

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Dorchester County
Honorable Judge Doyet A. Early, III, Circuit Judge

CA No. 05-CP-18-1368


KENNETH SIMMONS, SK#5066, *Respondent/Petitioner*

v.

STATE OF SOUTH CAROLINA, *Petitioner/Respondent*

NOTICE OF CROSS APPEAL

Kenneth Simmons appeals the order of the Honorable Judge Doyet A. Early, III dated October 15, 2013, granting post-conviction relief as to sentencing. Respondent/Petitioner received Petitioner/Respondent's Notice of Appeal March 3, 2014.



EMILY C. PAAVOLA

Death Penalty Resource & Defense Center
900 Elmwood Avenue, Suite 101
Columbia, SC 29201
(803)765-1044

RECEIVED

MAR 05 2014

S.C. SUPREME COURT

JAMES MORTON

Morton & Gettys, LLP
P.O. Box 707
Rock Hill, SC 29731
(803)366-3388

March 4, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Dorchester County
Honorable Judge Doyet A. Early, III, Circuit Judge

CA No. 05-CP-18-1368

KENNETH SIMMONS, SK#5066, *Respondent/Petitioner*

v.

STATE OF SOUTH CAROLINA, *Petitioner/Respondent*

PROOF OF SERVICE

I, Jill Rider, hereby certify that I have served upon the attorney for the petitioner/respondent one (1) copy respondent/petitioner's Notice of Cross Appeal in the above-captioned case by depositing a copy of same in the United States Mail, first class, postage pre-paid, addressed as follows:

Donald J. Zelenka
Senior Assistant Deputy Attorney General
P.O. Box 11549
Columbia, SC 29211-1549

This the 4th day of March, 2014, in Columbia, South Carolina.


JILL RIDER

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

KENNETH SIMMONS

Applicant,

v.

STATE OF SOUTH CAROLINA

Respondent.

2013 OCT 21 PM 4:13

) IN THE COURT OF COMMON PLEAS

) Case No.: 05-CP-18-1368

) **ORDER GRANTING**
) **POST-CONVICTION RELIEF**
) **PURSUANT TO**
) ***Atkins v. Virginia*, 536 U.S. 304**
) **(2002).**

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

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.

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).

3
[Handwritten signature]
RE3

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

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

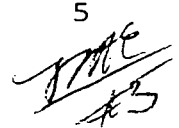


Applicant was first given an IQ test at the beginning of the 1978 school year, during his second attempt at the eleventh grade, when he was evaluated for the Resource program at Summerville High School. Resource was a special education program. In order to qualify for Resource placement, the student 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

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

5


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 malingering, 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"

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 malingering 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	2 nd Grade	1 st Grade	3 rd Grade
Dr. Keyes	WJ-Ach. = 2/6/99	2 nd Grade	1 st Grade	3 rd Grade
Dr. Zenger	Writing Analysis = 2009	Kottmeyer Spelling Test 4 th Grade		
		Sample Letter Writing 1 st Grade		
		Hand written statement on 12/5/98 1 st 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

7


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.

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

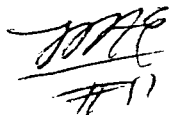
loading and unloading a wheelbarrow full of bricks, shoveling mortar and mixing mortar. Applicant's former employer reported that he was a hard worker, but he did not take initiative or perform complicated tasks.

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.

Handwritten signature and initials, possibly "JMC" and "11".

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

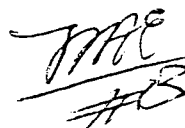
valid, although he noted that this score was likely inflated due to the practice effect. Dr. Sandler concluded, however, that applicant was not mentally retarded and was likely malingering. Based on the Court's review of totality of the evidence, this Court finds that Dr. Sandler's opinion is not entitled 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 malingering. *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

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

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.

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 literature¹¹ 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).

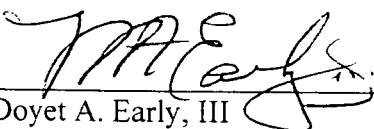


Handwritten signature and date: *[Signature]*
#15

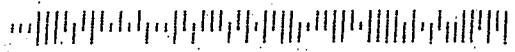
and federal law. Applicant has raised a number of other claims challenging his conviction and death sentence. The claims relating to his conviction are denied as without merit. In light of this Court's finding that applicant is mentally retarded, the remaining claims attacking the sentence are moot. 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.


September 15, 2013
Bamberg, SC



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



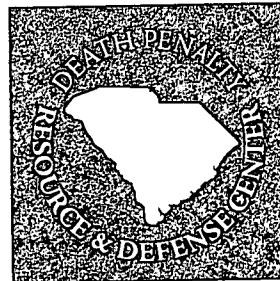
1000



29211

U.S. POSTAGE
PAID
COLUMBIA, SC
29201
MAR 04, 14
AMOUNT

\$1.82
00053447-16



900 Elmwood Avenue
Suite 101
Columbia, SC 29201

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