CAPITAL CASE
NO. 22-5536

In The Supreme Court of the United States

MIKAL D. MAHDI,
Petitioner,

v.

BRYAN STIRLING, Commissioner, South Carolina Department of Corrections; LYDELL CHESTNUT, Deputy Warden of Broad River Correctional Institution Secure Facility,
Respondents.

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

REPLY BRIEF OF PETITIONER

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Respondent's brief in opposition (BIO) does not—and could not—contest that the mitigating evidence presented to the judge during the sentencing phase of Mikal Mahdi's capital trial *totaled just fifteen pages of testimony* and provided only cursory information about his tumultuous and abusive early childhood. "Although counsel nominally put on a case in mitigation in that counsel in fact called witnesses to the stand after the prosecution rested, the record leaves no doubt that counsel's investigation to support that case was an empty exercise." *Andrus v. Texas*, 140 S. Ct. 1875, 1882 (2020) (per curiam). Respondent attempts to excuse these failures by Mahdi's trial counsel, even though they allowed his judge to sentence him to death with only the vaguest picture of his life.

Respondent argues that the post-conviction relief (PCR) testimony from four non-family lay witnesses describing how Mahdi's father, Shareef, derailed his childhood with racialized paranoia is somehow cumulative to the "sanitized" version presented at sentencing. Respondent next argues that the true evidence of Mahdi's victimization by his father's conspiracy-tinged interventions in his education and mental health care would have triggered the introduction of negative evidence about Mikal's character, even though the prosecution presented an extensive case in aggravation that this evidence would have blunted.

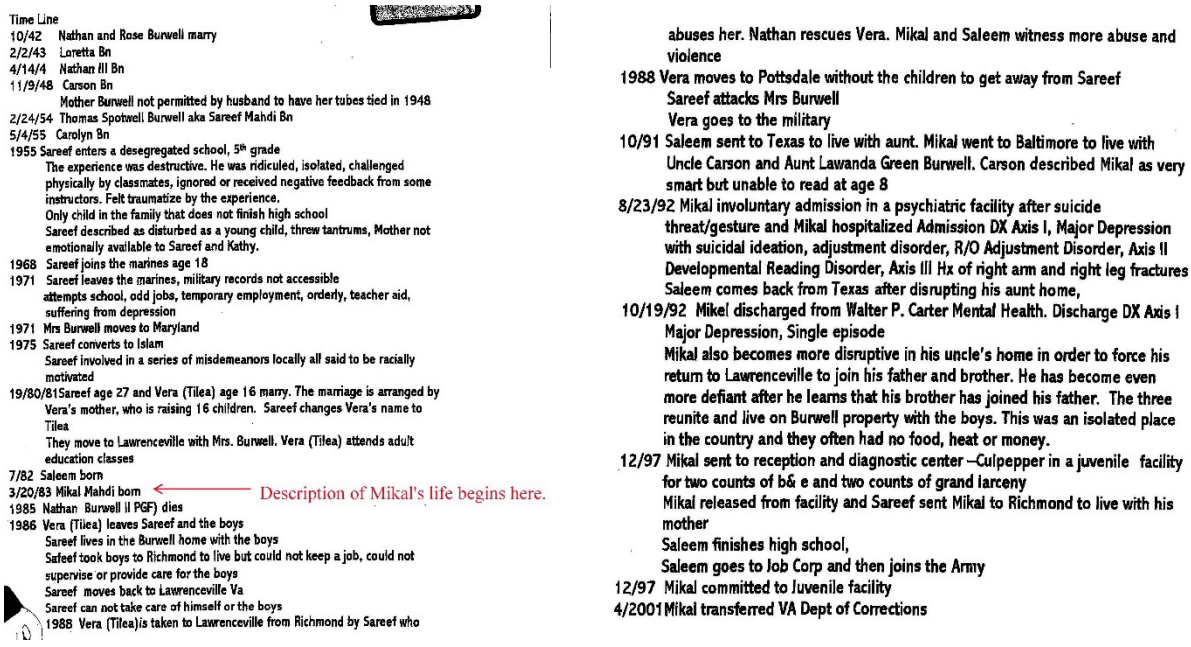
Because Respondent's arguments run afoul of the record and this Court's precedent, certiorari should be granted. Moreover, because neither the State nor the federal courts have engaged with this evidence in a reasonable fashion, the

limitations on relief imposed by 28 U.S.C. § 2254 do not impair this Court's ability to grant review and relief. For these and other reasons discussed below, this case merits the Court's attention.

I. The paltry sentencing-phase exhibits that trial counsel submitted illustrate just how little information the trial judge was given.

Respondent's Brief in Opposition tries to persuade the Court that the 15-pages of testimony from the defense's social work investigator was an adequate picture of their client's life, and no more was needed or available. Mahdi's petition has already addressed that testimony and its limited nature, but a visual aid may help emphasize the point.

During her testimony, the investigator, Marjorie Hammock, presented two exhibits. The first was a "a list of [Mikal's] experiences in terms of a time line." (J.A. 1596):



Time Line
10/42 Nathan and Rose Burwell marry
2/2/43 Loretta Bn
4/14/4 Nathan III Bn
11/9/48 Carson Bn
Mother Burwell not permitted by husband to have her tubes tied in 1948
2/24/54 Thomas Spotwell Burwell aka Sareef Mahdi Bn
5/4/55 Carolyn Bn
1955 Sareef enters a desegregated school, 5th grade
The experience was destructive. He was ridiculed, isolated, challenged physically by classmates, ignored or received negative feedback from some instructors. Felt traumatize by the experience.
Only child in the family that does not finish high school
Sareef described as disturbed as a young child, threw tantrums, Mother not emotionally available to Sareef and Kathy.
1968 Sareef joins the marines age 18
1971 Sareef leaves the marines, military records not accessible
attempts school, odd jobs, temporary employment, orderly, teacher aid, suffering from depression
1971 Mrs Burwell moves to Maryland
1975 Sareef converts to Islam
Sareef involved in a series of misdemeanors locally all said to be racially motivated
19/80/81 Sareef age 27 and Vera (Tilea) age 16 marry. The marriage is arranged by Vera's mother, who is raising 16 children. Sareef changes Vera's name to Tilea
They move to Lawrenceville with Mrs. Burwell. Vera (Tilea) attends adult education classes
7/82 Saleem born
3/20/83 Mikal Mahdi born ← Description of Mikal's life begins here.
1985 Nathan Burwell II PGF) dies
1986 Vera (Tilea) leaves Sareef and the boys
Sareef lives in the Burwell home with the boys
Safeef took boys to Richmond to live but could not keep a job, could not supervise or provide care for the boys
Sareef moves back to Lawrenceville Va
Sareef can not take care of himself or the boys
1988 Vera (Tilea) is taken to Lawrenceville from Richmond by Sareef who abuses her. Nathan rescues Vera. Mikal and Saleem witness more abuse and violence
1988 Vera moves to Pottsdale without the children to get away from Sareef
Sareef attacks Mrs Burwell
Vera goes to the military
10/91 Saleem sent to Texas to live with aunt. Mikal went to Baltimore to live with Uncle Carson and Aunt Lawanda Green Burwell. Carson described Mikal as very smart but unable to read at age 8
8/23/92 Mikal involuntary admission in a psychiatric facility after suicide threat/gesture and Mikal hospitalized Admission DX Axis I, Major Depression with suicidal ideation, adjustment disorder, R/O Adjustment Disorder, Axis II Developmental Reading Disorder, Axis III Hx of right arm and right leg fractures
Saleem comes back from Texas after disrupting his aunt home,
10/19/92 Mikel discharged from Walter P. Carter Mental Health. Discharge DX Axis I Major Depression, Single episode
Mikal also becomes more disruptive in his uncle's home in order to force his return to Lawrenceville to join his father and brother. He has become even more defiant after he learns that his brother has joined his father. The three reunite and live on Burwell property with the boys. This was an isolated place in the country and they often had no food, heat or money.
12/97 Mikal sent to reception and diagnostic center –Culpepper in a juvenile facility for two counts of b& e and two counts of grand larceny
Mikal released from facility and Sareef sent Mikal to Richmond to live with his mother
Saleem finishes high school,
Saleem goes to Job Corp and then joins the Army
12/97 Mikal committed to Juvenile facility
4/2001 Mikal transferred VA Dept of Corrections

(J.A. 1596, Hammock's testimony); (J.A. 6322, full exhibit).

The second exhibit was a half-page review of Mikal's school records:

SCHOOL EXPERIENCE SUMMARY

1988 Sister Clara Muhammad Richmond, VA	Records not available
9/15/88Totaro Elemen availabel Lawenceville, VA	K 23 abs Transferred from Sister Clara Muhmmad Narrative records not
Chamberlayne Elemen Richmond, VA	1st. grade Transferred from Totaro, Narrative records not available
1991-1992 Scotts Branch Elemen program Baltimore MD authority expectation	2nd 3 abs Placed in average math program and below average reading Needs improvement in meets standards for behavior and show respect for Reading and written language skills remain below grade level Attends special reading and qualifies for chapter I
Scotts Branch Elemen	3rd 6 abs Place in average reading and math. Needs improvement in written composition, letter formation, vocabulary, written work, and showing respect for authority. Outstanding in Science. Works well in small groups
Totaro Elemen	4th 12 ab 6 abs Appears to be stifling his potential .Does not appear motivated
ITotaro Elemen year he	5th 35 Mikal has not attended school since the 94-95 school year. During that was a 5th grader at Totaro, earned 6 b's and 1 c His father removed Mikal in order to home school. There was no official information that this schooling had
Totaro Elemen	6th 35 ab Hanover Juvenile

1999 enrolled in academic/vocat courses through the Dept of Correction Education Services

(J.A. 1603, Hammock's testimony); (J.A. 6294, full exhibit).

So, not only did the defense present just a few minutes of testimony about their client's life, the exhibits supporting that testimony added up to little more than a two-page, superficial outline. This drive-by capital defense cannot pass constitutional muster. The Sixth Amendment guarantees effective assistance from counsel, and this meager showing in a capital case was a far cry from effective.

II. Respondent cannot escape the fact that the defense sentencing presentation gave the trial court only a superficial, vague, and extremely brief picture of Mikal Mahdi's traumatic childhood.

Respondent suggests that Mahdi's petition should be denied because it addresses an "intensely fact-based issue" (BIO at p. 4). But *Strickland* prejudice is necessarily a "weighty and record-intensive analysis[.]" *Andrus*, 140 S. Ct. at 1887. Respondent does *not* dispute that trial counsel's presentation of Mahdi's life history

is only 15 pages of the record (J.A. 1596-1611). And Respondent does not contest the new information presented by the four non-family lay witnesses—Myra Harris, Carol Wilson, George Smith, and James Woodley (BIO at pp. 15-18).

"The untapped body of mitigating evidence was" far more descriptive and textured than the perfunctory information submitted at trial. *Andrus*, 140 S. Ct. at 1883. At the sentencing hearing, social worker Marjorie Hammock testified only vaguely about Mikal's early schooling, noting that "there are different moves in terms of schooling" between Lawrenceville (Virginia), Richmond, and Baltimore where "Mikal constantly ha[d] difficulty in school," was a "poor reader" and had "poor self-esteem." (J.A. at 1601-05). Hammock mentioned that Mikal attended third grade at Scotts Branch Elementary School in Baltimore—where he continued to lack self-esteem and performed poorly with reading, vocabulary, and spelling (J.A. 1604-05).

However, Hammock provided none of the vivid and mitigating details of Mahdi's third-grade year that teacher Myra Harris testified to during the PCR hearing, or Harris's assessment of Mikal's considerable potential. (*See* J.A. 2310-22). Nor did Hammock testify about the potential Harris saw in Mikal when he was removed from the harmful effects of his father Shareef's supervision and nurtured in the supportive environment of Harris's classroom. *Id*. Similarly, Hammock offered no testimony whatsoever about Mikal's fifth grade year. But during the PCR hearing, Mikal's teacher during that year, Carol Wilson, described a boy who had the ability to excel in life, but was thwarted by a father who prevented him from receiving the

mental health care recommended by the school psychologist, instead removing him from school altogether.

As a result of these inadequacies in the trial presentation, the sentencing judge never learned about the potential to excel that Harris and Wilson recognized in Mikal, and which his father Shareef suppressed. Consequently, the trial judge's review of Mikal's life during his sentencing order failed to assign any real weight to Mikal's extraordinarily difficult childhood. The trial judge observed there was "no reference to physical . . . abuse" and minimized the difficulties in Mikal's upbringing as "less than ideal." (J.A. 1670).

Of course, the trial judge's characterization of Mikal's childhood bore little resemblance to the information that non-family witnesses like Harris and Wilson could have provided. Ms. Wilson in particular, an experienced special education teacher, could have explained how she saw Mikal suffer from "excessive self-blame" and "extreme sadness." (J.A. 2335). She could have told the trial judge how the elementary school was trying to get Mikal the educational and mental health support he needed. But instead of accepting that support, his father berated and cursed at school staff, refused their recommendations, and "yanked" Mikal out of school. (J.A. 2333, 2347).

The information that Sheriff Woodley could have provided was even more stark. According to his own finding, the trial judge was given no evidence of physical abuse in Mikal's home. But abuse, there was. The Sheriff could have testified that Shareef Mahdi beat his own mother with a belt buckle, leaving bruises on her legs

and thighs, *while his children watched*. (J.A. 2925). Imagine the effect on a child of watching their own father brutalize their grandmother. This gives a whole new meaning to the trial judge's comment that Mikal's childhood was "less than ideal."

Sheriff Woodley could have also testified how, as a young boy, Mikal got into a car with his mother and father, thinking they were going to get ice cream. But instead of going on a childhood trip for ice cream, Shareef threatened to kill Mikal's mother. When they returned home, Mikal and his brother were sent inside. And when the boys heard screaming, they came back out and saw "Shareef trying to kill [their] mother." (J.A. 2926).

Sheriff Woodley could have made clear to the trial judge that this was part of a pattern of violent behavior by Mikal's father. The Sheriff "recall[ed] occasions when Shareef threw a brick at his sister Kathy through the door of the house." Another time, he "put a cinder block through" his sister's car window. (J.A. 2926).[1]

George Smith's unpresented testimony also would have illustrated vividly Shareef Mahdi's pattern of unpredictable and violent behavior. Smith, a community educator, could have testified to an incident in which Shareef jumped in a local swimming pool that was not integrated at the time, and started "using extremely vile language," yelling about O.J. Simpson, and trying to "inflame" the black officer who

[1] Respondent argues that Woodley's PCR affidavit "contains serious credibility problems" and characterizes Sheriff Woodley as "anything but a cooperative witness to the defense at sentencing." (BIO at p. 31). Respondent, however, does not contest that trial counsel failed to interview Sheriff Woodley prior to sentencing. Moreover, Respondent has alleged, without evidence, that this law enforcement officer's affidavit, given under oath, somehow lacks credibility. The Court should not accept Respondent's unsupported invitation to discredit Sheriff Woodley. Prosecutors believed he was credible enough when he was called as a State witness at trial. He cannot become incredible now, simply because he has offered information that the State does not like.

was there to help. (J.A. 2374-75). Later, when Shareef was taken to jail, he "went wild," "started throwing the chairs against the wall, [and] breaking the tables." "[I]t was just as violent as anything" Smith had ever seen. (J.A. 2378). This testimony, like Sheriff Woodley's, would have shown the trial judge in clear terms just how unpredictable and frightening Shareef Mahdi could be, particularly to a young child like Mikal.

A true picture of Mikal Mahdi's childhood would have established "the kind of troubled history" that this Court has consistently "declared relevant to assessing a defendant's moral culpability. *Wiggins v. Smith*, 539 U.S. 510, 535 (2003) ("'[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable than defendants who have no such excuse'") (internal citation omitted); *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) (consideration of offender's life history is a "'part of the process of inflicting the penalty of death'"); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (invalidating Ohio law that did not permit consideration of a defendant's background). But because Mahdi's trial judge heard so little of this evidence, he was able to conclude, erroneously, that there was no abuse, and that Mikal's childhood should not "be given any significant weight" when determining his sentence. (J.A. 1670).

There's a reason why, as parents, we shield our children from violence, aggression, and unpredictability. We know instinctively the harm it causes. Mikal

Mahdi was raised by a father who caused that very harm, but the trial judge charged with deciding Mikal's sentence never knew, because of poor defense representation. No person should be sent to their death in these circumstances.

Respondent argues that it was reasonable for trial counsel to present their shallow and "sanitized" version of Mikal's life, in order to avoid the presentation of Mikal's "bad school behavior" and "negative character evidence." (BIO at pp. 33-34). But the suggestion that "not all of the additional evidence was favorable" to Mahdi could not justify "the failure to introduce the comparatively voluminous amount of [mitigating] evidence." *Williams v. Taylor*, 529 U.S. 362, 396 (2000). Moreover, the aggravating aspect of this evidence is wildly overstated. Bear in mind that the two teachers, Ms. Harris and Ms. Wilson, knew Mikal when he was in third and fifth grades. Does Respondent really believe that an eight to ten-year-old child's school misbehavior could justify a death sentence? Respondent's argument is little more than an instance of zealous advocacy overtaking common sense. This Court should not accept that a capital defense lawyer acts reasonably by eliding their client's traumatic childhood to prevent the sentencer from finding out that their client misbehaved in elementary school.

Finally, Respondent protests that "much, if not all, of the evidence offered at PCR regarding [Mikal's] family and social history, whether from family, community, or school witnesses, was cumulative to that presented in the sentencing proceeding." (BIO at p. 30). But as Mahdi detailed in his petition, this claim cannot be reconciled with the record. *None* of the vivid testimony from Harris, Wilson, Smith, and

Woodley, describing Mikal's potential as a child, and the ways his dysfunctional and abusive father thwarted that potential, was presented during the sentencing hearing. This evidence is, by definition, not cumulative. It also merits certiorari review and a new sentencing hearing.

III. This case presents clear bases for granting relief under 28 U.S.C. § 2254(d), and Respondent has failed to rebut any of them.

Mikal's petition for certiorari review presents several ways in which the PCR court and Fourth Circuit adjudicated his Sixth Amendment claim of constitutional error in an unreasonable fashion, violating § 2254(d):

- Under *Strickland* and *Wiggins*, defense counsel may not end their investigation based on an insufficient or unreasonable factual basis. Yet that is exactly what trial counsel did here when they perceived challenges with Mikal's family witnesses, but made only minimal efforts to identify alternative non-family witnesses who could have brought Mikal's troubled childhood to life for the sentencing judge.

- Under *Porter* and *Rompilla*, an uncooperative client or family does not excuse defense counsel from undertaking a reasonable mitigation investigation. Yet that is exactly what trial counsel did here when they failed to make a reasonable effort to locate non-family witnesses to testify about Mikal's upbringing.

- Under *Williams* and *Sears*, the presence of unhelpful information within mitigating evidence does not excuse the defense from presenting a "comparatively voluminous amount of evidence." Here, trial counsel presented only a superficial picture of Mikal's childhood. They presented no community witnesses who could have humanized their client. And they did all this in the name of avoiding information about elementary-age misbehavior that had zero relevance to the question whether Mikal deserved a death sentence.

(Petition at pp. 25-28). Respondent's BIO fails to meaningfully rebut any of these points.

Likewise, the certiorari petition explains how the PCR court and Fourth Circuit claimed that trial counsel were not deficient for failing to locate non-family witnesses, while *never discussing* the availability of the four critical non-family witnesses in the context of deficiency, focusing exclusively on trial counsel's purportedly strategic decision not to call family witnesses. (Petition at pp. 27). Respondent never rebuts or addresses this reality.

There are two ways of viewing this error, and both merit relief. In one sense, this was an unreasonable factual determination that violates § 2254(d)(2). It strains common sense to say that counsel acted reasonably in accepting the limitations they perceived in Mikal's family, and failing to take further steps to pursue the type of first-hand information provided by the four non-family witnesses identified during PCR.

In another sense, this Court could conclude that the PCR court, in failing to address any of the non-family witnesses when finding counsel's performance sufficient, did not adjudicate that aspect of the claim, and as a consequence, there is no state court decision to which this Court needs to defer. *See Harrington v. Richter*, 562 U.S. 86, 92 (2011) (explaining that § 2254(d) only limits federal habeas relief "with respect to claims previously adjudicated on the merits in state-court proceedings.") (internal quotations omitted); *Henderson v. Cockrell*, 333 F.3d 592, 600-01 (5th Cir. 2003) (holding the AEDPA did not apply, and a claim was not adjudicated on the merits, where "[t]he state courts did not address Henderson's actual claim of deficient performance . . . [and instead] misconstru[ed] his claim").

The Fourth Circuit made the exact same error, also ignoring the four central non-family witnesses when analyzing deficiency. Under either approach, the PCR court erred unreasonably, and Mr. Mahdi should be entitled to review by this Court, and ultimately to relief from his death sentence.

In the BIO, Respondent tries to avoid this conclusion with an extensive accounting of each investigative step taken by trial counsel, the pros and cons of the information they uncovered, and the evidence in aggravation. However, this case is not nearly as complicated as Respondent would have it. There are some basic, unrebutted facts that warrant this Court's review.

Mikal Mahdi was on trial for his life. Defense counsel believed his family members would not be good witnesses, but made very little effort to navigate around that by finding non-family witnesses to speak on Mikal's behalf.[2] As a result, trial counsel gave the sentencing judge a description of their client's life that likely lasted less than thirty minutes. This was a pitiful showing in a capital case. And had the sentencing judge heard from teachers, community members, and the law enforcement official who was willing to testify, it is reasonable to believe that a different result was possible. *See Chinn v. Shoop*, No. 22-5058, 2022 WL 16726032 (U.S. Nov. 7, 2022) (Jackson, J., dissenting from denial of certiorari) (explaining in the *Brady* context that "a reasonable probability" of a different outcome is a "relatively low burden" that is "qualitatively less[ ]" than a preponderance).

[2] As the Fourth Circuit found, and Respondent fails to contest, trial counsel ended their efforts prematurely after speaking only with teachers who "had not spent significant amounts of time with" Mikal, and with a community member who "didn't know much about" him. *Mahdi v. Stirling*, 20 F.4th 846, 901 (4th Cir. 2021).

Yes, as Respondent details, there was plenty of evidence in aggravation that arose during Mikal's teenage years, up through the time of the capital offense when he was still only 21 years old. But this is exactly the point of Mikal's Sixth Amendment claim. The central question his sentencer was going to face was how such a young person had amassed this record of impulsive, tragic, and violent behavior. Was it because Mikal Mahdi was an irreparably and innately horrible person? Or was it because of challenges in his young life that hobbled his growth and decision-making? *Compare Miller v. Alabama*, 567 U.S. 460, 471-72 (2012) (recognizing that children are vulnerable to negative influences; outside pressures, including from their family and peers; have limited control over their environment; and have brains that are still developing). The paltry presentation that Mikal's trial counsel put on made it all too easy for the sentencing judge to choose the former. But had that judge been given a more complete picture of Mikal Mahdi's childhood trauma, he may well have found that his life had redeeming value yet.

When one compares the meager showing at trial with the testimony that could have been presented, the reasonable probability of a different result at sentencing practically jumps off the page. This Court must grant review.

Respectfully submitted,

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