CAPITAL CASE
NO. ____________

In The
Supreme Court of the United States

———————♦———————

MIKAL D. MAHDI,
Petitioner,

v.

BRYAN STIRLING, Commissioner, South Carolina Department of Corrections; MICHAEL STEPHAN, Warden of Broad River Correctional Institution,
Respondents.

———————♦———————

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI

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****CAPITAL CASE****

QUESTION PRESENTED

Mikal Mahdi lived through extreme trauma as a child. His mother abandoned him at the age of five to the father who viciously beat her. Mikal was hospitalized with a mental health crisis at age nine. By the age of ten, his father began "homeschooling" Mikal in political paranoia, and taught him how to shoot and wield knives to protect himself from white people. Then, between the ages of fourteen and twenty-one, Mikal was incarcerated for 85% of his life, with minimal mental health care, where he was also tasered, shot with rubber bullets, and called "camel monkey" and "towelhead" by guards. The charged crimes followed just two months after his release from these brutal conditions.

Despite having two retained investigators and a broad outline of their client's upbringing, Mikal Mahdi's trial counsel abandoned their inquiry into his background after determining that his family was uncooperative. Counsel made virtually no effort to identify available teachers and community witnesses who could describe Mikal's harrowing life. As a result, the sentencing judge received a mere fifteen transcript pages of testimony about Mikal.

The question presented is:

1. Did the state post-conviction court misapply this Court's Sixth Amendment precedent when it held that Mikal Mahdi's trial attorneys reasonably ended their investigation into mitigating evidence.

LIST OF PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

STATEMENT OF RELATED CASES

This petition arises from a habeas corpus proceeding in which Mikal D. Mahdi was the petitioner before the U.S. District Court for the District of South Carolina, and before the U.S. Court of Appeals for the Fourth Circuit. The Respondents are Bryan P. Stirling, Commissioner of the South Carolina Department of Corrections, and Michael Stephan, Warden of Broad River Correctional Institution. There are no additional parties to this litigation.

Mahdi v. Stirling, No. 8:16-cv-03911-TMC, U.S. District Court for the District of South Carolina, order denying habeas petition issued on September 24, 2018.

Mahdi v. Stirling, No. 19-3, U.S. Court of Appeals for the Fourth Circuit, opinion and order issued on December 20, 2021, and order denying rehearing *en banc* issued on April 8, 2022.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mikal D. Mahdi respectfully petitions this Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The decision of the Fourth Circuit is reported at *Mahdi v. Stirling*, 20 F.4th 846 (4th Cir. 2021), and is attached as App. 1a. The district court opinion is unpublished but is available at *Mahdi v. Stirling*, C/A No. 8:16-3911-TMC, 2018 WL 4566565 (D.S.C. Sept. 24, 2018), and is attached at App. 136a.

STATEMENT OF JURISDICTION

The Fourth Circuit issued an opinion on December 20, 2021. A timely petition for rehearing was filed and denied by the Fourth Circuit on April 8, 2022, *see* App. 135a. Mr. Mahdi invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment right "[i]n all criminal prosecutions . . . to have the assistance of counsel," and the Fourteenth Amendment right to be free from the deprivation "of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

I. Mikal Mahdi had an unusually traumatic background and upbringing, as shown by the evidence developed during the state PCR hearing.

Mikal Mahdi's parents—Shareef and Vera Mahdi—were an arranged marriage. (J.A. 2453.)[1] Although Vera was not thrilled about an arranged marriage, she wanted to escape the poverty and abuse of her family. (*Id.* 2964.) Shareef and Vera married and had their first child, Saleem (Mikal's older brother). (*Id.* 2964-65.) A short time later, Vera became unexpectedly pregnant with Mikal. (*Id.* 2965.) Mikal Mahdi was born in 1983. (*Id.* 2447, 2997.)

After Mikal was born, Shareef was controlling and abusive towards Vera. (*Id.* 2925.) Vera was forced to flee the abusive relationship when Mikal was only four or five years old. (*Id.* 2298, 2287-88.) She told Shareef that she was taking Mikal and his brother Saleem. (*Id.*) Shareef told her he would kill Mikal and Saleem before letting them leave with her. (*Id.* 2288.) Vera fled without the children, who were later told she left them behind because she did not love them. (*Id.* 2931.) Shareef did not allow Vera to visit her sons, and he eventually told them that she had died. (*Id.* 2967.) This left Mikal with deep feelings of abandonment, which is a theme that recurred throughout his life. (*Id.*)

Shareef did not have the skills to be a single parent. He was depressed, constantly moving, and unable to keep a job. (*Id.* 2241.) Mikal's family members, including his Uncle Carson, recalled Shareef was not meeting Mikal's most basic needs. (*Id.* 2241, 2243.) Shareef left the boys completely unsupervised. Mikal,

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[1] References to "J.A." are to the Joint Appendix filed in the Fourth Circuit.

between the ages of five and eight, was frequently forced to care for himself. Shareef exhibited no regard for his sons' stability, and moved them constantly from school to school. (*Id.* 2241, 2215, 5707.) While Mikal did attend school, his records show irregular attendance and major gaps in his education and abilities. (School Records, J.A. 2934-52; 4265-76l 5701-04; Walter Center Records, J.A. 3197.)

It soon became apparent Shareef could not care for the children. Mikal could not read and was not getting proper nutrition. (*Id.*) Mikal's Uncle Carson and Aunt Lawanda Burwell took him to live with them in Baltimore, and Saleem went to live with family members in Texas. (*Id.* 2244-45.) In Baltimore, Carson spent a lot of time with Mikal, teaching him to read and helping him with his schoolwork. (*Id.* 2252-53.)

Nonetheless, Mikal continued to struggle. When he was in second grade, Mikal's principal contacted Carson, informing him that Mikal had said, "[W]hy doesn't someone just shoot me? If I had a gun, I would shoot myself." (*Id.* 2248.) School officials recommended psychiatric treatment, which Mikal did not receive. (*Id.* 2266.)

The summer following his second-grade year, Mikal visited his father in Virginia where he learned his mother was in fact alive. (*Id.* 2946, 2968.) Shareef used Mikal and his brother as bait to see Vera. (*Id.* 2972.) When Shareef saw Vera, he immediately started to abuse her and threatened to kill her in front of the children. Shareef then took Vera to the woods and assaulted her. (*Id.*) When Vera escaped the vicious beating, her family members quickly took her out of town to Richmond. (*Id.*)

Mikal returned to Baltimore to live with his Uncle Carson and Aunt Lawanda. (*Id.*) But even away from his father, Mikal continued to suffer abuse. One day, Mikal's

Aunt Lawanda got upset because he would not finish his homework. (*Id.* 2259.) She cruelly beat him for ten to fifteen minutes. (*Id.*) After she finished, Mikal called the police. (*Id.* 2260.) When the police arrived, Mikal asked the officer for his gun so he could shoot himself. (*Id.* 2263.) Mikal was then committed to the Walter Carter Center and hospitalized for two months. (*Id.* 2263.) He was only nine years old.

At the hospital, Mikal was asked what he would want if he was granted three wishes. (*Id.* 2215.) He responded that his only wish was for his family to be reunited. (*Id.*) When he was asked what he would wish for if he could not have his family back together, Mikal told the doctor that he would "jump off a bridge, shoot myself, or kill myself with my bow and arrows." (*Id.* 2628) Mikal's treating physician noted anxiety and experience with trauma, and recommended a highly structured and safe residential and educational environment. (*Id.* 2418, 2436.) However, after Mikal was released, there is no indication that any of his family members sought any follow up counseling or treatment. (*Id.*)

At the time he was discharged, Mikal was in third grade. He showed both academic and behavioral progress that year. But the next year, the progress dissipated when Mikal's brother Saleem was sent back to live with their father. Mikal felt unwanted and acted out. Mikal's aunt became frustrated with his behavior and sent him away to live with Shareef again. (*Id.* 2974-76.) The progress Mikal made in third grade was lost when he was once again in Shareef's care. Shareef continued to fail to meet Mikal's most basic needs. (*Id.* 2955.) Mikal began his fourth grade in

Lawrenceville, where he was put in special education classes due to inappropriate and disruptive behaviors. (*Id.*)

Carol Wilson was Mikal's fifth-grade teacher; she was also a special education teacher. (*Id.* 2329.) After seeing Mikal continue to struggle, she tried to connect him with services. However, Shareef thwarted these special education efforts from the start. (*Id.* 2341-42.) As Ms. Wilson explained, Shareef disrupted the very first school assessment team meeting that was called to determine what special education services Mikal might need. (*Id.* 2333.) When the school psychologist read his psychological findings, Mikal's father became very angry and the director of pupil personnel and the principal tried to calm him down. (*Id.*) Even though the meeting was not even half over, Shareef got up, cursed, and left because he didn't want any white man (the school psychologist) writing any negative reports about his son. (*Id.*) Shareef refused to permit Mikal to receive the recommended mental health counseling. (*Id.* 2341-42.) Ms. Wilson nonetheless recognized Mikal "had the ability to go ahead and do well, even to excel." (*Id.* 2344.)

Between Mikal's depression and Shareef's interference, it was difficult for Ms. Wilson to help Mikal. (*Id.* 2346.) Mikal was quiet and kept to himself. Ms. Wilson could not get any "joy," "interest," or "motivation" out of Mikal. (*Id.*) Ms. Wilson and the school psychologist "really wanted to help Mikal," but it "wasn't able to materialize" because Shareef "yanked" Mikal out of Ms. Wilson's class. (*Id.* 2347.) Shareef claimed he would homeschool Mikal. According to Ms. Wilson, Mikal "just

got lost in the cracks." (*Id.* 2348.) Testing at this time showed that Mikal was depressed, lacked self-esteem, and felt hopeless. (*Id.* 2669.)

By this time, Mikal was still only eleven years old. (*Id.* 2977.) Shareef removed Mikal from the school system and provided no structure for Mikal or Saleem. (*Id.* 2975-76.) He regularly exposed them to religious and political tirades centering around racism, injustice, religion, and the need to separate from the world and protect yourself. (*Id.* 370.) Mikal learned that he was on his own educationally, as Shareef would not help him with his homework, instead going off on religious and racial rants. (*Id.*)

Indeed, Shareef was unstable and mentally ill during the time that he pulled Mikal out of public school for "homeschool." Within a few months of Mikal being pulled from school at age eleven, Shareef was referred for mental health treatment after he jumped in an "all-white" private pool at an elite country club. (*Id.* 2979.) Law enforcement officers were unable to get him out of the pool, but eventually got a well-respected local African-American leader, George Smith, to talk him out of the pool. (*Id.* 2374-76, 2979.) Mr. Smith recalled Shareef "was in the pool swimming around and cursing, using extremely vile language." (*Id.*)

Mental health evaluators found Shareef suffered from a personality disorder and discharged him from mental health treatment and sent him back to jail. (*Id.* 2978-79.) After being released, Shareef obtained several guns and taught Mikal and Saleem to shoot so they would be ready when the "white folks" came to get them. (*Id.* 2978.) Shareef also taught the boys the best way to stab people and effectively kill

them with a knife. (*Id.*) Throughout this, Shareef continued to indoctrinate the children with religious and racial ideas. (*Id.* 2978-80.) Mikal was still just a young child, between eleven and fifteen years old, at the time of this trauma. (*Id.* 2979.)

Around age fourteen, Mikal began to have run-ins with the law for various property crimes. (*Id.* 3017, 3410-19.) He entered the Virginia Juvenile Justice system in approximately December 1997, after Shareef failed to take Mikal to his required court and other program meetings, and stayed for seven to eight months. (*Id.*)

After being released, Mikal wanted to go back to school and straighten his life out. (*Id.* 372.) However, through a number of clerical errors and his father's failure to take him to court dates, Mikal ended up spending the vast majority of the rest of his adolescence in juvenile facilities. (*Id.* 2956-57; 2983-84.) At one point, when Mikal was fifteen, Shareef even provoked an eight-hour standoff with law enforcement when they came to take Mikal to court for a sentencing hearing. The situation Shareef created was so tense that the police sent an armored truck and tactical team, and it only ended after the sheriff and his team entered the home with a battering ram. (*Id.* 2926-29.)

Mikal was sent back to a juvenile facility where he stayed for several years, from ages fifteen to seventeen. (*Id.* 2982-85.) While incarcerated, Mikal continued to suffer from depression. (*Id.* 2663, 2669-72; 2983-85; 3926-28.) At one point, Mikal was placed in protective custody on suicide watch because he was threatening to harm himself. (*Id.*)

Several psychologists examined him and noted that Mikal thought everyone was against him and was preoccupied with conspiracy theories (likely as a result of his father's belief system). (*Id.*) Mikal had suicidal ideations frequently throughout his incarceration and attempted suicide at least once. Evaluators diagnosed him with Major Depression. (*Id.*)

As Mikal neared the age of majority, he was "released without any requirement of aftercare or therapy or group home placement." (*Id.* 2578.) At age seventeen, Mikal was released from the juvenile institution with the same problems he had at age fourteen, "arguably worsened by the fact that he had been in this institutional setting." (*Id.* 2580.) Mikal still had severe depression, felt hopeless about his future, and had a worsened paranoia. (*Id.*)

When Mikal was released at seventeen years old, he attempted to reunite with his mother, but the reunion did not go well, with his mother showing almost no emotion. (*Id.* 2986.) Within five months of being released from the juvenile institution, Mikal was charged with assault and was sentenced to fifteen years in the Virginia Department of Corrections. (*Id.* 2987.) Approximately a year and a half into his sentence, Mikal was transferred to Wallens Ridge State Prison, a supermax prison in rural Virginia with a reputation for brutality and racism. (*Id.* 2987-89.)

While Mikal was housed at Wallens Ridge, a majority of the inmates were minorities, while the majority of the officers were white. (*Id.*) The atmosphere was charged with racial tension, and officers often used racial slurs and epithets towards the inmates. (*Id.*) Mikal was disciplined several times while at Wallens Ridge for

rules infractions and spent a large portion of his time in some form of isolation. (*Id.*) Mikal witnessed horrendous abuse of inmates by officers and was himself tasered by officers and shot with rubber bullets on as many as fifteen occasions. (*Id.*) Officers frequently called Mikal racist names, including "camel monkey" and "towelhead." (*Id.*) On top of this abuse, Wallens Ridge offered no programs for inmates to study or prepare themselves for release from prison. (*Id.*)

Mikal had to endure this brutal environment for several years, living at Wallens Ridge from age seventeen until the time of release at twenty-one. In total, between ages fourteen and twenty-one, Mikal spent 86% percent of his time in a juvenile or adult prison. (*Id.* 2570.) As explained by one of the mental health experts who testified during the PCR hearing, Mikal was released from Wallens Ridge on May 12, 2004 without any of his life-long mental health issues being addressed, as he had "almost no psychological or psychiatric contact during the entire period of time that he's institutionalized." (*Id.* 2581-82.)

Not long after his release from Wallens Ridge, and lacking the support he would need to cope with life after a history filled with unrelenting trauma, Mikal committed the series of crimes that would ultimately result in his death sentence. On July 14, 2004, Mikal stole a gun and car from his neighbor in Virginia. The next day, in North Carolina, he killed Christopher Boggs, a gas station clerk, in the course of a robbery. Mikal shot Boggs twice in the face at close range. On July 17, Mikal committed a carjacking in Columbia, South Carolina, and after stopping at a gas station, fled into the woods. There, Mikal came across a farm work shop. When the

owner of the property, Captain James Myers, came home, Mikal shot him multiple times and burned the body. Mikal fled to Florida, where he was apprehended on July 21. *Mahdi*, 20 F.4th at 854-55.

II. Trial counsel abandoned their mitigation investigation upon deciding that Mikal's family was not cooperative, and failed to pursue non-family witnesses as an alternative source of information.

As summarized in the Fourth Circuit panel opinion, Mikal's trial team included two mitigation investigators who met with Mikal; obtained school, hospital, and prison records; gathered additional information that had been assembled by Mikal's North Carolina defense team; and spoke with various members of Mikal's family. *Mahdi*, 20 F.4th at 901.

However, the PCR court found, and the Fourth Circuit agreed, that this investigation was stymied when Mikal's family members failed to cooperate. The PCR court made a credibility determination that Mikal's family members were unwilling to serve as witnesses or assist trial counsel. 20 F.4th at 902. Similarly, during the PCR hearing, trial counsel and one of the mitigation investigators testified that Mikal's close family members either refused to participate or were only willing to discuss subjects that were unhelpful to Mikal's defense. *See* 20 F.4th at 874-79 (Fourth Circuit's full summary of the trial-level mitigation investigation).

Even assuming this is an accurate description of trial counsel's investigation and the challenges they encountered, it remains uncontested that trial counsel made only minimal efforts to go beyond Mikal's members and identify non-family witnesses who could have provided meaningful testimony about Mikal's background. As the

Fourth Circuit itself summarized, mitigation investigator Paige Haas "visited schools and spoke with several teachers who knew and remembered Mahdi but had not spent significant amounts of time with him." 20 F.4th at 901; *see also id.* at 874-75. The other mitigation investigator, Marjorie Hammock, met with a community member who "didn't know much about" Mikal. *Id.* And trial counsel themselves did not extend their search for non-family witnesses beyond their reliance on Mikal's family to identify those witnesses, and the family was "not helpful" in that regard. *Id.* at 901-02. Thus, faced with an allegedly unhelpful family, trial counsel made only the most minimal efforts to identify other witnesses beyond that family.

III. Trial counsel's curtailed investigation provided the jury with only a vague picture of Mikal's life, totaling just 15 pages of testimony.

In November 2006, Mikal proceeded to trial. Following three days of jury selection, the judge held an in-chambers conference to address a possible guilty plea. (J.A. 1173-74.) The trial judge allowed Mikal to consider his options overnight. The next morning, the trial judge explained to Mikal that, under state law, if he plead guilty, the judge would determine the sentence, not the jury. When courtroom proceedings resumed, trial counsel announced that Mikal would plead guilty, and the plea was accepted. (*Id.* 1181-85, 1206-07.)

The capital sentencing hearing before the trial judge began. The State's evidence in aggravation was extensive. The State called twenty-eight witnesses to establish the facts of the crimes, the aggravating circumstances, Mikal's prior criminal record and other bad acts, his behavior in custody, and the impact of the

death of Captain Myers on his family, friends, and colleagues. (*Id.* 1226-617.); *see also Mahdi*, 20 F.4th at 858-62 (summarizing the State's evidence).

The defense, in contrast, called two witnesses. And rather than presenting a single mitigation witness from the community who actually knew Mikal, *trial counsel relied on one expert witness*, clinical social worker Marjorie Hammock, to present a summary of Mikal's life experiences. Hammock's testimony, excluding the explanation of her credentials and methodology, *spanned just fifteen pages of trial transcript* and "included vague conclusions based on an incomplete investigation." (*Id.* 1597-1611, 7175.) Hammock's testimony was little more than a series of generalized descriptions about Mikal's upbringing that did nothing to capture its true nature.

Hammock did prepare two reports for the trial judge, but they were just as measly as her testimony. There was a two-page biographical timeline, only half of which covered Mikal's life. Trial counsel also had Hammock present a "school experience summary." That document was a half page. (*Id.* 1596-97, 1603); District Court Doc. 33-19, pp. 13, 45-46.

James Aiken was the only other mitigation witnesses. He testified as a prison adaptability expert. (*Id.* 1563.) Although Aiken characterized Mikal as an "immature boy in a big prison system," (*id.* 1567), the majority of his testimony highlighted Mikal's disciplinary record without providing any context for the infractions. The entirety of Aiken's testimony, after reciting qualifications, spanned only *thirteen transcript pages*. (*Id.* 1553-76.)

Following the close of evidence, the trial judge found the murder of James Myers "was committed while in the commission of burglary in the [second] degree" and "while in the commission of larceny with the use of a deadly weapon." (*Id.* 1680.) The trial judge found the "State presented compelling evidence of prior and subsequent bad acts of [Mikal Mahdi] which are relevant to show his bad character, evil nature and malignant heart." (*Id.* 1681.) The trial judge also considered the impact of Captain Myers' death on his family, friends, and colleagues. (*Id.* 1686.)

The trial judge considered but did not give any weight to Mikal's "young age," "mentality," "turbulent and transient childhood," (*id.* 1684) testimony of James Aiken, and Mikal's guilty plea, noting the "guilty plea occurred during the fourth day of his trial, following jury selection but prior to the jury being sworn." (*Id.* 1685.)

The trial judge sentenced Mikal to consecutive sentences of death for the murder of Captain Myers, fifteen years for second-degree burglary, and ten years for grand larceny. (*Id.* 1687.) Mikal's guilty plea and sentences were affirmed on direct appeal. (*Id.* 2020-86) (direct appeal counsel filed a six-page brief on a single issue, which the South Carolina Supreme Court held was not preserved for review).

IV. If trial counsel had interviewed readily-available non-family witnesses, they could have put on a far more compelling mitigation case about their client's life.

A. Myra Ramsey Harris – third-grade teacher.

Myra Ramsey Harris was Mikal's third-grade teacher. (J.A. 2310.) Harris was never contacted by trial counsel and, thus, did not testify at Mikal's sentencing hearing, although she was available and willing to do so. (*Id*. 2321-2322.)

Harris did testify at the PCR hearing. There, she explained that when Mikal entered her class, he was at first "withdrawn," but his socialization improved and she "developed a relationship with him where we would sit and talk." *(Id.* 2313.) Notably, during third grade, Mikal lived with his aunt and uncle in Baltimore and not with his father Shareef. (*Id*. 2339.) Removed from the harmful effects of Shareef's supervision and assisted by the supportive environment of Harris's classroom, Mikal began to thrive. (*Id*. 2318.)

B. Carol Wilson -- fifth-grade teacher.

The progress that Mikal made in third grade was lost when family members sent him back to Shareef in Brunswick County, Virginia. Carol Wilson was Mikal's fifth-grade teacher there (*Id*. 2329), and, like Harris, was willing and available to testify at sentencing but never contacted by the defense team, (*Id*. 2349.)

At the PCR hearing, Wilson provided a grim description of Mikal's condition at the start of that school year, when he was under Shareef's care testifying that "he scored very . . . significant and excessive self-blame, poor impulse control, and excessive resistance. He has also exhibited periods of extreme sadness at times." (*Id*. 2335.)

Wilson was a special education teacher who was equipped to give Mikal the assistance that he needed in order to overcome his dysfunctional family situation. (*Id*. 2330.) Her PCR testimony vividly illustrated how Shareef thwarted her efforts from the start. (*Id*. 2332-2334.) Shareef disrupted the very first school assessment

team meeting that was called to determine what special education services Mikal might need:

> When [the school psychologist] read his psychological findings [Shareef] became very angry and [the director of pupil personnel] and [the principal] tried to calm him down because the meeting wasn't even half over and he got up and he cursed us and he left because [the psychologist] is Caucasian and [Shareef] said he didn't want any white man writing any negative reports about his son.

(*Id*. 2333.)

Wilson further testified that Shareef refused to permit Mikal to receive recommended mental health counseling. (*Id*. 2341). She nonetheless recognized that "Mahdi had the ability to go ahead and do well, even to excel." (*Id*. 2344.) However, his profound sadness and depression made it difficult for him to progress. Wilson testified:

> Q When Mikal joined your class do you have any specific memory of what he was like early on?
>
> A Yes. I will never forget him. He did like to draw and he was able to do well, but it came a point of time that I had to sit him next to me in order for him to get his work done. He was never disrespectful. The thing that I noticed about Mikal was that he was depressed and he was very sad.

Id.

That sadness and depression made it difficult for Wilson to help Mikal and, as she testified, her efforts were hampered by Shareef:

> A I just felt that it was very hard for me to approach him. I felt that he did not trust. I wanted to help him as much as I could. See, what made it difficult a little bit, too, is that Mr. Mahdi – Mikal's father – would request to come in and observe my classroom.

> Q And what would happen then?
>
> A Then I think that Mikal was sort of tight. I don't know if he was nervous, but that didn't last too long because Ms. Wynn [the principal] did put a stop to it, but I felt he was flat. I felt Mikal – You couldn't get any real like joy out of him, any interest, any motivation. He was just like always to his self and quiet, little interaction with the other students. He was not a behavior problem. I just had him next to me to keep him on task, but he was never disrespectful or anything like that.
>
> Q So, even though he had come to you having problems in classes, with you he wasn't a behavior problem?
>
> A No. I think it was the depression that just kept him very low key.

(*Id*. 2346.)

Mikal made a powerful impression on Wilson. As she explained at the PCR hearing:

> Q How is it that you are able to recall Mikal so clearly after all of these years of students? Did he stand out in some way to you?
>
> A From the time that I started teaching in '84 – and even taught at a prison up through '06 – I will never forget Mikal. He just – I felt that we could have help [*sic*] him because really and truly Mr. Vecker [the school psychologist] really wanted to help Mikal and I just feel so lost about the fact that it wasn't able to materialize because after Mikal was just I felt he was sort of yanked out of my class by his dad and I would see his dad and his dad would say, Look, I am homeschooling him, you know.

(*Id*. 2347.) Unfortunately, Mikal never was home-schooled, (*Id*. 2926); instead, in Wilson's words, "he just got lost in the cracks." (*Id*. 2348.)

C. George Smith – community member who knew Mikal's father.

George Smith was a lifelong resident of Brunswick County, Virginia, who could have provided testimony of bizarre and violent behavior by Shareef. (*Id*. 2374-2377.) Smith was willing and available to testify at sentencing, but was never contacted by trial counsel. (*Id*. 2377.) Because he had known Shareef Mahdi for many years, Smith could have offered both testimony about the father's pathological hatred of whites generally and a specific example of the wild, erratic behavior that resulted from this hatred. (*Id*. 2372-2374.) At the PCR hearing, Smith testified:

> Shareef Mahdi hated white people. I mean, he just hated them with a passion, and, you know, I remember once – I watch the military channel sometime. I am not fascinated with Hitler, but I am interested in him, you know, and sometimes I wonder, you know, to myself how he led these people to destruction being the kind of person he was and I remember once he [Shareef] told me, when he killed those Jews he knew what he was doing – something to that effect.

(*Id*. 2372.)

Smith also recounted an incident where Smith had to assist the state police in removing Shareef from a country club swimming pool where he was causing a disturbance. (*Id*. 2374-2377.) Smith testified that when he arrived on the scene, he saw Shareef:

> He was in the pool swimming around and cursing, using extremely vile language, and I do remember it was in the timeframe of maybe after the O.J. Simpson trial and he was making disparaging remarks about Nicole and why he killed her and cursing and hollering as loud as he possibly could as to try to inflame these policemen that were standing around.

(*Id*. 2374-2376.)

Shareef was arrested and Smith went with him into his jail cell. (*Id*. 2377.) Smith's testimony about Shareef Mahdi's behavior in that cell vividly illustrated Shareef's crazed and violent nature:

> When we got into the cell he just went wild. He took the furniture and started throwing the chairs against the wall, breaking the tables, not directed at any individual at the time, but it was just wild, you know. I wondered why I had gone in there because I hadn't seen that side of him before, but it was just as violent as anything I have ever seen in my life.

(*Id*. 2378.)

D. James Woodley – former sheriff who knew Mikal's father.

James Woodley was the former Sheriff of Brunswick County and a witness for the State at Mikal's sentencing hearing. (*Id*. 2925.) At the sentencing, Woodley offered damaging testimony about a "standoff" when Woodley attempted to execute warrants to arrest Mikal and Shareef at their home. (*Id*. 1276-1280.) Woodley testified about officers "putting on their gear, the bullet proof vests and getting weapons out," (*Id*. 1279) and engaging in a nine-hour standoff before going into the residence and subduing Mikal and Shareef. *Id.* Woodley also testified that after Mikal was in custody, Mikal said, "I'm going to kill a cop before I die." (*Id*. 1280.)

Trial counsel's cross-examination of Woodley failed to blunt the force of this testimony. (*Id*. 1630.) As a result, the State emphasized Mikal's statement in its closing, (*Id*. 1630.) and the trial judge referenced it in his sentencing order, as well, (*Id*. 1681.)

Trial counsel could have defused Woodley's harmful testimony but were unable to do so because they failed to interview Woodley before trial (*Id.* 2927) and thus did not know what questions to ask him on cross-examination. In an affirmation submitted as part of the PCR hearing, Woodley testified about the additional details that he would have described to trial counsel had they spoken with him. *Id.* Among other things, Woodley's affirmation made clear that Shareef was the architect of the standoff and that the incident ended peacefully, as there were no weapons in the house and no resistance to the officers when they eventually entered the house. (*Id.* 2926-2927.)

Had trial counsel interviewed Woodley, they also would have known that Woodley would have testified that Mikal "probably got [his "I'm going to kill a cop before I die" statement] from Shareef, who had no respect for authority and who had begun the standoff that day." *Id.* Instead, trial counsel failed to elicit that explanation on cross-examination, and the trial judge was left with a misleading view of Mikal, as a result. That failure alone was deficient performance. *See Rompilla v. Beard*, 545 U.S. 374, 387 n. 7 (2005) (counsel's duties include to develop "evidence to rebut any aggravating evidence that may be introduced by the prosecutor") (internal quotation marks and citations omitted).

Trial counsel's failure to interview Woodley also meant that they were unable to elicit mitigating information from him about Shareef, including evidence of Shareef preventing Mikal from receiving an education and of violent abuse by Shareef. (*Id.* 2926.) With regard to Mikal's education, Woodley would have

complemented the testimony of Mikal's teachers. In his affidavit, Woodley testified both that Shareef took Mikal out of school for purported home schooling but did not in fact teach him, and that neither the Brunswick County Department of Social Services nor the School Board ever remedied the situation. (*Id.* 2926.) As a result, Mikal "just got lost in the cracks," as Wilson testified, and was left with no education at all. (*Id.* 2348.)

Woodley also would have offered detailed evidence of violent abuse of family members that Mikal witnessed. For example, in his affidavit, Woodley testified:

> [Shareef] had no respect for women including his mother, Nancy Burwell. I recall an instance when Mrs. Burwell came to me expressing concerns that he was "sick" and saying that he needed help. I suspected at the time that he had been abusive to her and asked her about it. She showed me bruises on her legs and thighs and told me that he had beaten her with the buckle end of a belt while his sons, Saleem and Mikal, [were] watching.

(*Id.* 2925.)

Woodley also would have testified about Mikal witnessing his father, Shareef, kidnap and attempt to kill Vera:

> Around this same time, I learned, mostly directly from Shareef and Mrs. Burwell, that he had kidnapped and beaten his wife after she left him. Shareef took Saleem and Mikal to Petersburg to visit their mother. He used a pretense of taking her and the boys to get ice cream or something, but once she got in the pickup truck Shareef told her he was going to take her back to Lawrenceville and kill her. Once they were back at the house in Brodnax, Shareef and his wife remained outside while the boys went in the house with their grandmother and a female relative visiting from Maryland. Mrs. Burwell, the other woman, and the boys heard screaming and ran outside to see Shareef trying to kill the boys' mother.

(*Id.* 2926.)

Such mitigating testimony would have been particularly powerful, as it would have come from a law enforcement officer who was a State witness, rather than someone from Mikal's family or a retained defense expert.

V. The state and federal courts have addressed the merits of Mikal's claim that he received ineffective assistance of counsel when his trial attorneys failed to interview non-family witnesses, resulting in the presentation of only a single mitigation witness and just 15 pages of testimony describing Mikal's entire life.

When Mikal's case moved to state postconviction review, his attorneys raised the claim that Mikal was denied the effective assistance of counsel in violation of his Sixth and Fourteenth Amendment rights when his trial attorneys, during the sentencing phase, failed to develop and present mitigating evidence of Mikal's background. (J.A. 43; *see* Claims 10(a) and 11(a)(iii).)

The state PCR court held an evidentiary on this claim. PCR counsel presented the testimony of seven family members and lay witnesses from the community where Mikal grew up, along with additional testimony from a mitigation investigator, as well as three mental health experts. Collectively, they testified about the conditions Mikal endured during his upbringing. (*See* J.A. Table of Contents, xi to xiv.)

After hearing this evidence, the PCR court issued an order finding that trial counsel were deficient for undertaking only a "narrowly focused [investigation into] Mahdi's competency to stand trial and diminished capacity defense, rather than mitigation," (J.A. 7080) failing "to obtain necessary and available records and provide them to expert witnesses focused on mitigation," (*id.* 7081) and failing "to locate and interview available witnesses;" (*id.* 7083) but, the PCR judge did not find prejudice

under the second prong of *Strickland v. Washington*, 466 U.S. 668 (1984). (*Id.* 7084.) However, after the State filed a motion to amend the order, the PCR court issued an amended order of dismissal that reversed course and rejected, not only the prejudice prong of Mikal's claim, but deficient performance as well. (*Id.* 7507-637.)

Mikal's PCR attorneys sought certiorari review of this decision in the state supreme court, which was denied. (*Id.* 7721, 7835-36.) This Court also denied review prior to federal habeas proceedings. (*Id.* 7838, 8179).

Mikal next moved to federal habeas review, where he filed a petition in district court raising the ineffective assistance claim at issue here. The district court denied the petition on summary judgment. (*Id.* 447-544.) On appeal, the Fourth Circuit titled this claim "Non-Family Lay Witnesses," and also denied it on the merits, noting that it was not procedurally barred. *Mahdi*, 20 F.4th at 901.

REASONS FOR GRANTING THE PETITION

I. The state PCR court misapplied this Court's Sixth Amendment precedent when it held that Mikal Mahdi's trial attorneys reasonably ended their investigation into mitigating evidence after identifying only 15 transcript pages worth of testimony about their client's entire life.

A. The Court should grant review to safeguard its rule that capital mitigation investigations cannot be ended at unreasonably premature junctures.

This case involves an extreme misapplication of the Court's longstanding precedent governing Sixth Amendment claims of ineffective assistance of trial counsel, specifically, the instances in which counsel engage in deficient legal representation by prematurely ending their investigation into mitigating evidence.

See Strickland v. Washington, 466 U.S. 668 (holding that Sixth Amendment ineffectiveness claims require a two-part showing: deficient performance by the attorney, and prejudice to the defendant).

In *Strickland*, the Court held that an attorney's decision to end an investigation into their client's case is only reasonable to the degree that the factual basis for that decision is also reasonable:

> [S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

466 U.S. at 690-91.

The Court applied this rule in *Wiggins v. Smith*, 539 U.S. 510, 522-23 (2003), explaining the "focus is on [the issue of] whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins' background *was itself reasonable*." (emphasis in original). Thus, in *Wiggins*, the Court determined that trial counsel's conduct was deficient because they ended their investigation prematurely, prior to becoming sufficiently informed about their client's life: "counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources." *Id.* at 524.

Wiggins also established that trial counsel merely having "*some* information with respect to [their client's] background" does not necessarily mean "they were in a position to make a tactical choice" regarding their mitigation defense. (emphasis in original). When "assessing the reasonableness of an attorney's investigation . . . a

court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." Critically, "*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy." *Wiggins*, 539 U.S. at 691.

The Court should grant review of this case because it implicates this clearly established principle governing capital mitigation investigations. If the Court allows the lower court decisions to stand, it risks eroding this critical safeguard for ensuring fair capital trials under the Sixth Amendment, and the heightened reliability the Eighth Amendment demands of capital sentencing proceedings.

B. This case involved an extreme misapplication of the clearly established law that governs when capital mitigation investigations may reasonably be concluded by trial counsel.

Because this is a capital habeas case governed by 28 U.S.C. § 2254(d), a federal court may not grant relief unless the state court adjudication was contrary to or involved an unreasonable application of clearly established U.S. Supreme Court precedent. The Court has emphasized in recent years that this relief is reserved for only the most extreme malfunctions in the state criminal process, over which there could be no fair-minded disagreement. *See, e.g., Mays v. Hines*, 141 S. Ct. 1145, 1149 (2021). This is such a case. In a series of ways, the PCR court, and later the Fourth Circuit, misapplied *Strickland* and its progeny.

First, the PCR court unreasonably applied the rule, described above, that a trial attorney is deficient when their decision to end an investigation is based on an insufficient factual basis. Mikal's trial counsel pursued a sentencing-phase strategy to investigate and present mitigating evidence about their client's traumatic upbringing. Counsel hired mitigation investigators to collect evidence about Mikal's background. They assembled records and spoke with his family, confirming that Mikal, in fact, had experienced significant trauma. But, as the PCR court and Fourth Circuit held, they encountered resistance. Mikal's family members, in the lower courts' telling, either declined to be interviewed, were reticent about testifying, or focused on unhelpful topics. But rather than continue their search for compelling witnesses to speak on Mikal's behalf, trial counsel shut down their investigation after just a few half-hearted attempts at reaching beyond Mikal's reticent family members. *See Mahdi*, 20 F.4th at 901-02 (describing how one investigator spoke with several teachers, but none who knew Mikal well; the other investigator met with one community member who did not know much about Mikal; and trial counsel stopped looking for non-family witnesses after Mikal's family was not helpful in identifying people). Counsel instead chose to proceed to trial with only the vague, conclusory information that Marjorie Hammock would ultimately testify to for a mere fifteen transcript pages. How could such a paltry showing ever be considered reasonable when a client's life is on the line?

The Fourth Circuit held that trial counsel did all they needed to, and ended their investigation at a reasonable juncture. *Mahdi*, 20 F.4th at 902 ("trial counsel

did all that could be expected of them"). Meanwhile the PCR court did not even address the issue of non-family witnesses directly, instead excusing counsel's shortcomings because of the resistance they said they encountered with Mikal's family. (J.A. 7556-60.) But these conclusions are totally at odds with the record. Instead of doing all that could be expected, as the Fourth Circuit claimed, trial counsel made only the most minimal efforts to locate willing non-family witnesses. And in holding that Hammock's cursory, fifteen pages of testimony were a sufficient basis to end their search for non-family lay witnesses, both the state and federal courts erred in the extreme.

Next, the PCR court unreasonably applied *Strickland* by failing to recognize that counsel prematurely ended their search for cooperative non-family witnesses, given what they already knew about Mikal's background. Trial counsel knew that Mikal went through extensive trauma in his life. The broad strokes they presented through Hammock's testimony showed as much. What trial counsel lacked was the lay witnesses who could fill out the details of that story, to give it the human face needed to evoke mercy from a sentencer. The PCR court and Fourth Circuit's conclusions that trial counsel acted reasonably in these circumstances fly in the face of this Court's established holding that capital mitigation investigations cannot be curtailed precipitately when the attorneys know full well that additional, important information is available. *See Wiggins*, 538 U.S. at 525 ("The scope of their investigation was also unreasonable in light of what counsel actually discovered in the DSS records" and "any reasonably competent attorney would have realized that

pursuing these leads was necessary to making an informed choice among possible defenses"); *Rompilla*, 539 U.S. at 389 (counsel are not required to search for "a needle in a haystack," but they may not short circuit their investigation when they "truly [have] reason to" believe that mitigating evidence is available).

Third, the PCR court unreasonably applied Supreme Court precedent when it analyzed Mikal's claim about his attorneys' failure to identify *non-family witnesses* by focusing almost exclusively on the fact that Mikal's *family* was not cooperative. (J.A. 7556-60.); *see also Mahdi*, 20 F.4th at 902 (same error). This Court has made plain that a lack of cooperation by a client's family does not excuse counsel from making reasonable efforts to investigate and present a persuasive mitigation case. In *Porter v. McCollum*, 558 U.S. 30, 40 (2009), the Court held that "Porter may have been fatalistic or uncooperative, but that does not obviate the need for defense counsel to conduct *some* sort of mitigation investigation." (emphasis in original). The Court articulated the same principle four years earlier in *Rompilla*. 545 U.S. at 381-82. The PCR court and Fourth Circuit improperly ignored these holdings and used the reticence of Mikal's family to excuse counsel's failure to take reasonable measures to find non-family witnesses who would cooperate.

Finally, the PCR court and Fourth Circuit erred beyond fair-minded disagreement when they held that trial counsel's deficiency could be excused on the ground that the additional information from non-family witnesses also included downsides for Mikal. *See* 20 F.4th at 903. This Court has been clear that the presence of unhelpful information does not excuse counsel from investigating and presenting

a "comparatively voluminous amount of evidence" in mitigation. *Williams v. Taylor*, 529 U.S. 362, 396 (2000) (finding counsel deficient even though the unpresented mitigation also included information about the defendant's juvenile criminal history); *see also Sears v. Upton*, 561 U.S. 945, 951 (2010) ("Competent counsel should have been able to turn some of the adverse evidence into a positive").

This principle is particularly applicable here. During the State's sentencing phase presentation, the judge heard from numerous State witnesses who testified about a litany of prior unsympathetic acts committed by Mikal during this turbulent youth. Given the volume of aggravating evidence Mikal had to overcome, it strains credulity to claim that he was better off presenting only a few minutes and a few pages worth of testimony about his life, with no community members to support him, all in the name of avoiding further mention of information the sentencer already knew about. The PCR court and Fourth Circuit's determinations in this respect were out of step with these record facts, and inconsistent with this Court's holdings. A finding that Mikal's trial attorneys performed deficiently is more than warranted.

C. Mikal Mahdi was prejudiced by his trial attorneys' failure to make reasonable efforts to locate non-family mitigation witnesses, instead pinning their client's hopes for a life sentence to a single, retained mitigation expert who would testify for only a few minutes.

As a result of trial counsel's premature end to their investigation, Mikal's attorneys went into the capital trial with only a single person who was able to testify about their client's life. And the testimony from that person, the trial team's mitigation investigator, was nothing more than fifteen transcript pages of broad

generalities about Mikal's childhood. It's doubtful this lasted longer than fifteen or thirty minutes. It takes longer to eat breakfast in the morning than it took Mikal Mahdi's lawyers to present everything they found about their client's upbringing.

Even the federal district court that denied habeas relief acknowledged that Hammock's testimony was "concise and *lacking the detail* presented at the PCR hearing," included only "*basic* information" and gave only a "*brief*" description of Shareef's background. *See Mahdi*, 2018 WL 4566565, at *31 (emphasis added).

Indeed, it is unsurprising that the trial judge assigned no weight to Mikal's "young age," "mentality," "turbulent and transient childhood," (J.A. 1684.) Had the judge heard evidence beyond the conclusory outline provided by Hammock, there is at least a reasonable probability he would have reached a different conclusion. The unpresented testimony from two school teachers and two local community members, one of whom was a former sheriff, is precisely the type of humanizing presentation that is known to affect capital sentencing decisions. *See* 2003 ABA Death Penalty Defense Guideline 10.11, Commentary ("Community members such as co-workers, prison guards, teachers, military personnel, or clergy who interacted with the defendant or his family, or have other relevant personal knowledge or experience often speak to the jury with particular credibility.").

Instead, all the trial judge received was a superficial outline of Mikal's childhood. For example, at sentencing, trial counsel introduced a half-page chart entitled "School Experience Summary" which merely listed the schools attended with brief summary notations of Mikal's performance at each one. (J.A. 6294.) Based on

her review of those records, Hammock testified generally that "his education was disrupted many times," (J.A. 1605.), and very little in the way of supporting detail about Mikal's education.

The PCR court and Fourth Circuit claimed the additional non-family witness evidence was cumulative of what trial counsel presented through Hammock. *Mahdi*, 20 F.4th at 903-04. But this was an unreasonable factual determination, contravening § 2254(d)(2). The PCR evidence from non-family witnesses constituted four different people who each could have provided testimony about their observations of Mikal's potential as a child, and the myriad ways his dysfunctional and abusive father thwarted that potential. In contrast, the trial attorneys had their expert provide nothing more than a brief outline of Mikal's life, testimony that was over in minutes.

The question is whether there is a "likelihood of a different result if the [unpresented] evidence had gone in" and whether trial counsel's failure was "sufficient to undermine confidence in the outcome actually reached at sentencing." *Rompilla*, 545 U.S. at 393. When the vague outline of Mikal's life that was presented at trial is considered in tandem with the detailed, unpresented testimony from the four PCR non-family witnesses, the answer to whether Mikal Mahdi was prejudiced in this case is unquestionably yes.

CONCLUSION

Petitioner Mikal D. Mahdi requests this Court grant the petition for a writ of certiorari.

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