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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CALHOUN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 09-CP-09-164

Mikal D. Mahdi, #5238, ...Appellant,

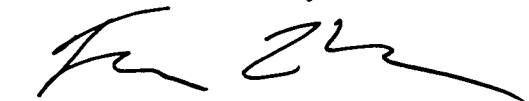
v.

State of South Carolina, ...Respondent.

NOTICE OF APPEAL

Mikal D. Mahdi appeals the Order of Dismissal of the Honorable Doyet A. Early, III filed
January 3, 2013. Appellant received written notice of entry of this order on January 7, 2013.

January 28, 2013



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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CALHOUN	)	Civil Action No. 09-CP-09-164
Mikal D. Mahdi, #5238,	)	
	)	
Applicant	)	
	)	ORDER OF DISMISSAL
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

KENNETH RASTY
CLERK OF COURT
CALHOUN COUNTY
ST. MATTHEW, S.C.

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FILED

This is a capital post-conviction relief (PCR) case. Applicant, Mikal D. Mahdi ("Mahdi") filed a *pro se* Application for Post-Conviction Relief on August 18, 2009, and served it on Respondent on November 24, 2009. This action was brought pursuant to S.C. Code Ann. Section 17-27-160 and the South Carolina Supreme Court's July 23, 2009, Order, staying execution, allowing Mahdi to pursue potential state post-conviction relief, and assigning this Court with continuing jurisdiction regardless of assignment, with the authority to schedule such hearings as may be necessary. Respondent filed a Return denying the allegations of the application and moving to dismiss the application with prejudice. Applicant filed two amended PCR applications, and Respondent filed a Return to each, denying the allegations and moving to dismiss the applications with prejudice. The Application for Post-Conviction Relief, as amended, is DENIED and DISMISSED WITH PREJUDICE, for the reasons set forth below.

I. PROCEDURAL HISTORY

Mahdi was arrested on June 21, 2004, in the State of Florida and charged with a fugitive from justice warrant arising from the June 18, 2004, murder of James E. Myers. Mahdi waived extradition, was returned to South Carolina, and was charged with Myers's murder, the

grand larceny of Myers's truck, and the burglary of Myers's work shed.¹ Mahdi was indicted by the Calhoun County grand jury on August 23, 2004 for murder (2004-GS-09-243), grand larceny greater than \$5,000 (2004-GS-09-242), and burglary in the second degree (violent)(2004-GS-09-244). The State sought the death penalty. The South Carolina Supreme Court assigned the case to the Honorable Clifton Newman, Circuit Court Judge.

The Continuances

Attorneys Carl B. Grant and Glenn Walters, Sr., 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 a motorcycle accident, whereupon Mr. Walters was substituted 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

¹ The 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's wife had an office inside the "shed," which also

On November 30, 2006, Mahdi pled guilty before Judge Newman to murder, grand larceny over \$5,000, and burglary in the 2nd degree (violent). Prior to his guilty plea, Mahdi was re-examined by Dr. Michael Cross, whereupon Mahdi was determined to be competent for the second 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 that Mahdi's pleas were knowingly, voluntarily, and intelligently entered into by extensive and detailed questioning of Mahdi under oath. (R. 1259-84, 1343-68). 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 twenty-four 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 fifteen (15) years for burglary second degree (violent), and ten (10) years for grand larceny, to run consecutively to one another and to the murder sentence. (R. 1741, 1825).

contained a television and chairs. (R. 1273-83, 1311-41, 1357-67, 1395-1425).

The Appeal

Mahdi appealed his death sentence to the South Carolina Supreme Court. Mahdi was represented on appeal by attorney Kathrine H. Hudgins of the Office of Appellate Defense. In his appeal, Mahdi raised only 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 Supreme Court affirmed Mahdi's conviction and death sentence. *Mahdi v. State*, 383 S.C. 135, 678 S.E.2d 807 (2009). The Remittitur was issued on July 1, 2009. Mahdi did not seek certiorari to the United States Supreme Court.

The Motion for a Stay of Execution

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

The Appointment of Collateral Counsel Hearing

On Tuesday, August 11, 2009, this Court convened a hearing in Beaufort, South Carolina pursuant to the Order of the Supreme Court, to determine Mahdi's desires concerning PCR counsel. Mahdi was present at the hearing. Respondent was represented by Assistant Attorney

General Mabry. At this Court's request, attorney Melissa "Lisa" J. Kimbrough was also present at the hearing.

This Court made inquiry of Mahdi, who desired appointed counsel in his PCR action. Mahdi requested that attorney Teresa L. Norris represent him in this matter, instead of Ms. Kimbrough. Ms. Kimbrough indicated that she would likewise prefer that Ms. Norris be appointed to represent Mahdi.

On August 19, 2009, this Court held a conference call with Ms. Norris, attorney Robert E. Lominack, and Assistant Attorney General Mabry, regarding Ms. Norris's and Mr. Lominack's qualifications and willingness to serve as PCR counsel and the timely scheduling and disposition of this matter. On August 24, 2009, this Court issued its Order of Appointment of Post-Conviction Relief Counsel and Scheduling Order appointing Ms. Norris and Mr. Lominack to represent Mahdi. The Order was filed August 28, 2009.

The PCR Application

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

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 one-tenth 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).² Mahdi traveled 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 .380 caliber 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

² This 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.

Exhibit 94) He then left the store with only the beer. (State's Exhibit 94). The store clerk, Christopher Jason Boggs, died from his wounds. (R. 1567-82, 1585).³

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 carjacked 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 carjacked 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.⁴ (R. 1532).

(Calhoun County)

Approximately thirty-five minutes after the carjacking, 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, Virginia. (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 credit 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-

³ Subsequent to the instant PCR hearing, Mahdi pled guilty to first degree murder in the death of Christopher Jason Boggs, and received a life sentence.

⁴ The Mercury Sable station wagon stolen from Lawrenceville, Virginia was found in the parking lot of the Washington Street United Methodist Church near the scene of the car-jacking. (R. 1359).

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

James Myers owned a farm approximately one-quarter to one-half 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 television, converted Myers's shotgun, sawed it off, 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 on 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 to 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 at the shed, and shot him nine (9) times with the victim's own .22 caliber rifle, killing him. (R. 1364, 1541-66, 1696).⁵ After murdering Myers, Mahdi poured diesel fuel on and around the body and set it 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 caliber rifle, Mahdi stole Captain Myers's police-issued Ruger assault rifle and the converted shotgun.

⁵ There 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).

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 contacted Myers's father and discovered what time he left his father's home. Mrs. Myers drove to the 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 a few 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 seven (7) fired .22 caliber bullets. (R. 1541-65). Police also found evidence that 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.⁶ 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 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

⁶ By this time, police in Virginia and South Carolina had connected the crimes there and here to Mahdi. As a result, a nationwide BOLO was issued for Mahdi's arrest. (R. 1365-66). Florida police noticed Mahdi's erratic driving and thought Mahdi might be an impaired driver and began following him. Mahdi refused to stop for police. Mahdi eventually ran over a stop sign near the end of the pursuit. (R. 1379-82).

shot." Mahdi said with "cold eyes," "I don't think I could have got you ~ I couldn't have shot you, the other cop, and excuse my language, that fucking dog." (R. 1394).

After his arrest, police discovered the license plate on 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's 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, Florida, who purchased a .380 caliber pistol and a .22 caliber rifle from Mahdi shortly after Myers's 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 caliber pistol and the .22 caliber 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 Jason Boggs, in Winston-Salem, North Carolina, and that the .22 rifle was used on Myers. (R. 1562, 1592-96).

The autopsy determined Myers died from multiple gunshot wounds, after being shot nine (9) times, including four (4) in the chest and three (3) in the head. The pathologist, Dr. Janice Ross, opined that 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 Virginia's juvenile justice system at the age of 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 within the juvenile justice system. (R. 1441-42). While in the juvenile justice system, Mahdi told juvenile authorities that one of his strengths was "robbing people." (R. 1440). During one of the break-ins 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).

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 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 leave Virginia, violate any law, nor possess a firearm. (R. 1483-97). After his release, Mahdi tried to get his grandmother's neighbor, Amanda Weaver, to help him assemble a 9mm pistol. He bragged to her that 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, Mahdi was required to submit to a urine drug screen administered by the Virginia 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; State's Exhibit 85). Mahdi was incarcerated again in the Virginia Department of Juvenile Justice 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 Exhibit 95). Records from the Department of Juvenile Justice also document Mahdi committing several assaults during his incarceration. (R. 1441-42; State's Exhibit 95).⁷

As an adult, Mahdi was incarcerated in the Virginia Department of Corrections from October 11, 2001, to May 12, 2004, repeatedly disobeying corrections officers' orders. (R. 1485-86). He had numerous disciplinary infractions, including repeatedly used 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 the Virginia prison system, Mahdi was charged with setting a fire, giving false information to an employee, destroying state property, and assaulting a non-inmate. (R. 1453-1456; State's Exhibit 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 prison 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

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

of blankets. (R. 1624). Another piece of metal was found in his cell on a different occasion. (R. 1627-28). Mahdi also wrote a grievance in which he discussed killing Department of Corrections' employees. (R. 1629). Mahdi made additional threats toward a Department of Corrections' employee at the disciplinary hearing. (R. 1646-48).

Captain Gary Lane testified that at the time of trial, Mahdi was kept on the High D Wing of the super max portion of the Kirkland Correctional Facility. This facility houses the six most difficult to manage inmates in the entire South Carolina Department of Corrections. (R. 1652-53). According to the sentencing hearing testimony, these six inmates are kept differently than the other twenty-three thousand inmates in the Department of Corrections. (R. 1661-62). These six cells are even more secure than death-row. (R. 1662). While in one of these super-secure cells, Mahdi made a rope and somehow obtained two pieces of contraband metal, of which one was sharpened to a point. (R. 1656-57). Mahdi had been transferred to the High D Wing, from the High C Wing, because of his 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 Department of Corrections, kept it secreted in his mouth during the trial, and took it out of his mouth when he was away from guards for a meeting with his attorneys. (R. 1666-67). Mahdi had attempted to use it in the county jail but had not had an opportunity to use it in the courtroom, due to the 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

introduced all of Mahdi's juvenile disciplinary violations while incarcerated. They totaled over forty.

two of the three sets of handcuffs 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 James 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.⁸ 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 that 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).

⁸ 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.

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

Judge Newman considered Mahdi's age (twenty-one years) and mentality at the time of this murder. Judge Newman noted that the last time Mahdi's I.Q. was tested at age fourteen (14), his I.Q. was one hundred and eight (108), slightly above average. While he considered this statutory mitigating circumstance, he did not give it great weight because Mahdi began his criminal career at an early age, fourteen (14). Judge Newman found that at twenty-one (21) Mahdi was experienced in the world of crime. Judge Newman found that by the time Mahdi committed these crimes, he was well aware of the severity of his crimes and the possible consequences. Judge Newman found that 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 Department of Juvenile Justice showed Mahdi's father, brother, and grandmother continually expressed great care and concern for his well-being. Judge Newman found that while Mahdi's family life may have been less than ideal, particularly without the presence of a loving and caring mother, he did not find that Mahdi's difficult childhood and family life contributed in any significant way to his senseless criminal activities. Therefore, while he considered this non-statutory mitigating circumstance, he did not believe that it should be given

any significant weight in his ultimate sentencing determination. (R. 1849; Sentencing Order, p. 8).

Judge Newman also considered Mahdi's offered testimony of prison adaptability.

While Judge Newman considered the testimony of the defense expert James Aiken, Judge Newman pointed out that he had reviewed and considered Mahdi's records regarding his prior behavior in various correctional institutions. Judge Newman found that Mahdi had consistently been disruptive and uncooperative and had threatened to kill prison employees. Judge Newman found that prison officers had repeatedly found homemade weapons, ropes, and other contraband in Mahdi's 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 Sheriff that he made the key while being housed and monitored at the State's highest security level facility. While Judge Newman believed Mr. Aiken was highly credentialed and gave impressive testimony, based on Mahdi's behavior in correctional institutions throughout his adolescence and adult years, Judge Newman did not believe that Mahdi was sufficiently adaptable to prison life for this non-statutory mitigating circumstance to be given any significant weight in his ultimate decision as to the appropriate sentence to be imposed. (R. 1849-50; Sentencing Order, p. 8-9).

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 considered the impact of the crime upon the victim's family and the community. Judge Newman found that the victim, James Myers, was a husband, father, grandfather, son, and friend to many. Judge Newman also found that Myers was a well-respected police officer, an outdoorsman, a mentor, and a treasured member of humanity. Furthermore, Judge Newman found that 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 of America. Furthermore, Judge Newman stated that this obligation was not only to Mikal Mahdi, but of equal importance, this was an obligation he had to the citizens of the State of South Carolina.

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

My challenge and my commitment throughout my judicial career has been to temper justice with mercy and to seek to find the humanity in every defendant that I sentence. That sense of humanity 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).

D. Post Conviction Relief Applications

On August 18, 2009, with the assistance of counsel, Mahdi filed a *pro se* application for post-conviction relief (2009-CP-09-00164). In the Application, Mahdi alleged only one ground, as follows:

Ground: 10(a) Ineffective assistance of counsel

Supporting facts: 11(a) Trial counsel failed to object when the trial judge improperly based his decision to impose a death sentence on petitioner's assertion of his right to a jury trial, thereby effectively punishing him for exercising his constitutional right. Counsel's deficient performance in failing to preserve the issue for appellate review deprived petitioner of the right to effective assistance of counsel under the Sixth and Fourteenth Amendments and *Strickland v. Washington*, 466 U.S. 668 (1984).

The State filed its Return on December 3, 2009, denying the allegations and moving to dismiss Mahdi's Post Conviction Relief Application with prejudice.

On March 19, 2010, Mahdi, through collateral counsel, filed an Amended Application for Post-Conviction Relief. In this Application, Mahdi re-alleged Ground One above (see Ground 10(a)/11(a)(i) of the Amended Application) and alleged the following additional grounds:⁹

⁹ In his Amended Application in March, and in his Amended Application in July of 2010, Mahdi replaced his simple *pro se* allegation of "ineffective assistance of counsel," with the following language: "10(a)Applicant was denied the

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.

On July 29, 2010, complying with this Court's Scheduling Order, collateral counsel filed another (Second or Final) Amended Application for post-conviction relief, re-alleging Ground 11(a)(i) from his first *pro se* application, and Grounds 11(a)(ii) and (a)(iii) from his Amended Application of March 19, 2010, and adding and elaborating as follows:

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

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

Counsel's conduct in each instance, separately and cumulatively was 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).

(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).

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."

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

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

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

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

E. The PCR Merits Hearing

On March 9, 2011, an evidentiary hearing was convened at the Broad River Correctional Institution. Present were applicant Mahdi, Mahdi's attorneys, Ms. Norris and Mr. Lominack, representatives from the Attorney General's Office, and the victim's widow, Amy Myers.

Mahdi called twelve witnesses: 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 submitted sworn affidavits of James Woodley, Dora Wynn, Doug Pond, and Sandra Wynn Burwell. Applicant Mahdi did not testify.

Respondent called the following witnesses: Carl Grant, Esq.; Glenn Walters, Esq.; Josh Koger, Esq.; Paige Tarr Haas; Dr. Thomas Martin; James Gordan; and Dr. Geoffrey McKee.

Exhibits were introduced by both sides, and this Court had the opportunity to view and hear the testimony of the witnesses and assess their credibility.

After reviewing the record, including the Record on Appeal and the trial exhibits, and after reviewing and assessing the credibility of all testimony and evidence submitted in this case, this Court finds the application for post-conviction relief to be without merit and denies and dismisses the application, with prejudice.

III. Standard of Review

In a post-conviction relief action, the applicant has the burden of proving his allegations by a preponderance of the evidence. SCRCP 71.1(e); *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, 80 L.Ed.2d 674, 692 (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 judgement. *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 117-18, 386 S.E.2d at 625, citing *Strickland*.

"Surmounting *Strickland*'s high bar is never an easy task[.]" *Premo v. Moore*, 562 U.S. ____ , 131 S.Ct. 733, 178 L.Ed.2d 649 (2011) citing *Harrington v. Richter*, 562 U.S. ____ , 131 S.Ct. 770, 178 L.Ed.2d 624 (2011), quoting *Padilla v. Kentucky*, 559 U.S. ____ , 130 S.Ct. 1473, 176 L.Ed.2d 284 (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. *Id*.

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 has 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*, 558 U.S. ___, 130 S.Ct. 383, 2009 WL 3805746 (2009), citing *Strickland*. The applicant must prove that had counsel acted competently there is a reasonable probability that a different sentence would have resulted. *Id.*; *Wiggins v. Smith*, 539 U.S. 510, 535, 536, (2003); see also *Terry v. State*, 394 S.C. 62, 714 S.E.2D 326 (2011). Such a showing “requires a substantial, not just conceivable, likelihood of a different result.” *Cullen v. Pinholster*, ___ U.S. ___, 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) of the Final Amended Application

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 death sentence decision 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's consideration of Mahdi's initial exercise of his right to a jury trial as a circumstance supporting the imposition of the death penalty.¹⁰ (See BOA, p. 9, 11, 18-21).

A plain reading of the sentencing order and the paragraph in question shows that Judge Newman accurately recounted in his Order and for the South Carolina Supreme Court, or any reviewing court, when Mahdi's guilty plea occurred in the request to consider the guilty plea as a non-statutory mitigating circumstance. Judge Newman did not consider Mahdi's participation in *voir dire* and selecting a jury as an aggravating circumstance. See *State v. Ray*, 310 S.C. 431, 437, 427 S.E.2d 171, 174-75 (1993)(trial judges are presumed to know the law and apply a narrowing definition to this state's death penalty statute), referencing *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047 (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

¹⁰ The sentence reads, "The defendant's guilty plea occurred during the fourth day of his trial following jury selection, but prior to the jury being sworn." (See BOA).

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. *Strickland*; *Wong*; *Wiggins*; *Jones*. This ground must be dismissed with prejudice.

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

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

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

Mahdi did not testify, and offered no testimony or other evidence at the merits hearing on this issue.¹¹ Mahdi did not question his former appointed attorneys on this issue. (PCR Tr. 587-710). Mahdi has failed to meet his burden of proof on this allegation, which must therefore be dismissed with prejudice. *Butler, supra*; *Hill, supra*. Furthermore, having offered no proof, Mahdi waived and abandoned this issue. *Parks v. Morris Homes Corp.*, 245 S.C. 461, 471, 141 S.E.2d 129, 134 (1965)(Further, it is a litigant's duty to bring to the court's attention any perceived error, and "the failure to do so amounts to a waiver of the alleged error."). *See also Gibbs v. Kimbrell*, 311 S.C. 261, 267, 428 S.E.2d 725, 729 (Ct. App. 1993)(discussing waiver).

¹¹ At the close of Mahdi's PCR case presentation, Respondent moved for a directed verdict due to lack of any evidence or proof offered by Mahdi on this ground. When asked for a response, collateral counsel gave none. This Court held the motion for a directed verdict in abeyance until the completion of the PCR merits hearing. At the conclusion of the merits hearing, there was still no evidence offered on this ground by applicant Mahdi. (PCR Tr. 1-719).

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 versus 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 (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 a 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. 682-684). Mahdi offered no testimony on this issue and offered no evidence that contradicted counsel's sworn testimony on this issue. This Court finds counsel's testimony on this issue to be credible. This Court also finds that counsel's testimony on this issue is supported and corroborated by Mahdi's responses to Judge Newman's questions during the guilty plea itself. Given the vague allegations of this ground, the lack of any supportive evidence in the record, and the clear record

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

Additionally, as a result of this record, Mahdi cannot show prejudice. *Hill, supra*. Given this record, including counsel's credible testimony, the record of the plea proceeding, and the evidence that would have been submitted to the chosen jury, including the horrendous facts of Myers'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.

Duties of Trial Counsel

In capital cases, defense counsel have a duty to vigorously investigate and present mitigating evidence.¹² This duty requires that counsel "discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *see also Williams v. Taylor*, 529 U.S. 362, 393 (2000). In addition to the Supreme Court's jurisprudence regarding the standards governing

¹² Mitigating evidence encompasses all information about a person's background and characteristics, not simply information directly related to the offense itself. *See Lockett v. Ohio*, 438 U.S. 586, 608 (1978); *see also Bailey v. State*, 309 S.C. 455, 461, 424 S.E.2d 503, 507 (1992) ("[T]he [capital] defendant is entitled to produce evidence concerning

trial counsel, the American Bar Association promulgated guidelines, revised in 2003, that set out the standard of practice for defense counsel in capital cases. The United States Supreme Court and the South Carolina Supreme Court have recognized the ABA Guidelines as the standard of practice and as "guides to determining what is reasonable." *Wiggins, supra*; see also *Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008). These standards existed at the time of Mahdi's trial and governed the efforts of attorneys Grant, Walters, and Koger in this case.

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

"It is unquestioned that under the prevailing professional norms . . . , counsel had an obligation to conduct a thorough investigation of the defendant's background." *Porter v. McCollum*, 558 U.S. ___, 130 S.Ct. 447, 453 (2009), quoting *Williams v. Taylor*, 529 U.S. 362, 396 (2000). A thorough investigation requires an assessment of the following:

Medical history (including hospitalizations, mental and physical illness or injury, alcohol and drug use, pre-natal and birth trauma, malnutrition, developmental delays, and neurological damage).

Family and social history (including physical, sexual or emotional abuse; family history of mental illness, cognitive impairments, substance abuse, or domestic violence; poverty, familial instability); other traumatic events such as exposure to criminal violence, the loss of a loved one or a natural disaster; experiences of racism; cultural or religious influences; failures of government or social intervention.

Educational history and special educational needs.

Prior juvenile and adult correctional experience.¹³

[ABA Guideline 10.7, commentary at 81-82]

his childhood and family background in mitigation of his criminal conduct . . . "); *Tennard v. Dretke*, 542 U.S. 274 (2004) (emphasizing that the relevance standard concerning mitigation should be viewed in expansive terms).

¹³ Moreover, if - as was the case here - the client was incarcerated, either as a juvenile or an adult, trial counsel should investigate the "possible effect of the facility's conditions on the client's contemporaneous and later conduct." (ABA Guideline 10.7, commentary at 84).

A thorough social history is developed through witnesses - both expert and lay - and records. Therefore, counsel have a duty to locate witnesses and records, which will shed light on the defendant's childhood and, more generally, any other mitigating factors.

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

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

Williams v. Taylor, 529 U.S. 362 (2000). Among other things, trial counsel failed to locate and interview potential mitigation witnesses, including a witness who left a telephone message for counsel.

Porter v. McCollum, 130 S.Ct. 447 (2009). Trial counsel was ineffective for failing to investigate and present evidence of abusive childhood (including witnessing violence of father against mother), the defendant's long-term substance abuse, and his mental health.

Sears v. Upton, 130 S.Ct. 3259 (2010). The Court reiterated a superficially reasonable mitigation presentation at penalty phase is not sufficient, and agreed with lower court's finding of deficient performance where trial counsel failed to present evidence of the defendant's traumatic childhood and cognitive dysfunction.

Council v. State, 380 S.C. 159, 670 S.E.2d 356 (2009). In its case in aggravation, the state relied on the circumstances of the murder as well as the defendant's numerous disciplinary infractions while incarcerated as a juvenile and adult. In response, the defense offered one witness - his mother - who provided a general social history of the defendant, including that he had attended some type of mental health counseling. Trial counsel had hired a forensic psychiatrist but only provided him an incomplete set of the defendant's school records and some state mental health hospital records. The psychiatrist was primarily focused on the defendant's competency and criminal responsibility. The Court held that even the "limited information obtained should have put counsel on notice that [the defendant's] background, with additional investigation, could potentially yield powerful mitigating evidence."

Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009). Trial counsel presented the testimony of five witnesses, none of whom discussed the defendant's mental health. The state supreme court found trial counsel

ineffective for failing to present the defendant's social history and evidence of his mental illness.

In order to develop information about a client's social history, "it is necessary to locate and interview the client's family members ... and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation, and parole officers, and others." ABA Guideline 10.7, *commentary* at 83. These witnesses can provide first-hand accounts of the client's life. ABA Guideline 10.11, *commentary* at 109. In the end, defense counsel are obligated to locate witnesses who are relevant to the client's social history, including:

The client's friends, teachers, classmates, co-workers, employers, and those who served in the military with the client, as well as others who are familiar with the client's early and current development and functioning, medical history, environmental history, mental health history, educational history, employment and training history, military experience and religious, racial, and cultural experiences and influences upon the client or the client's family;

Social service and treatment providers to the client and the client's family members, including doctors, nurses, other medical staff, social workers, and housing or welfare officials;

Witnesses familiar with the client's prior juvenile and criminal justice and correctional experiences;

Former and current neighbors of the client and the client's family, community members, and others familiar with the neighborhoods in which the client lived, including the type of housing, the economic status of the community, the availability of employment and the prevalence of violence;

Witnesses who can testify about the adverse impact of the client's execution on the client's family and loved ones.

[ABA Guideline 10.11]

Standard 3 - Counsel must locate available and relevant records.

The Supreme Court has also recognized that an exhaustive records collection effort is vital to a thorough and reliable social history investigation. Records usually created prior to the crime can provide powerful corroboration to the witness accounts.

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

Porter v. McCollum, 130 S.Ct. 447 (2009). Trial counsel did not obtain school, medical, or military service records.

Williams v. Taylor, 529 U.S. 362 (2000). Trial counsel found ineffective in part for failure to obtain records that described the defendant's childhood, that established that the defendant was borderline mentally retarded, and that described the defendant's good deeds while in jail.

Council v. State, 380 S.C. 159, 670 S.E.2d 356 (2008). The state supreme court found trial counsel ineffective in part for their failure to obtain relevant records. "[T]rial counsel[] only obtained the DJJ and state hospital records before trial; did not request certain background records until the day of jury selection; . . . and provided [the only defense expert] with only limited records." 380 S.C. at 172, 670 S.E.2d at 363. The Court held that counsels' "conduct fell below the standards set by the ABA." *Id.* (citing to 11.4.1(2)(C) (1989), requiring counsel to collect information relevant to medical, educational, family and social history, and prior adult or juvenile record). Particularly, the Court found it unreasonable for counsel not to obtain records relating to the defendant's family.

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

Counsel should attempt to obtain the following records: School records, social service and welfare records, medical records, employment records military records, Family Court records, criminal and correctional records, and family birth, marriage, and death records. [ABA Guidelines 10.7, commentary at 84, and 10.11.(F)]

Standard 4 - Counsel have a duty to investigate and rebut the government's evidence in aggravation.

In addition to conducting a mitigation investigation, counsel must also investigate the state's case in aggravation. After discovery of the evidence that the prosecution intends to introduce, counsel must "thoroughly investigate to determine whether this evidence can be excluded, rebutted or undercut." ABA Guideline 10.11., commentary at 111. "The notion that defense counsel must obtain information that the State has and will use against the defendant is not simply a matter of common sense." *Rompilla v. Beard*, 545 U.S. 374, 387 (2005). As the ABA Guidelines make clear, counsel "must also investigate prior convictions, adjudications, or unadjudicated offenses that could be used as aggravating circumstances or otherwise come into evidence." ABA Guideline 10.7, commentary at 85.

The PCR hearing revealed that trial counsel were narrowly focused on Mahdi's competency to stand trial and a diminished capacity defense, rather than mitigation.¹⁴ Mr. Walters testified:

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

[PCR Tr. 610-11]

Mr. Koger testified: "[W]e didn't have any type of question about the competency of Mr. Mahdi and his ability to participate in his particular defense and it was nothing in those reports of record that would show a . . . sentencing judge that he had diminished capacity. So, [presenting mitigation] was not advantageous in this particular case." PCR Tr. 690.

The focus on Mahdi's competence and mental state at the time of the crimes was also evidenced in the work of the defense experts, who were retained but not called to testify in the trial proceedings. Dr. McKee, the psychologist hired by trial counsel, administered brief "screeners" tests geared towards addressing competency or detecting malingering with both being "relevant to and specific to a court procedures [sic] and being in court." (PCR Tr. 551, 557.) Dr. McKee admitted that he would not rely on these tests to learn everything about a person's life. (PCR Tr. 557). Dr. Martin, the psychiatrist hired by trial counsel, stated that his evaluation was focused on Mahdi's mental state at the time of the crime. (PCR Tr. 543). The records that the experts reviewed are consistent with a team focused on competency to stand trial or insanity issues. Drs. Martin and McKee principally reviewed discovery, police investigation file, necropsy and pathology reports provided by the prosecution. (PCR Tr. 511, 554). Neither doctor reviewed Mahdi's school records, including his special education records (complete with psychological testing) nor his juvenile or adult correctional records which had been provided to trial counsel. (PCR Tr. 530-32).

V. Failure of Trial Counsel

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

The records collection effort of trial counsel was narrow and incomplete. The collection of Mahdi's records was limited and, except for the school and employment records of Mahdi's brother, trial counsel did not attempt to gather records of any of Mahdi's family members. Some of the records trial counsel did gather were not reviewed by any defense expert, including the only testifying social history witness - Ms. Hammock. Trial counsel's failures in this regard were

¹⁴ See *Council v. State*, 380 S.C. at 173, 670 S.E.2d at 363 (trial counsel focused on competency to stand trial and criminal responsibility rather than a complete mitigation investigation).

threefold: (1) they failed to obtain relevant and available documents; (2) they failed to review documents that they did have; and (3) they failed to provide relevant documents in their possession to their experts.

Documents obtained by trial counsel included an incomplete set of Mahdi's school records, Walter Carter Center records documenting Mahdi's hospitalization, and Virginia DJJ and DOC records provided by the prosecution. Documents not obtained or not reviewed by anyone included school records¹⁵ (including special education records), criminal records regarding the applicant's father, Shareef Mahdi, psychiatric records regarding Shareef Mahdi, military records regarding Shareef Mahdi, Virginia DJJ and DOC Records.

A number of relevant records were never obtained. Even if the defense experts had reviewed all the mitigation records obtained by the defense, they would not have been well-informed. Ms. Hammock, the only witness to testify about Mahdi's social history, reviewed only a "synopsis" of Mahdi's school records and "a report" of his Walter Carter Center records. (R. 1747). Similarly, Drs. McKee and Martin reviewed only the Walter Carter Center records. They did not review his school records or his institutional records. (PCR Tr. 530-32, 547, 554).

Trial counsel failed to obtain available records, which were relevant to Mahdi's social history and were mitigating. It appears that trial counsel never obtained Mahdi's special education records. This file contained a full psychological assessment of Mahdi when he was in the fourth grade. On the basis of this assessment and teacher observations, Mahdi was eligible for special education because he was emotionally disabled. Ms. Hammock provided the Court with a "School Experience Summary" that purported to detail Mahdi's schooling, but it failed to note that Mahdi was placed in special education. Mahdi's school and psychiatric records portray him as depressed

and in need of significant assistance. Trial counsel never obtained criminal and military records regarding Shareef Mahdi, Mahdi's father. These records reveal that Shareef Mahdi was irrational, mentally ill to the point of being hospitalized, and violent.

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

Trial counsel and the mitigation specialist did not conduct any interviews outside Mahdi's family. The family members that were interviewed by trial counsel and the defense team were Rose Gupton (maternal aunt), Nathan Burwell (paternal uncle), Carson and Lawanda Burwell (paternal uncle and aunt), Vera Artis (mother), Shareef Mahdi (father), Corliss Artis (maternal aunt), Sophia Gee (maternal aunt), and Nancy Burwell (paternal grandmother). Trial counsel and the defense team did not conduct any non-family interviews.

In preparation for the PCR hearing, the following non-family members were interviewed: Sheriff James Woodley, Dora Wynn, Myra Harris, Carol Wilson, Mayor Douglas Pond, George Smith, and Sharon Pond.

Based on the above, I find that counsel's performance was deficient and fell below the "reasonableness under professional norms" standard. *Cherry, supra*. Nonetheless, I find that counsel's deficient performance does not satisfy the second prong of the test articulated in *Cherry* and discussed hereinabove.

Considering the horrible facts of this murder and the aggravating circumstances, additional mitigation evidence would not have altered the resulting death sentence.

The convenience store clerk in North Carolina was shot point blank by Mahdi, not once but twice. Mahdi has a well-documented history of violence in and out of prison. Mahdi confronted Myers in his shed, where Mahdi had been lying in wait and shot him nine times. After

¹⁵ Drs. McKee and Martin did not review any school records. Dr. Hammock reviewed only a "synopsis" of the records.

murdering Myers, Mahdi poured diesel fuel on Myers and set him on fire. During his guilty plea, Mahdi admitted that he murdered Myers, burglarized his cabin before murdering him, and stole his guns and police-issued truck after murdering him.

It is important to note Chief Justice Toal's concurring opinion in the appeal. She wrote separately to record the facts of what she describes as a "particularly heinous crime." *Mahdi v. State*, 383 S.C. 135 at 137 (2009). After reciting the facts, Chief Justice Toal states, "in my time on this Court, I have seen few cases where the extraordinary penalty of death was so deserved." *Id.* at 138.

A careful review of Judge Newman's sentencing order in the underlying trial shows the careful thought and deliberation that he put into the decision.

While this Court finds that defense counsel's performance fell below the standards as required by the United States and South Carolina Supreme Courts and the ABA guidelines, the Court finds and concludes that there is not a reasonable probability that the sentencing judge would have decided against a death sentence even if presented with more mitigation evidence. Therefore, the Applicant fails to meet the second prong in *Cherry*. This ground must be dismissed with prejudice.

C. Ground 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.

On this allegation, Applicant has failed to state a claim upon which relief may be granted. Assuming Mahdi is referring to his alleged "mental age" allegation in Ground 10(b)/11(b)[below], the record shows Mahdi was twenty-one (21) years old at the time of the crime. *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183 (2005) (Eighth Amendment prohibits execution of those under the

age of 18 at the time of the crime). The record also shows Mahdi is not mentally retarded. (See Blair hearing testimony and testimony of R&E evaluation).¹⁶ *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242 (2002) (Eighth Amendment prohibits the execution of mentally retarded); *State v. Laney*, 367 S.C. 639, 627 S.E.2d 726 (2006); *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003)(defining mental retardation). There is no testimony in the record that Mahdi was insane at the time of the crime, is insane now, or is incompetent to be executed. *Ford v. Wainwright*, 477 U.S. 399 (1986) (Eighth Amendment precludes the execution of one who is insane); *Singleton v. State*, 313 S.C. 75, 437 S.E.2d 53 (1993) (setting forth the standard for competency to be executed). Mahdi has failed to show he fits under any class of persons recognized by the United States Supreme Court or the South Carolina Supreme Court as being excluded from application of the death penalty. See *Atkins*; *Roper*; *Ford*. Counsel could not have been ineffective in failing to object to his sentence on a ground not recognized by the law. 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 118696 (Tenn. Crim. App., Jan 13, 2010) (unpublished).

¹⁶ 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.

Applicant has failed to show that he had, at the time of the murder, 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 (23) years old at the time of his guilty plea, had obtained his GED, and had attended some community college. (R. 1346). Mahdi had been previously employed in mostly roofing and brick laying. (R. 1346). Mahdi denied ever having been treated for abuse of alcohol, drugs or for any mental disease. (R. 1346). Ms. Hammöck testified that Mahdi had been hospitalized on one occasion as an adolescent, a voluntary admission to a mental health facility, and 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 the 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 (21) years old at the time of the murder, and has a criminal mentality. Mahdi cannot

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

D. 10(b)/11(b):

10(b) Applicant's death sentence violates the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution due to Applicants 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,¹⁷ 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 (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 South Carolina Supreme Court in his appeal. See *Gibbs v. Kimbrell*, 311 S.C. 261, 267, 428 S.E.2d 725, 729 (Ct. App. 1993)(discussing waiver). As a result, this ground must be dismissed with prejudice.

Third, applicant has failed to state a claim upon which relief may be granted. The record shows Mahdi was twenty-one (21) years old 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);

¹⁷ See *Mahdi v. State*, 383 S.C. 135, 678 S.E.2d 807 (2009).

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 or who pleads guilty but mentally ill may be sentenced to death. *State v. Weik*, 356 S.C. 76, 587 S.E.2d 683 (2002), cert. denied June 16, 2003; *State v. Wilson*, 306 S.C. 498, 413 S.E.2d 19 (1992).

The record also shows Mahdi knew and understood that use of illegal drugs or possession of a weapon would result in a violation of his adult probation. (R. 1487-1491). 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 the Myers murder, and his conduct as a pretrial detainee (including his homemade handcuff key) reveal that he has above-average intelligence, is streetwise, and has a keen criminal mentality. Mahdi does not have a juvenile mentality, as alleged, but an adult criminal mentality and bad character.

Mahdi was evaluated by 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 antisocial personality disorder, which is not a mental illness. Both mental health professionals found Mahdi was not suffering from any mental illness at the time he committed the offenses 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. 508-561).

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

Mahdi was also examined by Dr. Donna Schwartz-Watts prior to the PCR hearing. While Schwartz-Watts testified Mahdi's immaturity was cross-referenced in the records, she did not testify Mahdi had a "juvenile mentality" nor did she testify to what mental age Mahdi was, nor his mentality at the time of Myers'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 the rights and privileges of others. (See Va. DJJ records M00410).

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

Mahdi was found to be age appropriate with regard to his maturity level during his intake evaluation. (See DJJ records M00418, line 4). Another record indicated that Mahdi's teachers

should be aware that "he has demonstrated the capacity to plot, and carry out, apparently unprovoked assaults on peers. He requires extraordinarily close supervision." (See DJJ records M00426).

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

Trial counsel testified at the PCR merits hearing, that Mahdi was very intelligent, recounting that Mahdi had informed him that he had hatched a plan when he lived in Virginia whereby he would eliminate all other drug dealers in his area, resulting in a "false drought" of drugs. As a result, Mahdi would make more money selling drugs because everyone would have to come to him for the illegal product. Mahdi also related to trial counsel that he left Virginia because homicide detectives were closing in on him for a homicide committed in the Richmond, Virginia area. Trial counsel 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 he was 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. 592-593, 603-611, 688-690). This Court had an opportunity to view

counsel's testimony on this issue and judge their credibility accordingly. This Court finds counsel's testimony on this issue to be credible. This Court also finds counsel's testimony on this issue to be supported by the credible evidence in the record.

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

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

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

In this ground, Mahdi alleges trial counsel was ineffective for failing to assert that S.C. Code 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*, Shearouse Advance Sheets Opinion 27081 (filed December 28, 2011); *State v. Allen*, 386 S.C. 93, 687 S.E.2d 21 (2009), cert. denied; *State v. Crisp*, 362 S.C. 412, 608 S.E.2d 429 (2005); *State v. Downs*, 361 S.C. 141, 604 S.E.2d 377 (2004); *State v.*

Wood, 362 S.C. 135, 607 S.E.2d 57 (2004).¹⁸ 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 that Mahdi did not want to plead guilty and have the jury sentence him. (PCR Tr. 682-684). Mahdi had selected twelve (12) jurors and four (4) alternates to hear his trial and decide his sentence. Mahdi decided to plead guilty because Mahdi believed he had a better chance of receiving a life sentence from Judge Newman than from the jury he had selected. (PCR Tr. 682-684). 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 Department of Juvenile Justice, the Virginia Department of Corrections, and the South Carolina Department of Corrections. This Court had the opportunity to view the witnesses and hear their testimony on this issue. This Court finds trial counsel's testimony on these issues to be credible. Mahdi offered no testimony to contradict trial counsel's testimony on these issues. This Court finds based on trial counsel's credible testimony and the record in this case, Mahdi wanted to be sentenced by Judge Newman, not the jury he had initially selected and impaneled. Therefore, it would have made no

¹⁸ 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).

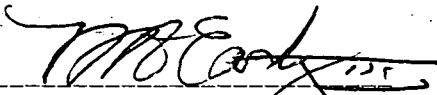
sense for Mahdi to have objected to the constitutionality of the statute and insist on pleading guilty and being sentenced by the jury, and counsel was not ineffective in failing to object to the constitutionality of Section 16-3-20. Mahdi has failed to show deficient performance or prejudice on the part of counsel in this regard. *Strickland*. This ground must be dismissed with prejudice.

VI. CONCLUSION

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

December 18, 2012

AIKEN, SC


Honorable Doyet A. Early, III
Circuit Court Judge

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CALHOUN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 09-CP-09-164

Mikal D. Mahdi, #5238, ...Appellant,

v.

State of South Carolina, ...Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Respondent by depositing a copy of it in the United States Mail, postage prepaid, on January 28, 2013, addressed to Respondent's counsel of record, Anthony Mabry, Assistant Attorney General, Post Office Box 11549, Columbia, SC 29211.

January 28, 2013



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January 28, 2013

The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

The Honorable Kenneth Hasty
Calhoun Clerk of Court
PO Box 709
St Matthews, SC 29135

RE: Mikal Mahdi v. State (Calhoun County Capital Post-Conviction Relief Action)

Dear Mr. Shearouse and Mr. Hasty:

Please find enclosed, with proof of service, Mr. Mahdi's Notice of Appeal.

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

Sincerely,



Teresa L. Norris

cc: Anthony Mabry
Robert Lominack
Mikal Mahdi

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S.C. SUPREME COURT



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