STATE OF SOUTH CAROLINA
In the Supreme Court

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

C/A No.: 2005-CP-18-1368
(Capital PCR Action)

Kenneth Simmons, #5066,

Respondent,

vs.

State of South Carolina,

Petitioner.

NOTICE OF APPEAL

The State of South Carolina hereby appeals from the Order of the Honorable Doyet A. Early, III, dated October 15, 2013, granting limited post-conviction relief by vacating the death sentence upon a finding of mental retardation, and the Order dated January 22, 2014, denying the State's motion to alter or amend. Written notice from the Dorchester Clerk of Court of the January 30, 2014 entry of the January 22, 2014 Order denying the State's post-trial motion was received in the Office of the Attorney General on February 3, 2014.

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

February 28, 2014.

Other Counsel of Record:

Emily C. Paavola, Esquire
James Morton, Esquire

ATTORNEYS FOR RESPONDENT

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S.C. Supreme Court

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CERTIFICATE OF SERVICE

I, Donald J. Zelenka, Senior Assistant Deputy Attorney General, certify that I have served the State's Notice of Appeal on counsel for Respondent by depositing one copy of same in the United States mail, postage prepaid, addressed as follows:

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This 28th day of February, 2014.

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ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
2013 OCT 21 PM 4:18
COUNTY OF DORCHESTER)
)
KENNETH SIMMONS) Case No.: 05-CP-18-1368
Applicant,)
)
v.) **ORDER GRANTING POST-CONVICTION RELIEF PURSUANT TO *Atkins v. Virginia*, 536 U.S. 304 (2002).**
)
STATE OF SOUTH CAROLINA)
Respondent.)

I. INTRODUCTION.

This is a Post-Conviction Relief (PCR) matter filed by Kenneth Simmons, a death-sentenced inmate. Applicant alleges, pursuant to the South Carolina Supreme Court's decision in Franklin v. Maynard, 356 S.C. 276, 588 S.E.2d 604 (2003), that he is mentally retarded and thus his death sentence violates the Eighth Amendment to the United States Constitution. *See* Atkins v. Virginia, 536 U.S. 304 (2002). This Court heard testimony on February 1-4, 2010, December 15, 2011, and July 2, 2012. Additional evidence was entered into the PCR record through multiple sworn affidavits, depositions and exhibits. After careful review of the evidence and record of this proceeding, this Court finds, by a preponderance of evidence, that the applicant is mentally retarded as that condition is defined under South Carolina law and for purposes of the application of the Franklin and Atkins cases. Therefore, the Court hereby vacates applicant's death sentence and imposes a life sentence.

II. LEGAL FRAMEWORK.

In 2002, the United States Supreme Court ruled that the Eighth Amendment to the United States Constitution prohibits the execution of persons with mental retardation. Atkins, 536 U.S. at 321. The Eighth Amendment, in part, prohibits the government from inflicting cruel and

unusual punishment. The United States Supreme Court categorically excluded from execution mentally retarded persons and mandated such a categorical exemption as part of this nation's death penalty jurisprudence.[1]

The Supreme Court left it primarily to the states to establish appropriate procedures for determining whether capital litigants are mentally retarded and thus, ineligible for capital punishment. In Franklin, 356 S.C. at 280, 588 S.E.2d at 606, the South Carolina Supreme Court set forth the following procedure for PCR applicants who, like Mr. Simmons, were sentenced to death prior to Atkins:

> A death row inmate who claims he is mentally retarded and, as a result, not subject to the death penalty, may institute post-conviction relief (PCR) proceedings because his sentence is in violation of the Constitution and exceeds the maximum authorized by law. As with other PCR claims, the applicant must show he or she is mentally retarded by a preponderance of the evidence. If mental retardation is proven, the PCR court will vacate the death sentence and impose a life sentence.

Id. at 280; 588 S.E.2d at 606 (internal citations omitted). The applicable definition of mental retardation is found in the current death penalty statute, which defines mental retardation as:

> significantly subaverage intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

Id. at 278-79, 588 S.E.2d at 605 (quoting S.C. Code Ann. § 16-3-20(C)(b)(10)).[2] Thus, the definition of mental retardation consists of three prongs: (1) significant sub-average intellectual

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[1] The Supreme Court reasoned and held that "by definition, [mentally retarded persons] have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." Id. at 318.

[2] In Atkins, the Supreme Court cited two professional organizations for their definitions of mental retardation – the American Association on Mental Retardation (AAMR), which is now

functioning; (2) deficits in adaptive behavior; and (3) a manifestation of these attributes before age eighteen.

III. LEGAL ANALYSIS AND FACTUAL FINDINGS.

To determine whether the applicant has met the three-prong test for mental retardation, the Court applied the preponderance of evidence test to the information presented. This Court examined the evidence presented to determine which evidence is of greater weight – or more convincing – the evidence which as a whole shows that a fact sought to be true is more probable than not true. The word preponderance means something more than weight; it denotes a superiority of weight, or outweighing. The degree of proof which this Court applied in determining if applicant met his burden of proof is whether the evidence, when viewed as a whole, demonstrated the fact to be proved is more probably true than not. The burden of proof never shifted from the applicant. After reviewing the evidence presented, the testimony of the witnesses, and arguments put forth, the Court finds the applicant has proved by a preponderance of the evidence that he is mentally retarded.

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known as the American Association on Intellectual and Developmental Disabilities (AAIDD), and the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR). Atkins, 536 U.S. at 308 n.3. The AAIDD no longer uses the term "mental retardation." Instead, AAIDD uses the term "Intellectual Disability." However, because the term "mental retardation" continues to be used consistently in the legal context, the Court continues to use that term here. To be clear, even though much of the testimony and evidence presented was in the nature of a clinical diagnosis of mental retardation, this Court, in determining whether applicant has met his burden of proof of establishing mental retardation, has applied the evidence to the legislature's definition of mental retardation. *See* Franklin, 356 S.C. at 278-79; 588 S.E.2d at 605, citing with approval S.C. Code §§ 16-3-20(C)(b)(10) (2003), 44-20-30(11) (2002), and 44-26-10(11).

A. SIGNIFICANT SUB-AVERAGE INTELLECTUAL FUNCTIONING.

The first prong of a mental retardation diagnosis requires an individual to display sub-average intellectual functioning. Determinations regarding a person's intellectual functioning are made primarily by referring to intelligence quotient (IQ) tests. Applicant offered evidence of six IQ tests, which were administered to him over a thirty-year period. Applicant also presented expert testimony interpreting those tests. Based upon the expert testimony and persuasive case law, this Court concludes that the standard error of measurement (SEM) and the "Practice Effect" are helpful in accurately assessing applicant's intellectual functioning. SEM, which is an estimate of the amount of error attached to an individual IQ score, is critical and must be part of any decision concerning a diagnosis of mental retardation.[3] "Practice Effect" refers to gains in IQ scores on tests of intelligence that result from a person being retested on the same or similar test within a relatively short period of time – generally within one year. For this reason, established clinical practice is to avoid administering the same intelligence test within the same year to the same individual because it will often lead to an overestimate of the examinee's true intelligence.[4]

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[3] In addition, courts across the country have made clear that SEM is an important consideration when deciding whether a person is mentally retarded. *See, e.g.*, Walker v. True, 399 F.3d 315, 322 (4th Cir. 2005) (recognizing that "IQ tests have a measurement of error of plus or minus five points" and directing the district court to consider SEM on remand); United States v. Davis, 611 F. Supp. 2d 472, 475 (D. Md. 2009) (providing a detailed discussion on "Mental Retardation – A Primer For Capital Cases" and concluding that "the SEM in IQ assessments is approximately 5 points, therefore raising the operational definition of mental retardation to 75").

[4] The impact of practice effect has also been recognized in numerous courts. *See, e.g.*, Holladay v. Allen, 555 F.3d 1346, 1357 (11th Cir. 2009) (crediting expert testimony that one of the petitioner's IQ scores was "probably artificially high because of practice effect," since the test was administered only eight months after he had taken the same test); Davis, 611 F. Supp. 2d at

Applicant was first given an IQ test at the beginning of the 1978 school year, during his second attempt at the eleventh grade, when he was evaluated for the Resource program at Summerville High School. Resource was a special education program. In order to qualify for Resource placement, the student had to be given an individually administered IQ test by a certified psychologist and score in the 50-70 range. The actual testing records from applicant's placement in the Resource program have been destroyed, but, according to school officials and written protocols in effect at the time of applicant's placement, an individually administered IQ score of 50-70 is the only way he could have been placed into the Resource program. After the 1978 testing, applicant was administered five additional IQ tests. The following chart reflects all of the historical IQ test results.

Psychologist(s)	Test Date	Test Name	Full-Scale IQ Score
Summerville High School	1978	Individually administered IQ test	50-70
Dr. Saylor	5/15/1998	WAIS-R	69
Drs. Behrmann & Vidic	1/8/1999	WAIS-III	66
Drs. Sandler & McAbee	2/9/1999	WAIS-R	75*
Dr. Keyes	2/5/1999	KAIT	70
Dr. Knight	12/10/2008	WAIS-IV	67
*The State's expert, Dr. Leslie Sandler, testified at trial that this score is likely artificially inflated due to practice effect. *See ROA* at p. 2614.			

All six test scores reflect that applicant functions in the mentally retarded range. His highest IQ score is 75, which is within the range of acceptable IQ scores for a diagnosis of mental retardation. Moreover, even the State's expert who conducted this test, Dr. Leslie Sandler from the Department of Disabilities and Special Needs (DDSN), acknowledged that the score of 75 is

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477 (stating that the AAMR Manual instructs clinicians to recognize the impact of practice effect).

most likely artificially inflated due to practice effect because it was administered only one month after a previous WAIS. *ROA* at p. 2614. Applicant had also taken this exact test, a WAIS-R, only 9 months before. Thus, applicant had taken two previous tests (one exactly the same and one substantially similar) within a period of 9 months before scoring a 75 on this WAIS-R. Even with two recent opportunities to "practice," applicant still scored within the mental retardation range.

Applicant's IQ scores are remarkably consistent over time. Considering the five IQ scores from 1998 to 2008, the scores vary by only 9 points over a period of 10 years.[5] The average of these five scores is 69. Dr. Marc Tassé testified that although a person can malinger, or "fake," a low score on a single IQ test, it would be nearly impossible to manipulate IQ test scores over time so that the result is stable across multiple test administrations.[6]

In addition to IQ scores, applicant's school records and academic testing indicate that his intellectual functioning is very low. Throughout his elementary school years, applicant's academic achievement levels remained consistently below grade level. For example, in the third grade, applicant's reading and overall academic skills were reported to be at a first grade level. In the fifth grade, his achievement levels were all recorded at a third grade level, and his sixth grade records indicate only a fourth grade achievement level. By the time he repeated the eleventh grade, applicant's academic achievement still remained at fourth grade levels. Moreover, applicant did not pass a single grade in middle school. Instead, he was "placed"

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[5] If one also considers applicant's earliest IQ testing from 1978, his IQ scores have been congruent for a period of 30 years.

[6] Moreover, applicant would have had no incentive to malinger a score of 50-70 in 1978 when he was placed into the Resource program at Summerville High School.

forward in each grade level, which was a form of social promotion. Beginning in the seventh grade, when different levels of classes were available, applicant was in classes of the lowest available level. Even at this low level, and with additional Resource program help, applicant continued to fail some of his remedial courses. He failed Driver's Education, Consumer Education and Personal Health, which were very basic courses. Applicant's final grade point average was 0.8222. Although applicant did receive a high school diploma, this Court is persuaded by the evidence offered that he would be unable to do so by today's standards.

Further, applicant's standardized academic achievement testing consistently indicates that he functions academically at roughly a first to third grade level. The following chart summarizes these test results.

Academic Achievement Testing

Psychologist(s)	Test/Year	Test Scores		
		Reading	Spelling	Arithmetic
Dr. Saylor	WRAT-3 = 5/15/98	2nd Grade	1st Grade	3rd Grade
Dr. Keyes	WJ-Ach. = 2/6/99	2nd Grade	1st Grade	3rd Grade
Dr. Zenger	Writing Analysis = 2009	Kottmeyer Spelling Test		4th Grade
		Sample Letter Writing		1st Grade
		Hand written statement on 12/5/98		1st Grade

This Court finds that applicant's academic history and test scores are consistent with mental retardation. Dr. Tassé testified that "people with mild mental retardation can learn to read and write up to a fifth and sixth grade reading level." *2010 PCR Tr.* p. 126. "An adult with mild mental retardation is cognitively, intellectually functioning sort of at [the range of] a ten or eleven year old child." *2010 PCR Tr.* p. 135. Applicant's resource teacher, Ms. Linda Shwec, likewise opined that applicant's performance in school is consistent with the abilities of a person with mental retardation. Thus, in addition to his IQ scores, applicant's school history and formal

academic achievement test scores (which are consistent both pre- and post-age 18) provide additional significant evidence that his intellectual functioning is sub-average.

B. Deficits in Adaptive Behavior.

The second requirement for a diagnosis of mental retardation looks at the *expression* of intellectual deficits in the life of an individual. South Carolina's definition of mental retardation refers without elaboration to "deficits in adaptive behavior." S.C. Code Ann. § 16-3-20(C)(b)(10) (2011). Similarly, the text of the Atkins opinion refers to "significant limitations in adaptive skills such as communication, self-care, and self-direction." Atkins, 536 U.S. at 318. A footnote in Atkins, however, quotes approvingly the definitions adopted by the AAMR and the DSM-IV-TR. Id. at 308 n.3. The AAMR definition requires limitations in two (2) or more of the following ten (10) applicable skill areas:

- Communication
- Self-care
- Home living
- Social skills
- Community use
- Self-direction
- Health and safety
- Functional academics
- Leisure
- Work

AAMR Manual (10th ed.) at 22. The American Psychiatric Association's definition is virtually identical. *See* DSM-IV-TR at 41. Both definitions have been accepted and applied previously in South Carolina courts. *See, e.g., Order Granting Post-Conviction Relief in Elmore v. South Carolina, 05-CP-24-15; Order Finding Defendant Mentally Retarded in South Carolina v. Pearson, 96-GS-32-3338.*

Like intellectual functioning, the measurement of limitations in adaptive behavior can be established through the use of standardized measures, which should be augmented by observations, interviews and other methods of assessment. This Court is persuaded that the

evidence offered on applicant's behalf establishes by a preponderance of the evidence that he suffers from significant deficits in adaptive behavior.

First, with regard to standardized measurement, Dr. Dennis Keyes completed the Vineland Adaptive Behavior Scales in 1999 using two informants: (1) Ms. Eartha Smooth, who is applicant's oldest sister; and (2) Ms. Valerie Simmons, who is applicant's ex-wife.[7] As a result of the information collected from these two informants, Dr. Keyes obtained a composite score of 43, which is significantly below average.

Second, the standardized score for applicant's adaptive behavior is corroborated by an extensive social history investigation. Ms. Marjorie Hammock testified that applicant has significant deficits in at least five (5) of the ten (10) applicable skill areas. Those areas are: (1) Functional Academics; (2) Home Living; (3) Work; (4) Self-Direction; and (5) Communication. This Court finds that applicant exhibits deficits in at least five out of the ten areas; thus, the second prong is satisfied.

Functional Academics

As discussed previously, applicant's school history consistently indicates very serious limitations. His academic performance was consistently below grade level. He did not pass a single grade in middle school, but was socially promoted instead; and, he was placed in the lowest level available in every class he had. Applicant also failed the eleventh grade, and he was eventually tested and placed in the special education program at Summerville High School. He failed Driver's Education, Consumer Education and Personal Health, which were very basic,

[7] Ms. Smooth was the eldest sister living in the home throughout applicant's childhood, and was in many respects like a mother to him. Valerie Simmons met applicant when they were both in high school. They married in 1981 and lived together for several years before they separated.

#9

common sense kinds of topics. Applicant's special education teacher opined that his performance was consistent with the abilities of a person with mental retardation and that it would be impossible for applicant to earn a high school diploma by today's standards. Applicant's high school teachers used reading materials for him that were written at a fourth grade reading level. Ms. Linda Shwec helped applicant with all of his subjects, read assignments to him, gave him extra time on tests, and re-worded test questions for him in simple terms. Academic achievement testing in 1998, 1999 and 2009 consistently showed that applicant functions at the first to third grade level in reading, spelling and arithmetic.

Home Living

Applicant was never able to live independently for any significant period of time. He did not regularly cook, clean, buy groceries or pay bills. Applicant's ex-wife was responsible for handling the family's finances during their marriage. After applicant separated from his wife, he mostly lived in half-way houses and homeless shelters. He visited the Palmetto House Homeless Shelter regularly for meals. Applicant once lived in a small building owned by his brother, but his brother later asked him to leave because he was not able to take care of the property. For example, applicant would leave the doors and windows open in the winter when he was not at home.

Work

All of applicant's employment opportunities were secured for him by a network of family and friends. His work history consists of odd jobs performing basic, unskilled labor. For example, applicant's brother helped him get a job with a contractor. No application or formal training was necessary for the job. Applicant's duties consisted of nailing boards and other simple tasks. Applicant also did some work in brick masonry. He performed tasks such as

loading and unloading a wheelbarrow full of bricks, shoveling mortar and mixing mortar. Applicant's former employer reported that he was a hard worker, but he did not take initiative or perform complicated tasks.

Self-direction

Applicant's friends, family and former teachers consistently reported that he is unable to perform undirected tasks. Ms. Margaret Halstead and Ms. Doris Russell indicated that applicant could not complete tasks without very simple, careful directions. Applicant also required direction from others as a member of his high school football team. His coach stated that applicant was extremely slow and played a position that essentially required basic repetition. One of applicant's former teammates described an incident when applicant had a sore throat and drank a whole bottle of cough syrup because he thought that the more medicine he took, the faster he would get better. The record in this case demonstrates that applicant is consistently described as a "follower" by others. Ms. Hammock explained that applicant benefitted from a rigid family structure. Inside the structure, with direction from his parents and family members, applicant was able to function fairly well. But, after his parents died and the structure was gone, applicant was unable to succeed in an independent, self-directed fashion.

Communication

Applicant's ability to communicate in writing has been very poor throughout his entire life. He also had a very serious stutter as a child, which embarrassed him and sometimes caused him to be socially withdrawn. Applicant's childhood friend, Robyn Beech Schmeiding, described him as simple, gullible, shy and someone who would be easy to take advantage of. Applicant's ex-wife reported that she mostly had to initiate their conversations because he would rarely just sit and chat.

In sum, this Court finds that both standardized measurements and an extensive social history demonstrate that applicant suffers from significant deficits in adaptive behavior.

C. ONSET BEFORE AGE 18.

The Court finds that the PCR record is replete with evidence that applicant's condition began before he reached the age of eighteen. The 1978 IQ test was administered before he turned eighteen, and the overwhelming majority of the information contained in applicant's school records and collected from his teachers, classmates and coaches relates to his functioning before the age of eighteen. Applicant's stuttering and difficulties with written communications began when he was a young child. Further, Ms. Hammock focused on the pre-eighteen period in her interviews with applicant's siblings and family members, who described him as slow and developmentally delayed during that period of time. Moreover, both informants who provided information to Dr. Keyes for the Vineland Adaptive Behavior Scales – applicant's older sister and his ex-wife – knew applicant during the developmental period. Viewed as a whole, the hearing evidence affirmatively demonstrates that applicant's intellectual and adaptive functioning were significantly impaired before age eighteen.

IV. THE STATE'S EVIDENCE REGARDING MENTAL RETARDATION.

The State offered no evidence on the mental retardation issue during the PCR hearing, and relied, instead, on the pre-Atkins opinion of Dr. Leslie Sandler, from DDSN. Dr. Sandler was tasked by the trial court to make a determination about whether applicant was competent to cooperate with his attorney and to know the charges against him. *ROA* p. 1721; *see also id.* at p.1723. Applicant was sent to DDSN after he was initially evaluated by the Department of Mental Health and provisionally diagnosed as mentally retarded. *ROA* p. 1737. Dr. Sandler testified that he tested applicant and obtained an IQ score of 75 that he felt was reliable and

#12

valid, although he noted that this score was likely inflated due to the practice effect. Dr. Sandler concluded, however, that applicant was not mentally retarded and was likely malingering. Based on the Court's review of totality of the evidence, this Court finds that Dr. Sandler's opinion is not entitled to significant weight and the evidence offered by applicant, in the form of expert testimony, lay testimony and exhibits, is more credible, thorough and accurate.[8]

First, the Court notes that contrary to Dr. Sandler's opinion, there is no persuasive evidence of malingering in this case. In fact, every expert who tested applicant for malingering found no results indicating that he ever attempted to malinger. *See ROA* p. 1609; *id.* at pp.1643-45; *id.* at pp.1687-88; and *id.* at pp.1826-27. In addition, Dr. Tassé explained that the best way to assess the possibility of malingering is to look for a pattern of consistency over a long period of time.[9] Applicant's IQ scores, academic achievement scores, and limitations in adaptive functioning all converge into a tight, consistent pattern across his entire life history. This Court is not persuaded that applicant has been faking symptoms of mental retardation across multiple domains from early childhood through to his approximate age of fifty-one at the conclusion of the PCR proceeding.[10]

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[8] The State's arguments regarding the trial testimony of Dr. Randy Waid are also unpersuasive given that Dr. Waid's affidavit, entered into the PCR record by respondent's stipulation, specifically stated that: (1) Dr. Waid was never asked to determine whether applicant meets the criteria for mental retardation; (2) Dr. Waid did not have all of the materials available to him that he considers necessary for an evaluation of mental retardation; and (3) Dr. Waid never assessed applicant's deficits in adaptive behavior nor did he assess whether applicant's significantly sub-average intellectual functioning manifested itself during the developmental period.

[9] *See also* Allen v. Wilson, 2012 WL 2577492, at *7 (S.D. Ind. July, 3 2012); Tarver v. Thomas, 2012 WL 4461710 (S.D. Ala. Sept. 24, 2012); Brumfield v. Cain, 854 F. Supp. 2d 366, 390, n.24 (M.D. La. 2012); United States v. Smith, 790 F. Supp. 2d 482, 492 (E.D. La., 2011).

[10] The Court also notes that applicant offered evidence that, in 1989, Dr. Sandler was sanctioned by the Pennsylvania State Bureau of Professional and Occupational Affairs and his medical

Second, this Court finds it significant that, unlike applicant's experts, Dr. Sandler did not conduct any standardized measure of applicant's adaptive behavior. He did not interview any of applicant's family members, teachers, friends, classmates, football coaches or employers. He did not interview school administrators to learn details about the level of classes available, the school's special education programs, or the requirements for placement in those programs. Instead, Dr. Sandler made assumptions based on inaccurate and un-verified factual information about applicant's life history

Finally, this Court finds that Dr. Sandler relied, in part, on some misconceptions about what people with mild mental retardation can achieve. For example, Dr. Sandler testified that "persons with mental retardation have trouble grooming themselves and attending to their own hygiene." *ROA* p. 2623. He noted that "[t]here was no malodorous smells of any kind emanating from [applicant], and there was no reason that I could see to suspect that there was anything abnormal about his ability to groom and [tend] to his personal hygiene." *Id.* Dr. Tassé testified in detail about several misconceptions, or stereotypes, that people often have about the level of functioning that those with mild mental retardation can achieve. *2010 PCR Tr.* pp.129-136. Dr. Tassé has extensive experience in the area of mental retardation and is nationally recognized as a leader in his field. He is a co-author of the AAMR's diagnostic manual and of its user's guide – both of which are critical texts on mental retardation. He explained that

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license was placed on probation after he admitted to a Pennsylvania administrative court that he lied about administering a WAIS IQ test, along with some other tests, and misstated his credentials under oath on two other occasions. Although these facts bear some relevancy in this matter, they are not the basis for this Court's conclusion that Dr. Sandler's opinion is less credible than those of applicant's experts. Rather, as explained above, this Court finds that applicant's presentation was far more thorough, detailed and accurate, and is therefore entitled to the greater weight.

MME #14

whether a person has mental retardation is not apparent from their looks or demeanor, and persons with mental retardation are generally indistinguishable from non-retarded persons in terms of personal hygiene. People with mild mental retardation can read a newspaper, drive a car, become successfully employed, play sports, get married, and have children. These points are widely recognized in both clinical literature[11] and case law.[12] Moreover, Dr. Tassé's opinion in this case is supported by additional expert testimony from Ms. Marjorie Hammock, as well as IQ scores, prior evaluations, academic achievement test scores, a standardized measurement of adaptive skills, and an extensive social history. In sum, the evidence overwhelmingly shows that applicant meets all three prongs of South Carolina's definition of mental retardation by a preponderance of the evidence.

VI. CONCLUSION.

Based upon all of the evidence presented, this Court finds that applicant, Kenneth Simmons, is mentally retarded, and thus, he is ineligible for the death penalty pursuant to state

[11] *See* AAMR Manual at p. 151 (people with mental retardation may "be able to live independently" and "[d]ocumented successful outcomes of individuals with appropriate supports contrasts sharply with incorrect stereotypes that these individuals never have friends, jobs, spouses, or children."); DSM-IV-TR at p. 46 ("There are no specific physical features associated with mental retardation"); *id.* at p. 43 (people with mild mental retardation can acquire academic skills up to a 6th grade level, have minimal impairment in sensori-motor areas, are often indistinguishable from children without mental retardation until a later age, and can achieve vocational skills and even successfully live independently).

[12] *See, e.g.*, Wiley v. Epps, 625 F.3d 199, 203 (5th Cir. 2010) (noting expert testimony that "it is widely accepted in the medical community that mentally retarded persons are often able to perform basic life functions and tasks, such as holding jobs, driving cars, and supporting their families"); United States v. Lewis, 2010 WL 5418901, at *20 (N.D. Ohio Dec. 23, 2010) (crediting expert testimony that it is a stereotype that people with mental retardation cannot carry on a conversation); Pickens v. State, 126 P.3d 612, 618-19 (Okla. Crim. App. 2005) (holding evidence that the defendant filled out medical request forms in prison, wrote letters to the trial court and dated a woman was not inconsistent with mental retardation).

#15

and federal law. Applicant has raised a number of other claims challenging his conviction and death sentence. The claims relating to his conviction are denied as without merit. In light of this Court's finding that applicant is mentally retarded, the remaining claims attacking the sentence are moot. In accordance with Franklin, the sentence of death is vacated and a life sentence shall be imposed. To the extent necessary, this matter is remanded to the Court of General Sessions in Dorchester County for the imposition of the life sentence.

AND IT IS SO ORDERED.

Hon. Doyet A. Early, III
Presiding by Appointment of the Supreme Court

September 15, 2013
Bamberg, SC

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER	)	
	)	Case No.: 05-CP-18-1368
KENNETH SIMMONS	)	
Applicant,	)	**ORDER DENYING RESPONDENT'S MOTION TO ALTER OR AMEND PURSUANT TO RULE 59**
	)	
v.	)	
	)	
STATE OF SOUTH CAROLINA	)	
Respondent.	)	
	)	

This is a Post-Conviction Relief (PCR) matter filed by Kenneth Simmons, a death-sentenced inmate. On October 15, 2013, this Court signed an Order Granting Post-Conviction Relief Pursuant to Atkins v. Virginia, 536 U.S. 304 (2002). The Court determined that Applicant meets South Carolina's three-prong definition by a preponderance of the evidence presented. Applicant offered un-contradicted evidence of six individually administered IQ tests, which were administered to him over a thirty-year period, all of which indicate that his intellectual functioning is significantly subaverage. Second, the Court found "that both standardized measurements and an extensive social history demonstrate that Applicant suffers from significant deficits in adaptive behavior." Order p.12. Finally, the Court found that the record "is replete with evidence that Applicant's condition began before he reached the age of eighteen," including, among other things: Applicant's school testing and placement in special education; the overwhelming majority of the information contained in Applicant's school records and collected from his teachers, classmates and coaches; Applicant's stutter and difficulties with written communications; and, information from his siblings and family members that Applicant was slow and developmentally delayed as a child. Id. Thus, the Court concluded that the

preponderance of the evidence "demonstrates that Applicant's intellectual and adaptive functioning were significantly impaired before age eighteen." Id.

The Court's Order was filed on October 21, 2013. Respondent moved to alter or amend the Court's judgment pursuant to Rule 59(e), SCRCP.[1] The Court heard arguments on the motion on December 4, 2013. After careful and thorough consideration of the parties' arguments and briefs, all relevant legal authorities and the extensive record in this case, this Court now determines that Respondent's Motion to Alter must be denied.

First, Respondent asserts that this Court's conclusions are not supported by the record and argues that the Court failed to adequately consider all relevant and available information. This Court disagrees. The Court has given long and careful consideration to the entire record in this case, including the original competency hearing, the full trial record, the entire PCR record, numerous exhibits, and the parties' extensive arguments and briefs. The Court has vigilantly considered all available information and concludes that the Applicant has established, by a preponderance of the evidence, that he satisfies South Carolina's three-prong test for mental retardation. *See* Franklin v. Maynard, 356 S.C. 276, 279, 588 S.E.2d 604, 605 (2003) (holding mental retardation is established by "'significantly subaverage general intellectual functioning

[1] Respondent filed its Motion to Alter on November 1, 2013. The Applicant filed a response in opposition on November 5, 2013. Thereafter, Respondent sought to file an "Amended" Motion which was signed on November 15th and received by Applicant's counsel on November 18, 2013. Respondent's proposed Amended Motion is untimely under Rule 59(e), SCRCP. Nevertheless, the only ascertainable difference between Respondent's original and proposed amended motion appears to be that the amended motion removes any references to Respondent's original, incorrect assertion that Dr. Marc Tasse never met with or interviewed the Applicant. Accordingly, this Court addresses Respondent's amended motion even though it was untimely filed.

existing concurrently with deficits in adaptive behavior and manifested during the developmental period.'") (quoting S.C. Code Ann. § 16-3-20(C)(b)(10)).

Next, Respondent challenges this Court's finding that there is no persuasive evidence of malingering in this case. Respondent notes that Dr. Leslie Sandler and Dr. Thomas McAbee issued a pre-trial competency evaluation report in which they stated that "some of [Applicant's] responses seemed exaggerated or distorted in a self-protective or self-serving fashion, as is sometimes encountered during competency-to-stand trial evaluations." DDSN Report pp.4-5. Drs. Sandler and McAbee also believed that Applicant was malingering because "[h]is clinical presentation during the four evaluations appeared to be substantially lower than what would be expected from a high school graduate and also appeared to be substantially lower than his vocabulary and other skills as revealed in his 1997 oral and written statements to the police." Id. at p.5.

This Court does not find Respondent's malingering arguments persuasive. Despite Dr. Sandler's and Dr. McAbee's belief that Applicant "seemed" to be faking, every expert who formally tested Applicant for signs of malingering found no results indicating that he ever attempted to malinger symptoms of mental retardation. *See* ROA pp.1643-45 (Dr. Behrmann explaining that he and Dr. Vidic conducted several specific tests for malingering and all of the results showed that Applicant was not malingering); id. at pp.1687-88 (Dr. Vidic testifying that "on formal testing Mr. Simmons did not show evidence of trying to malinger either mental retardation or an inability to remember things. And I am very comfortable with stating my opinion to a reasonable degree of certainty is that he did not try to malinger mental retardation or memory deficits."); id. at pp.1826-27 (Dr. Waid explaining that he gave "one of the best" tests for malingering and it did not show that Applicant was attempting to fake low test results); id. at

p.1826 (Dr. Waid explaining, moreover, that "none of the malingering tests" administered by "all of [my] colleagues involved" gave any indication of malingering); *see also,* id. at p.1609 (Dr. Saylor testifying that he did not find any evidence of malingering during his examination of Applicant).

Moreover, Dr. Sandler and Dr. McAbee did not conduct a reliable assessment of mental retardation using appropriate clinical standards. They did not complete a standardized measure of adaptive behavior corroborated by observations, interviews and other methods of assessment across multiple domains. *See* 2010 Tr. pp.119, 143; INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS, 43 (American Association on Intellectual and Developmental Disabilities, 11th ed. 2010) [hereafter, AAMR Manual]. They failed to interview the overwhelming majority of Applicant's family members, teachers, friends, classmates, football coaches and employers. They did not extensively interview school administrators or other officials to learn about the level of classes available, the school's special education programs, or the requirements for placement in those programs. Instead, they began with an erroneous and misleading understanding of Applicant's school performance and pre-18 abilities and, from there, concluded that Applicant must be malingering symptoms of mental retardation because those symptoms did not fit with their erroneous understanding of his life history.[2] For example, Dr. Sandler and Dr. McAbee concluded:

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[2] Respondent asserts that Dr. Tasse's opinion lacks credibility because he did not personally administer an IQ test to Applicant. At the time of Dr. Tasse's PCR testimony, Applicant had been tested six times on an individually administered IQ examination, and all six scores placed him within the mental retardation range. Dr. Tasse testified that "when I reviewed the materials I felt that there were sufficient IQ tests available to show sufficient data. In fact, I suggested to [Applicant's counsel] that if they could find someone locally to administer a WAIS-IV, that would be informative to know on the most current IQ test, what was his IQ." 2010 PCR Tr.

> [Mr. Simmons'] records do not report that he received any special education services, including any services for learning, educable or trainable mental disabilities. He graduated from high school, played varsity football, passed the South Carolina driver's license test, and drove a car by himself. (Per Mr. Simmons report). The preponderance of available information does not suggest significant intellectual or adaptive deficits before 18 years, and therefore a diagnosis of mental retardation cannot be made. . . .

DDSN Report at p.5.

However, contrary to the conclusions of Drs. Sandler and McAbee, a careful and thorough review of the complete record in this case demonstrates that Applicant was classified in school as "Educably Mentally Handicapped" after individualized testing, and he received special education services. *See* Polk Affidavit at ¶ 6; Shwec Affidavit at ¶¶ 4-5 and 8. His special education teachers used reading materials for him that were written at a fourth grade reading level. Schwec Affidavit at ¶ 15. His Resource teacher, Ms. Linda Shwec, read his assignments to him, gave him extra time on tests, re-worded questions for him in simple terms that he could understand and evaluated his overall school performance as "consistent with the abilities of a person with mental retardation." Id. at ¶¶ 14 and 23. Although Applicant received a high school diploma, he "would be unable to earn his high school diploma by today's standards." Id. at ¶ 14. Moreover, there was no required grade point average for students to play on the Summerville High School football team. *2010 PCR Tr. p.93.* Applicant's coach, classmates and friends said

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p.175. Thus, Dr. Susan Knight, from MUSC, administered a WAIS-IV in 2008 at Dr. Tasse's request. Id. at pp.176-76. The Court does not find it suspicious, as Respondent argues, that Applicant's score on the WAIS-IV was the lowest of his six overall scores. As Dr. Tasse explained, the WAIS-IV is not the same test as those previously administered to Applicant. Rather, it is the "newest, . . . most recent test of the Wechsler Scale." Id. at p.176. The Wechsler Scale is periodically re-normed to adjust for an overall increase in test performance in the general population. Id. at p.117. Thus, it is not unusual that Applicant's lowest score would occur on the most recently released version of the WAIS.

he was extremely slow and required specific, concrete directions from others. *See e.g.*, Long Affidavit at ¶¶ 2-3; Affidavit of Bo Parks.; Schmeiding Affidavit at ¶ 3; Halstead Affidavit at ¶ 5; Russell Affidavit at ¶ 5; Glover Affidavit at ¶ 5. Finally, Applicant was only able to obtain a driver's license after the examiner read the test questions aloud to him on his eighth or ninth attempt. *ROA p.1567.* Applicant did not own a car, and he lost his driver's license after he was cited for driving uninsured and failing to pay traffic tickets. *2010 PCR Tr. p.70-72; Affidavit of Jack Simmons at* ¶ 7. Others consistently described Applicant as "a follower," and someone who was "slow" and "gullible." Schmeiding Affidavit at ¶ 3; Long Affidavit at ¶ 3; Glover Affidavit at ¶ 5; Shwec Affidavit at ¶ 11. He had limited cooking skills, never successfully lived on his own, and could not perform complicated tasks. *See e.g.*, 2010 PCR Tr. pp.14-20, 22-23, 62, 73, 94; Affidavit of Jack Simmons at ¶ 5; Affidavit of Legare Simmons at ¶ 5; Russell Affidavit at ¶¶ 2 and 5; Affidavit of Margaret Halstead at ¶¶ 3 and 5; Schmeiding Affidavit at ¶ 2; Affidavit of Gene Simmons at ¶ 6.

Further, it is well-established that a pattern of consistency over a long period of time is a key inquiry in assessing the possibility of malingering in a mental retardation case. *See e.g.*, 2010 Tr. p.144 (Dr. Tasse explaining that "[u]sually the best indicator is consistent test results over numerous years, different measures."); Brumfield v. Cain, 854 F.Supp.2d 366, 390, n.24 (M.D. La. 2012) ("Given the consistently close scores on the IQ tests and the testimony from Dr. Weinstein that such consistently low and close scores could only be accomplished through malingering by a genius – a label manifestly inappropriate for Brumfield – the Court cannot credit Dr. Hoppe's [claim of malingering]."); United States v. Smith, 790 F.Supp.2d 482, 492 (E.D. Louisiana, 2011) (finding that consistency of IQ test results "indicate[s] good effort and reliability."); Allen v. Wilson, 202 WL 2577492, *7 (S.D. Ind. 2012) (crediting expert testimony

that the best way to look for malingering in an Atkins case is to "look[] for consistency in the testing over a long period of time."); *see also*, Tarver v. Thomas, 2012 WL 4461710 (S.D. Ala., 2012) ("Any concern that Tarver was malingering in hopes of creating a *post hoc* justification for revoking his death sentence is further belied by the fact that Tarver was diagnosed with mental retardation before he was eighteen years old, placed in special education classes, and determined to have a second-grade reading level at the age of sixteen.").

Applicant's IQ scores, academic achievement scores, and limitations in adaptive functioning all converge into a consistent pattern across his entire life history. *See* 2010 PCR Tr. p.144 (Dr. Tassé testifying that Applicant's test scores indicate "a pattern, a very tight pattern of scores that would be hard to reproduce on four different types of tests on five different administrations across ten years. So, to me this seems to indicate a fairly consistent performance on tests of intelligence."). Applicant's school records and academic testing likewise consistently indicate that his intellectual functioning is very low. *See* Kenneth Simmons School Records. For example, in the third grade, Applicant's reading and overall academic skills were reported to be at a first grade level. Id. In the fifth grade, his achievement levels were all recorded at a third grade level, and his sixth grade records indicate only a fourth grade achievement level. Id. By the time he repeated the eleventh grade, Applicant's academic achievement still remained at fourth grade levels. *Id.* Applicant did not pass a single grade in middle school, but was socially promoted instead. *See* Affidavit of Betty Profit. He was in the lowest level classes available. Shwec Affidavit at ¶ 21. At the time that he failed the eleventh grade, Applicant was testing at a fifth grade reading level and at the fourth grade level in math. Id. at ¶ 23. He failed Driver's Education, Consumer Education and Personal Health, which were very easy courses on topics of common sense and basic living skills. Id.

Standardized academic achievement testing of Applicant in his adult years closely corresponds to his school history. Pre-trial testing in 1998 and 1999, and additional testing ten years later, all indicated that Applicant functions academically at roughly a first to third-grade level. Applicant's social history is entirely consistent with mental retardation. Dr. Tasse testified that "people with mild mental retardation can learn to read and write up to a fifth and sixth grade reading level." 2010 PCR Tr. p.126. "An adult with mild mental retardation is cognitively, intellectually functioning sort of at [the range of] a ten or eleven year old child." Id. at p.135. This Court simply does not believe that Appilcant has been faking symptoms of mental retardation across multiple domains from early childhood through to present day.

Next, Respondent complains that the Court has not adequately considered Dr. Randy Waid's trial testimony. As stated above, the Court has carefully considered the complete record in this case, including Dr. Waid's trial testimony. Dr. Waid executed a sworn affidavit, which was entered into the PCR record by Respondent's stipulation, *see* 2010 PCR Tr. pp. 5-6, in which he specifically explained that, in preparation for his trial testimony in 1999:

> I was not asked to determine whether or not Mr. Simmons met diagnostic criteria for mental retardation. Furthermore, I did not have all of the materials available to me that I would require for an evaluation of mental retardation per standards of current practice. For example, I did not have access to a complete social history or have family members and teachers available for interview. I did not formally assess Mr. Simmons' adaptive behavior functioning.

Waid Affidavit at ¶ 4. Dr. Waid testified at trial that Applicant "is a very low functioning individual from an intellectual, neuro-cognitive point of view" and that he "is kind of like a second or third grader, seven or eight years old." ROA p.1780. But, without access to a complete social history or a formal assessment of adaptive skills, Dr. Waid was also under the misimpression that Applicant received a regular high school diploma and maintained a certain

level of academic success in order to play on the football team. ROA p.1881. Thus, Dr. Waid concluded that Applicant must have previously functioned at a higher level but had declined post-18 due to some other cause, such as a potential head injury or substance abuse, particularly alcohol. ROA pp.1882-83. Dr. Waid acknowledged, however, that there was no evidence that Applicant had ever sustained any serious head injuries. ROA p.1797. He also acknowledged that some people can drink a lot of alcohol and, for whatever reason, it does not affect them. ROA p.1800. Moreover, an MRI, neurological examination and EEG all showed no evidence of that Applicant suffers brain damage from substance abuse. ROA p.1909 and 1911-12; *see also,* id. at p.1913 (Dr. Waid testifying that there is "no medical evidence of any physical effect of [Applicant's substance] abuse"); id. at 2655 (Dr. Sandler testifying that an MRI "did not show cortical atrophy or lesions that are usually associated with long-term alcohol abuse or drug abuse," and, moreover, that "the testing did not show significant pieces of substance abuse evidence"); 2010 PCR Tr. p.147 (Dr. Tasse testifying that an MRI indicated that there was no brain damage).[3]

Dr. Waid previously operated from an uninformed misunderstanding of Applicant's school history and pre-18 abilities, and he has since disavowed his previous testimony. Dr. Waid has never made a formal assessment of whether Applicant meets all three prongs of South Carolina's definition of mental retardation. Waid Affidavit at ¶ 6. Therefore, this Court cannot rely on Dr. Waid's trial testimony in rendering a decision on exactly that question. Further, the Court does not perceive Dr. Waid's PCR affidavit as an effort to "change the definition of mental

[3] Accordingly, this Court also rejects Respondent's argument that the Court failed to adequately consider "the DDSN opinion that substantial drug and alcohol use could account for present deficits in intellectual functioning." Respondent's Amended Motion to Alter at p.6.

retardation" in light of Atkins, as Respondent has argued. Instead, Dr. Waid has simply acknowledged that he previously lacked access to all of the information necessary for a reliable assessment of mental retardation.

Next, Respondent asserts that there is no evidence to support this Court's finding that "Dr. Sandler relied, in part, on some misconceptions about what people with mild mental retardation can achieve." Order p.14. Respondent is mistaken; ample evidence supports this Court's conclusion that Dr. Sandler relied on at least some stereotypes about people with mild mental retardation.[4] Dr. Sandler testified at trial that people with mental retardation are unable to groom or tend to their personal hygiene, and he specifically referenced Applicant's lack of a "malodorous smell" as evidence against a finding of mental retardation. ROA p.2623. Moreover, Respondent has likewise consistently invoked a variety of stereotypes, arguing that factors such as Applicant's ability to use multi-syllable words, maintain his own hygiene, read on an elementary school grade level, get a driver's license, follow rules and attract girlfriends should somehow negate this Court's findings that he meets all three criteria of South Carolina's definition for mental retardation.[5] It is well-established in both the clinical literature[6] and the

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[4] In fact, it is not clear that Dr. Sandler and Dr. McAbee even had mild mental retardation in mind. During his trial testimony, Dr. Sandler compared Applicant to "individuals that Dr. McAbee and I have examined who are seriously and profoundly mentally retarded." ROA p.1706. Of course, Dr. Sandler's testimony occurred well before the Supreme Court's decision in Atkins, which ultimately made clear that the categorical bar extends to those in the "mild" mental retardation category, and is not limited to those with "severe" or "profound" mental retardation. Atkins, 536 U.S. at 308; *see also,* Bobby v. Bies, 556 U.S. 825, 829 (2009) (holding that a pre-Atkins determination of mental retardation as a general mitigating factor was not the same as an evaluation of "mental retardation for purposes of Atkins").

[5]Respondent has also repeatedly claimed that Applicant led a Bible study and played chess in prison. These alleged "facts" were cited in Dr. Sandler's written report to the trial court. *See* DDSN Report at p.3 (reporting that Applicant leads Bible reading discussions and plays chess

case law[7] that people with mild mental retardation can do a number of tasks, including caring for their personal hygiene, reading a newspaper, driving a car, becoming successfully employed, playing sports, getting married, and having children. None of this evidence is inconsistent with mental retardation where the totality of the evidence demonstrates that the Applicant has

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"with a notable degree of expertise"). On cross examination, however, Dr. Sandler admitted that neither allegation is accurate. In fact, a correctional officer reported that he once saw Applicant play checkers and that Applicant attended a Bible study, not that he served as its leader. ROA p.1729. Following this admission, Dr. Sandler stated that, in any event, these allegations were merely based on hearsay and he did not rely on them in any way. Id. Respondent's repeated reliance on these allegations is therefore misplaced.

[6] *See* AAMR Manual at p.151 (people with mental retardation may "be able to live independently" and "[d]ocumented successful outcomes of individuals with appropriate supports contrasts sharply with incorrect stereotypes that these individuals never have friends, jobs, spouses, or children."); DSM-IV-TR at p.46 ("There are no specific physical features associated with mental retardation"); id. at p.43 (people with mild mental retardation can acquire academic skills up to a 6th grade level, have minimal impairment in sensori-motor areas, are often indistinguishable from children without mental retardation until a later age, and can achieve vocational skills and even successfully live independently).

[7] *See e.g.*, Wiley v. Epps, 625 F.3d 199, 203 (5th Cir. 2010) ("it is widely accepted in the medical community that mentally retarded persons are often able to perform basic life functions and tasks, such as holding jobs, driving cars, and supporting their families"); Thomas v. Allen, 607 F.3d 749, 759 (11th Cir. 2010) (rejecting the State's argument that the defendant was not mentally retarded because he drove a car, worked on a farm performing manual labor, drove a tractor, and also held several other menial labor jobs.); Allen v. Wilson, 2012 WL 2577492, *13 (S.D. Ind. 2012) ("[A] person with mental retardation can hold a job, get married, have friends and commit crimes, and a strength in one area does not negate mental retardation."); Tarver v. Thomas, 2012 WL 4461710, *8 (S.D. Ala., 2012) (holding that the State court unreasonably rejected petitioner's mental retardation claim by "ignor[ing] all of the expert testimony that possession of some social and adaptive skills is not inconsistent with a finding of mental retardation."); United States v. Lewis, 2010 WL 5418901, *20 (N.D. Ohio 2010) (crediting expert testimony that it is a stereotype that people with mental retardation cannot carry on a conversation); Pickens v. State, 126 P.3d 612, 618-19 (Okla. Crim. App. 2005) (holding evidence that the defendant filled out medical request forms in prison, wrote letters to the trial court and dated a woman was not inconsistent with mental retardation).

"significantly subaverage intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." Franklin, 356 S.C. at 278-79, 588 S.E.2d at 605.

Next, Respondent argues that the Court should view testimony from a defense-hired social worker with suspicion. This Court does not necessarily disagree. However, the Applicant did not rely solely on the testimony of Ms. Marjorie Hammock. On the contrary, Ms. Hammock's testimony was supported and corroborated by multiple sources of information, including Applicant's school records, multiple affidavits from Applicant's teachers, employers, family, friends, football coaches and classmates, various psychological evaluations, a standardized measurement of adaptive skills, academic achievement test scores, and the trial record. The preponderance of the evidence clearly weighs in Applicant's favor, and the fact that Ms. Hammock was retained by the defense does not undermine this Court's conclusions.

Finally, this Court rejects Respondent's argument that the Court should adopt a definition of mental retardation different from the one approved by the South Carolina Supreme Court in Franklin, 356 S.C. 276, 588 S.E. 2d 604. This definition has been used by every court in South Carolina ever to address an Atkins claim. *See e.g.*, Order Finding Defendant Mentally Retarded in South Carolina v. Pearson, 96-GS-32-3338; Order Granting Post-Conviction Relief in Elmore v. South Carolina, 05-CP-24-12-05; Order Granting Post-Conviction Relief in Mercer v. South Carolina, 09-CP-32-5465. There is no reason for this Court to deviate from South Carolina's well-established criteria. The Court has applied South Carolina's three-pronged definition of mental retardation to the totality of the evidence presented in this case, and the Court remains confident in its conclusion that Applicant meets all three prongs by a preponderance of the evidence. Respondent has repeatedly described the evidence in this case as "admittedly a close

issue." Respondent's Post-Hearing Brief at p.44; Respondent's Amended Motion to Alter at p.8. This Court has carefully considered Respondent's arguments urging the Court to amend its previous judgment, and concludes that they are without merit. Respondent's amended motion is denied. By a preponderance of the evidence, the Applicant is mentally retarded and is therefore ineligible for a death sentence pursuant to state and federal law. His death sentence is hereby vacated and this matter is remanded to the Court of General Sessions in Dorchester County for resentencing.

AND IT IS SO ORDERED.

Hon. Doyet A. Early, III
Presiding by Appointment of the Supreme Court

January 22, 2014
Bamberg, SC