti-social personality disorder in the Virginia DOC would also have been emphasized before Judge Newman with either of these two witnesses. Finally, both Dr. Schwartz-Watts and Dr. Meyers concurred in the diagnosis of Mahdi having anti-social personality disorder. This information would not have been helpful before Judge Newman.

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

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

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

On this allegation, Applicant has failed to state a claim upon which relief may be granted. Assuming Mahdi is referring to his alleged "mental age" allegation in Ground

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10(b)/11(b)[below], the record shows Mahdi was 21 years old at the time of the crime. *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183 (2005) (Eighth Amendment prohibits execution of those under the age of 18 at the time of the crime). The record also shows Mahdi is not mentally retarded. (See *Blair* hearing testimony and testimony of R&E evaluation).³⁷ *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242 (2001) (Eighth Amendment prohibits the execution of mentally retarded); *State v. Laney*, 367 S.C. 639, 627 S.E.2d 726 (2006); *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003) (defining mental retardation). There is no testimony in the record that Mahdi was insane at the time of the crime, is insane now, or is incompetent to be executed. *Ford v. Wainwright*, 477 U.S. 399 (1986) (Eighth Amendment precludes the execution of one who is insane); *Singleton v. State*, 313 S.C. 75, 437 S.E.2d 53 (1993) (setting forth the standard for competency to be executed). Mahdi has failed to show he fits under any class of persons recognized by the United States Supreme Court or the South Carolina Supreme Court as being excluded from application of the death penalty. See *Atkins, supra*; *Roper, supra*; *Ford, supra*. Counsel could not have been ineffective in failing to object to his sentence on a ground not recognized by the law. The Court is unaware of any state or federal authority for such an objection by trial counsel. See e.g. *State v. Irick*, 320 S.W.3d 284, 297-98 (Tenn. 2010); *Mays v. State*, 318 S.W.3d 368, 379-80 (Tex. Crim. App. 2010); *Johnson v. State*, 27 So.3d 11, 26-27 (Fla. 2010). See also e.g. *Shisinday v. Quarterman*, 511 F.3d 514 (5th Cir. 2007); *In re Neville*, 440 F.3d 220, 221 (5th Cir. 2006) citing *In re Woods*, 155 Fed. Appx. 132, 136, 2005 WL 3087882, *3 (5th Cir. Nov. 17, 2005) (unpublished); *State v. Ketterer*, 111 Ohio St. 3d 70, 855 N.E.2d 48 (2006); *Matheney v. State*, 833 N.E.2d 454 (Ind. 2005); *Hall v. Brannan*, 284 Ga. 716, 670 S.E.2d 87 (2008); *Coleman v. State*, No. W2007-0267-CCA-R3-PD, 2010 WL

³⁷ Mahdi's I.Q. was tested twice, with scores of 108 at age fourteen and 118 at an earlier age (R. 1437-39). Mahdi introduced no other I.Q. scores at the PCR merits hearing and made no claim that he was mentally retarded.

118696 (Tenn. Crim. App. Jan 13, 2010) (unpublished).

Applicant has failed to show that he had, at the time of the murders, any mental impairment so severe that he is necessarily and categorically less morally culpable than those who are not mentally disabled. *Mays, supra*.

There is no merit to this ground factually. Counsel had Mahdi evaluated by order of the circuit court for competency. (R. 8-10). As a result of that examination, it was determined Mahdi had no mental illness and was not mentally retarded. (R. 131; Court's Exhibit 2). It was determined Mahdi was competent to stand trial. (R. 139-140). Mahdi was twenty-three years old at the time of his guilty plea, had obtained his GED, and had attended some community college. (R. 1346). Mahdi had been previously employed in mostly roofing and brick laying. (R. 1346). Mahdi denied ever having been treated for abuse of alcohol, drugs or for any mental disease. (R. 1346). Ms. Hammock testified that Mahdi had been hospitalized on one occasion as an adolescent, a voluntary admission to a mental health facility, and Mahdi was released. (R. 1747, 1756). Mahdi was competent to plead guilty. (R. 1342). He understood the charges he faced, including murder, and the legal consequences of a conviction, including the death penalty. (R. 1339-68). Mahdi denied any emotional or nervous problem that might prevent him from understanding what he was doing when he pled guilty. (R. 1347). Mahdi had a good understanding of the legal process and the legal system. (R. 1340-41).

Mahdi cannot show counsel was deficient in failing to object to the imposition of the death penalty against him for the above stated reason, given the law and this record, nor can he show prejudice under *Strickland* and *Wong*, because the law does not recognize Mahdi's contention and the record demonstrates Mahdi is educated, has an above average I.Q., is streetwise, was twenty-one years old at the time of the murder, and has a criminal mentality. Mahdi cannot show a reasonable probability that, had counsel objected to the sentence on the

asserted grounds, the objection would have been sustained and there would have been a different sentence. The record and credible evidence demonstrates that Mahdi does not have a juvenile mentality, if this is what Mahdi is referring to in this ground, but an adult criminal mentality and bad character. This ground must be dismissed with prejudice.

10(b)/11(b)

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

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

There is no merit to this ground. First, this is a claim of trial court error, and a direct appeal issue that was not preserved for appellate review because there was no objection at sentencing,³⁸ not raised in the direct appeal, and, being a direct appeal claim, is not cognizable in a PCR action. *Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001)(citations omitted) ("Allegations of trial court error are not cognizable on PCR. In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel."); *Drayton v. Evatt*, 312 S.C. 4, 430 S.E.2d 517 (1993) (issues that could have been raised at trial or on direct appeal cannot be raised in a PCR application absent a claim of ineffective assistance of counsel), citing *S.C. Code Ann. Section 17-27-20(b)* (1985); *Hyman v. State*, 278 S.C. 501, 299 S.E.2d 330 (1983); *Peeler v. State*, 277 S.C. 70, 283 S.E.2d 826 (1981); *Simmons v. State*, 264 S.C. 417, 215 S.E.2d 883 (1975), also referencing *Cummings v. State*, 274 S.C. 26, 260 S.E.2d 187 (1979); *Ashley v. State*, 260 S.C. 436, 196 S.E.2d 501

³⁸ See *Mahdi v. State*, 383 S.C. 135, 678 S.E.2d 807 (2009).

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(1973); *Sellers v. Boone*, 261 S.C. 462, 200 S.E.2d 686 (1973). As a result, this ground is dismissed with prejudice.

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

Third, applicant has failed to state a claim upon which relief may be granted. The record shows Mahdi was twenty-one years old and not mentally retarded at the time of the crime. As set forth above, there is no evidence in the record that Mahdi was insane at the time of the crime, is insane now, or is not competent to be executed, nor that he fits under any class of persons recognized by the United States Supreme Court or the South Carolina Supreme Court as being excluded from application of the death penalty. This ground must be dismissed.

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

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

The record also shows Mahdi knew and understood that use of illegal drugs or possession of a weapon would result in violation of his adult probation. (R. 1487-91). The record shows he chose to engage in such conduct anyway. (R. 1492-1511). Mahdi's crimes in Virginia, North Carolina, and South Carolina, his acts surrounding Myers's murder, and his conduct as a pretrial detainee (including his homemade handcuff key) reveal that he has above-average intelligence, is streetwise, and has a keen criminal mentality. Mahdi does not have a juvenile mentality, as alleged, but an adult criminal mentality and bad character.

Mahdi was evaluated by two psychiatric or psychological experts retained by trial/plea counsel (the defense). Both Dr. Thomas Martin, a psychiatrist, and Dr. Geoffrey McKee, a psychologist, found Mahdi had anti-social personality disorder, which is not a mental illness. Both mental health professionals found Mahdi was not suffering from any mental illness at the time he committed the offenses against Myers. Both testified at the PCR hearing that Mahdi was very intelligent. Neither testified that Mahdi was immature or had a "juvenile mentality." (PCR Tr. 508-61).

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

Mahdi was also examined by Dr. Donna Schwartz-Watts prior to the PCR hearing. While Dr. Schwartz-Watts testified Mahdi's immaturity was cross-referenced in the records, she did not testify Mahdi had a "juvenile mentality" nor did she testify to what mental age Mahdi

was, nor his mentality at the time of Myers's murder. There is absolutely no evidence in the record Mahdi has a "juvenile mentality." Mahdi has failed to meet his burden of proof on this issue. *Butler, supra.*

Contrary to his assertion, the Virginia DJJ records reveal Mahdi had matured beyond his age, especially with regard to his criminal activities. As a teenager, Mahdi stated his friends were other fourteen and fifteen year olds, and he was a "leader among his peers," and was his "own person." (Va. DJJ Records M00431). At the Virginia DJJ, Mahdi admitted his criminal behaviors involved a great deal of thought and planning. (Va. DJJ records). A counselor noted: "He described his current criminal charges in a very calculated, almost professional way that is alarming." (Va. DJJ records M000410). "He is developing and behaving like a teenager much older." (See Va. DJJ records M000410). Mahdi was described as a teenager with many negative attitudes toward authority, rules, limits, and rights and privileges of others. (See Va. DJJ records M00410).

While in the Virginia DJJ system, Mahdi planned an assault on another inmate and enlisted the support of other juveniles in this assault. (DJJ records M00425). The victim was injured in this assault. Mahdi exhibited a negative attitude with staff, and stated the attitude would continue until he got his way. Mahdi cursed staff profusely. (DJJ records M00425).

Mahdi was found age appropriate with regard to his maturity level during his intake evaluation. (See DJJ records M00418, line 4). Another record indicated that Mahdi's teachers should be aware that "he has demonstrated the capacity to plot, and carry out, apparently unprovoked assaults on peers. He requires extraordinarily close supervision." (See DJJ records M00426).

Mahdi was tested in 1994 when he was in the fourth grade and his overall level of functioning was at a mid-fourth grade level. At that time, his current level of educational

functioning fell in the average range. His mathematics equivalent yielded a grade equivalent of 5.8. Other tests showed his general information skills at a 6.8 grade level. Mahdi did struggle with reading during this time; however, psychological data revealed Mahdi's intellectual functioning was in the high average range. (See Brunswick County School Records).

Trial counsel testified at the PCR merits hearing, that Mahdi was very intelligent, recounting that Mahdi informed him that he had hatched a plan when he lived in Virginia whereby he would eliminate all other drug dealers in his area, resulting in a "false drought" of drugs. As a result, Mahdi would make more money selling drugs because everyone would have to come to him for the illegal product. Mahdi also related to trial counsel that he left Virginia because homicide detectives were closing in on him for a homicide committed in the Richmond, Virginia area. Trial counsel testified they had no problems communicating with Mahdi. Counsel testified Mahdi was calculating and intelligent in being able to disguise himself as someone else. Counsel related Mahdi impersonated a homeless person in Columbia in order to gain entrance into the Oliver Gospel Mission when the car he originally stole from Virginia broke down. Counsel related Mahdi was able to pretend to be a homosexual in order to accomplish the carjacking. Counsel related that Mahdi impersonated a police officer while in Florida, including investigating a crime reported by a citizen. Trial counsel did not believe Mahdi had a "juvenile mind" or mentality. (PCR Tr. 592-93, 603-11, 688-90). This Court had an opportunity to view counsel's testimony on this issue and judge their credibility accordingly. This Court finds counsel's testimony on this issue to be credible. This Court also finds counsel's testimony on this issue to be supported by the credible evidence in the record.

This Court finds Mahdi did not present any credible testimony or evidence on this issue, and therefore he failed to meet his burden of proof regarding this issue. *Butler, supra*. Mahdi has not convinced this Court by a preponderance of the evidence that he has a "juvenile mind" or

mentality. In fact, the credible evidence shows, Mahdi has an adult mentality, and an adult criminal mentality. This ground has no merit and must be dismissed with prejudice.

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

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

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

The South Carolina Supreme Court has, on several occasions, rejected the claim that the statute is unconstitutional. *State v. Inman*, Shearhouse Advance Sheets Opinion 27081 (filed December 28, 2011); *State v. Allen*, 386 S.C. 93, 697 S.E.2d 21 (2009), cert. denied; *State v. Crisp*, 362 S.C. 412, 608 S.E.2d 429 (2005); *State v. Downs*, 361 S.C. 141, 604 S.E.2d 377 (2004); *State v. Wood*, 362 S.C. 135, 607 S.E.2d 57 (2004).³⁹ Therefore, counsel could not have been deficient in failing to preserve an issue that has no merit under the law. Mahdi has failed to show any prejudice because any such objection would have been overruled by Judge Newman and our state Supreme Court would have found this issue to be without any merit as it has on several occasions.

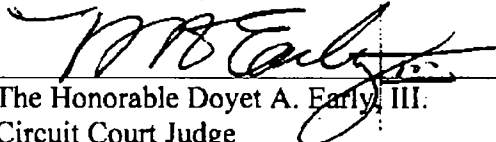
Furthermore, counsel testified at the PCR hearing Mahdi did not want to plead guilty and

³⁹ The South Carolina Supreme Court recently recognized this issue has no merit and has been repeatedly rejected by the Court. *State v. Inman*, Shearhouse Advance Sheets, Opinion No. 27081 (Filed December 28, 2011).

have the jury sentence him. (PCR Tr. 682-84). Mahdi had selected 12 jurors and 4 alternates to hear his trial and decide his sentence. Mahdi decided to plead guilty because Mahdi believed he had a better chance of receiving a life sentence from Judge Newman than from the jury he had selected. (PCR Tr. 682-84). As counsel correctly testified at the PCR hearing, the jury, composed of ordinary citizens, would not have been accustomed to seeing murders, as Judge Newman, an experienced circuit judge, and when confronted with the brutality of Mahdi's murder of Myers, and the videotape of the murder in North Carolina and its brutality, would in all likelihood have sentenced Mahdi to death for the murder of Myers. Additionally, the jury would have heard Mahdi's extensive criminal record, both adult and juvenile; and, the jury would have heard Mahdi's horrible prison behavior record while in the Virginia DJJ, the Virginia DOC, and the South Carolina DOC. This Court had the opportunity to view the witnesses and hear their testimony on this issue. This Court finds trial counsel's testimony on these issues to be credible. Mahdi offered no testimony to contradict trial counsel's testimony on these issues. This Court finds based on trial counsel's credible testimony and the record in this case, Mahdi wanted to be sentenced by Judge Newman, not the jury he had initially selected and impaneled. Therefore, it would have made no sense for Mahdi to have objected to the constitutionality of the statute and insist on pleading guilty and being sentenced by the jury, and counsel was not ineffective in failing to object to the constitutionality of Section 16-3-20. Mahdi has failed to show deficient performance or prejudice on the part of counsel in this regard. *Strickland, supra*. This ground must be dismissed with prejudice.

VI. CONCLUSION

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


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

August 18, 2014

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Pursuant to South Carolina Code § 16-3-26, the Solicitor timely notified the Defendant that he intended to seek the death penalty as punishment for the murder of James E. Myers. On November 30, 2006, the Defendant waived his right to a jury trial and pled guilty to all charges after the jury was seated but not yet sworn. Mr. Mahdi acknowledged that he understood that as a consequence of his guilty plea to murder while in the commission of a burglary and grand larceny that the Court would conduct a separate sentencing proceeding and determine whether he should be sentenced to life imprisonment without the possibility of parole or death.

From December 4 – 6, 2006, the Court heard additional evidence in extenuation, mitigation, or aggravation of the punishment. The Court also heard the arguments of counsel for or against the sentence to be imposed. Mr. Mahdi waived his right to testify and to have the final closing argument regarding the sentence to be imposed.

On December 6, 2006, the Court requested and subsequently received memoranda from both counsel for the State and counsel for the Defendant listing all statutory and non-statutory aggravating and mitigating factors believed to have been established by the evidence.

This Order is as a result of the guilty plea and the separate sentencing proceeding to determine whether the sentence of the Defendant, Mikal Deen Mahdi, for the murder of James E. Myers should be life imprisonment without the possibility of parole or death.

FACTS

In the early morning of July 18, 2004, after carjacking a vehicle in Columbia, South Carolina, the defendant pulled into the Wilco Travel Plaza off Interstate 26 in

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Calhoun County and attempted to use stolen credit and/or check cards. Employees at the Travel Plaza called the Calhoun County Sheriff's Office reporting that the defendant was acting in a suspicious manner. When the Sheriff's deputy arrived at the Travel Plaza, the defendant fled into the woods and eventually entered upon land owned by James E. Myers and Amy Tripp Myers. Mr. Myers was an Orangeburg Department of Public Safety Captain, who was off duty, but on call at the time. Mr. Mahdi forcefully entered a shed located on the land. When Captain Myers arrived at his property, Mr. Mahdi was lying in wait.

Earlier that afternoon, Captain Myers and his wife Amy returned to their home in Orangeburg County from Edisto Beach after celebrating the birthdays of Amy, his sister and his daughter. After returning home, he visited his father who lived a short distance away. Captain Myers left his father's home and stopped by his farm in Calhoun County. He went to the shed located on the farm as he had done many times before. This shed was where he and his wife were married; this shed was their place of peace and serenity; and this shed held treasured memories and dreams of Captain Myers and his wife. On the premises was Mikal Deen Mahdi who shot Captain Myers nine times, with a .22 caliber semiautomatic rifle that was stored in the shed. Three of the bullets were to the head. The defendant poured diesel fuel over Captain Myers's body and lit him on fire. The defendant then stole Captain Myers's city issued truck and rifles and fled to Florida. On July 21, 2004, the police department in Satellite Beach, Florida apprehended the defendant after a chase. He was driving Captain Myers's truck.

Based upon the defendant's guilty plea, testimony presented, and other evidence in the case, the court finds and concludes as follows:

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AGGRAVATING CIRCUMSTANCES

The State alleges the following statutory aggravating circumstances:

1. **The murder of Captain James E. Myers was committed while in the commission of burglary in the 2nd degree.**
2. **The murder of Captain James E. Myers was committed while in the commission of larceny with use of a deadly weapon.**

Mikal Mahdi pled guilty to Murder, Burglary in the 2nd degree and Grand Larceny. The State presented additional evidence during the sentencing proceedings concerning the manner in which the murder of James E. Myers occurred while the Defendant was committing these crimes. Further evidence was presented indicating that the Defendant stole from the victim his police issued vehicle and two rifles – one of which was used to kill the victim. I find that these two aggravating circumstances were proven beyond a reasonable doubt.

The State alleges the following as additional statutory aggravating circumstances:

3. **The murder of Captain James E. Myers was committed while in the commission of robbery while armed with a deadly weapon.**
4. **The murder of a Captain James E. Myers occurred during or because of the performance of his official duties.**

There is strong evidence to suggest that items were taken from the person of Captain Myers, particularly his police badge that was never recovered. The evidence also suggests that a South Carolina Law Enforcement Division (SLED) investigative file on the premises being worked on by Amy Tripp-Myers, then a SLED agent, had been disturbed during the time the Defendant was alone in the shed. This is evidence that the Defendant knew or should have known that he was on the premises of a person or

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persons involved in law enforcement. I conclude, however, that the State has failed to prove these two aggravating circumstances beyond a reasonable doubt. Therefore, I have neither considered nor given any weight to these two allegations as aggravating circumstances.

The State also alleges the following non-statutory aggravating circumstances:

Characteristics of the Defendant

The State presented compelling evidence of prior and subsequent bad acts of the Defendant which are relevant to show his bad character, evil nature and malignant heart. These incidents covered a period over eight years showing the Defendant committing a series of crimes, including housebreaking, stealing guns, robbing people, selling crack cocaine, vandalism and malicious wounding. These bad acts are summarized as follows:

On January 7, 1998, while in the Virginia Department of Juvenile Justice for grand larceny and breaking and entering, Mr. Mahdi, then 14 years of age, conveyed to a counselor during an evaluation profile, that his only strength was robbing people. On June 30, 1998, Mr. Mahdi, then 15 years old, was involved in an over 9 (nine) hour standoff with the Brunswick County Virginia Sheriff's Department who was attempting to execute an Order to return the Defendant to a juvenile detention facility, when Mr. Mahdi made the comment according to Brunswick County Sheriff James Woodley that "I'm gonna kill a cop before I die." On November 23, 2000, the Defendant then 17 years of age, attempted to grab the gun of a Richmond, Virginia, police officer who was attempting to arrest Mr. Mahdi on a vandalism charge for slashing his mothers automobile tires. During this arrest, Mr. Mahdi commented, according to Officer Mike

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Koehler that he "should have killed that crazy bitch," referring to his mother. On April 17, 2001, then 18 years old, while attempting to break into an apartment in Richmond, Virginia, Mr. Mahdi stabbed Moises Rivera, a maintenance supervisor, five (5) times, resulting in a felony conviction for malicious wounding. Mr. Mahdi received a fifteen (15) year prison sentence suspended to the service of thirty-nine (39) months to be followed by fifteen (15) years of probation.

During each of these periods of incarceration, Mr. Mahdi's behavior was maladaptive, assaultive, and demonstrated an utter disrespect for authority, including threatening the life of a Detention officer.

Following Mr. Mahdi's release on probation on May 12, 2004, his criminal activities escalated during a crime spree that resulted in his killing Christopher Jason Boggs during a robbery of an Exxon Station in Winston Salem, North Carolina on July 15, 2004. Mr. Mahdi shot Mr. Boggs twice in the face at point blank range with a weapon that had been stolen from his grandmother's neighbor's house in Lawrenceville, Virginia. On July 18, 2004, three days later at approximately 3:30 a.m., Mr. Mahdi carjacked Corey Pitts in Columbia, South Carolina using a chrome plated handgun. Following his murder of Captain Myers, Mr. Mahdi was apprehended on July 21, 2004 in Satellite Beach, Florida after jumping out of Captain Myers city-issued truck armed with a Ruger .223 assault rifle belonging to the Orangeburg Department of Public Safety. Following his arrest, Mr. Mahdi stated according Sergeant Darren Frost of the Satellite Beach Police Department that he did not shoot Sergeant Frost only because the gun was stuck in a three shot burst and he did not think he could shoot him, the other cop, referring to the other police officer, and the f'ing dog. While in safekeeping in the South

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Carolina Department of Corrections awaiting this trial, Mr. Mahdi made numerous threats to kill various Department employees.

I find that The State has established by clear and convincing evidence the Defendant's bad character and propensities. This evidence is an important consideration to the Court in assessing the Defendant's characteristics, but not as proof of any alleged statutory aggravating circumstance.

MITIGATING CIRCUMSTANCES

I have considered all statutory mitigating circumstances and non-statutory mitigating circumstances argued by the Defense as well as other mitigating circumstances supported by the evidence.

Statutory Mitigating Circumstance

Defense counsel argues that the Defendant's youth should be considered by the court in determining the appropriate sentence to be imposed. Mikal Deen Mahdi was twenty-one (21) years old at the time of the murder of Captain Myers. When last tested at age 14, the Defendant's IQ was 108 – slightly above average. While this is a young age for such a serious crime, Mikal Deen Mahdi began his criminal career at an early age, having entered the Virginia Department of Juvenile Justice at age 14. He is experienced in the world of crime. By the time he committed these crimes, Mr. Mahdi was well aware of the severity of his crimes and the possible consequences.

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I have considered the defendant's young age, but I have not afforded it great weight in reaching my decision. There is nothing about Mr. Mahdi's age or mentality that in any way mitigates, excuses, or lessens his culpability and neither should it be given any significant weight in the Court's ultimate decision as to his sentence.

Non-Statutory Mitigating Circumstances

I have also given consideration to what the defense contends to be the Defendant's turbulent and transient childhood and upbringing. In reviewing the testimony of Margie Hammock, the Defense's clinical social worker expert, there is no reference to physical or sexual abuse suffered by the Defendant. In addition, records of the Virginia Department of Juvenile Justice indicate that the Defendant's father, brother, and grandmother continually expressed great care and concern for his well-being. While Mr. Mahdi's family life may have been less than ideal particularly without the presence of a loving and caring mother, I do not believe that his difficult childhood and family life contributed in any significant way to his senseless criminal activities. Therefore while I have considered this non-statutory mitigating circumstance, I do not believe that it should be given any significant weight in the Court's ultimate decision as to the sentence to be imposed.

The Defense presented testimony from Mr. James Aiken, a prison adaptability expert. Mr. Aiken, a highly credentialed expert, testified concerning Mr. Mahdi's potential adaptability to prison life.

I have reviewed and considered Mr. Mahdi's records regarding his prior behavior in various correctional institutions. He has consistently been disruptive and

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uncooperative and has threatened to kill prison employees. Officers have repeatedly found homemade weapons, ropes and other contraband in the Defendant's cell. During this trial, the Defendant 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. The Sheriff of Calhoun County testified that Mr. Mahdi stated to him that he made the key while being housed and monitored at the State's highest security level facility.

While Mr. Aiken gave impressive testimony, based on Mr. Mahdi's behavior in correctional institutions throughout his adolescence and adult years, I do not believe that he is sufficiently adaptable to prison life for this non-mitigating circumstance to be given any significant weight in the Court's ultimate decision as to the sentence to be imposed.

The defense further argues as a non-statutory mitigating circumstance that the Court should consider the Defendant's guilty plea in determining the appropriate sentence to be imposed. The Defendant's guilty plea occurred during the fourth day of his trial, following jury selection but prior to the jury being sworn. This was one day following his attempted escape through the use of the homemade key. In addition, Mr. Mahdi has failed to demonstrate any remorse for his actions at any point in time known to the Court. Therefore, I conclude that no significant weight should be given to this non-statutory mitigating circumstance in the Court's ultimate decision as to the sentence to be imposed.

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VICTIM IMPACT

Mikal Deen Mahdi murdered a husband, father, grandfather, son, and friend to many. Captain Myers was a well-respected police officer, an outdoorsman, a mentor and a treasured jewel of humanity. Mikal Deen Mahdi burglarized Captain Myers's farm shed and stole his family's sense of security and serenity. He robbed the Myers family and their many colleagues and friends of their right to peaceful enjoyment of life.

SENTENCING RATIONALE

In considering the appropriate sentence to be imposed, I am acutely aware that I am being called upon to determine what few of my brethren and sisters on the bench have been called upon to do. It is being the sole judge of whether Mr. Mahdi should be sentenced to life in prison without the possibility of parole or death by electrocution or lethal injection. It is an awesome task – which I do not take lightly.

United States Supreme Court Justice Potter Stewart referred to the penalty of death in the case of Furman v. Georgia as being different from all other forms of criminal punishment, not in degrees but in kind. It is unique in its total irrevocability; it is unique in its rejection of rehabilitation as a basic purpose of criminal justice; and it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

My challenge and commitment throughout my judicial career has been to temper justice with mercy and to seek to find the humanity in every defendant that I sentence. That sense of humanity seems not exist in Mikal Deen Mahdi.

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The State pleads for justice- Mr. Mahdi's plea is for mercy.

In evaluating these two ideals, I am reminded of my duly sworn oath to preserve, protect, and defend the Constitution of this State and the United States of America. This obligation that I have applies not only to Mikal Dean Mahdi but as importantly it is an obligation that I have to all the citizens of the Sate of South Carolina.

The State and the Defendant are entitled to justice. Today, the Defendant also seeks mercy- the same mercy that perhaps Captain James E. Myers sought for an instant before Mikal Deen Mahdi fired nine bullets into Captain Myers' body from one of Captain Myers's prized weapons, before setting his body on fire with matches and diesel fuel belonging to Captain Myers.

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

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. As to Burglary 2nd degree and Grand Larceny, the sentence is fifteen years and ten years, respectively, consecutive to the sentence for murder and consecutive to each other.

AFFIRMATIVE FINDING

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 a result of prejudice, passion, or any other arbitrary factor.

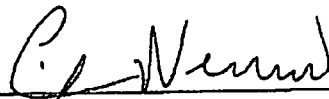
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It is therefore the judgment of the law and the sentence of the Court that you the Defendant Mikal Deen Mahdi be taken to the South Carolina Department of Corrections, henceforth to be kept in close and safe confinement, until the 8th day of February 2007, upon which day, between the hours of 6:00 a.m. and 6:00 p.m., that you the Defendant Mikal Deen Mahdi shall suffer death in the manner provided by law. May God have mercy on your soul.

The execution of the sentence will be stayed pending the automatic appeals and reviews as required by law.

THIS COURT IS ADJOURNED.

December 8, 2006



Clifton Newman
Presiding Judge