

STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM CALHOUN COUNTY  
Court of Common Pleas (PCR)  
The Honorable Doyet A. Early, III., Circuit Court Judge

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Appellate Case No. 2013-00183

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MIKAL MAHDI., #5238,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**MOTION TO STAY APPEAL AND REMAND FOR  
CONSIDERATION OF POST-TRIAL MOTION**

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Comes now Respondent, above named, by and through the Office of the South Carolina Attorney General, and hereby moves to stay the appeal and remand this matter back to the PCR Court for consideration and ruling upon the State's timely post-trial motion (Rule 59, SCRCP Motion) filed in this case. In support of this Motion, Respondent (hereinafter referred to as the State) would show this Court the following:

1. Petitioner Mahdi served and filed the Notice of Appeal in this action on January 28, 2012 appealing from the Circuit Court's Order of Dismissal issued December 28, 2012 and filed January 3, 2013 denying and dismissing his PCR application with prejudice. Prior to the filing of the Notice of Appeal, the State had not received written notice of the entry of the Circuit Court's Order of Dismissal. The State received written notice of entry of judgment of the Order Denying Post-Conviction Relief on **January 30, 2013**. The State then filed a Rule 59, SCRCP, Motion to Alter or Amend the Order of Dismissal asking the Circuit Court to alter or amend its finding of deficient performance under one ground of the

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S.C. Supreme Court

PCR application. (Attached). The Rule 59 Motion to Alter or Amend was timely filed and served by the State on Friday, February 8, 2013.

2. The State moves for this appeal to be stayed and the case be remanded back to the PCR Court to allow the PCR Court to rule upon the Motion to Alter or Amend Judgment pursuant to Rule 59(e), SCRPC. The State submits that a remand is necessary to avoid piecemeal appellate litigation in this case, and is proper under South Carolina law. See Otten v. Otten, 287 S.C. 166, 337 S.E.2d 207 (1985)(granting motion to remand where Appellant filed motions under Rule 59(e) and Rule 60(a) to modify order and Appellant served and filed notice of appeal before trial court ruled on motions); see also Wicker v. Anderson County Council, 289 S.C. 479, 347 S.E.2d 96 (1986)(Supreme Court remanded case back to trial court for consideration of timely post-trial motion filed after filing of notice of appeal); but see Hudson v. Hudson, 290 S.C. 215, 215-16, 349 S.E.2d 341, 341-42 (1986)(holding service and filing of Notice of Appeal before filing of timely post-trial motion under Rule 59 does not deprive lower court of jurisdiction to consider the motion).

WHEREFORE, premises considered, Respondent respectfully requests this Court stay this appeal and remand the case back to the PCR Court for ruling on the pending post-trial motions. The State further requests any other relief this Court deems appropriate.

Respectfully Submitted,

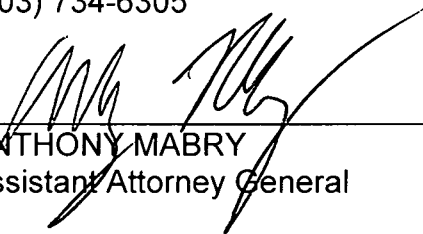
ALAN WILSON  
Attorney General

JOHN W. McINTOSH  
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ANTHONY MABRY  
Assistant Attorney General  
Bar No. 11973

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Columbia, SC 29211  
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ANTHONY MABRY  
Assistant Attorney General

February 13, 2013.

STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM CALHOUN COUNTY  
Court of Common Pleas (PCR)  
The Honorable Doyet A. Early, III., Circuit Court Judge

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Appellate Case No. 2013-000183

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MIKAL MAHDI., #5238,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner.

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**PROOF OF SERVICE**

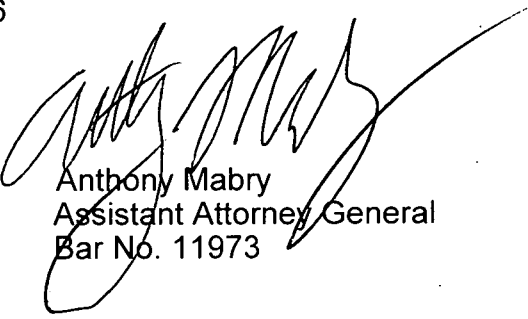
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I, ANTHONY MABRY, hereby certify that a true copy of the Motion to Stay Appeal and Remand for Consideration of Post Trial Motion has been served upon opposing counsel by depositing copies in the United States mail, postage prepaid, to the following:

Teresa Norris, Esquire  
Blume Norris & Franklin-Best, LLC  
900 Elmwood Avenue, Ste. 101  
Columbia, SC 29201

Seth Farber, Esquire  
Brandon W. Duke, Esquire  
Winston & Strawn, LLP  
200 Park Avenue  
New York, NY 10166

This 13<sup>th</sup> day of February, 2013.

  
Anthony Mabry  
Assistant Attorney General  
Bar No. 11973

STATE OF SOUTH CAROLINA )  
 COUNTY OF CALHOUN )  
Mikal D. Mahdi )  
 Plaintiff, )  
 vs. )  
State of South Carolina )  
 Defendant. )

IN THE COURT OF COMMON PLEAS  
First JUDICIAL CIRCUIT  
 CASE NO.: 09-CP-09-164

**MOTION AND ORDER INFORMATION  
 FORM AND COVERSHEET**

Plaintiff's Attorney: <u>Teresa L. Norris</u> , Bar No. _____ Address: <u>900 Elmwood Ave, Ste 101, Columbia SC 29201</u> Phone: <u>(803) 765-1044</u> Fax _____ E-mail: _____ Other: _____	Defendant's Attorney: <u>Anthony Mabry</u> , Bar No. <u>11973</u> Address: <u>P.O. Box 11549 Columbia SC 29211</u> Phone: <u>(803) 734-6365</u> Fax <u>(803) 734-4035</u> E-mail: _____ Other: _____
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MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)  
 FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)  
 PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

**SECTION I: Hearing Information**  
 Nature of Motion: Rule 59  
 Estimated Time Needed: 1 hr Court Reporter Needed:  YES /  NO

**SECTION II: Motion/Order Type**

Written motion attached  
 Form Motion/Order  
 I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for  Plaintiff /  Defendant \_\_\_\_\_ Date submitted \_\_\_\_\_, 20\_\_

**SECTION III: Motion Fee**

PAID - AMOUNT: \$ \_\_\_\_\_  
 EXEMPT: (check reason)

Rule to Show Cause in Child or Spousal Support  
 Domestic Abuse or Abuse and Neglect  
 Indigent Status  State Agency v. Indigent Party  
 Sexually Violent Predator Act  Post-Conviction Relief  
 Motion for Stay in Bankruptcy  
 Motion for Publication  Motion for Execution (Rule 69, SCRPC)  
 Proposed order submitted at request of the court; or,  
 reduced to writing from motion made in open court per judge's instructions  
 Name of Court Reporter: \_\_\_\_\_  
 Other: \_\_\_\_\_

**JUDGE'S SECTION**

Motion Fee to be paid upon filing of the attached order.  
 Other: \_\_\_\_\_

JUDGE CODE \_\_\_\_\_  
 Date: \_\_\_\_\_, 20\_\_

**CLERK'S VERIFICATION**

Collected by: \_\_\_\_\_ Date Filed: \_\_\_\_\_, 20\_\_

MOTION FEE COLLECTED: \$ \_\_\_\_\_  
 CONTESTED - AMOUNT DUE: \$ \_\_\_\_\_

STATE OF SOUTH CAROLINA )  
COUNTY OF CALHOUN )  
Mikal D. Mahdi, #5238, )  
Applicant, )  
v. )  
State of South Carolina, )  
Respondent. )

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IN THE COURT OF COMMON PLEAS

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

**RULE 59, SCRPC  
MOTION TO ALTER OR AMEND  
ORDER OF DISMISSAL**

This is a capital post-conviction relief case. On December 28, 2012, this Court issued its Order of Dismissal denying dismissing the allegations of Applicant Mikal D. Mahdi’s PCR Application with prejudice. The Order was filed with the Calhoun County Clerk of Court on January 8, 2013. Respondent received written notice of the entry of the Order of Dismissal on January 30, 2013.<sup>1</sup> Respondent believes this Court correctly decided all grounds presented in Applicant’s PCR Application except the Court’s finding of *deficient performance* of counsel with regard to the following ground:<sup>2</sup>

**Ground 10(a)/11(a)(iii)**

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. (See Amended Application p. 2).

Pursuant to Rule 59, SCRPC, Respondent moves that this Court alter or amend its Order of Dismissal to correctly find counsel was not deficient under this ground.

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<sup>1</sup>Respondent did not receive notice of entry of the Order until it received Applicant’s Notice of Appeal from the Order.

<sup>2</sup>Respondent agrees this Court correctly determined there was no prejudice to Petitioner from any *alleged* deficient performance.

Specifically, with regard to this ground, Mahdi claimed counsel should have interviewed and called in the penalty phase several of his extended family members and also community members and school officials to testify to his family, social, scholastic, and mental health history. Mahdi also claimed counsel should have presented the testimony collateral counsel presented through a different forensic social worker than the one used at sentencing. Mahdi claimed counsel should have introduced testimony from an expert regarding the effect of incarceration on Mahdi. Mahdi also alleged counsel failed to adequately investigate, develop, and present evidence concerning his mental health history or mentality, specifically counsel should have discovered and presented the testimony collateral counsel presented through Doctors Schwartz-Watts and Myers at PCR and counsel failed to provide certain records to his psychiatric/psychological experts. Finally, Mahdi claimed counsel failed to introduce certain documents at the sentencing proceeding such as certain school records, his DJJ records, and records from his commitment to the Walter Carter Center at age (9).

**1. In its Order of Dismissal, this Court erred in finding counsel's performance was deficient under this ground. This Court specifically held that counsel's performance in investigating mitigation evidence was deficient because counsel did not comply with several ABA Guidelines for Counsel in Capital or Death Penalty Cases (2003). The Court erred in doing so.**

As the United States Supreme Court pointed out recently in Bobby v. Van Hook, 558 U.S. 4, 130 S.Ct. 13, 175 L.Ed. 255 (2009), the ABA Guidelines are not the mandatory constitutional standard for determining whether counsel's performance was deficient or not, but the proper standard is that set forth in Strickland v. Washington. Id. Further, as Justice Alito pointed out in his concurring opinion in Van Hook:

I join the Court's *per curiam* opinion but emphasize my understanding that the opinion in no way suggests that the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003)(2003

Guidelines or ABA Guidelines) have special relevance in determining whether an attorney's performance meets the standard required by the Sixth Amendment. The ABA is a venerable organization with a history of service to the bar, but it is, after all, a private group with limited membership. The views of the association's members, not to mention the views of the members of the advisory committee that formulated the 2003 Guidelines, do not necessarily reflect the views of the American bar as a whole. It is the responsibility of the courts to determine the nature of the work that a defense attorney must do in a capital case in order to meet the obligations imposed by the Constitution, and I see no reason why the ABA Guidelines should be given a privileged position in making that determination.

Id. Subsequent, to Van Hook, the United States Supreme Court handed down Cullen v. Pinholster, 131 S.Ct. 1388, 179 L.Ed. 557 (2011) in which the Court reiterated that the determination of whether counsel's performance was deficient and ultimately ineffective cannot be made based specific guidelines. Id. In fact, the Court pointed out in Pinholster that "[b]eyond the general requirement of reasonableness, "specific guidelines are not appropriate." Id., *citing* Strickland, at 688, 104 S.Ct. 2052. The Pinholster Court went on to state: "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions..." Id., *quoting* Strickland, at 688-89, 104 S.Ct. 2052. The Pinholster Court went further in stating:

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

As a result, it is clear that since the particular decisions cited by this Court in finding deficient performance in this case, the United States Supreme Court has subsequently made clear that the mere fact that an attorney did not follow the ABA Guidelines in general or specific ABA Guidelines does not mean counsel's performance was deficient in performing a mitigation investigation in a capital case. As a result, this Court erred in finding counsel in the present case was deficient because counsel did not follow specific ABA Guidelines. Van Hook; Pinholster.

**2. This Court erred in finding counsel conducted a superficial mitigation investigation and one focused on competency and criminal responsibility. The record shows completely the opposite.<sup>3</sup>**

The record shows counsel did a reasonable mitigation investigation including retaining a mitigation investigator, Paige Tarr Haas, retaining a forensic social worker, Marjorie Hammock, and retaining a private investigator, James Gordon, to investigate and develop Mahdi's family and social history. The record also shows counsel retained two (2) psychiatric or psychological experts, Dr. Thomas Martin (a forensic psychiatrist) and Dr. Geoffrey McKee (a forensic psychologist), to investigate Mahdi's psychiatric history and mentality at the time of the crime *and* uncover any mental deficiencies or disorders that would mitigate punishment. (PCR 503 - 710). Counsel also interviewed Mahdi about his life and his life history.<sup>4</sup>

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<sup>3</sup>The record also shows counsel moved for and obtained a continuance for almost one (1) year in order to completely and thoroughly investigate and develop the mitigation case on Mahdi's behalf. (PCR 597-98, Resp. Ex. 16 (Motion for Continuance) & Resp. Ex. 17, Order of Judge Clifton Newman continuing the case from January until November).

<sup>4</sup>Counsel testified they also traveled to N.C. and met with Mahdi's defense attorneys and mitigation investigators in the N.C. murder case. Mahdi's N.C. defense team shared with counsel the results of their investigation. (PCR 597, 612). Counsel also testified there were team meetings at which the mitigation investigator, the forensic social worker, the retained psychiatric/psychological experts and counsel were present, and each person would share what their investigation had uncovered. (PCR 595-96, ). Counsel testified they also interviewed applicant

The record shows Ms. Tarr, the mitigation investigator, was retained by attorney Carl Grant on the recommendation of attorney Jeff Bloom, an experienced capital defense attorney. (PCR 589). Tarr had previously served as mitigation investigator or specialist *in thirty (30) to forty (40) capital cases*. (PCR 562-563). As a result, she was thoroughly familiar with the necessity of, and how to conduct a capital mitigation investigation. Ms. Tarr also traveled to Lawrenceville, Virginia and made contact with applicant's grandmother Nancy and uncle Nathan, and traveled to Philadelphia and made contact with applicant's aunt Lawanda, uncle Carson, and aunt Kathy. Ms. Tarr also located applicant's maternal aunts Corliss Artis and Sophie Gee in Richmond. Ms. Tarr also located applicant's mother Vera Mahdi. Ms. Tarr also attempted to speak with applicant's brother, Saleem, however, the brother was repeatedly unavailable to speak with Ms. Tarr. (PCR 563-575). Tarr traveled to Virginia, Maryland, and Pennsylvania to interview Mahdi's immediate family and members of his extended family. Tarr investigated applicant's social, family, school, institutional, and mental health history by interviewing Mahdi, his father, his mother, his grandmother, his paternal uncle Carson, his paternal aunt Lawanda, his paternal aunt Kathy Burwell, his maternal aunt Sophie Gee, his maternal aunt Corlis Artis, his paternal uncle Nathan, *and* school officials, and by obtaining records of applicant's background including his DJJ records, school records, and his records of commitment to a psychiatric facility in Baltimore when he was nine (9) years old. (PCR 563-575 & Resp. Ex. 12). Tarr additionally summarized these particular psychiatric records for counsel and their retained experts. (PCR 565-66). Tarr also summarized

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Mahdi and traveled to Virginia as well, and spoke with Mahdi's grandmother, Nancy Burwell, and uncle Nathan. Mahdi's uncle Nathan was not cooperative in their mitigation investigation, and counsel testified they would have been hesitant to call Nathan as a witness because he assisted police in identifying Mahdi from the video-tape of the N.C. murder and was proud of that fact.

applicant's school records for counsel and their retained experts. The mitigation investigator also met with Mahdi's defense team in the N.C. murder case and obtained the results of their mitigation investigation.<sup>5</sup> She returned to Virginia and Maryland with the forensic social worker where they were able to interview members of Mahdi's immediate and extended family. Tarr testified she provided counsel with summaries of the witnesses potential testimony and relayed to counsel the information collected. (PCR 574). As of November 6, 2006, one month before Mahdi's sentencing proceeding, Tarr had spent approximately 170 hours interviewing witnesses, collecting documents, and producing data in her quest to put together an appropriate mitigation presentation at sentencing. (Resp. Ex. 10). At that time, she anticipated working an additional seventy-five (75) hours in preparing the case for trial. (Resp. Ex. 10).

Ms. Marjorie Hammock, the forensic social work expert, retained by attorney Grant, had previously worked as a forensic social worker in numerous capital cases in several states including South Carolina. At the time of trial, Hammock had testified in and been qualified as an expert in clinical social work in approximately 14 cases. At trial, she testified she had worked on 25 capital cases. And, at the time of trial, Hammock was working on another 5 capital cases, some here in South Carolina, some in Florida, and one in Alabama. (R 1739-63). Hammock traveled with Tarr on a second (2<sup>nd</sup>) occasion to Lawrenceville, Virginia, to meet with applicant's paternal grandmother Nancy Burwell and his paternal uncle Nathan Burwell. She interviewed both. Hammock also traveled to Richmond, Virginia and attempted to speak in person with applicant's mother, who was not cooperative, and was finally able to speak with applicant's mother but only by telephone. Hammock also interviewed a family friend, Ms. Pearson. Hammock also interviewed applicant's

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<sup>5</sup>Mahdi's N.C. defense team was present at the PCR and did not contest this fact.

maternal aunts Sophie Gee and Corlis Artis. Hammock also traveled to Baltimore, Maryland where she met with and interviewed applicant's paternal uncle Carson Burwell and paternal aunt by marriage Lawanda Burwell. Hammock also interviewed applicant's father Shareef Mahdi while in Philadelphia. **(R 1739-63 & PCR 563-75).**

Both Dr. Martin and Dr. McKee, counsel's psychiatric and psychological experts, also took an additional social history from Mahdi, and also a psychiatric history. Both Martin and McKee were aware of applicant's earlier commitment to a psychiatric facility when he was 9 years old and reviewed those records in detail. Dr. Martin also reviewed Ms. Tarr's interview summaries with applicant's family members. Both experts were also aware that Mahdi had been placed in special education classes in elementary school. Both Drs. Martin and McKee were present at defense team meetings where information was shared regarding the joint investigation into Mahdi's past. Both Doctors Martin and McKee found separately that Mahdi was not suffering from any major mental illness at the time he committed this murder, and they diagnosed him with anti-social personality disorder at the time of Captain Myers' murder. While Dr. Martin testified he found that Mahdi had suffered from some recurrent depression in his life, he did not find any evidence that Mahdi was suffering from any depression at the time he committed the murder of Captain Myers. Doctor Martin testified at the PCR hearing that the records introduced by applicant Mahdi at PCR would not change his diagnosis. Dr. McKee testified at the PCR hearing he did not need additional records to make his diagnosis or issue his report. Neither Dr. Martin nor Dr. McKee changed their diagnosis based on records shown them by applicant at PCR. **(PCR 508-561)**

Counsel also traveled to North Carolina and met with Mahdi's defense attorneys and mitigation investigators in the North Carolina murder case. Mahdi's North Carolina defense team

shared with counsel the results of their investigation. (PCR 597, 612). Counsel also testified there were team meetings at which the mitigation investigator, the forensic social worker, the retained psychiatric experts and counsel were present, and each person would share what their investigation had uncovered. (PCR 595-96). Counsel also interviewed applicant Mahdi and traveled to Virginia as well, and spoke with Mahdi's grandmother, Nancy Burwell, and uncle Nathan. Mahdi's uncle Nathan was not cooperative in their mitigation investigation. Counsel testified they would have been hesitant to call Nathan as a witness because he assisted police in identifying Mahdi from the videotape of the North Carolina murder and was proud of that fact.<sup>6</sup> Mahdi's grandmother was cooperative in their mitigation investigation, and they had her present at trial/sentencing to testify, but she was unwilling to assist Mahdi regarding mitigation, stating she was there to defend the family name. Counsel also talked with Mahdi's aunt Lawanda and uncle Carson. While they were cooperative in providing background information on Mahdi and his family, Carson informed counsel that he would not be helpful to Mahdi if he testified in the case. Carson informed counsel Mahdi was defiant and manipulative in their home. Carson and Lawanda's position was they were glad Mahdi was out of their home. Both Lawanda and Carson admitted Mahdi made a false claim of child abuse against Lawanda and almost had her arrested. Carson also told counsel he and his wife were not going to help Mahdi.<sup>7</sup> Trial counsel also testified they spoke with Carson prior to the sentencing proceeding, and Carson told them that if he were called as a witness he would have bad things to say about Mahdi. Counsel also testified that Carson informed them that he and his wife, Lawanda,

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<sup>6</sup> Ms. Tarr also related to the Court that Mahdi's uncle Nathan was not helpful in the mitigation investigation. (PCR 576).

<sup>7</sup>Lawanda testified at Mahdi's PCR hearing that she would have been reluctant to testify at Mahdi's sentencing proceeding in 2006.

would not be going to help Mahdi in his sentencing proceeding. (PCR 618-20, 627-28, 649-50, 693-97). Carson admitted at PCR he may have told Mahdi's N.C. attorneys that Mahdi was a "demon" because of Mahdi's disruptive conduct in their home. Counsel also spoke with Mahdi's aunt Kathy Burwell, and she indicated she did not wish to participate in Mahdi's sentencing hearing, because she was still angry and resentful at Mahdi's brother for almost burning her house down. Counsel also testified they interviewed Mahdi's brother, Saleem, however, he was not particularly helpful or interested in testifying.<sup>8</sup> Counsel also testified Mahdi himself indicated to them he did not want his father involved in his trial or sentencing proceeding. Counsel testified Mahdi's mother was completely uncooperative and did not want to participate in Mahdi's sentencing proceeding. (PCR 602-710).<sup>9</sup>

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

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<sup>8</sup>Collateral counsel's forensic social worker, Nicholas Cooper-Lewter, admitted at PCR that Mahdi's brother, Saleem, would not talk to him either. (PCR 317-18).

<sup>9</sup>Neither Mahdi's mother nor his father or brother testified at the PCR hearing or offered any affidavits. (PCR 1-720).

worker Ms. Hammock. (PCR 624, ll. 17-22).<sup>10</sup>

The record clearly shows counsel's mitigation investigation was anything but superficial or focused only on competency to stand trial or criminal responsibility. Counsel, their mitigation investigator, forensic social worker, experts, and private investigator attempted to develop live mitigation evidence witnesses but were unable to do so due to the family members reluctance and/or refusal to testify at the time of trial, or refusal to testify in a helpful fashion. (PCR 503-710). The record also clearly shows counsel conducted a reasonable mitigation investigation. Strickland; Van Hook; Pinholster.

**3. This Court erred in finding counsel was deficient in presenting mitigation evidence at Mahdi's sentencing proceeding when essentially the same testimony presented at the PCR hearing was presented at Mahdi's sentencing through the forensic social worker *or* counsel made an objectively reasonable strategic decision not to present mitigation evidence, and Mahdi's family was uncooperative with counsel in being willing to testify favorably at the sentencing proceeding. See Simpson v. Moore, 367 S.C. 587, 605-07, 627 S.E.2d 701, 711-12 (2006)(reversing PCR Court's conclusion that capital defendant suffered prejudice from counsel's failure to offer sufficient social history evidence in mitigation case where record**

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<sup>10</sup>Mahdi's family's reluctance to testify is further demonstrated by what occurred at the PCR evidentiary hearing. Applicant's mother, father, and brother did not testify at the PCR hearing. His grand-mother did not testify at the PCR hearing, apparently because she now has dementia; however, there was no contention by Mahdi that counsel should have called the grandmother Nancy Burwell at sentencing. At the time of sentencing, she was only interested in defending the family name, not helping Mahdi. None of Mahdi's immediate family testified at the PCR merits hearing. Nor were any affidavits offered by them. (PCR 1-720). The circumstances trial counsel faced are similar to those faced in Rutherford v. Crosby, 385 F.3d 1300 (11<sup>th</sup> Cir. 2000). In that case, the defendant's family was uncooperative at the time of trial. The behavior of applicant's family is typical in these type cases. When the crime has been recently committed and those who knew the victim are still outraged, the defendant's family and friends are likewise shocked, angry, embarrassed, and disappointed in the defendant's behavior. In this case, as in others, they are in no mood to assist the defendant in escaping responsibility for his crimes. (See PCR 619, ll. 19-24). It is only after the passage of many years, when the case is on post-conviction relief, and the case is no longer in the forefront of the community's or the victims' family's mind, that witnesses become cooperative and insist that they would have cooperated at the time of trial, when in fact they were originally hesitant, did not want to be involved, or refused to testify.

showed counsel did in fact do adequate investigation and presented similar mitigation evidence); Jones v. State, 504 S.E.2d 822 (S.C. 1998)(no prejudice shown where mitigation evidence presented at PCR was not that different from evidence presented at trial).

The record shows many of the witnesses presented at the PCR hearing were interviewed by counsel or the mitigation team, or both; however, at the time of the sentencing proceeding these witnesses were uncooperative or unwilling to come and testify favorably on Mahdi's behalf and counsel was forced to present the mitigation story through the forensic social worker rather than through mitigation witnesses. However, the same information was related to the sentencing judge through the forensic social worker, Ms. Hammock, i.e. that Mahdi came from a superficially intact family that was dis-functional upon further examination, and Mahdi was the product of a broken home, in which he witnessed domestic violence, in which his mother was withdrawn and his father suffered from mental illness and could not competently care for applicant.<sup>11</sup>

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<sup>11</sup>Ms. Hammock conducted a bio-social assessment of Mahdi's life and family history. (R 1747). She testified to the same before Judge Newman. (R 1739-63). She interviewed Madhi's paternal grandmother Nancy Burwell, his paternal uncle Carson, another paternal uncle Nathan, his paternal aunt Lawanda Burwell, his mother Vera Telea Artis, his maternal aunt Sophie Gee, another maternal aunt Corliss Artis, and Mahdi's father Shareef Mahdi. (R 1746-47). She also interviewed a family friend. She conducted her bio-social assessment by interviewing family members, reviewing records, interviewing Mahdi, and taking information from anyone who would give information about Mahdi, his life and development. (R 1762). She also reviewed a synopsis of Madhi's school records and reviewed a report from his admission in Baltimore to a psychiatric facility [the Walter Carter Center] at the age of nine (9). (R 1747). Like the family witnesses presented at PCR, Hammock testified to the problems within Mahdi's family. Mahdi's family looked like an intact family, but there were problems within the same. There was alcoholism in the family, and there was some neglect on the part of Mahdi's grandfather. (R 1750). Counsel introduced through Hammock a time-line of Mahdi's family which sets forth Madhi's grandmother, Nancy, was not allowed to have her tubes tied after the birth of 1 of the siblings born before Mahdi's father, Shareef, was born. (Def. Ex. 2/Resp. Ex. 5, p. 1). Hammock testified Mahdi's father, like Mahdi, was extremely troubled as a child. (R 1749-50). The time-line sets forth Madhi's father was described as disturbed as a young child, threw tantrums, and his mother was not emotionally available to him or his younger sister, Kathy. (Def. Ex. 2/Resp. Ex. 5). Hammock testified Mahdi's father considered himself an unwanted child. (R 1750). His childhood was difficult, and he grew up in a situation feeling alienated from

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everyone around him. (R 1750). Mahdi's father was traumatized by his attending desegregated schools as a young child. (R 1750). The time-line sets forth this experience was destructive to Mahdi's father. He was ridiculed, isolated, challenged physically by classmates, ignored or received negative feedback from instructors at school. (Def. Ex. 2/Resp. Ex. 5). Hammock also testified to Mahdi's father's inability to get along with his own family and others in the community. (R 1750). Mahdi's father was constantly in conflict with those around him. (R 1750). On cross-examination of a State's witness, counsel also brought out Mahdi's father had committed assaults on some of his own family members. (R 1433). Mahdi's father did not finish high school, and he was the only sibling that did not, and this was a source of consternation between he and his family. (R 1750). Hammock testified to his inability to hold a job and his eventual conversion to Islam. (R 1750-51). The time-line also sets forth Mahdi's father was suffering from depression as early as 1971. (Def. Ex. 2/Resp. Ex. 5). Hammock testified Mahdi's father's conversion to Islam, and his changing his name from Thomas Burwell to Shareef Mahdi brought grief to the Burwell family. (R 1750). She also testified to Mahdi's father's discharge from the Marines under less than honorable conditions. (R 1750). Hammock testified Mahdi's father was not able to function well, and there was some description of Mahdi's father suffering continuing depression. (R 1751). There were a number of incidents involving Mahdi's father with local law enforcement. (R 1751). The time-line also sets forth Mahdi's father was involved in a series of misdemeanors locally, all said to be racially motivated. (Def.'s Ex. 2/Resp.'s Ex. 5). On cross-examination of a State's witness, counsel also brought out Mahdi's father had prior dealings with law enforcement in the community. (R 1433). On cross-examination of the same witness, counsel also brought out Mahdi's father's involvement in the eight (8) hour stand-off with law enforcement. Hammock also interviewed Mahdi's mother. (R 1756-58). Mahdi's mother was extremely withdrawn and did not want to participate in the interview at all. (R 1756). It appeared as if Mahdi's mother was frightened about being involved with the family again because of her previous experiences with Mahdi's father. (R 1757). While Mahdi's mother did eventually educate herself, joined the military, and at the present time worked and took care of herself, she was totally isolated from her own family, as well as the Burwell (Mahdi's paternal) family. (R 1757). While Mahdi's mother may occasionally speak to some members of the family, there was a disconnection there. (R 1757). The information regarding Mahdi's mother came from Mahdi's mother herself *and* from her siblings and the Burwell family, and it was all consistent. (R 1757). She testified Mahdi's father and mother's marriage was a pre-arranged one to which Mahdi's mother did not agree, and Mahdi's father was much older at the time of the marriage than Mahdi's mother, who was 16 at the time. (R 1751). The time-line also sets forth the marriage between Mahdi's father and mother was arranged by Mahdi's maternal grandmother, and Mahdi's father was 27 years old, and Mahdi's mother was just 16 at the time of the marriage. (Def.'s Ex. 2/Resp.'s Ex. 5). Mahdi's mother had no choice but to join the marriage, and there was conflict in the marriage from its very beginning. (R 1751). The time-line sets forth that after the arranged marriage, Mahdi's father changed Mahdi's mother's birth name, Vera, to Tilea. (Def.'s Ex. 2/Resp.'s Ex. 5). Mahdi's father was physically abusive to Mahdi's mother, and Mahdi's mother eventually left to escape the abuse. (R 1751). Mahdi's mother was in what she, Mahdi's mother, described, and others described, as an abusive

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relationship, with Mahdi's father, and she decided to leave because she could no longer stay with Shareef Mahdi even though it meant leaving her children. (R 1757). As previously stated, on cross-examination of a state's witness, counsel brought out Mahdi's father had assaulted members of his own family. (R 1433). Hammock testified Mahdi's childhood was chaotic. (R 1751). Mahdi's brother and then Mahdi were born into a very unstable family. (R 1751). The 2 children were born within a 24 month period of time. (R 1757). Mahdi's father could not provide for or take care of the family. (R 1751). The family moved several times, ultimately ending up back in Lawrenceville living with Mahdi's grandmother. Once again, Mahdi's father was not able to sustain himself. (R 1751). There was a great deal of conflict between Mahdi's father and Mahdi's mother, and Mahdi and his brother Saleem witnessed this. (R 1751). The time-line showed Mahdi's life until he was committed to an adult prison facility. (Def.'s Ex. 2/ Resp.'s Ex. 5). Hammock testified the exhibit accurately reflected what had occurred in Mahdi's life. The Exhibit sets forth Mahdi and his brother witnessed domestic violence committed by their father against their mother. (Def.'s Ex. 2/Resp.'s Ex. 5). Mahdi's mother eventually left the family trying to get away from the abuse committed by Mahdi's father. (R 1751). Mahdi's mother was forced to leave because of the abuse. (R 1757-58). Mahdi's mother left applicant Mahdi and his brother Saleem when Mahdi was just 4 or 5 years old. (R 1751-52). After Mahdi's mother left him at a young age, the chaos continued. (R 1752). Mahdi's father tried to take care of the children, and the grandmother, Nancy Burwell, also tried to provide assistance during this time, but the relationship between Mahdi's father and the grandmother and the rest of the family members was constantly confrontational. (R 1752). The time-line also sets forth Mahdi and his brother witnessed their father commit domestic violence on their grandmother. (Def.'s Ex. 2/Resp.'s Ex. 5). During this period of time, there were several moves in terms of schooling for Mahdi from Lawrenceville to Richmond and back to Lawrenceville. (R 1752). Hammock also testified to the incident described by family members at PCR where Mahdi's father forced Mahdi's mother to come back to Lawrenceville and assaulted her. (R 1752). After Mahdi's mother left to get away from the abuse, she was literally forced to return from Richmond to Lawrenceville, ostensibly to see the boys, but this ultimately resulted in physical conflict, and Mahdi's mother left again not to see her children for a number of years. (R 1752). The time-line also sets forth this incident. The time-line sets forth Mahdi's mother, Vera (Tilea), was taken to Lawrenceville from Richmond by Shareef, who then abused Mahdi's mother. It sets forth Mahdi's uncle Nathan actually rescued Mahdi's mother, but as a result of this incident Mahdi and his brother witnessed more abuse and violence. (Def.'s Ex. 2/Resp.'s Ex. 5). The time-line also chronicles that after this incident Mahdi's mother moved to Pottsdale without the children (Mahdi or his brother Saleem) in order to escape from Mahdi's father. (Def.'s Ex. 2/Resp.'s Ex. 5). Ultimately, Mahdi's father was unable to take care of Mahdi at all. (R 1753). The time-line also sets forth Mahdi's father suffered from depression. (Def.'s Ex. 2/Resp.'s Ex. 5). Hammock testified that at that point in time, Mahdi is sent to live with his aunt and uncle in Baltimore, and his brother Saleem is sent to live with another aunt in Texas. (R 1753). As a result, Mahdi and his brother are separated, and the two boys are separated from their father. (R 1753). The time-line introduced also sets forth this same information. (Def. Ex. 2/Resp. Ex. 5). Hammock testified she personally interviewed the aunt and uncle Mahdi had to live with because of his

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father's inability to care for him (Lawanda and Carson Burwell), and they related Mahdi was a bright and energetic young boy, but very, very troubled, who had difficulty in school. (R 1753). Carson related that when Mahdi came to live with them he could not read. (R 1753). There was conflict at this time in getting Mahdi to deal with the fact that he had these academic limitations. (R 1754). Hammock also testified Mahdi had been hospitalized, psychiatrically, on 1 occasion in Baltimore. (R 1747, 1749, 1756). This admission lasted approximately two (2) months at a mental health facility, and Mahdi was released. (R 1756). The time-line sets forth Mahdi was committed involuntarily to the Walter Carter Center psychiatric facility, after being separated from his brother and father, where he was diagnosed with Major Depression with suicidal ideation, adjustment disorder, R/O Adjustment Disorder, Developmental Reading Disorder, and history of right arm and leg fractures. (Def. Ex. 1/Resp. Ex. 5). [Mahdi suffered broken bones as child while riding a bicycle and falling off of monkey bars. There was no contention at PCR that Mahdi was ever physically or sexually abused by anyone. (PCR Tr. pp. 571-572).] The Exhibit sets forth Mahdi spent sixty (60) days in the psychiatric facility in Baltimore. After Mahdi was released from the facility, he stayed only a short time with his aunt and uncle, Carson and Lawanda, because he was anxious to be reunited with his father and brother. (R 1756). The time-line also sets forth Mahdi's behavior in Carson and Lawanda's home was defiant and became even more defiant when Mahdi learned his brother had already re-united with his father, and, as a result, Mahdi had to be returned to his father. (Def. Ex. 2/Resp. Ex. 5). It also sets forth Mahdi, his brother, and his father were subsequently re-united on the Burwell family property, and this was an isolated place in the country, and they often had no food, heat, or money. (Def. Ex. 2/ Resp. Ex. 5). Hammock also testified Mahdi had difficulty in his adolescence which eventually resulted in his incarceration. (R. 1749). She also testified Mahdi eventually re-united with his mother, however this did not work out. It was not a good reunion. Mahdi and his mother did not get along, and they both had very different ideas about his living with her. (R 1758). The time-line reflects Mahdi re-united with his mother after being released from DJJ after his 1st stint of incarceration. (Def. Ex. 1/Resp. Ex. 5). After this split from his mother, Mahdi and his mother had not spoken to each other since. (R 1758). Hammock also testified to Mahdi's difficulties in school. In her expert opinion Mahdi's education was disrupted many times. (R 1752,1756). She testified this was reflected in the school records. (R 1752). She also testified the school records noted lateness and absences, but not consistently through the whole record. (R 1756). The time-line of Mahdi's school history introduced showed Mahdi was forced to change elementary schools five (5) times. (Def. Ex. 3). The time line of Mahdi's life also shows Mahdi had to move several times. (Def. Ex. 2/Resp. Ex. 5). Hammock testified Mahdi started out kindergarten at Sister Clara Muhammad School in Richmond. He also completed part of kindergarten at Totoro Elementary School in Lawrenceville. Mahdi then moved back to Richmond and attended Chamberlayne Elementary School for part of that year. Then he is removed from there and sent to Baltimore where he attended Scotts Branch Elementary School for 2 years. Then he was removed from that school while in the Carter Center, and ultimately returns back to Lawrenceville to live with his father. (R 1754-56). Hammock testified even in his pre-teen years there was a lack of stability in terms of Mahdi's attending school, and it was reflected in the kinds of reports he received. (R 1760-61). She

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testified Mahdi constantly had difficulty in school. (R 1752). He was considered bright, but he didn't perform well. (R 1752-1753). Mahdi was particularly a poor reader. (R 1753). Mahdi's uncle Carson also reported Mahdi could not read when he came to live with them at eight (8) years old. Both Carson and Lawanda also reported Mahdi had difficulty in school. (R 1753). Carson and Lawanda reported there was constant conflict in getting Mahdi to deal with the fact that he had academic limitations. (R 1754). Hammock testified the school records during this time were consistent with this report. (R 1754). She testified Mahdi had uneven skills in school. (R 1755). Mahdi was in the average math program, but in the below average reading program. (R 1755). While he excelled in science, his reading, vocabulary, and spelling remained below average. (R 1756). He needed improvement in a number of areas, including standards for behavior and showing respect for authority. (R 1755). Mahdi was described as having poor self-esteem throughout his academic time. (R 1753). It was noted several places that he had poor self-esteem and had difficulty in relationships with others. (R 1756). The time line of Mahdi's life also shows when he was involuntarily committed to the Carter Center his initial diagnosis included "Developmental Reading Disorder." (Def. Ex. 2/Resp. Ex. 5). Counsel also introduced another Exhibit through Hammock (See Def. Ex. 3) which summarizes Mahdi's difficulties in school particularly in reading, and writing, which remained at below grade level throughout elementary school. Hammock confirmed this in her testimony. (R 1755). The exhibit also chronicles the numerous absences Mahdi had while in school. (Def. Ex. 3). And, that Mahdi's father removed him from school in the 5<sup>th</sup> grade to home school him. (Def. Ex. 3). The exhibit also indicates there was no information this home schooling had occurred. (Def. Ex. 3). Hammock testified Mahdi's educational history was one of poor school progress. (R. p. 1762). Hammock informed Judge Newman Mahdi did not receive proper parenting while growing up. (R 1759). Mahdi' father was not equipped to provide consistency, positive reinforcement, support, care giving, to teach social values in the community, and how to develop relationships with others, i.e. those things children need to grow up healthy. (R 1759). Mahdi's father had his own personal issues that prohibited him from being a good father. (R 1759). Mahdi's father and his mother were not really available to Mahdi on any kind of consistent basis. (R 1760). Mahdi was exposed to a lot of conflict and chaos. (R 1760). In his preteen years he was exposed to more chaos, more movement, more change, a lack of stability even in terms of his attending school, and this was reflected in the kinds of reports he received. (R 1760). In his adolescent years Mahdi was exposed to more chaos. (R.1761) He was exposed to his father's outbursts and problems. (R 1761). His father was known to be at odds with people in the community, with his own family, and with law enforcement. (R 1761). Hammock testified Mahdi cares about his father, wanted more than anything else to have an intact family and an ongoing relationship, but that did not happen. (R 1761). Hammock testified Mahdi did not receive from his mother or father consistent help in growing up, developing good skills, and a sense of value. (R 1761). While some people tried, it was not consistent enough for him to learn how to do these types of things. (R 1761). Mahdi had been traumatized throughout his early life, and this had an impact on his inability to make good choices. It also had an effect on his ability to have a good sense of himself and others. And, it had an impact on his ability to behave according to societal norms. (R 1762). Hammock testified that during her investigation

Further, counsel had to be careful regarding presentation of mitigation testimony from Virginia or Mahdi's previous incarcerations because of the danger of opening the door to damaging character evidence of Mahdi's criminal conduct in the community, including two (2) unsolved homicides, and his egregious behavior in the Department of Juvenile Justice and the Virginia Department of Corrections. Wong v. Belmontes, 558 U.S. \_\_\_, 130 S.Ct. 383 (2009). If counsel did not present certain evidence Mahdi presented at PCR, there was an objectively reasonable strategic reason for not doing so. Strickland v. Washington; Council v. State. Mahdi presented several family members at the PCR hearing who were previously interviewed by Ms. Tarr, Ms.

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of Mahdi's life, she assessed whether certain risk factors were present or not. She testified certain risk factors were present. Mahdi had been abused and neglected. He suffers from abandonment. He was never exposed to the right kind of socialization. And, he has poor self-esteem. He has a poor history of school progress and a poor sense of self. (R 1762). Mahdi is someone who has been neglected, was abandoned, suffers from poor parenting, and as a result is likely to end up in a situation where he is out of control and he does damage to himself and others. Mahdi fits the typical profile of persons who end up in the kind of situation before the sentencing court, because Mahdi never really had a chance to develop appropriately. (R 1762-63). The State did not cross-examine Hammock or challenge her mitigation testimony. R 1763). The State did not challenge the accuracy of the exhibits introduced through her. (R 1739-63). All of this evidence was before the sentencing court uncontested. Further, the State introduced portions of Mahdi's DJJ records during the sentencing proceeding. These records also confirmed much of what Hammock testified to regarding Mahdi's family and upbringing. They indicate Mahdi lacked appropriate parental discipline and support. Mahdi was not supervised as a child and was not given appropriate structure and guidelines.(State's Ex. & See R. 1440, 1442, 1869-70, 1873-74). Mahdi began smoking marijuana at age 12 and had been smoking marijuana every day since he was twelve (12) years old. Mahdi informed DJJ officials he began selling crack cocaine at age fourteen (14). (R 1440). The records indicate Mahdi needed self-esteem training, family services, and values clarification. Mahdi suffered from a lack of a mother. (R 1446). Mahdi's father was not involved in his life, the father had a criminal record for malicious damage to property and escape, Mahdi had no supervision, no curfew, and Mahdi's father did not care about Mahdi's criminal behavior. (R 1869-70, 73-74). Mahdi came from a dis-functional one (1) parent family. The DJJ day notes also indicate that Mahdi's father believed the criminal justice system was prejudiced, and he also voiced his belief that there were many white supremacists in the area. (R 2146). These notes also indicate that a young Mahdi also makes racial comments. (R 2154).

Hammock, and/or counsel prior to the sentencing proceeding, but not called during the sentencing proceeding. At the time of the sentencing proceeding these witnesses were not cooperative with trial counsel and were unwilling to testify at the sentencing proceeding. Further, counsel testified the witnesses related or their investigation uncovered that the witnesses would say bad things about Mahdi.

Carson Burwell related to applicant's defense attorneys in N.C. that Mahdi "was a demon." This fact was established by a document generated by Ms. Tarr after meeting with the N.C. attorneys and shared with defense counsel in this case. (PCR 503-05, Def. Ex. 7). Carson also related to counsel in this case that if he were called to testify he would not have good things to say about Mahdi. (PCR 618-619). Carson indicated Mahdi was manipulative and faked abuse and suicidal gestures. (PCR 572-74, 64). Both Lawanda and Carson admitted Mahdi almost had them arrested by police when he made a false claim of child abuse, and manufactured false evidence of that abuse. (PCR 572-74, 58-61, 63-64, 266-67, 287-88, 290). Lawanda and Carson also related Mahdi acted out while at the Carter Center, the psychiatric facility, and had to be placed in isolation. (PCR 66-67, 292). Carson also related to Haas that Mahdi was manipulative. (PCR 572-74). Carson related Mahdi acted out after being released from the Carter Center and had to be returned to live with his father. (PCR 68-69, 618-19). Lawanda also related Mahdi acted out and had to be returned to live with his father. (PCR 293-94). Both aunt and uncle related Mahdi would only talk about suicide when he did not get his way or did something wrong. (PCR 572-74, 64-66, 288-89, 618-19). Carson was also aware of an incident where Mahdi, his brother, and his father were involved in destroying Carson's sister's car. (PCR 69). Carson and Lawanda also related that when Mahdi lived with his uncle Nathan as an adult, he could not abide by the rules of the house, and was forced to leave that

home. (PCR 70, 278).

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

Counsel was not ineffective in failing to call witnesses from whom negative things could be elicited about Mahdi, or who also indicated they were not going to be helpful to Mahdi. It was an objectively reasonable trial strategy decision for counsel not to call Carson or Lawanda Burwell or Sophie Gee, who could be asked on cross-examination about confirmed instances of bad conduct by applicant and who would have been required to answer truthfully to such questions. Reed v. Florida Department of Corrections, 393 F.3d 1217 (11<sup>th</sup> Cir. 2010)(attorneys were not ineffective in failing to call family members who would have opened the door to bad things about defendant's past); Rutherford v. Crosby, 385 F.3d 1300 (11<sup>th</sup> Cir. 2000)(attorneys' strategic decision not to call witnesses on alcoholism of defendant was objectively reasonable where it would have opened the door to prior violent behavior of the defendant that the jury had not heard). See Bell v. Kelly, 260 Fed. App. 599 (4<sup>th</sup> Cir. 2008)(*Unpublished Opinion*)(finding state court's determination petitioner had failed to prove prejudice was not unreasonable where petitioner alleged counsel was ineffective for failing to investigate and present family members mitigation where family members could have been cross-examined about the defendant's prior bad conduct such as infidelity, abandonment of his

children, wife, and girlfriend, domestic abuse, and failure to provide child support), *citing Barnes v. Thompson*, 58 F.3d 571 (1995)(upholding in a federal habeas district court's determination that counsel was not ineffective in state death penalty case in failing to offer family members who constituted "cross-purpose evidence."); *Moody v. Polk*, 408 F.3d 141, 154 (4<sup>th</sup> Cir. 2005)(to the extent affidavits presented new information, they were "double edged.").

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

Counsel's testimony concerning reasonableness and strategy on this issue is also supported and corroborated by the evidence and testimony introduced at the PCR hearing. Counsel made an objectively reasonable trial strategy decision not present witnesses who were uncooperative, refusing to testify, or had bad things to say about Mahdi or from whom bad information about Mahdi could have been elicited on cross-examination. *Strickland v. Washington* (objectively reasonable trial strategy decisions are not subject to claims of ineffective assistance of counsel); *Council v. State* (counsel's strategic decisions will be judged on an objective standard of reasonableness); *Wong v.*

Belmontes (it was an objectively reasonable trial strategy decision for counsel not to call witnesses who would expose on cross-examination bad character evidence about the defendant).

Mahdi also presented the testimony of a community activist George Smith, an affidavit of James Woodley, an affidavit of Vernon Pond, and the testimony of Sharon Pond, who testified to Mahdi's father's behavior in the community. Both the activist and Ms. Pond testified to an incident where Mahdi's father jumped into a segregated [all white] swimming pool and would not leave the pool in protest. He was subsequently arrested and began throwing items at the jail. As a result, he was sent for a mental evaluation. The evaluation eventually determined Mahdi's father had no major mental illness. Mr. Woodley averred to Mahdi's father's conversion to Islam, his behavior in the community and his abusive behavior toward his wife and his mother. **(PCR 166-86, & Affidavits of James Woodley and Vernon Pond)**. Counsel was not ineffective in failing to interview these witnesses where similar testimony was presented to the sentencing court by counsel.

Mahdi claims counsel should have called a different social worker than Ms. Hammock, Dr. Nicholas Cooper-Lewter, and related what Cooper-Lewter related to this Court. However, Mahdi discounts that counsel did retain and call a qualified clinical social work expert who interviewed Mahdi, Mahdi's immediately family, and many members of his extended family.

As previously set forth above, Ms. Hammock testified in detail before Judge Newman to the problems in Mahdi's family including his father's difficulties in life, including depression, criminal arrests, inability to keep a job, and inability to get along with the community and even with his own family. **(R 1734-63 & Def. Ex. 2)**. Hammock also testified to Mahdi's life of deprivation, including transience, lack of proper support, abandonment by his mother, witnessing domestic violence committed by his father on his mother and grandmother, lack of a proper male role model, and

psychiatric commitment at the age of 9. (R. 1734-63 & Def. Ex. 2). Hammock also testified to the risk factors Mahdi was exposed to as a child and adolescent and how that affected the rest of his life. (R 1734-63). The DJJ records introduced at sentencing also detailed that Mahdi came from a dysfunctional one parent family, and Mahdi was provided with no structure or guidelines as a child. Cooper-Lewter admitted at PCR that this information was before Judge Newman. (PCR 328-40). Mahdi has failed to show deficient performance in failing to present the information presented by Cooper-Lewter because much of Cooper-Lewter's testimony was also testified to by Ms. Hammock at the sentencing hearing. Simpson v. Moore, 367 S.C. 587, 605-07, 627 S.E.2d 701, 711-12 (2006)(reversing PCR Court's conclusion that capital defendant suffered prejudice from counsel's failure to offer sufficient social history evidence in mitigation case where record showed counsel did in fact do adequate investigation and presented similar mitigation evidence); see Jones v. State, 504 S.E.2d 822 (S.C. 1998)(no prejudice shown where mitigation evidence presented at PCR was not that different from evidence presented at trial). Counsel is not required to expert shop. See Poyner v. Murray, 964 F.2d 1404, 1419 (4<sup>th</sup> Cir. 1992)(petitioner could not establish ineffective assistance because counsel did not "expert shop" until one could be found who would testify favorably).

Additionally, if counsel had called Dr. Cooper-Lewter, on cross-examination the Solicitor would have introduced Mahdi's numerous disciplinary violations within the Virginia DJJ as the State did at the PCR merits hearing which dramatically removed positive impact of his testimony. Cooper-Lewter specifically relied on these records in forming his assessment of Mahdi. There were over forty (40) disciplinary violations by Mahdi in the Virginia DJJ. These included Mahdi assaulting a teacher; assaulting guards on numerous occasions; assaulting other inmates, leading an escape attempt, refusing to follow orders; refusing to be disciplined, cursing staff, and damaging and

destroying property. Cooper-Lewter could also have been questioned about Mahdi's statements to Cooper-Lewter that he never should have been placed in special education in elementary school, because he did not belong there. Cooper-Lewter would also have been cross-examined about Mahdi's numerous disciplinary violations within the Virginia Department of Corrections, including assaulting staff, setting fire to his cell, and possession of contraband. The State would also have cross-examined Cooper-Lewter as he was at PCR regarding Mahdi's faking a suicide attempt at DJJ in order to manipulate the system to gain better conditions of confinement. The State would also have brought out from Cooper-Lewter that Mahdi was diagnosed at DJJ with conduct disorder, which is a pre-cursor to a diagnosis of anti-social personality disorder.

The State at trial would also have cross-examined Cooper Lewter on the fact Mahdi's aunt informed him that Mahdi would threaten to harm himself when he did not get his way. The State would also have brought out that Mahdi informed personnel at the Carter Center that he only wanted to hurt himself when he did not get his way. The State would also have cross-examined Cooper-Lewter on the fact that Mahdi's brother grew up in the same home and did not commit criminal offenses.

Cooper-Lewter would also have been cross-examined regarding Mahdi holding several different jobs during his life and even obtaining college credits. Cooper-Lewter would also have been forced to admit, as he testified at PCR, that Mahdi had never been physically abused or sexually abused by his father, mother, or uncle Carson or aunt Lawanda. (PCR 340-41).

Cooper-Lewter would also have been impeached on the fact that he did not review any records on Mahdi after he was released from the Virginia Department of Corrections. He did not review Dr. Martin's notes; he did not review Dr. McKee's notes, and he did to even review Ms.

Hammock's interview notes. He could not opine what stressors, if any, Mahdi was under or caused him to commit the murder of Christopher Boggs or Captain Myers. Cooper-Lewter admitted that he did not include any details regarding Mahdi's employment history in his report, and he asserted he did not do so because he did not believe it was important in terms of impacting Mahdi's psycho-social history. This testimony is simply not persuasive. Counsel was not deficient in failing to call Cooper-Lewter or in not presenting the information Cooper-Lewter presented.

Mahdi claims counsel should have called Dr. Haney at mitigation to elicit his testimony above and to underscore the impact of Mahdi's confinement on him.<sup>12</sup> There is no merit to this argument. Dr. Haney's testimony is not persuasive nor are his conclusions supported by the evidence in the record. Dr. Haney attempts to place the blame for Mahdi's criminal conduct on untreated psychological issues or directly on the criminal justice system. Judge Newman would not have found this testimony persuasive to a reasonable probability in light of the entire record. Counsel was not deficient in failing to present such evidence.

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

The sentencing court was aware Mahdi had been committed to the Walter Carter Center after being separated from his father and brother. The Court was aware of the diagnosis of Mahdi while

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<sup>12</sup>Craig Haney, Ph.D, an expert in social psychology with specific expertise in prison systems and the effects of incarceration on inmates, reviewed Mahdi's school records, psychiatric records, juvenile justice records, and Virginia Department of Corrections.

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

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

Nor is Dr. Haney's testimony that Mahdi is just an impulsive actor and does not victimize others persuasive. The Virginia DJJ records and Mahdi's adult criminal records from Virginia show without question that he is a person who victimizes others and manipulates the system for his own

benefit. Mahdi repeatedly assaulted guards in Virginia. Further, Mahdi's records from the South Carolina Department of Corrections, which Dr. Haney did not review, show that Mahdi has repeatedly assaulted guards and threatened to assault guards here. Additionally, Mahdi's conduct in murdering Christopher Boggs in North Carolina shows his plan was to murder Boggs simply so he could rob the store's cash register. And, trial counsel's testimony, along with that of Dr. Martin and Dr. McKee at PCR, shows that Mahdi plans out criminal behavior when necessary to benefit himself. As a result, Dr. Haney's testimony would not have been persuasive to Judge Newman.

Nor should the Court accept Dr. Haney's testimony that Mahdi's incarceration in DJJ and in adult prison led to his later criminal conduct. Haney misses the point. The elephant in the courtroom is Mahdi's bad character and characteristics that led him to be confined, and which continued and led him to be confined in the institutions in which he was confined. And, Mahdi did not conform his conduct to the requirements of the law so that he would not go back to a harsh prison environment, but committed even more and more violent offenses.

The record shows Mahdi was not confined after his first brush with the law. Mahdi was arrested at fourteen (14) years old after breaking into a car and stealing a purse. Mahdi also escaped from police custody after this arrest. Mahdi admitted to DJJ employees that he had no problem in stealing, and he felt no remorse about it. Mahdi was placed on juvenile probation for this offense. **(PCR 342-43, Mahdi's DJJ Records)**. While on juvenile probation, Mahdi did not adjust his criminal behavior. Mahdi broke into two (2) homes and stole firearms. One gun was a .44 magnum pistol. As a result, Mahdi was confined at the Virginia DJJ. While there, Mahdi led a pre-meditated assault on another inmate, in which he enlisted the support of other juveniles. This inmate was injured and had to be taken for medical treatment. While confined on this first occasion, Mahdi

complained that he should not be confined at all because he did not have a lengthy juvenile record. While confined, Mahdi admitted that one of his strengths was robbing people. During this confinement, Mahdi engaged in other disruptive behavior and committed other disciplinary violations.

After his release from DJJ, Mahdi was confined again after engaging in an eight (8) hour standoff with police. During this stand-off, Mahdi was heard to say "them mother-fuckers' got guns" and "I'm going to kill a police officer before I die." While Mahdi attempts to blame his father for this stand-off, Mahdi could have walked out of his home anytime he wanted to during the standoff. When the stand-off ended, police found Mahdi in the back room of the house watching television. Mahdi was recommitted to DJJ for obstruction of justice and contempt of court.

While incarcerated this 2nd time, Mahdi assaulted other inmates, destroyed property, assaulted staff, threatened staff, and generally refused to follow orders and comply with discipline. Mahdi threatened that if he was not released from DJJ on time (i.e. when he expected to be released), he would "go around acting crazy" and assaulting people. Mahdi also threatened that if he were not released on time, guards would find him hanging in his cell. True to his word, Mahdi fashioned a sheet into a noose and tied it around his neck, causing him to be placed on suicide watch. Later, Mahdi admitted to the staff counselor that this suicide attempt was not genuine, and he only wanted better living conditions, specifically more recreation time, and was attempting to manipulate the system by the suicidal gesture. After this incident, Mahdi incurred other disciplinary violations, including an assault.

Mahdi was eventually released from DJJ. Rather than maintaining good behavior so that he would not have to return to prison, Mahdi slashed his mother's tires either because she would not

come to the door of her residence, or she would not let Mahdi use her car.

Subsequently, Mahdi attempted to break into an apartment. When caught in this last act, he severely stabbed Moises Rivera, a maintenance worker at the apartment complex. Madhi fled the scene and was apprehended by police using dogs. Madhi was sentenced to adult prison for this criminal act.

While in adult prison, Mahdi engaged in the same behavior he had in the Virginia DJJ. Mahdi disobeyed direct orders, was found in possession of contraband, set fire to his cell, and committed other disciplinary violations. As a result of his prison mis-conduct, Mahdi was assigned to a Super-Max facility, Wallens' Ridge State Prison. At Wallens' Ridge, Madhi engaged in similar conduct including assaulting a non-inmate and other disciplinary violations.

After being released from Wallens' Ridge, Mahdi did not conform his behavior in order that he would not be sent back to a harsh prison environment. Mahdi initially lived with his Uncle Nathan and his grandmother Nancy Burwell. Mahdi would not live by the rules of the house as set down by his uncle and was asked to leave. Rather than obeying the law so he would not be sent back to prison, Mahdi engaged in numerous criminal acts while on supervised probation or parole. Mahdi engaged in these acts knowing they could result in the revocation of his supervised probation and his return to prison. While on supervised probation, Mahdi possessed a 9 mm handgun. Mahdi also sold drugs during this time period. Mahdi was involved in the murder of a drug dealer in Virginia. Mahdi told Dr. Martin he was involved in another murder in which the police had yet to discover the body. Mahdi burglarized the home of Amanda Weaver and stole a .380 pistol, which he was not supposed to even possess under the conditions of his supervised probation or parole. Mahdi stole a car and a license plate. Mahdi then left Virginia because homicide detectives were

closing in on him on the Virginia homicide. Under the conditions of his supervised probation, Mahdi was not supposed to leave the State of Virginia. Shortly thereafter, Mahdi murdered Christopher Boggs in N.C. so he could rob the store's cash register. Mahdi then drove to South Carolina and car-jacked a vehicle in Columbia, S.C. Mahdi then attempted to pass a stolen credit card in Calhoun County. Mahdi then burglarized Captain Myers' shed and murdered Captain Myers. Mahdi stole Captain Myers truck and his firearms. Mahdi then drove to Florida. While there, Mahdi impersonated a police officer in Satellite Beach, Florida. Also in Florida, Mahdi fled from police in Captain Myers' police issued truck.

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

Dr. Haney's testimony on the impact of prison on Mahdi is not persuasive to a reasonable probability. Nor would it have been to Judge Newman. Quite the opposite is true. The record shows Mahdi has had an impact on each prison or institution he has been in, not the reverse.

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

was robbing people. As previously stated, Mahdi assaulted inmates while incarcerated in DJJ. Mahdi assaulted an inmate on April 11, 1999 by hitting him in the head with a broom. Mahdi had 12 moderate institutional violations while at Culpepper Juvenile Institution, and Mahdi had 12 major institutional violations at Culpepper Juvenile Institution. Mahdi had anger management training while in DJJ but did not practice what he learned. Mahdi committed several assaults on guards while he was a juvenile. Mahdi punched a guard in the face on September 29, 1999. Mahdi assaulted a staff person on November 18, 1999. Mahdi had an assault on another staff person on December 5, 1999. Mahdi threatened to assault individuals on several occasions while he was a juvenile. The record shows Mahdi was violent even at a young age.

Mahdi's incarceration did not cause him to commit crimes. Mahdi engaged in criminal behavior before ever being incarcerated. Mahdi had no remorse for stealing even as a juvenile. After being released from Wallens' Ridge, Mahdi began to sell drugs and bragged to his grandmother's neighbor about his drug dealing. He also bragged that he was going to kill drug dealers. The evidence produced at PCR shows he did exactly that, becoming involved in the murder of a drug dealer in Virginia.

This Court should have found that counsel was not deficient in failing to investigate, develop, and present the mitigation evidence presented by Dr. Haney. Strickland; Wiggins; Rompilla; Council; Rosemond. The evidence is not persuasive, nor would it have been to Judge Newman, the sentencing court. Dr. Haney's position is refuted by the evidence and Mahdi's record. Furthermore, if counsel had called Dr. Haney as a witness, the State would have been able to highlight Mahdi's lengthy criminal career including his commission of crimes before he was ever incarcerated or confined as a juvenile and his extensive violent behavior in DJJ, in adult prison in Virginia, and in

prison in South Carolina.

Mahdi also claims counsel did not adequately investigate his mentality at the time of the crime. Mahdi asserts counsel should have discovered what Dr. Schwartz-Watts (a psychiatrist) and Dr. Myers (a psychologist) found, that Mahdi was suffering from serious mental illnesses at the time of the murder of Captain Myers.<sup>13</sup>

Dr. Donna Schwartz-Watts, a psychiatry expert, testified that she reviewed two notebooks of records, transcripts of Mahdi's prior court hearings, and records from Dr. McKee. (PCR Tr. 458-60). She met with Mahdi three times. (PCR Tr. 460). Mahdi did not trust her or provide her much information during her interviews with him. (PCR Tr. 478). She obtained more information regarding Mahdi's thought process after he left Wallens Ridge from Dr. Martin's and Dr. McKee's notes. (PCR Tr. 478-80).

Schwartz-Watts diagnosed Mahdi as suffering from major depression, anxiety disorder, paranoid personality disorder, reactive attachment disorder, and antisocial personality disorder. (PCR Tr. 460-61). She noted that the depression was in remission at the post-conviction relief hearing. (PCR Tr. 462). She testified Mahdi's depression went into remission between one of the first times she spoke with him and one of the last times she spoke with him. Schwartz-Watts opined that Mahdi was suffering from these diagnoses when he went on the crime spree that included the murder of Captain Myers. (PCR Tr. 468-71). Schwartz-Watts also disagreed with the Virginia Department of Corrections' diagnosis that Mahdi met the criteria for intermittent explosive disorder.

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<sup>13</sup>Dr. Schwartz-Watts evaluated Mahdi beginning approximately one (1) year before the merits hearing in this case. She issued her report approximately three (3) days before the merits hearing. Absent from her report is any discussion of the crimes against Captain Myers, Christopher Boggs, or the drug dealer in Virginia and how Mahdi's alleged mental illnesses could have caused Mahdi to commit any of these crimes.

(PCR Tr. 473). She stated that Mahdi was not an impulsive person by nature. (PCR Tr. 473).

Reactive attachment disorder was a very rare disorder that is not seen in a lot of adults. (PCR Tr. 463). She opined that Mahdi suffered from the inhibited type of attachment disorder, noting that the records indicate Mahdi was typically described as being detached. (PCR Tr. 463). She noted the reactive attachment disorder would have been the result of the numerous disruptions in relationships that he had in his childhood. (PCR Tr. 464). There was little stability in his early life. Mahdi mother left when he was young; his father had some mental illness, and was available to Mahdi only at times; he lived with his aunt and uncle for some time; and he moved six times in that period. (PCR Tr. 464-65).

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

Schwartz-Watts did not ask Mahdi about the murder in North Carolina, but she believed he would have been suffering from major depression at that time. (PCR Tr. 482-83). The last documentation she saw that evidenced Mahdi's depression was the statement from Mr. Crutchfield, Mahdi's co-defendant from Virginia. (PCR Tr. 483-85). She also asserted that other documentation regarding Mahdi's depression dated back to 2001, when Mahdi denied he has been treated for mental illness and denied he had attempted suicide in his evaluation in the Virginia Department of Corrections. (PCR Tr. 486). Schwartz-Watts admitted there was no evidence in any of Mahdi's adult prison records that indicate he either complained or received treatment for depression. (PCR Tr. 487-90).

Schwartz-Watts stated Mahdi may not have been suffering from major depression on the day he shot Captain Myers, but Mahdi would still have been affected by the condition. (PCR Tr. 493-94). She noted the only illness that probably had anything to do with the crime was Mahdi's anxiety disorder. (PCR Tr. 496-97).

deRossett Myers, Ph.D., a clinical psychologist who was qualified as an expert in child and adolescent psychology, evaluated Mahdi for developmental concerns that were evident from his life as a juvenile. (PCR Tr. 419). Myers was struck by the extent of the poverty of Mahdi's family, the number of times Mahdi moved in a short period of time, and the amount of violence in Mahdi's family. (PCR Tr. 420). Myers indicated those were all factors that put Mahdi at risk for mental health problems. (PCR Tr. 421). Myers opined that Mahdi suffered from major depression and severe attachment disorder. (PCR Tr. 421).

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

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

A psychologist during Mahdi's first stint at DJJ recommended that Mahdi be placed into an out-of-home placement, like a group home or residential treatment facility. Myers noted that Shareef Mahdi's home did not comport with the recommendations. (PCR Tr. 447-48). Myers further noted that the observations made in the psychological testing during this second stint at DJJ was consistent with attachment disorder and depression. (PCR Tr. 450-52). He recalled that in the DJJ records, someone had indicated Mahdi would be very difficult to deal with in the future unless he got the treatment he needed. (PCR Tr. 457). Myers noted that same individual indicated an untreated Mahdi would likely end up in adult prison, and Mahdi had aged well beyond his years in terms of some of his criminal behaviors. (PCR Tr. 457).

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

Dr. Schwartz-Watts' retrospective testimony is not persuasive on these issues given the record before this Court. First, Dr. Schwartz-Watts admitted during her testimony that Mahdi's history of depression had nothing to do with the murder of Captain Myers. (PCR 495-496).

Additionally, she testified the only illness that he suffered from that could have had anything to do with the murder of Captain Myers was the generalized anxiety disorder that she diagnosed him as having. (PCR 495-497). She based this determination mainly on the fact that Mahdi told her he was anxious at the time he murdered Captain Myers. However, Schwartz-Watts admitted that Mahdi had broken into Captain Myers' cabin, and it would be expected he would be anxious when he saw Captain Myers entering his cabin and about to discover Mahdi unlawfully inside his shed. (PCR 496-497). This is not significantly mitigating given the circumstances. This is also a tenuous basis to diagnose generalized anxiety disorder and its relation to this crime. Furthermore, while Dr. Martin's notes indicate Mahdi told him he was anxious and paranoid in Virginia, because he was being investigated for a homicide he committed, he was no longer anxious or paranoid after he left Virginia. (Def. Ex. 8). Dr. Martin took a detailed history from Mahdi, which Dr. Schwartz-Watts relied on, and did not diagnose Mahdi with generalized anxiety disorder. Additionally, the record shows Mahdi has been in the South Carolina Department of Corrections for the past six to seven (6-7) years and has not been treated for any anxiety disorder or any mental illness. (PCR 488-491). Mahdi has received no psychotropic medications or attempted suicide since his arrest in 2004. (PCR 488-491). Mahdi did go on a hunger strike prior to trial, but this was due to his objection to being kept as a safe-keeper prior to trial, i.e. his conditions of confinement. (PCR 489-490). Mahdi also denies that he has any mental illness. (PCR 490). Mahdi was also examined by Dr. Michael Cross and Randy Pickens prior to trial for competency to stand trial. Dr. Cross found no evidence of any mental illness. (R 131, 136 & Court's Ex. 2). Dr. McKee also ran tests on Mahdi and took a history from him and did not diagnose him with generalized anxiety disorder.

The record also shows Dr. Schwartz-Watts admitted Mahdi did not provide her with a lot of

information and was not as conversive with her as he was with Dr. Martin and Dr. McKee. (PCR 479). Dr. Schwartz-Watts acknowledged that there are no records from the South Carolina Department of Corrections where Mahdi has been treated for depression or any mental illness since his arrest for Captain Myers' murder. (PCR 488-491). Dr. Schwartz-Watts claimed there was evidence in the DOC records that Mahdi was suffering from depression; however, that claim was not persuasive. She acknowledged that Mahdi's hunger-strike was related to his being kept as a safe-keeper prior to trial, i.e. his conditions of confinement. (PCR 489-490). And, his physical complaint was for just not feeling well, i.e. tired and run down. (PCR 488-489). And, her claim that Mahdi's aggressive and threatening conduct is definitive evidence of depression is not persuasive, because it is also consistent with Mahdi's diagnoses anti-social personality disorder. (PCR 489). Schwartz-Watts admitted that Mahdi has stated over the past six (6) years that there is nothing wrong with him. (PCR 491-492). And, she also admitted he has not been given any medications for any mental illness. (PCR 491). At his guilty plea on the current charge, Mahdi told Judge Newman that he was not suffering from any mental illness. Dr. Cross found no evidence of any mental illness. (R 131, 136 & Court's Ex. 2). Dr. Schwartz-Watts acknowledged that upon Mahdi's entry into the Virginia DOC in 2001, Mahdi was not diagnosed as suffering from depression but intermittent explosive disorder and anti-social personality disorder. (PCR 486-487). She acknowledged that there was nothing in Mahdi's adult prison records from the Virginia DOC, where Mahdi resided from 2001 to 2004, that showed Mahdi was suffering from depression or was being treated for depression. (PCR 487). Schwartz-Watts also admitted there was no documentation by a doctor, psychologist, parole officer or any professional that Mahdi was suffering depression before he left Virginia before committing this current crime. (PCR 487). She further admitted there was no record of Mahdi

being treated for depression or complaining of depression from his arrest in Florida until his return to South Carolina to face these charges. (PCR 487-488). Schwartz-Watts was also acknowledged that Mahdi admitted his suicidal gesture in the Virginia DJJ was manipulative behavior on his part in order to obtain better living conditions and more recreation time. (PCR 490, See also Resp. Ex. 4). If Mahdi was anxious or depressed in Virginia, it was due to his own criminal conduct there and his fear that he would be apprehended.<sup>14</sup> (Def. Ex. 8). Dr. Schwartz-Watts further admitted it did not appear Mahdi was depressed the day of Captain Myers' murder, based on his actions, and he may not have been depressed at all. (PCR 493).

Dr. Schwartz-Watts diagnosis that Mahdi was suffering from depression at the time of the murder of Captain Myers is not persuasive. In addition to the facts cited above, Mahdi's cold, calculated, and intelligent actions over several days from Virginia, to North Carolina, to Columbia, to Calhoun County, and finally to Florida do not indicate Mahdi was depressed. Mahdi burglarized a neighbor's home in Virginia and stole a firearm. Mahdi then stole a license plate from one establishment and a car from another and left Virginia to escape police who were investigating him for a homicide there. Mahdi drove the stolen vehicle to Winston-Salem N. C.. Mahdi entered a convenience store and pretended to be a patron, and when the clerk was distracted checking his identification to buy alcohol, Mahdi drew the stolen pistol and shot the clerk. Mahdi then shot the clerk again to render him helpless. Mahdi then attempted to rob the store's cash register. Mahdi

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<sup>14</sup>Dr. Schwartz-Watts relied in large part in her diagnosis of depression at the time of the crime on the statements Mahdi made to a co-defendant in the Virginia homicide. The co-defendant stated Mahdi stated "he didn't have shit to live for," and Mahdi had a belief in a fore-shortened future. Again, if these statements of this witness are even credible, they are due to Mahdi's involvement in a robbery and a murder in Virginia and his belief that he was about to be arrested for his criminal activities while on supervised probation. This is not significantly mitigating. And, Judge Newman would not have found this mitigating either.

then drove to Columbia, S.C. in the vehicle stolen from Virginia. While here, he pretended to be a homeless person and stayed at the Oliver Gospel Mission. Mahdi then pretended to be a homosexual person so he could car-jack a vehicle and did so. Mahdi then switched the license plate on the car-jacked vehicle with the license plate he stole from Virginia. Mahdi then drove to Calhoun County. Mahdi then attempted to pass a stolen credit card, but the card had been cancelled. Mahdi then fled when he realized police were going to apprehend him. Mahdi then burglarized Captain Myers' shed and while there altered a shotgun into a sawed off shogun. Mahdi then murdered Captain Myers and attempted to burn his body to destroy evidence of the crime. Mahdi then stole Captain Myers' truck, but switched license plates on the vehicle before fleeing to Florida. Mahdi then drove all the way to Jacksonville, Florida where he sold both the murder weapon he used in N.C. and the murder weapon he used in S.C.. However, Mahdi retained the assault rifle and sawed-off shotgun he had stolen from Captain Myers' shed. Mahdi then impersonated a police officer when approached by a citizen in Florida. Mahdi then attempted to flee from police in Satellite Beach, Florida, and was arrested only after the use of a police dog.

Furthermore, Doctors Martin and McKee, based in part on their interviews with Mahdi, found that Mahdi was not suffering from any mental illness at the time of Captain Myers' murder. They diagnosed Mahdi as having anti-social personality disorder. Their testimony is persuasive given this record. While Mahdi may have suffered some recurrent depression in his childhood and adolescence, Mahdi was not depressed at the time of Captain Myers' murder.

Additionally, counsel was not ineffective in failing to retain Dr. deRossett Myers, a clinical psychologist, or elicit the testimony he provided. Dr. Myers testified to many things that were not favorable to Mahdi and would not have helped his case in mitigation before Judge Newman.

Specifically, Myers testified that the Carter Center records reflected either a *diagnosis* of oppositional defiant disorder or a *rule out* oppositional defiant disorder, which Meyers admitted was a precursor to antisocial personality disorder. (PCR 442-43). Myers also noted that Mahdi had a history of being oppositional and a history of behaviorally acting out with aggression. (PCR 443). While Myers testified his interpretation of the Carter Center records was that the doctors attributed Mahdi's oppositional behavior to his depression, Myers admitted that a diagnosis of conduct disorder/oppositional defiant disorder is based exclusively on observation of overt behavior. (PCR 443). Myers also related that when Mahdi returned to school in Lawrenceville he was tested because he was not doing well in school *and* his behavior wasn't particularly good at school. Myers also admitted that after Mahdi was committed to the Virginia DJJ Mahdi was described as being an angry, alienated, tough youth. (PCR 447). Myers also testified that at that time Mahdi had already been involved in an altercation in a cottage that he was housed in. (PCR 447). Myers testified the psychologist noted Mahdi had a lot of negative attitudes towards authority; Mahdi did not like rules; Mahdi did not like limits; he was poorly socialized; and, Mahdi was not sensitive to the rights and privileges of other people. (PCR 447). Myers related that the psychologist termed Mahdi's problem a conduct disorder. (PCR 447). Myers also related Mahdi only stayed out of DJJ about 2 weeks before he was involved in a stand-off with police, and he was recommitted to DJJ where he was diagnosed with conduct disorder. (PCR 449-50). Myers also noted that Mahdi was noted to be disruptive at DJJ and also engaged in oppositional defiance. (PCR 451). Myers also testified that Mahdi's diagnosis of anti-social personality disorder in the adult department of corrections was justified at the time based on the record as he knew it. (PCR 456). Myers also admitted it was noted in Mahdi's DJJ records that Mahdi had aged well beyond his years in terms of his criminal

behaviors. (PCR 457). Myers also agreed Mahdi's I.Q. of 118 was an accurate level of his intelligence. (PCR 457).

More importantly, it is not what Dr. Schwartz-Watts or Myers allegedly found six (6) to seven (7) years after the murder that is critical to the issue before this Court. Reed v. Florida Dept. of Corrections, 593 F.3d 1219 (11<sup>th</sup> Cir. 2010)(fact that expert retained at trial and expert retained later at PCR differed, does not prove trial counsel was ineffective); Davis v. Singletary, 19 F.3d 1471, 1475 (11<sup>th</sup> Cir. 1997)("the mere fact that a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial."). None of Mahdi's appointed attorneys, Mr. Grant, Mr. Walters, or Mr. Koger are psychiatrists or psychologists. They retained experts to investigate this area of mitigation on Mahdi's behalf and relied on what their experts told them. Counsel had a right to rely on what their experts told them. See Poyner v. Murray, 964 F.2d 1404, 1419 (4<sup>th</sup> Cir. 1992)(Petitioner cannot establish ineffective assistance because counsel did not expert shop until one could be found who would testify favorably). Counsel retained Dr. Thomas Martin, *a forensic psychiatrist*, who has testified in several capital cases, to evaluate Mahdi and determine if he suffered from any mental illness that would serve as mitigation. Dr. Martin found that Mahdi had some history of recurrent depression, but there was no evidence that he suffered from a mental illness at the time of the commission of the crimes against Captain Myers. The only thing Dr. Martin found with regard to Mahdi was that Mahdi suffers from a personality disorder, anti-social personality disorder. That diagnosis *is* fully supported by the record. When Mahdi was admitted to the Virginia DOC, he was diagnosed with intermittent explosive disorder and anti-social personality disorder. Dr. Martin testified at PCR Mahdi had no difficulty in talking about killing

people if necessary in order to achieve independence, and he appeared to have no remorse regarding any of his past violent acts. Dr. Martin related to trial counsel on several occasions what his findings were and that they would not be helpful to Mahdi. Additionally, in conducting his evaluation, Dr. Martin took a history from Mahdi. Dr. Martin discussed with Mahdi the circumstances of the crimes against Captain Myers and why Mahdi left Virginia in the first place. Mahdi related to Dr. Martin that he left Virginia because he was involved in the homicide of a drug dealer, and homicide detectives in Virginia were closing in on him. Mahdi also related to Dr. Martin that he was involved in another homicide in which the police had yet to find the body. Mahdi also related to Dr. Martin that he shot Captain Myers in the chest and head, and after Captain Myers was on the floor of his cabin, he shot him several more times in the head to make sure he was dead. (PCR 508-523).

Counsel also retained a *forensic psychologist*, Dr. Geoffrey McKee, to evaluate Mahdi with regard to mental health mitigation. Dr. McKee took a detailed history from Mahdi, conducted tests on Mahdi, and reviewed records including Mahdi's psychiatric records from when he was 9 years old. McKee found that Mahdi was very intelligent and that he suffered from no major mental illness at the time of the crime. McKee found, independent of Dr. Martin, that Mahdi had anti-social personality disorder. McKee found nothing else. Mahdi also related to Dr. McKee that he left Virginia because he was involved in the homicide of a drug dealer and police were closing in on him for that murder.<sup>15</sup> (PCR 545-561). Dr. McKee also related his findings to trial counsel. (PCR 689-690, 626-27).

Counsel testified they made a strategic decision not call either psychiatric or psychological

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<sup>15</sup>Mahdi also related to attorneys Grant, Walters and Koger his involvement in the murder of the drug dealer in Virginia and that this was why he left Virginia immediately prior to the Boggs' and Myers' murders. (PCR Tr. pp. 592-93 ).

expert in the sentencing hearing before Judge Newman, because their testimony would not be helpful and damaging information would have come out if these 2 witnesses were subject to cross-examination. (PCR 689-90, 626-27). This was an objectively reasonable trial strategy decision by counsel under the circumstances, and is not subject to a claim of ineffective assistance of counsel. Strickland; Wong; Council.<sup>16</sup> Had either of these experts been called to testify at trial, they would have been cross-examined by the Solicitor on the fact that they took a history from Mahdi and what Mahdi related about why he stole a car and left Virginia and about the murder of Captain Myers. Each expert's testimony would not have been helpful but would have been devastating to Mahdi's mitigation case because it would have revealed other homicides Mahdi had committed in addition to the Boggs' and Myers' murders and that Mahdi shot Myers again after he was helpless on the floor. Wong v. Belmontes, *supra* (calling mitigation witness would have exposed defendant to admission of evidence of other homicide not previously before the sentencing authority).

Additionally, the experts would had to have related that they found Mahdi was suffering from no major mental illness and had anti-social personality disorder, which is not a mental illness but a personality disorder. This would not have been helpful to the defense mitigation case. Byrum v. Ozmint, 339 F.3d 203, 210 (4<sup>th</sup> Cir. 2003)(counsel were not ineffective in failing to present testimony by a psychiatrist and psychologist because the suggestions of antisocial behavior which

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<sup>16</sup>The fact that Mahdi had committed another homicide would clearly have been admissible in the sentencing phase before Judge Newman. See State v. George, 476 S.E.2d 903, 913(admission of testimony defendant had attempted to commit similar crime in past was proper as evidence of individual characteristics of defendant and pre-disposition to commit similar crimes); State v. Owens, 552 S.E.2d 745 (2001)(defendant's confession to another murder during 24 hour waiting period was admissible in the penalty phase because it went to defendant's character); State v. Ray, 498 S.E.2d 640, 641-42 (photographs of prior victim in ABIK admissible in penalty phase); State v. Green, 392 S.E.2d 157, 162-63 (1990)(prior crimes of defendant admissible in penalty phase); State v. Howard,

the experts found could have been harmful to the defense); Satcher v. Pruett, 126 F.3d 561 572 (4<sup>th</sup> Cir. 1997)(finding that trial counsel was not ineffective for not presenting testimony by a psychologist and psychiatrist who examined the defendant for the purpose of developing mitigating evidence where the psychologist and the psychiatrist found no psychiatric or neurological disorders, but also finding that the defendant had an antisocial personality disorder that might make him a “future danger”); Reed v. Florida Dept. of Corrections, 593 F.3d 1217 (11<sup>th</sup> Cir. 2010)(counsel made objectively reasonable trial strategy decision not to offer anti-social personality disorder diagnosis); Cummings, 588 F.3d 1368 (11<sup>th</sup> Cir. 2009)(stating that a diagnosis of antisocial personality disorder “is not mitigating but damaging”)(collecting cases); *see also* Looney v. State, 941 So.2d 1017, 1028-29 (Fla. 2006)(observing that “[t]his Court has noted that a diagnosis as a psychopath is a mental health factor viewed negatively by jurors and is not really considered mitigation”) *citing* Dufour v. State, 905 So.2d 42, 57-58 (Fla. 2005)); Freeman v. State, 858 So.2d 319, 327 (Fla. 2003); Parker, 331 F.3d at 788; Clisby v. State of Ala., 26 F.3d 1054, 1056 & n.2 (11<sup>th</sup> Cir. 1994); Weeks v. Jones, 26 F.3d 1030, 1035, n. 4 (11<sup>th</sup> Cir. 1994)(stating antisocial personality disorder is “not ...mitigating as a matter of law”). *See* Truesdale v. Moore, 142 F.3d 749, 755 (4<sup>th</sup> Cir. 1998)(mental health evidence is a “double edged sword that might as easily condemn a defendant to death as excuse his actions.”). *See also* Cullen v. Pinholster, \_\_\_ U.S. \_\_\_, 131 S.Ct. 1388 (2011)(it was a reasonable penalty phase strategy to pursue evoking sympathy for mother where psychiatrist found defendant had no signs or symptoms of mental disorder other than his “pychopathic personality traits”). Fulks v. United States, *Slip Copy*, 2010 WL 3069390 (D.S.C. 2010)<sup>17</sup>(trial attorneys were not ineffective

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<sup>17</sup>In Fulks, United States District Judge Joseph Anderson cited several articles written by attorney John Blume discussing that antisocial personality disorder is a diagnosis to be avoided. *See* John H. Blume & David Voisin, *Avoiding or Challenging a Diagnosis of Antisocial*

in avoiding testimony defendant met criteria of antisocial personality disorder); St. Pierre v. Walls, 297 F.3d 617, 633 (7<sup>th</sup> Cir. 2002)(facts that show a defendant has a condition or proclivity toward violence are often aggravating, not redeeming or mitigating factors).<sup>18</sup>

Once Mahdi's psychiatric and psychological experts returned to counsel with their opinion regarding Mahdi, counsel was under no constitutional obligation to expert shop and find another psychiatrist or psychologist who might find something more palatable to a sentencing court. Poyner v. Murray, 964 F.2d 1404, 1419 (4<sup>th</sup> Cir. 1992)(petitioner could not establish ineffective assistance because counsel did not "expert shop" until one could be found who would testify favorably). Counsel was under no duty to search out and find Drs. Schwartz-Watts or Myers. See Harrington v. Richter, 562 U.S. \_\_\_\_ (2011)(slip op. at 17)("Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies."). Mahdi has failed to show deficient performance on the part of trial counsel. Strickland; Wong.

Further, even if counsel had retained and called Dr. Schwartz-Watts or Dr. Myers at sentencing, the devastating evidence of Mahdi's involvement in the Virginia homicide would have been elicited at trial, as it was at PCR. Dr. Schwartz-Watts' report lists Dr. Martin's and Dr.

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*Personality Disorder*, 24 Champion 69 (Apr. 2000)(antisocial personality disorder diagnosis "can be the kiss of death, because to many people, and most judges, this means that the defendant is little more than a remorseless sociopath."). Fulks, at p. 18, n. 21.

<sup>18</sup>This Court recognizes that a diagnosis of anti-social personality disorder would entitle a defendant to a jury charge on certain statutory mitigating circumstances. See State v. Caldwell, 308 S.C. 494, 388 S.E.2d 816 (1990). However, as the above cited authority shows, that does not mean counsel is deficient for failing to offer testimony that their client suffers from anti-social personality disorder. And, there was no real contention at PCR that counsel was deficient in failing to call Doctors Martin or McKee in this regard.

McKee's records as part of the materials she relied upon in conducting her evaluation of Mahdi. She acknowledged at PCR she relied, in part, and reviewed Dr. Martin 'sand Dr. McKee's files in rendering her opinion. She acknowledged Mahdi told Dr. Martin and Dr. McKee that the reason he left Virginia was because the police were closing in on him for a homicide he was involved with there. (PCR 481). This would have been devastating to any mitigation case trial counsel was trying to present. Wong v. Belmontes.

Finally, Dr. Schwartz-Watts and Dr. Myers also diagnosed applicant Mahdi with antisocial personality disorder. As previously discussed, this testimony would not have been helpful to the mitigation case. Byrum v. Ozmint, 339 F.3d 203, 210 (4<sup>th</sup> Cir. 2003)(counsel were not ineffective in failing to present testimony by a psychiatrist and psychologist because the suggestions of antisocial behavior which the experts found could have been harmful to the defense); Satcher v. Pruett, 126 F.3d 561 572 (4<sup>th</sup> Cir. 1997)(finding that trial counsel was not ineffective for not presenting testimony by a psychologist and psychiatrist who examined the defendant for the purpose of developing mitigating evidence where the psychologist and the psychiatrist found no psychiatric or neurological disorders, but also finding that the defendant had an antisocial personality disorder that might make him a "future danger"); Reed v. Florida Dept. of Corrections, 593 F.3d 1217 (11<sup>th</sup> Cir. 2010)(anti-social personality disorder was not good mitigation evidence, counsel made objectively reasonable trial strategy decision not to offer the same); Cummings, 588 F.3d 1368 (11<sup>th</sup> Cir. 2009)(stating that a diagnosis of antisocial personality disorder "is not mitigating but damaging")(collecting cases); *see also* Looney v. State, 941 So.2d 1017, 1028-29 (Fla. 2006)(observing that "[t]his Court has noted that a diagnosis as a psychopath is a mental health factor viewed negatively by jurors and is not really considered mitigation") *citing* Dufour v. State,

905 So.2d 42, 57-58 (Fla. 2005)); Freeman v. State, 858 So.2d 319, 327 (Fla. 2003); Parker, 331 F.3d at 788; Clisby v. State of Ala., 26 F.3d 1054, 1056 & n.2 (11<sup>th</sup> Cir. 1994); Weeks v. Jones, 26 F.3d 1030, 1035, n. 4 (11<sup>th</sup> Cir. 1994)(stating antisocial personality disorder is “not ...mitigating as a matter of law”). See Truesdale v. Moore, 142 F.3d 749, 755 (4<sup>th</sup> Cir. 1998)(mental health evidence is a “double edged sword that might as easily condemn a defendant to death as excuse his actions.”). See also Cullen v. Pinholster, \_\_\_ U.S. \_\_\_, 131 S.Ct. 1388 (2011)(it was a reasonable penalty phase strategy to pursue evoking sympathy for mother where psychiatrist found defendant had no signs or symptoms of mental disorder other than his “psychopathic personality traits”); Fulks v. United States, *Slip Copy*, 2010 WL 3069390 (D.S.C. 2010) (trial attorneys were not ineffective in avoiding testimony defendant met criteria of antisocial personality disorder); St. Pierre v. Walls, 297 F.3d 617, 633 (7<sup>th</sup> Cir. 2002)(facts that show a defendant has a condition or proclivity toward violence are often aggravating, not redeeming or mitigating factors).<sup>19</sup>

Furthermore, Mahdi has failed to prove counsel was deficient in failing to have Dr. Martin or Dr. McKee diagnose Mahdi with depression, generalized anxiety disorder, or paranoid personality disorder.<sup>20</sup> While Mahdi called 2 new experts that said Mahdi suffered from depression, one in his

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<sup>19</sup>Again, testimony of an expert that a defendant suffers from anti-social personality disorder would entitle a defendant to a charge on certain statutory mitigating circumstances. Caldwell. However, as the above authority shows, this does not mean counsel is deficient in failing to offer such testimony. This testimony would have been harmful to the defense mitigation case had this testimony been presented before Judge Newman and counsel made an objectively reasonable trial strategy decision not to offer this evidence from their retained psychiatrist and psychologist. .

<sup>20</sup>Dr. Martin did diagnose Mahdi has having some recurrent depression during his life but not at the time of the offense. Counsel did not call Dr. Martin because of the other negative things he would had to have related to Judge Newman, including his diagnosis of anti-social personality disorder and things Mahdi had told him.

childhood, and the other in his childhood and as an adult, and Dr. Schwartz-Watts testified Mahdi had paranoid personality disorder and generalized anxiety disorder, this was not sufficient to prove counsel was deficient in this regard. Reed v. Florida Dept. of Corrections, 593 F.3d 1219 (11<sup>th</sup> Cir. 2010)(fact that expert retained at trial and expert retained later at PCR differed, does not prove trial counsel was ineffective); Davis v. Singletary, 19 F.3d 1471, 1475 (11<sup>th</sup> Cir. 1997)(“the mere fact that a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial.”). It was incumbent upon Mahdi to show that had counsel provided additional documents or information to their experts they would have come up with a different diagnosis. Von Dohlen v. State, 360 S.C. 598, 606-07, 602 S.E.2d 738, 742-43 (2004), *cert. denied*, 544 U.S. 943, 125 S.Ct. 1645 (2005)(concluding case was sufficiently analogous to Wiggins and holding counsel in capital murder case was ineffective in failing to adequately prepare and present evidence in the penalty phase that defendant suffered from severe, chronic depression at the time of the murder given trial counsel failed to provide their expert witness with crucial medical records and related information which prevented that witness from conveying an accurate diagnosis of defendant’s mental condition to the jury). Specifically, at PCR, Mahdi did not call Dr. Martin or McKee and prove that had they been provided with certain additional records or information, their diagnosis would have been different, i.e. depression, paranoid personality disorder, and/or generalized anxiety disorder. Von Dohlen, supra. In fact, the State called Dr. Martin and Dr. McKee at the PCR hearing, and Mahdi did not establish through either expert that if they had been shown certain additional records or information that their diagnosis would have been any of the above. Id. As a result, Mahdi has failed to meet his burden of proof to show ineffective assistance in this regard. Id. In fact, Dr. Martin

testified that based on the records he saw and what he had heard at the PCR hearing, his diagnosis would not have been any different. McKee also testified that he did not need any further records to make the diagnosis he made. As a result, Mahdi has failed to meet his burden in this regard. Von Dohlen v. State; Reed v. Florida Dept. of Corrections, (fact that expert retained at trial and expert retained later at PCR differed, does not prove trial counsel was ineffective); Davis v. Singletary (“the mere fact that a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial.”).

Furthermore, Mahdi has failed to prove counsel deficient in failing to have Dr. Martin or Dr. McKee diagnose Mahdi with reactive attachment disorder. Mahdi called 2 new experts, Dr. Schwartz-Watts and Dr. Myers who testified Mahdi either had reactive attachment disorder or the evidence indicated Mahdi had reactive attachment disorder. This diagnosis is questionable. The DSM IV TR provides that onset of reactive attachment disorder must be before age (5). There is no evidence in this case that there was onset of reactive attachment disorder before the age of (5). DSM-IV-TR, 4<sup>th</sup> edition, pp. 127-130. More importantly, Mahdi did not prove *counsel* did not provide *their experts* with records or information that would have led *them* to diagnose Mahdi as having reactive attachment disorder. Von Dohlen v. State, 360 S.C. 598, 606-07, 602 S.E.2d 738, 742-43 (2004), *cert. denied*, 544 U.S. 943, 125 S.Ct. 1645 (2005). Specifically, Mahdi did not call Dr. Martin or McKee and prove that had they been provided with certain additional records or information, their diagnosis would have been different, i.e. reactive attachment disorder. Id.. In fact, the State called Dr. Martin and Dr. McKee at the PCR hearing, and Mahdi did not establish through either expert that if they had been shown certain additional records or information that their

diagnosis would have reactive attachment disorder. Id. As a result, Mahdi has failed to meet his burden of proof to show ineffective assistance in this regard. Id. In fact, Dr. Martin testified that based on the records he saw and what he had heard at the PCR hearing, his diagnosis would not have been any different. McKee also testified that he did not need any further records to make the diagnosis he made. Mahdi has failed to meet his burden in this regard. Von Dohlen v. State; Reed v. Florida Dept. of Corrections, 593 F.3d 1219 (11<sup>th</sup> Cir. 2010)(fact that expert retained at trial and expert retained later at PCR differed, does not prove trial counsel was ineffective); Davis v. Singletary, 19 F.3d 1471, 1475 (11<sup>th</sup> Cir. 1997)(“the mere fact that a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial.”). As a result of the above, counsel was not deficient in failing to investigate, develop, and present mental health mitigation evidence.

#### *The DJJ Records*

Mahdi also claims counsel should have introduced Mahdi’s records from the Virginia DJ J. Mahdi argues these records should have been introduced because they contained some mitigating evidence, that he was noted to be suffering from depression while in DJJ. Mahdi introduced these DJJ records at the PCR hearing, and the State did as well. Counsel was not deficient in failing to introduce these records.

At Mahdi’s sentencing hearing, the State introduced a minimal amount of Mahdi’s DJJ records. (ROA, Vol. IV. and V.). The records introduced at sentencing document just a few of Mahdi’s disciplinary violations; however they do not document the extensive and aggravated nature of Mahdi’s disciplinary violations while in the Virginia DJJ.

The record shows counsel obtained Mahdi’s DJJ records through the efforts of its mitigation

investigator. (PCR 585). Mahdi had over forty (40) disciplinary violations within the Virginia DJJ. (PCR 684). These included assaults on guards, teachers, and inmates. Mahdi was involved in destroying property on several occasions. Mahdi was involved in one escape attempt by assaulting a female guard, taking her radio away from her, and demanding keys from another guard. The records also show that Mahdi threatened that if he was not released from DJJ when he thought he should be released, he would go around "acting crazy." These records also show that Mahdi later admitted faking a suicidal gesture in an attempt to manipulate the DJJ prison system into gaining more recreation time. The records would also have shown that Mahdi did not think he should have been incarcerated for any of his offenses, and threatened to assault other inmates or guards or harm himself if he was not released from DJJ. when he thought he should be released. The records would also have shown that Mahdi received various treatment programs provided to inmates by the Virginia DJJ, but he did not practice what he had learned such as anger management. In fact, Mahdi was kicked out of the anger management program for disruptive behavior. In fact, on January 14, 1998, it was reported that Mahdi described his own criminal behavior "in a very calculated, almost professional way that is alarming." The report also indicated that Mahdi "is behaving and developing like a teenager much older" than he was. There were numerous bad things about Mahdi that would have been revealed to the sentencing court if these records would have been introduced. If counsel had introduced only select portions of these records, then the State would have introduced all of Mahdi's DJJ records, which included his numerous disciplinary violations and his admission to faking a suicide gesture to manipulate the prison system.

Mahdi also admitted to DJJ officials he had difficulties in school adjustment. He admitted he had been frequently suspended, he had a history of verbal aggression, he had a history of physical

aggression, he had conflicts with educational authorities, and he had difficulties getting along with classmates. (DJJ record M00416). He also admitted he had injured someone in a fight, and he had hit or attacked someone who was not in his family. (DJJ record M00495). One DJJ official indicated Mahdi was very dangerous if he did not get his way. (DJJ record M00511). Counsel was not deficient in failing to introduce Mahdi's DJJ records. Wong v. Belmontes. Counsel's not introducing Mahdi's DJJ records was an objectively reasonable trial strategy decision.

This evidence would have further advanced the State's argument Mahdi has a bad character and further advanced proof of his future dangerousness. See State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999)(evidence of defendant's behavior in prison is admissible in capital sentencing because it bears on his character and future dangerousness); State v. Whipple, 324 S.C. 43, 476 S.E.2d 683 (1996). It would also have further undercut applicant's prison adaptability expert's testimony at trial. See Hughes, supra.; State v. Woomer, 278 S.C. 468, 299 S.E.2d 317 (1982)(prior escape by defendant refuted evidence by defendant of his good conduct while in prison).

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

Both Dr. Martin and Dr. McKee had reviewed Mahdi's psychiatric records of his commitment to the Walter Carter Center. Both knew Mahdi had been diagnosed with major depression as a child. Dr. Martin testified he also interviewed Mahdi, and based on his interviews with Mahdi and his participation in the mitigation team meetings where the other experts shared their background information on Mahdi, he determined Mahdi had a history of recurrent depression in his

life.<sup>21</sup> However, even with this determination, Dr. Martin testified he found that Mahdi was not suffering from any mental illness at the time the crime was committed. Therefore, even with this information from DJJ, Dr. Martin's diagnosis would not change because he was already aware Mahdi had a history of recurrent depression during his life. Additionally, as previously set forth above, the claim that Mahdi was suffering from depression at the time of Captain Myers' murder is not persuasive. The evidence introduced at trial and the PCR does not support a conclusion Mahdi was depressed or was suffering from depression at the time he murdered Captain Myers. Additionally, even if counsel had provided these documents to their psychiatric experts, they could not call either Dr. Martin or McKee in the sentencing phase because of things Mahdi told both doctors that would have come out on cross-examination *and* their diagnosis of anti-social personality disorder. Wong v. Belmontes.

Counsel did not or could not call Dr. Martin to testify to Mahdi's history of recurrent depression for several reasons: (1) Dr. Martin did not find Mahdi was suffering from depression at the time of the crime; (2) Dr. Martin diagnosed Mahdi with anti-social personality disorder, and (3) Mahdi told Dr. Martin he had committed two (2) homicides in Virginia, and he fled from Virginia to get away from homicide detectives who were closing in on him for one of the two homicides. Again, this was an objectively reasonable trial strategy decision under the circumstances, and providing the DJJ records to Dr. Martin would not have changed these negative factors that led to this strategic decision. Mahdi has failed to show deficient performance in this regard.

Additionally, Dr. McKee also diagnosed Mahdi with anti-social personality disorder. And, Mahdi also informed McKee that he left Virginia to escape from homicide detectives who were

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<sup>21</sup>Ms. Tarr testified at the PCR hearing that she received the DJJ records.

closing in on him. Counsel did not and could not call Dr. McKee to testify for these two reasons, which were objectively reasonable trial strategy decisions under the circumstances. Providing the DJJ records to Dr. McKee would not have changed these negative factors that led to this strategic decision. Mahdi has failed to show deficient performance here.

Finally, Mahdi failed to meet his burden of proof with regard to this specific allegation. Both Dr. Martin and Dr. McKee testified at the PCR hearing. Mahdi did not show either Dr. Martin or Dr. McKee the DJJ records and ask them if these records would have changed their opinion in this case.<sup>22</sup> Von Dohlen v. State. As a result, Mahdi has failed to meet his burden of proof to show counsel was deficient in this regard. Id.

#### *The School Records and School Witnesses*

Mahdi also alleges counsel was ineffective for failing to introduce Mahdi's school records and in not calling elementary school officials. At PCR, Mahdi introduced school records and called several school officials and provided the affidavit of another school official. These individuals either taught Mahdi or were involved in the decision to place him in special education. There is no merit to this ground.

Trial counsel retained a qualified mitigation investigator, Paige Tarr Haas, to investigate and develop mitigation in this case. Ms. Haas had previously been a mitigation investigator in thirty (30) to forty (40) capital cases. Haas testified as part of her investigation she requested school records of Mahdi. (PCR 565). Although she no longer had her file in this case, she testified it was her common practice to request records from any school that Mahdi or his family informed her he had

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<sup>22</sup>In fact, Dr. Martin testified that based on what he saw and heard discussed at the PCR hearing, his opinion regarding Mahdi's mental state had not changed. And, Dr. McKee testified he did not need to see any additional records to make his diagnosis in this case.

attended. (PCR 565). She also testified that she went to the schools Mahdi attended. (PCR 585). She also testified that she spoke with teachers in Lawrenceville who were familiar with Mahdi; however, these teachers had not spent a lot of time with Mahdi (PCR 586). She also testified she spoke with individuals from a school Mahdi attended in Baltimore. (PCR 586). Ms. Haas testified that she routinely provides summaries of school records in capital cases. (PCR 587). She also testified that if she had done a summary of school records in this case, she would have included all pertinent information that she thought was helpful to Mr. Madhi. (PCR 586-87). The record shows a summary of the school records was done in this case and introduced at the sentencing hearing before Judge Newman. Counsel testified that they relied on Hass and also Ms. Hammock to get all of the information with regards to Mahdi's school and education. (PCR 629-30). Counsel also testified there were team meetings where the mitigation investigators shared with them and their experts what they had found in their investigation. (PCR 631, 700). Counsel testified he was aware Mahdi was in special education. (PCR 629). Doctors Martin and McKee also testified they were aware Mahdi was in special education. Counsel also testified they would have forwarded any records they received to their experts.

At Mahdi's sentencing proceeding before Judge Newman, Ms. Hammock testified to Mahdi's difficulties in school. Hammock testified that in her expert opinion Mahdi's education was disrupted many times. (R 1752, 1756). Hammock testified this was reflected in the school records. (R 1752). Hammock also testified the school records noted lateness and absences, but that was not consistent in the whole school record. (R 1756). The time-line of Mahdi's school history introduced before Judge Newman shows Mahdi was forced to change elementary schools five (5) times. (Def. Ex. 3). The time line of Mahdi's life introduced also shows Mahdi had to move several times. (Def.

**Ex. 2/Resp. Ex. 5).** Hammock testified Mahdi started out kindergarten at Sister Clara Muhammad School in Richmond. He completed part of kindergarten at Totaro Elementary School in Lawrenceville. He then moved back to Richmond and attended Chamberlayne Elementary School for part of that year. Then he was removed from there and sent to Baltimore where he attended Scotts Branch Elementary School for 2 years. Then he was removed from that school while in the Carter Center, and ultimately returned back to Lawrenceville to live with his father. **(R 1754-56).** Hammock also testified that even in his pre-teen years there was a lack of stability in terms of Mahdi's attending school, and it was reflected in the kinds of reports he received. **(R 1760-61).**

Hammock testified Mahdi constantly had difficulty in school. **(R 1752).** He was considered bright, but he didn't perform well. **(R 1752- 53).** Hammock testified Mahdi was particularly a poor reader. **(R 1753).** Hammock also related Mahdi's uncle Carson also reported Mahdi could not read when he came to live with them at 8 years old. She also informed Judge Newman that both Carson and Lawanda reported to her Mahdi had difficulty in school. **(R 1753).** She testified Carson and Lawanda reported there was constant conflict in getting Mahdi to deal with the fact that he had academic limitations. **(R 1754).** She testified the school records during this time were consistent with this report. **(R 1754).** Hammock testified Mahdi had uneven skills in school. **(R 1755).** Mahdi was in the average math program, but in the below average reading program. **(R 1755).** While he excelled in science, his reading, vocabulary, and spelling remained below average. **(R 1756).** He needed improvement in a number of areas, including standards for behavior and showing respect for authority. **(R 1755).** Mahdi was described as having poor self-esteem throughout his academic time. **(R 1753).** It was noted in records that he had poor self-esteem and had difficulty in relationships with others. **(R 1756).** The time line of Mahdi's life shows when he was

involuntarily committed to the Carter Center his initial diagnosis included "Developmental Reading Disorder." (Def. Ex. 2/Resp. Ex. 5). Counsel also introduced another Exhibit through Hammock (Def. Exhibit 3) which summarizes Mahdi's difficulties in school particularly in reading, and writing, which remained at below grade level throughout elementary school. Hammock also confirmed this in her testimony. (R 1755). The exhibit also chronicles the numerous absences Mahdi had while in school. (Def. Ex. 3). The exhibit also chronicles that Mahdi's father removed him from school in the 5<sup>th</sup> grade to home school him. (Def. Ex. 3). The exhibit also indicates there was no information this home schooling ever occurred. (Def. Ex. 3). Hammock testified Mahdi's educational history was one of poor school progress. (R 1762). While counsel did not introduce the records themselves, counsel conducted a reasonable investigation of Mahdi's school history and presented the same before Judge Newman. Strickland; Vanhook.

The school records themselves reveal damaging information about Mahdi and his character, even at an early age. The records reveal that Mahdi was referred for special services not because he was mentally retarded, but because of "...behavior problems. He exhibits inappropriate and disruptive behavior." (Brunswick County Public Schools, 3/25/99). The same record also indicates Mahdi had a negative attitude about being corrected, he did not always get along with other children, his behavior with adults was inappropriate at times, and most of his problems seemed to be getting along with people. The records also indicate that Mahdi had an I.Q. of 118, but had episodic acting-out behavior and an unwillingness to deal with difficult school tasks. (Confidential Psychological Evaluation). The records also indicate Mahdi was referred for special services, not because of mental retardation, but because of "*behavioral difficulties*; such as leaving his seat inappropriately, *physically and verbally aggressive towards others* at times, talks out of turn, preoccupied, anxious,

*easily frustrated or angered, lacks respect for authority, and daydreams. (Educational evaluation)(emphasis added).* A Burk's Behavior Rating Scale revealed very significant factors for poor impulse control, poor anger control and excessive resistance. (Appendix Y). The records also indicate Mahdi's "intellectual functioning" was "in the high average range." (M000065).

To have introduced Mahdi's school records, including the special education records, would have introduced bad things about Mahdi to Judge Newman. It would also have introduced that Mahdi's intellectual functioning was not impaired. Counsel was not deficient in failing to introduce Mahdi's school records which contained bad things about Mahdi. Counsel introduced Mahdi's school problems and difficulties through Hammock's testimony and through an exhibit showing Mahdi's problems in school without introducing the bad things Mahdi had done while in school. Counsel's performance was not deficient in this regard. Wong v. Belmontes.

Mahdi further argues counsel should have introduced Mahdi's school records and called school witnesses to show Mahdi was diagnosed by school officials in the fourth grade as emotionally disturbed. However, the record shows Mahdi's emotional disturbance diagnosis was based in large part on his *inappropriate behavior* in school such as defiance and aggressiveness toward other students. Further, there was expert testimony in this case that a diagnosis of emotional disturbance many times means simply a misbehaving child. (PCR 542). This testimony would have further exposed testimony regarding Mahdi's oppositional defiant disorder/intermittent explosive disorder and his conduct disorder, which is a pre-cursor to anti-social personality disorder, which would not have been favorable to Mahdi. Additionally, Mahdi was also referred for special education services because of his inability to read, which Judge Newman already knew about.

Additionally, the records contain information that would have undercut counsel's attempt to

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

Furthermore, Mahdi's own mitigation witnesses undercut the validity of Mahdi's being placed in special education. Dr. Cooper-Lewter testified Mahdi himself informed him that he should not have been placed in special education. Mahdi informed Cooper-Lewter that after being placed in special education he put forth no effort, because he did not belong there. Lawanda Burwell, Mahdi's aunt, and a credentialed school administrator, also testified Mahdi should not have been in

special education.<sup>23</sup>

As previously discussed, Mahdi also claims trial counsel was ineffective in failing to provide his psychiatric experts, Doctors Martin and McKee with records from Mahdi's school history, specifically the records regarding Mahdi being placed in special education classes. However, both Drs. Martin and McKee testified these records would not have changed their ultimate diagnosis. (PCR 544, 561). Dr. Martin also testified at the PCR hearing that applicant Mahdi informed him he had been placed in special education. (PCR 515). Dr. Martin also testified Mahdi told him that he should not have been placed in special education. (PCR 515). Mahdi told Dr. Martin he begged the school principal to take him out of special education, but this was unsuccessful. (PCR 516). And, he also asked his father to take him out of special education, and his father eventually pulled him out of public school and home schooled him. (PCR 516). Dr. Martin also testified that students are classified as emotionally disturbed and placed in special education classes because they are behavioral problems. (PCR 542). Dr. Martin testified that sometimes this behavior is fueled by depression, sometimes its incorrigible behavior, or sometimes they are truant or having problems with conduct disorder. (PCR 542). Dr. Martin also testified Mahdi's acting-out behaviors such as irritability, talking back to teachers, and disrespectful attitude were in other reports he did review and also in information Mahdi provided to him. (PCR 542). Mahdi has failed to show counsel was deficient in failing to provide Drs. Martin or McKee with Mahdi's school records. *See Von Dohlen v. State.*

Mahdi also claims counsel was ineffective for failing to provide their experts with these

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<sup>23</sup>Mahdi also told Doctors Martin and McKee that she should not have been in special education. Mahdi also told Dr. Martin that he became ODD (Oppositional Defiant Disorder) after being placed in special education because he did not belong there. (Respondent's Ex. 8).

specific records of Mahdi being placed in special education because they showed evidence of Mahdi's depression. This ground has no merit for several reasons.

Dr. Martin testified he extensively reviewed Mahdi records from the Walter Carter Center that documented his major depression at age (9). He reviewed the summary prepared by Ms. Tarr and the records themselves. Dr. McKee likewise reviewed Mahdi's commitment records from the Walter Carter Center at age nine (9). Both experts knew Mahdi suffered from major depression as a child. The special education records were generated approximately eighteen (18) months after Mahdi's release from the Carter Center. Dr. Martin further testified he interviewed Mahdi about his life. Mahdi informed him he had been placed in special education classes. Mahdi also indicated he had suffered from recurrent depression in his life. Dr. Martin further testified that he participated in several team meetings where the findings of other members of the mitigation team were shared with him, including Mahdi's developmental and social history. Dr. McKee testified likewise. As previously stated, Ms. Tarr had subpoenaed Mahdi's school records and interviewed individuals who worked at two different elementary schools Mahdi attended. Based on his interviews with Mahdi regarding his life, and his review of the Carter Center records, along with the information he received from the mitigation investigators, Dr. Martin determined that Mahdi had suffered from recurrent depression during his life. Dr. Martin further testified at PCR that the records Mahdi presented at PCR, the special education records, would not change his opinion in this case. Dr. McKee also testified he was aware Mahdi had been placed in special education as a child. Dr. McKee also testified he did not need any further records to make his diagnosis in this case. (R 508-545, 545-561). As a result, Mahdi has not shown deficient performance on the part of counsel for failing to provide Dr. Martin or McKee with Mahdi's school records regarding special education. Von

Dohlen.

Additionally, Mahdi cannot show deficient performance from the failure to provide these records because counsel could not call either of these witnesses because they found Mahdi had anti-social personality disorder, and Mahdi had related to both Dr. Martin and Dr. McKee that he had been involved in at least one homicide in Virginia. Mahdi had also related to Dr. Martin other damaging things: (1) Dr. Martin noted Mahdi had no difficulty talking about killing people if necessary to achieve independence; (2) Mahdi informed Dr. Martin of another homicide he had committed in Virginia, where police had yet to find the body; (3) Dr. Martin testified Mahdi's outlook on life was quite violent and his interactions with others were hostile, aggressive, and sometimes quite violent. (R 508-545, 545-561). As previously stated, counsel's decision not to call these witnesses in mitigation was an objectively reasonable trial strategy decision under the circumstances, and providing these experts with Mahdi's special education records would not change the negative factors that motivated this decision.

Dr. Martin also testified there was no evidence Mahdi was depressed at the time he committed Captain Myers' murder. Mahdi did not state he was depressed or psychotic at the time. There was no evidence of depression from the way Mahdi described the events surrounding Captain Myers' murder. Mahdi's description of the events of Captain Myers' murder were quite coherent. Mahdi described very clearly to Dr. Martin what he was feeling and what he was perceiving at the time of Captain Myers' murder. Mahdi described extensive details regarding his actions during Myers' murder. Mahdi described murdering Captain Myers because Captain Myers discovered Mahdi in Captain Myers' cabin, and Mahdi thought Captain Myers' was going to shoot him. Mahdi also described burning Captain Myers' body to cover-up or destroy evidence. Mahdi was coherent

and had no problem remembering events. As a result, Dr. Martin opined that at the time of the offense Mahdi only had a personality disorder, anti-social personality disorder. Likewise, Dr. McKee found no evidence Mahdi was suffering from depression at the time of the Captain Myers' murder. Dr. Martin testified the special education records would not change his opinion in this case. Dr. McKee testified that he did not need to see any other records to make his diagnosis in this case. (R 508-545, 545-561).

Finally, Mahdi has failed to meet his burden of proof with regard to this specific allegation. Dr. Martin was shown Mahdi's special education records at PCR and testified they would not change his opinion in this case. Additionally, Mahdi did not show Dr. McKee the special education records and even ask him if they would have changed his opinion in this case. As a result, Mahdi has failed to show counsel was deficient in failing to provide the special education records to their psychiatric/psychological experts. Von Dohlen v. State; Reed v. Florida Dept. of Corrections, 593 F.3d 1219 (11<sup>th</sup> Cir. 2010)(fact that expert retained at trial and expert retained later at PCR differed, does not prove trial counsel was ineffective); Davis v. Singletary, 19 F.3d 1471, 1475 (11<sup>th</sup> Cir. 1997)("the mere fact that a defendant can find, years after the fact, a mental health expert who will testify favorably for him does not demonstrate that trial counsel was ineffective for failing to produce that expert at trial."); See Poyner v. Murray, 964 F.2d 1404, 1419 (4<sup>th</sup> Cir. 1992)(Petitioner cannot establish ineffective assistance because counsel did not expert shop until one could be found who would testify favorably).

As a result of all of the above, Mahdi has failed to show deficient performance in counsel's failure to introduce Mahdi's school records, failure to call school officials as witnesses, or failure to provide his school records to his psychiatric/psychological experts. As a result, this ground must

be dismissed with prejudice.

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

First, the record shows trial counsel had possession of these records, and Ms. Tarr summarized them for counsel and the experts. (**Def. Ex. 11 & PCR 565-66**). Trial counsel's experts, Dr. Thomas Martin and Dr. Geoffrey McKee, also had the records themselves from the Walter Carter Center. (**PCR 511-512, 553-54**). They reviewed them in conducting their evaluation of Mahdi. (**PCR 511-512, 553-54**).

The sentencing phase record shows, Ms. Hammock testified regarding Mahdi's commitment to the Walter Carter Center, his diagnosis there, and his discharge diagnosis. An exhibit was also introduced detailing Mahdi's involuntary commitment and diagnosis at the Carter Center. Judge Newman, was well aware that Mahdi was committed to the Walter Carter Center at age 9 for depression and suicidal ideation. Judge Newman was also well aware Mahdi was diagnosed with major depression at this young age, and that it came of the heels of his being separated from his family, and being forced to move to Baltimore with to live with his aunt and uncle. Judge Newman was also well aware Mahdi was confined at the Walter Carter Center for 60 days, and he was discharged to his aunt and uncle. Trial counsel chose not to introduce the records themselves. (**R 1739-63 & Def. Ex. 2**).

The records themselves are cumulative to the testimony of Hammock and the exhibit introduced through her. Additionally, the records themselves contain damaging information about Mahdi. Mahdi was placed in isolation several times while at the Carter Center due to his disruptive or inappropriate behavior. Importantly, the records show Mahdi assaulted other patients, assaulted

staff, was verbally threatening or aggressive towards staff, and attempted to escape from the facility. On several occasions, Mahdi threw chairs or tables and attempted to damage property of the hospital. On one occasion, Mahdi falsely pulled a fire alarm. Mahdi also cursed staff members. On another occasion Mahdi threatened to suffocate a staff member with a pillow. Also, the records detail Mahdi's making a false claim of child abuse against his aunt Lawanda Burwell. The records show the claim of child abuse against his aunt was determined to be unfounded. The records show Mahdi admitted he only threatened suicide when he didn't get his way. The records also show that Mahdi's aunt reported that Mahdi only talked about suicide when he didn't get his way or did something wrong. Mahdi also admitted threatening suicide as a way of getting attention. The records also indicate Mahdi had anti-social behavior and conduct disorder. Counsel was not deficient in failing to introduce the records themselves when bad things were contained within the records that would have been damaging to their client. (**Walter Carter Center Records & Resp. Ex. 7**). Wong v. Belmontes. Counsel appropriately presented the Carter Center testimony or information to the sentencing court through Ms. Hammock, without the negative information about Mahdi that would have been before the sentencing court had the records themselves been introduced. This ground has no merit must be dismissed with prejudice.

#### *Conclusion*

Counsel conducted a proper mitigation investigation, however, Mahdi's family members were resistant and uncooperative in that investigation, and Mahdi's family members either refused to be involved and/or knew matters about Mahdi that would have been harmful to counsel's attempt to present a mitigation case on Mahdi's behalf. Counsel made objectively reasonable trial strategy decisions under the circumstances not to call these mitigation witnesses or introduce certain

evidence, and therefore, such decisions are not subject to a claim of ineffective assistance of counsel. Strickland, 466 U.S. at 689 (objectively reasonable trial strategy is not a basis for ineffective assistance); Bell v. Evatt, 72 F.3d 421 (4<sup>th</sup> Cir. 1995)(standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel, and petitioner must overcome presumption that the challenged actions were an appropriate and necessary trial strategy); Council v. State (strategic decisions will be judged as reasonableness under the circumstances). Counsel's mitigation presentation of Mahdi's social and family history was not deficient. Counsel was not deficient in failing to introduce Mahdi's DJJ records, school records, or Walter Carter Center records. Counsel was not deficient in failing to call school officials to testify. Counsel was not deficient in failing to call or elicit the testimony Dr. Cooper-Lewter testified to at PCR. Counsel was not deficient in failing to call or elicit the testimony Dr. Haney testified to at PCR. Counsel was not deficient in failing to investigate, develop, and present mitigating evidence regarding Mahdi's mental status. Counsel retained two well-qualified psychiatric/psychological experts to evaluate Mahdi and their findings were not helpful to the mitigation case, and their testimony would have been even more harmful if presented. Wong v. Belmontes. Applicant has also failed to show counsel was deficient in failing to provide his experts with specific records. Von Dohlen.

Mahdi has not met his burden of proof to show deficient performance. Strickland; Wong; Vanhook; Pinholster. As a result, this Court should alter or amend its Order of Dismissal to correctly find that Mahdi has failed to meet his burden of proof to show counsel's performance was deficient in this regard.

RESPONDENT SO MOVES.

Respectfully submitted,

ALAN WILSON  
Attorney General

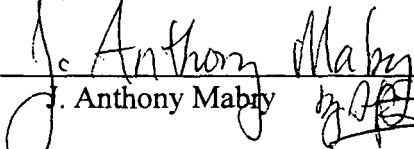
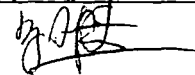
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February 8, 2013


**CERTIFICATE FOR SERVICE**

I, **Donald J. Zelenka**, hereby certify that I have served the Proposed Order of Dismissal in the foregoing action by depositing copies in the United States mail, postage prepaid, to the following:

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This 8<sup>th</sup> day of February, 2013.

  
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DONALD J. ZELENKA for  
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